No. 00-767

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. *Jurisdiction.* Respondent concedes (Br. in Opp. 14) that the jurisdictional ruling of the Second Circuit in this case—holding that the district court had habeas corpus jurisdiction under 28 U.S.C. 2241 to review the merits of respondent's challenge to his final removal order—conflicts with decisions of the Fifth and Eleventh Circuits, which hold that, in the permanent judicial-review provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 *et seq.* (IIRIRA), Congress has precluded the district courts from entertaining challenges to final removal orders on habeas corpus. Respondent argues (Br. in Opp. 14-15), however, that this conflict among the circuits does not warrant review because it merely extends a similar division of authority concerning judicial review under the *transitional* rules of IIRIRA, which this Court previously declined to

review. See Pet. 6; Br. in Opp. 9. Respondent ignores the critical distinction between transitional rules and permanent rules. The Court may well have declined to review those earlier decisions precisely because they involved only IIRIRA's transitional rules. By contrast, the division of authority on jurisdiction under the *permanent* rules at issue in this case will extend indefinitely into the future unless it is resolved by this Court.

Respondent also argues (Br. in Opp. 15-16) that the Fifth and Eleventh Circuits' decisions do not squarely conflict with the decision of the Second Circuit in this case because those decisions denied district court jurisdiction for claims that could have been raised on a petition for review to the court of appeals, while the claim in this case for which the Second Circuit permitted district court review could not have been raised on petition for review as a result of the preclusion of review in 8 U.S.C. 1252(a)(2) (Supp. V 1999) for claims raised by criminal aliens. Neither the Fifth Circuit nor the Eleventh Circuit, however, so qualified its jurisdictional ruling; both ruled broadly that Congress had completely precluded the district courts from reviewing removal orders under 28 U.S.C. 2241.[1] Both courts have also relied on those broad rulings to hold in subsequent cases that the same bar to district court habeas corpus review applied to an alien whose claim could not be entertained by the court

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[1] See *Max-George* v. *Reno*, 205 F.3d 194, 199 (5th Cir. 2000) ("Accordingly, we hold that IIRIRA's permanent provisions eliminate § 2241 habeas corpus jurisdiction for those cases that fall within § 1252(a)(2)(C)."), petition for cert. pending, No. 00-6280; *Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) ("IIRIRA precludes § 2241 habeas jurisdiction over an alien's petition challenging his removal proceedings and detention pending removal proceedings. * * * [IIRIRA's permanent rules] constitute a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction over challenges to removal orders, removal proceedings, and detention pending removal."), cert. denied, 120 S. Ct. 1529 (2000).

of appeals under Section 1252(a)(2).[2] The Seventh Circuit has also concluded that IIRIRA divested the district courts of their authority to review removal orders by habeas corpus. See *Morales-Ramirez* v. *Reno*, 209 F.3d 977, 980 (7th Cir. 2000). And the Second Circuit, in the companion case to the decision below in this case, recognized that its jurisdictional ruling conflicts with the decisions of the Fifth and Eleventh Circuits. See Pet. App. 57a-59a. The conflict in the circuits is therefore well developed and warrants this Court's review.

Respondent suggests (Br. in Opp. 18-19) that, because the court of appeals in this case relied on and applied its jurisdictional decision in the companion case of *Calcano-Martinez* v. *INS*, 232 F.3d 328 (2d Cir. 2000), petition for cert. pending, No. 00-1011, the Court should grant review in *Calcano* rather than (or in addition to) this case to resolve the intertwined issues of court of appeals and district court jurisdiction over aliens' challenges to final removal orders. For the reasons set forth in our response (at 15-17) to the petition in *Calcano*, we submit that the Court should grant review in both *Calcano* and this case, so that the Court will have before it a case filed in the district court as well as a case filed in the court of appeals, and will also have before it the court of appeals' jurisdictional analysis in both settings.

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[2] See *Perez* v. *Reno*, 227 F.3d 294 (5th Cir. 2000) (alien who was barred by 8 U.S.C. 1252(a)(2)(B) (Supp. V 1999) from challenging on petition for review denial of eligibility for waiver of inadmissibility under 8 U.S.C. 1182(h) (1994 & Supp. V 1999) also could not present that challenge on habeas corpus); *Russell* v. *Reno*, No. 99-10084 (11th Cir. May 9, 2000), slip op. 2 (per curiam) (relying on *Richardson* to hold that district court lacked habeas corpus jurisdiction over alien's challenge to his removal order), petition for cert. pending, No. 00-5970; see also *Alanis-Bustamante* v. *Reno*, 201 F.3d 1303, 1307 n.8 (11th Cir. 2000) (noting that, in *Richardson*, the Eleventh Circuit held that "under the permanent provisions of IIRIRA, an alien may not seek habeas review of any aspect of his removal").

As respondent observes, the jurisdictional issues in the two cases are closely related, but resolution of the jurisdictional issue in one case would not necessarily dictate a particular outcome in the other case. Review in both cases would allow the Court to resolve definitively whether (and if so, where) an alien convicted of an aggravated felony may present a challenge to a final removal order.

2. *Merits*. Respondent contends (Br. in Opp. 20-21) that the court of appeals' decision does not warrant review because it merely applied the Court's settled retroactivity jurisprudence in this particular context. The correct application of retroactivity principles in the immigration context, however, is a matter of very substantial importance to the proper administration of the Immigration and Nationality Act (INA). None of this Court's four most recent retroactivity decisions cited by respondent (*id.* at 20) addressed any issue involving immigration cases. Moreover, rather than applying settled principles, the Second Circuit's ruling on the merits diverges from a long line of this Court's cases holding that Congress may expand the bases on which an alien may be deported, or be denied relief from deportation, without running afoul of retroactivity principles, as Judge Walker observed in his dissent below (Pet. App. 33a-34a; see Pet. 27-28).[3]

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[3] Respondent does not challenge the Attorney General's determination that he is removable from the United States. He contends only that the Attorney General erred in concluding that discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) is not available to him because that Section has been repealed. Even when it was in effect, however, Section 1182(c) conferred no substantive or individual rights on an alien. Rather, it conferred a discretionary power on the Attorney General to relieve an alien of the consequences of his ongoing violation of the law. As with other grants of discretionary authority under the INA, the exercise of such authority is an "act of grace," like "the President's power to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996).

If the ruling on the merits is permitted to stand, the Second Circuit's decision that a statutorily-imposed restriction on the Attorney General's authority to grant discretionary relief from removal is "retroactive" if applied to the case of an alien who was convicted before the restriction was enacted will have potentially broad consequences for Congress's ability to adjust the terms on which criminal aliens, among others, may be removed. This Court has never viewed such adjustments to raise any concern about retroactivity. Indeed, as the Court recently noted in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999), removal of an alien according to the terms of a statute setting forth the categories of aliens whose presence in this country Congress has deemed to be contrary to the national interest is intended "to bring to an end *an ongoing violation* of United States law," not to impose punishment for a prior act.

Respondent also maintains (Br. in Opp. 21-23) that the decision below has limited significance because it potentially provides relief only to aliens who pleaded guilty to a criminal offense before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 *et seq.* (AEDPA), and will be released from incarceration before the end of 2001 (because even before AEDPA, aggravated felons could not obtain relief from deportation under 8 U.S.C. 1182(c) (1994) if they had served five years in prison for the aggravated felony offense). Even that set of aliens, however, is very large. As this Court is well aware, the vast majority of criminal cases in this country are resolved by guilty plea; and as we point out in the certiorari petition (at 29-30), in just the first year in which IIRIRA was effective, the Executive Office for Immigration Review adjudicated 13,000 removal cases involving aggravated felons. The potential number of aliens affected by this issue, therefore, may well exceed 50,000. Moreover, the issue of the continued availability of relief

under former Section 1182(c) potentially affects even aliens who are not aggravated felons, because several of the terms of eligibility for relief under IIRIRA's discretionary cancellation-of-removal provision, 8 U.S.C. 1229b (Supp. V 1999), are more strict than were the terms of eligibility under former Section 1182(c).[4]

Respondent acknowledges (Br. in Opp. 23-24) that the decision below is inconsistent with the decision of the Ninth Circuit in *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (Nov. 17, 2000), which held generally (*id.* at *3-*4) that aliens who were convicted (even upon a guilty plea) of an aggravated felony before AEDPA was enacted are *not* eligible for relief under former Section 1182(c) if they were placed in removal proceedings after IIRIRA became effec-

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[4] For example, before AEDPA, a lawful permanent resident alien could obtain relief from deportation under Section 1182(c) if he had had a lawful unrelinquished domicile in this country of seven years, see 8 U.S.C. 1182(c) (1994), and the courts had held that the period that an alien spent in deportation proceedings should be counted towards that seven-year eligibility requirement, see, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981). Under IIRIRA, by contrast, to obtain cancellation of removal, a legal permanent resident alien must show both that he had been lawfully admitted for permanent residence in the United States for five years *and* that he had resided continuously here for seven years. See 8 U.S.C. 1229b(a) (Supp. V 1999). In addition, the alien's period of continuous residence is deemed to have ended whenever the alien committed a criminal offense rendering him removable or was served with a notice to appear commencing removal proceedings. See 8 U.S.C. 1229b(d)(1) (Supp. V 1999). The latter restriction in particular has been quite significant in rendering ineligible for cancellation of removal even aliens who were convicted of offenses that were not aggravated felonies and who would have been eligible for relief under former Section 1182(c). A petition involving one such alien is presently before the Court. See *Zalawadia* v. *Reno*, No. 00-268. In our response to that petition (at 11-12), we informed the Court that Congress was considering a bill that would have ameliorated the effect of that restriction for aliens who were convicted before IIRIRA became effective. We are informed, however, that Congress adjourned without passing that legislation.

tive. But respondent attempts to minimize that division of authority by pointing out that the Ninth Circuit recognized a "limited exception" to that general rule for an alien who could show that he pleaded guilty in specific reliance on the state of the law at the time, under which he would have been eligible for relief under Section 1182(c). *Id.* at *4. The Second Circuit, however, ruled much more broadly that *all* aliens who had pleaded guilty to the disqualifying offenses before AEDPA and IIRIRA were enacted remained eligible for relief under Section 1182(c), whether or not they had acted in specific reliance on their eligibility for discretionary relief from deportation. The Ninth Circuit, moreover, expressly endorsed the reasoning of Judge Walker's dissent from the Second Circuit's ruling in this case. *Id.* at *3-*4.

In addition, as we point out in the certiorari petition (at 28-29), the decision below on the merits cannot be squared with the Seventh Circuit's decision in *Morales-Ramirez* v. *Reno*, *supra*, or the Eleventh Circuit's decision in *Galindo-Del Valle* v. *Attorney General*, 213 F.3d 594 (2000), petition for cert. pending, No. 00-362. Respondent seeks to distinguish those cases on the ground that they presented constitutional challenges to the unavailability of relief under Section 1182(c). See Br. in Opp. 25 n.22. In each of those cases, however, the predicate for the court of appeals' ruling was that Section 1182(c) had been repealed in its entirety with respect to aliens, like respondent, who had pleaded guilty prior to IIRIRA and had been placed in removal proceedings on or after April 1, 1997. See *Morales-Ramirez*, 209 F.3d at 978, 981, 983; *Galindo-Del Valle*, 213 F.3d at 596, 598-599. Accordingly, respondent's efforts to avoid the inconsistency between the decision below and the decisions in *Morales-Ramirez* and *Galindo-Del Valle* are unavailing.

The decision below also cannot be reconciled with decisions of the Third, Fifth, and Tenth Circuits holding that aliens who were convicted of aggravated felonies before AEDPA was enacted but who were placed in *deportation*

proceedings after AEDPA's enactment (but before the effective date of IIRIRA's permanent provisions) are barred by Section 440(d) of AEDPA, 110 Stat. 1277, from obtaining relief from deportation under Section 1182(c).[5] *A fortiori*, in those circuits, aliens who were placed in *removal* proceedings after the effective date of IIRIRA's permanent provisions (which altogether repealed Section 1182(c)) are not eligible for relief under Section 1182(c). Moreover, the Third, Fifth, and Tenth Circuits in those cases all concluded, under the second step of the framework of this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), that Congress's restriction in AEDPA Section 440(d) on the availability of discretionary relief from deportation for criminal aliens had no retroactive effect, because the enactment was intended to affect the alien's future status with regard to the legality of his continuing presence in the United States, not to impose punishment for past conduct, and therefore had only prospective effect within the meaning of this Court's retroactivity decisions.[6] In the decision below, by contrast, the Second Circuit concluded that a statutory restriction on the future availability of discretionary relief from deportation *does* have a "retroactive effect" within the meaning of this Court's decision in *Landgraf*. See Pet. App. 22a-32a. It follows, therefore, that the Third, Fifth, and Tenth Circuits would disagree with the Second Circuit's rationale as well as its ultimate decision in this case, because those circuits would conclude that Congress's outright repeal of former Section 1182(c) with respect to aliens placed in removal proceedings

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[5] See Pet. 5-6 n.4 (discussing *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 307-308 (5th Cir. 1999); and *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1149-1152 (10th Cir. 1999), cert. denied, 120 S. Ct. 1539 (2000)).

[6] See *DeSousa*, 190 F.3d at 187; *Requena-Rodriguez*, 190 F.3d at 308; *Jurado-Gutierrez*, 190 F.3d at 1150-1152.

after April 1, 1997, had no retroactive effect on those aliens who would otherwise have been eligible for relief under that provision.

Nor is there merit to respondent's contention (Br. in Opp. 26) that the Second Circuit's decision is supported by *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946-951 (1997), where the Court held that jurisdictional statutes are subject to the presumption against retroactive application of federal statutes that was articulated in the second step of the *Landgraf* analysis. Although *Hughes* held that jurisdictional statutes establishing forums in which new causes of action may be heard are, like other statutes, subject to the presumption against retroactivity (see *id.* at 951), *Hughes* did not alter the test, set forth in *Landgraf*, for determining whether a statute is actually retroactive.[7] As we have explained (p. 4, *supra*; Pet. 27), legislative changes in the bases on which aliens may be removed affect prospectively the aliens' future status in the United States. It follows *a fortiori* that changes in the bases on which an alien may be granted discretionary relief from removal also affect only a form of prospective relief and do not trigger retroactivity analysis under *Landgraf*. The court of appeals therefore erred in concluding that Congress's repeal of Section 1182(c) had retroactive effect.[8]

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[7] See *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."); cf. *id.* at 293 (Scalia, J., concurring in the judgment) ("Since the purpose of prospective relief is to affect the future rather than remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.").

[8] Nor is the application to respondent of Congress's repeal of Section 1182(c) retroactive or fundamentally unfair merely because respondent pleaded guilty at a time when he would have remained eligible for relief under Section 1182(c) notwithstanding his conviction. This Court has observed that guilty pleas are often made in the face of considerable uncertainty, and that "judgments may be made that in light of later events

Finally, review is warranted on the court of appeals' ruling on the merits in this case to bring to an end the burgeoning litigation in the lower courts over the continued availability of relief under former Section 1182(c) for aliens placed in removal proceedings after that provision was repealed by Congress. As we note in the certiorari petition (at 29-30), dozens of aliens have already challenged their removal orders contending that they are eligible for discretionary relief under Section 1182(c), and thousands of other aliens are potentially affected by the issue and may challenge their removal orders in court. A delay in the definitive resolution of this issue will inevitably postpone the removal of criminal aliens, especially those convicted of aggravated felonies, who were among the principal objects of Congress's efforts to provide for expeditious removal.

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For the foregoing reasons, and for those stated in the petition, the petition for a writ of certiorari should be granted. The Court should also grant the petition in *Calcano-Martinez* v. *INS*, No. 00-1011, and the two cases should be consolidated for briefing and oral argument.

Respectfully submitted.

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seem improvident, although they were perfectly sensible at the time." *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970). Nor, indeed, does a guilty plea voluntarily made become defective merely because later developments in the law indicate that the plea "rested on a faulty premise." *Id.* at 757. An alien defendant who pleads guilty to an offense that may render him subject to deportation does not obtain vested rights in the state of the law at the time that may not be altered by Congress. Indeed, an alien such as respondent, who was convicted of a narcotics-trafficking offense, could have had no assurance whatsoever that he would have received discretionary relief from deportation under Section 1182(c) even if he had remained eligible to apply for such relief. See *Matter of Marin*, 16 I. & N. Dec. 581, 585-586 (B.I.A. 1978) (requiring alien convicted of narcotics trafficking offense to show "unusual or outstanding equities" in order to obtain relief under Section 1182(c)).

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