No. 95-457

In the Supreme Court of the United States

OCTOBER TERM, 1995

CESAR A. PERALES, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO OPPOSITION TO CERTIORARI

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ARGUMENT

1. Respondents defend the circuit majority's ruling by mischaracterizing it as one that "concerns only the timing of petitioners' claims [but] does not foreclose judicial review." Op. Cert. 12. According to respondents, the ruling below does not bar judicial review because petitioners' statutory and constitutional claims can be adjudicated through IRCA's limited scheme of review (8 U.S.C. § 1255a(f)) as part of an individual class member's appeal from a final order of deportation. Op. Cert. 12.

Respondents misstate the law. As this Court has twice held, IRCA's judicial review provision "applies only to review of denials of individual . . . [amnesty] applications," and "does not apply to challenges to INS's practices and procedures."[1] *CSS*, 113 S.Ct. 2485, 2494-95; *McNary v. Haitian Refugee Center*, 498 U.S. 479, 494 (1991). It affords no opportunity for review of petitioners' dissemination claims, both because the policies and practices challenged by those claims are not "denials of individual . . . applications," and because the harm inflicted by the challenged practices was to "preven[t] [class members] from filing a timely application," *Perales II*, 48 F.3d at 1313 (App. 16a), the prerequisite to obtaining review under 8 U.S.C. § 1255a(f).

In addition, this Court has twice concluded that broad-based statutory and constitutional challenges --

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1 IRCA's judicial review provision, 8 U.S.C. § 1255a(f) provides, in relevant part (emphasis added):

(4) Judicial Review. --

(A) Limitation to Review of Deportation. - There shall be judicial review *of such a denial* [of an amnesty application] only in judicial review of an order of deportation under section 106 [of the Immigration and Nationality Act] (i.e., by way of a petition for review to the court of appeals).

(B) Standard for Judicial Review. - Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

like petitioners' dissemination claims -- "could receive no practical judicial review" through IRCA's limited appeal provisions. *See CSS*, 113 S.Ct. at 2497; *McNary*, 498 U.S. at 496-97. IRCA authorizes judicial review of a denied amnesty application as part of an individual appeal -- via petition to a court of appeals -- from a final order of deportation. 8 U.S.C. § 1255a(f)(4). Review is conducted without discovery, evidentiary proceedings or independent fact-finding, but only upon the administrative record compiled by INS on the individual applicant. 8 U.S.C. § 1255a(f)(4). Because such a record is wholly insufficient to permit any "meaningful judicial review" of "procedural or constitutional claims" against general agency policies, *McNary*, 498 U.S. at 493-96, this Court has held that:

> restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims.

Id.., 498 U.S. at 497. It is therefore clear that the circuit majority's ruling does not merely affect the timing of review, but forever bars class members from presenting their substantial statutory and constitutional claims.

2. Respondents assert that the ruling below does not create a new exception to the presumption of judicial review, but their argument establishes the contrary. Like the circuit majority, respondents contend that the "first formulation" of petitioners' dissemination claim must be dismissed because it is

"inextricably intertwined with" a challenge to eligibility regulations and "turns upon a determination of [a] regulation's validity." Op. Cert. 11-12. Notably, this argument has nothing to do with ripeness. The dissemination claims are ripe -- whether or not they turn on the validity of a regulation -- if "the effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties.'" *CSS*, 113 S.Ct. at 2495 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). Petitioners satisfy this standard because both formulations of the dissemination claim allege an invasion of independent procedural interests that Congress enacted for class members' particular benefit; INS's invasion of these specific legal interests produces the requisite "concrete effect." *See* Pet. 21-24. Respondents do not argue to the contrary. Their contention that these otherwise justiciable claims may not be adjudicated because they "tur[n] upon a determination of a regulation's validity" embraces the circuit majority's misreading of *CSS* as a directive that benefit-restricting regulations be afforded special insulation from judicial review. This far-reaching misinterpretation of *CSS* warrants correction by this Court.

3. Lastly, respondents argue that certiorari should be denied because a ruling in petitioners' favor would have no practical consequence. Respondents assert that the circuit majority "[dismissed] the second formulation of the dissemination claim because it agreed with the district court that 'the INS satisfied its duty to disseminate accurate information.'" Op. Cert. 13, n.3 (*quoting Perales II*, 48 F.2d at 1317 (App. 25a)). They contend that this

ruling has not been appealed and would prevent petitioners from prevailing on the "first formulation of the dissemination claim" even if this Court were to rule that claim ripe. *Id.*

Respondents misapprehend the circuit court's holding and the scope of the Petition. The statement that respondents have excerpted from the circuit majority opinion merely specifies which part of the district court judgment was affirmed:

> For the foregoing reasons, we affirm that portion of the district court's judgment that held that INS satisfied its duty to disseminate accurate information regarding the amnesty program and remand for further proceedings as to plaintiffs' facial challenge to the public charge regulations.

Perales II, 48 F.2d at 1317 (App. 25a). The *reason* for the affirmance was the circuit majority's rulings that (1) the "first formulation" of the dissemination claim was not justiciable, and (2) the "second formulation" was not established on the merits. The circuit majority never reached the issue presented by the *merits* of the "first formulation," *viz.*, whether INS violated 8 U.S.C. § 1255a(i) by publicizing illegally restrictive eligibility regulations. And nothing elsewhere in the opinion purports to decide that question. At all events, since the only issue presented by the "second formulation" was whether INS adequately communicated its own eligibility policies, any statement that might be read as deciding the legality of disseminating concededly illegal

eligibility regulations is unnecessary to the holding and must be regarded as non-binding *dicta*.

Respondents' argument also overlooks the fact that the Petition seeks review not only of the circuit majority's ripeness ruling (Question 2), but also of its interpretation and application of *CSS* to other aspects of the case (Questions 1 & 3), including the application of *CSS* to the adjudication of fact and mixed fact-law questions "in the concededly ripe portions [*i.e.*, the "second formulation"] of Petitioners' claims." Pet. 24-25.

CONCLUSION

For all the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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