No. 98-1361

In the Supreme Court of the United States

OCTOBER TERM, 1998

RALPH RICHARDSON, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the district court has jurisdiction under 28 U.S.C. 2241 to review petitioner's claim (a) that, as a legal permanent resident returning to the United States detained a port of entry because of his prior criminal conviction and placed in removal proceedings, he was entitled to a bond hearing before an immigration judge to determine whether he should be released from detention, (b) that his current mandatory detention, pursuant to 8 U.S.C. 1226(c)(1) (Supp. III 1997), violates the Due Process Clause or the Excessive Bail Clause, or (c) that, because he was taken into custody several years after he completed his criminal sentence, and not immediately after he was released, he is not covered by the mandatory-detention provision of Section 1226(c)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-101) is reported at 162 F.3d 1338. The opinion of the district court (Pet. App. 105-118) is reported at 994 F. Supp. 1466. The report and recommendation of the magistrate judge (Pet. App. 119-132) are unreported. The order of the immigration judge denying bond (Pet. App. 154-155) and the decision of the district director denying parole (App., *infra*, 1a-2a) are unreported.

JURISDICTION

The amended judgment of the court of appeals was entered on December 22, 1998. The petition for a writ of certiorari was filed on February 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to the application and, in this Court, the constitutionality of new provisions of the immigration laws concerning the detention of criminal aliens who are required to be removed from the United States because of their criminal convictions. The provisions at issue here, which concern the detention of such criminal aliens pending the completion of their administrative removal proceedings, were added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, enacted on September 30, 1996, which comprehensively revised the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*

First, IIRIRA requires that certain criminal aliens be removed from the United States, and bars the Attorney General from granting those aliens discretionary relief from such removal (known as "cancellation of removal" under the new terminology of IIRIRA). IIRIRA § 304, 110 Stat. 3009-594. Thus, 8 U.S.C. 1182(a)(2) (1994 & Supp. III 1997) provides that an alien who has been convicted of any offense involving moral turpitude or any controlled substance offense, or who has engaged in trafficking of controlled substances, is inadmissible to the United States and shall be removed. See 8 U.S.C. 1182(a)(2)(A)(i)(I) and (II), and (C) (1994 & Supp. III 1997). In addition, 8 U.S.C. 1229b(a)(3) (Supp. III 1997) provides that the Attorney General may not cancel the removal of any alien who has been convicted of an "aggravated felony," which is defined elsewhere in the INA to include any crime involving trafficking in controlled substances, see 8 U.S.C. 1101(a)(43)(B).

Second, IIRIRA provides that the Attorney General "shall take into custody" any alien who is inadmissible

by reason of having committed any offense covered in Section 1182(a)(2) (including those mentioned above). 8 U.S.C. 1226(c)(1)(A) (Supp. III 1997).[1] Such an alien may be released from custody, before entry of a final order of removal, only if the Attorney General determines that such release is necessary to protect a witness, a person cooperating with a criminal investigation, or a relative or associate of such person, and if the alien satisfies the Attorney General that he will not pose a danger to the safety of persons or property and that he is likely to appear for any scheduled proceeding. 8 U.S.C. 1226(c)(2) (Supp. III 1997).[2]

Third, when Congress enacted these mandatory-detention provisions in IIRIRA, it also authorized the Attorney General to postpone their final implementation for two years. See IIRIRA § 303(b)(2), 110 Stat. 3009-586. To address the possibility that the Attorney General might elect to do so, Congress enacted certain "Transition Period Custody Rules" (TPCR) to apply in that event, instead of the mandatory-detention provisions. IIRIRA § 303(b)(3), 110 Stat. 3009-586 to 3009-

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[1] Although Section 1226(c)(1) makes the detention of such a criminal alien mandatory, another provision, Section 1226(a)(1), grants the Attorney General discretionary authority to detain other aliens pending the outcome of removal proceedings.

[2] Somewhat different considerations govern the detention of aliens after a final order of removal is entered. The Attorney General is required to remove the alien within 90 days after the order becomes final, and may not release a criminal alien from detention during that 90-day period. 8 U.S.C. 1231(a)(1)(A) and (2) (Supp. III 1997). If the Attorney General is unable to remove the alien within 90 days, however (as where the country to which the alien has been ordered deported will not accept him), the Attorney General may under limited circumstances release the alien from detention. 8 U.S.C. 1231(a)(3) (Supp. III 1997).

587. The TPCR directed the Attorney General to take into custody any criminal alien covered by Section 1182(a)(2), but also authorized the Attorney General to release such an alien if he was "lawfully admitted to the United States" and satisfied the Attorney General that he would not pose a danger to persons or property and would appear for proceedings. IIRIRA § 303(b)(3)(B)(i), 110 Stat. 3009-587.

IIRIRA defined "admission" and "admitted" to refer to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (Supp. III 1997). IIRIRA further provided that an alien lawfully admitted for permanent residence "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws" *except* under certain circumstances, including if the alien "has committed an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v) (Supp. III 1997). The result is that a legal permanent resident alien who has committed a criminal offense covered by Section 1182(a)(2), and who leaves the country and thereafter seeks to return, may be considered an alien "seeking an admission into the United States."

The Attorney General exercised her authority to delay the final implementation of the permanent detention rules of IIRIRA for two years. She also promulgated regulations governing the detention of criminal aliens under the TPCR. Those regulations provided that, in the case of an alien who had been lawfully admitted to the United States and was thereafter placed in detention pending his removal proceeding, the alien, after an initial custody determination made by an INS District Director, could apply to an immigration judge for release upon bond. 8 C.F.R. 236.1(d)(1). The

regulations also provided, however, that an immigration judge would have no such authority in the case of "arriving aliens," 8 C.F.R. 236.1(c)(5)(i), defined elsewhere in the regulations to mean "an alien who seeks admission to * * * the United States * * * at a port-of-entry," 8 C.F.R. 1.1(q). "Arriving aliens," under the TPCR, could apply only to a district director, not an immigration judge, for release on bond, and could appeal from an adverse decision of the district director to the Board of Immigration Appeals (BIA). 8 C.F.R. 236.1(d)(1), (2)(i) and (3)(i). Accordingly, under the Attorney General's regulations implementing the TPCR, a legal permanent resident alien who had been convicted of a criminal offense covered by Section 1182(a)(2), and who left the country and thereafter sought to return, was considered an "arriving alien," and could apply only to the district director (with subsequent appeal to the BIA), not an immigration judge, for release from detention.

2. Petitioner is a 32-year-old native and citizen of Haiti. He was admitted to the United States in 1968 as a lawful permanent resident. In 1984, he was convicted of carrying a concealed firearm. In 1990, he was convicted of trafficking in cocaine. He was sentenced to five years in prison for the trafficking offense and served four years. In 1993, he was arrested for violation of probation when he eluded the police. Pet. App. 4, 106.

On October 26, 1997, petitioner returned to the United States after a two-day trip to Haiti. During petitioner's inspection for admission, he admitted to having been convicted for trafficking in cocaine, arrested for violation of probation when he eluded the police, arrested for loitering and prowling, arrested for possession of marijuana, and convicted for possession of

a concealed firearm. Petitioner was detained and placed in removal proceedings. Pet. App. 5-6.

On the same day, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner, charging him with inadmissibility pursuant to 8 U.S.C. 1182(a)(2)(A)(i)(I) and (II), (B), and (C) (1994 & Supp. III 1997) (referring respectively to a conviction for a crime involving moral turpitude, a conviction for a controlled substance offense, multiple criminal convictions, and engaging in drug trafficking). App., *infra*, 3a-4a. On November 13, 1997, petitioner requested parole from the INS District Director. While that request was pending, petitioner also requested parole from an immigration judge. Pet. App. 6, 107. On November 24, 1997, the immigration judge denied petitioner's request for parole or release on bond, on the ground that petitioner was an "arriving alien," and therefore under the Attorney General's TPCR regulations an immigration judge lacked jurisdiction to hear his request for parole. *Id.* at 7, 154-155. On December 4, 1997, the INS District Director denied petitioner's request for parole. The District Director concluded that, based on petitioner's convictions, his release was not in the public interest, and that there were no humanitarian reasons for granting parole. App., *infra*, 1a-2a. Petitioner did not appeal to the BIA from the decision of either the immigration judge or the District Director.

3. On November 26, 1997, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida; he subsequently filed an amended petition. Pet. App. 7, 133. In his amended petition, filed on December 10, 1997, petitioner alleged that the Attorney General's TPCR regulations that denied him the opportunity for a hearing before an immigration judge violated equal-protection

principles by creating a class of lawful permanent residents who are not afforded a hearing before an immigration judge because of their brief departure from the United States, while affording such a hearing to lawful permanent residents who have not departed the United States. *Id.* at 141. He also alleged that the denial of a bond hearing before an immigration judge and his detention without bail violated procedural due process, substantive due process, and the Excessive Bail Clause of the Eighth Amendment. *Id.* at 144-147. Finally, petitioner argued that, to the extent the Attorney General's TPCR regulations provided that he should be treated as an "arriving alien" seeking admission to the United States (and therefore not entitled to a bond hearing before an immigration judge) rather than a returning lawful permanent resident alien, those regulations were contrary to the doctrine of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). Pet. App. 150. Under that decision, which construed the term "entry" in the INA as it existed prior to IIRIRA, a lawful permanent resident alien who made a brief, causal, and innocent trip abroad and then sought to return to the United States was not deemed to be seeking an "entry" into this country upon his return. See 374 U.S at 451-461 (discussing 8 U.S.C. 1101(a)(13) (1958)).

On February 13, 1998, the district court granted the writ of habeas corpus and ordered a bond hearing to be held by an immigration judge within eleven days. Pet. App. 105-118. The district court found that it had jurisdiction to entertain the claims in petitioner's habeas corpus petition. *Id.* at 110. (Although the district court did not cite an explicit provision for its jurisdiction, it presumably relied on 28 U.S.C. 2241, the general federal habeas corpus statute.) The district court rejected (Pet. App. 109-110) the INS's argument that such ju-

risdiction was precluded by 8 U.S.C. 1226(e) and 1252(g) (Supp. III 1997). On the merits, the district court held that the INS regulation treating criminal aliens such as petitioner as "arriving aliens" was contrary to the statute. The court concluded that, when Congress enacted IIRIRA, it did not supersede the *Fleuti* doctrine under which legal permanent resident aliens returning to the United States from a brief, casual, and innocent trip abroad are not treated as aliens seeking entry into the United States. Pet. App. 115-117.

4. On February 23, 1998, the court of appeals granted the INS's request for a stay of the district court's order pending appeal, and ordered expedited briefing. Pet. App. 104. On April 2, 1998, Justice Kennedy denied petitioner's application to vacate the court of appeals' stay. *Id.* at 103. On October 10, 1998, while this case was pending in the court of appeals, the TPCR expired, and, as petitioner notes (Pet. 9), after that time, petitioner's custody was based on the permanent custody provisions of IIRIRA. Petitioner requested leave to file a supplemental brief in the court of appeals on questions concerning mandatory detention under those provisions, but the court of appeals denied that request. See Pet. 9-10.

5. Meanwhile, on January 8, 1998, an immigration judge found petitioner inadmissible pursuant to Sections 1182(a)(2)(A)(i)(I) (conviction for crime involving moral turpitude), 1182(a)(2)(A)(i)(II) (conviction for controlled substance offense), and 1182(a)(2)(C) (engaging in drug trafficking), and ordered him deported to Haiti. App., *infra*, 5a-6a. Petitioner appealed the immigration judge's order of removal to the Board of Immigration Appeals. Petitioner's brief to the BIA was originally due on June 29, 1998. After clarification of

the briefing schedule, petitioner requested and received an extension for the filing of his brief. He ultimately filed his brief with the BIA on October 15, 1998. The INS filed its responding brief on November 26, 1998. *Id.* at 9a-11a. The appeal to the BIA is still pending.

6. On December 22, 1998, the court of appeals, in a lengthy opinion, vacated the district court's order for lack of jurisdiction. Pet. App. 1-101. The court concluded that 8 U.S.C. 1252(g) (Supp. III 1997) had divested the district court of authority to hear petitioner's challenges. Pet. App. 1-101.

a. After reviewing IIRIRA's far-reaching changes to the immigration laws (Pet. App. 11-39), the court framed the "first question" before it as whether Section 1252(g) "has eliminated federal jurisdiction under [28 U.S.C.] 2241 over [petitioner's] habeas petition." Pet. App. 40. The court answered that question in the affirmative because, it stated, Section 1252(g) "clearly and unequivocally precludes any jurisdiction in the district court except that provided in [Section 1252]." Pet. App. 43. Observing (*ibid.*) that Section 1252(g) provides that, "notwithstanding *any* other provision of law, * * * no court shall have jurisdiction" to review certain matters except as provided in Section 1252 itself, the court found that this locution "sufficiently and clearly encompasses other provisions of law, such as [28 U.S.C.] 2241." "When Congress says 'any,' it means 'any' law, which necessarily includes § 2241." Pet. App. 43-44. The court found that conclusion buttressed by the fact that Congress had also repealed an express provision in the INA that had recognized some

authority in the district courts to grant the writ of habeas corpus. See *id.* at 45-46.[3]

The court rejected two arguments put forward by petitioner to avoid the effect of Section 1252(g). First, it rejected petitioner's reliance on the rule against repeals of habeas corpus jurisdiction by implication, and in particular his argument that Section 1252(g) did not oust the district court's habeas corpus jurisdiction under 28 U.S.C. 2241 because Section 1252(g) does not mention Section 2241 expressly. Pet. App. 46-47. The court suggested that, by using sweeping language, including "notwithstanding any other provision of law," Section 1252(g) "does not require repeal by implication. Indeed, Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by [Section 1252]." Pet. App. 47-48.

Second, the court rejected petitioner's argument that Section 1252(g) "affects only final removal orders" and does not address "interim detention orders" such as denying bond and parole. Pet. App. 46 n.100. The court concluded that the INS's "interim orders and actions are not collateral proceedings but are inextricably part of the removal proceedings and covered by the broad language of [Section 1252(g)]." *Id.* at 46-47 n.100.

b. The court of appeals also rejected petitioner's argument that the elimination of the district court's jurisdiction over his habeas corpus petition under

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[3] In Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," Congress repealed former 8 U.S.C. 1105a(a)(10) (1994). Former Section 1105a(a)(10) had provided that "any alien in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."

28 U.S.C. 2241 would contravene the Due Process Clause, Article III, and the Suspension of Habeas Corpus Clause. Pet. App. 48-71. As for the Due Process Clause, the court concluded that the Clause does not necessarily require judicial review of all immigration decisions, and that instead, the question is whether the alien has adequate procedural safeguards attendant to the relevant administrative decision. *Id.* at 57-59. The court also rejected (*id.* at 59) petitioner's argument that limiting his opportunity to request bond to a written submission to the INS District Director rather than a hearing before an immigration judge deprived him of due process. Applying the test of *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976), the court found the opportunity for written submission to the District Director sufficient because, while petitioner's liberty interest was, in its view, "weighty"—"although slightly attenuated given his resident alien status"—the risk of error is low, since petitioner's counsel was able to make a full submission to the District Director supported by written evidence, and the INS's interest in avoiding bond hearings before immigration judges is "fairly high" given the volume of arriving aliens at numerous ports of entry. Pet. App. 60.

With respect to the mandatory-detention provision in Section 1226(c) that had just come into effect, the court observed (Pet. App. 60 n.119) that "Congress acts well within its plenary power in mandating detention of a criminal alien with an aggravated felony conviction facing removal proceedings." That mandatory detention "poses no constitutional issue," the court of appeals continued, because this Court "already has stated that [t]he Eighth Amendment has not prevented Congress from defining the classes of [immigration] cases in which bail shall be allowed. The Supreme Court has

determined that bail need not be provided in all immigration cases." *Ibid.* (quoting *Carlson* v. *Landon*, 342 U.S. 524, 545 (1952) (ellipsis and internal quotation marks omitted)).

The court of appeals further held that what it called "IIRIRA's repeal of § 2241 habeas over INS decisions" (Pet. App. 61) did not violate Article III. The court observed that Article III does not require judicial review in any inferior federal court, and that "[t]he jurisdiction of the inferior federal courts are [*sic*] created by statute and jurisdiction does not exist except to the extent conferred by statute." Pet. App. 62. "Similar to many congressionally-enacted limits on federal jurisdiction, Article III does not preclude Congress from removing all judicial review over immigration decisions from the inferior courts." *Ibid.*

Finally, the court rejected the contention that Section 1252(g), by precluding the district court from entertaining petitioner's habeas corpus petition under 28 U.S.C. 2241, effected an unconstitutional suspension of the writ of habeas corpus. The court first reviewed (Pet. App. 64-88) the history of habeas corpus in the immigration context and other appellate decisions examining Section 1252(g). The court then concluded that, in Section 1252(b)(9)—which independently provides that "[j]udicial 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 * * * shall be available only in judicial review of a final order [of removal] under [Section 1252]"—Congress had chosen "to delay federal court review of all claims of aliens against whom removal proceedings have been instituted until the conclusion of the administrative proceedings." *Id.* at 86.

The court found the availability of judicial review at that point sufficient to allay constitutional concerns about a suspension of the writ of habeas corpus, because "[d]eferring [petitioner's] claims until the entry of a final order of deportation does not raise substantial constitutional concerns. Congress has broad latitude to regulate the mode and timing of judicial review of administrative agency decisions, even where constitutional claims are involved." *Id.* at 87-88. Thus, the court likened the operation of Section 1252(b)(9) in this case to an exhaustion requirement, which "avoids piecemeal review by consolidating all challenges to the deportation process into a single judicial proceeding." *Id.* at 88.

The court acknowledged that another provision of the INA added by IIRIRA, 8 U.S.C. 1252(a)(2)(C) (Supp. III 1997), significantly restricts the jurisdiction of the court of appeals to hear any claim by a criminal alien such as petitioner on a petition for review of a final order of removal. Pet. App. 90-91. The court stressed, however, that some judicial review remained available to an alien in petitioner's position on such a petition for review, including a constitutional attack on a provision of the INA itself. *Id.* at 91-92. Thus, the court concluded that the INA "still assures [petitioner] a significant degree of judicial review in the court of appeals after a final removal order," *id.* at 93-94, and it found that review sufficient to allay constitutional concerns about a suspension of habeas corpus, *id.* at 94-96.

DISCUSSION

Petitioner argues that the court of appeals erred in concluding that, because of 8 U.S.C. 1252(g) (Supp. III 1997), the district court lacked jurisdiction over his habeas corpus petition challenging the application, to this case, of the Attorney General's TPCR regulations classifying him as an "arriving alien" who was not entitled to a hearing before an immigration judge on the question whether he should be released on bond pending the outcome of his removal proceeding. That challenge, however, is now moot, because the TPCR rules have expired. See *Burke* v. *Barnes*, 479 U.S. 361, 363-364 (1987); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam); see also *Fursari* v. *Steinberg*, 419 U.S. 379, 386-390 (1975); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972).

Petitioner argues, however, that this Court should grant review to determine whether the permanent mandatory-detention provisions of IIRIRA, 8 U.S.C. 1226(c)(1) (Supp. III 1997), apply to his case, and if so, whether they are constitutional. The lower courts, however, did not examine those questions in detail (although the court of appeals did indicate, in a footnote, that it saw no constitutional difficulty with the mandatory-detention provisions, see Pet. App. 60 n.119), and the parties did not brief any questions relating to the permanent mandatory-detention rules. (Petitoner sought leave to file a supplemental brief on the permanent rules, which was denied by the court of appeals. See Pet. App. 102.) Given the lack of briefing in the court of appeals on such a potentially far-reaching issue, it would not be appropriate for this Court to grant plenary review to examine those issues in detail in the first instance. See *Fursari*, 419 U.S. at

389; *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482 (1990). Nor is there a conflict in the circuits on the application or constitutionality of the mandatory-detention provisions that would otherwise warrant this Court's review; the only court of appeals that has addressed their constitutionality in detail has concluded that Section 1226(c)(1) is fully consistent with the Due Process Clause. *Parra* v. *Perryman*, No. 99-1287, 1999 WL 173692, at *3-*4 (7th Cir. Mar. 24, 1999).

We do observe, however, that the court of appeals' analysis of Section 1252(g) has been superseded by this Court's construction of the same provision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999) (*AADC*). In *AADC*, the Court rejected the contention that Section 1252(g) covers "all claims arising from deportation proceedings" (*id.* at 943) and concluded instead that the provision is more narrowly limited to specific "decisions or actions that may be part of the deportation process" (*ibid.*); see *id.* at 945 n.9 (referring to Section 1252(g)'s "explicit limitation to specific steps in the deportation process").[4]

The court of appeals also discussed 8 U.S.C. 1252(b)(9) (Supp. III 1997) in the course of its jurisdictional ruling.[5] See Pet. App. 86-89. It is unclear

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[4] Section 1252(g) provides: "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 or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

[5] Section 1252(b)(9) provides: "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

whether the court of appeals intended to rule that Section 1252(b)(9) constitutes an independent preclusion of district court review on habeas corpus proceedings on petitioner's claim that he is entitled to a bond hearing before an immigration judge, or whether the court intended its discussion of Section 1252(b)(9)'s "final order" requirement and the exhaustion principle it embodies essentially to reinforce its principal holding that Section 1252(g) forecloses review. It is also unclear to what extent the court's discussion of Section 1252(b)(9) was influenced by its analysis of Section 1252(g). Accordingly, we suggest that the Court grant the certiorari petition, vacate the judgment below, and remand for further proceedings in light of *Reno* v. *American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999), which discussed (*id.* at 942-943) Section 1252(b)(9) as well as Section 1252(g).

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under this subchapter shall be available only in judicial review of a final order under this section."

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of *Reno* v. *American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999).

Respectfully submitted.

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