For Opinion See 1997 WL 55472

United States District Court, E.D. New York.
Neil JEAN-BAPTISTE, et al., Plaintiffs,
v.
Janet RENO, Immigration & Naturalization Service, et al., Defendants.
No. 96-4077 (SJ).
November 13, 1996.

Defendants' Reply in Support of Motion to Dismiss

INTRODUCTION

Plaintiffs' memorandum in opposition to the motion to dismiss fails to refute defendants' position that the new Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("1995 Act") divests the Court of subject matter jurisdiction over this action and that plaintiffs failed to state a claim upon which relief can be granted. In this memorandum, defendants will demonstrate that the Court lacks jurisdiction because (2) plaintiffs have not established a claim for relief; (2) this case falls within the scope of the 1996 Act's jurisdictioneliminating provision; (3) notwithstanding their failure to state a colorable constitutional claim, Section 242(g) bars plaintiffs from bringing an action in this court that challenges INS policies and procedures on due process grounds; and (4) neither the federal question statute at 28 U.S.C. § 1331 nor any other statute provides jurisdiction for this action.

ARGUMENT

A. *Plaintiffs Have No Claim to Relief*

Plaintiffs' claims do not rest on a cognizable statutory or constitutional basis and therefore are not actionable. Plaintiffs contest their deportations under several theories that are somewhat unclear. First, they appear to claim a property interest in their "green card" that entitles them to remain permanently in the United States. Complaint at ¶¶ 2-6, 25-26; Plaintiffs' Opposition to Motion to Dismiss ("Pl. Opp") at 10, 16. Second, as permanent residents they assert a liberty interest against deportation. *Id.* at 6. They further allege that these interests gave rise to an INS duty to provide express notice, when they entered the United States or adjusted status, that engaging in criminal activity could subject them to deportation. Eecause they did not receive such notice, plaintiffs contend, their deportation would amount to a deprivation of liberty and property without due process cf law. Complaint at ¶¶ 53-57, 60-62; Pl. Opp. at 4, 9-18.

Plaintiffs' conclusory allegations do not survive a motion to dismiss, since they have shown no legal basis for claiming the INS failed to discharge a duty owed to them. *Malik v. Meissner*, 52 F.3d 560, 562 (2d Cir. 1996) (citing *Robinson v. Over-*

seas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994), and *Butler v. Castro,* 896 F.2d 698, 700 (2d Cir. 1990)). Congress has charged the INS with enforcing the immigration laws, and its conduct must therefore reflect the congressional intent. *United States ex rel Knauff v. Shaughnessy,* 338 U.S. 537, 543 (1950). Where Congress did not intend to provide a right or remedy, aliens may not bring suit to compel recognition thereof. *Cort v. Ash,* 422 U.S. 66, 84 (1975).

In this instance, the laws already afford plaintiffs a deportation procedure that is fundamentally fair. *Felzcerek v. INS,* 75 F.3d 112 (2d Cir. 1996); *Bustos-Torres v. INS,* 898 F.2d 1053 (5th Cir. 1990). That procedure provides notice of the charges of deportation, an opportunity to post bond, assistance of counsel, an adversarial hearing before an immigration judge, and de novo review by the Board of Immigration Appeals. *See generallv* 8 U.S.C. §§ 1252, 1252A; 8 C.F.R. §§ 242 *et seg.; Rabiu v. INS,* 41 F.3d 879, 882 (2d Cir. 1994); *Augustin v. Sava,* 735 F.2d 32 (2d Cir. 1984). It does not require the INS to advise incoming aliens of the grounds of deportation. Because plaintiffs have not shown that defendants disregarded the law, this action is not sustainable.[FN1]

FN1. Plaintiffs cited authority that discusses causes or actions challenging the implementation of a particular immigration statute or regulation. Pl. Opp. at 5-7, 16-18; *see, e.g., Hamava v. McElrov,* 797 F.Supp. 186 (E.D.N.Y. 1992) (concerning bond proceedings); *Haitian Refucee Center v. Smith,* 576 F.2d 1023 (1982) (concerning processing of asylum applications). These cases are inapplicable since plaintiffs' due process claim is not premised on the INA, but solely on the Fifth Amendment.

Nor can plaintiffs assert a private right of action under any INA provisions. There is nothing in the statute or its legislative history to indicate that Congress ever intended to provide aliens with pre-entry notice of the grounds of deportation. Implying a private right of action would therefore be inconsistent with the underlying purposes of the statute. *Cort v. Ash,* 422 U.S. at 66; *Hernandez-Avalos v. INS,* 50 F.3d 842 (10th Cir. 1995).

In addition, despite their amorphous reference to the Fifth Amendment, plaintiffs have failed to identify a constitutionally protected interest which triggers the due process safeguards. *Board of Regents v. Roth,* 408 U.S. 564, 569-72 (1972). It is not disputed that, when Congress grants property rights to aliens, the Fifth Amendment protects against the deprivation of those rights without due process of law. *Azizi v. Thornburgh,* 908 F.2d 1130, 1134 (2d Cir. 1990) (citing *Board of Regents v. Roth,* 408 U.S. at 569-70, and *Matthews v. Diaz,* 426 U.S. 67, 77 (1976)). Plaintiffs, however, cannot prevail in their constitutional challenge, because they do not have an inherent property right in a “green card.” Their classification as legal residents under the INA creates no such interest. *See Azizi v. Thornburgh,* 908 F.2d at 1134; *Knoetze v. U.S. Dep't of State,* 634 F.2d 207, 211 (5th Cir. 1981). Although courts have characterized an alien's physical presence in this country as giving rise to a limited liberty interest *see, e.g., Brides v. Wixon,* 326 U.S. 135 (1945); *The Japanese Immigrant Case,* 189 U.S. 86 (1903), they have also found that the Constitution does not bar deportation. *Linnas v. INS,* 790 F.2d 1024, 1031 (2d Cir.

1986) ("there is no substantive due process right not to be deported"), *cert. denied,* 479 U.S. 995 (1986).

To prevail upon their Fifth Amendment claim, therefore, plaintiffs must show that the challenged conduct -- INS's failure to provide notice -- unreasonably burdens any property or liberty interest they might have enjoyed at the time of their admission. It is simply not enough to assert that the *Due* Process Clause requires notice under any circumstances. *Cf. Matthews v. Elridge,* 464 U.S. 319 (1976) (balancing the alien's private interest against the government's interest in maintaining current procedures); *Kleindienst v. Mandel,* 408 U.S. 753 (1972), and *Fiallo v. Bell,* 430 U.S. 787 (1977) (establishing the "facially legitimate and bona fide reason" standard for testing constitutionality of government policy). Plaintiffs cannot make this showing because no liberty or property interests attach prior to their admission or entry. *Fiallo v. Levi,* 406 F.Supp. 162, 165 (E.D.N.Y. 1975), *aff'd sub nom., Fiallo v. Bell,* 430 U.S. 787 (1977).

Finally, plaintiffs urge the Court to continue this case so that they would have an opportunity to conduct discovery and demonstrate "whas process is due." Pl. Opp. at 19-19. This request should be denied since the issue is whether the Court has jurisdiction to entertain this lawsuit. Even assuming that all facts as stated are true, plaintiffs have not presented a viable claim against deportation. As explained below, the Court also lacks jurisdiction due to the passage of the 1996 Act. The Court's subject matter jurisdiction turns on the facts existinc at the time the action is brought, *Keene Corp. v. United States,* 508 U.S. 200, 207 (1993), and continuing this action so that plaintiffs could further develop the record would conflict with the time-of-filing rule. *Id.*

B. The 1996 Act Expressly Removes District Court Jurisdiction Over This Action Which Challenges the Attorney General's Decision to Commence Proceedings, Adjudicate Cases, *or Execute Removal Orders*

1. Statutory Background

In 1996, Congress overhauled the immigration system by enacting two laws that fundamentally change the judicial review procedure under the INA. They were the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act ("1996 Act"), Pub. L. No. 104-208, 110 Stat. 3009 (published at 142 Cong. Rec. 11787 (daily ed. September 28, 1996)). With the passage of these laws, Congress expressed a clear intent to streamline the immigration appeal and removal process, by restricting access of deportable aliens to the federal courts. AEDPA Section 440(a) prohibits aliens convicted of serious crimes from petitioning the court of appeals to review their final deportation order and from filing statutory habeas applications in the district court. INA §106(a)(10), 8 U.S.C. § 1105a(a)(10) (as amended by AEDPA § 440(a) and 1996 Act § 306(c), 142 Cong. Rec. at 11804); *Hincapie-Nieto v. INS,* 92 F.3d 27 (2d Cir. 1996); *see also* AEDPA §§ 401(e) (repealing 8 U.S.C. § 1105a(a)(10)); *Mbiva v. INS,* 930 F.Supp. 609 (N.D. Ga. 1996).

The 1996 Act bars any cause or claim against a decision by the Attorney General to

"commence proceedings, adjudicate cases, or execute removal orders." 1996 Act § 306(a), 142 Cong. Rec. at 11803-11804 (to be codified at INA § 242(g), 8 U.S.C. § 1252). It also redefined district court jurisdiction under 8 U.S.C. § 1329 to allow only the United States to bring actions under Title II of the INA, and not "for suits brought against the United States or its agencies or officers." 1996 Act § 381(a), 142 Cong. Rec. at 11814 (to be codified at INA § 279, 8 U.S.C. § 1329).

Altogether, these amendments effectively preclude review of the Attorney General's decisions and actions outside the context of the new streamlined judicial review scheme established in the INA. *See* H. Rep. No. 104-469(I), 104th Cong., 2d Sess. 359, 463 (1996) (available at 1996 WL 168955) (Addendum A) (explaining that "streamlined appeal and removal process" make it "easier to remove deportable aliens from the United States"). They make clear that Congress does not intend for federal courts to intervene in the deportation process by hearing direct appeals or entertaining collateral claims.[FN2]

> FN2. The legislative history behind AEDPA and the 1996 Act highlights the degree to which Congress sought to prevent federal courts from unduly interfering with the Attorney General's ability to deport illegal and criminal aliens. The Senate Judiciary Committee, for example, criticizes judicial decisions that "characterize deportation as a grave penalty (*Bridges v. wixon,* 326 U.S. 135, 147 (1945)), and suggest that statutory ambiguities should be resolved in favor of the alien (*INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987))." *See* S. Rep. No. 104-249, 104th Cong., 2d Sess. 7 (1996) (Addendum B). The Senate Judiciary report further states:
> If the United States is to have an immigration policy that is both fair and effective, the law and the commitment of those with the duty to apply or enforce it must be clear .... This is a nation governed by law, and the law includes the immigration statutes and the regulations promulgated thereunder. Aliens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General.
> *Id.*

2. Section 242(g) Applies to this Case

Plaintiffs do not dispute that Congress may statutorily repeal the Court's jurisdiction over cases of this kind. They argue, however, that Section 242(g) is inapplicable because they are not challenging their deportation, but rather the "defendants' policies, practices, and procedures on constitutional grounds." Pl. Opp. at 5. This argument is unpersuasive.

Plaintiffs' motivation for bringing suit in the district court is quite apparent. In this case, all named plaintiffs are deportable criminal aliens who have deportation orders issued by an immigration judge some time in July or August, 1996.[FN3] Complaint at ¶¶ 27-45. On August 2, 1996, the Second Circuit decided *Hincapie-Nieto,* 92 F.3d 27 (2d Cir. 1996), finding that the AEDPA eliminated court of appeals' jurisdiction to hear petitions for review of individual criminal aliens. On August 19, 1996, plaintiffs filed this action in the district court. Casting their claims in

constitutional terms, plaintiffs request the Court to nullify their deportation orders and to enjoin permanently their removal from the United States. Complaint, at 23-24. Thus, it is clear that their primary goal in this lawsuit is nothing more than to avoid deportation.

> FN3. On November 7, 1996, the Clerk's Office for the Board of Immigration Appeals informed that plaintiff Neil Jean-Eaptiste did not appeal his deportation order to the BIA. Plaintiffs Gustavo Enrique Cepeda-Torres, Victor Israel Santana, Boydy Delano Eeckford, and Manuel Jovino Duran, however, have filed BIA appeals. Plaintiffs' failure to exhaust their administrative remedies is an impediment to establishing jurisdiction.
> Parties may not seek federal judicial review of an adverse administrative determination until they have first sought all possible relief within the agency itself. *Howell v. INS,* 72 F.3d 288, 290 (2d Cir. 1995) (citations omitted). While parties may bring for the first time before the court due process claims which are beyond the power of the Board to correct, the exhaustion requirement must be met where the Board has jurisdiction to correct the procedural errors alleged. *Nsukami v. INS,* 890 F.Supp. 170, 174-75 (E.D.N.Y. 1995); *Liu v. Waters,* 55 F.3d 421 (9th Cir. 1995). Plaintiff Jean-Baptiste has waived his right to Board review and cannot raise any constitutional arguments in this action. Other plaintiffs who have appealled have not exhausted their due process claims with the Board. Therefore, insofar as plaintiffs have failed to raise procedural issues that are within the Board's authority to consider, this Court does not have jurisdiction to hear their claims. *Nsukami,* 890 F. Supp. at 175; *Lozada v. INS,* 857 F.2d 10 (1st Cir. 1988).

The 1996 Act prevents plaintiffs from invoking the Court's jurisdiction simply by asserting an insupportable due process claim. In enacting the AEDPA and the 1996 Act, Congress was keenly aware of the practice under the old judicial review scheme, whereby deportable aliens have been able to delay their removal by filing last-minute legal challenges in the district courts. *See* Senate Judiciary Committee Report (Addendum B). The AEDPA was written specifically to preclude direct appeal of a criminal alien's deportation order, while Section 242(g) generally prohibits any challenge to the Attorney General's conduct on any claim relating to deportation. Plaintiffs, therefore, can no more rely on the Court to exercise jurisdiction in this case than on the Second Circuit to hear their petitions for review. Theirs is precisely the type of collateral attack on the Attorney General's decision “to commence proceedings, adjudicate cases, or execute removal orders” that Congress intended Section 242(g) to prohibit.

Plaintiffs further contend that Section 242(g)'s jurisdictional bar applies only to suits filed on or after September 30, 1996, the date of the 1996 Act's enactment. Pl. Opp. at 1-4. This argument misunderstands its effective date provision. As will be shown, Section 242(g) immediately divested courts of jurisdiction over actions already pending when the law was enacted.

The effective date for many of the 1996 Act provisions is coverned by Section 309(a).[FN4] Section 242(g)'s effective date, however, is controlled by Section

306(c) (1), which has been amended by technical corrections enacted on October 11, 1996. It states:

> FN4. Section 309(a) sets forth the effective date for most of the amendments in Title II of the 1996 Act, and provides as follows:
> Except as provided in this section and sections 303(b) (2), 306(c), 308(d) (2) (D), or *308(d)(5)* of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the 'title III-A effective date').
> 1996 Act § 309(a). *See* Red-lined version of the 1996 Act, Appendix A.

(1) IN GENERAL -- Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under Section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a) [of Section 306]), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

See 1996 Act § 306(c), as amended by the "Technical Correction to be added to the H-1A Nursing Bill," set forth in the Act of October 11, 1996, Pub. L. No. 104-302, 100 Stat. 3656 (Addendum C).

Section 242(g)'s judicial review provision is jurisdictional in nature and must be construed with both precision and strict fidelity to its terms. *INS v. Stone*, 115 S. Ct. 1537, 1548 (1995) (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) Its effective date provision makes clear that repeal of jurisdiction ocsurred instantly, regardless of when the claims arose. Thus, limiting its application to only prospectively filed actions, as plaintiffs suggest, would contravene the clear intent of Congress to remove the Court's jurisdiction over claims already pending on the date of enactment.

It is not significant, therefore, that plaintiffs filed their lawsuit prior to the enactment of the 1996 Act. As the Supreme Court explained in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), in deciding whether a new statute applies to pending cases, the courts first must determine whether Congress has expressly prescribed the statute's "proper reach." *Id.* at 1505. Here, Congress made Section 242(g) expansive so that it applies to all actions regardless of when filed. Where the language of a statute is clear, as in this case, it may be overcome only if "there is a 'clearly expressed, legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *see also* *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (courts "must give effect to the unambiguously expressed intent of Congress"). The sweeping language of Section 242(g), and its clearly prescribed effective date, leave no doubt that Congress intended to take away the Court's jurisdiction over this case.

3. Congress Clearly Intended Section 242(g) to Bar Review of Plaintiffs' Due Process Claims

Plaintiffs also charge that the 1996 Act is constituionally defective because it prevents them from bringing constitutional claims before the district court. This argument was advanced in a single sentence of their twenty-page brief, without citation to any authority. Pl. Opp. at 7. Since plaintiffs have not stated a colorable constitutional claim, this is not even an issue before the Court. In any event, the language and legislative history of Section 242(g) show a clear intent by Congress to preclude review of certain constitutional issues.

It is settled that Congress has the authority to define the jurisdiction of the lower federal courts. *Keene Corp. v. United States,* 508 U.S. at 207. *See, e.g., Sheldon v. Sill,* 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisidiction but such as the statute confers."); *Yakus v. United States,* 321 U.S. 414, 429 (1944); *Kline v. Burke Const. Co.,* 260 U.S. 226, 234 (1922). This is especially true in immigration law, where Congress' legislative power is "more complete" than in any other area. *Fiallo v. Bell,* 430 U.S. at 792.

The application of Section 242(g) thus affects only the jurisdictional power of the Court, and not the rights of any party. *Landgraf,* 114 S. Ct. at 1501. For this reason, the *Hincapie-Nieto* court found that eliminating the court of appeals' jurisdiction over petitions for review filed by criminal aliens " 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " 92 F.3d at 29 (quoting *Landgraf,* 114 S. Ct. at 1502) (internal citations omitted). No right is implicated because the Constitution does not guarantee aliens judicial review in an Article III court. *Carlson v. Landon,* 342 U.S. 524, 537 (1952) ("[n]o judicial review is guaranteed by the Constitution [as] deportation is not a criminal proceeding and has never been held to be punishment").

The Supreme Court, moreover, determines whether and to what extent a particular statute proscribes judicial review by looking at the express language, the legislative history, and the nature of the administrative action involved. *Block v. Community Nutrition Institute,* 467 U.S. 340, 345 (1984) (citations omitted). In drafting Section 242(g), Congress was mindful of the statutory interpretation pitfalls that prior INA judicial review provisions encountered. ?? *e Cheng Fan Kwok v. INS,* 392 U.S. 206 (1970), *with Foti v. INS,* 375 U.S. 217 (1983).

In *McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 279 (1991), for example, the Supreme Court examined Section 201(e)(1) of the INA which governed the appeal procedure for seasonal agricultural workers ("SAW"). *Id.* That provision specifically prohibited judicial review "of a determination respecting an application for [SAW status]" outside the context of an exclusion or deportation hearing. *Id.* at 491-92. The Court found that Congress would have easily used broad language if it had intended to preclude constitutional and statutory challenges to the INS procedures governing the adjudication of SAW applications. *Id.* at 494. It could have modeled Section 210(e), for instance, on more expansive language such as to include "all causes ... arising under any of the provisions" of the legalization program. *Id.* Apparently heeding the Supreme Court's advice in *McNary v. Haitian Refugee Center, Inc.,* Con-

gress drafted Section 242(g) broadly to make the jurisdictional bar applicable to all causes or claims "arising from the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders." 1996 Act § 306(a), 142 Cong. Rec. 11804. This contruction gives Section 242(g) full preclusive effect.

The history of the 1996 Act also illustrates the legislative purpose to restrict federal court jurisdiction over immigration matters to the fullest extent possible. Congress has determined that aliens who have violated the United States laws shall receive no consideration by the federal courts and are to be removed from this country expeditiously. *See* Senate Judiciary Committee Report (Addendum B); *Mbiva v. INS,* 930 F. Supp. at 612. To accomplish this objective, it replaced the existing judicial review scheme with an even more restrictive procedure to be codified at INA Section 242. The new scheme encompasses the jurisdictional bar at Section 242(g), which removed the courts' prior jurisdiction to entertain collateral challenges to the Attorney General's decision making process. 1996 Act § 306(a), 142 Cong. Rec. at 11804. For non-criminal aliens, Sections 242(a)-(b) provide an expedited review procedure in the court of appeals for final orders of removal. *See id.,* §§ 306(a)-(b), 142 Cong. Rec. at 11803-11804 (to be codified at INA § 242, 8 U.S.C. § 1252). All claims brought in the court of appeals must be consolidated into one petition for review. *Id.* at § 306(a), 142 Cong. Rec. at 11804 (to be codified at INA § 242, 8 U.S.C. § 1252).[FN5] These provisions are meant to channel reviewable claims to the circuit courts, thereby restricting district court jurisdiction over immigration cases.

> FN5. The new INA Section 242(b)(9) requires consolidation of constitutional issues in the petition for review, as follows:
> CONSOLIDATION OF ISSUES 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 title shall be available only in judicial review of a final order under this section.
> 1996 Act § 306(a), 142 Cong. Rec. at 11804 (to be codified at 8 U.S.C. § 1252).

The 1996 Act thus serves Congress' purpose in limiting aliens from extending their continued illegal stay in this country by removing a level of review. *See* H. Rep. Report 104469(I) (Addendum A). Claims that are not heard in the federal courts are placed within the exclusive jurisdiction of the executive department, which traditionally had the authority to decide immigration matters. *See Langraf,* 114 S. Ct. at 1505 (citing *Hallowell v. Commons,* 239 U.S. 506, 508 (1916)) (an intervening jurisdictional statute deprives the district court of jurisdiction it formerly had and leaves the resolution of the disputes to the executive department); *see also Reno v. Flores,* 113 S. Ct. 1439, 1449 (1993) ("For reasons long ago recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"). Therefore, aliens subject to the Section 242(g) jurisdictional bar can only bring their claims before an administrative tribunal such as the immigration judge or the BIA.

In light of the express language and clear purpose of the 1996 Act, there is no constitutional infirmity in the repeal of district court jurisdiction over suits brought by criminal aliens, even if it precludes their constitutional claims. *See* *Webster v. Doe,* 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims, its intent must be clear")(citing ?? 415 U.S. 361 (1974) and *Weinberger v. Salfi,* 422 U.S. 749 (1975)); *see also* *Califano v. Sanders* 430 U.S. 99, 109 (1977). The underlying intent is to deny illegal *and* criminal aliens a judicial forum to collaterally attack their deportation, while allowing other classes to bring constitutional claims -- through a consolidated petition for review -- before the appellate court. *See* 1996 Act § 306(a), 142 Cong. Rec. at 11804. The preclusion is intentional. Congress desires that only aliens eligible for some form of relief be relied upon to thallenge agency disregard of the law. *Cf.* *Block v. Community Nutrition Center,* 467 U.S. at 345-47. The judicial review scheme created by the 1996 Act merely embodies an immigration policy that, in Congress' view, is both fair and effective.

This is not to say that plaintiffs are left with no avenues of judicial relief. In *Hincapie-Nieto,* the Second Circuit found that repeal of its prior jurisdiction to hear a criminal alien's petition for review did not mean that the federal courts are closed to all claims by such aliens in the course of deportation proceedings. 92 F.3d at 30. Citing *Felker v. Turpin,* 116 S. Ct. 2333 (1996), a case concerning the AEDPA's limitation on habeas review, the court held that aliens may nevertheless petition the Supreme Court to entertain an original habeas application. *Id.; see also* *Mbiva v. INS,* 930 F. Supp. 609.

4. Plaintiffs May Not Invoke Jurisdiction Under Any Other Statutory Provision

Finally, plaintiffs suggest that jurisdiction still lies under 28 U.S.C. § 1331, notwithstanding Section 242(g)'s bar of district court jurisdiction. They maintain that jurisdiction is preserved under the federal question statute to the extent that their case is premised on the Fifth Amendment, not the INA. P1. Opp. at 5. This argument is no more availing than the others, given that their constitutional claim is not even colorable.

Moreover, Section 242 (g) does not permit recourse to statutes other than the INA for jurisdiction. Congress intended this result when it wrote Section 242(g) in preclusive terms: "*Except as provided in this section and notwithstanding any other provision of law,* no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." 1996 Act § 306(a), 142 Cong. Rec. at 11804 (emphasis added). The statute is intended to make the INA judicial review procedure the exclusive method by which immigration claims are heard. As such, plaintiffs cannot invoke federal question jurisdiction under 28 U.S.C. § 1331, because that is prohibited under the broad language of Section 242(g).

Weinberger v. Salfi, 422 U.S. 749 (1975), presents a similar situation and is dispositive on this point. In that case, the Supreme Court found that the district

court did not have federal question jurisdiction under 28 U.S.C. § 1331 to hear the plaintiffs' constitutional claim arising under the Social Security Act, because § 405(h) of the SSA precluded any action brought against the federal government to recover social security survivor benefits. *Id.* The Court determined that the plaintiffs could not maintain an action for statutory benefits simply by arguing that is raised constitutional issues and was therefore governed by the federal question statute. *Id.* The Court further stated that while the plaintiffs' claim arose under the Constitution, it also must arise under the SSA, which "furnishes the standing and substantive basis for the presentation of their constitutional contentions." *Id.* at 760-61. "To contend that such an action does not arise under the Act whose benefits are sought is to ignore both the language and the substance of the complaint and judgment." *Id.* at 761.

In light of the *Weinberger v Salfi* analysis, plaintiffs' due process challenge to deportation cannot be independently maintained under 28 U.S.C. § 1331. Plaintiffs' legal theories do not sustain this cause of action, and as criminal aliens they are barred from asserting jurisdiction under the amended INA judicial review procedure. 1996 Act § 306(a), 142 Cong. Rec. at 11787.

CONCLUSION

For the reasons set forth above, the Court should dismiss this action in its entirety.

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