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~~Nos. 14-6570, 21-6808; 22-~~

Supreme Court, U.S.
FILED
APR - 5 2023
OFFICE OF THE CLERK

In the Supreme Court of the United States

ZENITH E. VIVAS,
DHS-A200-599-097 ,
Petitioner,
-v.-
OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as
Attorney General of the United States,
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
ALEJANDRO MAYORKAS, Secretary of Homeland Security
Respondents.

ON APPLICATION TO CHIEF JUSTICE ROBERTS FOR STAY OF MANDATE OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT PENDING FURTHER PROCEEDINGS IN THIS COURT

"PETITIONER'S APPLICATION TO STAY MANDATE PENDING CERTIORARI"

ZENITH E. VIVAS
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950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Tel. (202) 514-2000

Respondent

Additional Respondent Listed on Inside Cover

PETITION FOR A WRIT OF CERTIORARI No. 21-6808 **FILED:** August 17th, 2021
CERTIORARI DENIED: February 28th, 2022

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SUPREME COURT, U.S.

ALEJANDRO MAYORKAS,
Secretary of Homeland Security,
U.S. Department Homeland Security,
2707 MLK Jr. Ave S.E.
Washington, D.C. 20528
Respondent

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Attorneys for Respondent

Dated: April 5th, 2023

UNITED STATES SUPREME COURT
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT (CIP)

Zenith E. Vivas vs. U.S. Attorney General ~ Appeal Nos.: 14-6570 21-6808;

I hereby certify that the following persons may have an interest in the outcome of this case pursuant to **Rule 18** of this Honorable U.S. Supreme Court, **Rule 26.1** of the Federal Rules of Appellate Procedure and **Rules 26-1** and **28-1** of the United States Court of Appeals for the District of Coulmbia Circuit:

1.- Boynton, Brian M., Attorney for Respondent, Principal Deputy Asst. Att'y General, Civil Division, U.S. Department of Justice, Washington, D.C.;
2.- Hon. Cohen, Mark H., U.S. District Court for the Northern District of Georgia;
3.- Lawrence, Victor M., Attorney for Respondent, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.
4.- Garland, Merrick B., Attorney General of the United States, U.S. Department of Justice, Washington D.C., Respondent;
5.- Hon. Hyles, Stephen, U.S. Magistrate Court for the Middle District of Georgia;
6.- Mayorkas, Alejandro, Secretary of Homeland Security, U.S. Department Homeland Security, Washington, D.C., Respondent;
7.- Park, Song, Attorney for Respondent, Acting Assistant Director, OIL, Civil Division, U.S. Department of Justice, Washington, D.C.;
8.- Prelogar, Elizabeth, Acting Solicitor General of the United States, U.S. Department of Justice, Washington, D.C.;
9.- Hon. Scott, Mark A., Dekalb County Georgia Superior Court Stone Mountain Judicial Circuit;
10.- Vivas, Zenith E., Pro Se Petitioner;
11.- Hon. Wall, Sarah F., Chief Judge, Wheeler County Georgia Superior Court, Oconee Judicial Circuit;
12.- Hon. David J. Smith, U.S. Court of Appeals for the 11th Circuit, Clerk of Court, Atlanta, Georgia.

/s/ ______________________

Zenith E.Vivas - DHS-A200-599-097
Pro Se Petitioner
118 Green House Dr.
Roswell, GA 30076
Tel.: (302)219-4670

District of Columbia: **SS**
Signed and Sworn to (or affirmed) before me on the 5th day of April, 2023

KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2025.

PARTIES TO THE PROCEEDINGS

PETITIONER:

ZENITH E. VIVAS, **DHS-A200-599-097**

RESPONDENTS:

OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as Attorney General of the United States;

UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
ALEJANDRO MAYORKAS,* Secretary of Homeland Security.

RELATED PROCEEDINGS

UNITED STATES SUPREME COURT: ***Vivas v. Garland*****, No. 21-6808,** (January 11th, 2022); ***Martinez v. Georgia*****, No. 14-6570** (October 6th, 2014);

UNITED STATES COURT OF APPEALS (D.C. Cir.): ***Vivas v. Garland et al.*****, No. 22-1060** (April 11th, 2022);

UNITED STATES COURT OF APPEALS (11th Cir.): ***Vivas v. Garland*****, Nos. 20-14767,** (December 22, 2020) **20-14815** (December 22nd, 2020).

UNITED STATES DISTRICT COURT (Middle District of Georgia): ***Vivas v. Warden, Irwin County Detention Center*****, 7:18-CV-161-WLS-MSH** (September 19th, 2018).

UNITED STATES DISTRICT COURT (Northern District of Georgia): ***Martinez v. Dosier*****, No. 1:17-CV-4976-MHC** (December 6th, 2017).

*. Pursuant to **8 U.S. Code §1252(b)(3)(A)**, Petitioner lists the Attorney General as a Respondent. However, as the Department of Homeland Security (**'DHS'**) issued the agency decision for which Petitioner seeks review, Petitioner also has listed the Secretary of Homeland Security. **DHS** is not whithin the exclusion list **APA §2(a)**.

In the
Supreme Court of the United States

Nos. 14-6570; 21-6808; 22- ____

ZENITH E. VIVAS,
DHS-A200-599-097 ,
Petitioner,
-v.-
OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as
Attorney General of the United States,
-and-
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
ALEJANDRO MAYORKAS, Secretary of Homeland Security
Respondents.

♦

ON APPLICATION TO CHIEF JUSTICE ROBERTS FOR STAY OF MANDATE OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT PENDING FURTHER PROCEEDINGS IN THIS COURT

♦

"PETITIONER'S APPLICATION TO STAY MANDATE PENDING CERTIORARI"

♦

In pursuant to this Court's **Rule 23**; also to the *All Writs Act,* **28 U.S. Code §1651**; and **under the provisions of Title 28, Section 2101(f), United States Code, mainly because it is the bona fide intent of the Petitioner to make proper and timely application to the Supreme Court of the United States for a writ of certiorari.** –In addition, taking into considerations facts exposed in the attached *Statement of Issues Presented*– Zenith E. Vivas, (**'VIVAS'**) respectfully applies hereby for a stay of the August 30th, 2022 order issued by the United States Court of Appeals for the District of Columbia Circuit (as amended September 8th), pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

US const art. III § 2

US const. art. III §2
US const. amend. I, V, and XIV

Rules:

U.S. Supreme Court Rule 23
Fed. R. App. P. 41(d)(1); D.C. Cir. Rule 41(a)(2)

Statutes:

Administrative Procedure Act (APA) is codified in **5 U.S.C. §§ 551–559**
5 U.S. Code §552a - Records maintained on individuals
Immigration and Nationality Act (INA) is codified in **8 U.S. Code §§1101 *et seq.***

Cases:

Avila-Santoyo v. U.S. Atty. Gen., 713 F.3d 1357 (11th Cir. 2013).
Begna v. Ashcroft, 392 F. 3d 301 (8th Cir. 2004)
Berg v. Obama, 586 F. 3d 234 (3rd Cir. 2009)
Bell v. Thompson, 545 U.S. 794, 803, 125 S. Ct. 2825, 2831, 162 L. Ed. 2d 693 (2005)
Calderon v. Thompson, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2D 728 (1998)
Carachuri-Rosendo v. Holder, 560 U.S. 563 (5th Cir. 2010)
Chen v. Ashcroft, 378 F.3d 1081, 1088 (9th Cir. 2004)
George E. Warren Corp. v. U.S., 341 F.3d 1348 (Fed. Cir. 2003)
Haoud v. Ashcroft, 350 F.3d 201, 206 (1st Cir. 2003)
Henderson v. INS, 157 F.3d 106, 112-17 (2d Cir. 1998) (Calabresi, J.)
Hilton v. Braunskill, 481 U.S. 770, 776 (1987)
Hollingsworth v. Perry, 558 U.S. 183, 190 (2010)
Kucana v. Mukasey, 533 F. 3d 534 (7th Cir. 2008)
Liang v. INS, 206 F.3d at 322 (3rd Cir, 2000)
Lugo-Resendez v. Lynch, 831 F.3d 337 (5th Cir. 2016);
Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-561 (1992);
Marbury v. Madison, 1 Cranch 137, 177 (1803).
Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2D 272 (2012)
Martinez v. State, 750 S.E.2d 504 (GA Ct. App Decided Nov. 21, 2013)
Mathews v. Eldridge, 424 US 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (4th Cir. 1976)
Niz-Chavez v. Garland, 141 S. Ct. 1474 (6th Cir. 2021)
Nken v. Holder, 556 U.S. 418, 434 (2009)
Pereira v. Sessions, 138 S. Ct. 2105 (1st Cir. 2018)
Richardson v. Reno, 162 F. 3d 1338 (11th Cir. 1998)
Ruiz-Turcios v. U.S. Atty. Gen., 717 F.3d 847 (11th Cir. 2013).
Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004)
Sun Oil Co. v. Burford, C.C.A.5 (Tex.) 1942, 130 F.2d 10 , certiorari granted 63 S.Ct. 265, 317 U.S. 621, 87 L.Ed. 503 , certiorari granted 63 S.Ct. 524, 317 U.S. 623, 87 L.Ed. 505 , reversed on other grounds 63 S.Ct. 1098, 319 U.S. 315, 87 L.Ed. 1424 , rehearing denied 63 S.Ct. 1442, 320 U.S. 214, 87 L.Ed. 1851. Federal Courts 3534; Federal Courts 3792
United States v. Silver, 954 F.3d 455, 458 (2d Cir. 2020).
Webster v. Doe, 486 U.S. 592, 603 (1988)
Weinberger v. Salfi, 422 US 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975)

RELIEF SOUGHT

VIVAS's filing his "*Petition for Writ of Certiorari*" in this matter. A copy of which is attached as Exhibit "H." For such a purpose, he's also applying to Honorable Chief Justice John G. Roberts, Jr. for an order staying enforcement of the "*Formal Mandate*" of the United States Court of Appeals for the District of Columbia Circuit –dated September 8th, 2022, pending final disposition of this case by the United States Supreme Court.

JUDGMENT BELOW

The "Mandate" [*Judgment* below] respectfully requested to be stayed was entered by the Honorable United States Court of Appeals for the District of Columbia Circuit on September 8th, 2022. On October 20th, 2022, the Court denied to recall its "Mandate." A true and correct copy of this judgment is appended as

REQUEST FOR RELIEF FROM LOWER COURT

It's remarkable here that **USCADC** may have *sua sponte* recalled its Mandate:

> *"where a federal court of appeals sua sponte recalls its mandate to revisit the merits of an earlier decision..."* ***Calderon v. Thompson***, 523 U.S. at 558, 118 S. Ct. at 1502.

Notwithstanding, your Justice should know, that whereas the U.S. Supreme Court has already held that "*the courts of appeals are recognized to have an inherent power to recall their mandates.*" ***Calderon v. Thompson***, 523 U.S. 538, 549 (1998); Whereas "*the court of appeals had power to order its mandate recalled ... and a reconsideration of case was necessary to avoid injustice.*" ***Sun Oil Co. v. Burford, C.C.A.5 (Tex.)*** 1942, 130 F.2d 10 , certiorari granted 63 S.Ct. 265, 317 U.S. 621, 87 L.Ed. 503 , certiorari granted 63 S.Ct. 524, 317 U.S. 623, 87 L.Ed. 505 , reversed on other grounds 63 S.Ct. 1098, 319 U.S. 315, 87 L.Ed. 1424 , rehearing denied 63 S.Ct. 1442, 320 U.S. 214, 87 L.Ed. 1851. Federal Courts 3534; Federal Courts 3792; **VIVAS** has reasons to believe, that his September 28th, 2022, motion to the **USCADC** to recall its Mandate, pursuant to **D.C. Cir. Rule 41(a)(2); Fed. R. App. P. 41(d)(1)**, should've been ***favored.***

On the other hand, should this Court grant the present "*Petition for a Writ of Certiorari,*" staying of the Mandate by this Court must last until the final disposition of the case, c.f. ***Martinez v. Ryan***, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2D 272 (2012) –the judgment shall be stayed pending the determination of the petition for certiorari filed in this Court.

INTRODUCTION

This civil action stems from a "*wrongful removal*" –purely adjudicated by **DHS** under **INA §238(b) (8 U.S. Code §1228(b)(2015))**. The action's become so peculiar, mainly because although the same started in Atlanta, GA, however, for erroneous, improper reasons, the **USCA11** declined its jurisdiction as to review Immigration proceedings. Much in contrast, Exhibit "H" may aid to clear up the misunderstanding, and here's where arguments like Thompson's may become of great importance:

> **[Thompson's argument]** Thompson counters by arguing that **Rule 41(d)(2)(D)** is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari. ***Bell v. Thompson***, 545 U.S. 794, 803, 125 S. Ct. 2825, 2831, 162 L. Ed. 2d 693 (2005).

VIVAS main argument will be that the purpose of a stay pending appeal is to protect a meaningful opportunity to appeal where guaranteed. Nonetheless, he does acknowledge there exist different standards for stays, turning on whether review is *guaranteed* or *discretionary.*

Federal courts ostensibly consider the factors enumerated in ***Hilton v. Braunskill***.[1] Nevertheless, provided that his "*Motion to Recall Mandate*" has been *denied*, **VIVAS** will venture for what Supreme Court justices consider factors that largely accord with those that lower federal courts use when determining stays pending appeal requests.

For the Supreme Court to grant a "*Stay Pending Certiorari*," an applicant must show:[2]

> **(1)** "*A reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari*";
> **(2)** "*a fair prospect that a majority of the Court will vote to reverse the judgment below*";
> **(3)** "*a likelihood that irreparable harm will result from the denial of a stay*"; and
> **(4)** "*in close cases it may be appropriate to 'balance the equities'– to explore the relative harms to applicant and respondent, as well as the interests of the public at large.*"

---

1. See ***Hilton v. Braunskill***, 481 U.S. 770, 776 (1987); see also ***Nken v. Holder***, 556 U.S. 418, 434 (2009) (applying four Hilton factors)

> **(1)** Whether the movant has demonstrated a likelihood of success on the merits;
> **(2)** whether the movant is likely to suffer irreparable harm if the court denies a stay;
> **(3)** whether the balance of the hardships to the parties counsels in favor of issuing a stay; and
> **(4)** where the public interest lies.

Federal courts often use language such as "whether issuance of the stay will substantially injure the other parties interested in the proceeding" when describing the third factor. See ***Nken***, 556 U.S. at 426; see also ***Chafin v. Chafin***, 133 S. Ct. 1017, 1027 (2013); ***June Med. Servs., LLC v. Gee***, 814 F.3d 319, 323 (5th Cir. 2016), vacated on other grounds, 136 S. Ct. 1354 (2016); ***Campaign for S. Equal. v. Bryant***, 773 F.3d 55, 57 (5th Cir. 2014); ***In re World Trade Ctr. Disaster Site Litig.***, 503 F.3d 167, 170 (2d Cir. 2007); ***Republic of Phil. v. Westinghouse Elec. Corp.***, 949 F.2d 653, 658 (3d Cir. 1991); ***Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.***, 559 F.2d 841, 843 (D.C. Cir. 1977); ***Garcia-Mir v. Meese***, 781 F.2d 1450, 1453 (11th Cir. 1986).

2. Factors enumerated in ***Hollingsworth v. Perry***, 558 U.S. 183, 190 (2010) (citing ***Lucas v. Townsend***, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers)); ***Rostker v. Goldberg***, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); see ***Hollingsworth***, 558 U.S. at 199 (Breyer, J., dissenting) (suggesting a correction to the Court's description of the fourth consideration for in-chambers stay determinations by saying "(4) the balance of the equities (including, the Court should say, possible harm to the public interest) favors issuance"); See also *Stephen M. Shapiro,et al.*, **SUPREME COURT PRACTICE** 898–99 (10th ed. 2013).

ARGUMENTS

[Opening remarks] At the outset, the "*Petition for a Writ of Certiorari*" (Exhibit "H") prays for review under the "*abuse of discretion*" standard, because previously on the **USCA11** had withheld its Mandate. The Clerk accepts no further submissions in this closed case. Moreover, as provided in **Federal Rule of Appellate Procedure 41(d)**, the **USCADC** may have *sua sponte* stayed its Mandate pending certiorari proceedings in the U.S. Supreme Court. That's **not** the case here, either!

Let's please recall that although on September 8th, the **USCADC** did issue its Mandate, on October 20th, recalling was ***denied***. Let's recall as well, that if a Stay of Mandate is **not** obtained, the issuance of the same may make the D.C. Circuit's judgment **FINAL**. As a result, even though a timely-filed "*Petition for a Writ of Certiorari*," the same will be eventually ***denied***.

[Opening remarks>Factual background][3] (In chronological order)

• In March 2018, **VIVAS** was surprised by an early release from State prison. He did sign a reprieve and within few days was transferred from State unto **ICE** custody.
• On March 19th, 2018, he received *in-Person* the "*Final Administrative Removal Order*," **(FARO)** under section **238(b)** of the Immigration and Nationality Act, **(FORM I-851A)** which had been erroneously, improperly issued since February 8th, 2012.[4]
• On September 19th, 2018, (180 days afterwards) he filed "*Application for Habeas Relief*," **7:18-CV-161-WLS-MSH** under **28 U.S. Code §2241** -Mainly seeking for Judicial intervention.
• On October 16th, 2018, he received a "*Notice to Removed Aliens who may be seeking Judicial Review*."

Rule 41(d)(1) requires the Application to "*show that the petition would present a substantial question*:"[5]

(1) "*A reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari*."

a) [Constitutional challenges] The case at bar presents a combination of "*Due Process*" shortcomings and matters brought into question by "*Article III*" as well as "*Suspension Clause*" issues. Now, despite their strengths, each of these constitutional theories are subject to serious counter-arguments, such as:

It is **NOT** obvious at all that "*Due Process*" requires a federal judicial forum, or indeed any judicial forum at all... "*Public rights*" doctrine arises against "*Article III*" and the "*Suspension Clause*."

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3. See more details in Exhibit "H" ~Statement of Issues Presented.
4. While case no. **A13A1445** was still ongoing in the Court of Appeals of Georgia.
5. Substantial question "[T]*he standard for presenting a 'substantial question' is high. Silver's proposed petition presents no 'substantial question*[s]*' that raise a 'reasonable probability' that four justices will vote to grant certiorari, nor is there a 'fair prospect' that five justices will vote to reverse the Panel's judgment*." ***United States v. Silver***, 954 F.3d 455, 458 (2d Cir. 2020).

Nonetheless, in certain cases, the Government sua sponte has chosen to concede the availability of *judicial review* for some claims outright, in order to avoid the constitutional issues that would otherwise arise.

◇ ***Kolster v. INS***, 101 F. 3d 785, 790 (1st Cir. 1996)
◇ ***Calcano-Martinez v. INS***, 232 F. 3d 328 (2nd Cir. 2000)
◇ ***Liang v. INS***, 206 F.3d at 322 (3rd Cir, 2000) (*noting the Government's concession, in order to avoid constitutional problems, that some forms of review would be available on a Petition for Review*)
◇ ***Williams v. INS***, 114 F. 3d 82 (5th Cir. 1997)
◇ ***Mansour v. Immigration and Naturalization Service***, 123 F. 3d 423 (6th Cir. 1997)
◇ ***Chow v. INS***, 113 F. 3d 659 (7th Cir. 1997)
◇ ***Benziane v. US***, 960 F. Supp. 238 - Dist. Court, D. Colorado, 1997
◇ ***US v. Arce-Hernandez***, 163 F. 3d 559 (9th Cir. 1998)
◇ ***Jurado-Gutierrez v. Greene***, 190 F.3d 1135, 1144 n.4 (10th Cir. 1999)
◇ ***Richardson v. Reno***, 162 F. 3d 1338 (11th Cir. 1998)

Please kindly note, your Justice, the list of circuit courts' decisions (above) has been truncated; though, the same contains each item a different circuit.

On September 19th, 2018, **VIVAS** filed "*Application for Habeas Relief*," **7:18-CV-161-WLS-MSH** under **28 U.S. Code §2241** -Mainly seeking for Judicial intervention.

On October 16th, 2018, he did give up the Habeas action when he received a "*Notice to Removed Aliens who may be seeking Judicial Review*." It seems as though the legal department made available *judicial review* for his claims

Moreover, in ***Sandoval v. Reno***, 166 F.3d 225 (3d Cir. 1999) for example, the Third Circuit held that the AEDPA's mandate that certain deportation orders are "*not subject to review by any court*" did not bar review via the writ of habeas corpus. Id. at 235 (construing **AEDPA §440(a)** and **IIRIA §309(c)(4)(G)**). In so holding, the court noted that it was avoiding "*serious constitutional problems*" under the Suspension Clause which would arise if the habeas and immigration statutes were read to preclude habeas review as well as review under the Administrative Procedure Act.[6]

Actually, in many cases, the Government has chosen to concede the availability of judicial review for some claims outright, in order to avoid the constitutional issues that would otherwise arise.[7]

---

6. Id. at237; see also ***Flores-Miramontes v. INS***, No. 98-70924, 2000 U.S. App. LEXIS 9165, at *27-28 (9th Cir. May 9, 2000) (construing **IIRIRA**'s permanent rules to permit habeas review in order to avoid Suspension Clause problems); ***Liang v. INS***, 206 F.3d 308, 321 (3d Cir. 2000) (same); ***Pak v. Reno***, 196 F.3d 666 (6th Cir. 1999) (construing the **IIRIRA** not to repeal habeas jurisdiction in order to avoid both Suspension Clause and **Article III** problems); ***Goncalves v. Reno***, 144 F.3d 110, 122-23 (1st Cir. 1998) (same); ***Henderson v. INS***, 157 F.3d 106, 118-22 (2d Cir. 1998) (construing the scope of habeas review permitted under **IIRIRA** to conform to the constitutional minimum).

7. See, e.g., ***Kolster v. INS***, 101 F.3d 785, 790 (1st Cir. 1996) (noting that the **INS** has conceded the availability of habeas corpus review in order to avoid raising a constitutional question regarding jurisdiction to review final deportation orders); see also **Liang**, 206 F.3d at 322 (noting the Government's concession, in order to avoid constitutional problems, that some forms of review would be available on a petition for review); ***Jurado-Gutierrez v. Greene***, 190 F.3d 1135, 1144 n.4 (10th Cir. 1999).

The potential counters to the "Due Process," "*Article III*," and "*Suspension Clause*," theories discussed above suggest that the Government's concessions, as well as the Court's creative constructions of the relevant statutes may have been ***unwarranted*** for the case at bar.

Have the courts reached the merits of such *constitutional* challenges?

One thing about the Law is, that the same is always changing and adapting itself to new challenges:

In April of 1996, Congress enacted the **AEDPA**, which included two provisions relevant to the judicial review of immigration decisions. Prior to the enactment of the **AEDPA, INA §106(a)(10)** provided that "*any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.*" **8 U.S. Code §1105a(a)(10) (1996). Section 401(e)** of the **AEDPA**, entitled "*Elimination of Custody Review by Habeas Corpus*," explicitly repealed prior **INA §106(a)(10)**. See **AEDPA §401(e)**, 110 Stat. at 1268.

This question which stems from provisions purporting to restrict judicial review of removal orders in immigration cases actually should be from among the most serious questions on the merits.

Let's recall, prior to 1996, the *Immigration and Nationality Act* **(INA)** had provided with direct judicial review in the federal courts of appeals, while also preserving the right to habeas corpus review in federal district court; but **Section 401(e)** of the **AEDPA**[8] eliminated the habeas review provision. **Section 440(a)** provided:

> **"[a]*ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense* [within an enumerated category] *shall not be subject to review by any court.*"**

b) [There's Law to Apply] From now on, let's slight the latter one and focus upon "*Due Process*" shortcomings as well as matters brought into question by "**Article III.**"

In fact, the reviewable administrative action here took place on February 8th, 2012, when the **DSO** established conviction of an aggravated felony finding "... *you have a final conviction*...;" and proceeded on to sign the **FARO** under **INA §238(b).**

There had been some evidences as to support the **FARO.** But, the conviction had also been on direct appeal; See ***Martinez v. State***, 750 S.E.2d 504 (GA Ct. App Decided Nov. 21, 2013) therefore it was **nonfinal;** and hence, what the **DSO** found was actually **NOT** a sufficient basis upon which to ground the removal order. **The officer actually broke DHS**'s policies and went against procedures already set out in "*Administrative Removal Proceedings Manual*" **(M-430**, Rev. June 4, 1999).

Plainly, there is "***law to apply***" and thus the exemption for action "committed to agency discretion" is ***inapplicable***.

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8. AEDPA, Pub. L. No. 104-132 §401(e) 110 Stat. 1214, 1268 (1996)
8 U.S. Code §1105a(a)(10)(1994) (repealed 1996)
Henderson v. INS, 157 F.3d 106, 112-17 (2d Cir. 1998) (Calabresi, J.).

Even where there's been some review by the **Atlanta ICE/ERO**'s legal department; though, there hasn't been any judicial order that spends even one word about the Agency's "*erroneous exercise of discretion.*"

Where the **FARO** should've been terminated and the case referred to an Immigration Judge **(IJ)** as well as placed upon a status docket; what ended up happening was:

[Opening remarks>Factual background (Cont'd)] It took certain amount of months from November 19th, 2018, –when **VIVAS** was removed from the **U.S.** and escorted back unto his original country **VENEZUELA**– until when he was actually able to find out "*Records of Proceedings,*" as well as to file his "*Petition for Review*" no. **20-14767** (December 22nd, 2020) and a set of motions no. **20-14815** (December 28th, 2020) before the 11th Circuit. It wasn't but until April 16th, 2021, when a three judges panel granted the government's motion to dismiss both petitions for lack of jurisdiction. The decision was affirmed on May 24th, 2021.

Now, we may count with a three-Judges panel's order, but the legal situation is even worse. Not only the order did **NOT** spend even one word about the Agency's "*erroneous exercise of discretion;*" but still worse, the same is *clearly erroneous* from the administrative law's viewpoint. The order's been entitled:

"Petitions for Review of a Decision of the Board of Immigration Appeals"

Where's the BIA's opinion (or decision at least)?

The *Justice Department's Executive Office for Immigration Review* **("EOIR")** has been at the center of a recent circuit split over whether a particular type of ruling, in which the **BIA** affirms an immigration judge's ruling without issuing an opinion, is subject to *judicial review* by the circuit courts.

The First, Third, and Ninth Circuits have concluded that they have jurisdiction to review the **BIA**'s decision to affirm without opinion the decision of an **IJ**. Actually, at this time, there's a progeny of cases spread out among other circuits:

◇ ***Haoud v. Ashcroft***, 350 F.3d 201, 206 (1st Cir. 2003);
◇ ***Kambolli v. Gonzales***, 449 F. 3d 454 (2nd Cir. 2006);
◇ ***Smriko v. Ashcroft***, 387 F.3d 279 (3d Cir. 2004);
◇ ***Quinteros-Mendoza v. Holder***, 556 F. 3d 159 (4th Cir. 2009);
◇ ***Hassan v. Gonzales***, 403 F. 3d 429 (6th Cir. 2005);
◇ ***Cuellar Lopez v. Gonzales***, 427 F. 3d 492 (7th Cir. 2005);
◇ ***Chen v. Ashcroft***, 378 F.3d 1081, 1088 (9th Cir. 2004).

... and still more progenies.

All of the circuit courts (above) considering the issue share the common core:

NO statute precludes them from reviewing the **BIA**'s decision to affirm without opinion under the streamlining regulations.[9]

9. Compare to ***Begna v. Ashcroft***, 392 F. 3d 301 (8th Cir. 2004)

Please, your Justice, allow **VIVAS** to explore a little bit further...

The **APA** expressly precludes judicial review of agency action in two situations:

<u>*First*</u>, judicial review is **not** available if any statute precludes judicial review. **5 U.S. Code §701(a)(1) (2000).**

<u>*Second*</u>, judicial review is **not** available if the agency's "*action is committed to agency discretion by law.*" **Id. § 701(a)(2).**

DHS's action –ordering administrative removal– was **NOT** committed to agency discretion by law!

c) [Congress's Intention] Let's hear from the U.S. Supreme Court:

"[I]*t is 'emphatically the province and duty' of* **[Article III]** *judges to 'say what the law is.'*" ***<u>Marbury v. Madison</u>***, 1 Cranch 137, 177 (1803).

"*The intention of the legislature to repeal 'must be clear and manifest.'*" ***<u>United States v. Borden Co.</u>***, 308 U.S. 188, 198 (1939).

"*... Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.*" ***<u>Gilmer v. Interstate/Johnson Lane Corp.</u>***, 500 U.S. 20 (1991)

At the core of this power is the federal courts' independent responsibility– independent from its coequal branches in the Federal Government–to interpret federal law.

For instance, a construction of **AEDPA** that would require the federal courts to cede this authority to the administrative agencies would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under **Article III** of the Constitution.

In such a sense, if Congress had intended to require such an important change in the exercise of **Article III** courts' jurisdiction, it would have spoken with much greater clarity than is found in the text of **AEDPA!**

Let's say a particular statutory construction is rejected on the ground that it might violate the "*Free Speech Clause*," for example, then in that instance the avoidance canon has protected the values underlying that clause. Similarly, when courts construe the **AEDPA** and the **IRIRA**.

It gets worked up to find out there's a risk that **Article III** values are becoming systematically balanced away. Especially, where **Congress's Intention** is for **Article III**'s commitmet to independent judicial review.

<u>In administrative law</u>, the federal courts have long required a clear statement of Congress's intent before finding that agency action is **not** subject to judicial review.

◊ ***<u>Webster v. Doe</u>***, 486 U.S. 592, 603 (1988) (applying a narrower presumption against restrictions on judicial review of constitutional claims... explaining that Congress must be clear if it intends to preclude judicial review of constitutional claims).

(still more...)

◇ ***Bowen v. Mich. Academy of Family Physicians***, 476 U.S. 667, 670 (1986) (recognizing "the strong presumption that Congress intends judicial review of administrative action");
◇ ***Abbott Laboratories v. Gardner***, 387 U.S. 136, 141 (1967)(stating that "only upon showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review");
◇ ***Weinberger v. Salfi***, 422 U.S. 749, 762 (1975);
◇ ***Johnson v. Robison***, 415 U.S.361, 373-74 (1974)

(...And by Circuits still more...)

◇ ***Ryan v. US IMMIGRATION AND CUSTOMS ENFORCEMENT***, et al (1st Cir. 2020)
◇ ***INS v. St. Cyr***, 533 US 289 (2001) (Arose from 2d Cir. 1991)
◇ ***New York v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al*** No. 19-cv-8876 (JSR) (2019)
◇ ***Berg v. Obama***, 586 F. 3d 234 (3rd Cir. 2009)
◇ ***Cort v. Ash***, 422 US 66 (3rd Cir. 1975)
◇ ***Salinas v. United States***, 522 US 52 (5th Cir. 1997)
◇ ***Califano v. Sanders***, 430 US 99 (7th Cir. 1977)
◇ ***Gregory v. Ashcroft***, 501 US 452, 111 S.Ct. 2395 (1991) (Arose from 8th Cir. 1991)
◇ ***INS v. Cardoza-Fonseca***, 480 US 421 (9th Cir. 1987)
◇ ***John v. U.S.***, 247 F. 3d 1032 (9th Cir. 2001)
◇ ***Oregon v. Ashcroft***, 368 F. 3d 1118 (9th Cir. 2004) ('*usual constitutional balance between the States and the Federal Government*')
◇ ***Evans v. United States***, 504 US 255 (11th Cir. 1992)

Administrative agencies are **not** supposed to be legislators and **Article III** judges!

"Issues below will moreover aid ***four Justices (or more) consider the issue sufficiently meritorious to grant certiorari***."

(2) "*A fair prospect that a majority of the Court will vote to reverse the judgment below*."

a) [Clear error judgment] There's **NOT** any reasonable explanation for the **USCA11**'s decision at issue. The same is **not** only irrational, but it's also **not** in accordance with *Administrative Law* and should **not** be allowable (or even tolerable) from any perspective of this Law; simply because:

USCA11 gave the decision a title "*in contradiction to the record!*"

USCA11 improperly assumed that Immigration proceedings at bar had been seen by an Immigration Judge and there'd been a decision by the Board of Immigration Appeals, **BIA**-1: A200-599-097, where there's not even one shred of evidence as to support such a finding. So, where the same is "*clearly against reason and evidence*." **USCA11** has reached a conclusion that contradicts the underlying record. The decision should be deemed:

"In contradiction to the record!"

b) [The Legality of Law] The **USCA11**'s decision clearly, plainly violates the Administrative Law principle of *Legality* or is otherwise "*arbitrary and capricious.*"

USCA11 arbitrarily gave deference to a **BIA**'s decision, in an instance where **no** deference is warranted, simply because **no** decision has ever been made. **USCA11** failed, neglected to take into considerations, that:

Both Petitioner and Respondent had already presented evidence to the contrary!

• **VIVAS** had asserted in both **PFR**s:
No Court has upheld the validity of the "*Final Administrative Removal Order*"
• The "*Respondent's Motion to Dismiss the Petitions for Review for Lack of Jurisdiction,*" (*In-File* since Jan. 15, 2021) on its Page 2, also confirmed:

FN1: According to the Board of Immigration Appeals online decision database, the Board has not issued any decisions pertaining to Vivas.

Not to mention, that the Board may **not** entertain **VIVAS**'s **PFR**s because of "*Lack of Jurisdiction*:[10] "

The Case has never been seen before by the Board. This is **NOT** a case already decided by the **BIA**![11] See (**BIA** Practice Manual 5.2(a)(e)). Here, it has become paramount important to recall, that any decision by public authorities should be deemed unreasonable if they do not logically follow all the legally and reasonably relevant dimensions. Conformity to reasonability is what makes people believe and rely on administrative actions and law.

According to the Board of Immigration Appeals (**BIA**) online decision database,[12] the Board has never issued any decisions pertaining to **VIVAS**; and therefore, a final order of removal has never been issued by any Immigration Judge much less by the **BIA**.

USCA11's findings should be characterized as ***unreasonable***. (i.e., as "*clearly erroneous*") In actual fact, its decision ended up unfairly supported by the record!

c) [Standards of Review] It is moreover likely, that in order to conceal "*Due Process*" violations, the **USCA11**'s order explained:

"*We also note that the 30-day period is not subject to equitable tolling, despite Vivas's arguments to the contrary.*"

This, actually creates Inter-Circuit tension with all other circuits,[13] including Intra-Circuit tension:

◊ ***Avila-Santoyo v. U.S. Atty. Gen.***, 713 F.3d 1357 (11th Cir. 2013);
◊ ***Ruiz-Turcios v. U.S. Atty. Gen.***, 717 F.3d 847 (11th Cir. 2013).

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10. C.f. (Department of Justice - **EOIR** Policy Manual. Part III - **BIA** Practice Manual 5.2(a)(1)).
11. See (**BIA** Practice Manual 5.2(a)(e))
12. Available at: https://www.justice.gov/eoir/ag-bia-decisions
13. See Chart of Principal Cases, by Circuit in Exhibit "H"

The **abuse-of-discretion** standard of review should be the most sensible approach to, *inter alia*:

- ♦ Withholding its Mandate;
- ♦ Denial of Motions to vacate/set aside the dismissal and to reinstate action;
- ♦ Denial of Motions to reopen and reconsider:
  - ◊ ***INS v. Doherty***, 502 US 314 (2nd Cir. 1992)
  - ◊ ***Sevoian v. Ashcroft***, 290 F. 3d 166 (3rd Cir. 2002)
  - ◊ ***Zhao v. Gonzales***, 404 F. 3d 295 (5th Cir. 2005)
  - ◊ ***INS v. Rios-Pineda***, 471 US 444 (8th Cir. 1985)
  - ◊ ***INS v. Phinpathya***, 464 U. S. 183, 188, n. 6 (9th Cir. 1984)
  - ◊ ***Mendiola v. Lynch***, No. 15-9565 (10th Cir. 2016)

Now, with regards to **USCADC's**:

- ♦ Denial of Motion to reconsider;
- ♦ Denial of Motion to accept New Evidence;
- ♦ Denial of Motion for summary judgment. ... **All motions unopposed!**

Where prima facie has been shown, ***de novo*** arises as the most sensible approach!

This Court actually reviews the grant or denial of summary disposition ***de novo*** to determine if the moving party is entitled to judgment as a matter of law:

- ◊ ***In re Dana Corp.***, 574 F. 3d 129 (2nd Cir. 2009)
- ◊ ***Laber v. Harvey***, 438 F. 3d 404 (4th Cir. 2006)
- ◊ ***Kinney v. Weaver***, 367 F. 3d 337 (5th Cir. 2004)
- ◊ ***Williams v. Mehra***, 186 F. 3d 685 (6th Cir. 1999)
- ◊ ***Wagoner v. Lemmon***, 778 F. 3d 586 (7th Cir. 2015)
- ◊ ***Jett v. Penner***, 439 F. 3d 1091 (9th Cir. 2006)
- ◊ ***Applied Genetics v. First Affiliated Securities***, 912 F. 2d 1238 (10th Cir. 1990)
- ◊ ***Cowart v. Widener***, 697 S.E. 2d 779 - Ga: Supreme Court 2010
- ◊ ***Querubin v. Thronas***, 109 P. 3d 689 - Haw: Supreme Court 2005

d) [The need for uniformity] The Court may stop for a second as to appreciate "*it is necessary to secure or maintain uniformity of the court's decisions*," c.f. **FRAP 35(a)(1)**. Also, that "*the case involves a question of exceptional importance. As an example, a case may present a question of exceptional importance where there is an inter-circuit conflict*," c.f. **FRAP 35(a)(2)**.

A proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Intercircuit conflicts create problems!

Intercircuit conflict is cited as one reason for asserting that a proceeding involves a question of "*exceptional importance.*" Actually, here it may become appropriate that **(1)** court must answer question of exceptional importance and **(2)** answer will create precedent, c.f. ***George E. Warren Corp. v. U.S.***, C.A.Fed.2003, 341 F.3d 1348, rehearing and rehearing en banc denied, certiorari denied 125 S.Ct. 31, 543 U.S. 808, 160 L.Ed.2d 10.

The proceeding involves questions of exceptional importance Concerning "*Motions for Reconsideration,*" cf.**(Fed.R. App.P., R.35(a)(2))**. In order to prevent more conflicts *-f.ex.-* because of the denial of statutory motions to vacate and reconsiderate and/or failure to file a timely motion, please kindly have regards for...

◇ ***Pereira v. Sessions***, 138 S. Ct. 2105 (1st Cir. 2018)
◇ ***Chen v. Gonzales***, Docket No. 06-1010-ag. (2nd Circuit 2007)
◇ ***Ordonez-Tevalan v. Atty. Gen. of the U.S.***, 826 F. 3d 670 (3rd Cir. 2016)
◇ ***Cochran v. Holder***, 564 F. 3d 318 (4th Cir, 2009)
◇ ***Richardson v. Holder***, 344 F. App'x 976 (5th Cir. 2009)
◇ ***Stone v. INS***, 514 US 386 (6th Cir. 1995)
◇ ***Boykov v. Ashcroft***, 383 F. 3d 526 (7th Cir. 2004)
◇ ***Kucana v. Mukasey***, 533 F. 3d 534 (7th Cir. 2008)
◇ ***Esenwah v. Ashcroft***, 378 F. 3d 763 (8th Cir. 2004)
◇ ***Plasencia-Ayala v. Mukasey***, 516 F. 3d 738 (9th Cir. 2009)
◇ ***Desta v. Ashcroft***, 329 F. 3d 1179 (10th Cir. 2003)
◇ ***Jaggernauth v. US Atty. Gen.***, 432 F. 3d 1346 (11th Cir. 2005)
◇ ***Stanton v. District of Columbia***, 639 F. Supp. 2d 1 (D.C. Cir. 2009)
◇ ***Bailey v. West***, 160 F. 3d 1360 (Federal Circuit, 1998) ...

... the **USCADC's** mandate should've been stayed / recalled!

e) [Action by the Court] Because this is one of those rare cases involving several fundamental constitutional questions of exceptional importance to all, **VIVAS** wishes to bring to the Court's attention points of law or fact that it may have overlooked, **Fed. Rule App. Proc. 40(a).**

VIVAS –as an individual– has been seeking to *vacate* the existing "*Final Administrative Removal Order*" based upon errors of law and fact in the administrative decision *–e.g.*: "*Newly vacated convictions,*" as well as "*subsequently issued case law that affects removability or eligibility for relief.*" –The action by the Court's become required, since he should've been allowed to enjoy the benefits of **INA§240A(2011)** instead of remaining restricted by **INA§238(b)(2011)**.

VIVAS actually, has employed distinct mechanisms, such as a "*Motion-to-Reconsider*[14]." –In practice, the **BIA** would've employed the modified categorical approach to determine whether a criminal conviction meets the definition of a predicate offense for immigration purposes, c.f. *-e.g.-* **8 U.S. Code §1229a(c)(6)**;

In actual fact, moreover, not only under regulatory provision but also under a separate statutory provision, individuals who were ordered removed *in-absentia* can seek rescission of the order and reopening if they did not receive proper notice or failed to appear for a hearing in immigration court based on *exceptional circumstances*, c.f. *-e.g.-* **8 U.S. Code §1229a(b)(5)(C)**.

VIVAS has **not** even been allowed to supplement administrative records with supporting documents as to demonstrate that he's prima facie eligible for the relief sought; c.f. *-e.g.-* **8 C.F.R. §§1003.2(c)(1); 1003.23(b)(3)** instead, he's been deprived of "***Equitable tolling.***[15]"

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14. Many of the rules governing *motions-to-reopen* also apply to *motions-to-reconsider* *-e.g.-* **8 C.F.R. §§1003.2** (motions to the **BIA**) and **1003.23** (motions to an immigration court).

15. "Equitable tolling" is a principle that entitles litigants to an extension of non-jurisdictional filing deadlines

Here the ***"Good-Cause"*** makes its way clear out upon the ground that because the case may establish a new precedent it ***"involves a question of exceptional importance."***

◊ ***Neves v. Holder***, 613 F.3d 30 (1st Cir. 2010);
◊ ***Iavorski v. INS***, 232 F.3d 124 (2d Cir. 2000);
◊ ***Borges v. Gonzales***, 402 F.3d 398 (3d Cir. 2005);
◊ ***Kuusk v. Holder***, 732 F.3d 302 (4th Cir. 2013);
◊ ***Lugo-Resendez v. Lynch***, 831 F.3d 337 (5th Cir. 2016);
◊ ***Harchenko v. INS***, 379 F.3d 405 (6th Cir. 2004);
◊ ***Pervaiz v. Gonzales***, 405 F.3d 488 (7th Cir. 2005);
◊ ***Hernandez-Moran v. Gonzales***, 408 F.3d 496 (8th Cir. 2005);
◊ ***Socop-Gonzalez v. INS***, 272 F.3d 1176 (9th Cir. 2001) (en banc) (overruled in part on other grounds by ***Smith v. Davis***, 953 F.3d 582 (9th Cir. 2020) (en banc));
◊ ***Riley v. INS***, 310 F.3d 1253 (10th Cir. 2002);
◊ ***Avila-Santoyo v. Att'y Gen.***, 713 F.3d 1357 (11th Cir. 2013) (en banc).

There simply can't exist any clearer need for uniformity![16]

(3) *"A likelihood that irreparable harm will result from the denial of a stay."*

Often the need arises to take action as fast as possible, mainly in the presence of examples of *irreparable harm*, which are *disappearances, torture or executions*.

Here, please kindly have regards for the "*Statement of Issues Presented*" at Exhibit "H" –which relates how **VIVAS** was unlawfully arrested... unconstitutionally, criminally indicted and tried by Jury... and even wrongfully removed from the country –**VIVAS** as a father has ended up forced, prolonged separated from his family–Such amount of *Prejudice* should amount as to ***irreparable***!

It is sad to acknowledge that oftentimes such instances of "*Immigration Exceptionalism*" are related to violations of "*International Human Rights*,[17]" such as "*Access to Justice*[18]" –which is a basic principle of the rule of law.

In the abscense of "*access to justice*," people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

Now, while International standards recognize "*access to justice*" as both a basic human right and a means to protect other universally recognized human rights, governments have not felt a positive obligation to protect this right through affirmative action programs.

... if they act diligently in pursuing their rights but are nonetheless prevented from timely filing by some extraordinary circumstance. See, e.g., ***Holland v. Florida***, 560 U.S. 631 (2010). Although the **BIA** has not addressed whether the motion to reopen deadline is subject to tolling, every court of appeals to have done so in a published decision has found that tolling applies.

16. Compare with Exhibit "H" ~ where the **USCA11**'s order explained:

> "*We also note that the 30-day period is not subject to equitable tolling, despite Vivas's arguments to the contrary.*"

17. See e.g. Rachel E. Rosenbloom, The Citizenship Line: Rethinking Immigration Exceptionalism, 54 B.C. L. REV. 1965, 1981-89 (2013).

18. People need to be able to access the courts and legal processes or the law cannot enforce people's rights and responsibilities.

Nevertheless, with utmost respect your Justice, the case here is that the "*U.S. Justice Department*" has opened the "*Office for Access to Justice*" to lead its efforts to improve the federal government's understanding of and capacity to address the most urgent legal needs of communities across America.

a) [The Right To Petition] "*Access to justice*" is **not** a right set out within the "*Bill of Rights.*" Notwithstanding, the 1st Amendment's sixth clause makes provision for the "*right to petition the government for redress of grievances.*"

b) [The Right To Appear In Court] In its narrowest conception, "*Access to justice*" represents only the formal ability to appear in court; and this refers to an individual's formal right to litigate or defend. Thus an individual may, pending complex litigation, request a court to provide for preventive measures, injunctions, or other relief.

c) [The Right Judicial Review] "*Judicial review*" is typically justified on consequentialist grounds, namely that it is conducive to the effective protection of individual rights. "*Judicial review*" is based upon a "right to voice a grievance" or a "right to a hearing"–a right designed to provide an opportunity for the victim of an infringement to challenge that infringement.

Here's important to highlight, that 'another way of putting the idea of preserving the status quo' is when the "*Finality*" required for "*Judicial review*" is achieved! – That occurs only after the further steps of a hearing before an administrative law judge, c.f. ***Weinberger v. Salfi***, 422 US 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975); ***Mathews v. Eldridge***, 424 US 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (4th Cir. 1976).

Often Lack of Due Process triggers the need as to take necessary action...

The Court may wish to shift the focus off of the individual and place it now upon the harm that continues on to be inflinged upon the written U.S. Constitution:

Both upon "***Article III***" and "*Due Process.*"

(4) "*In close cases it may be appropriate to 'balance the equities'– to explore the relative harms to applicant and respondent, as well as the interests of the public at large.*"

It's been since long held, that the power of the judicial branch is limited to particular "*cases or controversies*:" Questions that can be framed with appropriate specificity, which have an appropriate adverseness among the parties to ensure a vigorous presentation of the competing interests, and which can be resolved by an order providing meaningful relief that is binding on the parties. Thus, a court cannot pronounce any executive action unlawful or any statute unconstitutional "*except as it is called upon to adjudge the legal rights of litigants in actual controversies,*" ***Liverpool Steamship Co. v. Commissioners of Emigration***, 113 U.S. 33, 39 (1885). As in actual fact, under the '*Case and Controversy Clause*' ~ **Article III**, Section 2 of the Constitution, a federal court may only adjudicate an '*actual controversy.*'

VIVAS does have enough reasons as to believe: **(a)** There are matters that the Court can adjudicate -i.e.- the Court may determine '*justiciability*;' **(b)** the Court may then rule on the merits; and **(c)** hopefully, the Court may further determine the acceptable, appropriate remedy.

(a) [Justiciability] The purpose of the standing requirement is to ensure that a litigant has a sufficient interest at stake to present the case or controversy in a sufficiently concrete and competent manner, ***Warth v. Seldin***, 422 U.S. 490, 498–99 (1975).

VIVAS actually is ready and willing to show: ***(i)*** He's standing; ***(ii)*** the facts of the case have matured into an 'actual controversy;' -so, the case is ripe- and ***(iii)*** issues presented are neither 'moot' nor 'violative of the political question doctrine.'

[Standing] Standing refers to the capacity of a plaintiff to bring suit in court. Typically, the plaintiff must have suffered an actual harm by the defendant, and the harm must be redressable. ***Etuk v. Slattery***, 936 F.2d 1433, 1441 (2d Cir. 1991) (the court "*must look to the facts and circumstances as they existed at the time this suit was initiated*").

To satisfy the 'Case' or 'Controversy' requirement of **Article III**, a plaintiff must, generally speaking, demonstrate this "*irreducible constitutional minimum*" of standing, which requires: **(1)** that the plaintiff has suffered an "*injury in fact*"–an invasion of a judicially cognizable interest which is **(a)** concrete and particularized and **(b)** actual or imminent, not conjectural or hypothetical; **(2)** that there be a causal connection between the injury and the conduct complained of–the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and **(3)** that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. ***Lujan v. Defenders of Wildlife***, 504 U. S. 555, 560-561 (1992); ***Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.***, 454 U. S. 464, 471-472 (1982).

Please, your Justice, although generally in many immigration cases standing is **not** an issue.[19] **VIVAS** spends a good effort explaining how this should be deemed an '*actual controversy*,' See Exhibit ("**H**").

[Mootness] It's been likely for Immigration cases to reject government's mootness argument, C.f. e.g. ***Carachuri-Rosendo v. Holder***, 560 U.S. 563 (5th Cir. 2010) (Reconsideration); ***INS v. Cardoza-Fonseca***, 480 US 421 (1987)('*no evidence of any substance in the record*;') ***INS v. Lopez-Mendoza***, 468 US 1032 (1984)(Evidences).

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19. See ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 561–62 (1992) ("*When the suit is one challenging the legality of government action or inaction [and] ... the plaintiff is himself an object of the action (or foregone action) at issue, ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.*"); ***Fund for Animals, Inc. v. Norton***, 322 F.3d 728, 733–34 (D.C. Cir. 2003) (a party's standing to seek judicial review of administrative action is typically "self-evident" when the party is the object of the action); 3 K. Davis, Administrative Law Treatise 217 (1958) ("*A plaintiff who seeks to challenge governmental action always has standing if a legal right of the plaintiff is at stake*").

Let's set forth: "*Like private actors, governments can and will seek to manipulate a court's jurisdiction to moot an unfavorable case. But unlike private actors, if a government succeeds in insulating its conduct from judicial review, the consequences are far more dire: the coercive power of the political branches is left unchecked by the judiciary, and important constitutional issues may remain unresolved, permitting future government actors to engage in identical illegal conduct. It is of course possible that in many instances the government's change of policy reflects a true change of heart. But both law and experience undermine the notion that courts should treat government defendants as inherently more honest and trustworthy than private ones.*"

VIVAS again will spend a good effort explaining to a deeper extent how the government's mootness argument should be rejected by the Court, See Exhibit "H" . But, let's take -for instance- the unopposed "*Motion to accept new evidence.*" Especially, where there are substantial evidences that the criminal conviction did **not** comport with constitutional standards, which are **not** within the administrative records; and therefore, the same are in need for *supplementation.* Moreover, what about the "*Motion to reconsider*" based upon ***Carachuri-Rosendo v. Holder*** (2010, supra) ... By **NO** means your Justice, these are moot claims as for resolving the case in such manner. C.f. *e.g.* ***Lewis v. Continental Bank Corp.***, 494 US 472 (11th Cir. 1990).

[Ripeness] VIVAS's set forth claims because he's suffered legal wrongs. His claims are ripe since the facts of the case have matured into an actual controversy.

Please your Justice be aware, that since '*ripeness*' is concerned with when that litigation may occur, Lee v. Oregon, 107 F.3d 1382, 1387 (9th Cir. 1997) **VIVAS** has extensively worked out the avoidance of premature adjudication. ***Abbott Labs. v. Gardner***, 387 U.S. 136, 148–49 (1967). In fact, Here you are three-fold:

◇ The erroneous '*administrative removal*' occurred on November 19th, 2018;
◇ Since August 30th, 2022, the **USCA11** accepted no further submissions from Petitioner in this closed case. Mandate's been withheld; and
◇ On October 20th, 2022, the **USCADC** denied **VIVAS**'s motion to recall the mandate

Now, it's been since long held, that there must be some rule of law to guide the court in the exercise of its jurisdiction, ***Marbury v. Madison***, 5 US 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 - Supreme Court, 1803. A Mandate may aid, under the Constitution, the Court to take authority to act -to take and exercise its federal certiorari jurisdiction. Not to mention, that the lawsuit will present "*concrete legal issues, presented in actual cases, not abstractions.*" ***United Public Workers v. Mitchell***, 330 U.S. 75, 89 (1947).

[Political Question Doctrine] Here, judicial review shouldn't be barred by the 'political question doctrine,' and the Court may go ahead and slight this last doctrine because the relevant issues are **NOT** 'politically charged,' at all.

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20. Joseph C. Davis & Nicholas R. Reaves, The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine, 129 Yale L.J. 341 26 NOV 2019

b) [Ruling upon the Merits] The administrative decision-making at issue requires "*Merits Review*," since inter alia:

> Let's Take, for instance, the issue of whether a particular set of facts falls under a particular legal rule.
>
> Within the Department of Homeland Security, the U.S. Immigration and Customs Enforcement **(ICE)** does have a significant role in enforcing immigration laws. Like all law enforcement agencies, **ICE** can and does exercise a great deal of prosecutorial discretion. **ICE** exercises this discretion in deciding where to focus investigative resources, whether to initiate removal proceedings against a particular individual, whether to detain a person after initiating removal proceedings (when detention is not mandatory), and whether to support or oppose a non-citizen's request for relief from removal.
>
> i) **NTA under INA §240**: On February 19th, 2010, two **ICE** officers interviewed **VIVAS** at Dekalb Co. Jail with regards to the *Notice-to-Appear* ~ In removal proceedings under section **240** of the Immigration and Nationality Act.
>
> - **VIVAS**'s armband referred to "*John Doe*;" **VIVAS**'s name wasn't listed as Respondent —VIVAS refused to be sent toMexico or Guatemala.
> - There was **NO** criminal charge against **VIVAS**;
> - **VIVAS** did provide his fingerprints; though, as a Stipulation he also refused-to-sign.
>
> Moreover, the original **NTA** seems to have been corrected in the time; though, the same doesn't specify date or time of the removal hearing.
>
> Furthermore, the **NTA** at challenge seems to have been *cancelled*.
>
> **Section 1229(a)**, in turn, provides that the Government shall serve noncitizens in removal proceedings with a written "*notice-to-appear*," specifying, among other things, "[t]*he time and place at which the [removal] proceedings will be held.*" **§1229(a)(1)(G)(i)**.
>
> ◊ ***Pereira v. Sessions***, 138 S. Ct. 2105 (1st Cir. 2018)
> ◊ ***Chery v. Garland***, 16 F. 4th 980 (2nd Cir. 2021)
> ◊ ***Guadalupe v. ATTY. GEN. US***, 951 F. 3d 161 (3rd Cir. 2020)
> ◊ ***Rodriguez v. Garland***, 31 F. 4th 935 (5th Cir. 2022)
> ◊ ***Niz-Chavez v. Garland***, 141 S. Ct. 1474 (6th Cir. 2021)
> ◊ ***Ortiz-Santiago v. Barr***, 924 F. 3d 956 (7th Cir. 2019)
> ◊ ***Ali v. Barr***, 924 F. 3d 983 (8th Cir. 2019)
> ◊ ***Lopez v. Barr***, 925 F. 3d 396 (9th Cir. 2019)
> ◊ ***Estrada-Cardona v. Garland***, 44 F. 4th 1275 (10th Cir. 2022)
> ◊ ***Perez-Sanchez v. US Attorney General***, 935 F. 3d 1148 (11th Cir. 2019)
> ◊ ***Andrade-Rodriguez v. US Attorney General*** No. 19-13578. (11th Cir. 2022)
> ◊ ***Salgado-Escamilla v. US Attorney General*** No. 21-10323 (11th Cir. 2021)

ii) Erroneous **AF** determination: On February 8th, 2012, the Atlanta **ICE/ERO**'s Deciding Service Officer **(DSO)** issued a "*Final Administrative Removal Order*," **(FARO)** the same date as the Issuing Service Officer **(ISO)** signed "*Notice of Intent to Issue a Final Administrative Removal Order*." There was a remarkable change from **INA §240** to **INA §238(b)**.

On that same date, **VIVAS** was in State custody at the same compound where there's an Immigration Court. He was only a call-out away. Nevertheless, he was **NOT** notified of the proceedings against him right away! It wasn't but until March 19, 2018, after **VIVAS** completed his State sentence and was transferred unto **ICE** custody, when he received *in-Person* the "*Final Administrative Removal Order*." **(FARO)** So, there actually was **NO** personal jurisdiction until then.

VIVAS comes to challenge findings of fact and conclusions of law: ... "*I further find that you have a final conviction for an aggravated felony as defined in section* **101(a)(43)(R)** *of the Immigration and Nationality Act (Act) as amended*, **8 U.S.C. 1101(a)(43)(R)**..." where:

- **VIVAS**'s direct appeal was quite on-going, See Case **A13A1445** before the Georgia Court of Appeals;
- The appeal's outcome was a substantial reversal in-part; "*Identity Fraud*" convictions were found to be constitutionally impermissible; See ***Martinez v. State***, 750 S.E. 2d 504, 325 Ga. App. 267 (Ga Court of Appeals 2013)
- There was a New Trial Hearing, where Hon. Mark A. Scott (Trial Judge) voiced out his reason for denying **VIVAS**'s "*Motion for Directed Verdict*," despite of the fact that the State hadn't adduced any evidence as to prove the essential element "*Forgery;Presentation*."

> Here, there's an "*Issue of Policy*," which collides with Judicial Review of the administrative action.[21]

Attached as Exhibit "H," your Justice will find copy of which is **VIVAS**'s "*Petition for Writ of Certiorari*" and in which he expands this matter to somewhat further extent.

VIVAS's main concern is that he's ready to bring forth Constitutional Challenges in Substantive Immigration Law. However, it's been a problem:

- The **DOJ**'s Board of Immigration Appeals, which adjudicates formal removal proceedings and sets legal precedent, has often declined to consider constitutional concerns in adjudication;
- the "*plenary power*" doctrine's limited the scope of judicial review of constitutional immigration cases; and
- although the federal courts have routinely waded into these constitutional waters in recent years, federal immigration agencies have been far more inconsistent in their approach.

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21. This can be read at: https://www.uscis.gov/administrative-appeals/aao-practice-manual

c) **[Acceptable, appropriate Remedy]** Provided that the generally accepted right of access to justice will be honoured, such egregious violations of fairness in the immigration proceedings at issue should give rise to judicially provided remedies:

[BIAS] On the one hand, **DHS**'s officers handling the Immigration case have obturated all paperworks showing **VIVAS**'s good performance while in state Prison, inter alia:

- **ESOL** diplom;
- **GED** diplom;
- **NCCER** certifications: Carpentry I & II, Electricity I & II, Masonry I & II, and Plumbing I & II; and even
- Associate Degree in Theology by Titus Baptist Seminary. (This should be deemed exceptional!)

[Eligibility for Relief: Waivers Under INA §212(h)][22] **USCA11**'s order might be intended to block any benefit from being received by the Petitioner. Especially, whereas any Conviction of an Aggravated Felony **(AF)** is an absolute bar for relief, such a bar may be otherwise waivable under **§212(h)**. For **VIVAS**, it will not be too difficult to show Remorse, rehabilitation, for the inadmissible conviction incident/s occurred at least 15 years ago. See **INA §212(h)(1)** Allegedly criminal accusations date since August 2007.

[Supplementing the Records] Although U.S. Courts of Appeals review district court orders and judgments on the basis of a closed record, which is limited to materials in the record when the district court made the decision under review.[23] Notwithstanding, two-folds: **Fed. R. App. P. 10(e)(2)(C)** and **Fed. R. Evid. 201**, list three exceptions to the general rule of reviewing a closed record; also **Fed. R. App. P. 48** provides for appellate fact-finding in the form of appointing a "*special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court.*"

FINAL REMARK

It is with much trepidation, that **VIVAS** prays for the Court will assess Compensatory damages and atop the effectivity of Exemplary/Punitive damages. Those should be awarded by the Court to punish government officials whose conduct should be considered grossly *negligent or intentional.*

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22. https://www.ilrc.org/sites/default/files/resources/waivers_under_212h_dec_2019-final.pdf

23. See e.g. ***Fassett v. Delta Kappa Epsilon***, 807 F.2d 1150, 1165 (3d Cir. 1986) (pointing out that "[t]he only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court").

Punitive damages may serve three important functions:
• Punish particularly egregious behavior by the defendant;
• Set an example to dissuade government officials from behaving that way time after time in the future; and
• **Deter others from engaging in similar conduct.**

CONCLUSION

For the reasons set forth above, and

- In order to maintain order and uniformity amongst the Circuit Court of Appeals;
- This Highest Court has set forth the Federal Rules of Appellate Procedure, and the Appellate Courts must comply with the procedures, particularly the procedures that directly impact due process, as in this case;
- Ensure Petitioner is provided equal opportunity to due process before judiciary, same as all others before it.

WHEREFORE, the Petitioner moves for an order staying the issuance of the U.S. Court of Appeals for the District of Columbia Circuit's mandate pending the filing of a petition for writ of certiorari in the Supreme Court and until final disposition there of the case.

/s/ ______________________________

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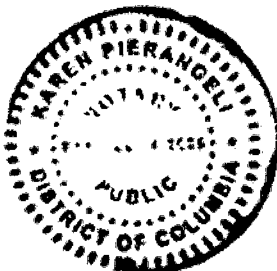
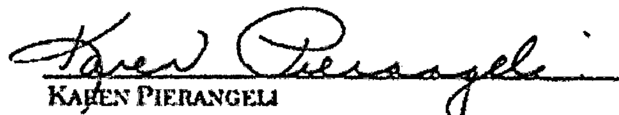
District of Columbia: SS
Signed and Sworn to (or affirmed) before me on the 5th day of April, 2023





KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2025.