98-4246

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 98-4246

FAZILA KHAN,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF DECISION OF
BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

This case concerns a challenge to a final order of removal (formerly known as deportation) issued against a longtime, legal permanent resident of the United States, Fazila Khan. Ms. Khan contends that the removal order was entered in violation of the Immigration and Nationality Act (INA) and the Constitution and seeks a judicial determination of her statutory and constitutional claims. Because judicial review of the order is governed by new statutory provisions, the jurisdiction of this Court to address Ms. Khan's claims is disputed.

In 1996, Congress enacted two statutes that amended the Immigration Act - the Antiterrorism and Effective Death Penalty Act (April 24, 1996) ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act (Sept. 30, 1996) ("IIRIRA"). This appeal involves nationally-significant questions concerning the effect of those amendments on the federal courts' jurisdiction to review removal orders, and the availability of equitable relief from removal for longtime legal residents who become deportable based on a criminal conviction.

Specifically, the issues presented are (1) whether jurisdiction to address Ms. Khan's statutory and constitutional claims lies in this Court by means of the instant petition for review or in a district court habeas action, and (2) on the merits, whether recent amendments to the INA apply retroactivity to Ms. Khan to deprive her of eligibility for a waiver of deportation and, if so, whether the amendments violate the Constitution.

This Court has previously addressed these questions in three prior decisions -- Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), cert denied sub nom. Reno v. Navas, 119 S. Ct. 1141 (1999), Jean-Baptiste v. Reno, 144 F.2d 212 (2d Cir. 1998), and Hincapie-Nieto v. INS, 92 F.3d 27 (2d 1996). Those decisions, however, arose in the context of "deportation" and not "removal" proceedings, because the immigrants in those cases had been placed into immigration proceedings before April 1, 1997. Accordingly, the jurisdictional and substantive provisions governing those cases were the amendments enacted by AEDPA and IIRIRA's "transitional" rules applicable to immigrants in deportation proceedings pending on April 1, 1997. See IIRIRA § 309(c)(4).

This case arises under IIRIRA's permanent judicial review provisions that govern immigration removal proceedings commenced on or after April 1, 1997. IIRIRA § 309(c). This is the Court's first opportunity to address IIRIRA's permanent jurisdictional provisions.

Ms. Khan is a longtime, lawful permanent resident of the United States, who has lived here for the past 17 years, since the age of thirteen. In 1996, she was arrested for her minor role in a drug offense, for which she received only a four-month sentence. She was subsequently found removable by the BIA based on that conviction and denied the right even to apply for an equitable waiver of deportation. The BIA's refusal to adjudicate her relief application was based solely on its legal conclusion that the provisions of AEDPA and IIRIRA had retroactively eliminated her right to apply for relief.

Ms. Khan does not dispute that she is removable based on her criminal conviction. She challenges only the BIA's ruling that she is statutorily ineligible to apply for equitable relief from removal. She contends that the BIA misinterpreted the temporal reach of changes to the INA enacted by AEDPA and IIRIRA and that those amendments do not apply retroactivity where, as here, the triggering criminal offense occurred before both AEDPA and IIRIRA went into effect. She also contends that, if the new amendments do eliminate her right to apply for a waiver, they violate due process and equal protection.

In Henderson, this Court considered a related retroactivity claim. Henderson rejected the Attorney General's conclusion that longtime legal residents who were placed into deportation proceedings before AEDPA and IIRIRA were enacted had been retroactively deprived of their right to apply for relief under the waiver provisions in § 212(c) of the INA, 8 U.S.C. § 1182(c). The Court noted the strong presumption against retroactive application of new laws and held that nothing in AEDPA or IIRIRA manifested a congressional intent to deviate from this long standing principle in relation to eligibility for § 212(c) relief.

Ms. Khan's case presents the same claim for eligibility for § 212(c) relief, but, as noted, her case arises under the new removal process enacted by IIRIRA (rather than the deportation context presented in Henderson). However, nothing in the amendments applicable to her case indicates that Congress intended --

retroactively -- to deprive immigrants like her of all eligibility for § 212(c) relief and to subject her to automatic deportation regardless of the severity of her crime, her ties to this country, or the hardship that her deportation will cause to family members, including U.S. citizens like her mother, sister, and four-year old child.

The threshold question in this case, however, concerns the federal courts' jurisdiction to review Ms. Khan's statutory retroactivity and constitutional Fifth Amendment claims in light of the permanent 1996 amendments, which contain restrictions on the availability of judicial review for immigrants who are deportable on the basis of certain criminal convictions. In Henderson, the government contended that the predecessor jurisdictional amendments had eliminated virtually all review for immigrants with criminal convictions, and that such aliens could assert only "substantial constitutional" claims.

The government thus argued that even if the Attorney General's retroactivity ruling at issue in Henderson were patently contrary to congressional intent, no court could correct that error because it involved only an error of statutory interpretation, and not a "substantial constitutional" error. According to the government, Congress had, and constitutionally could, eliminate all judicial review -- including habeas corpus review -- over the Attorney General's interpretation of a federal statute.

Henderson flatly rejected the government's contention that Congress could wholly insulate the Attorney General's ruling on a pure question of law, finding that assertion at odds with at least "a hundred years" of precedent. 157 F.3d at 120. Henderson made clear that even if the 1996 amendments narrowed the scope of judicial review, immigrants deportable for criminal offenses were constitutionally entitled to challenge their removal order on the grounds that the order was unconstitutional and that it was based on a misinterpretation of the Immigration Act. Henderson stated that such review was "constitutionally mandated." Id. Thus, in Henderson, this Court affirmed that immigrants are constitutionally entitled to have an Article III court determine whether the Attorney General and BIA properly concluded that the new amendments governing eligibility for equitable relief under § 212(c) applied retroactively.

In light of Henderson, it is settled that Ms. Khan has a constitutional right to a judicial determination of her claim that the Board misinterpreted the retroactive reach of the new amendments governing her eligibility to apply for equitable relief (as well as her Fifth Amendment claims). The only question is whether the proper forum for her to seek that review is in this Court by a petition for review or in a district court habeas action.

That "forum" question is not of constitutional dimension. As the Court noted in Henderson, Congress is constitutionally free to require aliens to seek review in either a district court habeas action or a petition for review in the court of appeals, so long as at least one avenue remains available.

However, in its decisions decided under the earlier transitional judicial review provisions, this Court found that direct review in this Court by means of a petition for review was foreclosed for immigrants with criminal convictions. Henderson, Jean-Baptiste, Hincapie-Nieto. Instead, the Court required such aliens to file district court habeas actions to present their claims. Now the government contends that the permanent IIRIRA jurisdictional provisions dictate the opposite result for aliens with criminal convictions, and require them to seek review exclusively in the courts of appeals. The government contends that the permanent rules have repealed all habeas review.

Ms. Khan's position is that there is no material difference between the permanent statutory provisions governing her removal order and the prior jurisdictional provisions at issue in this Court's decisions in Henderson, Jean-Baptiste, and Hincapie-Nieto. Thus, review of Ms. Khan's claims would be in a habeas action, and not in this Court by means of a petition for review. But, even if this Court were to find that IIRIRA's permanent rules dictate a different result regarding the forum in which aliens with criminal convictions must seek review, Henderson conclusively settles that review of Ms. Khan's retroactivity and Fifth Amendment claims is "constitutionally mandated" in some court. Thus, if the Court were to hold that the permanent rules at issue here, in contrast to the prior jurisdictional rules, repealed all habeas review, then Ms. Khan must be permitted to obtain review of her statutory and constitutional claims in this Court by means of the instant petition for review.

SUBJECT MATTER AND APPELLATE JURISDICTION

Ms. Khan received an administratively final order of removal from the BIA on May 28, 1998. Under this Court's decisions, review of Ms. Khan's challenge to that removal order is available only in a district court habeas action, and there is no review of her challenge by means of the instant petition for review. If, however, review of Ms. Khan's challenge is not available in a district court habeas action, then review must be available in this Court by means of the instant petition for review, which was timely filed on June 29, 1998. See 8 U.S.C. § 1252(b)(1), INA § 242(b)(1) (30-day deadline to file petition for review from date of final Board decision).

STATEMENT OF ISSUES

1. Under the permanent IIRIRA jurisdictional amendments, is the proper forum for Ms. Khan to seek review of her statutory retroactivity and constitutional Fifth Amendment claims a district court habeas action or a petition for review in this Court?

2. Are the statutory retroactivity and constitutional Fifth Amendment claims raised by Ms. Khan the type of claims for which review is "constitutionally mandated" under this Court's decision in Henderson?

3. Did the BIA err in finding that the 1996 amendments retroactively eliminated equitable relief for Ms. Khan under INA § 212(c)?

4. If the 1996 amendments restricting eligibility for

equitable relief in removal cases under the IIRIRA permanent rules apply retroactively to Ms. Kahn's case, do they violate due process or equal protection?

STATEMENT OF THE CASE

A. Ms. Fazila Khan

Fazila Khan is a 30 year-old native and citizen of Guyana. She has lived in the United States since she was thirteen years old, after she and her family lawfully entered on nonimmigrant visas in 1983. She adjusted her status to that of a legal permanent resident ("LPR") when she was eighteen years old, on September 2, 1987. She has lived with her family since coming to the United States, and currently resides in Staten Island. Ms. Khan has a four year-old daughter, who is a U.S. citizen. Ms. Khan's mother and sister, as well as five of her aunts and uncles, are also U.S. citizens. Her father, brother, and one uncle are LPRs of the United States.

B. Ms. Khan's Removal Proceedings.

1. Decisions of the Immigration Judge and BIA. On March 20, 1996, Ms. Khan was arrested and charged with the use of a telephone to facilitate the distribution of heroin. She pleaded guilty and was sentenced on February 13, 1997, to four months imprisonment which she served beginning March 31, 1997. On April 29, 1997, the INS issued a notice to appear ("NTA") charging Ms. Khan with being removable for having been convicted of an

aggravated felony, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227 (a)(2)(A)(iii). Because Ms. Kahn was put into proceedings after April 1, 1997, her proceedings were governed by the new "removal" procedures of IIRIRA. See IIRIRA § 309(a) (replacing proceedings formerly termed "deportation" proceedings with new "removal" proceedings).

When Ms. Khan appeared before an Immigration Judge ("IJ"), she requested, inter alia, that she be allowed to apply for a waiver under former INA § 212(c), 8 U.S.C. § 1182(c) (1994). On July 24, 1997, the IJ found her removable from the United States based on her criminal conviction and also pretermitted her § 212(c) application, finding that Ms. Khan was statutorily ineligible for § 212(c) relief as a matter of law. He ordered her removed to Guyana.

Ms. Khan filed a timely appeal with the BIA. On May 28, 1998, the Board dismissed her appeal, holding that Ms. Khan is statutorily ineligible for relief from deportation under INA § 212(c) in light of the 1996 amendments to the INA.[1] Ms. Kahn filed this petition for review on June 29, 1998.

2. <u>1996 Amendments and the Restrictions on § 212(c) Relief</u>.

A § 212(c) waiver is discretionary, and the Attorney General and her delegates -- IJs and the BIA -- have wide (though not unfettered) latitude to decide which aliens are deserving of a

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[1]The Board also rejected Ms. Kahn's argument that her crime did not constitute an "aggravated felony." Ms. Kahn does not challenge this finding on appeal.

favorable exercise of discretion. However, and of particular significance here, Congress did not vest the Attorney General with discretion to determine who is statutorily eligible to be considered for a § 212(c) waiver. Instead, the INA provides the eligibility criteria and a § 212(c) application must be adjudicated where the applicant satisfies the statutory eligibility criteria.

It is undisputed that Ms. Khan would have been statutorily eligible for a § 212(c) waiver prior to the enactment of AEDPA and IIRIRA. She was a lawful permanent resident, had at least seven years of "lawful unrelinquished domicile," and had not served five years for an aggravated felony conviction. INA § 212(c).

In April 1996, § 440(d) of AEDPA amended § 212(c) and expanded the category of crimes precluding eligibility for a waiver. As amended by AEDPA § 440(d), § 212(c) bars relief for any alien who has committed an aggravated felony, regardless of the amount of time served. Accordingly, although Ms. Khan's conviction resulted in only four months of imprisonment, AEDPA § 440(d) would render her statutorily ineligible for a waiver if it applies retroactively to her case.

In February 1997, the Attorney General held that AEDPA § 440(d) retroactively barred § 212(c) relief in all pending cases. Matter of Soriano, 1997 WL 159795 (AG Feb. 21, 1997) ("Soriano"). In Henderson, 157 F.3d at 128-30, this Court held that the Attorney General had incorrectly interpreted the temporal reach of § 440(d) and that it did not apply to the alien in that case, who had been placed into deportation proceedings prior to AEDPA's passage. Henderson specifically reserved the question whether AEDPA § 440(d) could be applied retroactively to cases where the alien had been placed into immigration proceedings after AEDPA, but the triggering criminal conduct had occurred before AEDPA.

In September 1996, Congress passed IIRIRA. IIRIRA § 304(b) repeals § 212(c) altogether, and replaced it with a new form of relief called "Cancellation of Removal." See INA § 240A, 8 U.S.C. § 1129b. As in the case of AEDPA § 440(d), § 304(b) does not contain an express statement as to its temporal reach. If § 304(b) is applied retroactively to Ms. Kahn's case, then Ms. Kahn would be statutorily ineligible for § 212(c) relief.

SUMMARY OF ARGUMENT

Ms. Khan challenges her final order of removal on the ground that the BIA erred, as a matter of pure law, in holding that she was statutorily barred from applying for relief under former Section 212(c), 8 U.S.C. § 1182(c) (1994).

In Henderson v. INS, Jean-Baptiste v. Reno, and Hincapie-Nieto v. INS, this Court examined the effect of some of the new jurisdictional provisions enacted by AEDPA and IIRIRA. It concluded that those provisions completely eliminated any jurisdictional basis for immigrants deportable on one of the enumerated criminal grounds to challenge the denial of relief from deportation in the court of appeals by a petition for review. However, the cases also establish that none of the provisions of AEDPA or IIRIRA's transitional rules were sufficient to repeal the district courts' historic habeas corpus jurisdiction under 28 U.S.C. § 2241. This Court's conclusion represents the almost unanimous view of the courts of appeals, nine of which have now held that, under the prior jurisdictional amendments, habeas corpus review remains available to immigrants who are barred from obtaining review directly in the court of appeals because of a criminal conviction.

In holding that habeas corpus was not precluded, the Court considered -- and rejected -- the government's contentions that various provisions enacted by AEDPA and IIRIRA's transitional rules were sufficient to repeal habeas corpus jurisdiction under § 2241. The Court held that none of the provisions were sufficient to eliminate habeas jurisdiction under the express repeal rule reaffirmed in Felker v. Turpin, 116 S.Ct 2333 (1996). Therefore, the government cannot rely on any of the provisions of AEDPA or IIRIRA's transitional rules applicable in those earlier cases to contend that habeas corpus is repealed.

Most importantly, in Henderson, this Court definitively resolved the question left open in the earlier two decisions: what is the scope of review available in the habeas corpus action that remains available? Henderson held that, at a minimum, an immigrant subject to deportation is constitutionally entitled to review of constitutional and certain statutory claims of general applicability involving questions of "pure law." Henderson, 157

F.3d at 120-22 (review of statutory retroactivity challenge to the denial of § 212(c) relief is "constitutionally mandated").

The claims that Ms. Khan brings in this case are identical for jurisdictional purposes to the claims that Henderson held must be reviewable in some court as a matter of constitutional right. Thus, there is no basis for the government to contend that Ms. Khan can be denied the right to a judicial determination of either her statutory or constitutional claims. The only issue is whether her claims are reviewable in a district court habeas action or in this Court by means of a petition for review.

The prior jurisdictional rules that Hincapie-Nieto, Jean-Baptiste and Henderson held were not sufficient to repeal habeas corpus are materially indistinguishable from the limitations on judicial review codified in the permanent judicial review provisions that govern here. None of the additional permanent jurisdictional provisions provide a repeal of habeas corpus under the standards of Felker and this Court's prior decisions. Thus, like before, habeas corpus remains available and is the proper forum.

In the event the Court were to reconsider its prior ruling finding that habeas corpus jurisdiction is available, then the prohibition on direct review would have to be construed to permit review in the court of appeals of all of Ms. Khan's claim. If, however, both direct review and habeas corpus are foreclosed, then, under Henderson, the statute must be held unconstitutional insofar as it precludes review of either the statutory or constitutional claims raised by Ms. Khan. <u>See</u> Section I.

On the merits, the BIA erred in finding that Ms. Khan was statutorily ineligible to apply for a waiver of deportation under former INA § 212(c), 8 U.S.C. § 1182(c). Ms. Khan remains eligible to apply for § 212(c) relief because Congress intended that the new restrictions in AEDPA and IIRIRA only apply prospectively, and not to cases where the criminal offense occurred before passage of those statutes. Moreover, even if Congress's intent were not clear, applying the restrictions to Ms. Khan would have an impermissible retroactive effect. <u>See</u> Section II.

If the restrictions on § 212(c) relief do apply retroactively to Ms. Khan, then those restrictions violate due process and equal protection under the Fifth Amendment, because they would deny relief based solely on when Ms. Khan was placed in immigration proceedings -- an arbitrary event over which aliens have no control. <u>See</u> Section III.

ARGUMENT

I. IIRIRA'S PERMANENT JURISDICTIONAL AMENDMENTS DO NOT AND CONSTITUTIONALLY COULD NOT PRECLUDE ALL JUDICIAL REVIEW OVER MS. KHAN'S STATUTORY AND CONSTITUTIONAL CLAIMS.

Ms. Khan does not dispute the Board's conclusion that she is removable on the basis of her aggravated felony conviction, but rather, challenges the Board's ruling that she is statutorily ineligible to apply for a § 212(c) waiver of deportation in light of recent amendments made by IIRIRA restricting eligibility for such waivers for aliens with certain criminal convictions. She raises two principal challenges.

First, she raises a claim of statutory construction -- that the Board misinterpreted the temporal reach of IIRIRA's amendments when it held that those amendments retroactively repealed § 212(c) relief in cases where, as here, the conviction occurred before passage of both AEDPA and IIRIRA. Second, Ms. Khan raises constitutional Fifth Amendment claims challenging the Board's refusal to allow her to apply for a waiver.

From a jurisdictional standpoint, the critical feature about both of her challenges is that they raise pure questions of law regarding the proper interpretation and constitutionality of a federal statute. Neither challenge requires the Court to review the Board's exercise of discretion or the agency's factual findings.

Judicial review of Ms. Khan's case is governed by IIRIRA's permanent jurisdictional rules, because she was placed into removal proceedings after April 1, 1997. This Court has not yet interpreted IIRIRA's permanent jurisdictional rules, but has issued a trilogy of decisions comprehensively interpreting the jurisdictional provisions enacted by AEDPA and IIRIRA's transitional rules -- the predecessor provisions to the permanent rules. Hincapie-Nieto, 92 F.3d 27; Jean-Baptiste, 144 F.3d 212; Henderson, 157 F.3d 106.

Those three decisions considerably narrow the issues in this case, and set forth the governing principles of statutory construction. Most significantly, the Court's decision in Henderson sets forth the constitutional minimum against which the permanent rules must be assessed. See Section I.A.

Under the analysis in those decisions, Ms. Khan is statutorily barred from seeking review of her claims by means of a petition for review, but is entitled to obtain review in a district court habeas action under 28 U.S.C. § 2241, the general federal habeas corpus statute. See Section I.B. If this Court were to conclude, however, that the IIRIRA's permanent amendments (unlike the amendments made by AEDPA and IIRIRA's transitional rules) repealed district court habeas jurisdiction, then this Court should construe the permanent statute to permit Ms. Khan to raise her constitutional and her statutory claims directly in this Court by means of a petition for review. See Section I.C.(1). If the Court finds that neither of these two constructions of the permanent IIRIRA amendments is possible, then the bar on review must be invalidated under this Court's decision in Henderson holding that review of the type of constitutional and statutory claims raised by Ms. Khan is "constitutionally mandated." Henderson, 157 F.3d at 120. See Section I.C.(2).

A. Prior Second Circuit Precedent Construing The 1996 Jurisdictional Amendments And The Government's Jurisdictional Position.

1. Prior Second Circuit Cases. In 1961, Congress amended the Immigration Act and established the modern scheme governing judicial review of immigration decisions. See former INA § 106, 8 U.S.C. § 1105a (1994). AEDPA and IIRIRA amended that scheme, and created three sets of new jurisdictional rules: (1) the 1961 Act as amended by AEDPA, (2) the 1961 Act as amended by IIRIRA's transitional rules, and (3) IIRIRA's permanent jurisdictional amendments, which repealed and wholly replaced the provisions of the 1961 Act.

The applicability of the three sets of rules depends on the date on which the alien was placed into immigration proceedings, and the date on which the order of deportation became administratively final. The first set of rules (the 1961 Act as amended by AEDPA) governs cases in which the alien was placed into immigration proceedings before April 1, 1997, and the deportation order became administratively final prior to October 31, 1996. The second set of rules (the 1961 Act as amended by IIRIRA's transitional rules) governs cases in which the alien was placed into immigration proceedings before April 1, 1997, but the deportation order became administratively final on or after October 31, 1996. The transitional rules are set forth in IIRIRA § 309(c)(4), but are not codified in the U.S. Code. The third set of rules (IIRIRA's permanent rules) govern cases in which the alien was placed into removal proceedings on or after April 1, 1997. The permanent rules are codified at INA § 242, 8 U.S.C. § 1252 et seq. Because Ms. Khan was placed into immigration proceedings after April 1, 1997, her case is governed by IIRIRA's permanent rules. See Hincapie-Nieto, 92 F.3d 27; Henderson, 157

F.3d at 117; IIRIRA § 309(c)(4).

The three sets of rules are similar in two relevant respects. First, they all retain the basic mode of judicial review established by the 1961 Act -- a "petition for review" filed directly in the court of appeals, rather than a district court action. See former 8 U.S.C. § 1105a. Second, all three sets of provisions contain nearly identical provisions restricting judicial review for aliens deportable on the basis of a wide range of criminal offenses, including misdemeanors. See AEDPA § 440(a); IIRIRA § 309(c)(4)(G) (transitional rule); 8 U.S.C. § 1252(a)(2)(C) (IIRIRA permanent rule).

In Hincapie-Nieto, Jean-Baptiste, and Henderson, this Court extensively addressed the first two sets of jurisdictional rules enacted in 1996 -- i.e., the 1961 Act as amended by AEDPA, and the 1961 Act as amended by IIRIRA's transitional rules. Those decisions collectively resolved three basic questions.

First, the decisions made clear that the amendments made by AEDPA and IIRIRA's transitional rules do not preclude all judicial review over deportation orders issued to aliens deportable on the basis of criminal convictions. Second, the decisions held that although the restrictions on judicial review precluded aliens with criminal convictions from obtaining review in the court of appeals by means of a petition for review, they could obtain review in a district court habeas action under 28 U.S.C. § 2241. The decisions thus rejected the government's position that habeas jurisdiction had been wholly repealed, and that the courts of appeals had exclusive jurisdiction to review deportation orders. Finally, the decisions held that the proper scope of review for such aliens was not limited to "substantial constitutional" claims (as the government maintained), but rather, encompassed at least certain non-constitutional legal errors, such as whether the Board misinterpreted the governing statutory provisions of the Immigration Act.

Hincapie-Nieto was this Court's first decision and arose under AEDPA's amendments. There, an alien deportable on the basis of a criminal conviction challenged his deportation order by means of a petition for review filed directly in the court of appeals. This Court dismissed the petition in light of AEDPA § 440(a), which provided that "[a]ny final order of deportation against an alien who is deportable by reason of having committed [one of the enumerated offenses] shall not be subject to review by any court." But, the Court made clear that the repeal of its own jurisdiction over petitions for review did not eliminate all "avenue[s] for judicial relief," and specifically found that habeas review had not been eliminated. 92 F.3d at 30-31. The Court declined, however, to specify the precise "nature" or "scope" of the remaining habeas review, reserving those questions for subsequent cases. Id. at 31.

Hincapie-Nieto relied on the Supreme Court's recent decision in Felker v. Turpin, 116 S.Ct 2333 (1996), which reaffirmed the long-standing principle that habeas jurisdiction cannot be eliminated "by implication" without an express and specific provision repealing such jurisdiction. 92 F.3d 30-31. Because AEDPA lacked the requisite clear statement, the Court found that habeas review remained available, and that because habeas review had not been repealed, AEDPA did not trigger the constitutional problems that would have been raised by a statute that foreclosed all avenues of review.

Jean-Baptiste, 144 F.3d 212, the Court's second decision interpreting the 1996 amendments, arose under IIRIRA's transitional rules, and involved aliens deportable on the basis of criminal convictions who filed suit in a federal-question action under 28 U.S.C. § 1331. The Court found that the applicable IIRIRA amendments eliminated § 1331 jurisdiction to review deportation orders. The Court also held that these aliens would have been foreclosed from filing petitions for review in light of the successor provision to AEDPA § 440(a) -- IIRIRA transitional rule § 309(c)(4)(G) -- which provides that "there shall be no appeal" for aliens with certain criminal offenses. But, like the AEDPA amendments, the Court found that IIRIRA's transitional rules also lacked the requisite clear statement under Felker to repeal habeas jurisdiction. Accordingly, the Court upheld the constitutionality of IIRIRA's transitional rules "[b]ecause habeas corpus remain[ed] available" for aliens deportable on the basis of a criminal conviction. Id. at 218. The Court again declined to decide the precise "scope" of habeas review because the aliens had not filed a habeas petition. Id. at 220.

Jean-Baptiste, like Hincapie-Nieto, did not question that the 1996 amendments were generally intended to retain the basic scheme established by the 1961 Immigration Act, and that under that scheme, the primary mechanism of review was a petition for review in the court of appeals. Rather, both decisions were premised on the Court's conclusion that the 1996 amendments precluded aliens with criminal convictions from filing petitions for review in the courts of appeals, and that serious constitutional concerns would be raised if all avenues of review were foreclosed. The Court further noted the Supreme Court's admonition in Felker that habeas jurisdiction under 28 U.S.C. § 2241 could not be repealed by "implication" but rather required an express directive from Congress that it intended to take that extraordinary step. On the basis of these factors, the Court held that although the courts of appeals are, in general, the exclusive forum for reviewing deportation orders, the 1996 amendments were best interpreted not to have repealed the general habeas corpus statute -- enacted as part of the First Judiciary Act in 1789 and available continuously for more than two centuries.

Henderson, the Court's third and most recent decision involving the 1996 amendments, also arose under IIRIRA's transitional rules. Like Ms. Khan, the aliens in Henderson sought review by means of both a district court habeas action and a petition for review, were deportable on the basis of a criminal conviction, and raised both constitutional and statutory retroactivity claims challenging the BIA's refusal to allow them to apply for a discretionary waiver of deportation.

Notwithstanding Hincapie-Nieto and Jean-Baptiste, the government took the position in Henderson that AEDPA and IIRIRA's transitional rules had: (1) repealed all habeas review, (2) vested the courts of appeals with exclusive jurisdiction to review deportation orders, (3) permitted aliens with criminal convictions to file petitions for review notwithstanding the restrictions on review for such aliens in AEDPA § 440(a) and IIRIRA transitional rule § 309(c)(4)(G), and (4) limited the court of appeal's jurisdiction to reviewing (a) whether the individual was an alien deportable on the basis of a crime listed in AEDPA § 440(a) or IIRIRA § 309(c)(4)(G), and (b) whether the denial of a discretionary waiver of deportation was based on a "substantial constitutional" error. The government thus argued that the habeas petitions had to be dismissed, that petitioners's Fifth Amendment claims challenging the denial of waivers could be reviewed by means of a petition for review (because they were "colorable" and therefore "substantial" constitutional claims), but that petitioners's statutory claims could not be reviewed by any means in any court.

The government insisted that Congress intended to vest the Attorney General and BIA with the unilateral and unreviewable power to construe the Immigration Act, and that insulating the Executive Branch's interpretation of a federal statute from all judicial scrutiny raised no constitutional concerns. In the government's view, even if the Attorney General and BIA had plainly misconstrued the retroactive reach of the new amendments governing eligibility for waivers (which this Court ultimately concluded was the case), the government contended that no court could correct that error, and that the aliens could be deported based on a patently erroneous interpretation of the governing statute.

Henderson rejected the government's position in full. The Court first addressed the government's contention that habeas review was unavailable to challenge a deportation order, and that insofar as any review remained for aliens deportable by reason of a criminal conviction, that review must be sought by means of a petition for review. The Court held that Hincapie-Nieto and Jean-Baptiste had definitively resolved that issue under AEDPA and IIRIRA's transitional rules, and that habeas review was the proper mode of review under those decisions. 157 F.3d at 119.

Henderson noted, however, that if the members of the panel were writing on a "clean slate," they would have been "strongly inclined" to require petitioners to seek review by means of a petition for review in the court of appeals, rather than by a habeas corpus petition, because it seemed "perverse to find that the new laws actually added a layer of review in the district courts that did not generally exist before." 157 F.3d at 109 n.2, 119 n.9 (emphasis added). The Court suggested that its approach could have been accomplished, notwithstanding the bar on review for aliens with criminal convictions, by finding an "implied" right for such aliens to file petitions for review, and stated that this solution would not create constitutional problems "so long as the review that remained [in the court of appeals] was the equivalent of habeas" in a district court action. 157 F.3d at 119 n.9. The Court acknowledged, however, that "neither approach is without problems in terms of the text and legislative history ...." 157 F.3d at 119 n.9., and that other circuits had taken the habeas approach adopted in Hincapie-Nieto and Jean-Baptiste, 157 F.3d at 118.

Henderson next addressed the question specifically reserved in Hincapie-Nieto and Jean-Baptiste -- the scope of review in a district court habeas action under § 2241. The Court rejected the government's position that aliens challenging the denial of discretionary relief could raise only constitutional claims and were precluded from seeking review of errors of statutory construction: "we disagree with the government's contention that the courts are without power to review the Attorney General's interpretation of the immigration laws." 157 F.3d at 120.

The Court made clear that the government's restrictive position would render the statute unconstitutional under the Suspension Clause because review of at least certain statutory claims was "constitutionally mandated" under venerable precedent. 157 F.3d at 120. The Court emphasized that the Attorney General's extraordinary contention

> "that no court has the power to review her interpretation of the immigration laws ... is, to put it mildly, not only at war with the historical record described earlier in this opinion--for at least a hundred years, the courts have

> reviewed the executive branch's interpretation of the immigration laws, and have deemed such review to be constitutionally mandated--it is also hard to square with the core conception of habeas corpus as it has been applied over many centuries."

157 F.3d at 120 (emphasis in original). Accordingly, the Court concluded that petitioners's had a constitutionally guaranteed right, protected by the Suspension Clause, to seek review of their statutory claims challenging the agency's refusal to adjudicate their waiver applications. 157 F.3d at 122.

The Court noted that the government's position that the Suspension Clause permitted Congress to limit review to constitutional errors made "little sense" in light of the historical origins of that Clause. 157 F.3d at 121 n.13. The Court observed that the Constitution did not "define the term 'writ of habeas corpus' and so the founders were presumably referring to the common law writ as it existed" before the Constitution was enacted -- when the "writ could only have been granted based on errors of law, since there was no such thing as a constitutional error." Id.

The Court punctuated its analysis, however, by emphasizing that its holding was a limited one, that not every non-constitutional error must be reviewable in a habeas action, and that it agreed with the government that the scope of habeas review is "considerably narrower than the review that was available prior to the 1996 amendments." 157 F.3d at 119. The Court stressed, in particular, that the Board had refused to adjudicate petitioners's applications on the merits and that the petitioners were not, therefore, seeking review of the agency's "factual findings" or the "exercise of ... discretion." 157 F.3d at 120 n.10. Similarly, the Court stressed that the petitioners were not seeking review of mixed questions of statutory interpretation involving the "application of law to specific facts." 157 F.3d at 120 n.12. Rather, the claims in Henderson were ones of "pure law" raising statutory questions of "general applicability." 157 F.3d at 120 nn. 10, 12. Thus, in finding that petitioners's particular statutory claims were reviewable, the Court stated:

> [t]his is not to say that every statutory claim that an alien might raise is cognizable on habeas. But those affecting the substantial rights of aliens of the sort that the courts have secularly enforced -- in the face of statutes seeking to limit judicial jurisdiction to the fullest extent constitutionally possible -- surely are. The two statutory questions before us today are clearly of this variety ....

157 F.3d at 122.

The result reached in Henderson, Jean-Baptiste and Hincapie-Nieto have now been followed by nine other circuits. All nine have ruled that, in cases governed by AEDPA and IIRIRA's transitional rules, aliens deportable on the basis of a criminal conviction who seek to challenge the denial of a waiver of deportation (1) may not file a petition for review, but must raise their challenges in a § 2241 district court habeas action, and (2) that the scope of habeas review is not limited to constitutional challenges, but includes at least certain non-constitutional claims, such as the statutory retroactivity claim at issue in Henderson. See Goncalves v. Reno, 144 F.3d 110 (1st

Cir. 1998), cert. denied, 119 S.Ct. 1140 (1999) (statutory retroactivity claims reviewable in habeas); Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999) (same); Bowrin v. INS, 1999 WL 957725 (4th Cir. Oct. 20, 1999) (same); Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 1999 WL 717367 (5th Cir. Sept. 15, 1999) (same); Pak v. Reno, 1999 WL 791660 (6th Cir. Oct. 6, 1999) (same); Shah v. Reno, 184 F.3d 719, 1999 WL 493681 (8th Cir. July 1, 1999) (same); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1999 WL 637038 (10th Cir. Aug. 19, 1999) (same); Mayers v. INS, 175 F.3d 1289 (11th Cir. 1999) (same). See also Magana-Pizano 152 F.3d 1213, amended 159 F.3d 1217 (9th Cir. 1998) (finding that IIRIRA repealed all grants of jurisdiction, including habeas, but holding statute unconstitutional), vacated and remanded, 119 S. Ct. 1137 (1999), in light of AADC, 119 S. Ct. 936 (1999), to allow the court of appeals to reconsider whether IIRIRA repealed § 2241.

The Seventh Circuit is the only court of appeals to take a different approach under AEDPA and IIRIRA's transitional rules, and that Court disagreed only in part. LaGuerre v. Reno. 164 F.3d 1035 (7th Cir. 1998), petition for certiorari filed, Sept. 7, 1999. LaGuerre held that habeas jurisdiction was not available to challenge a deportation order, and that all review must be sought in the court of appeals by means of a petition for review, even for aliens with criminal convictions subject to the bar on review. But LaGuerre did not accept the government's position that the scope of review was limited solely to constitutional challenges, and that Congress had intended to foreclose all review of statutory claims, including the statutory retroactivity claim at issue in that case (and Henderson): "It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." LaGuerre, 164 F.3d at 1041. Thus, no circuit has accepted the government's ultimate position that only constitutional claims challenging the denial of a waiver are reviewable under AEDPA and IIRIRA's transitional rules.

2. **The Government's Jurisdictional Position.** Despite this Court's rulings under AEDPA and IIRIRA's transitional rules (as well as the rulings of virtually every other circuit), the government has taken the same jurisdictional position under IIRIRA's permanent rules in cases where, as here, an alien with a criminal conviction seeks to challenge the Board's refusal to adjudicate a waiver application: that aliens with criminal convictions can only challenge the denial of relief from deportation on constitutional grounds, that review of statutory claims is completely foreclosed in any court by any means, that this restrictive scheme raises no constitutional concerns, and that this limited review must be sought by means of a petition for review, because IIRIRA's permanent rules repealed all habeas jurisdiction, even if AEDPA and IIRIRA's transitional rules did not do so.

The government's contention that review can be limited to constitutional claims without violating the Suspension Clause is unequivocally foreclosed by Henderson. Indeed, although Henderson arose under IIRIRA's transitional rules, and this case arises under IIRIRA's permanent rules, the two cases are jurisdictionally identical from a constitutional standpoint.

Both cases involve aliens deportable on the basis of a criminal conviction who challenge the Board's refusal to allow them to apply for a § 212(c) waiver on Fifth Amendment grounds and on statutory retroactivity grounds. Thus, Ms. Khan's case falls squarely within the precise holding in Henderson, which made absolutely clear that "whatever the outer perimeters" of review may be after 1996, review of a statutory retroactivity claim is "constitutionally mandated." 157 F.3d at 112, 120.

Accordingly, in light of Henderson, the only remaining question under the permanent rules is whether Ms. Khan's Fifth Amendment and statutory retroactivity claims are reviewable in a district court habeas action or by means of a petition for review. Ms. Khan's position is that the proper forum is a habeas action in light of this Court's prior decisions. Like AEDPA and IIRIRA's transitional rules, the permanent provisions contain a bar restricting "review" for aliens with criminal convictions, which this Court has held preclude such aliens from filing petitions for review. But, like the prior rules, nothing in the permanent rules mentions, much less expressly repeals, habeas jurisdiction under § 2241. Accordingly, Ms. Khan has filed a habeas petition in district court and requested expedited resolution of that petition. See Section I.B., infra.

However, the government has argued that the permanent rules should be interpreted to have repealed all habeas jurisdiction. Because this Court has not yet definitively ruled that question, Ms. Khan has also filed the instant petition for review as a protective matter.

The availability of review for Ms. Khan does not hinge on whether this Court ultimately chooses to place review in district court or in the court of appeals. If the Court reaffirms that habeas review is available to review the type of constitutional and statutory claims raised by Ms. Khan, then it can dismiss the instant petition for review. See Henderson. Alternatively, if the Court were to conclude that IIRIRA's permanent rules repeal all habeas jurisdiction, then Henderson requires that Ms. Khan be permitted to raise her constitutional and statutory claims directly in the court of appeals by means of the instant petition for review.

Providing review directly in this Court can be accomplished by one of two means. The Court can either construe the jurisdictional bar restricting review for aliens with criminal convictions to permit review of Ms. Khan's constitutional and statutory claims, or the Court can invalidate the bar on review under the constitutional analysis in Henderson insofar as necessary to permit all "constitutionally mandated" review protected by the Suspension Clause, see Section I.C., infra.

B. Under the Analysis in Hincapie-Nieto and

Jean-Baptiste The Permanent IIRIRA Rules Do Not Repeal Habeas Jurisdiction Under 28 U.S.C. § 2241 To Review Ms. Khan's Statutory and Constitutional Claims.

The government's jurisdictional position is that the courts of appeals have exclusive jurisdiction to review deportation orders, and that habeas jurisdiction has been wholly repealed. The government has relied on four sources for that repeal.

First, the government has argued that the 1961 Immigration Act repealed habeas jurisdiction to review deportation orders, and the 1996 amendments served merely to confirm that repeal. Second, the government has argued that AEDPA repealed habeas review of deportation orders, even if the 1961 Act did not do so. Third, the government has argued that IIRIRA's transitional rules repealed habeas review of deportation orders, even if the 1961 Act and AEDPA did not do so. Fourth, the government now maintains that IIRIRA's permanent rules repeal habeas jurisdiction to review deportation orders, even if none of the earlier amendments did so.

Hincapie-Nieto and Jean-Baptiste rejected the government's first three arguments and foreclose the government from reasserting them here. Those decisions held that the 1961 Act, AEDPA and IIRIRA's transitional rules did not repeal § 2241 habeas jurisdiction to review final deportation orders. Nine other circuits have reached the identical conclusion. See , e.g., Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1988), cert. denied, 119 S. Ct. 1140 (1999) (finding that § 2241 habeas review was not repealed by AEDPA or IIRIRA's transitional rules). See Section I.A. (citing cases). Accordingly, if § 2241 habeas jurisdiction is unavailable to Ms. Khan, it can only be because IIRIRA's permanent amendments repealed § 2241. The permanent rules do not do so.

The thrust of the government's argument has been that the availability of habeas jurisdiction is inconsistent with Congress's decision to streamline review into the courts of appeals. The government has further argued that if aliens with criminal convictions are permitted to file district court habeas petitions, then they will receive an extra layer of review that is generally not available to other aliens, who must seek review solely by means of a petition for review in the court of appeals. Accordingly, the government has argued that aliens with criminal convictions should be required to seek review solely in the courts of appeals, and that the Court should construe the jurisdictional bars precluding review for such aliens to permit review in the court of appeals, but only of substantial constitutional challenges.

In rejecting these arguments, no court has disputed the proposition that -- in general -- Congress intended to streamline review into the courts of appeals. But, as the courts have also recognized, the 1996 amendments present them with a difficult problem of statutory construction that carries enormous constitutional implications -- a problem which yields no easy resolution and one to which the government has not provided a satisfactory answer.

The government's proposed solution is unsatisfactory because it would completely bar review in any court of statutory claims challenging the denial of a waiver of deportation -- such as the statutory retroactivity claim at issue in Henderson and in Ms. Khan's case. Henderson made clear, however, that review of such claims in some court is "constitutionally mandated" and that the Suspension Clause would not permit Congress to vest an Executive Branch official with unreviewable authority to determine the meaning of a federal statute where an individual's liberty is at stake. 157 F.3d at 120. See also Wallace v. Reno, 1999 WL 959538, at *5 (1st Cir. Oct. 26, 1996) (noting that government's solution is "at odds" with the bar on direct review in the court of appeals, and would not provide a judicial forum for "statutory claims").

Thus, in light of the constitutional requirement that review encompass at least certain statutory claims, the courts of appeals have had three alternatives. The courts could find that § 2241 habeas jurisdiction is available to review statutory and constitutional claims. Or, the courts could construe the bar on review in the court of appeals to permit all constitutionally-required review -- i.e., constitutional claims and some non-constitutional claims, such as the statutory claims raised in Henderson and this case. Finally, the courts could hold that the 1996 amendments precluded both habeas review and review in the court of appeals, and invalidate the statute on constitutional grounds.

This Court, like nine other circuits, concluded that the preferable solution was to hold that AEDPA and IIRIRA's transitional rules did not repeal § 2241. Among other things, the habeas solution was supported by the Supreme Court's recent decision in Felker, which made clear that Congress must be express if wishes to repeal § 2241. 116 S.Ct at 2338-39 (Congress may not repeal § 2241 "by implication" where no provision even "mentions" that grant of jurisdiction); see Hincapie-Nieto, 92 F.3d at 30 (relying on Felker principle); Jean-Baptiste, 144 F.3d at 219 (same).

As the courts have observed, the Felker clear statement rule serves a critical function of creating predictable background rules and thereby forces Congress to act explicitly when it legislates in an area with grave consequences for individual litigants and serious implications for the structural checking role played by the courts in the tripartite system:

> "Clear statement rules act as signposts, warning Congress that specific types of legislation, such as acts that impose liability upon the states or that strip the courts of all jurisdiction, may give rise to constitutional difficulties."

Lee v. Reno, 15 F. Supp. 2d 26, 38 n.16 (D.D.C. 1998), appeal dismissed by Gov't.

The government contends, however, that the habeas solution is unavailable under IIRIRA's permanent rules because the permanent provisions are sufficiently comprehensive and restrictive to repeal all habeas review, even if the prior rules were not. Yet nothing in the permanent rules warrants this Court abandoning its analysis in Hincapie-Nieto and Jean-Baptiste. That is evident from a detailed comparison of the permanent rules with the specific provisions that this Court has already found insufficient to repeal habeas.

1. The 1961 Immigration Act. Prior to 1961, review of deportation orders occurred exclusively in district court, and until 1952, the only district court action that could be brought was a habeas action. The 1952 Immigration Act gave aliens the additional right to bring a declaratory action in district court pursuant to the APA. See Henderson, 157 F.3d at 112-17 (tracing history).

The 1961 Immigration Act amended the 1952 Act, and made the court of appeals the primary forum for review. The relevant provision was former 8 U.S.C. § 1105a(a) (1994), INA § 106a, a "channeling" or "exclusivity" provision providing that a petition for review in the courts of appeals would be the "sole and exclusive" means of review, subject only to the exceptions listed in the remainder of § 1105a. One of those exceptions to the "sole and exclusive" review in the court of appeals was former § 1105a(a)(10) (1994), INA § 106(a)(10) (repealed by AEDPA § 401(e)), which provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." The text of the 1961 Act did not, however, mention § 2241.

The government argued that the "sole and exclusive" language in § 1105a(a) of the 1961 Act was clear and divested the district courts of jurisdiction to review deportation orders, including habeas jurisdiction. The government acknowledged that the 1961 contained an exception for habeas review under § 1105a(a)(10), but argued that the "sole and exclusive" language meant that habeas review was only available to review matters collateral to the deportation order, and not the deportation order itself. The government further argued that, even assuming that habeas review of deportation orders was available under § 1105a(a)(10), there was no separate and independent grant of habeas jurisdiction under § 2241 to review deportation orders.

The courts did not dispute the proposition that the "sole and exclusive" language channeled review to the courts of appeals, and in general divested the district courts of jurisdiction to review deportation orders. The courts found, however, that while the sole and exclusive language was sufficient to repeal other forms of district court review (such as APA declaratory actions), that language not sufficient to repeal habeas jurisdiction, which could only be eliminated by express and unambiguous statutory directive.

Nine circuits, including this Court, rejected the government's position that the 1961 Act's "sole and exclusive" language repealed habeas jurisdiction to review deportation orders, finding "no authority" for the government's broad position that the 1961 Act repealed all grants of habeas jurisdiction to review deportation orders, or the government's more narrow contention that § 2241 habeas jurisdiction was repealed. Goncalves, 144 F.3d at 120. See Jean-Baptiste, 144 F.3d at 219; Sandoval, 166 F.3d at 234-235; Bowrin, 1999 WL 957725, at *3, 5; Requena-Rodriguez, 190 F.3d 299, at 305 n.22; Pak, 1999 WL 791660, at *5; Shah, 184 F.3d 719 at 721, 723-724; Jurado-Gutierrez, 1999 WL 637038, at *7; Mayers, 175 F.3d at 1298-1300. See also Mondragon v. Ilchert, 653 F.2d 1254, 1255 (9th Cir. 1980) (finding habeas jurisdiction to review deportation order under both "106(a)(10) and section 2241") (emphasis added); Foti v. INS, 375 U.S. 217, 231 (1963) (holding that 1961 Act made courts of appeals primary forum for review, but stating that "of course, our decision ... in no way impairs the preservation and availability of habeas corpus relief"). But see LaGuerre, 164 F.3d at 1039-40.

2. **AEDPA Amendments.** The government next relied on two provisions of AEDPA, §§ 401(e) and 440(a), in support of its position that AEDPA repealed all habeas review over deportation orders, even if the 1961 Act had not done so. Like the government's argument under the 1961 Act, nine circuits, including this one, rejected the governments contention that § 2241 did not survive the amendments made by AEDPA. See Goncalves, 144 F.3d at 120. See Jean-Baptiste, 144 F.3d at 219; Sandoval, 166 F.3d at 235; Bowrin, 1999 WL 957725, at *5; Requena-Rodriguez, 190 F.3d 299, at 305; Pak, 1999 WL 791660, at *4; Shah, 184 F.3d 719, at *722-723; Jurado-Gutierrez, 1999 WL 637038, at *7-8; Mayers, 175 F.3d at 1297-1298; but see LaGuerre,

164 F.3d at 1038-1039.

AEDPA § 401(e), entitled "Elimination of Custody Review By Habeas Corpus," repealed the former habeas provision in INA § 106a(a)(10) added by the 1961 Act. The government took the position that the repeal of the habeas provision in INA § 106(a)(10) evidenced a clear congressional intent to repeal all habeas review, including § 2241. The courts again did not dispute the government's general point that in AEDPA Congress had intended to streamline review and to eliminate certain grants of jurisdiction. Nonetheless, the courts overwhelmingly rejected the government's position that § 2241 could be implicitly repealed without any mention of that provision: "AEDPA eliminated the habeas corpus jurisdiction available under old INA § 106(a)(10), it did not explicitly repeal the habeas corpus jurisdiction traditionally available to aliens under 28 U.S.C. § 2241." Mayers, 175 F.3d at 1300 (citing Felker).

Instead, the Courts found that AEDPA § 440(a) -- providing that deportation orders based on criminal convictions "shall not be subject to review by any court" -- repealed only this Court's jurisdiction. The circuits overwhelmingly held that the restriction on "review" did not repeal the more limited habeas inquiry: "in the Immigration context, the [Supreme] Court has historically drawn a sharp distinction between `judicial review' -- meaning APA review -- and the court's power to entertain petitions for writs of habeas corpus." Sandoval, 166 F.3d at 235 (finding that AEDPA § 440(a) did not repeal § 2241). See Jean-

Baptiste, 144 F.3d at 219-220; Hincapie-Nieto, 92 F.3d at 30-31.

3. **IIRIRA's Transitional Amendments.** The government further relied on two IIRIRA provisions in support of its contention that § 2241 habeas jurisdiction has been repealed in transitional rule cases. One of the provisions was IIRIRA transitional rule § 309(c)(4)(G) (not codified in the U.S. Code); the other provision, new INA § 242(g), 8 U.S.C. § 1252(g), is a permanent IIRIRA provision that applies retroactively to all cases. The government's reliance on these provisions was also rejected by nine circuits, including this Court. See Jean-Baptiste, 144 F.3d at 219; see also Goncalves, 144 F.3d at 120. See Sandoval, 166 F.3d at 235-236; Bowrin, 1999 WL 957725, at *4-5; Requena-Rodriguez, 190 F.3d at 303-305; Pak, 1999 WL 791660, at *3-5; Shah, 184 F.3d at 722-724; Jurado-Gutierrez, 1999 WL 637038, at *6-8; Mayers, 175 F.3d at 1296-1300.

The first provision, IIRIRA § 309(c)(4)(G), is the successor to AEDPA § 440(a), and provides that "there shall be no appeal" of a deportation order issued on the basis of one of the enumerated criminal offenses. This Court, like the other circuits, held that § 309(c)(4)(G), like AEDPA § 440(a), prohibited the courts of appeals from entertaining petitions for review -- "even for constitutional claims" 144 F.3d at 220, and held that nothing in its language repealed, or even mentioned, § 2241 habeas jurisdiction. Id. at 220.

The second provision on which the government relied, § 242(g), 8 U.S.C. § 1252(g), is entitled "EXCLUSIVE JURISDICTION" and provides in full:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

No court interpreting § 242(g) has disputed the government's contention that this provision expressed a general congressional desire to channel review into the court of appeals by means of a petition for review, and to make that mode of review generally exclusive.

Nor has any court disputed the strength of the provision's language, or contended that the language did not implicitly sweep within its coverage all grants of jurisdiction, including § 2241 habeas jurisdiction. Indeed, the provision states that there shall be no jurisdiction "[e]xcept as provided" in § 242, and "notwithstanding <u>any</u> <u>other</u> provision of law." (emphasis added).

Yet, because § 242(g) nowhere mentions § 2241 this Court, along with the First and Third Circuits, held that, despite the strength of § 242(g)'s channeling and exclusivity language, § 242(g) does not repeal habeas review. As this Court noted, § 242(g) cannot satisfy the <u>Felker</u> clear statement rule because "[n]othing in the language" of § 242(g) "expressly repealed § 2241." <u>Jean-Baptiste</u>, 144 F.3d at 219. The Third Circuit likewise found that the language of § 242(g) was not sufficiently express to repeal § 2241: "We are unpersuaded by the government's argument that the rule disfavoring repeals by implication does not apply here because the new INA § 242(g) sets up a comprehensive jurisdictional scheme which displaces, by virtue of its comprehensiveness, any other jurisdictional grant." Sandoval, 166 F.3d at 236. See also Goncalves, 144 F.3d at 122 (citing Felker and finding that § 242(g) did not repeal § 2241 in light of "long standing rule disfavoring repeal ... by implication").

Six other circuits have also rejected the government's contention that § 242(g) repealed § 2241, but have done so on different grounds, basing their decision on the Supreme Court's recent decision in Reno v. American-Arab Anti-Discrimination Committee v. Reno, 119 S.Ct 936 (1999) ("AADC"), which was decided after Jean-Baptiste, Sandoval, and Goncalves, and significantly narrowed the scope of § 242(g).[2]

In light of the Supreme Court's narrowing construction of § 242(g), the circuits that have addressed that provision in post-AADC decisions have uniformly held that § 242(g) does not apply

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[2] AADC involved aliens who brought a federal question suit in district court under § 1331 to enjoin their administrative proceedings from going forward, arguing that the Attorney General had initiated the deportation charges solely because she disapproved of their political activity and speech. The Court held that the district court lacked § 1331 jurisdiction in light of § 242(g), finding that the suit directly challenged the Attorney General's decision to "commence" proceedings, and thus, fell squarely within § 242(g)'s prohibition against review outside of the "petition for review" process. The Court further stated, however, that § 242(g) was not as broad as previously assumed, that it did not apply to the universe of deportation decisions, and that it applied only to "three discrete" actions specifically referenced in the statute (i.e., the decision to "commence" proceedings "adjudicate" cases and "execute" removal orders).

to a challenge to a final order of deportation after exhaustion of administrative remedies. See Bowrin, 1999 WL 957725, at *4; Requena-Rodriguez, 190 F.3d at 303-304; Pak, 1999 WL 791660, at *3-6; Shah, 184 F.3d at 719; Jurado-Gutierrez, 1999 WL 637038, at *6; Mayers, 175 F.3d at 1296-1297. Because AADC makes clear that § 242(g) does not apply at all to review of final orders of deportation, it was unnecessary for any of the post-AADC decisions to address the question decided by this Court in Jean-Baptiste (and by the First and Third Circuits) -- whether the language of § 242(g) is sufficient to repeal § 2241 habeas review over final orders of deportation.

Nor was it necessary for the Supreme Court to address that question in AADC, because the aliens were not challenging final administrative orders, and more importantly, had sought review only under 28 U.S.C. § 1331, and not under § 2241. AADC, 119 S.Ct at 942 n.7 (noting but not resolving habeas issue). See also Wallace, 1999 WL *3 (noting that AADC involved a "different matter" than a habeas challenge to a final administrative order).

Thus, AADC makes clear that § 242(g) has no application to in cases where, as here, aliens have exhausted their administrative remedies and challenge a final order of deportation. For purposes of this case, however, the critical point is that Jean-Baptiste (like all of the other pre-AADC circuit decisions) assumed that § 242(g) applied to final orders of deportation, but held that § 242(g)'s language was insufficiently specific and express to repeal § 2241 habeas jurisdiction under the Felker clear statement rule. Yet the language of § 242(g) is equally, if not more, sweeping than the language in any other permanent IIRIRA provision -- none of which expressly mention § 2241.

4. IIRIRA's Permanent Rules. The government has principally relied on three provisions of IIRIRA's permanent rules, codified at 8 U.S.C. § 1252 et seq., (in addition to § 242(g) discussed above) to support its position that those rules repeal § 2241 habeas -- Section § 242(a)(2)(C); Section § 242(a)(1); and Section 242(b)(9). Under this Court's decisions in Hincapie-Nieto and Jean-Baptiste, these three provisions cannot repeal § 2241 habeas review.

The first provision, INA § 242(a)(2)(C), is the permanent counterpart to AEDPA § 440(a) and IIRIRA transitional rule § 309(c)(4)(G), which respectively prohibit "review" and "appeals" of deportation orders issued on the basis of one of the enumerated criminal convictions. Section 242(a)(2)(C) similarly provides that "notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal" issued on the basis of one of the enumerated criminal offenses, which encompasses Ms. Khan's conviction.

Hincapie-Nieto and Jean-Baptiste held that the prior provisions barred all review in the court of appeals. Like AEDPA § 440(a), INA § 242(a)(2)(C) also prohibits "review" of deportation orders, and in general, is indistinguishable in all relevant respects from the prior provisions in AEDPA § 440(a) and

IIRIRA § 309(c)(4)(G). Accordingly, under the law of this Circuit, Ms. Khan cannot obtain review in the court of appeals of her constitutional or statutory claims.

Thus, the permanent provisions present the same situation created by AEDPA and IIRIRA's transitional rules -- a statute barring review in the court of appeals that would be unconstitutional in the absence of § 2241 jurisdiction. Accordingly, the question is whether the bar on review in INA § 242(a)(2)(C), or any of the other permanent provisions, repeals § 2241, thereby rendering the permanent amendments unconstitutional.

INA § 242(a)(2)(C) does not repeal § 2241. Like its predecessor provisions in AEDPA § 440(a) and IIRIRA § 309(c)(4)(G), it does not mention § 2241. Moreover, by its terms, § 242(a)(2)(C) prohibits only "review" and not "habeas." See, e.g., Sandoval, 166 F.3d at 235 (noting historical distinction "in the Immigration context ... between `judicial review' -- meaning APA review -- and ... habeas corpus").

Nor can the government claim that § 242(a)(2)(C) repeals § 2241 because it applies "notwithstanding any other provision of law." Although the "notwithstanding" language does not appear in AEDPA § 440(a) or IIRIRA § 309(c)(4)(G), it does appear in INA § 242(g), which Jean-Baptiste held did not repeal § 2241 because it did not "expressly" mention that grant of jurisdiction. See also Sandoval, 166 F.3d at 236 (notwithstanding language in § 242(g), although "comprehensive" is not sufficient to satisfy Felker clear statement rule in the absence of any mention of § 2241).

The government has also relied on INA § 242(a)(1) which provides that the "only" judicial review of removal orders shall be by means of a petition for review according to the procedures set forth in Chapter 158 of Title 28 (the Hobbs Act) and the remainder of INA § 242. That language is plainly insufficient in light of this Court's decisions in Hincapie-Nieto and Jean-Baptiste, which rejected the government's contention that § 2241 was repealed by the 1961 language giving the courts of appeals "sole and exclusive" jurisdiction over deportation orders.

Finally, the government has argued in other cases that INA § 242(b)(9) repeals § 2241, and has attributed heavy significance to the Supreme Court's characterization of that provision in AADC as a "zipper clause." See AADC, 119 S.Ct. at 943. Section 242(b)(9) is entitled "Consolidation Of Issues For Judicial Review" and provides in full:

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

The government has argued that this provision leaves absolutely no doubt about Congress's desire to channel all review to the courts of appeals, and that it allows for no exceptions, including habeas review under § 2241. But, like the prior jurisdictional amendments, § 242(b)(9) does not mention § 2241, and thus, cannot satisfy the requirement that Congress must "expressly repeal" § 2241 if it wishes to take the step of eliminating that grant of jurisdiction. Jean-Baptiste, 144 F.3d at 219-20.

The general purpose of § 242(b)(9) is to channel review into the courts of appeals, the same purpose served by INA § 242(g), and the "sole and exclusive" language in former § 1105a of the 1961 Act. But no court has disputed the general proposition that Congress has, since 1961, sought to streamline review into the courts of appeals.

Rather, in finding that habeas review remained available as a residual mode of review, the courts have confronted a statute that barred review in the courts of appeals and that would have been unconstitutional in the absence of § 2241. In this context, the courts have refused to find a repeal of § 2241 in the absence of an express and unmistakable directive in the statute indicating that Congress wished to take that extraordinary step.

That principle is especially appropriate here, given that IIRIRA was enacted just three months after the Supreme Court issued Felker. Thus, when it enacted IIRIRA, Congress was on notice that an express statement was necessary to repeal § 2241. See Goncalves, 144 F.3d at 122 ("IIRIRA was enacted after Felker, and Congress was well aware of the need for specific language if it wished to impair the Great Writ").

Thus, whether or not the language in § 242(b)(9) is stronger than the language in prior "channeling" and "exclusivity" provisions does not address the particular issue faced in Jean-

Baptiste and Hincapie-Nieto -- what should the courts do in the face of a bar on review in the courts of appeals.

The language of § 242(b)(9) is, in any event, no more restrictive than the language this Court previously held was insufficient to repeal § 2241. Section 242(g), for example, provides that the courts of appeals will have sole jurisdiction "except as provided" and "notwithstanding any other provision of law" -- language that is equally, if not more, restrictive than the language in § 242(b)(9).

Nor does the Supreme Court's decision in AADC support the contention that § 242(b)(9) repealed § 2241. AADC was a transitional rule case brought under 28 U.S.C. § 1331, and thus, neither § 242(b)(9) nor § 2241 was directly at issue. The Court nevertheless discussed § 242(b)(9), but it did not address habeas review, much less purport to resolve whether § 242(b)(9) had or could repeal § 2241 in cases where there was an express bar on review in the courts of appeals. The Court simply noted, without discussion, that the habeas issue had resulted in disagreement among the Circuits (at 942 n.7), and twelve days later denied certiorari in Henderson and Goncalves. Nothing in AADC suggests that the language in § 242(b)(9) is sufficiently express to repeal § 2241 habeas review in light of the special presumption governing the repeal of habeas, particularly where the repeal would result in an unconstitutional statute; indeed, AADC does not even cite Felker, which was decided only three years earlier, and specifically concerned § 2241 habeas jurisdiction.

The government also has misapprehended the Court's reference to § 242(b)(9) as a "zipper clause." AADC, 119 S. Ct. at 943. That statement was intended to show that § 242(b)(9)'s coverage was broad, in contrast to § 242(g) which applies only to review of three specified actions by the Attorney General (i.e., the decision to "commence" or "adjudicate" or "execute"). Thus, in comparison to § 242(g)'s limited applicability, § 242(b)(9) functions as a "zipper clause" in that it applies to a broad range of immigration decisions, and consequently, precludes review of those claims outside of the review of a final order. AADC did not, however, address the entirely distinct issue presented here -- whether the language of § 242(b)(9) is sufficiently specific and express to repeal habeas review over final orders when direct review in the court of appeals is barred.

The Eleventh Circuit is the only circuit that has thus far addressed whether the permanent rules repeal habeas review over deportation orders. See Richardson v. Reno 180 F.3d 1311 (1999) ("Richardson II"). Richardson arose in the context of a challenge to detention during pendency of removal proceedings, and was not a challenge to a final order. Nonetheless, Richardson stated that, unlike AEDPA and IIRIRA's transitional rules, the permanent rules repeal all habeas jurisdiction over removal orders, and vest the courts of appeals with exclusive jurisdiction, even for aliens with criminal convictions subject to the bar on review in the courts of appeals. Compare Mayers v.

INS, 175 F.3d 1289 (11th Cir. 1999) (holding under transitional rules that repeal of habeas must be explicit and finding no repeal). Richardson II did not, however, decide the scope of review in the court of appeals, but recognized that aliens with criminal convictions must be permitted to raise whatever claims they could have raised in a district court habeas action by virtue of the Suspension Clause. 180 F.3d 1315-16. (noting that Congress can place exclusive jurisdiction in the court of appeals only if the "scope" of review in the court of appeals is "commensurate" with traditional habeas review guaranteed by the Constitution).

Richardson II was wrongly decided, was based on a misapprehension of the Supreme Court's discussion of § 242(b)(9), and should not be followed by this Circuit. The Eleventh Circuit's conclusion that § 2241 could be repealed without an express statement, based on Congress's general intent to place review in the courts of appeals, is inconsistent with Felker and this Court's application of the Felker rule in Jean-Baptiste and Hincapie-Nieto. Indeed, the result reached in Richardson II cannot be reconciled with the Eleventh Circuit's transitional rule decision in Mayers, where the Court stated that § 2241 habeas review must be "explicitly repealed." 175 F.3d at 1300.

Equally significant, Ms. Khan's case arises against the backdrop of this Court's decision in Henderson. Henderson makes unequivocally clear that the 1996 amendments would be unconstitutional if they were construed to repeal § 2241 habeas review without permitting the courts of appeals to review at least certain statutory claims, such as the statutory retroactivity claim raised in Henderson and this case. Thus, unless this Court alters its conclusion that review in the courts of appeals is foreclosed for aliens with criminal convictions, the Court will be compelled to invalidate the permanent amendments if it were to follow the Eleventh Circuit and hold that § 2241 has been repealed. That is both unnecessary and inappropriate given that the permanent rules nowhere even mention § 2241.

In sum, the permanent rules, like the transitional rules, do not mention § 2241, much less expressly repeal that grant of jurisdiction. Accordingly, under this Court's precedent § 2241 remains available, and provides district courts with authority to hear the types of constitutional and statutory claims raised by Ms. Khan.

C. Ms. Khan Must Be Permitted To Raise Her Constitutional And Statutory Claims In This Court By Means Of A Petition For Review If Habeas Jurisdiction Has Been Repealed.

If the Court concludes that habeas review is unavailable, then it has two options. First, it can construe the restriction on review in the court of appeals contained in INA § 242(a)(2)(C) to permit review of Ms. Khan's statutory and constitutional claims. See Section I.C.(1), infra. If, however, the Court concludes that § 2241 has been repealed, and that § 242(a)(2)(C) cannot be construed to permit review of all of Ms. Khan's claims, then the Court must invalidate § 242(a)(2)(C) as applied to Ms. Khan because, as Henderson found, review in some court of the types of constitutional and statutory claims raised by Ms. Khan is "constitutionally mandated." See Section I.C.(1), infra.

(1) The court should construe § 242(a)(2)(C) to permit review of Ms. Khan's statutory and constitutional claims if habeas review is not available.

As discussed above, supra Section I.B., Ms. Khan's position is that habeas review is available to review her statutory and constitutional claims, and that nothing in the permanent rules requires this Court to abandon its analysis in Jean-Baptiste and Hincapie-Nieto, since the permanent rules do even mention § 2241. But, if this Court were to revisit its holding that § 2241 can be repealed without a specific and express directive in the statute, then it is appropriate for the Court also to revisit its conclusion that the bar on review for aliens with criminal convictions prohibits them from filing petitions for review. Doing so is appropriate not only because invalidating the statute should be the option of last resort, but also because the statute should be construed as a whole.

Two arguments support a construction of § 242(a)(2)(C) that would allow Ms. Khan to obtain review of both her statutory and her constitutional claims by means of a petition for review. First, the plain language of § 242(a)(2)(C) prohibits aliens with criminal convictions only from obtaining "review." Section 242(a)(2)(C) does not, however, mention habeas corpus.

Consequently, the Court could hold that although § 242(a)(2)(C) prohibits aliens with criminal convictions from obtaining the same full APA-type review available to other aliens, it does not prohibit the court of appeals from undertaking the more limited inquiry available under habeas corpus law. This would not mean that aliens with criminal convictions would literally file § 2241 petitions in the court of appeals. Rather, like all other aliens, such aliens would still file petitions for review under INA § 242. But, unlike other cases, the Court's inquiry would be circumscribed and would include review of only those claims that Henderson found were traditionally available in habeas -- i.e., constitutional claims and at least certain non-constitutional claims, such as the type of statutory retroactivity claim raised by Ms. Khan.

This construction of the statute is consistent with the fact that "in the Immigration context, the [Supreme] Court has historically drawn a sharp distinction between `judicial review' -- meaning APA review -- and the court's power to entertain petitions for writs of habeas corpus." Sandoval, 166 F.3d at 235. See Law Prof. Amicus Brief; Goncalves, 144 F.3d at 123-25; Bowrin, 1999 WL 957725 at *5; Requena-Rodriguez, 190 F.3d at 305; Pak, 1999 WL 791660 at *4; Shah, 184 F.3d at 723; Jurado-Gutierrez, 1999 WL 637038 at *8; Mayers, 175 F.3d at 1299 n.14; but see LaGuerre, 164 F.3d at 1039.

It is also supported by the long standing canon that jurisdictional statutes must be read narrowly with fidelity to the precise language of the statute, and should never be given a construction beyond that compelled by their language; here nothing compels the Court to read the term "review" to prohibit the limited inquiry mandated by habeas corpus. See generally McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) (narrowly construing jurisdictional statute to avoid constitutional problems.

The second argument in support of construing § 242(a)(2)(C) to permit review of Ms. Khan's statutory and constitutional claims is the one suggested in Henderson. This argument is based on the maxim that "review can be implied when its unavailability would raise serious constitutional questions." Henderson, 157 F.3d at 119 n.9 (citing Webster v. Doe, 486 U.S. 592, 603 (1986)). Here, the preclusion of Ms. Khan's constitutional or statutory claims would not just raise serious questions, it would indisputably render the statute unconstitutional, as Henderson confirms.

Under these circumstances, the Court can and should presume that Congress did not intend to enact a statute that was unconstitutional, particularly in this area of heightened constitutional sensitivity surrounding efforts by Congress to exclude one of the other two Branches from exercising is constitutionally assigned role.

The government has also attempted to rely on the Supreme Court's decision in Webster and the principle of "implied" jurisdiction, arguing that the courts should find a repeal of §

2241, but should exempt only constitutional claims from the bar on review in the courts of appeals. See Jean-Baptiste, 144 F.3d at 219-20 (noting government's argument based on Webster). The government has maintained, however, that under this principle, the courts are not free to exempt non-constitutional claims.

Henderson has now rejected the government's contention that the Constitution would permit a jurisdictional scheme that wholly insulated statutory claims from review. Thus, if the government were correct that the Supreme Court's Webster line of cases would permit the Court to exempt only constitutional claims from the bar on review in the court of appeals, then the statute would have to be invalidated insofar as it precluded review of certain non-constitutional claims, such as the statutory retroactivity claim raised in Henderson and this case.

In any event, the government misreads the Supreme Court's case law in this area. As Henderson notes, the overriding principle is that courts can imply a right to review "when its unavailability would raise serious constitutional issues," and not that courts may exempt only constitutional claims. 157 F.3d at 119 n.9 (citing Webster). Here, the unavailability of review over either constitutional or statutory claims would render the statute unconstitutional, and thus a fortiori raise "serious constitutional issues."

The fact that the Supreme Court in Webster exempted only constitutional claims was not based on a principle that only constitutional claims can be exempted from a jurisdictional bar, but rather, that no serious constitutional issue was raised in that case by precluding review over non-constitutional claims.

Henderson did not suggest that review of statutory claims will always be constitutionally required. The specific constitutional right to review in Henderson and Ms. Khan's case is based on the fact that the government is taking coercive enforcement action against an individual's liberty that directly implicates the "core conception of habeas corpus" protected by the Constitution, and in particular, the Suspension Clause. Henderson, 157 F.3d 120. At issue in Webster was an employment decision, and there was no contention that an individual challenging his termination had a constitutional right to raise non-constitutional claims. 486 U.S. at 598.

Thus, in order to satisfy the principle that courts should not construe jurisdictional statutes in a way that would raise "serious constitutional issues," it was necessary in Webster only to exempt constitutional claims from the jurisdictional bar governing the employment decisions in that case. Nothing in Webster, however, forecloses the courts from exempting non-constitutional claims as well as constitutional claims when doing so is necessary to avoid constitutional problems. See, e.g., McNary v. Haitian Refugee Center, 498 U.S. 479.

Applying the "Webster principle" to exempt statutory claims is particularly justified in this case given that the plain terms of the bar in § 242(a)(2)(C) does not compel the conclusion that habeas corpus has been repealed, but only that "review" has been eliminated.

In short, the Court should reaffirm the analysis it adopted in Jean-Baptiste and Hincapie-Nieto (and overwhelmingly followed by the other circuits) and hold that § 2241 habeas review is available to review Ms. Khan's statutory and constitutional claims. If, however, the Court holds that § 2241 has been repealed, then nothing in the language of the statute compels the Court to adopt a construction of § 242(a)(2)(C) that would preclude the courts of appeals from entertaining petitions for review under the circumscribed scope of review traditionally available in habeas corpus.

As the Seventh Circuit noted, "It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." LaGuerre, 164 F.3d at 1041 (finding no habeas review under AEDPA, but suggesting that the bar on jurisdiction in the court of appeals should be construed to permit review of constitutional errors and certain statutory claims, such as a retroactivity claim).

(2) The permanent IIRIRA rules are unconstitutional if they preclude all review in any court over Ms. Khan's constitutional or statutory claims.

If the permanent IIRIRA rules preclude review of Ms. Khan's constitutional or statutory claims by means of both a § 2241 habeas action and by means of a petition for review, then the permanent rules are unconstitutional under Henderson and the long line of Supreme Court and lower court authority on which this Court based that decision. Henderson, 157 F.3d at 112-16 (citing cases). See also Law Professor Amicus Brief (collecting cases and agreeing with Henderson's constitutional conclusion); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (habeas action reversing denial of discretionary waiver of deportation based on violation of regulation); Gegiow v. Uhl, 239 U.S. 3 (1915) (rejecting agency's reading of exclusion provision).

Henderson made clear that an alien does not have a constitutional right to obtain review of all claims they might raise, but held that review is "constitutionally mandated" where the alien raises constitutional claims and where the alien raises certain non-constitutional claims -- such as statutory retroactivity claim alleging that the BIA or Attorney General misinterpreted the temporal reach of a new provision restricting eligibility for a waiver of deportation. See Henderson, 157 F.3d at 128 (finding review constitutionally required over petitioners's statutory claim "that Congress did not intend [the new bar on relief from deportation in] § 440(d) to apply retroactively").

Ms. Khan's case falls squarely within the constitutional analysis in Henderson. Like the aliens in Henderson, the Board refused to allow Ms. Khan to apply for a waiver of deportation under INA § 212(c) on the ground that she was statutorily ineligible for such relief in light of new amendments restricting relief for aliens with certain criminal convictions. She now raises the identical types of claims raised in Henderson -- a constitutional Fifth Amendment challenge and a statutory retroactivity claim contending that the new bar on relief does not apply retroactively.

Accordingly, if review of Ms. Khan's constitutional and statutory claims is not available under either § 2241 or by means of a petition for review, the permanent rules must be held unconstitutional, and § 242(a)(2)(C) must be invalidated as applied to Ms. Khan. That would enable this Court to review her statutory and constitutional claims by means of a petition for review in this court under the general provision granting review over petitions for review, INA § 242(a), since § 242(a)(2)(C) is the only provision preventing such review.

Because Henderson is squarely on point, Ms. Khan will not provide a detailed analysis of the constitutional right to review. The analysis is comprehensively set forth in Henderson, and is also set forth fully in the Law Professors Amicus Brief.

Briefly, Henderson recognized that the constitutional right to review of deportation orders was established during a roughly 60-year period governed by the Immigration Acts of 1891 and 1917. The Supreme Court has noted that these statutes were "intended to make these administrative [immigration] decisions nonreviewable to the fullest extent possible under the Constitution." Heikkila v. Barber, 345 U.S. 229, 234 (1953) (emphasis added). Thus, these statutes permitted the courts to exercise only that review over deportation orders that was "required by the Constitution," Id. at 234 -- precisely what the government contends Congress did in 1996 when it enacted AEDPA and IIRIRA. Yet, during this period the Supreme Court and lower courts consistently adjudicated habeas petitions where resident aliens challenged their deportation orders, thus making clear that review of deportation orders was constitutionally mandated; otherwise such review could not have occurred because the courts could only exercise jurisdiction if "review was required by the Constitution." Heikkila, 345 U.S. at 234-235.

Henderson further explained that the constitutionally-required scope of review was also established during this period governed by the 1891 and 1917 Immigration Acts. During this period, the courts routinely reviewed constitutional claims and claims of statutory construction raising issues of pure law. Henderson, 157 F.3d at 112-16, 119-22. As Henderson noted, this review established the constitutional minimum scope of review, since it occurred during a period when the courts were permitted to intervene only if review of the alien's claims was constitutionally mandated. Henderson, 157 F.3d at 112-16; 119-22.

Henderson thus concluded that "whatever the outer perimeters" of review may be in deportation cases, review of statutory claims challenging the Board's refusal to adjudicate the alien's waiver application must be reviewable. Henderson, 157 F.3d at 112. Ms. Khan is therefore constitutionally entitled to review of all her claims in some court by some means.

II. MS. KAHN REMAINS ELIGIBLE FOR § 212(C) RELIEF

Section 212(c) of the INA permits a lawful permanent resident to demonstrate that, because of humanitarian factors, the government should not remove him or her from the country. The government argues that recent amendments to the INA have eliminated Ms. Kahn's eligibility for § 212(c) relief. The government, however, is incorrect: none of the recent restrictions on § 212(c) relief apply retroactively to conduct that pre-dated their enactment, and, therefore, Ms. Kahn remains eligible for § 212(c) relief.

Retroactive legislation is disfavored by the law. "[T]here is a `presumption against retroactive legislation [that] is deeply rooted in our jurisprudence.' Accordingly, [courts] apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary." Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 946 (1997) (quoting Landgraf v. U.S.I. Film Products, 511 U.S. 244, 265 (1994)). In determining whether a particular provision is retroactive, courts apply a two-part test. First, courts must ask whether "Congress has expressly prescribed the statute's proper reach." Martin v. Hadix, 119 S. Ct. 1998, 2003 (1999). If Congress's intent is not clear, courts must then inquire into whether applying the statute to the conduct at issue would result in a "retroactive effect"; if the statute would have a retroactive effect, the statute is presumed not to apply retroactively absent a clear statement. Id.[3]

Applying these principles to the present case, it is clear that Ms. Kahn remains eligible for § 212(c) relief. First, Congress did not intend the amendments that altered the availability of § 212(c) relief to be applied retroactively to lawful permanent residents, like Ms. Kahn, whose conduct pre-dated the enactment of the amendments. Second, even if Congress's intent were unclear, applying these provisions to past conduct would have an impermissible "retroactive effect," thereby violating the presumption against retroactivity.

A. Congress Did Not Intend For the Restrictions on § 212(c) Relief to Apply Retroactively to Conduct Pre-Dating Their Enactment.

In determining the temporal reach of a statute, courts first look to the intent of Congress. In determining whether a statutory provision should be applied prospectively, a clear statement in not required; rather, "normal rules of construction" apply. Lindh v. Murphy, 521 U.S. 320, 326 (1997). In order to apply a provision retroactively, however, a clear statement is required from Congress, in keeping with the presumption against

[3]The presumption against retroactivity is especially appropriate where, as here, it protects an unpopular group or individual. Landgraf, 511 U.S. at 266 ("[Congress's] responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."); Pottinger v. Reno, 51 F. Supp. 2d 349, 361 (E.D.N.Y. 1999) (the presumption against retroactivity "reflects our enduring commitment to the protection of the unpopular and the voiceless from the retributive and vindictive use of retroactive legislation").

retroactivity. Hadix, 119 S. Ct. at 2004 (requiring "unambiguous directive" or "express command" for statute to be applied retroactively).

1. Traditional tools of statutory interpretation demonstrate that the restrictions on § 212(c) relief do not apply retroactively to conduct pre-dating their enactment.

In this case, normal rules of construction demonstrate that the recent restrictions on § 212(c) relief -- IIRIRA § 304(b) and AEDPA § 440(d)[4] -- do not apply to conduct pre-dating their enactment.

As the Supreme Court has held, when some provisions of a statute contain expressly retroactive language -- and others do not -- there is a "negative implication" that Congress did not intend the silent provisions to be applied retroactively, Lindh, 521 U.S. at 327-30, 336; see also Henderson, 157 F.3d at 129-30. Such a conclusion is appropriate even if prospective application results in statutory "loose end[s]." Lindh, 521 U.S. at 336 ("No answer leaps out at us [as to why Congress included a particular provision.] All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting.").

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[4]IIRIRA § 304(b) states: "REPEAL OF SECTION 212(c).--Section 212(c) (8 U.S.C.1182(c)) is repealed."

AEDPA § 440(d) also restricted § 212(c) relief. AEDPA § 440(d) amended § 212(c) to remove eligibility for any person who:

> is deportable by reason of having committed an offense covered in section 241(a)(2)(A)(iii)(A), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(I).

It is clear that Congress did not intend IIRIRA § 304(b) or AEDPA § 440(d) to apply retroactively to conduct pre-dating their enactment. When enacting IIRIRA, Congress expressly provided that certain provisions were to be applied retroactively. See, e.g., IIRIRA §§ 306(c)(1), 321(c), 322, 324(c), 347(c), 351. All of these provisions contain express language that the particular provision should be applied retroactively.[5] Congress's clear

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[5]IIRIRA § 306(c)(1), relating to judicial review, states that "subsection (g) of section 242 of the Immigration and Nationality Act . . . shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act."

IIRIRA § 321(c), which amended the definition of the term "aggravated felony" as set forth in INA § 101(a)(43), expressly provides for the retroactive application of the new definition. "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." IIRIRA § 321(c) (emphasis added).

IIRIRA § 322 amended INA § 101(a) to include definitions for the terms "conviction" and "term of imprisonment." IIRIRA § 322(c) provides that such definitions "shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act." IIRIRA § 322 (emphasis added).

IIRIRA § 324(c), which contains the effective date of INA § 276, makes clear that provision applies to departures that "occurred before, on, or after the date of enactment" of IIRIRA. IIRIRA § 324(c) (emphasis added).

IIRIRA § 347 provides that "any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable." IIRIRA § 347(c), the effective date provision, states that this amendment "shall apply to voting occurring before, on, or after the date of the enactment of this Act." IIRIRA § 347(c)(emphasis added).

IIRIRA § 351, entitled "Clarification of Date as of which Relationship Required for Waiver from Exclusion or Deportation for Smuggling." IIRIRA § 351(a) amends INA § 212(d)(11) and IIRIRA § 351(b) amends INA § 241(a)(1)(E)(iii) in the same way. Both provisions clarify that an individual is only eligible for a waiver from exclusion or deportation for alien smuggling if at the time of the smuggling a marital or parental relationship existed between the individual and the alien whose entry was encouraged, induced, assisted, abetted, or aided. IIRIRA §

intent in these provisions demonstrates that when Congress wishes to provide for retroactive application, it knows how to do so and does so expressly. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213-14 (1988); Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1970); Valderrama-Fonseca v. INS, 116 F.3d 853, 856 (9th Cir. 1997) (reaffirming that "it is apparent that Congress knew how to make provisions of IIRIRA applicable to pending proceedings when it wanted to, and not having done so in [the relevant section], we hesitate to read retroactivity into the [provision]."). Indeed, Congress's specific attention to retroactivity in IIRIRA is unsurprising, in light of the fact that, when Congress enacted IIRIRA, the Supreme Court had recently reaffirmed that Congress must act explicitly when it chooses to make legislation retroactive. See Lindh, 512 U.S. at 328.

By contrast, the absence of such explicit language in § 304(b) leads to the "negative implication" that Congress did not intend § 304(b) to apply retroactively. Lindh, 521 U.S. at 327-30, 336; see also Henderson, 157 F.3d at 129-30. It was precisely this negative implication -- i.e., retroactive language in other statutory provisions but not in the provision at issue -- that led the Supreme Court to conclude in Lindh that particular

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351(c) explicitly provides that such amendments (IIRIRA § 351(a) & (b)) "shall apply to applications for waivers filed before, on, or after the date of the enactment of this Act, but shall not apply to such an application for which a final determination has been made as of the date of the enactment of this Act." IIRIRA § 351(c) (emphasis added).

provisions of AEDPA did not apply retroactively. Lindh, 521 U.S. at 327-30, 336. Similarly, in Henderson, this Court found a similar negative implication in interpreting § 440(d) of AEDPA -- because other provisions contained explicit retroactive language, and § 440(d) did not, this Court concluded that Congress did not intend § 440(d) to apply retroactively. Henderson, 157 F.3d at 129 ("Many of [the provisions of AEDPA], with the notable exception of . . . § 440(d), contain explicit subsections stating that they apply retroactively"; this difference, "strongly indicates that Congress did not intend § 440(d) to apply retroactively." (internal quotation omitted)); see also, e.g., Goncalves, 144 F.3d at 128-31. Thus, "normal rules of construction" demonstrate that IIRIRA § 304(b) should not be applied retroactively to conduct pre-dating its enactment.[6]

Similarly, the language and structure of AEDPA demonstrate

[6]Section 309(a) of IIRIRA, which simply sets out the effective date of IIRIRA, does not, of course, answer the question whether § 304(b) is retroactive. As the Court stated in Landgraf, "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." Landgraf, 511 U.S. at 257. Similarly, § 309(c) simply sets out transitional rules for individuals in exclusion or deportation proceedings before April 1, 1997. See also H.R. Conf. Rep. No. 104-828, at 222 (section 309(c) "provides for the transition to new procedures in the case of an alien already in exclusion or deportation proceedings on the effective date"). In any event, to the extent that § 309 establishes the effective date for the new set of procedures for proceedings initiated on or after April 1, 1997, see, e.g., IIRIRA § 304(a)(3) (removal proceedings initiated by a "Notice to Appear" rather than an "Order to Show Cause"); H.R. Conf. Rep. No. 104-828, at 222, these changes are merely procedural, and do not implicate retroactivity concerns under Landgraf. 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.").

that AEDPA § 440(d) does not apply to conduct pre-dating its enactment. As this Circuit has held, "when § 440(d) is read in conjunction with the rest of the AEDPA and with the legislative history of that statute, there is abundant evidence that the section was not intended to apply retroactively." Henderson, 157 F.3d at 129. While Henderson only addressed the question whether § 440(d) should be applied retroactively to cases pending when AEDPA was enacted, id. at 128 n.28, its "analytic approach supports the . . . conclusion that Congress did not design section § 440(d) to apply to cases in which deportation was triggered by pre-enactment conduct." Pottinger, 51 F. Supp. 2d at 359; see also Maria v. McElroy, 1999 U.S. Dist. LEXIS 13502, at *68-*69 (E.D.N.Y. Aug. 27, 1999).

Like IIRIRA, AEDPA contains numerous provisions that expressly apply retroactively. See, e.g., AEDPA §§ 401(f), 421(b), 413(g), 435(b), 440(f), 441(b). The explicit retroactivity of all of these sections - and the notable absence of such clear retroactive language in § 440(d) - indicates that Congress did not intend § 440(d) to apply retroactively. Henderson, 157 F.3d at 129-30 (citing Lindh, 117 S. Ct. at 2063). Thus, as this Circuit concluded, "traditional rules of statutory interpretation all point in one direction: § 440(d) should not apply retroactively." Id.; see also Pottinger, 51 F. Supp. 2d at 359-61; Maria, 1999 U.S. Dist. 13502, at *61-*69.[7] Thus, the

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[7]Other courts have concluded that the temporal scope of § 440(d) is ambiguous. See Requena-Rodriguez, 190 F.3d at 307-08 (concluding, after considering petitioner's "belated and

language and the structure of the statutes demonstrate that neither § 304(b) nor § 440(d) should be applied retroactively.

Even if the language and structure of the statutes were simply silent as to the temporal reach of these provisions, they should not be applied retroactively. As this Court has stated: "under ordinary rules of statutory construction, a statute that is silent with respect to retroactivity is not `ambiguous.' In the absence of clear evidence that Congress intended some other result, such a statute does not apply retroactively." Henderson, 157 F.3d at 130; see also Lindh, 521 U.S. at 336 (limiting statute to prospective application despite statutory "loose end").

Finally, two additional "normal rules of construction" require that these provisions should be applied only prospectively: the rule of lenity and the principle of constitutional avoidance. Under the rule of lenity, courts are instructed to construe "any lingering ambiguities in deportation statutes in favor of the alien." I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). The rule of lenity complements the

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undeveloped" argument on retroactivity, that "we hesitate to find a clear congressional intent with respect to AEDPA § 440(d)"); DeSousa v. Reno, 190 F.3d 175, 185-88 (3d Cir. 1999) ("DeSousa's mention of the retroactivity argument in his appellate brief substantially is limited to two short sentences"; concluding, on the basis of this limited briefing, that the temporal scope of § 440(d) is unclear); Jurado-Gutierrez, 1999 U.S. App. LEXIS 19706, at *40 (finding Congress's intent on the temporal scope of § 440(d) ambiguous); Turkhan, 1999 U.S. App. LEXIS 18886, at *29 (7th Cir. Aug. 16, 1999) (stating that "AEDPA § 440(d) is silent" as to its temporal reach); LaGuerre, 164 F.3d at 1040-41 (stating, in dicta, that Congressional intent on temporal reach of § 440(d) is unclear).

Landgraf rule by assuring that Congress has given due consideration to the extreme consequence of deportation even where retroactive application of a law is not the issue in question. Where retroactivity is at issue, the rule of lenity, like the Landgraf rule, assures that a new immigration law will be applied to past conduct only when Congress clearly intended that it do so. See Mojica v. Reno, 970 F. Supp. 130, 180 (E.D.N.Y. 1997) (citing Kessler v. Strecker, 307 U.S. 22 (1939)).

Similarly, it is fundamental that courts should construe statutes so as to avoid serious constitutional questions. E.g., Jones v. United States, 119 S. Ct. 1215, 1228 (1999) ("Any doubt on the issue of statutory construction is . . . to be resolved in favor of avoiding [constitutional] questions."); Landgraf, 511 U.S. at 268 n.21 ("In some cases, . . . the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application."); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988) (constitutional avoidance "has for so long been applied by this Court that it is beyond debate"). As explained in Part III, infra, applying § 304(b) and § 440(d) retroactively would violate both Equal Protection and Due Process; this Court should therefore construe the provisions to avoid these constitutional infirmities. See Landgraf, 511 U.S. at 268 n.21.

2. In any event, Congress did not explicitly provide that the restrictions on § 212(c) relief should be applied retroactively to pre-enactment conduct.

In any event, even if traditional rules of statutory construction did not settle the question, it is clear that Congress did not _explicitly_ provide that § 304(b) and § 440(d) be applied retroactively.

In order for a provision of a statute to be applied retroactively, Congress must have provided an "`unambiguous directive' or `express command' that the statute is to be applied retroactively." _Hadix_, 119 S. Ct. at 2004 (quoting _Landgraf_, 511 U.S. at 263, 280); _see also_ _Landgraf_, 511 U.S. at 272-73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay . . . ."). "[C]ases where this Court has found truly `retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation." _Lindh_, 521 U.S. at 328 n.4 (collecting cases); _see also_ _Shwab v. Doyle_, 258 U.S. 529, 537 (1922) ("[A] statute should not be given a retrospective operation, unless its words make that imperative.").

Indeed, when noting the type of language required to make a provision unambiguously retroactive, the Court has analogized to the "clear statement" required to override a state's Eleventh Amendment sovereign immunity. _See_ _Lindh_, 521 U.S. at 328 n.4 (citing _Seminole Tribe of Fla. v. Florida_, 517 U.S. 44 (1996), _United States v. Williams_, 521 U.S. 527, 531-32, and _United States v. Nordic Village, Inc._, 503 U.S. 30, 34-37 (1992)); _see also_ _Landgraf_, 511 U.S. at 288 n.2 (Scalia, J., concurring in the judgment) (analogizing to the "clear statement" required to override Eleventh Amendment immunity).

Clearly, no such "clear statement" is present here. Section 304(b) of IIRIRA states quite simply: "Section 212(c) (8 U.S.C. 1182(c)) is repealed." Nothing in § 304(b) -- nor in any other provision of IIRIRA -- explicitly states that § 304(b) should be applied retroactively. If anything, the use of the phrase "is repealed" in § 304(b) suggests a prospective application. Similarly, § 440(d) does not contain an explicit statement of retroactivity. Indeed, when this Court considered whether § 440(d) applied retroactively to cases pending when AEDPA was enacted, the Court stated that "there is abundant direct evidence that [§ 440(d)] was not intended to apply retroactively." Henderson, 157 F.3d at 129. While Henderson does not necessarily answer the retroactivity question presented in the present case, id. at 128 n.28, it did hold that § 440(d) does not provide a "clear statement" of retroactivity, id. at 129.

Thus, even assuming that Congress's prospective intent was not clear, the statutes certainly do not contain a "clear statement" that § 304(b) or § 440(d) should be applied retroactively. See Hadix, 119 S. Ct. at 2004; Lindh, 521 U.S. at 328 n.4; Shwab, 258 U.S. at 537.

B. Applying the Restrictions on § 212(c) Relief to Ms. Khan's Case Would Have An Impermissible Retroactive Effect.

If this Court does not find that Congress intended to apply the provisions prospectively, it must then proceed to the second step of retroactivity analysis: whether applying the statute to the conduct at issue would have a "retroactive effect." If the statute would indeed have such a retroactive effect, then the statute is presumed not to apply retroactively absent a clear statement to the contrary. Hadix, 119 S. Ct. at 2003.

The Supreme Court has used different formulations in describing whether a statute has an impermissible "retroactive effect." An impermissible retroactive effect may result when a statute "increase[s] a party's liability for past conduct," Landgraf, 511 U.S. at 280; "sweep[s] away settled expectations suddenly and without individualized consideration," id. at 266; "changes the legal consequences of acts completed before [the new law's] effective date," id. at 269 n.23; or "gives a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed," id. While these different formulations provide guidance, none is talismanic. See Hughes Aircraft, 520 U.S. at 947. Rather, the question of whether a statute operates retroactively requires a "common sense, functional judgment about `whether the new provision attaches new legal consequences to events completed before its enactment.'" Hadix, 119 S. Ct. at 2006 (quoting Landgraf, 511 U.S. at 269-70).

Applying the recent restrictions on § 212(c) relief to Ms. Kahn's case would have an impermissible retroactive effect. Discretionary relief such as § 212(c) relief has been available in some form since at least 1917. Francis v. INS, 532 F.2d 268, 270 (2d Cir. 1976). Indeed, in recent history, over half of all applications for § 212(c) relief were granted by the INS. Goncalves, 144 F.3d at 128; Mojica, 970 F. Supp. at 178. In this light, eliminating § 212(c) relief because of past conduct certainly "`attaches new legal consequences to events completed before [the statutes'] enactment.'" Hadix, 119 S. Ct. at 2006 (quoting Landgraf, 511 U.S. at 269-70); see Landgraf, 511 U.S. at 266, 269 n.23, 270, 278, 280 (statute is impermissibly retroactive if it "increase[s] a party's liability for past conduct," "sweep[s] away settled expectations suddenly and without individualized consideration," "changes the legal consequences of acts completed before [the new law's] effective date," or "gives a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); see also Goncalves, 144 F.3d at 128 (although § 212(c) relief is discretionary, it "is plainly substantive, and so implicates Landgraf's presumption against retroactivity"); Pottinger, 51 F. Supp. 2d at 361 ("In the instant case, involving a radical change in the law eliminating a major opportunity to avoid deportation from the country of the petitioner's family and upbringing to one with which he has virtually no connection, `sound instincts' cry out against retroactivity."); Maria, 1999 U.S. Dist. LEXIS 13502, at *74-*75.

Indeed, although this Court has not squarely decided the precise question at issue here, the Circuit has indicated that the retroactive elimination of § 212(c) relief would be impermissibly retroactive. Henderson, 157 F.3d at 129

("Application of [the] presumption [against retroactivity] would require us . . . to consider whether the statute before us is genuinely retroactive. We are inclined to believe that it is.");[8] see also Mayers, 175 F.3d at 1303; Goncalves, 144 F.3d at 128.; Pottinger, 51 F. Supp. 2d at 361; Maria, 1999 U.S. Dist. LEXIS 13502, at *74-*75. But see Requena-Rodriguez, 190 F.3d at 307-08 (concluding, after considering petitioner's "belated and undeveloped" argument on retroactivity, that applying § 440(d) to convictions pre-dating its enactment does not have retroactive effect); DeSousa v. Reno, 190 F.3d at 185, 187 ("DeSousa's mention of the retroactivity argument in his appellate brief substantially is limited to two short sentences"; concluding, on the basis of this limited briefing and Third Circuit precedent, that applying § 440(d) to pre-enactment convictions does not have a retroactive effect); Jurado-Gutierrez, 1999 U.S. App. LEXIS 19706, at *40 (same); Turkhan, 1999 U.S. App. LEXIS 18886, at *26-*36 (holding, contrary to Henderson, that § 440(d) applies to cases pending when AEDPA was enacted, and that there is no impermissible retroactive effect); LaGuerre, 164 F.3d at 1039-41

[8]Buitrago-Cuesta v. INS, 7 F.3d 291, 294-95 (2d Cir. 1993), does not, of course, speak to this question. In that case, this Court upheld the retroactive application of a prior statutory provision restricting § 212(c) relief because the Court found that Congress clearly intended for the restriction to apply retroactively, id. ("plain language of the statute indicates a congressional intent that [the provision] apply retroactively"); it did not, therefore, need to decide whether the restriction would have an impermissible retroactive effect. In any event, Buitrago-Cuesta was decided before the Supreme Court provided additional guidance in Landgraf, Lindh, Hughes Aircraft, and Hadix on the question of retroactivity. See also Henderson, 157 F.3d at 129.

(dicta).

The Supreme Court has in recent years considered whether a statute has an impermissible retroactive effect on three separate occasions. In all three cases, the Court has held that the statute had an impermissible retroactive effect. Hadix, 119 S. Ct. at 2006-07; Hughes Aircraft, 520 U.S. at 947-52; Landgraf, 511 U.S. at 280-86.[9]

Hughes Aircraft is particularly illustrative. At issue in that case was the qui tam provision of the False Claims Act, 31 U.S.C. § 3730(b) (which, at the time, authorized qui tam actions by private individuals "against any person who knowingly presented false or fraudulent claims to the United States"). Under pre-1986 law, a party could defend against such a qui tam action on the grounds that the false information that formed the basis for the suit was already in the government's possession; a 1986 amendment, however, removed this defense. The question before the Court was whether the amendment eliminating the defense should apply to conduct pre-dating the amendment's enactment. 520 U.S. at 941.

The Court held -- in an unanimous opinion -- that applying the amendment to conduct pre-dating its enactment would have an impermissible retroactive effect. The Court came to this conclusion notwithstanding the fact that applying the amendment

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[9]Lindh did not need to consider whether the statute would have an impermissible retroactive effect in light of its conclusion that Congress intended the provisions to only apply prospectively. 521 U.S. at 326-37.

retroactively would not create liability that had not previously existed -- for, under the False Claims Act, even if a private suit were barred, the defendant would still be subject to a suit by the government. Id. at 948. Nor would applying the amendment retroactively have increased the theoretical extent of the liability, as "the monetary liability faced by [the] defendant is the same whether the action is brought by the Government or by a qui tam relator." Id.[10] Rather, the Court used a functional approach and concluded that the amendment "changes the substance of the existing cause of action . . . by `attaching a new disability, in respect to transactions or considerations already past.'" Id. at 948 (quoting Landgraf, 511 U.S. at 269).

The retroactive effect in this case is even clearer than that in Hughes Aircraft. As noted, the defendant in Hughes Aircraft would have faced the exact same liability under retroactive application of the new law as it previously faced in suits by the government; retroactive application would only have taken away a defense in cases brought by qui tam litigators when the government chose not to bring suit. In contrast, retroactive application of § 304(b) and § 440(d) necessarily strips away statutory eligibility for § 212(c) relief for a whole class of aliens. As a functional matter, then, the retroactive effect of applying these amendments to Ms. Kahn's case is much more drastic than the one that the Supreme Court held to be impermissible in

[10]The Court further noted that the fact that the underlying conduct was illegal was of no moment. Hughes Aircraft, 520 U.S. at 947; see also Landgraf, 511 U.S. at 280-82 & n.35.

Hughes Aircraft. See also Pottinger, 51 F. Supp. 2d at 361 ("In the instant case, involving a radical change in the law eliminating a major opportunity to avoid deportation from the country of the petitioner's family and upbringing to one with which he has virtually no connection, `sound instincts' cry out against retroactivity.").

The Supreme Court's Ex Post Facto jurisprudence also provides useful analogies in this case, in light of the fact that the Court has often looked to this body of law in assessing whether a statute is impermissibly retroactive. See, e.g., Hughes Aircraft, 520 U.S. at 948 (citing Collins v. Youngblood, 497 U.S. 37 (1990), and Beazell v. Ohio, 269 U.S. 167 (1925)); Landgraf, 511 U.S. at 266-67; id. at 269 n.23 (citing Miller v. Florida, 482 U.S. 423 (1987)); id. at 281 (citing De Veau v. Braisted, 363 U.S. 144, 160 (1960)).[11] For example, the Supreme Court has held that a statute that converts a maximum sentence into a mandatory sentence violates the Ex Post Facto Clause, Lindsey v. Washington, 301 U.S. 397 (1937); in the same way, converting the possibility of deportation into a certainty constitutes an impermissible retroactive effect, Pottinger, 51 F. Supp. 2d at 362; Mojica, 970 F. Supp. at 174. The Court has also held that the elimination of the mere eligibility for parole,

[11]The Ex Post Facto Clause itself does not, of course, apply to the present case. Nonetheless, the Supreme Court has repeatedly looked to Ex Post Facto jurisprudence in determining whether a particular statute has an impermissible retroactive effect. See, e.g., Hughes Aircraft, 520 U.S. at 948; Landgraf, 511 U.S. at 266-67, 269 n.23, 281.

thereby increasing the practical consequences of a prison term, violates the Ex Post Facto Clause, Warden, Lewisberg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974); similarly, eliminating the possibility of a humanitarian waiver - and thereby increasing the practical consequences of the underlying conduct - is impermissibly retroactive, Pottinger, 51 F. Supp. 2d at 362; Mojica, 970 F. Supp. at 174.[12]

Thus -- even assuming that it is unclear that Congress intended the amendments to apply only prospectively -- applying the recent restrictions on § 212(c) relief to conduct that pre-enactment conduct would have an impermissible retroactive effect, thereby violating the presumption against retroactivity. See Henderson, 157 F.3d at 129.

III. APPLYING THE RESTRICTIONS ON § 212(C) RELIEF TO MS. KAHN'S CASE WOULD BE UNCONSTITUTIONAL

Applying the recent restrictions on § 212(c) to Ms. Kahn's case would violate the Constitution. First, conditioning the

[12]The relevant date for Ex Post Facto analysis is the date on which an offense is committed: the Ex Post Facto Clause prohibits increased penalties based on past offenses, regardless of the date of conviction. See, e.g., Miller v. Florida, 482 U.S. 423, 435-36 (1987). Similarly, the relevant date for retroactivity analysis is the date of the underlying conduct. See Hughes Aircraft, 520 U.S. at 945 (deciding whether the amendment applies retroactively "to pre-1986 conduct" and determining that it does not); Landgraf, 511 U.S. at 282 n.35 ("Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past."); Mojica, 970 F. Supp. at 175 ("Retroactivity depends on when the crime is committed, and not on any later date.").

availability of § 212(c) relief on an arbitrary event - namely, the date that the INS happens to initiate proceedings - would violate both Due Process and Equal Protection. Under the government's approach, two aliens who are identical in all respects - with the same humanitarian factors, and the same crimes committed on the same date -- would be treated differently based on the happenstance of when the INS initiated proceedings. This is an irrational distinction that violates both Due Process and Equal Protection. See, e.g., Francis, 532 F.2d at 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").[13]

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[13]Yet the government's distinction is even more irrational. Under the government's approach, it is not simply that the availability of § 212(c) relief would turn on when the INS initiated proceedings; rather, aliens would be ineligible for § 212(c) precisely because the INS decided that their cases presented compelling humanitarian factors. As Judge Weinstein has stated:

> Retroactivity generally targets those whom the INS had once decided not to . . . place in deportation proceedings. It denies them the relief that was available to their fellow inmates who had deportation proceedings against them commenced in a timely manner. . . . By choosing not to pursue deportation for [these] legal residents . . ., the INS demonstrated a belief that such individuals need not be deported. The irony is that those whom the INS deemed strong candidates for deportation had the opportunity to seek section 212(c) relief from deportation, and . . . had a good chance of prevailing [because over half of such applications were granted]. In contrast, persons deemed excellent candidates for section 212(c) relief because of strong family ties, value to their communities, and manifest rehabilitation are now told that they are to be automatically deported without any opportunity of section 212(c) individual merit-based review.

Mojica, 970 F. Supp. at 171. This is an arbitrary and irrational distinction that would violate both Due Process and Equal Protection. See, e.g., Francis, 532 F.2d at 273.

Second, applying these provisions retroactively would violate substantive Due Process. The constitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation." Bowen v. Georgetown University Hospital, 488 U.S. 204, 223 (Scalia, J., concurring). Like any legislation, legislation with retroactive characteristics must meet the basic due process requirement of being "supported by a legitimate legislative purpose furthered by rational means." Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). Legislation that operates retroactively, however, must further be supported by an independent rationale for the ways in which the statute operates retroactively. Id. at 730. A purpose that supports a law's prospective characteristics is not sufficient, in itself, to support the application of the law retroactively. Id.

Congress did not, however, provide any justification for retroactively applying these amendments to conduct pre-dating their enactment. See Mojica, 970 F. Supp. at 170-71 ("In the instant situation courts are left to guess at what purpose could be served by applying section 440(d) retroactively. . . . [N]ot only has Congress failed to articulate any rational purpose, but after a year of the government's attempts at retroactive application, it still can identify no rational purpose for the retroactive application of section 440(d)."). As such, applying these provisions retroactively to Ms. Kahn's case would violate substantive Due Process. See Pension Benefit Guaranty Corp, 467

U.S. at 470; see also Eastern Enterprises v. Apfel, 118 S. Ct. 2131, 2158 (Kennedy, J., concurring) (noting that Congress has given "serious consideration" to due process challenge to retroactive application of new rules); United States v. Carlton, 512 U.S. 26, 37-38 (1994) (O'Connor, J., concurring in the judgment) (noting that substantive due process protects an individual's interest in "finality and repose"; upholding tax statute at issue because of the "limited period of retroactivity" at issue in the case).

CONCLUSION

Ms. Kahn's statutory and constitutional claims are reviewable in a district court habeas action, or alternatively in a petition for review in this Court if habeas jurisdiction is unavailable. On the merits, Ms. Kahn is statutorily eligible to apply for a § 212(c) waiver. Accordingly, this Court should reverse the BIA and remand to the Board to allow Ms. Kahn to apply for § 212(c) relief.

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CERTIFICATE OF SERVICE

I, CHRISTOPHER J. MEADE, do hereby certify that I served two copies of the attached **BRIEF FOR PETITIONER** on this 5th day of November, 1999 by first-class mail to the following:

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