No. 00-767

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

A. *Jurisdiction.*

1. Congress has directed that "[j]udicial review of a final order of removal * * * is governed *only*" by the exclusive court-of-appeals review provisions of the Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.* See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (emphasis added). That rule, channeling all review of all final removal orders into the courts of appeals, is subject to only one narrow exception, not applicable here, which expressly identifies "habeas corpus" as the means of "judicial review" for cases falling within that exception. See 8 U.S.C. 1252(a)(1) and (e)(2) (Supp. V 1999) (referring to removal orders under 8 U.S.C. 1225(b)(1) (Supp. V 1999)). The clear import of Section 1252(a) is that—subject to that single exception—the validity of a final order of removal may be tested in the courts, if at all, only in a court of appeals, and only pursuant to the Hobbs Act's procedures, as modified by Section 1252. Congress has thereby precluded district court review of final removal orders, by habeas corpus or otherwise.

That conclusion is confirmed by 8 U.S.C. 1252(b)(9) (Supp. V 1999), which this Court in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471, 483 (1999), described as an "unmistakable 'zipper' clause," *ibid.*—*i.e.*, a clause that says "no judicial review in [removal] cases unless [Section 1252] provides judicial review," *id.* at 482. See Opening Br. 20-21. Respondent argues (Br. 17), however, that in *AADC* the Court did not comment on the "analytically distinct" question of whether Section 1252(b)(9) repealed habeas corpus jurisdiction for those situations in which there is no review in the courts of appeals. The question of the availability of review in a district court (whether by habeas corpus or otherwise) is not, however, analytically distinct from the channeling function of Section

1252(b)(9); it is, rather, at the core of the problem to which Section 1252(b)(9) is addressed. The very purpose of Section 1252(b)(9), as its sweeping language establishes, is to make clear that judicial review of any issue arising out of a removal proceeding is available, if at all, only in a court of appeals on petition for review, which necessarily precludes review in the district courts (by habeas corpus or otherwise). Section 1252(b)(9) provides that "*all* questions of law and fact, including interpretation and application of * * * statutory provisions, arising from *any* action taken or proceeding brought to remove an alien from the United States * * * shall be available *only* in judicial review of a final order under this section [*i.e.*, Section 1252]" (emphasis added). That language necessarily precludes district court review of the issue of statutory interpretation raised by respondent—whether the Attorney General properly denied him discretionary relief under former 8 U.S.C. 1182(c) (1994). And because 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) provides that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against" an aggravated felon, judicial review of that question is also unavailable in the courts of appeals.[1]

Respondent argues (Br. 10-11) that Section 1252 does not expressly mention the general habeas corpus statute, 28 U.S.C. 2241, and so should not be read to preclude review of removal orders under that statute. But Congress did refer specifically to habeas corpus in Section 1252(e)(2), where it provided that, for removal orders entered in expedited-

[1] Because Section 1252(a)(2)(C) says that "no court" shall have jurisdiction, that Section independently bars district court review in this case. And because Section 1252(a)(2)(C) applies "[n]otwithstanding *any* other provision of law" (emphasis added), it applies "notwithstanding" 28 U.S.C. 2241's provision for habeas corpus review—even if we assume, arguendo, that the other provisions of Section 1252 discussed above are insufficient to preclude district court review here.

removal proceedings under Section 1225(b)(1), "[j]udicial review * * * is available in habeas corpus proceedings." 8 U.S.C. 1252(e)(2) (Supp. V 1999). Congress thus specified the only circumstance in which "judicial review" of removal orders by habeas corpus is authorized, and it reconfirmed that point by making that circumstance an express exception to the otherwise flat rule of Section 1252(a)(1) requiring all "judicial review" to be had only in the courts of appeals.

Contrary to respondent's suggestion (Br. 10-11) that Congress did not focus on the consequences of precluding judicial review of aggravated felons' removal orders, the legislative history of Section 1252(a)(2)(C) makes clear that Congress fully anticipated that such orders would not be reviewable in court. See Gov't Br. at 18-21, *Calcano-Martinez* v. *INS*, No. 00-1011 (hereinafter Gov't *Calcano* Br.). Section 1252(a)(2)(C) originated in an amendment offered in committee by Senator Abraham, which was intended to "end the process" once a final removal order was entered by the Board of Immigration Appeals. See *id.* at 21. Senator Abraham stated on the Senate floor that his amendment would "end judicial review for orders of deportation entered against these criminal aliens while maintaining the right to administrative review." 142 Cong. Rec. 7349 (1996); accord S. Rep. No. 249, 104th Cong., 2d Sess. 14, 27 (1996) (provision "eliminates" judicial review); *id.* at 40 (additional views of Sen. Abraham). And he explained that aggravated felons would have full access to habeas corpus to challenge their underlying criminal convictions, but would not have any right of judicial review of the final orders of removal subsequently entered on the basis of such convictions:

> 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. at 7349. Senator Abraham thus made clear that, under his amendment, the only "habeas corpus review" aliens would thenceforth have would be review of the criminal convictions that formed the basis for their removal orders, and not the removal orders themselves.

2. Respondent relies (Br. 11) on *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), to argue that the district courts must retain habeas corpus jurisdiction over a particular kind of claim unless Congress states *in haec verba* that the courts' jurisdiction under 28 U.S.C. 2241 over that claim has been precluded. Neither decision supports that proposition. Both cases involved statutes that restricted this Court's statutory authority to review by appeal or certiorari decisions of the lower federal courts denying a writ of habeas corpus. See *Felker*, 518 U.S. at 659-661. In both cases, however, Congress had not also restricted the Court's separate statutory authority to entertain habeas corpus petitions filed directly in this Court.[2] In *Felker* and *Yerger*, the Court declined to read Congress's restriction in the former statutory source of its jurisdiction over into the latter by implication.[3]

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[2] Although referred to as "original" petitions, such petitions are for purposes of Article III of the Constitution an exercise of the Court's appellate jurisdiction over lower courts' decisions denying habeas corpus petitions. See *Felker*, 518 U.S. at 659-661; *id.* at 667 n.1 (Souter, J., concurring); *Yerger*, 75 U.S. (8 Wall.) at 97-98; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807) (Court's authority under Judiciary Act of 1789 to issue writ of habeas corpus was appellate in nature).

[3] Contrary to respondent's suggestion (Br. 11 n.5), neither *Felker* nor *Yerger* involved a categorical, across-the-board statutory preclusion of all jurisdiction (or all habeas corpus jurisdiction) over the kind of claim that the petitioner sought to raise in those cases. Thus, the Court asserted

By contrast, in IIRIRA, Congress placed *all* of the courts' authority to review removal orders in one place, Section 1252, and made clear as a categorical matter in that very same place that all such review must proceed only in the court of appeals, except as otherwise provided in Section 1252 itself. No "implication" is necessary to conclude that district court jurisdiction to review removal orders (by habeas corpus or otherwise) has been precluded.

3. Even before it enacted IIRIRA, Congress had eliminated the district courts' jurisdiction to review deportation orders on habeas corpus when it enacted Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268. See Opening Br. 26; Gov't *Calcano* Br. 19. AEDPA Section 401(e), entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed former 8 U.S.C. 1105a(a)(10) (1994), which had expressly preserved the writ of habeas corpus for aliens held in custody under deportation orders.

Respondent maintains (Br. 12-15) that former Section 1105a(a)(10) was not necessary to preserve habeas corpus review, because Section 1105a(a) by itself, without subsection (a)(10), would not have ousted that jurisdiction. But the text of Section 1105a(a), without subsection (a)(10), plainly *would* have ousted all district court jurisdiction, for Section 1105a(a) provided that the "sole and exclusive" avenue for review of deportation orders was by petition for review in the court of appeals. Indeed, subsection (a)(10), which preserved habeas corpus in district court for aliens actually held in custody, was one of a number of express "except[ions]" to

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jurisdiction over Felker's original habeas corpus petition (see p. 4 n.2, *supra*) because Congress had precluded the Court's jurisdiction *only* with respect to review by appeal or certiorari, and not over original petitions. For that reason, while the Court dismissed the certiorari petition for want of jurisdiction, it denied the "petition for an original writ of habeas corpus" on the merits. 518 U.S. at 665.

the general rule that judicial review was governed by the Hobbs Act, see *Stone* v. *INS*, 514 U.S. 386, 393 (1995)—thereby making clear on the face of the statute that the general rule would have governed in the absence of that "except[ion]." The legislative history, moreover, confirms that subsection (a)(10) was enacted in response to concerns that Section 1105a(a) otherwise would have unconstitutionally suspended habeas corpus. See Opening Br. 5-6.[4]

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[4] Respondent argues (Br. 13-14) that Congress's principal purpose in enacting Section 1105a(a) was to eliminate judicial review of exclusion and deportation orders by declaratory judgment action brought under the Administrative Procedure Act (APA), and that Congress did not intend to eliminate aliens' access to habeas corpus. We of course do not suggest that Congress in 1961 intended to eliminate aliens' access to habeas corpus; rather our point is that Congress enacted Section 1105a(a)(10) precisely because it did not intend to eliminate such access, and because Section 1105a(a), without subsection (a)(10), would have had that effect.

In arguing to the contrary, respondent notes (Br. 14 n.7) that, although Representative Walter had, at a hearing in April 1958, expressed concern that legislation providing for exclusive review of all claims arising out of deportation orders in one proceeding might be unconstitutional because it would not leave habeas corpus available (see Opening Br. 5 n.2), he introduced a bill in May 1958 that provided for exclusive review of deportation orders in the courts of appeals, without an express exception for habeas corpus. It is not clear why his bill did not contain such an express exception, but he was aware (as his comment at the 1958 hearing referring to the President's proposed legislation demonstrates) that the Eisenhower Administration had already proposed legislation that would have occupied the field of judicial review of deportation orders. That legislation would have provided that, "[n]otwithstanding the provisions of the [APA] or any other law," the district courts would have had jurisdiction to review challenges to deportation orders "only as provided in this subsection," and would also have expressly preserved habeas corpus review for aliens held in custody. See H.R. 9182, 84th Cong., 2d Sess. § 203(a)(1) (1956); H.R. 11167, 85th Cong., 2d Sess. § 29 (1958). Representative Walter may well have expected that the approaches of the two bills would be melded, which is exactly what happened.

Respondent suggests (Br. 16 & n.9) that when Congress repealed Section 1105a(a)(10) in AEDPA Section 401(e), Congress might have intended only to clarify that the district court's habeas corpus jurisdiction to review deportation orders would thenceforth rest only on 28 U.S.C. 2241 itself, and not also on Section 1105a(a)(10) (which, respondent suggests, might have provided broader review than 28 U.S.C. 2241). But the case law predating AEDPA does not suggest any significant confusion in the courts on whether habeas corpus jurisdiction to review deportation orders arose under Section 1105a(a)(10), 28 U.S.C. 2241, or both.[5] The courts of appeals that engaged in a reasoned discussion of the issue either indicated that the district court's habeas corpus jurisdiction arose under Section 1105a(a)(10),[6] or recognized that, even if 28 U.S.C. 2241 were the source of the district court's jurisdiction, Section 1105a(a)(10) preserved that jurisdiction in light of Section 1105a(a)'s otherwise unqualified language requiring review of all deportation orders to be in the courts of appeals.[7] No court of appeals

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[5] There was disagreement in the courts of appeals about the *kinds* of challenges to final deportation orders that might be raised in the district courts on habeas corpus, as opposed to direct review of a deportation order in the court of appeals. Compare *Daneshvar* v. *Chauvin*, 644 F.2d 1248, 1250 (8th Cir. 1981) (habeas corpus available only to review denial of stay of deportation, and not merits of deportation order), with *United States ex rel. Marcello* v. *District Director*, 634 F.2d 964, 971 (5th Cir. 1981) (plenary review of merits of deportation order available on habeas corpus), and *Galaviz-Medina* v. *Wooten*, 27 F.3d 487, 491 (10th Cir. 1994) (only limited review of merits of deportation order on habeas corpus), cert. denied, 513 U.S. 1086 (1995). To the extent that AEDPA Section 401(e)'s repeal of Section 1105a(a)(10) might be seen as resolving that conflict, it did so by eliminating district court review altogether.

[6] *Galaviz-Medina*, 27 F.3d at 489-491; *Marcello*, 634 F.2d at 966-970.

[7] *Garay* v. *Slattery*, 23 F.3d 744, 745 (2d Cir. 1994) (noting that "[t]he second avenue for judicial review of a deportation proceeding is provided

held that a district court had habeas corpus jurisdiction to review the merits of a deportation order only 28 U.S.C. Section 2241, without regard to the preservation of habeas corpus in Section 1105a(a)(10).[8] Especially against this background of the clear text of Section 1105a(a) and the case law construing it, the obvious purpose and effect of Congress's enactment of AEDPA Section 401(e)—which amended Section 1105a(a) by "striking" subsection (a)(10)—were to terminate the availability of habeas corpus review that subsection (a)(10) had theretofore preserved. If there could be any remaining doubt on that score, however, it is removed by the heading of AEDPA Section 401(e), which confirms that that Section accomplished the "ELIMINATION" of review by habeas corpus.[9]

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in [Section 1105a(a)(10)]" but citing a case referring to habeas corpus jurisdiction under 28 U.S.C. 2241).

[8] In *Sotelo Mondragon* v. *Ilchert*, 653 F.2d 1254 (9th Cir. 1980), cited by respondent (Br. 16 n.9), the court first stated (653 F.2d at 1255) that "[t]he district court had jurisdiction to review the deportation order under [then] 8 U.S.C. § 1105a(a)(9) and 28 U.S.C. § 2241," but subsequently noted (653 F.2d at 1256) that the court of appeals had exclusive jurisdiction to review deportation orders "unless the review is had by habeas corpus under § 1105a(a)(9)." In *Orozco* v. *INS*, 911 F.2d 539 (11th Cir. 1990), also cited by respondent (Br. 16 n.9), the court stated that "[c]hallenges to deportation proceedings are cognizable under 28 U.S.C. § 2241," see 911 F.2d at 541 (citing *Marcello*, *supra*), but did not address the relation between that provision and Section 1105a(a)(10). Moreover, that statement by the court is not inconsistent with our submission, which is that the express exception in Section 1105a(a)(10) was necessary to preserve that habeas corpus jurisdiction, in light of the opening paragraph of Section 1105a(a).

[9] See *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."); see also *Knowlton* v. *Moore*, 178 U.S. 41, 65 (1900); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818).

4. Respondent argues (Br. 18-19) that our submission that Congress has required all judicial review of removal orders to proceed only in the courts of appeals, and not at all in the district courts, is at odds with the position taken by the government in briefs in opposition to certiorari petitions presenting a similar issue arising under AEDPA Section 440(a), 110 Stat. 1276-1277—which, like Section 1252(a)(2)(C) (added later by IIRIRA), precluded judicial review of challenges to deportation orders by aggravated felons. In those opposition briefs, however, we did not argue that the district courts would have had jurisdiction over habeas corpus petitions filed by the petitioner aliens; rather, we pointed out that the courts of appeals had not yet addressed that issue, because the aliens in those cases had filed only petitions for review, and not habeas corpus petitions. We subsequently argued in this Court that, in both AEDPA and IIRIRA, Congress had required that all challenges to deportation orders proceed only in the courts of appeals. See Pet. at 14-24, *Reno* v. *Goncalves*, 526 U.S. 1004 (1999) (No. 98-835).[10]

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[10] Respondent suggests (Br. 10 n.4) that, if judicial review of the claim he raises would have been available in the court of appeals, it would be unfair to close the district court to his challenge now because, when he filed his habeas corpus petition, Second Circuit precedent indicated that a challenge to a deportation order against an aggravated felon that did not involve the alien's deportability could proceed *only* in the district court, and not in the court of appeals. That Second Circuit decision involved not the permanent provisions for judicial review of removal orders under IIRIRA, but rather AEDPA and IIRIRA's transition rules for judicial review of old deportation orders. *Henderson* v. *INS*, 157 F.3d 106 (1998), cert. denied, 526 U.S. 1004 (1999).

Should the Court conclude, however, that it would have authority to reach the merits of respondent's challenge in this case arising on habeas corpus in the district court, even though Congress has generally precluded that avenue of judicial review, and that for reasons of fairness it would be appropriate to do so, cf. *Turkhan* v. *Perryman*, 188 F.3d 814, 822 (7th Cir. 1999); *Singh* v. *Reno*, 182 F.3d 504, 510-511 (7th Cir. 1999), the Court

B. *Merits.*

1. When Congress enacted IIRIRA, it effectuated a "fundamental re-orientation of immigration policy." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 110 (1996). Congress was convinced that the pre-IIRIRA system of administrative and judicial review had failed to accomplish the deportation of numerous criminal aliens, see *id.* at 118-120, and that aliens had also abused opportunities to seek discretionary relief from deportation, see *id.* at 121-122. In IIRIRA, Congress started anew. It eliminated the old deportation and exclusion proceedings and replaced them with "a single, streamlined 'removal proceeding'" (*id.* at 158). It also eliminated both relief under old 8 U.S.C. 1182(c) (1994) and "suspension of deportation" under old 8 U.S.C. 1254 (1994) and replaced them with the new "cancellation of removal" provisions, with tightened restrictions on the Attorney General's authority to grant relief (see H.R. Rep. No. 469, Pt. 1, *supra*, at 231-232). One of IIRIRA's principal authors aptly described these new provisions as a "complete restructuring" of the Immigration and Nationality Act (INA). See Lamar Smith & Edward Grant, *Immigration Reform:*

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should reject that challenge on the merits (for the reasons given in our opening brief at 32-49 and in this reply brief at 10-20) and should therefore reverse the judgment of the court of appeals. Respondent suggests (Br. 10 n.4) that the Court remand this case to the court of appeals to decide whether his claim should be entertained notwithstanding the general preclusion of district court review. Because of the importance of the merits question in this case if it is subject to judicial review at all, we urge the Court to decide whether the question may be appropriately addressed in a district court habeas corpus proceeding in the circumstances of this case. If the Court were to conclude that the merits issue can be addressed in this case, the Court could then resolve it and thereby put an end to litigation of that question in the lower courts.

Seeking the Right Reasons, 28 St. Mary's L.J. 883, 915 (1997).[11]

Respondent maintains, however (Br. 31-32), that this "complete restructuring" should be applied to his case only piecemeal. Respondent does not dispute that it was entirely proper for the INS to commence removal proceedings against him under post-IIRIRA law. He nonetheless argues that the Attorney General must apply to his case one provision of prior law that was repealed by IIRIRA, Section 1182(c), despite Congress's clear intent to "replace" Section 1182(c) by IIRIRA's new provision for cancellation of removal. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996). That contention is contrary to the categorical rules Congress laid down for applying the amendments made by Title III-A of IIRIRA.

Section 309(a) of IIRIRA, 110 Stat. 3009-625, establishes a generally applicable effective date for Title III-A, specifying (with certain exceptions inapplicable here) that Title III-A and the amendments made by it "shall take effect" on the first day of the month beginning more than 180 days from the date of enactment of IIRIRA (April 1, 1997), which Section 309(a) refers to as the "title III-A effective date." Respondent contends that the mere specification of an effective date of a new law does not mean that it applies to conduct that occurred before that effective date. See Br. 28 (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 257, 259 (1994)). Section 309(a) does not, however, stand alone. Section 309(c) makes clear that the operative event for purposes of applying its effective date is the date on which administrative proceedings are instituted against the alien. Section

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[11] See also H.R. Rep. No. 469, Pt. 1, *supra*, at 230-233 (summarizing changes made to administrative proceedings under the INA by IIRIRA Section 304); *id.* at 237-238 (changes made to judicial-review provisions of the INA by IIRIRA Section 306).

309(c)(1) states that, subject to certain exceptions in succeeding provisions of Section 309(c), in the case of an alien who is in exclusion or deportation proceedings as of the "title III-A effective date," "(A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." 110 Stat. 3009-625. It follows that the amendments made by Title III-A *do* apply to aliens against whom administrative proceedings were instituted on or after the Title III-A effective date.

Respondent asserts (Br. 29-30) that this rule established by Sections 309(a) and (c)(1) for determining the application of Title III-A governs only the new "procedural" rules in Section 304(a) of IIRIRA. That assertion is contrary to the text of both Section 309(a), which establish a generally applicable "title III-A effective date," and Section 309(c)(1), which specifies the category of cases to which all of "the amendments made by this subtitle" (not merely "procedural" amendments or amendments contained in Section 304(a)) "shall not apply"—namely, cases commenced before that effective date. That assertion also is contrary to this Court's understanding of Title III-A's effective date provisions. In *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 420 (1999), this Court relied upon Sections 309(a) and (c) in concluding that the *substantive* statutory provisions governing withholding of removal that were enacted in *Section 305* of IIRIRA were inapplicable in a case in which administrative proceedings were commenced before April 1, 1997.[12]

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[12] Respondent also asserts (Br. 32) that Congress "likely did not intend" that the application of the amendments made by IIRIRA would depend on when the INS decided to institute proceedings against an alien. Respondent's assertion that Congress would not have intended to make the applicability of the new statutory provisions turn on an administrative determination is refuted by Sections 309(c)(2) and (3) of IIRIRA, 110 Stat. 3009-626, which expressly confer on the Attorney General the option to

Furthermore, as Judge Walker observed in dissent below, the "awkward statutory patchwork" that would result from the piecing together of old and new provisions that respondent proposes "reveals Congress could not have intended" such a conclusion. Pet. App. 37a. The far more sensible reading of IIRIRA—and the one dictated by the text of Section 309 and the structure of Title III-A as a whole—is that Congress intended that all aspects of the comprehensive and interrelated revisions made by Title III-A would be applied together in all removal proceedings commenced on or after Title III-A's date, and that none of them would be applied in any proceedings commenced before that date, *except* where Congress expressly so provided, as it did in a few instances.[13] Because that intent is clear, Congress was not required (as respondent evidently maintains, see Br. 23-26) to state *in haec verba* that "the repeal of Section 1182(c) shall apply in all cases commenced under the Title III-A amendments, regardless of the date of the alien's conviction," in order to accomplish that result.

2. Respondent notes (Br. 24-27) that Congress expressly provided that certain provisions in separate titles of IIRIRA that turn on an alien's conduct or conviction are to be applied

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proceed under the INA as amended by Title III-A of IIRIRA even in cases that were commenced prior to the general Title III-A effective date and that otherwise would be governed by pre-IIRIRA law.

[13] See, *e.g.*, IIRIRA § 306(c)(1), 110 Stat. 3009-612 (providing that new 8 U.S.C. 1252(g) (Supp. V 1999), added by IIRIRA Section 306(a), "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings"; see *AADC*, 525 U.S. at 477); IIRIRA § 309(c)(4), 110 Stat. 3009-626 (directing application of certain transition rules for judicial review of final deportation and exclusion orders entered more than 30 days after enactment of IIRIRA); IIRIRA § 309(c)(5), 110 Stat. 3009-627 (directing that new "stop-time" rule terminating period of continuous physical presence for eligibility for suspension of deportation, added by IIRIRA Section 304, be applied to cases commenced "before, on, or after the date of the enactment" of IIRIRA).

regardless of the date of that conduct or conviction, and finds significance in the fact that Congress made no such express statement about the repeal of Section 1182(c). Even the court of appeals realized, however, that no negative inference could be drawn from those widely varying provisions in other titles of IIRIRA about Congress's intent as to the temporal applicability of the repeal of Section 1182(c) in Title III-A. See Pet. App. 21a n.5. As we have explained (Opening Br. 37 & n.19), the other provisions of IIRIRA on which respondent relies had different origins in the legislative process and address widely disparate subject matters, and so no negative inference can be drawn from the absence of a similar express provision in IIRIRA Section 304. Cf. *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999).[14]

Moreover, the other titles of IIRIRA in which those provisions appear do not establish an integrated, comprehensive framework similar to that established by Title III-A's enactment of the new removal procedures. Congress therefore would not necessarily have expected that the courts would have treated (for example) the provisions in Title III-B as an integral whole, in the way that it plainly anticipated the courts would treat all the provisions of Title III-A. Because there is no specific provision directing

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[14] Respondent notes (Br. 27 n.22) that three provisions in Title III-A are governed by specific temporal-scope provisions. Two of those provisions, however, create exceptions to the otherwise broad rule that all of Title III-A is to be applied together to all cases commenced after its effective date, and thus reinforce our submission that the rest of Title III-A is to be applied together. See IIRIRA § 301(b)(3), 110 Stat. 3009-578 (period of alien's previous unlawful presence in United States before Title III-A's effective date is excluded in determining whether alien is inadmissible); IIRIRA § 301(c)(2), 110 Stat. 3009-579 (proof requirements of provisions making admissible battered women and children not applicable if alien first arrived in United States before effective date). The third provision, IIRIRA Section 306(d), 110 Stat. 3009-612, addressed transition cases involving the application of AEDPA Section 440 to criminal aliens.

the temporal applicability of Title III-B, Congress understandably found it prudent to be especially precise about the temporal applicability of particular provisions in Title III-B. For example, Congress may well have explicitly provided that the expanded definition of "aggravated felony" enacted in Title III-B (see IIRIRA § 321, 110 Stat. 3009-627 to 3009-628) is to be applied regardless of the date of the alien's conviction in order to avoid litigation (with attendant delay) over the question whether the application of the expanded definition in immigration proceedings implicates the presumption against retroactivity (or whether, as we have argued, matters relating to the removability of an alien are inherently prospective in nature).[15] By contrast, as Section 309 confirms, Congress clearly intended that all of the amendments made by Title III-A, including IIRIRA Section 304's repeal of old Section 1182(c), are to be applied together in all removal proceedings commenced on or after April 1,

[15] Congress in 1988 made a conviction for an aggravated felony a ground of deportability (see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469) and in 1990 barred the Attorney General from granting relief under Section 1182(c) to aliens who had been convicted of aggravated felonies and had served at least five years in prison for such offenses (see Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052). Several aliens who were convicted of offenses before those enactments argued that those changes in the law should not be applied to their cases because such application would contravene the presumption against retroactivity. The courts of appeals rejected those contentions, ruling under the second step of the *Landgraf* analysis that changes in the bases on which an alien may be deported or denied discretionary relief from deportation are inherently prospective and thus do not have a retroactive effect within the meaning of *Landgraf*. See *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996); *Samaniego-Meraz* v. *INS*, 53 F.3d 254, 256 (9th Cir. 1995); *De Osorio* v. *INS*, 10 F.3d 1034, 1042 (4th Cir. 1993). By making the expanded definition of aggravated felony in IIRIRA expressly applicable to past convictions, Congress may have simply intended to avoid similar litigation over the temporal applicability of that new definition.

1997. There was therefore no need for Congress to address further the temporal scope of specific amendments made by Section 304.[16]

3. Because it is clear that Congress deprived the Attorney General of authority to grant relief under Section 1182(c) to any alien placed in removal proceedings on or after April 1, 1997, there is no need for the Court to address whether that restriction on the Attorney General's authority is "retroactive," within the meaning of the Court's decision in *Landgraf*, 511 U.S. at 280, when applied to cases like this. If the Court reaches that issue, it should conclude that that restriction presents no retroactivity concerns, even as applied in the cases of aliens who pleaded guilty before IIRIRA was enacted. As we have explained (Opening Br. 37-41), the Nation's immigration laws have always operated on the premise that those laws regulate an alien's *future* status and eligibility to remain in the United States, in light of Congress's most recent determination about the classes of aliens whose ongoing presence in the United States is beneficial or contrary to the national interest. While statutory provisions rendering an alien removable or ineligible for discretionary relief from removal may turn on an alien's past conduct, those provisions do not operate as

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[16] In addition, Congress's significant expansion of the definition of "aggravated felony" in IIRIRA Section 321, and its express command that that definition be applied to prior convictions, seriously undermine respondent's submission (Br. 32-33) that Congress could not have expected that its repeal of Section 1182(c) in IIRIRA Section 304 would result in the removal of numerous aliens who otherwise might not have been removed. Congress was obviously aware that, by defining crimes as aggravated felonies that were not so categorized before IIRIRA, it was rendering many aliens subject to removal who were not previously removable, even though their criminal convictions became final before IIRIRA. And that is true even if the alien had pleaded guilty before IIRIRA was enacted and had at that time expected that his criminal conviction would not render him removable.

punishment for that conduct, but rather establish that the aliens' continued presence here is contrary to the public interest. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924).[17]

Respondent argues (Br. 47) that this Court's decisions upholding the constitutional power of Congress to alter the bases on which aliens may be deported are irrelevant to the statutory question whether such alterations are "retroactive" under *Landgraf*. Respondent overlooks the fundamental reasons why this Court has upheld Congress's power to change the status of classes of aliens. As the Court has explained, "any policy toward aliens is vitally and intricately interwoven with *contemporaneous policies*" with respect to other nations and immigration as a whole. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (emphasis added). When Congress determines that a class of aliens not previously removable should thenceforth be subject to removal,

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[17] We have also noted (Opening Br. 39-40) that, in *AADC*, 525 U.S. at 491, the Court stated that, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law," thus reaffirming that removal constitutes an evaluation of the alien's future right to be in the United States, not a punishment for his past conduct. Respondent argues (Br. 45 n.36) that that observation by the Court in *AADC* is inapposite here because respondent was a lawful permanent resident (LPR) alien who was entitled to remain here until ordered removed. For several reasons, that submission is incorrect. First, two of the respondents in *AADC* were LPRs, see 525 U.S. at 474, and so the Court must have understood its observation to refer to LPRs as well as other aliens. Second, the Court specifically stated in *AADC* that "in all cases" deportation brings a continuing violation to an end. *Id.* at 491. Third, the continuing presence in the United States of an LPR alien who is removable because he is an aggravated felon is no less an "ongoing violation of United States law" than is the continuing presence here of a non-LPR alien who has overstayed his visa or gained entry without proper documentation. "Any alien who is convicted of an aggravated felony at any time after admission is deportable," 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999), and so his presence in the United States violates federal law.

it is acting not to punish those aliens for past conduct but rather to carry out its evaluation of the current national interest in immigration. And when Congress requires "the deportation of aliens whose presence in the country it deems hurtful," its action is not "a punishment; it is simply a refusal by the Government to harbor persons whom it does not want." *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913).[18]

Respondent maintains (Br. 34-39), however, that the application of IIRIRA's repeal of Section 1182(c) to his case would be "retroactive" because it would impair his "reasonable reliance" and "settled expectations" when he pleaded guilty that he would remain eligible to apply for relief from deportation. That argument misconceives the inquiry that the courts undertake in determining whether a statute is to be applied based on events that predate its enactment. "[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. A critical assumption underlying a conclusion of statutory interpretation that a statute is "retroactive" must be that the statute actually regulates the past events in question, and not "merely [that] it draws upon antecedent facts for its operation." *Id.* at 270 n.24 (internal quotation marks omitted). IIRIRA, however, does not regulate, or "attach[] new legal consequences" to a

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[18] Contrary to respondent's contention (Br. 45-46), *Chew Heong* v. *United States*, 112 U.S. 536 (1884), does not stand for the proposition that a change in the grounds for removal (much less discretionary relief from removal) triggers a presumption against retroactivity. As we explain in our opening brief (at 40-41 n.22), the Court's decision in that case turned on the fact that the alien had a vested treaty right to return to the United States without being subjected to regulations that would impair the substance of that right. The typical removal case involves no such vested right derived from an independent source. Compare Opening Br. 43-46; p. 20, *infra* (explaining that Congress has never framed the opportunity for relief under Section 1182(c) as a "right" of the alien).

guilty plea as such, or in the sense that phrase was used in *Landgraf*.

First, neither IIRIRA nor the INA more generally mentions guilty pleas as a basis for any treatment of the alien, and such pleas in any event are the product of tactical judgments in litigation, see *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970), not the sort of primary conduct to which retroactivity analysis might apply in other settings.[19] While respondent might have had a hope that he would be granted relief in the Attorney General's discretion, he manifestly had no right to such relief, especially in light of the serious nature of his offenses. See Gov't *Calcano* Br. 6 n.5 (noting that aliens convicted of drug-trafficking crimes could not, under BIA case law, obtain Section 1182(c) relief unless they showed "unusual or outstanding equities").

Second, the Court has made clear that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment * * * or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (citation omitted); see, *e.g.*, *Kansas* v.

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[19] Respondent intimates that IIRIRA's repeal of Section 1182(c) would be retroactive if that repeal were applied in the case of any alien who committed an aggravated felony (or perhaps was convicted of an aggravated felony) before IIRIRA's enactment, whether or not the alien pleaded guilty. See Br. 37 (arguing that an alien "is entitled to notice of a change in immigration liability resulting from his behavior," including "the deportation consequences of criminal convictions"). No court of appeals, however, has endorsed that broad proposition, and even the court of appeals in this case squarely rejected the notion that "barring eligibility for discretionary relief on the basis of pre-enactment criminal conduct—as opposed to a plea going to the guilt of a deportable crime—constitutes an impermissible retroactive application of a statute." Pet. App. 25a. The court noted that it would "border on the absurd to argue" that these aliens might have decided not to commit their crimes if they had known, not only that they would be subject to removal, but they would be ineligible for discretionary relief from removal, upon conviction. *Ibid.*

Hendricks, 521 U.S. 346, 370-371 (1997) (new statute providing for involuntary commitment of person previously convicted of sexually violent offense who has a mental abnormality and is dangerous to community not "retroactive" because it operates on the basis of the person's *current* suitability to be in the community). The possibility of being granted discretionary relief under Section 1182(c), we have noted (Opening Br. 43-46), was never framed as a right of the alien but rather as a power of the Attorney General to be exercised in his unfettered discretion, and Congress has now limited that power. The "relevant activity" that IIRIRA's repeal of Section 1182(c) "regulates" is the decision of the Attorney General whether to grant relief under that provision, not the criminal conduct or conviction of an alien who might apply for that relief.[20] The power to grant relief from removal must inevitably be exercised in the future, and it is the prospective exercise of that power that Congress has regulated and restricted in IIRIRA. Accordingly, application of IIRIRA's repeal of the Attorney General's power to grant relief under Section 1182(c) in respondent's removal proceeding is not "retroactive" under *Landgraf*.

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For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[20] See *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment); see also 142 Cong. Rec. S11,886 (daily ed. Sept. 30, 1996) (Sen. Abraham) (purpose of restriction and elimination of Section 1182(c) relief in AEDPA and IIRIRA was to end perceived abuses by immigration judges in too freely granting relief); *id.* at S12,295 (daily ed. Oct. 3, 1996) (Sens. Hatch and Abraham) (same); 141 Cong. Rec. 15,069 (1995) (Sen. Kennedy) (parallel provision in AEDPA "virtually eliminates the Attorney General's flexibility to grant discretionary relief from deportation for long-term permanent residents convicted of lesser crimes").

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