No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARIO LOPEZ-PACHECO,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court held that a defendant may not be convicted of illegal reentry after a prior order of removal under 8 U.S.C. § 1326 if the defendant can show the prior removal order was invalid. Circuit law, however, remains unclear on an important related question: does it violate congressional intent, and is it impermissible, for federal courts to conduct a first-impression discretionary analysis of a defendant's equities to determine whether a defendant was prejudiced by an invalid removal order?

PRAYER

Petitioner Mario Lopez-Pacheco respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is reproduced in Appendix A to this petition.

JURISDICTION

The court of appeals entered judgment on May 7, 2018. *See* Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix B contains the following pertinent constitutional and statutory provisions: U.S. Const. amend. V; 8 U.S.C. § 1326; and 8 U.S.C. § 1252(a)(2)(B).

INTRODUCTION

This Court should grant certiorari to resolve an important federal question that affects one of the largest and fastest-growing segments of federal prosecutions—immigration-related offenses. Thirty years ago in *United States v. Mendoza-Lopez*, 481 U.S. 828, 842 (1987), this Court held that a noncitizen who was not advised of potential relief from deportation could not later be convicted of illegal reentry based on that deportation. The Court reached this holding even though no

federal court had ever examined the defendant's equities at the time of his deportation to determine the likelihood that such relief would have been granted.

Yet today, federal courts routinely parse a noncitizen's family ties, length of residence, criminal record, age, and employment history to issue a first-impression discretionary decision on whether the due process violation relating to relief caused the noncitizen prejudice. This inquiry is improper, as shown by Congress's decision to strip federal courts of jurisdiction to make such discretionary findings. Moreover, the inquiry is hopelessly uninformed because of the lack of access that federal courts and defendants have to the everyday decisions and reasoning of immigration judges.

As such, the Court should grant certiorari to bring the circuit courts in line with the Court's prior rulings and prevent federal courts from violating congressional intent by substituting their own discretion for that of the immigration agency. *See* Sup. Ct. R. 10(c). Doing so would uphold *Mendoza-Lopez*'s refusal to allow a criminal conviction to rest on a flawed administrative proceeding.

STATEMENT OF THE CASE

Mr. Mario Lopez-Pacheco was charged with being found in the United States illegally after previously being deported, in violation of 8 U.S.C. § 1326. He moved to dismiss the charges against him under 8 U.S.C. § 1326(d) on the grounds that his predicate removal order was invalid. Specifically, Mr. Lopez-Pacheco argued that the immigration judge who ordered him removed failed to meaningfully inform him of his right to apply for voluntary departure and improperly discouraged him from

following through with his application. He further argued that his length of residence in the United States, his education, his work history, and his family ties made it plausible that an immigration judge would grant him voluntary departure in lieu of removal.

The district court denied Mr. Lopez-Pacheco's motion, ruling that there was no due process violation and no prejudice. With respect to prejudice, the district court ruled that it was not plausible that an immigration judge would have granted Mr. Lopez-Pacheco voluntary departure given his criminal history. Mr. Lopez-Pacheco subsequently entered a conditional guilty plea that permitted him to appeal the district court's denial of his motion.

On appeal, Mr. Lopez-Pacheco renewed his arguments that the immigration judge's advisal about voluntary departure was deficient and that the immigration judge improperly coerced him into relinquishing his application for voluntary departure. Mr. Lopez-Pacheco further maintained that relief was plausible given the balance of his positive and negative factors and a comparison with three cases in which similarly situated noncitizens were granted voluntary departure.

In an unpublished decision, the United States Court of Appeals for the Ninth Circuit affirmed Mr. Lopez-Pacheco's conviction. *See* Appendix A. The court held that regardless of any due process violation, Mr. Lopez-Pacheco "cannot show that it is plausible that the IJ would have granted him voluntary departure." *United States v. Lopez-Pacheco*, --- F. App'x ----, 2018 WL 2093312, *1 (9th Cir. May 7, 2018) (unpublished). This was so, according to the court, because "the seriousness

and recency of [Mr.] Lopez-Pacheco's convictions [] outweigh[ed] his positive equities." *Id.*

REASONS FOR GRANTING THE PETITION

I. *Mendoza-Lopez* held that a noncitizen who is not afforded the opportunity to apply for available relief has suffered prejudice.

In *United States v. Mendoza-Lopez*, 481 U.S. 828, 831 n.3 (1987), this Court considered whether defendants may be convicted for illegal reentry after a prior deportation under 8 U.S.C. § 1326 when the underlying removal order was invalid—specifically, because the immigration judge had failed to advise the noncitizens that they were eligible to apply for suspension of deportation, a type of discretionary relief. Prior to this Court deciding the issue, the Eighth Circuit had found that the immigration judge's error violated due process and caused the defendants prejudice because the failure to advise of available relief "materially affected" the outcome of the proceedings. *United States v. Mendoza-Lopez*, 781 F.2d 111, 113 (8th Cir. 1985). In its petition for certiorari, the government asked the Court to assume prejudice if it found that the removal proceeding violated due process. *See Mendoza-Lopez*, 481 U.S. at 839-40. But at oral argument, the Solicitor General refused to concede that the defendants had suffered prejudice. *See id.* at 849 n.* (Rehnquist, C.J., dissenting).

The Court agreed with the Eighth Circuit that the immigration judge's failure to advise the defendants of their eligibility for relief violated due process. *See id.* at 839-40. It then proceeded to consider whether "the violation of

respondents' rights that took place *in this case* amounted to a complete deprivation of judicial review[,]" concluding "[w]e think that it did." *Id.* at 840 (emphasis added). Thus, the Court squarely held that the defendants' deportation proceedings "may not be used to support a criminal conviction" and summarized its decision accordingly:

> Because respondents were deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them, *the deportation proceeding in which these events occurred* may not be used to support a criminal conviction, and *the dismissal of the indictments against them was therefore proper*. The judgment of the Court of Appeals is *Affirmed*.

Id. at 842 (all but final emphasis added).

In other words, *Mendoza-Lopez* held that the defendants suffered prejudice because they were statutorily eligible for discretionary relief but had not been so advised. The Court did not consider the likelihood that such relief would be granted by delving into factual questions of family ties, length of residence, hardship, military service, employment history, property or business tries, evidence of value and service to the community, rehabilitation, or the defendants' good character. Nor did it remand for a lower court to conduct an inquiry into those equities. *See id.* at 840, 842. Instead, the Court flatly held that "the deportation proceeding . . . *may not be used to support a criminal conviction*" and vacated the criminal conviction. *Id.* (emphasis added). Thus, *Mendoza-Lopez* held that the immigration judge's failure to advise the defendants of available relief—without more—caused them prejudice.

Chief Justice Rehnquist's dissent confirms this. Noting the government's refusal to concede fundamental unfairness during oral argument, he found that the Court had reached the question of prejudice. *Id.* at 849 n.* (Rehnquist, C.J., dissenting). In a critical footnote, Chief Justice Rehnquist stated:

> Because the fairness of these proceedings was litigated in the courts below and *is a matter subsumed in the precise question presented* for this Court's review, it *cannot be seriously argued that the issue is not properly before this Court.* Indeed, *the Court itself has chosen to decide the issue*, albeit in a manner different from that suggested here.

Id. (emphasis added). Because Chief Justice Rehnquist disagreed that the immigration judge's failure to advise the defendants of available relief had rendered the proceeding "presumptively prejudicial," he dissented on that basis.[1] *Id.* And because no lower court had ever undertaken an examination of the *Mendoza-Lopez* defendants' equities, their convictions were vacated without any court having determined the likelihood that an immigration judge would have actually granted them relief.

This approach—to presume that failure to advise of statutorily-available relief violates due process *and* prejudices the defendant—makes sense. In the context of other due process violations, it is easy to see how a defendant would not necessarily suffer prejudice. For instance, if a noncitizen is deprived of his right to appeal or right to counsel, but still had no possible way to avoid removal, the absence of administrative error "could not have yielded a different result." *United*

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[1] In another dissent, Justice Scalia disagreed that the Court had reached the issue of prejudice, stating that it was not "subsumed within" the question presented. *Id.* at 847 n.1 (Scalia, J., dissenting).

States v. Proa-Tovar, 975 F.2d 592, 595 (9th Cir. 1992) (en banc). But where a noncitizen was eligible to apply for discretionary relief that could have resulted in an outcome other than a deportation order, the proper course is to find, as the Eighth Circuit did, that the defendant's missed opportunity to apply for such relief was a due process violation that "materially affected" the outcome of the proceedings. *Mendoza-Lopez*, 781 F.2d at 113.

II. The Courts of Appeals have significantly strayed from *Mendoza-Lopez*'s clear rule by creating an equities-based analysis that violates congressional intent.

A. The lower courts' equities-based approach is inappropriate for Article III courts.

As explained above, a deeper examination of *Mendoza-Lopez* reveals that a showing of statutory eligibility for relief is sufficient to establish prejudice. The federal courts of appeals, however, have abandoned this principle by dramatically expanding the prejudice analysis—*i.e.*, by looking to a defendant's equities to determine the likelihood that an immigration judge would actually have granted relief. *See, e.g.,* U*nited States v. Luna,* 436 F.3d 312, 321 (1st Cir. 2006); *United States v. Copeland*, 376 F.3d 61, 73 (2d Cir. 2004); *United States v. Wilson*, 316 F.3d 506, 511 (4th Cir. 2003); *United States v. Calderon-Pena*, 339 F.3d 320, 324 (5th Cir. 2003); *United States v. Perez-Ponce*, 62 F.3d 1120, 1122 (8th Cir. 1995); *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1204 (10th Cir. 2004) (en banc); *United States v. Fellows*, 50 F. App'x 82, 85 (3d Cir. 2002) (unpublished). As these cases illustrate,

to determine prejudice, federal courts attempt to step into the shoes of an immigration judge and weigh a defendant's length of residence, family ties, employment history, criminal background, and other equities.[2]

But this equities-based approach is a completely inappropriate inquiry for Article III courts to undertake because Congress has expressly prohibited federal courts from making discretionary determinations in the context of immigration relief. Prior to 1996, federal courts were permitted to review grants of discretionary relief by the agency. *See Kalaw v. I.N.S.*, 133 F.3d 1147, 1149 (9th Cir. 1997). But in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") added the following jurisdictional provision:

> . . . [N]o court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229(b), 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B). Thus, for the past two-plus decades, Congress has prohibited federal courts from reviewing any discretionary exercise of relief for

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[2] To add to the confusion, there is a split in authority as to the proper standard for determining prejudice. Most circuit courts look to whether there was a "reasonable likelihood" that an immigration judge would have granted relief, while the Ninth Circuit considers whether the defendant had a "plausible ground" for relief. *Compare Aguirre-Tello*, 353 F.3d at 1208 (agreeing with a majority of circuits that "the standard to apply in a case like [defendant's] is whether there is a reasonable likelihood" the defendant would have obtained relief) *with United States v. Arrieta*, 224 F.3d 1076, 1083 (9th Cir. 2000) (finding that it was "plausible" the defendant would have received a discretionary waiver of relief).

cancellation of removal, waivers of inadmissibility, voluntary departure, or adjustment of status.

Yet in the context of a § 1326(d) prejudice analysis, circuit courts undertake *exactly* such an inquiry—weighing family ties, length of residence, employment history, criminal conduct, and other equities—to determine whether the Attorney General would have exercised a favorable grant of discretionary relief. While no jurisdictional bar directly prevents this, IIRAIRA clearly demonstrates Congress's intent that federal courts be restricted to determining the *legal* question of statutory eligibility for discretionary relief. And notably, the Court in *Mendoza-Lopez* declined to undertake such an equities-based approach even *before* IIRAIRA stripped federal courts of jurisdiction to review discretionary decisions. Thus, there is simply no reason circuit courts should be undertaking an inquiry that both Congress and *Mendoza-Lopez* found to be outside the scope of judicial review.

The irony of this inconsistency can be seen in circuit courts' own harsh rebukes of noncitizens who seek judicial review of a discretionary decision in federal court. When noncitizens have sought review of applications for discretionary relief, the circuit courts have frequently rejected this as a "value judgment" that is dependent upon "the person or entity examining the issue." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003) (citation and quotation omitted). *See also Jimenez-Galicia v. U.S. Atty. Gen.*, 690 F.3d 1207, 1210-11 (11th Cir. 2012) ("We have no jurisdiction to consider 'garden-variety abuse of discretion' arguments about how the BIA weighed the facts in the record."); *Argueta v. Holder*, 617 F.3d

109, 112–13 (2d Cir. 2010) ("[C]laims lie beyond our jurisdiction because they are directed to the manner in which the IJ balanced the equities in denying [the petitioner's] application for discretionary relief . . . ."); *Obioha v. Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005) ("It is quite clear that the gatekeeper provision [of § 1252(a)(2)(B)(I)] bars our jurisdiction to review a decision of the BIA to actually deny a petition for cancellation of removal or the other enumerated forms of discretionary relief."). As such, courts have declined to hear cases that "would require us step into the IJ's shoes and reweigh the facts in light of the agency's subjective treatment of purportedly similar cases," *Mendez-Castro v. Mukasey*, 552 F.3d 975, 980 (9th Cir. 2009)—while simultaneously undertaking this exact same inquiry in the § 1326(d) context.

The circuit courts' split personality on this issue thus leads to absurd results. If an immigrant were denied discretionary relief and directly challenged that denial to a circuit court, the petition for review would be immediately dismissed with no inquiry into the equities. But if the same immigrant challenged an immigration judge's failure to advise him of discretionary relief in a § 1326 proceeding, a court would "step into the IJ's shoes" and make a "value judgment" by "reweigh[ing] the facts in light of the agency's subjective treatment of purportedly similar cases." *Mendez-Castro*, 552 F.3d at 980. Regardless of the statutory context, such an exercise is a matter of agency expertise and should be reserved for the Attorney General. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 307 (2001) ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand,

and the favorable exercise of discretion, on the other hand."). In other words, the proper role of federal courts is *not* to issue murky predictions about whether the agency would have favorably exercised discretion; the proper role is to apply an objective test of statutory eligibility.

A rule that relies on the objective test of statutory eligibility for relief is particularly appropriate given *Mendoza-Lopez*'s unease with using the result of an administrative proceeding to establish an element of a crime in the first place. *See* 481 U.S. at 839 n.15. Calling such use "troubling," the Court noted that the "propriety of using an administrative ruling in such a way remains open to question." *Id.* But under the current scheme, not only may a criminal conviction rest on an administrative ruling, the *validity* of that administrative ruling is reviewed for prejudice by judges who neither make nor review immigration decisions on discretionary relief and can at best only speculate as to what the agency would have done. *See* 8 U.S.C. § 1252(a)(2)(B). And importantly, an objective test of statutory eligibility would not mean that a noncitizen could not be deported, or would not be guilty of illegal entry under 8 U.S.C. § 1325—only that he could not be convicted of illegal reentry and its higher statutory maximum under 8 U.S.C. § 1326.

B. The circuit courts' approaches to determining prejudice are fundamentally unworkable.

To demonstrate how unworkable the current approach is, an examination of circuit court methods of employing an equities-based analysis is necessary. One of

the common methods of conducting such an analysis is to look to actual Board of Immigration Appeals decisions and compare the defendant's equities to those of other noncitizens who have applied for the same form of relief. *See United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013) (stating that, in determining whether relief was plausible, "we focus on whether aliens with similar circumstances received relief"). The problem with this method is that the sheer breadth and volume of the agency's discretionary decisions, combined with their arbitrary and erratic nature, renders them nearly useless as a tool to achieve any type of reliable, comparative analysis.

1. Defendants and federal courts have access to fewer than 1% of agency decisions.

A comparison of a defendant's equities to those of other citizens is inherently unworkable because defendants and federal courts lack access to over 99.8% of agency decisions. For instance, during the five years between 2008 and 2013, immigration judges granted a total of 4,453 applications for 212(c) relief. *See EOIR FY 2012 Statistical Year Book* (February 2013) p. R3 at http://www.justice.gov/eoir/statspub/fy12syb.pdf ("Year Book"). But a search of Westlaw reveals that the Board of Immigration Appeals has only released eleven decisions in which the immigrant was granted 212(c) relief during this time. Thus, even though Mr. Lopez-Pacheco must show that relief is "plausible" by comparing his equities to those of others granted voluntary departure, he is unable to compare

himself to hundreds of thousands of respondents who have been granted voluntary departure in the last decade.

The due process implications of this boggle the mind. First, defendants are told that to show prejudice, they must cite to cases they cannot access—a procedure that itself likely violates due process. Second, this limited access means that federal courts also lack a reliable basis for determining whether immigration judges grant relief to noncitizens with equal or fewer equities than the defendant. Third, because the Board of Immigration Appeals decides which of its cases will be released to Westlaw, it has the unfettered ability to release cases that may or may not represent the agency's discretion as a whole. The Ninth Circuit compounds these difficulties by requiring not one case, but at least two cases, on point. *See United States v. Valdez-Novoa*, 780 F.3d 906, 920 (9th Cir. 2014) ("[T]he existence of a single case that is arguably on point means only that it is 'possible' or 'conceivable' that a similarly situated alien would be afforded [relief]."). It is difficult to envision a more dysfunctional and constitutionally-suspect procedure for allegedly protecting a defendant's due process rights.

2. Immigration Judges are wildly inconsistent.

Additionally, the decisions of immigration judges do not provide a consistent barometer for determining whether relief would have been granted in a particular set of circumstances. For example, in comparing the grant rates for asylum—a discretionary form of relief, *see* 8 U.S.C. § 1158(b)(1)(A)—a 2006 study found that while certain immigration judges granted relief only 2% of the time, others granted

relief as much as 90% of the time. Transactional Records Access Clearinghouse, *Immigration Judges: Asylum Seekers and the Role of the Immigration Court*, http://trac.syr.edu/immigration/reports/160/, July 2006. In one of the starker examples cited, Colombians had an 88% chance of winning asylum from one judge in the Miami immigration court and a 5% chance from another judge in the same court. *Id.* Similarly, one immigration judge in New York granted relief to Chinese asylum applicants in 93.1% of cases, while another New York immigration judge granted relief to the same group in only 5.5% of cases. *Id.* And even after statistically controlling for nine of the most influential factors, such as nationality, access to counsel, and experience of the immigration judge, applicants in San Francisco were still twelve times more likely than those in Atlanta to be granted relief. *U.S. ASYLUM SYSTEM: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, U.S. Government Accountability Office, September 25, 2008, http://www.gao.gov/products/GAO-08-940.

These statistics demonstrate the difficulty of relying on a small number of cases to determine the likelihood that relief would have been granted. As the study shows, the outcome of an application for discretionary relief is just as dependent—if not more so—on the identity of the immigration judge than on the merits of the case. If the handful of cases a court examines for purposes of determining prejudice originated from one or more immigration judges on the extreme end of the spectrum, this does not provide a reasoned, consistent, or representative foundation for determining the likelihood that a noncitizen would have been granted relief.

Because it based on this flawed data, there is no guarantee that an Article III court's prediction bears any resemblance to what an immigration judge would have actually done. Most federal judges have never worked as an immigration judge, nor observed immigration proceedings firsthand (and could not rely on this experience even if they did). Federal courts have no way of knowing how liberally or frugally such relief is granted, nor how much weight is commonly assigned to each of the relevant factors.[3] Concluding what an immigration judge would have done based on limited and erratic data is little more than speculation and conjecture, the very shot-in-the-dark approach against which due process is meant to guard.

3. A noncitizen's access to counsel is a better indicator of success than his equities.

Unlike criminal proceedings, indigent noncitizens in civil immigration proceedings have no right to appointed counsel. *See* 8 U.S.C. § 1229a(b)(4)(A) (stating that, while a noncitizen has the right to counsel, it shall be "at no expense to the Government"). Yet the ability to retain an attorney is directly linked to a noncitizen's likelihood of success in removal proceedings. For instance, a report headed by Judge Robert Katzmann of the Second Circuit found that 67% of all immigrants with counsel had successful outcomes in their cases, while only 8% of

[3] In the context of voluntary departure, the BIA has stated that "Immigration Judges can use section 240B(a) relief to quickly and efficiently dispose of numerous cases on their docket, where appropriate. We accept the need for such a tool and support its purpose." *Matter of Arguelles-Campos*, 21 I. & N. Dec. 811, 817 (BIA 1999). This means that what look like close cases to courts of appeals might actually hinge on the size of an immigration court's docket, rather than the equities, a consideration the circuit courts could never attempt to replicate accurately.

those without lawyers prevailed. *In a Study, Judges Express a Bleak View of Lawyers Representing Immigrants, New York Times*, Kirk Semple, December 18, 2011, http://www.nytimes.com/2011/12/19/nyregion/judges-give-low-marks-to-lawyers-in-immigration-cases.html. As a result, representation has frequently been labeled "the single most important factor" affecting the outcome of an immigration case. Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication,* 60 STAN. L. REV. 295. 340 (2007).

Yet in comparing a defendant's equities to those of other cases in which noncitizens applied for the same form of relief, there is no evidence that circuits court take this factor into account. Without it, federal courts cannot accurately judge whether a grant of relief was attributable to a noncitizen's equities or the fact that he was represented by an attorney. Moreover, it is logical to believe that an unrepresented defendant who was properly advised of her eligibility to apply for relief would have attempted to hire an attorney, thereby increasing her chances of success and the likelihood of prejudice. Accordingly, the failure to consider whether a noncitizen was represented by an attorney—"the single most important factor" in predicting the outcome—renders the comparison of cases inherently unreliable.

4. In light of these factors, federal courts are actually making discretionary decisions in the first instance.

As shown above, when a federal court's prejudice determination is based on 1) fewer than 1% of the cases granted relief; 2) wildly inconsistent decisions by immigration judges; and 3) no consideration of whether the noncitizen was

represented by counsel, the resulting decision carries no indicia of reliability as to what the agency would plausibly have done. At this point, the simple truth is that federal courts are not predicting what an immigration judge would have done; they are making their own discretionary decisions in the first instance. That is, federal courts are not determining whether an *immigration judge* would have granted relief, but whether the *federal courts themselves* would have granted relief—a prospect that raises troubling separation-of-powers concerns regarding the judiciary's ability to intrude on the executive's and the legislative's domains regarding the creation and enforcement of immigration law. Consequently, circuit courts' determinations of whether discretionary relief was likely no longer bear any relationship to whether an immigration judge would have granted relief. Accordingly, the Court should undertake the long overdue task of providing guidance on prejudice determinations for purposes of 8 U.S.C. § 1326(d).

III. The issue carries grave consequences for thousands of defendants in light of the executive's increased emphasis on immigration enforcement.

Immigration-related offenses are now the number one federally prosecuted crime in the United States. In 2017, cases involving illegal entry under 8 U.S.C. § 1325 and illegal reentry under § 1326 constituted 37% of all federal prosecutions—roughly the same percentage as all federal drug and violent crime prosecutions *combined*. *See* United States Attorneys' Annual Statistical Report, available at https://www.justice.gov/usao/page/file/1081801/download, Table 3A at 11-12. Moreover, the bulk of this recent increase comes from illegal reentries under

§ 1326, which have skyrocketed by 76.2%, while illegal entries under § 1325 have only nudged up by 8.4%. *See* Transactional Records Access Clearinghouse (TRAC), *available at* http://trac.syr.edu/ immigration/reports/336/. In other words, the fastest growing sector of federal prosecutions is dependent on an inquiry into whether the underlying removal order that forms the basis of the offense was valid. Given this trend, the Court should move quickly to provide guidance on the adjudication of such claims and prevent federal courts from violating congressional intent by substituting their own discretionary decisions for those of the agency.

IV. This case is a good vehicle for the Court to resolve the question presented.

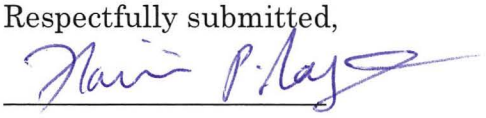
In affirming Mr. Lopez-Pacheco's conviction, the Ninth circuit assumed a due process violation and relied solely on Mr. Lopez-Pacheco's inability to show prejudice. *See Lopez-Pacheco*, 2018 WL 2093312 at *1 ("Even assuming that Lopez-Pacheco's removal proceeding violated due process, the district court properly denied his motion to dismiss because Lopez-Pacheco cannot show that it is plausible that the IJ would have granted him voluntary departure."). Thus, if the Court were to decide the issue in favor of Mr. Lopez-Pacheco, he would unquestionably have suffered prejudice under the standard set out in *Mendoza-Lopez*, 481 U.S. at 842, and his conviction would have to be overturned, unless the Ninth Circuit determined there was no due process violation. This case, therefore, presents an ideal vehicle to address the issue and to set out a clear rule for analyzing prejudice claims under 8 U.S.C. § 1326(d).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

August 6, 2018

Respectfully submitted,



Harini P. Raghupathi

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APPENDIX A

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Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Mario **LOPEZ-PACHECO**, Defendant-Appellant.

No. 16-50500
|
Argued and Submitted April
10, 2018 Pasadena, California
|
Filed May 7, 2018

Synopsis
Background: Following conditional guilty plea, defendant alien was convicted in the United States District Court for the Southern District of California, Dana M. Sabraw, J., No. 3:16-cr-00596-DMS-1, of illegal reentry into the United States after removal. He appealed.

[Holding:] The Court of Appeals held that alien was not entitled to dismissal of illegal reentry charges based on immigration judge's (IJ) failure to advise him about the benefits and availability of voluntary departure.

Affirmed.

West Headnotes (1)

[1] **Aliens, Immigration, and Citizenship**
Prosecutions

Even assuming that alien's removal proceedings violated due process based on immigration judge's (IJ) failure to advise him about the benefits and availability of voluntary departure, alien could not plausibly show that the IJ would have granted him voluntary departure, and thus, alien was not entitled to dismissal of his illegal reentry charges; since alien was removed shortly after being convicted of a misdemeanor violation of a temporary restraining order and a felony domestic violence offense, the IJ probably would have found the seriousness and recency of alien's convictions to outweigh his positive equities. U.S. Const. Amend. 5.

Cases that cite this headnote

Appeal from the United States District Court for the Southern District of California, Dana M. Sabraw, District Judge, Presiding, D.C. No. 3:16-cr-00596-DMS-1

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Harini P. Raghupathi, Esquire, Federal Defenders of San Diego, Inc., San Diego, CA, for Defendant-Appellant

Before: BOGGS,* BYBEE, and WATFORD, Circuit Judges.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

MEMORANDUM**

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

***1** Defendant Mario Lopez-Pacheco was charged with illegal reentry, in violation of 8 U.S.C. § 1326. Lopez-Pacheco moved to dismiss, contending that the 2003 removal order that served as the basis for his illegal-reentry charge was invalid because the immigration judge ("IJ") failed to adequately advise him about the benefits and availability of voluntary departure and because the IJ improperly discouraged him from applying for this

form of relief. The district court denied Lopez-Pacheco's motion, and Lopez-Pacheco entered a conditional plea of guilty. Lopez-Pacheco timely appealed, renewing his challenge to the 2003 removal order. We affirm.

Even assuming that Lopez-Pacheco's removal proceeding violated due process, the district court properly denied his motion to dismiss because Lopez-Pacheco cannot show that it is plausible that the IJ would have granted him voluntary departure. *See United States v. Valdez-Novoa*, 780 F.3d 906, 914 (9th Cir. 2015). Lopez-Pacheco was removed in 2003 shortly after being convicted of a misdemeanor violation of a temporary restraining order and a felony domestic-violence offense. We are persuaded that the IJ would have found the seriousness and recency of Lopez-Pacheco's convictions to outweigh his positive equities. *See id.* at 917–21; *In re Ruiz-Vazquez*, 2016 WL 7032744, at *1 (BIA Oct. 26, 2016); *In re Jasso-Villalba*, 2015 WL 2090742, at *1 (BIA Mar. 16, 2015).

The cases that Lopez-Pacheco cites to argue that it is plausible that he would have received voluntary departure are unavailing. In *In re Jimenez Garcia*, 2011 WL 4446823 (BIA Aug. 26, 2011), the non-citizen's negative equities were less significant that Lopez-Pacheco's. Jimenez Garcia had been convicted of hindering prosecution in the third degree for his role in covering up a murder. *Id.* at *2. But the Board of Immigration Appeals emphasized that Jimenez Garcia reported the murder and testified at trial and that the prosecutor wrote a letter to the IJ explaining that Jimenez Garcia's assistance was critical to the successful prosecution. *Ibid.* There is no comparable mitigating factor here. *In re Mounaddif*, 2008 WL 486935 (BIA Jan. 31, 2008), is distinguishable as well. Mounaddif's sole arrest in the United States was for selling goods without a license, and unlike Lopez-Pacheco, Mounaddif had not been convicted of a violent offense. *Id.* at *2. The final case that Lopez-Pacheco cites, *In re Gonzales-Figeroa*, 2006 WL 729784 (BIA Feb. 10, 2006), does involve similar positive and negative equities. But "the existence of a single case that is arguably on point ... is plainly insufficient to warrant a finding" that Lopez-Pacheco was prejudiced by any error in his removal proceeding. *Valdez-Novoa*, 780 F.3d at 920.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 2093312

End of Document

APPENDIX B

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 115-223. Title 26 current through 115-227.

End of Document

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United

States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 115-22.

End of Document

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part V. Adjustment and Change of Status (Refs & Annos)

8 U.S.C.A. § 1252

§ 1252. Judicial review of orders of removal

Effective: May 11, 2005
Currentness

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) [1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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 chapter.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 5, § 242, 66 Stat. 208; Sept. 3, 1954, c. 1263, § 17, 68 Stat. 1232; Pub.L. 97-116, § 18(h)(1), Dec. 29, 1981, 95 Stat. 1620; Pub.L. 98-473, Title II, § 220(b), Oct. 12, 1984, 98 Stat. 2028; Pub.L. 99-603, Title VII, § 701, Nov. 6, 1986, 100 Stat. 3445; Pub.L. 100-525, § 9(n), Oct. 24, 1988, 102 Stat. 2620; Pub.L. 100-690, Title VII, § 7343(a), Nov. 18, 1988, 102 Stat. 4470; Pub.L. 101-649, Title V, §§ 504(a), 545(e), Title VI, § 603(b)(2), Nov. 29, 1990, 104 Stat. 5049, 5066, 5085; Pub.L. 102-232, Title III, §§ 306(a)(4), (c)(7), 307(m)(2), 309(b)(9), Dec. 12, 1991, 105 Stat. 1751, 1753, 1757, 1759; Pub.L. 103-322, Title II, § 20301(a), Title XIII, § 130001(a), Sept. 13, 1994, 108 Stat. 1823, 2023; Pub.L. 103-416, Title II, §§ 219(h), 224(b), Oct. 25, 1994, 108 Stat. 4317, 4324; Pub.L. 104-132, Title IV, §§ 436(a), (b)(1), 438(a), 440(c), (h), Apr. 24, 1996, 110 Stat. 1275, 1277, 1279; Pub.L. 104-208, Div. C, Title III, §§ 306(a), (d), 308(g)(10)(H), 371(b)(6), Sept. 30, 1996, 110 Stat. 3009-607, 3009-612, 3009-625, 3009-645; Pub.L. 109-13, Div. B, Title I, §§ 101(e), (f), 106(a), May 11, 2005, 119 Stat. 305, 310.)

Footnotes

1 So in original. Section 1253 of this title was amended by Pub.L. 104-208, Div. C, Title III, § 307(a), Sept. 30, 1996, 110 Stat. 3009-612, and as so amended, no longer contains a subsec. (g); provisions similar to those contained in former 8 U.S.C.A. § 1253(g) are now contained in 8 U.S.C.A. § 1253(d).

8 U.S.C.A. § 1252, 8 USCA § 1252

Current through P.L. 115-223. Title 26 current through 115-227.

End of Document