No. 19-438

In the Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 et seq., an alien who has been convicted of certain offenses, including a "crime involving moral turpitude," is statutorily ineligible for discretionary cancellation of removal. 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I); see 8 U.S.C. 1229b(b)(1)(C). In determining an alien's eligibility for cancellation of removal or any other "relief or protection from removal," the alien bears the burden of proof to establish that he "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d). The question presented is:

Whether an alien carries his burden of proving his eligibility for cancellation of removal where the alien has been convicted under a statute defining multiple crimes, at least some of which would constitute disqualifying offenses, but the record is inconclusive as to which crime formed the basis of the alien's conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

The petitioner seeks cancellation of the removal proceedings against him and, thus, sues the Attorney General of the United States (the "Government") to establish his entitlement to that relief on the theory that his conviction for identity theft under a Nebraska statute does not necessarily establish that he acted with intent to defraud (that is, that he committed a crime of moral turpitude).

Constitutional Background

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power over immigration, *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), which Congress can and, in part, has delegated to the Executive Branch. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950).

Legislative and Regulatory Background

The Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"), sets the terms under which aliens lawfully may enter and remain in the United States. As relevant here, the INA provides expedited removal for certain aliens convicted of crimes, but also provides the Attorney General with discretion to cancel removal for less serious crimes:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien … has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5).

8 U.S.C. § 1229b(b)(1)(C). Both the INA itself and the implementing regulations provide that aliens bear the burden of establishing their entitlement to relief from removal. 8 U.S.C. § 1229a(c)(4)(A)(i); 8 C.F.R. § 1240.8(d). The Attorney General promulgated the implementing rule in 1997, 62 Fed. Reg. 10,312, 10,368 (Mar. 6, 1997), after issuing a proposed rule and taking comment. 62 Fed. Reg. 444, 491 (Jan. 3, 1997).

Factual Background

IRLI adopts the facts as stated by the Government brief. *See* Gov't Br. at 7-13.

SUMMARY OF ARGUMENT

Under the INA, the modified categorical approach is appropriate for divisible statutes because it correctly places the burden of proof on aliens to show their entitlement to relief from removal by first identifying their statute of conviction, before the categorical approach is applied to identify the comparable federal crime (Section I.A). The INA bars review of the INA's implementing regulations outside of review for unconstitutionality (Section I.B). In any event, the implementing regulations — which place the burden on aliens in this context — are correct under the INA itself, under the rules of statutory construction on eligibility for exemptions generally, and under the requirement of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), for deference to agencies' interpretations of statutes that they administer (Section I.C).

Finally, the petitioner's proposed rival allocation of the burden of proof to the Government would be unworkable: several states already openly flout

federal enforcement authority over immigration; putting the burden on the Government to produce evidence of state-court proceedings would give states the power of nullification over federal enforcement efforts and thus defeat the goal of uniformity in the enforcement of our immigration laws (Section II).

ARGUMENT

I. THE EIGHTH CIRCUIT CORRECTLY ANALYZED THE CASE.

This Court should affirm the Eighth Circuit's use of the "modified categorical approach" for "divisible statutes" of conviction. The nature of the petitioner's crime of conviction cannot be ascertained from the record the petitioner provided to the agency, and he bore the burden of proving his entitlement to an exemption from removal. Because he failed to meet that burden, the Eighth Circuit correctly denied his petition for review.

A. A "modified categorical approach" applies to divisible statutes.

Both the Board of Immigration Appeals and the Eighth Circuit found Nebraska's identify-theft statute divisible (that is, it contains multiple crimes, some — such as fraud — evincing moral turpitude and others not) and used the modified categorical approach to find that the petitioner failed to carry his burden of proving his eligibility for cancellation of removal. *Pereida v. Barr*, 916 F.3d 1128, 1130-31 (8th Cir.), *cert. granted* 140 S. Ct. 680 (2019). As the Government explains, in asking this Court to expand the categorical approach to cover both an identification of an alien's state crime of conviction and a determination of whether that crime is a disqualifying

one, the petitioner conflates two distinct issues. Resp.'s Br. at 33. The categorical approach applies only to the second issue. The first issue remains an evidentiary one, on which the alien bears the burden of proof.

B. The petitioner cannot challenge 8 C.F.R. § 1240.8(d) as *ultra vires* under the INA.

Although the INA allows "review of constitutional claims or questions of law raised upon a petition for review," it does not allow systemic review of the INA's implementing regulations. *Compare* 8 U.S.C. § 1252(a)(2)(D) *with id.* § 1252(e)(3)(A)-(B). The petitioner cannot, therefore, challenge 8 C.F.R. § 1240.8(d) on *non-constitutional* bases such as the rule's failure to conform to the INA.

To be sure, courts sometimes allow what would be a time-barred direct challenge to a rule "apart from the original rulemaking… when [a] rule is brought before [a] court for review of [agency] action applying it." *Murphy Explor'n & Prod'n Co. v. Dep't of Interior,* 270 F.3d 957, 958-59 (D.C. Cir. 2001). But that line of cases is inapposite in the face of a statute precluding or channeling review. *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 457 (D.C. Cir. 2013) (Kavanaugh, J.). Like the Clean Air Act in then-judge Kavanaugh's decision, the INA precludes systemic review and channels it to the federal courts in the District of Columbia Circuit. *Compare* 42 U.S.C. § 7607(b)(1) *with* 8 U.S.C. § 1252(e)(3)(A)-(B). Such statutes evince "the twin congressional purposes of insuring that the substantive provisions of the standard would be uniformly applied and interpreted and that the circumstances of its adoption would be

quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978). If anything, national uniformity is even more important for immigration law than for Clean Air Act emission standards. *See, e.g., Arizona v. United States*, 567 U.S. 387, 394-95 (2012) (quoting U.S. CONST. art. I, § 8, cl. 4 on the congressional power to "'establish an uniform Rule of Naturalization'").

As with the Clean Air Act, the INA requires that all challenges to systemic INA rules be brought in the District of Columbia, 8 U.S.C. § 1252(e)(3)(A), within 60 days of a rule's promulgation. *Id.* § 1252(e)(3)(B). This Court should not allow the circumvention of statutes that preclude systemic review.

C. 8 C.F.R. § 1240.8(d) correctly allocates the burden of proof for the modified categorical approach.

Even if the petitioner could challenge the merits of 8 C.F.R. § 1240.8(d), that challenge would fail for three reasons: (1) the regulation correctly reflects the INA, (2) the regulation and the INA reflect the basic, blackletter law that those seeking an exemption bear the burden of establishing their entitlement to that exemption, and (3) the regulation warrants deference under *Chevron*. Each reason is independently fatal to the petitioner's position.

First, the INA itself expressly provides that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien … satisfies the applicable eligibility requirements." 8 U.S.C. § 1229a(c)(4)(A)(i). The regulation thus fits comfortably within the INA's plain terms.

Second, even if the INA did not expressly give the alien the burden of proof, Congress enacts statutes against the background rule that those who claim an exemption bear the burden of proving their entitlement to that exemption:

> [T]he general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof [here].

FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948) (citing *Javierre v. Cent. Altagracia*, 217 U.S. 502, 507-08 (1910) and cases cited therein); *Javierre*, 217 U.S. at 508 ("those who set up such exception must prove it"); *accord NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001). As this Court put it in an early case, "those who set up any such exception, must establish it as being within the words as well as within the reason thereof." *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841). Moreover, the Court described this as "the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes." *Id.* Under our legal tradition, it is entirely unsurprising that aliens bear the burden of proving their entitlement to exemptions from the INA to forgive their criminal convictions.

Third, even if there were some ambiguity — and there is not — this Court should afford deference to the Government's interpretation of the INA. *Chevron*, 467 U.S. at 842-43; *see also Ky. River Cmty. Care*, 532 U.S. at 713 (applying *Chevron* deference). In short,

this Court should reject the petitioners' invitation to overturn or ignore 8 C.F.R. § 1240.8(d).

II. IMPOSING THE BURDEN OF PROOF ON THE GOVERNMENT IS UNWORKABLE.

As the Attorney General explains, the burden of proof belongs with the alien, who has the incentive and access to preserve the records that might answer the questions posed by the modified categorical approach. *See* Resp.'s Br. at 46-47. Recalling that the issue here is whether criminal aliens should remain in the United States, the policy arguments pressed by the petitioner and his *amici* fall short.

One group of *amici* argue that "even where misdemeanor records once existed, they may have been destroyed or may be otherwise inaccessible." Nat'l Ass'n of Crim. Def. Lawyers *Amici* Br. at 13-16. While *amicus* IRLI respectfully submits that possible loss of relevant records is the alien's risk and burden, it also bears emphasizing that putting the burden on the federal Government would be completely unfair: too many states already flout immigration laws and would thus likely destroy such records expressly to prevent the Government's access to them.

While the intentional shielding of illegal aliens may not be a problem in Nebraska, it is a problem in many states. *See*, *e.g.*, *United States v. California*, No. 19-532 (U.S.) (petition for a writ of *certiorari* to review state laws designed to shield illegal aliens from detection); Driver's License Access and Privacy Act, S.B. 1747-B, 247th Legis. Sess. (N.Y. 2019) (New York law shielding state driver's license records from federal immigration enforcement); *New York v. United States DOJ*, Nos. 19-267(L), 19-275(con), 2020

U.S. App. LEXIS 5831, at *4 (2d Cir. Feb. 26, 2020) ("States and localities … enforce[] … their own laws [to] adopt policies to extricate themselves from, hinder, or even frustrate the enforcement of federal immigration laws"). Placing the burden of proof on the federal Government would balkanize immigration enforcement in the United States — *viz.*, between states like California and New York and states like Nebraska — because it would empower the former group of states to frustrate or nullify the federal Government's plenary immigration powers. This Court should not enable these states to take yet further unconstitutional actions to thwart federal efforts to enforce the INA.

CONCLUSION

The Court should affirm the Court of Appeals.

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Respectfully submitted,

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