Nos. 14-50393, 14-50394

United States Court of Appeals for the Ninth Circuit

United States of America,
Plaintiff-Appellee,

v.

Rufino Peralta-Sanchez,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of California (Burns, L.)

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN OPPOSITION TO DEFENDANT-APPELLANT'S PETITION FOR EN BANC REHEARING

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Immigration Reform Law Institute (IRLI) is a 501(c)(3) not for profit charitable organization incorporated in the District of Columbia. IRLI has no parent corporation. It does not issue stock.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this *amicus curiae* brief to assist this Court in understanding why *en banc* review of this case would be a striking misuse of judicial resources.

Both of the parties have stated in writing that they consent to the filing of this *amicus curiae* brief.

RULE 29(A)(4)(E) STATEMENT

No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

Petitioner and the numerous *amici curiae* supporting him offer up a grand vista: a sweeping, groundbreaking new due process rule, issued by this Court sitting *en banc*, that will correct a supposed injustice faced by, in petitioner's words, "millions of people." Petition, Doc. No. 46, at 2; *id.* ("[T]he right to counsel [would] protect[] millions of noncitizens from grave due process violations and would result in little inconvenience to the Government"); *see also, e.g.*, Brief of the ACLU Immigrant Rights Project, *et al.* ("ACLU Br."), Doc. No. 60, at 3 ("Whether noncitizens in expedited removal have the right to representation by counsel of their own choosing is . . . a question of exceptional importance.").

This vista is an illusion. For at least two reasons, this Court is hardly in a position to consider, let alone issue, such a sweeping ruling. First, an act of Congress has removed this Court's jurisdiction to hear petitioner's general challenge to the expedited removal statute. Second, this Court lacks reliable evidence on which to base the sweeping ruling petitioner seeks, because no evidence that might be pertinent to alleged injustices faced by millions of people was developed or tested in the trial court. Instead, petitioner and some *amici* seek to submit evidence that they claim is so pertinent for the first time on appeal. For this Court to consider such evidence – let alone grant *en banc* review for the purpose of considering it – would be to flout the bedrock principle that appellate

courts, when considering evidence, should confine themselves to evidence in the record of trial.

Given these limitations, petitioner's remaining case is too particularized and narrow to have the "exceptional importance" that may merit *en banc* consideration.

I. *EN BANC* REVIEW IS A SHARPLY LIMITED JUDICIAL RESOURCE.

In the overwhelming majority of cases, decisions by federal courts of appeals are made by three-judge panels. Accordingly, *en banc* review is called for only when the uniformity of the court's precedents is at issue, or when a case is of exceptional importance. *See, e.g., Makaeff v. Trump Univ., LLC,* 736 F.3d 1180, 1180 (9th Cir. 2013) ("'En banc courts are the exception, not the rule.' They are 'not favored,' and 'convened only when extraordinary circumstances exist.'") (Warlaw, J., and Callahan, J., concurring in denial of rehearing *en banc*) (quoting *United States v. American-Foreign S.S. Corp*., 363 U.S. 685, 689 (1960), Fed. R. App. P. 35); *United States v. Burdeau,* 180 F.3d 1091, 1092 (9th Cir. 1999) ("The criteria for taking a case en banc are clear and well-established – either necessity to secure or maintain uniformity of the court's decisions, or to decide a question of exceptional importance.") (Tashima, J., concurring in denial of rehearing *en banc*) (internal citations and quotation marks omitted). As a judge on this Court has explained:

> Most of us vote against most such petitions and suggestions even when we think the panel decision is mistaken. We do so because federal courts of appeals decide cases in three judge panels. En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases.

United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1994) (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

Here, the question petitioner presents does not involve the uniformity of this Court's decisions, and its claimed "exceptional importance" is illusory.

II. THIS COURT HAS UNIFORMLY HELD THAT ALIENS LACK THE RIGHT TO CONSULT ATTORNEYS IN EXPEDITED REMOVAL PROCEEDINGS.

There is no question about the uniformity of this Court's precedents in the instant case. In *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1080, 1088 (9th Cir. 2011), which involved a challenge by an alien who had arrived at a designated port of entry, this Court held that the alien's lack of access to a lawyer did not deprive him of due process. *See also United States v. Grande*, 623 Fed. Appx. 858, 860 (9th Cir. 2015) ("[Appellant] was not entitled to representation by counsel during his expedited removal proceedings") (citing *Barajas, supra*). The panel that decided this case held the same, even though petitioner did not arrive at a designated port of entry, but instead sneaked over the border. *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1139 (9th Cir. 2017). Nor have district courts in

this circuit had trouble applying the case law in this area. *See United States v. Arteaga-Gonzalez*, Case No. 12-CR-4704-L, 2013 U.S. Dist. LEXIS 141723, *10 (S.D. Cal. 2013) ("There is no right for non-admitted aliens to counsel in expedited removal proceedings"). There is no lack of uniformity on this issue in this circuit, though it is not a uniformity to petitioner's advantage.

III. THIS CASE LACKS EXCEPTIONAL IMPORTANCE.

Petitioner thus claims that this case is of exceptional importance. Petition at 2. In fact, however, petitioner's case presents no broad, exceptionally-important issue for the *en banc* Court to decide, for two reasons.

A. *This Court Does Not Have Jurisdiction To Hear Petitioner's Facial Challenge.*

Petitioner claims generally that aliens have a constitutional right to counsel in expedited removal. Petition at 5. *Amici* echo this claim. *See, e.g.*, Brief of Nonprofit Immigration Organizations and Law School Immigration Clinics, Doc. No. 55 ("Nonprofit Imm. Orgs. Br."), at 3 ("Recognizing a due process right to counsel is necessary to curb a system that, in practice, routinely wrongfully removes the most vulnerable immigrants."); ACLU Br. at 11-12 ("The opportunity to retain counsel of one's own choosing would supply one of the few structural checks on the nearly untrammeled authority of immigration officers.").

As the Court held in this case, the expedited removal statute, properly construed, does not allow for lawyers at expedited removal proceedings. *Peralta,*

847 F.3d at 1133 (holding that Congress intentionally omitted to provide the privilege of representation by counsel to aliens in expedited removal proceedings); *see also* ACLU Br. at 3 ("[This] Court held that even if Mr. Peralta could provide his own counsel, Congress intended . . . a *prohibition on lawyers* in expedited removal proceedings.") (emphasis in original). Thus, when petitioner urges this Court to promulgate a broad new due process rule diametrically opposed to this statutory bar on lawyers – to wit, that *every* detainee undergoing expedited removal proceedings is entitled to consult a lawyer – he is making a general, facial challenge to the constitutionality of the statute. *See Peralta,* 847 F.3d at 1134 ("Because he has no statutory right to obtain counsel in an expedited proceeding, Peralta asks us to find that he has a constitutional right to do so. In this context, Peralta is asking us to find the INA unconstitutional because [8 U.S.C.] § 1225 does not provide an alien a right to counsel and, as we noted in the prior section in this context, we must presume the omission is deliberate.").

By statute, such general challenges must originate in the U.S. District Court for the District of Columbia. "Judicial review of determinations under section 235(b) [8 USCS § 1225(b)] and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of [] whether such section . . . is constitutional." 8 U.S.C. § 1252(e)(3). This Court has held that, § 1252(e)(3) notwithstanding, an

alien is entitled to challenge his expedited removal proceedings as "fundamentally unfair." *Barajas*, 655 F.3d at 1085 ("[A]n alien previously removed pursuant to an expedited removal order must receive some judicial review of the proceeding resulting in that order if the alien challenges the expedited removal order as fundamentally unfair, and the order is to play a critical role in the subsequent imposition of a criminal sanction. Under our case law, a predicate removal order satisfies the condition of being fundamentally unfair . . . when the deportation proceeding violated the alien's due process rights and the alien suffered prejudice as a result.") (internal citations and quotation marks omitted). But this Court also recognizes that § 1252(e)(3) limits jurisdiction to hear *general* challenges to the expedited removal process. *Id.* at 1086 n.10 (rejecting appellant's general challenges to the expedited removal process because "§ 1252(e)(3) limits jurisdiction over general challenges to expedited removal proceedings to actions instituted in the United States District Court for the District of Columbia.") (internal citations and quotation marks omitted).

At most, then, petitioner may make an as-applied challenge to the statute; that is, he may claim that, in the circumstances of his case, he was denied due process because he did not have access to an attorney. As explained in Section C below, that claim is too narrow and particular to merit the extraordinary recourse of *en banc* rehearing, and, at any rate, petitioner is unlikely to succeed in it.

B. *This Court Should Not Convene* En Banc *To Consider Evidence Outside Of The Record.*

Without so much as a motion for leave to supplement the record, petitioner, to support his broad challenge, relies on evidence never presented in the court below and outside of the record on appeal. Petition at 7-9, 11, 13 (citing a publication by the ACLU Foundation available on the internet), 11 (citing a journal article noting "'many stories of low-level INS inspectors . . . remov[ing] and impos[ing] a five-year bar against legal permanent residents [and] foreign nationals carrying valid business or visitor visas"') (ellipses and brackets in original). For their part, various *amici* also rely on such evidence. *E.g.*, ACLU Br. at 7, 9 (citing the same ACLU internet publication as petitioner), 9 (citing an internet publication by the Borderland Immigration Council); Nonprofit Imm. Orgs. Br. at 3, 14 (citing an internet publication by Human Rights Watch), 14 (citing an internet publication by Human Rights First), 17 (citing an internet publication by Disability Rights International). The latter *amicus* even goes so far as to present anonymous "client stories" as evidence. *Id.* at 5, 9-13, 15-17.

For this Court to consider such evidence would violate a fundamental tenet of appellate adjudication, not to mention the rules of evidence. *E.g.*, *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) ("'It is a basic tenet of appellate jurisprudence . . . that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below.'") (quoting *Tonry v. Sec. Exports*,

Inc., 20 F.3d 967, 974 (9th Cir. 1994)); *Harkins Amusement Enter., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988) ("[Appellate review is] limited to consideration of issues of fact presented to the district court."); *see also Brown v. Plata*, 563 U.S. 493, 555 (2011) ("The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take 'judicial notice') exclusively upon a closed trial record. That is one reason why a district judge's factual findings are entitled to clear-error review: because having viewed the trial first hand he is in a better position to evaluate the evidence than a judge reviewing a cold record.").

Instead of unilateral record supplementation, the normal – and, for the administration of justice, obviously far better – course for litigants who wish to rely on such evidence as social science studies, expert testimony, and anecdotal accounts by fact witnesses is to present such evidence in the trial court, where it can be tested, and made more reliable, by cross-examination, objection, and opposing evidence. *See, e.g.*, *Andersen v. Cumming*, 827 F.2d 1303, 1305 (9th Cir. 1987) ("The appealing litigant must ensure that sufficient facts are developed at trial to support a challenge on appeal.").

Thus, even if this Court had jurisdiction to hear petitioner's broad challenge, it would lack the broad facts necessary to evaluate it. If, as petitioner urges, it were to consider evidence that was never tested in the court below, it would not only

depart from its character as an appellate court, but run the serious risk of reaching a broad due process holding – and an *en banc* holding, at that – based on faulty evidence.

C. *Petitioner's Remaining Case Is Narrow, Particular, And Unlikely To Succeed.*

To prevail on any as-applied challenge petitioner may make to his lack of access to a lawyer at his expedited removal proceeding, petitioner must show that, because of his lack of access, he was denied due process in that proceeding and suffered prejudice as a result. *Barajas*, 655 F.3d at 1087-88. Here, petitioner asserts that his inability to have counsel at his expedited removal proceeding deprived him of the ability to take advantage of withdrawal relief. Petition at 17–19.

The Ninth Circuit uses a two-step test to determine whether the alien suffered prejudice:

> First, we identify the factors relevant to the [immigration official's] exercise of discretion for the relief being sought. Next, we determine whether, in light of the factors relevant to the form of relief being sought, and based on the unique circumstances of the alien's own case, it was plausible (not merely conceivable) that the [immigration official] would have exercised his discretion in the alien's favor.

United States v. Rojas-Pedroza, 716 F.3d 1253, 1263 (9th Cir. 2013). Such an analysis is highly factual and case specific.

When the question is whether it is plausible that a defendant would have been offered withdrawal relief, the Court looks to the factors in the Inspector's Field Manual the agency uses to determine whether such relief should be granted: "(1) the seriousness of the immigration violation; (2) previous findings of inadmissibility against the alien; (3) intent on the part of the alien to violate the law; (4) ability to easily overcome the ground of inadmissibility; (5) age or poor health of the alien; and (6) other humanitarian or public interest considerations." *Barajas*, 655 F.3d at 1090. The Court then applies these factors to the specific facts of the case to determine whether it was plausible that the defendant would have been offered withdrawal relief. *E.g.*, *United States v. Garcia-Gonzalez*, 791 F.3d 1175, 1179-80 (9th Cir. 2015); *United States v. Raya-Vaca*, 771 F.3d 1195, 1207-10 (9th Cir. 2014); *Rojas*, 716 F.3d at 1264-67; *Barajas*, 655 F.3d at 1090-91. The panel here followed this same process. *Peralta*, 847 F.3d at 1140-42. Such a case-specific, fact-intensive inquiry does not constitute a question of exceptional importance. *See United States v. Koon*, 6 F.3d 561, 564–65 (9th Cir. 1993) (Rymer, J. concurring in the order denying rehearing *en banc*) (explaining that an inquiry about whether exceptional reasons for bail on appeal had been shown was not a question of exceptional importance because it was highly fact-intensive).

Petitioner asserts that this process erects an impossible standard. Petition at 17-19 (arguing that because the analysis "'focus[es] on whether aliens with similar circumstances'" received relief, a defendant must show that such aliens received relief in order to meet the plausibility standard, and that because such data is not available, no such showing is possible) (quoting *Rojas*, 716 F.3d at 1263). But it is far from impossible to show plausibility under the Ninth Circuit standard. Even in *Rojas*, the Court compared the facts of the defendant's case with the guidelines established by the agency for granting withdrawal relief to determine whether it was plausible that such relief would be granted. *Id.* at 1265.

Furthermore, in practice defendants do meet the plausibility standard. *E.g.*, *Raya*, 771 F.3d at 1207-11 (reversing conviction for illegal reentry because, in the predicate expedited removal proceeding, the alien's due process rights were violated and the alien could plausibly have been granted withdrawal relief); *United States v. Grande*, 623 F. Appx. 858, 861 (9th Cir. 2015) (reversing illegal reentry conviction of alien on the ground that, in the predicate expedited removal proceeding, the alien's due process rights were violated because the charge was not explained to him and the alien could plausibly have been granted withdrawal relief in light of, *inter alia*, his minimal criminal history); *United States v. Arteaga-Gonzalez*, Case No. 12-CR-4704-L, 2013 U.S. Dist. LEXIS 141723, *9-22 (S.D. Cal. 2013) (dismissing indictment for illegal reentry on the ground that, in

defendant's predicate expedited removal proceeding, he was denied due process because he was not advised of the charges against him and did not have a chance to refute the statement that he made a false claim to citizenship, and it was plausible that a request for withdrawal relief would be granted); *United States v. Mejia-Avila,* Case No. 2:14-CR-0177-WFN-1, 2016 U.S. Dist. LEXIS 46158, *2-6 (E.D. Wash. 2016) (dismissing indictment for illegal reentry because, in the predicate expedited removal proceeding, the alien had not signed the form acknowledging his rights and it was plausible that he would have been granted withdrawal relief).

CONCLUSION

For the foregoing reasons, *en banc* review should be denied.

DATED: May 26, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 26, 2017. I certify that participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Christopher J. Hajec
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Circuit Rule 29(2) because it contains 3,039 words according to the word count feature of Microsoft Word, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Christopher J. Hajec
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