No. 00-268

In the Supreme Court of the United States

JAYSUKH ZALAWADIA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the district court had jurisdiction under 28 U.S.C. 2241 over petitioner's challenge to his final removal order.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported, as are the judgment of the district court (Pet. App. 16a-17a), the report and recommendation of the magistrate judge (Pet. App. 9a-15a), the decision of the Board of Immigration Appeals (Pet. App. 6a-8a), and the decision of the immigration judge (Pet. App. 3a-5a).

JURISDICTION

The order of the court of appeals was entered on May 18, 2000. The petition for a writ of certiorari was filed

on August 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had had a lawful unrelinquished domicile in this country for seven years. Courts had interpreted that temporal requirement to be deemed satisfied as long as the Board of Immigration Appeals (BIA) ruled on the alien's application for relief at least seven years after he obtained that domicile. See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

If the Attorney General, in the exercise of her discretion, denied relief from deportation, then the alien could challenge that denial of relief by filing a petition

for review of his final deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2) (1994) (now recodified as 8 U.S.C. 1227(a)(2) (Supp. IV 1998))). Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) amended 8 U.S.C. 1105a(a)(10) (1994) to provide that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1276-1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which as noted above, had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229 and 1229a (Supp. IV 1998); IIRIRA § 304(a), 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); IIRIRA § 304(a), 110 Stat. 3009-594. Congress provided that a lawful permanent resident alien is eligible for discretionary cancellation of removal only if he has resided continuously in the United States for seven years after having been lawfully admitted in any status. See 8 U.S.C. 1229b(a)(2) (Supp. IV 1998). Congress also provided, however, in a new rule known as a "stop-time" rule, that the potential qualifying period of continuous residence for cancellation of removal would be deemed to have terminated whenever the alien committed a criminal offense referred to in 8 U.S.C. 1182(a)(2) (1994 & Supp. IV 1998), which sets forth the grounds on which an alien may be denied admission into the United States. See 8 U.S.C. 1229b(d)(1) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new re-

moval procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA —would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined, in Section 306 of IIRIRA, 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. Congress replaced the repealed provisions with the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998).

And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Petitioner is a native and citizen of India who was admitted to the United States as a lawful permanent resident alien on September 7, 1988. On June 26, 1995, less than seven years later, he pleaded guilty in New Jersey state court to burglary and felony theft. Pet. App. 10a.

On November 30, 1998, petitioner traveled out of the United States. Upon his return, on December 9, 1998, the INS denied him admission and placed him in removal proceedings based on his 1995 conviction for theft, which is a "crime involving moral turpitude" rendering an alien inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I). Pet. App. 10a; see *Soetarto* v. *INS*, 516 F.2d 778, 780 (7th Cir. 1975); *Brett* v. *INS*, 386 F.2d 439, 439 (2d Cir. 1967), cert. denied, 392 U.S. 935 (1968); *Matter of De La Nues*, 18 I. & N. Dec. 140 (B.I.A. 1981); *Matter of Scarpulla*, 15 I. & N. Dec. 139 (B.I.A. 1974).[1]

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[1] The grounds for inadmissibility under Section 1182(a)(2) differ from the grounds of deportability under 8 U.S.C. 1227(a)(2) (Supp. IV 1998) in one important respect pertinent to this case. Under Section 1182(a)(2)(A)(i)(I), one conviction for a crime involving moral turpitude, entered at any time, is sufficient to deny an alien admission. Under Section 1227(a)(2)(A)(i) and (ii), however, an alien, to be rendered deportable, must be convicted either of *two*

At a hearing before an immigration judge (IJ), petitioner conceded his removability under Section 1182(a), but sought to apply for discretionary relief from removal, under either the cancellation of removal provisions of Section 1229b, or the old form of relief from deportation under the repealed Section 1182(c). The IJ ruled that petitioner was ineligible for relief under Section 1229b, because under the new stop-time rule of IIRIRA, petitioner had not acquired seven years' continuous residence before he committed his theft offense. Pet. App. 5a. The IJ did not specifically address relief under Section 1182(c) in his written order. The IJ ordered petitioner removed to India. *Ibid.*

The BIA affirmed. The BIA upheld the IJ's determination that, under the IIRIRA stop-time rule, petitioner was ineligible for cancellation of removal under Section 1229b, even though petitioner's offense was committed and his conviction was entered before enactment of IIRIRA. Pet. App. 8a. The BIA also ruled that petitioner was ineligible for relief under former Section 1182(c) because that form of relief was repealed by IIRIRA and is not available in post-IIRIRA removal proceedings. *Ibid.*

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crimes of moral turpitude not arising out of the same scheme of criminal misconduct, or one crime involving moral turpitude within five years after admission for which a sentence of at least one year's imprisonment may be imposed. Petitioner has not contested in this Court, however, that, even though he was a lawful permanent resident alien, the INS properly treated him as an alien seeking admission into the United States and therefore properly charged him with removal under Section 1182(a)(2) rather than Section 1227(a)(2). See Pet. App. 10a (district court noting that petitioner did not contest that he was properly treated as an arriving alien).

3. On September 6, 1999, petitioner filed a petition for review of his final removal order in the court of appeals. Petitioner did not contest that he was an alien, that he had been convicted of a crime involving moral turpitude, or that he was inadmissible under Section 1182(a)(2) based on his theft conviction. Rather, he argued that the BIA erred in holding that (a) IIRIRA's stop-time rule for discretionary relief under Section 1229b and IIRIRA's repeal of former Section 1182(c) were applicable to his case, and (b) he was therefore ineligible for discretionary relief from removal. The government moved to dismiss the petition for review for lack of jurisdiction, contending that the court of appeals' authority to review petitioner's claims was precluded by 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998), which provides 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 a criminal offense covered in [8 U.S.C. 1182(a)]." On October 21, 1999, the court of appeals granted the government's motion and dismissed the petition for review in a summary order. Pet. App. 18a-19a. Petitioner did not seek review of that order in this Court.

On October 6, 1999, petitioner filed a petition for a writ of habeas corpus in district court, raising essentially the same challenges to his removal order. The government moved to dismiss on the ground that AEDPA and IIRIRA had divested the district courts of authority under 28 U.S.C. 2241 to review the merits of aliens' removal orders, and that any judicial review that remained available to criminal aliens such as petitioner must be had, if at all, in the court of appeals on petition for review. The district court agreed and dismissed the petition. Pet. App. 12a-13a, 16a-17a.

The court of appeals affirmed the district court's dismissal of the habeas corpus petition in a summary order. Pet. App. 1a-2a. The court of appeals did not cite any authority for that disposition, although it may have relied on its recent decision in *Max-George* v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280, which held (*id.* at 198-203) that IIRIRA divested the district courts of authority to review the merits of final removal orders under 28 U.S.C. 2241.

DISCUSSION

Petitioner urges this Court to grant review to decide whether, after the comprehensive changes to the Immigration and Nationality Act (INA) made by AEDPA and IIRIRA, the district courts retain authority under 28 U.S.C. 2241 to review a criminal alien's challenge to the merits of his final removal order. Petitioner correctly points out (Pet. 9) that the courts of appeals have reached differing conclusions on that question. The Fifth Circuit, in *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000), petition for cert. pending, No. 00-6280, and the Eleventh Circuit, in *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (1999), cert. denied, 120 S. Ct. 1529 (2000), have concluded that Congress divested the district courts of such authority. By contrast, the First, Second, Third, and Ninth Circuits have concluded that the district courts retain such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 over retroactivity challenge to BIA's determination that alien was ineligible for discretionary relief from removal); *St. Cyr* v. *INS*, No. 99-2614, 2000 WL 1234850, at *3 (2d Cir. Sept. 1, 2000) (same), petition for cert. pending, No. 00-767; *Calcano-Martinez* v. *INS*,

No. 98-4033, 2000 WL 1336611, at *9-*16 (2d Cir. Sept. 1, 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain the claim on habeas corpus); *Liang* v. *INS*, 206 F.3d 308, 315-323 (3d Cir. 2000) (same), petition for cert. pending *sub nom. Rodriguez* v. *INS*, No. 00-753; *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the court of appeals' decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[2] In our view, *St. Cyr* is a better vehicle than this case for resolution of that jurisdictional issue, for several reasons. First, the court of appeals in this case did not cite any authority in its unpublished summary order dismissing petitioner's habeas corpus petition. Although the court of appeals reached the same result here as it did in *Max-George*, *supra*, and perhaps intended to rely on *Max-George*, the court did not specifically do so, and this Court, when considering the jurisdictional issue, might therefore

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[2] We are providing petitioner with a copy of our petition in *St. Cyr*. Related jurisdictional issues are also presented in pending certiorari petitions in *Obajuluwa* v. *Reno*, No. 00-523; *Rodriguez* v. *INS*, No. 00-753; *Russell* v. *Reno*, No. 00-5970; and *Max-George* v. *Reno*, No. 00-6280.

benefit from a more fully explicated decision from the court of appeals in the particular case.

Second, our petition in *St. Cyr* also seeks review of the court of appeals' decision on the merits in that case, which independently warrants plenary review in the event that the Court concludes in that case that district courts may exercise jurisdiction under 28 U.S.C. 2241 to review final orders of removal. See 00-767 Pet. 26-30 (*St. Cyr*). This case, however, presents only the issue of jurisdiction under Section 2241, because neither lower court adjudicated the merits of petitioner's challenge to his removal order.

Third, legislation is currently pending before Congress that might afford aliens in petitioner's situation the opportunity to apply for cancellation of removal under Section 1229b, notwithstanding the stop-time rule of Section 1229b(d)(1). Under that legislation, the rule of Section 1229b(d)(1) stopping the qualifying period of continuous residence for cancellation of removal at the date of the commission of the alien's offense would not be applied to any alien whose offense was committed before the enactment of IIRIRA. See H.R. 5062, 106th Cong., 2d Sess. § 1(a)(1) (2000). That bill passed the House of Representatives on September 19, 2000, see 146 Cong. Rec. H7766-H7770, and is pending in the Senate. The bill would not, however, afford the opportunity to apply for cancellation of removal to the alien in *St. Cyr*, who is barred from obtaining cancellation of removal under Section 1229b because he was convicted of a crime that was an aggravated felony even before AEDPA and IIRIRA were enacted. The possibility that Congress might pass legislation while this case is pending that might moot this case, but not *St. Cyr*, presents another reason why the Court should

review the jurisdictional issue in *St. Cyr* rather than this case.

For the foregoing reasons, we suggest that the Court hold the petition in this case pending its disposition of the petition in *St. Cyr*, and then dispose of this petition in light of that disposition.

CONCLUSION

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

Respectfully submitted.

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