No. 02-1273

In the Supreme Court of the United States

HUGO ARMENDARIZ-MONTOYA, PETITIONER

v.

PATRICIA SCHMIDT,
INTERIM DISTRICT DIRECTOR, BUREAU OF CUSTOMS AND IMMIGRATION ENFORCEMENT

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which rendered aggravated felons such as petitioner statutorily ineligible for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994), is inapplicable to petitioner's case because, although charges were not filed against petitioner until after the enactment of AEDPA, an order to show cause was served on him prior to that date.

2. Whether Section 440(d) is inapplicable to petitioner's case under the rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), even though he was convicted of an aggravated felony after a jury trial.

3. If AEDPA Section 440(d) applies to petitioner's case, whether its application violates constitutional equal protection guarantees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 291 F.3d 1116. The order of the district court (Pet. App. 44a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2002. A petition for rehearing was denied on November 26, 2002 (Pet. App. 50a-51a). On February 22, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 22, 2003. The petition for a writ of certiorari was filed on February 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner is a native and citizen of Mexico. Pet. App. 16a. In 1972, he entered the United States unlawfully and without inspection. *Id.* at 2a. Petitioner became a lawful permanent resident of the United States in 1978. *Ibid.* In September 1995, petitioner was convicted after a jury trial in Arizona state court of possessing cocaine with intent to distribute it. He was sentenced to a term of imprisonment of five years and eight months. *Ibid.*

On April 22, 1996, based on petitioner's conviction, the Immigration and Naturalization Service (INS) served on petitioner an order to show cause, charging him with being deportable as an alien convicted of an aggravated felony and a controlled substance violation. Pet. App. 3a; see 8 U.S.C. 1251(a)(2)(A)(iii) and (a)(2)(B)(i) (1994). The INS had earlier lodged a detainer against petitioner with the Arizona Department of Corrections. Pet. App. 3a. On December 19, 1996, the INS filed the order to show cause with the immigration court. *Ibid.*[1]

b. In his deportation proceeding before an immigration judge, petitioner conceded that he is deportable from the United States but applied for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994). Pet. App. 3a. Before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, the Attorney General was author-

[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (codified at 6 U.S.C. 251(2)).

ized under former Section 1182(c) to provide discretionary relief from deportation to aliens lawfully admitted for permanent residence.[2] To be eligible for such relief, the alien had to show that he had maintained a lawful, unrelinquished domicile in this country for seven years. The final sentence of Section 1182(c) provided, however, that the Attorney General's discretionary authority "shall not apply" to an alien who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for such an offense. 8 U.S.C. 1182(c) (1994).

On April 24, 1996, AEDPA became law. Section 440(d) of AEDPA amended the final sentence of Section 1182(c) to provide that the Attorney General's authority to grant relief under Section 1182(c) "shall not apply" to a broader class of aliens, including all aliens who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (recodified as 8 U.S.C. 1227(a)(2)(A)(iii)); see also 8 U.S.C. 1101(a)(43) (defining "aggravated felony").

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[2] Former Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms authorized only the admission of certain lawful permanent resident aliens who otherwise would have been excludable upon returning to the United States, deportable aliens (who had achieved entry into the United States) were allowed to apply for discretionary relief from deportation under that provision. See Pet. App. 11a-12a.

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. Section 304 of IIRIRA, 110 Stat. 3009-587 to 3009-597, repealed 8 U.S.C. 1182(c) (1994) and replaced it with current 8 U.S.C. 1229b, which makes permanent resident aliens who have been convicted of an aggravated felony categorically ineligible for discretionary relief from removal. New Section 1229b generally does not apply to immigration proceedings commenced before April 1, 1997. See IIRIRA § 309(a) and (c), reproduced in 8 U.S.C. 1101 note.[3]

c. In April 1997, the immigration judge in petitioner's case determined that AEDPA Section 440(d) applies to petitioner and, on that basis, denied his application for a waiver of deportation under 8 U.S.C. 1182(c) and ordered him removed. Pet. App. 3a, 48a-49a. In October 1997, the Board of Immigration Appeals (BIA) affirmed. It likewise determined that petitioner is statutorily ineligible under AEDPA Section 440(d) for relief under 8 U.S.C. 1182(c) (1994). The BIA rejected petitioner's equal protection challenge to

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[3] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were deportable. See 8 U.S.C. 1251 (1994). IIRIRA replaced the category of "excludable" aliens with the new category of "inadmissible" aliens, consisting of aliens who are not eligible for admission into the United States. See 8 U.S.C. 1182. In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-597, Congress instituted a new form of proceeding, known as "removal," that applies to inadmissible aliens as well as deportable aliens. See 8 U.S.C. 1229, 1229a.

Section 440(d), stating that it has no power to hold an Act of Congress unconstitutional. Pet. App. 46a-47a.

The Court of Appeals for the Ninth Circuit dismissed petitioner's ensuing petition for review because it lacked jurisdiction over the case. Pet. App. 4a; see IIRIRA § 309(c)(4)(G), reproduced in 8 U.S.C. 1101 note; see also 8 U.S.C. 1252(a)(2)(C).

2. In March 2000, petitioner filed a habeas corpus petition in the United States District Court for the District of Arizona pursuant to 28 U.S.C. 2241. Pet. App. 19a. Petitioner contended that AEDPA Section 440(d) does not apply to deportation proceedings that were pending at the time of AEDPA's enactment and that his proceeding commenced before AEDPA's enactment, when he was served with the INS's order to show cause. *Id.* at 23a. Petitioner also argued that, if AEDPA Section 440(d) does apply to his case, then that application violates the Constitution's due process and equal protection guarantees.[4]

The case was referred to a magistrate judge who determined that petitioner's deportation proceeding commenced on April 22, 1996 (two days before AEDPA's enactment), when the INS served its order to show cause. The magistrate judge rejected the INS's argument that the proceeding commenced on December 16, 1996, when the INS filed the order to show cause with the immigration court. Because the Ninth Circuit had ruled that AEDPA Section 440(d) does not apply to deportation proceedings pending at the time of AEDPA's enactment, see *Magana-Pizano* v. *INS*, 200

[4] Petitioner also argued that his detention during deportation proceedings, pursuant to 8 U.S.C. 1226(c), was unconstitutional. See Pet. App. 20a. The district court dismissed that claim as moot, *id.* at 45a, and the dismissal was not challenged on appeal.

F.3d 603, 610-611 (1999), the magistrate judge concluded that AEDPA's amendment to 8 U.S.C. 1182(c) (1994) does not apply to petitioner. Pet. App. 23a-28a. The magistrate judge therefore did not address petitioner's constitutional challenges to AEDPA. *Id.* at 28a-29a.

The district court adopted the magistrate judge's recommendation in relevant part, directed that petitioner's case be reopened for consideration of his application for a discretionary waiver of deportation under former Section 1182(c), and enjoined the INS from deporting petitioner during the consideration of petitioner's application for discretionary relief. Pet. App. 44a-45a.

3. The Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a-14a. The court of appeals followed its earlier decision in *Cortez-Filipe* v. *INS*, 245 F.3d 1054 (2001), which held, consistent with administrative regulations, that deportation proceedings commence when the INS files a charging document with the immigration court. See Pet. App. 5a (citing 8 C.F.R. 3.14(a) (2002), 239.1(a), 240.55). The court disagreed with the First Circuit's determination in *Wallace* v. *Reno*, 194 F.3d 279 (1999), that deportation proceedings commenced for purposes of applying AEDPA Section 440(d) when the INS served on the alien an order to show cause. Pet. App. 6a-8a. The court also rejected petitioner's argument that the INS's lodging of a detainer with the Arizona Department of Corrections, prior to serving the order to show cause, established that his deportation proceeding commenced upon service of the order to show cause. The court explained that "[t]he relevant INS regulations make the filing of the [order to show cause with the immigration court], not the lodging of a detainer, the critical event." *Id.* at

8a-9a. Therefore, the court of appeals concluded that AEDPA's amendment to 8 U.S.C. 1182(c) (1994), which disqualifies petitioner from being considered for a discretionary waiver of deportation, applies to petitioner's case. Pet. App. 9a.

The court of appeals next rejected petitioner's argument that AEDPA Section 440(d) is inapplicable to his case on retroactivity grounds. Pet. App. 9a-10a. The court held, in accord with Ninth Circuit precedent, that AEDPA Section 440(d) is not impermissibly retroactive under the rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), when it is applied to an alien whose pre-AEDPA criminal convictions were obtained after a jury trial. Pet. App. 9a-10a. The court explained that "[u]nlike aliens who pleaded guilty" before AEDPA, to whom the eligibility-limitation of Section 440(d) may not be applied under *St. Cyr*, "aliens who elected a jury trial [on aggravated felony charges] cannot plausibly claim that they would have acted any differently if they had known about [the change of law that was made by] § 440(d)." *Id.* at 10a.

The court of appeals likewise rejected petitioner's argument that AEDPA Section 440(d) denies equal protection as applied to his case. Pet. App. 11a-14a. Again relying on Ninth Circuit precedent, the panel concluded that, although the plain language of Section 440(d) makes relief under Section 1182(c) unavailable only to deportable aggravated felons, and not to aggravated felons who were denied admission to the United States and placed in exclusion proceedings, Section 440(d) should be read to "appl[y] equally to exclusion and deportation proceedings." *Id.* at 12a. Based on that reading of Section 440(d), the court of appeals determined that Section 440(d) treats deportable aliens and excludable aliens similarly, and does not deny

deportable aliens equal protection of the laws. *Id.* at 12a-13a. The court observed that other circuits "have uniformly rejected" equal protection challenges to AEDPA Section 440(d). *Id.* at 13a.

ARGUMENT

The two principal questions presented by the petition are (1) whether the retroactivity rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), should be extended to aliens who were convicted after a jury trial before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, and who would have been eligible at the time of their conviction to be considered for a waiver of deportation despite the conviction, and (2) whether the application of AEDPA Section 440(d) to such deportable aliens denies them equal protection. The decision below correctly resolved those issues and there is no conflict with any decision of this Court, nor any material disagreement among the courts of appeals. Indeed, every court of appeals that has considered the question has declined to extend *St. Cyr* to aliens who were convicted after a trial. Likewise, the courts of appeals have uniformly rejected equal protection challenges to Section 440(d) that have been brought by aliens in petitioner's situation.

This case, moreover, would be a poor vehicle for considering those possible judicial and constitutional limitations on Section 440(d)'s application. Petitioner disputes whether, by its own terms, AEDPA applies to his case. That "antecedent question" (Pet. i) about AEDPA's applicability was correctly resolved by the court of appeals, is of little continuing importance, and also does not warrant this Court's review.

1. Every court of appeals that has considered the question after *St. Cyr* has concluded that the 1996

immigration amendments do not operate in a retroactive fashion when applied to disqualify an alien such as petitioner from being considered for a waiver of deportation because of his conviction of an aggravated felony *after a trial*. See Pet. App. 9a-10a; *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir. 2003); *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), petition for cert. pending, No. 02-1344 (filed Feb. 24, 2003); *Chambers* v. *Reno*, 307 F.3d 284, 289-293 (4th Cir. 2002); see also *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001) (reaching same conclusion before *St. Cyr*).

Those uniform decisions of the courts of appeals are correct and consistent with *St. Cyr*. *St. Cyr* addressed only the situation of aliens whose criminal convictions "were obtained through plea agreements" before the 1996 immigration amendments. 533 U.S. at 326. The Court reasoned that the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that rendered waivers of deportation unavailable to aggravated felons and certain other criminal aliens, see 8 U.S.C. 1229b(a) and (b), should not be applied to that class of criminal aliens because that would "attach[] a new disabilit[y]" in respect to the pre-AEDPA plea. 533 U.S. at 321 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994)) (internal quotation marks omitted). The Court emphasized that "[p]lea agreements involve a *quid pro quo* between a criminal defendant and the government," *ibid.*, by which the defendant waives constitutionally guaranteed rights and provides a benefit to prosecutors and the criminal justice system, *id.* at 322. Furthermore, the Court concluded that "as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions," including the possibility

of ineligibility for discretionary relief from deportation. *Ibid.* Indeed, the Court determined that, before 1996, "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial," *id.* at 323, which "almost certainly" influenced their decision to accept a plea, *id.* at 325.

None of those considerations applies to aliens, like petitioner, who proceeded to trial. Those aliens did not provide the government a *quid pro quo*, but rather asserted their constitutional right to a trial and required the government to expend prosecutorial and judicial resources to obtain a conviction. Moreover, there is no basis for supposing that aliens who *rejected* plea agreements generally were motivated by a desire to obtain immigration benefits. Aliens who proceeded to trial before the 1996 immigration amendments commonly did so *despite* the immigration laws that were in effect at the time. Often, such aliens would have risked losing immigration benefits if they rejected a plea agreement, because they might receive and serve a sentence of five years or more and thereby be rendered ineligible for relief under 8 U.S.C. 1182(c) (1994). See p. 3, *supra*; *St. Cyr*, 533 U.S. at 323 (discussing case of alien who pursued plea agreement to avoid risk of losing waiver eligibility after trial); *Dias*, 311 F.3d at 458 (alien who chose to go to trial was "not relying on immigration law as it existed at the time in making that decision").

Petitioner argues (Pet. 23) that his own choice to go to trial was affected by pre-AEDPA immigration law, because "[i]f [petitioner] had known that § 440(d) would result in his *mandatory* deportation should he *lose* at trial, he would have had a greater incentive towards accepting a plea agreement to avoid a negative impact

upon his immigration status (e.g., by accepting a plea to solicitation to sell cocaine)." Petitioner, however, does not claim that he actually rejected a plea offer, much less that any such offer would have assured his eligibility for relief under Section 1182(c) as it then read. Nor does he suggest that any significant number of aliens who were convicted after trial rejected plea offers because of the provisions of former Section 1182(c). See *Chambers*, 307 F.3d at 290 ("An alien in Chambers' position * * * does not have a reliance interest comparable to that which was at the heart of *St. Cyr*.").

Indeed, contrary to petitioner's argument (Pet. 23), petitioner could not reasonably have "believed [that] even if he went to trial and *lost*, he would *still remain eligible* for [a waiver of deportation]." The drug-trafficking crime of which petitioner was accused was punishable by a prison term of more than five years, and petitioner actually received such a term (although he did not ultimately serve that full term). See Pet. App. 2a-3a. Therefore, when petitioner went to trial he clearly put himself at risk of serving a sentence of five years or more. Serving such a sentence would have made him ineligible to be considered for a waiver of deportation under 8 U.S.C. 1182(c) (1994), regardless of the later immigration amendments that denied waiver-eligibility to all aggravated felons. When an alien proceeds to trial under circumstances like those of petitioner's case, it is reasonable to assume that he did so because he believed that the government could not prove its case or because he was unable to reach a plea agreement that was sufficiently favorable overall, not to preserve his eligibility for immigration relief.

2. Like petitioner's *St. Cyr* claim, his equal protection challenge to AEDPA Section 440(d) presents an

argument that the courts of appeals have uniformly rejected. By its plain terms, Section 440(d) eliminated the possibility of discretionary immigration relief for aggravated felons in deportation proceedings, but not for aggravated felons in exclusion proceedings (who, in most instances, were seeking to enter the United States from abroad). See AEDPA § 440(d), 110 Stat. 1277. Consistent with that plain language, the Board of Immigration Appeals determined in 1997 that Section 440(d)'s restriction does not apply to aggravated felons who are in exclusion proceedings. *In re Fuentes-Campos*, 21 I. & N. Dec. 905 (1997). Petitioner claims (Pet. 27-30) that Section 440(d)'s distinction between deportable aggravated felons and excludable aggravated felons denies deportable aggravated felons equal protection, in violation of the Due Process Clause of the Fifth Amendment.

Every court of appeals that has addressed whether Section 440(d) violates the constitutional equal protection guarantee as applied to a deportable alien in petitioner's situation has rejected that claim. Those courts generally have held—correctly, in our view—that Congress could rationally distinguish between deportable aggravated felons and excludable aggravated felons when tightening eligibility for discretionary relief from removal from the United States, because the more generous rule for excludable aliens encourages aggravated felons who have been sentenced to less than five years' imprisonment to leave the country voluntarily and then apply for reentry under the more generous waiver provision, rather than remaining in the United States and awaiting government-initiated deportation proceedings in which the stricter waiver rule would preclude relief. See *Asad* v. *Reno*, 242 F.3d 702, 706-707 (6th Cir. 2001); *Alfarache* v.

Cravener, 203 F.3d 381, 383 (5th Cir.) (per curiam), cert. denied, 531 U.S. 813 (2000); *Almon* v. *Reno*, 192 F.3d 28, 31-32 (1st Cir. 1999), cert. denied, 531 U.S. 830 (2000); *DeSousa* v. *Reno*, 190 F.3d 175, 184-185 (3d Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1152-1153 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000); see also *Rankine*, 319 F.3d at 103 (summarily rejecting equal protection challenge). As the Seventh Circuit explained,

> [a] rational and indeed sensible reason can readily be assigned to Congress's more lenient treatment of excludable as distinct from deportable aliens: it creates an incentive for deportable aliens to leave the country—which is after all the goal of deportation—without their having to be ordered to leave at the government's expense.

LaGuerre, 164 F.3d at 1041; see Pet. App. 13a.

The Ninth Circuit has taken a different approach, determining that the waiver-eligibility restriction of Section 440(d) should be construed to apply to *both* excludable and deportable aggravated felons. *United States* v. *Estrada-Torres*, 179 F.3d 776, 779 (9th Cir. 1999) (per curiam), cert. denied, 531 U.S. 864 (2000), overruled on other grounds, *United States* v. *Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc). As the Ninth Circuit made clear in this case (Pet. App. 12a-14a), however, its approach is just as fatal to petitioner's equal protection argument as the approach of the other circuits, because it sustains the application of Section 440(d) to deportable aliens like petitioner.[5]

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[5] In *Estrada-Torres*, the Ninth Circuit rejected the BIA's determination in *Fuentes-Campos* that Section 440(d) applies to

Because the courts of appeals have uniformly reached the correct result of rejecting equal protection challenges to the application of Section 440(d), petitioner's equal protection claim does not merit this Court's review.

3. The third question presented in the petition is the logically "antecedent" issue (Pet. i) whether the court of appeals was correct when it concluded (Pet. App. 4a-9a) that AEDPA Section 440(d) applies to petitioner's case because petitioner's deportation proceeding had not yet commenced when AEDPA was enacted. The presence of that threshold question about the application of AEDPA's effective date is an additional reason why this Court's review of petitioner's case is not warranted.

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deportable aliens, but not excludable aliens. See 179 F.3d at 779. In *Servin-Espinoza* v. *Ashcroft*, 309 F.3d 1193 (2002), the Ninth Circuit held that it was a denial of equal protection for an immigration judge (affirmed by the BIA), after *Fuentes-Campos* but before the *Estrada-Torres* decision in June 1999, to apply *Fuentes-Campos* to a deportable alien's application for a discretionary waiver of deportation and deny that application in light of Section 440(d). See 309 F.3d at 1198 ("In the window of time between *Fuentes-Campos* and *Estrada-Torres*, the INS in violation of our interpretation of § 440(d), systematically favored excludables over deportables."). But this case is not governed by that aspect of *Servin-Espinoza*. The immigration judge in petitioner's case issued a deportation order in April 1997, see Pet. App. 19a, which was *before* the BIA's decision in *Fuentes-Campos*. *Estrada-Torres* rejected an equal protection challenge in similar circumstances. 179 F.3d at 777-778; see *Servin-Espinoza*, 309 F.3d at 1195; see also *id.* at 1196 (relevant administrative decision for purposes of *Servin-Espinoza*'s equal protection analysis is immigration judge's deportation order, not BIA's decision on appeal). Thus, the court of appeals correctly applied circuit precedent when it held that "*Estrada-Torres* dictates that [petitioner's] equal protection claim is without merit." Pet. App. 14a.

If petitioner were to prevail on his argument that AEDPA does not apply to his case because of the timing of his deportation proceeding, then the Court would have no occasion to answer either of the first two questions stated in the petition, which involve arguments why AEDPA, if otherwise applicable to petitioner, nevertheless should be held inapplicable on retroactivity or equal protection grounds. Thus, if petitioner's argument about AEDPA's effective date were accepted, granting the petition likely would not result in any determination by this Court about the *St. Cyr* and equal protection issues.

Furthermore, the effective-date issue that petitioner raises is not independently worthy of this Court's review. The issue is one of inherently limited and diminishing importance. Petitioner accepts and relies on the court of appeals' conclusion (Pet. App. 4a-5a) that AEDPA Section 440(d) does not apply to immigration cases that were already pending before an immigration judge as of AEDPA's enactment on April 24, 1996. Petitioner's argument is that, for purposes of AEDPA, his administrative deportation proceeding commenced on April 22, 1996—two days before AEDPA's enactment—even though charges had not yet been filed in the administrative immigration court. See Pet. 15-21. Petitioner emphasizes that his effective-date argument is based specifically on AEDPA and would not apply to cases concerning the effective date of IIRIRA, which was enacted later in 1996 and effectively superseded Section 440(d) of AEDPA. See Pet. i, 8, 17-19; see also Pet. App. 6a (noting petitioner's attempt to distinguish Ninth Circuit precedent "because it arose in the context of IIRIRA, not AEDPA"). Therefore, the question that petitioner raises implicates only the limited universe of cases in which there is a dispute

about whether, for purposes of applying AEDPA Section 440(d), deportation proceedings were commenced before or after April 24, 1996.

Petitioner's assertion is that his deportation proceedings commenced for purposes of applying Section 440(d) when the INS served an order to show cause on him, not when his proceedings began in the immigration court upon the INS's filing of its charges. The universe of cases that could be affected by this Court's review of that issue includes only cases in which the INS served an order to show cause on the alien before April 24, 1996, but did not file charges with the immigration court until after that date. Although petitioner asserts that "[t]he issue has arisen repeatedly" in the past, Pet. 11, he cites only two other court of appeals decisions in which similar facts have been considered. See Pet. 8; *Asad*, 242 F.3d at 705 (Section 440(d) applicable because deportation proceedings commenced when charging document was filed with immigration court); *Wallace* v. *Reno*, 194 F.3d 279, 287 (1st Cir. 1999) (deportation process "effectively beg[a]n" before AEDPA, when order to show cause was served on alien); see also *Alanis-Bustamante* v. *Reno*, 201 F.3d 1303, 1307-1311 (11th Cir. 2000) (addressing applicability of AEDPA, although charges were filed with immigration court after IIRIRA's effective date). Petitioner does not suggest or demonstrate that a significant number of cases involving the application of AEDPA Section 440(d) to this distinctive factual scenario remains to be adjudicated at this point, more than seven years after AEDPA was enacted.

Finally, the Ninth Circuit's determination that AEDPA Section 440(d) applies to petitioner's case, despite the INS's service of an order to show cause prior to AEDPA, is correct. As the court of appeals ex-

plained (Pet. App. 5a), the question of when petitioner's deportation proceeding began is answered by the governing administrative regulations, which provided that "proceedings before an Immigration Judge commence[] when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. 3.14(a) (2002); see 8 C.F.R. 242.1(a) (1996) ("Every proceeding to determine the deportability of an alien in the United States * * * is commenced by the filing of an order to show cause with the Immigration Court."); 8 C.F.R. 240.55 ("an alien is considered to be in deportation proceedings only upon" the filing of the order to show cause with the immigration court). The BIA's determination that petitioner's deportation proceeding commenced when charging documents were filed with the immigration court, see Pet. App. 46a, is compelled by "the plain language" of the governing regulations, *Asad*, 242 U.S. at 705, and would in any event be entitled to judicial deference as a reasonable application of those regulations, see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

The First Circuit determined in *Wallace* that "the deportation process has effectively begun" for purposes of AEDPA Section 440(d) when the order to show cause is served on the alien. 194 F.3d at 287. That determination, however, arose out of the First Circuit's concern about impermissible retroactive application of AEDPA, not an analysis of the governing administrative regulations. *Ibid.* As the First Circuit emphasized in a later case, its effective-date determination in *Wallace* was animated by constitutional concerns about AEDPA's retroactive application to aliens who entered guilty pleas before AEDPA—concerns that have since been fully addressed through the rule of *St. Cyr*. See *Costa* v. *INS*, 233 F.3d 31, 35-36 (2000). The consti-

tutional concerns that underlie *Wallace* no longer exist after *St. Cyr*, and *Wallace* accordingly provides no substantial support for petitioner's position in this case.

The Eleventh Circuit's decision in *Alanis-Bustamante* also does not create a significant conflict with the Ninth Circuit's decision in this case. The court emphasized in *Alanis-Bustamante* that the "case [was] about an order to show cause that was served on the alien but," unlike this case, "*never filed with the immigration court*." 201 F.3d at 1309 n.13 (emphasis added). In addition, the Eleventh Circuit expressly did not decide in *Alanis-Bustamante* "whether service of the order to show cause alone is enough" to begin deportation proceedings. *Id.* at 1309. The Eleventh Circuit concluded only that the "combination of" the INS's service of an order to show cause (which was never filed), together with the INS's earlier lodging of a warrant of detainer, was "enough to commence proceedings for purposes of determining the applicable law." *Ibid.* The category of as-yet-unresolved cases presenting *that* particular factual scenario is even more limited than the category of cases in which an order to show cause was served before AEDPA's enactment but not filed until after that date. See p. 16, *supra*. Accordingly, an issue arising specifically out of that scenario during the short-lived transition to AEDPA Section 440(d) presents no issue of general or continuing importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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