No. 05-467

In the Supreme Court of the United States

MIGUEL ANGEL RAMOS, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether it violates the equal protection component of the Due Process Clause of the Fifth Amendment to remove an alien on the basis of a conviction expunged under a state rehabilitative statute if the alien satisfied the requirements of the Federal First Offender Act, 18 U.S.C. 3607.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 414 F.3d 800. The decisions of the Board of Immigration Appeals (Pet. App. 12-14) and the immigration judge (Pet. App. 15-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2005. The petition for a writ of certiorari was filed on October 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Aliens convicted of certain drug offenses face a number of immigration consequences. For example, under Section 212(a)(2)(A)(i)(II) of the Immigration and

Nationality Act (INA), 8 U.S.C. 1182(a)(2)(A)(i)(II), an alien convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)" is inadmissible. See also 8 U.S.C. 1227(a)(2)(B)(i) (alien convicted of drug offense is deportable).

In 1984, Congress enacted the Federal First Offender Act (FFOA), 18 U.S.C. 3607. Under that law, if a person is found guilty of simple possession of a controlled substance, in violation of 21 U.S.C. 844, has no prior drug convictions, and has not previously had a case disposed of under the FFOA, the district court may place the person on probation "for a term of not more than one year without entering a judgment of conviction." 18 U.S.C. 3607(a). If, at the end of the term of probation, the person has not violated any condition of probation, "the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation." *Ibid.* If a conviction is expunged under the FFOA, it "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. 3607(b). In *In re Manrique*, 21 I. & N. Dec. 58 (1995), the Board of Immigration Appeals (BIA) ruled that "an alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) * * * had he been prosecuted under federal law." 21 I. & N. Dec. at 64.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322(a),

110 Stat. 3009-628, Congress amended the INA by adding Section 101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A), which defines "conviction." Under that provision, the term means either that there has been "a formal judgment of guilt of the alien entered by a court" or that "adjudication of guilt has been withheld" but "(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt" and "(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." *Ibid.* In *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999), vacated *sub nom. Lujan-Armendariz* v. *INS*, 222 F.3d 728 (9th Cir. 2000), the BIA ruled that its decision in *Manrique* had been "superseded by section 101(a)(48)(A)." 22 I. & N. Dec. at 528. Under *Roldan*, "[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Ibid.*

2. Petitioner is a native and citizen of Mexico who entered the United States illegally at an unknown place and time. Pet. App. 2-3. In August 2000, he was charged with attempted possession of cocaine, in violation of Neb. Rev. Stat. §§ 28-201 and 28-416 (2003). Pet. App. 2. He pleaded *nolo contendere* and was sentenced to a fine of $500. *Id.* at 3.

In January 2003, the Immigration and Naturalization Service (INS) initiated removal proceedings. Pet. App. 3.[1] It alleged that petitioner was removable on two inde-

[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement

pendent grounds: he was "[a]n alien present in the United States without being admitted or paroled," 8 U.S.C. 1182(a)(6)(A)(i); and he had been convicted of an offense "relating to a controlled substance," 8 U.S.C. 1182(a)(2)(A)(i)(II). Pet. App. 3.

After the commencement of removal proceedings, petitioner filed a motion in Nebraska court to set aside his drug conviction. Pet. App. 3. Petitioner relied (*id.* at 3-4) on Neb. Rev. Stat. § 29-2264 (2003), which permits a person sentenced only to a fine to petition the sentencing court to set aside the conviction; directs the court, in ruling on such a motion, to consider the person's behavior after sentencing, the likelihood that he will not commit other crimes, and any other relevant information; and provides that an order setting aside a conviction shall "[n]ullify the conviction" and "[r]emove all civil disabilities and disqualifications imposed as a result of the conviction." *Id.* § 29-2264(2), (3) and (4). In March 2003, the court granted the motion. Pet. App. 4. Its order stated that "the adjudication previously entered by this Court is hereby set aside and nullified, and the Court further orders that all civil disabilities and disqualifications imposed as a result of said adjudication are hereby removed." *Ibid.*

3. An immigration judge (IJ) ruled that petitioner was removable on both of the grounds alleged, and ordered him removed to Mexico. Pet. App. 15-18. Relying on the definition of "conviction" in Section 101(a)(48)(A) of the INA and the BIA's decision in *Roldan*, the IJ rejected petitioner's contention that he was not removable

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in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

under Section 212(a)(2)(A)(i)(II) of the INA because his conviction had been expunged. Pet. App. 16-18.

Petitioner appealed the IJ's decision to the BIA. Pet. App. 6. Before the appeal was decided, petitioner returned to the Nebraska court and obtained an order, *nunc pro tunc*, that reissued the March 2003 expungement order and added the following language: "The Court further finds that since the Defendant was sentenced to a fine only, that rehabilitative efforts of the Defendant are not considered or relevant under Nebraska Revised Statutes § 29-2264, and the Defendant is entitled to have said judgment set aside without a showing of rehabilitation." *Id.* at 5-6. After the order was reissued, petitioner filed a motion with the BIA to remand the case to the IJ with instructions to reconsider his decision. *Id.* at 6.

4. The BIA dismissed petitioner's appeal and denied his motion for a remand. Pet. App. 12-14. In denying the motion, the BIA explained that the Nebraska court's *nunc pro tunc* order "does not change the nature of the statute, which is a state rehabilitative statute," and that, under Section 101(a)(48)(A) and *Roldan*, an alien "remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure." Pet. App. 14.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1-11.

Petitioner's first contention on appeal was that "the manner in which the government conducted the proceedings before the IJ violated his due process rights." Pet. App. 6. The court of appeals rejected that contention on the ground that, "[w]hether or not [petitioner] is correct that the IJ's procedures fell short of the constitutionally

required standard," he "cannot show prejudice on this record." *Id.* at 7. In so holding, the court noted that petitioner "does not, even now, challenge the truth of the five allegations on which the IJ relied"—namely, that petitioner is not a national of the United States; that he is a native and citizen of Mexico; that he arrived in the United States at an unknown place and time; that he was not then admitted or paroled after inspection by an immigration officer; and that he was convicted of attempted possession of cocaine in a Nebraska court. *Id.* at 9. The court also observed that the first four allegations were "enough in themselves to support the order of removal" without regard to petitioner's claim concerning the drug conviction. *Ibid.*

Petitioner's second contention on appeal was that "it violates equal protection principles to remove him based on his now-expunged, minor state court conviction," when, according to petitioner, "the government could not remove him on that basis had he been convicted under the analogous [FFOA]." Pet. App. 6. The court of appeals rejected that contention on three grounds. First, the court relied on *Gill* v. *Ashcroft*, 335 F.3d 574 (7th Cir. 2003), which "upheld the rule of *Matter of Roldan*," Pet. App. 6, and rejected a claim that was "similar" to the one raised by petitioner, *id.* at 10. Second, the court believed that the premise that "someone with a FFOA conviction would escape immigration consequences" is "not necessarily correct." *Id.* at 11. The court explained that, "since the 1996 changes to the INA, the BIA has never used the FFOA to preclude removal," and that it therefore cannot be known "what the BIA would do if * * * confronted with this situation" or "whether its decision would pass legal muster." *Ibid* Third, the court believed that, even if the FFOA *would*

preclude removal of an alien convicted of a federal drug offense, the assumption that "it is utterly irrational to treat [convictions covered by] the FFOA and state convictions like [petitioner's] differently" goes "too far." *Ibid*. The court explained that "[s]tate laws vary considerably," and that "the BIA (as well as Congress) reasonably might have thought that the law should entitle only persons who actually have been charged and sentenced under the FFOA to leniency for immigration purposes." *Ibid*.

ARGUMENT

Petitioner contends (Pet. 5-16) that removing him on the basis of his drug conviction violated his right to equal protection. The court of appeals correctly held otherwise, and further review is unwarranted.

1. Petitioner's equal protection theory has two parts. First, petitioner contends that, in determining the immigration consequences for an alien convicted of a *federal* offense who satisfies the requirements of the FFOA, it is the FFOA rather than Section 101(a)(48)(A) of the INA that governs, because the latter provision "did not * * * repeal" the former. Pet. 13. Second, petitioner contends that, in determining the immigration consequences for an alien convicted of a *state* offense who has had the conviction expunged under a state rehabilitative statute and satisfies the requirements of the FFOA, it is likewise the FFOA rather than Section 101(a)(48)(A) that must govern, because there is no rational basis for treating state and federal convictions differently, and doing so would therefore be "incompatible with the tenets of equal protection of the law." Pet. 16. Petitioner's theory lacks merit, because each part of it is mistaken.

First, as the court of appeals recognized, and as respondent concedes (Pet. 14), "the BIA has never used the FFOA to preclude removal" of an alien convicted of a federal offense "since the 1996 changes to the INA" (Pet. App. 11). It therefore cannot be known "what the BIA would do if it were confronted with this situation," or "whether its decision would pass legal muster." *Ibid* If the BIA ultimately decided that it is Section 101(a)(48)(A) rather than the FFOA that governs *federal* convictions, and if courts sustained that decision, there would be no basis for a claim that the FFOA must govern *state* convictions as a matter of equal protection.

There is, moreover, a substantial basis on which the BIA could determine that Section 101(a)(48)(A) governs federal convictions. As Judge Easterbrook has explained, that provision "affects only immigration matters; even if a disposition under [the FFOA] counts as a conviction in immigration law, it would not be a conviction for other purposes, such as firearms disabilities." *Gill* v. *Ashcroft*, 335 F.3d 574, 578 (7th Cir. 2003). Accordingly, Section 101(a)(48)(A) and the FFOA "may coexist, though the former reduces the domain of the latter." *Ibid*. See also *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 331 n.12 (5th Cir. 2004) ("We have substantial doubt whether the FFOA controls over the subsequently enacted §1101(a)(48)(A).").

Second, even assuming that the FFOA would govern *federal* convictions, there is a rational basis for treating *state* convictions differently, and there is consequently no equal protection violation. As Judge Alito has explained, Congress was "[f]amiliar with the operation of the federal criminal justice system," and therefore "could have thought that aliens whose federal charges are dismissed under the FFOA are unlikely to present

a substantial threat of committing subsequent serious crimes." *Acosta* v. *Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003). In contrast, Congress may have been "unfamiliar with the operation of state schemes that resemble the FFOA," and therefore "could have worried that state criminal justice systems, under the pressure created by heavy case loads, might permit dangerous offenders to plead down to simple possession charges and take advantage of those state schemes to escape what is considered a conviction under state law." *Ibid*. Particularly given Congress's broad "power in immigration matters," there "plain[ly]" is a rational basis for the distinction between federal and state convictions. *Ibid*. Accord *Resendiz-Alcaraz* v. *U.S. Attorney General*, 383 F.3d 1262, 1272 (11th Cir. 2004) (endorsing Judge Alito's reasoning); *Madriz-Alvarado*, 383 F.3d at 332 (same).

2. As noted above, the rule that petitioner challenges—that, in light of Section 101(a)(48)(A) of the INA, a state rehabilitative action that does not vacate a conviction on the merits or on a ground related to the violation of a statutory or constitutional right has no bearing on whether an alien has been "convicted" for immigration purposes—was adopted by the BIA in *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999). On petition for review, the BIA's decision in that case was vacated by the Ninth Circuit. *Lujan-Armendariz* v. *INS*, 222 F.3d 728 (2000). The court rejected the INS's argument that Section 101(a)(48)(A) "partially repeal[ed]" the FFOA, *id*. at 743, and then held that, "as a matter of constitutional equal protection," the benefits of the FFOA must be "extended to aliens whose offenses are expunged under state rehabilitative laws, provided that they would have been eligible for relief under the

[FFOA] had their offenses been prosecuted as federal crimes," *id*. at 749.

While the BIA is bound by *Lujan-Armendariz* in the Ninth Circuit, it has made clear that it will continue to apply *Roldan* elsewhere. *In re Salazar-Regino*, 23 I. & N. Dec. 223 (2002). And every other court of appeals to address the question has upheld the BIA's interpretation of Section 101(a)(48)(A). See *Resendiz-Alcaraz*, 383 F.3d at 1266-1272; *Madriz-Alvarado*, 383 F.3d at 330-336; *Acosta*, 341 F.3d at 222-227; *Gill*, 335 F.3d at 575-579; *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 695-699 (8th Cir. 2002); *Herrera-Inirio* v. *INS*, 208 F.3d 299, 304-309 (1st Cir. 2000). Like the decision below, moreover, a number of those court of appeals decisions explicitly reject the equal protection claim that petitioner raises here. See *Resendiz-Alcaraz*, 383 F.3d at 1271-1272; *Madriz-Alvarado*, 383 F.3d at 332-334; *Acosta*, 341 F.3d at 224-227; *Vasquez-Velezmoro*, 281 F.3d at 695-699.

Petitioner asks this Court (Pet. 5-11) to resolve the conflict between those decisions and the Ninth Circuit's decision in *Lujan-Armendariz*. There is no need for the Court to resolve that conflict, however, and even if there were, this would not be an appropriate case in which to do so.

a. As an initial matter, the conflict can be eliminated without this Court's involvement. *Lujan-Armendariz* was the first case in which a court of appeals considered the equal protection claim that petitioner raises here. In the last four years, the Third, Fifth, Seventh, Eighth, and Eleventh Circuits have explicitly disagreed with the Ninth Circuit's decision in that case, see *Resendiz-Alcaraz*, 383 F.3d at 1271; *Madriz-Alvarado*, 383 F.3d at 332; *Acosta*, 341 F.3d at 225; *Gill*, 335 F.3d at 579;

Vasquez-Velezmoro, 281 F.3d at 697, and no circuit has followed it. In light of the subsequent decisions that have rejected *Lujan-Armendariz*, the Ninth Circuit may decide to reconsider the decision en banc.

While the BIA is bound by *Lujan-Armendariz* in cases arising in the Ninth Circuit, and there will therefore be no petitions for review in that circuit in which an alien challenges the rule adopted in *Roldan*, the Ninth Circuit would be in a position to grant hearing or rehearing en banc to consider whether to overrule *Lujan-Armendariz* in a case in which, for example, the alien petitions for review of a decision by the BIA that *Lujan-Armendariz* does not apply because the alien did not satisfy the requirements of the FFOA. Cf. Pet. 13 (citing cases in which the alien "could not meet the FFOA's requirements"). In addition, if the BIA or the Attorney General confronts the question in the future and concludes that the definition of "conviction" in Section 101(a)(48)(A) of the INA supersedes the FFOA in immigration proceedings, the BIA or the Attorney General could choose to apply that considered determination in the Ninth Circuit in order to present an occasion to seek reconsideration of that issue. If the en banc Ninth Circuit did overrule *Lujan-Armendariz*, the circuit conflict would be eliminated.

b. Even assuming that the issue were one that should be resolved by this Court, this would not be an appropriate case in which to do so. The IJ found petitioner removable, not only on the ground that he had been convicted of a drug offense, but also on the ground that he was in the United States without having been admitted or paroled. Pet. App. 16. The BIA and the court of appeals upheld the order of removal, and petitioner seeks this Court's review on only one of the two

grounds for removal. Since, as the court of appeals recognized, the fact that petitioner was not admitted or paroled is "enough in [itself] to support the order of removal" (*id.* at 9), a favorable decision by this Court would have no effect on the outcome of the case: the IJ's order of removal would still be upheld. Contrary to his assertion, therefore, petitioner would have been removed even "had his offense occurred within the Ninth Circuit" (Pet. 6), because, unlike the aliens in *Lujan-Armendariz*, petitioner was not a "legal resident," 222 F.3d at 732, 733, and there was thus an independent basis for his removal. This Court sits "to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

Petitioner denies that he would be removable even if this Court resolved in his favor the question presented in the petition. Pet. 12. He claims that (1) he "had an I-130 family petition approved for his benefit" in 1992; (2) he "possessed a valid social security number and proper employment verification documents"; and (3) "[h]is parents, wife, and child are all United States citizens." *Ibid.*[2] Petitioner cites nothing in the administrative record to support the second claim, however, and the only support he provides for the first and third claims are his own representations to the IJ. Pet. App. 28, 29. In any event, even if all of his claims are true, they do not alter the facts, the truth of which petitioner has never disputed, that demonstrate his removability on the first of the two grounds on which the IJ relied—namely, that he is not a national of the United States; that he is a native and citizen of Mexico; that he arrived in the United

[2] An "I-130 family petition" (Pet. 12) is a visa petition filed on behalf of an alien by a relative who is a lawful permanent resident. See 8 C.F.R. 204.2.

States at an unknown place and time; and that he was not admitted or paroled. *Id.* at 9. In that connection, petitioner's assertion that he has "had his status adjusted" (Pet. 12) is incorrect. As the court of appeals recognized, while petitioner may have *taken steps* to have his status adjusted, "[t]he immigration authorities ultimately denied his application for adjustment." Pet. App. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2006