

24-^{No.} 5625

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

SHENG-WEN CHENG,

PETITIONER,

vs.

JARED RARDIN,

RESPONDENT.

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

PETITION FOR CERTIORARI

Sheng-Wen Cheng (Pro Se)
No. 05261-509
Federal Medical Center
PMB 4000
Rochester, MN, 55903

QUESTIONS PRESENTED FOR REVIEW

1. Does Respondent Jared Rardin's ("BOP") policy of barring federal alien prisoners with a final order of removal from being eligible/considered for Residential Reentry Center ("RR~~C~~ Removal Policy"), violates the Equal Protection Clause of the Fourteenth Amendment?
2. Does BOP's RRC Removal Policy violates the Due Process Clause of the Fifth Amendment?
3. Is~~s~~ the Eighth Circuit's present judgement/opinion in conflict with the statute, its precedents, and authoritative opinions of other Circuit Court of Appeals?

LIST OF PARTIES IN COURT BELOW

1. Sheng-Wen Cheng ("Mr. Cheng"), Petitioner.
2. Jared Rardin (Also the Warden of Federal Medical Center Rochester, representing the BOP), Respondent.

LIST OF CASES DIRECTLY RELATED TO THIS CASE

1. Sheng-Wen Cheng v. Jared Rardin
No.23-cv-2852-ECT-DJF
U.S. District Court for the District of Minnesota
Judgement entered on March 25, 2024.
2. Sheng-Wen Cheng v. Jared Rardin
No.23-1796
U.S. Court of Appeals for the Eighth Circuit
Mandate Entered on July 2, 2024.

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OPINIONS AND ORDERS IN CASE

The opinion and judgement of the United States Court of Appeals for the Eighth Circuit is reported as Appendix A.

The opinion and judgement of the United States Court of Appeals for the Eighth Circuit, denying the petition for rehearing and rehearing en banc, is reported as Appendix B.

The opinion and judgement of the United States District Court for the District of Minnesota, based on adopting the Report and Recommendation, is reported as Appendix C.

JURISDICTIONAL STATEMENT

The judgement of the United States Court of Appeals for the Eighth Circuit (reported as Appendix A), was entered on May 20, 2024. On June 3, 2024, Mr. Cheng timely filed a combined Petition for Rehearing and for Rehearing En Banc. The Appeals Court entered an order (reported as Appendix B), denying the combined petition on June 24, 2024.

This petition for certiorari is filed within 90 days of that date, so that this Court has jurisdiction to review the judgement of the Eighth Circuit on petition for certiorari rests by virtue of 28U.S.C.1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall ... be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No state shall make or enforce any law which ... deny to any person within its jurisdiction the equal protection of the laws.

18U.S.C.3621(b) provides as follows:

The Bureau of Prisons shall designate the place of the prisoner's imprisonment ... The Bureau may designate any available penal or correctional facility that meets minimum standard of health and habitability established by the Bureau ... that the Bureau determines to be appropriate and suitable, considering -

- 1) the resources of the facility contemplated;
- 2) the nature and circumstance of the offense;
- 3) the history and characteristics of the prisoner;
- 4) any statement by the court that imposed the sentence
 - A) concerning the purpose for which the sentence to imprisonment was determined to be warranted; or
 - B) recommending a type of penal or correctional facility as appropriate; and
- 5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfer under this subsection, there shall be no favoritism given to prisoners of high social or economic status.

18U.S.C.3624(c)(1) provides as follows:

The Director of the Bureau of Prisons shall, to the extent [redacted] practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

18U.S.C.3624(c)(6) provides as follows:

The Director of the Bureau of Prisons shall issue regulations ..., which shall ensure that placement in a community correctional facility by the Bureau of Prisons is -

- A) conducted in a manner consistent with section 3621(b) of [redacted] this title;
- B) determined on an individual basis; and
- C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

STATEMENT OF THE CASE

On August 18, 2020, Mr. Cheng was arrested on federal charges at his apartment building in Manhattan, New York. Subsequently, on August 11, 2021, then Judge Alison J. Nathan sentenced Mr. Cheng to a term of 72 months imprisonment, with an judicial order of removal.

In 2007, Second Chance Act ("SCA") became law. The act aims to improve the criminal justice system by reducing the size of federal prison population, and assisting prisoners to reintergrate into the society through Residential Reentry Center ("RRC") or home confinement. As relevant here, SCA provides that the Director of BOP (Federal Bureau of Prisons) shall "[e]nsure that a prisoner serving a term of imprisonment spends a portion of the final months, under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." 18U.S.C.3624(c)(1). Also, the Director of BOP "[s]hall ensure that placement in an RRC by the BOP ... is determined on an individual basis", 18U.S.C..3624(c)(6)(B), consistent with the individual factors mandated in 18U.S.C.3621(b).

Nevertheless, on June 23, 2023, the BOP implemented the RRC Removal Policy, which automatically bars federal alien prisoners with a final order of removal like Mr. Cheng from being considered/eligible for RRC, without evaluating the prisoner's individual factors and personal situation as required by the SCA (R.Doc.1).

Therefore, on September 15, 2023, Mr. Cheng filed a 28U.S.C.2241 Habeas Corpus Petition at the U.S. District Court of Minnesota to challenge

the BOP's RRC Removal Policy. However, on January 2, 2024, the District Court issued a Report and Recommendation ("R&R"), recommending dismissing Mr. Cheng's petition because his challenge was premature, the BOP's decision to determine RRC placement is not subject to judicial review, and a habeas petition is not the appropriate vehicle to challenge the RRC Removal Policy, without addressing any constitutional and statute interpretation questions raised by Mr. Cheng (R.Doc.19).

Mr. Cheng subsequently filed his objection to the R&R with two exhibits (R.Docs.30-31), and the government filed a very short response to the objections (R.Doc.32). Nevertheless, the District Court overruled Mr. Cheng's objections, adopted the R&R in full without addressing Mr. Cheng's constitutional and statute interpretation questions, and dismissed Mr. Cheng's 2241 petition without prejudice (R.Doc.34); also as Appendix A. Mr. Cheng then timely filed a notice of appeal on April 11, 2024 (R. Doc. 37).

Nevertheless, on May 20, 2024, the panel of the Eighth Circuit Court of Appeals simply affirmed the District Court's dismissal of Mr. Cheng's Habeas petition by examining the record history from the District Court only, see Appendix B; causing its judgement to be in conflict with its precedent and the authoritative opinions of other Circuit courts. As a result, on June 3, 2024, Mr. Cheng filed a combined petition for rehearing and for rehearing en banc, but was subsequently denied on June 24, 2024 without any reasons provided. Mr. Cheng then filed a motion to stay the mandate, but was also denied without any reasons provided, see Appendix D.

Accordingly, this petition for certiorari follows.

EXISTENCE OF JURISDICITON BELOW

The United States District Court for the District of Minnesota had jurisdiction under 28U.S.C.2241.

The United States District Court's final judgement was duly appealed to the United States Court of Appeals for the Eighth Circuit, which had jurisdiction over the appeal under 28U.S.C.1291.

ARGUMENT FOR ALLOWANCE OF WRIT

This Court should review and reverse the decisions made by lower courts in this case, because both the District Court and the Eighth Circuit failed to address whether the BOP's RRC Removal Policy violates the Due Process and Equal Protection rights, both misinterpreted the provisions under the SCA that governs RRC placement, and both made decisions in contrary to the precedents and opinions of other Circuit courts.

This Court has never reviewed the question presented in this petition in regards to an RRC placement for a federal alien prisoners with a final order of removal. Therefore, the Eighth Circuit's decision, if not reversed, will defeat the Congress' intention of reforming criminal justice system when it passed the SCA, and in fact increases the recidivism risk of federal alien prisoners with a final order of removal, to the detriment of the society as a whole.

I. BOP'S RRC REMOVAL POLICY VIOLATES EQUAL PROTECTION.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person ... the equal protection of the laws." U.S. Const. Amend. 14, §1. Aliens, even illegal aliens, have long been recognized as persons guaranteed equal protection through the due process clause of the Fifth Amendment. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-369, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

This Court has long held that the federal government cannot discriminate on the basis of alienage. Because "aliens as a class are a prime example of a discrete and insular minority", and "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971). Thus, a law or policy that "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class" is reviewed under the strict scrutiny standard. *Mass. Bd. of Ret v. Murgie*, 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976).

At present case, federal aliens prisoners who have a final order of removal such as Mr. Cheng, is a suspect or quasi-suspect class that warrant a strict scrutiny standard, because this classification by the BOP singles out a particular group for disparate treatment, and the disparate treatment is presumptively unconstitutional absent a showing that the classification was "necessary" to fulfill a constitutionally

"permissible" and "substantial" purpose. *In re Griffiths*, 413 U.S. 717, 721-22, 729, 93 S. Ct. 2851, 37 L. Ed. 2d 970 (1973). Indeed, the fact that the challenged RRC Removal Policy here "is not an absolute bar [against] all aliens" does not mean that it does not discriminate against the class." *Nyquist v. Mauclet*, 432 U.S. 1, 9, 53 L. Ed. 2d 63, 97 S. Ct. 2120 (1977).

Thus, a strict scrutiny standard should be applied here for Mr. Cheng's equal protection claim.

Under the equal protection analysis, BOP's RRC Removal Policy clearly ignores that equal protection is written broadly as protecting all persons. Here, the RRC Removal policy allows federal alien^s prisoners with an immigration detainer but without a final order of removal to be considered/eligible for RRC. However, this distinction lacks any valid reasoning, as all federal aliens prisoners, with or without a final order of removal, pose the same flight risk, were sentenced under the same sentencing guideline, and do not get deported from the United States until the completion of the criminal sentence. Indeed, federal alien prisoners who currently do not have a final order of removal, most likely will receive one once being moved into the immigration cusotdy, and subsequently be deported from the United States. See 8U.S.C.1227 (a)(2). As a result, there is no rational basis¹ at all for the BOP to bar only federal alien prisoners with a final order of removal such as Mr. Cheng from being considered/eligible for RRC.

Most importantly, even federal alien prisoners who receive treaty-transfer -which mean that they will be physically removed from the

1. This Court can still use the rational basis analysis for Mr. Cheng's equal protection claim, if it were to reject using the strict scrutiny standard.

United States while they are still in the middle of their criminal sentence- are eligible for RRC (R.Doc.3). In another words, federal aliens prisoners who receive treaty-transfer, face the same fate of deportation/removal as federal alien prisoners who have ~~a~~ final order of removal, and yet they are eligible for RRC. Therefore, BOP's RRC Removal Policy obviously has no legitimate justification and violates equal protection.

Finally, BOP's RRC Removal Policy is a discriminatory policy with an irrebuttable presumption that federal alien prisoners with a final order of removal will 100% escape once he or she is placed in an RRC. This type of intentional discriminatory classification has been found by this Court to violate equal protection. ² See Washington v. Davis, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 66 S. Ct. 2040 (1976).

Accordingly, BOP's RRC Removal Policy violates Mr. Cheng's Equal Protection Right and should be invalidated.

II. BOP'S RRC REMOVAL POLICY VIOLATES DUE PROCESS.

The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving people of their life, liberty, and property without the required due process of law. See Dasenberry v. United States, 534 U.S. 161, 167, 122 S. Ct. 694, 151 L. Ed. 2d 597

2. This Court has also held other statutes or polices that employs irrebuttable presumption in regards to classification violates equal protection. See, e.g., Schlesinger v. Wisconsin, 270 U.S. 230, 46 S. Ct. 260, 70 L. Ed. 557 (1926); Carrington v. Rash, 380 U.S. 81, 85 S.Ct. 775, 13 L. Ed. 2d 675 (1965); Royster Guano Co v. Virginia, 258 U.S. 412, 40 S. Ct. 560, 64 L. Ed. 989 (1920); Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971); Sugarman v. Dougall, 413 U.S. 634, 37 L. Ed. 2d 853 93 S. Ct. 2842 (1973).

(2002). A liberty interest protected by the Fifth Amendment may arise from two sources: the Constitution or a federal statute. See, e.g., *Swarthout v. Cooke*, 562 U.S. 216, 131 S. Ct. 859, 862, 178 L. Ed. 2d 732 (2011); *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

At present case, all federal prisoners -including federal alien prisoners with a final order of removal such as Mr. Cheng here- have a liberty interest to be considered for RRC under SCA related statutes 18U.S.C.3621(b) and 3624(c).

In 18U.S.C.3621(b), the statute uses the word "shall", and thus it obliges the BOP to designate the place of the prisoner's imprisonment. In making this mandatory initial placement, the statute further specifies that the BOP "may designate any available penal or correctional facility ... that the Bureau determines to be appropriate and suitable, considering [enumerated statutory factors]." 18U.S.C.3621(b). Congress' use of language "may designate" in this provision seemingly empowers the BOP with broad discretion. Also, the fact that the statute differentiates the use of "may" and "shall" in adjacent sentences indicates the Congress' mindfulness of the significance of those terms. See *Lopez v. Davis*, 531 U.S. 230, 148 L. Ed. 2d 635, 121 S. Ct. 744 (2001).

However, if Congress had rested there, the BOP would have been left with unguided discretion in which correctional facilities are appropriate and suitable for every prisoner. See *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967,

162 L. Ed. 2d 820, 125 S. Ct. 2688, 2700 (2005) (Stating the presumption that when Congress left ambiguity in a statute meant it described the agency to possess whether degree of discretion the ambiguity allows). Nevertheless, Congress was not silent on the criteria for placing a prisoner in an appropriate and suitable facility. Instead, the text states that the BOP must do so considering and being regard for a list of factors. See 18U.S.C.3621(b).

From following the plain grammatical construction of the statute -the order of the sentence and the commas placed before 'considering'- that the BOP's discretion to designate a power to a penal or correctional facility, and its determination of which facility is appropriate and suitable for that prisoner, shows that it must be informed by the list of five factors. See 18U.S.C.3621(b). This construction is further reinforced by Congress' instruction with respect to transfer: "The Bureau may at any time, being regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another." 18U.S.C. 3621(b). To read the statute otherwise, by reading 'may designate' to render the five factors non-mandatory, would allow the discretion granted by the word 'may' to eclipse the mandatory Congressional parameters for the exercise of that discretion, and render them purely hortatory.

Most importantly, Congress used the word "and" rather than "or" to unify the five factors. 18U.S.C.3621(b). Thus, all of the listed factors must be considered. Furthermore, after enumerating the five factors, the statute places only one additional restriction on the BOP: "[t]here shall be no favoritism given to prisoners of high social or economic status"

18U.S.C.3621(b). Therefore, the statute clearly mandates the BOP to [redacted] consider the five factors whenever it designate the pace of every [redacted] prisoner's imprisonment, and federal alien prisoners with a final order of removal like Mr. Cheng should not be treated differently.

Similarly, the statute uses the word "shall" to require the BOP to "ensure that a prisoner serving a term of imprisonment spends a portion of the final months, under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community", and "that placement in an RRC ... is determined on an individual basis." 18U.S.C.3624(c)(1) and (c)(6)(B). Therefore, because RRC is a type of 'place of imprisonment' governed by 18U.S.C.3621(b), the consideration for RRC is also governed by the individual five factors in 18U.S.C.3621(b).

Nevertheless, the BOP employs its RRC Removal Policy -a categorical exclusion derives from an irrebuttable presumption that all federal alien prisoners with a final order of removal like Mr. Cheng, will escape once being placed at an RRC- to deprive Mr. Cheng's liberty interest of being considered/eligible for RRC without the required due process of law.

Indeed, this Court has held that using a categorical exclusion that deploys/derives an irrebuttable presumption, violates due process right.³ See, e.g., Triner v. Dep't of Employment Security, 423 U.S. 44 (1975);

3. If a classification would be invalid under the equal protection clause, it is also inconsistent with the due process requirement of the Fifth Amendment. See, e.g., Johnson v. Robinson, 415 U.S. 361, 364, n.4, 94 S. Ct. 1160, 1164, 39 L. Ed. 2d 389, 396 (1975); Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

Cleveland Bd. of Educ v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972), just as the BOP's RRC Removal Policy here.

Accordingly, BOP's RRC Removal Policy violates Mr. Cheng's Due Process Right and should be invalidated.

III. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE STATUTE, ITS PRECEDENT, AND OTHER CIRCUITS' OPINIONS.

As explained above in II, *supra*, the statute uses the mandatory word 'shall' in 18 U.S.C. 3624(c)(1) and (c)(6)(B). Therefore, numerous courts have held that the BOP has no discretion to delay or refuse transfer a prisoner to pre-release custody (which includes RRC), because such transfer is mandatory. See, e.g., *Doe v. Federal Bureau of Prisons*, 2024 U.S. Dist. LEXIS 19755, 2024 WL 455309, at *1-4 (S.D.N.Y. Feb 5, 2024) (transfer to pre-release custody was required despite the prisoner's participation in the witness protection program); *Ramirez v. Philips*, 2023 U.S. Dist. LEXIS 258778 (E.D. Cal, Dec 22, 20203) (agreeing with interpretation that transfer to pre-release custody is mandatory); *Komando v. Luna*, 2023 U.S. Dist. LEXIS 11477 (D.N.H. Jan 13, 2023) (transfer to pre-release custody was required despite outstanding detainer), R&R adopted, 2023 U.S. Dist. LEXIS 19054 (Feb 6, 2023); *Sierra v. Jacquez*, 2022 U.S. Dist. LEXIS 234525 (W.D. Wash, Dec 27, 2022) (transfer to pre-release custody required despite outstanding immigration detainer), R&R adopted, 2023 U.S. Dist. LEXIS 6938 (Jan 13, 2023); *Jones v. Engleman*, 2022 U.S. Dist. LEXIS 185635 (C.D. Cal, Sept 7, 2022) (transfer to pre-release custody is mandatory despite pending charges and argument that the prisoner is a flight risk), R&R adopted in relevant

part, 2022 U.S. Dist. LEXIS 185029 (Oct 7, 2022).

Indeed, the present judgement/opinion from the Eighth Circuit Court of Appeals of affirming the BOP's RRC Removal Policy, is in conflict with its precedent and authoritative opinions of other Circuit Courts. See, e.g., Levine v. Apker, 455 F. 3d 71, 87 (2d Cir. 2006); Woodfall v. Fed. Bureau of Prisons, 432 F. 3d 235, 244 (3d Cir. 2005); Elwood v. Jeter, 386 F. 3d 842, 847 (8th Cir. 2004); Fults v. Sanders, 442 F. 3d 1088 (8th Cir. 2006); Rodriguez v. Smith, 541 F. 3d 1180 (9th Cir. 2008); Wedelstedt v. Wiley, 477 F. 3d 1160, 1161-62 (10th Cir. 2007). [REDACTED]

Finally, discriminating federal alien prisoners with a final order of removal will defeat Congress' intention of reforming criminal justice system when it passed the SCA, and in fact increases the recidivism risk of federal alien prisoners with a final order of removal (for feeling discriminated and thus has no respect for the law), to the detriment of the society as a whole.

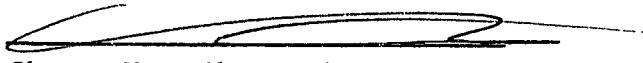
CONCLUSION

WHEREFORE, for the reasons set forth herein, Mr. Cheng respectfully requests that this Court grants this Petition for Certiorari.

Dated: Rochester, Minnesota

September 16, 2024

Respectfully Submitted,


Sheng-Wen Cheng (Pro Se)
No. 05261-509