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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAN MARIUS ANDREIU)	
)	
Petitioner,)	No. 99-70274
)	
v.)	MOTION FOR LEAVE
)	TO FILE BRIEF AS
JANET RENO, Attorney General)	AMICI CURIAE AND
)	TO FILE OVERSIZED BRIEF
Respondent.)	
_____)	

The American Immigration Lawyers Association and the American Immigration Law Foundation, by and through their counsel undersigned, respectfully move this Court to permit them to file the accompanying Brief of *Amici Curiae* in Support of Petitioner’s Motion for Reconsideration or Rehearing of Motion for Stay of Removal, and Suggestion for Rehearing En Banc. *Amici Curiae* further request permission to file a brief containing 2053 words, 11,000 characters (653 words more than 1,400 words, which is one-half of the limit on motions for reconsideration under Circuit Rule 27-10; 10 pages of 14-point text).

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. AILA is an affiliated organization of the American Bar Association. AILA was founded in 1946 and now has more than 6,000

members organized in 34 chapters across the United States and in Canada. AILA's members and their clients are directly and severely affected by the decision in this case.

The American Immigration Law Foundation (AILF) is a non-profit organization established to increase public understanding of immigration law and policy, to promote public service and professional excellence in the area of immigration law, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. AILF has a direct and serious interest in developments in the immigration law and in the case now before this Court.

Mark Walters, counsel for the Respondent, indicated that Respondent takes no position on whether the Court should permit *Amici Curiae* to submit this brief, nor on Amici's request to submit a brief containing 2053 words, provided that, if the Court directs Respondent to respond to Petitioner's Motion and the Court accepts the *Amici's* brief, Respondent have an opportunity to respond to both Petitioner's Motion and to the *Amici's* brief, and that Respondent have a maximum of 4,853 words (2800 plus 2053) for its brief.

Petitioner consents to the filing of this Brief and to its size.

RESPECTFULLY SUBMITTED this 25th day of September, 2000.

Nadine K. Wettstein
Attorney for *Amici Curiae*

Copy of the foregoing
mailed this same day to:

Linton Joaquin, Counsel for Petitioner
Mark Walters, Counsel for Respondent
Linda Wernery, Counsel for Respondent

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The majority’s holding in this case -- that the 1996 immigration law imposed an exceptionally high standard for the Court to issue a temporary stay of removal pending a petition for review -- has far-reaching ramifications. In a great many cases, it will render the right to judicial review of administrative removal orders empty and meaningless. Under the majority’s holding, noncitizens with meritorious appeals will be deported before their appeals are heard, even if they can establish that their deportation is likely to result in irreparable harm and that they are likely to succeed on the merits.

Amici Curiae submit this brief in support of the petitioner’s motion for rehearing to explain the broad implications and exceptional importance of this issue. *Amici* will explain some of the many different contexts in which this incorrect ruling, if left undisturbed, will completely eviscerate the right to appeal Board of Immigration Appeals (BIA) removal orders. *Amici* will demonstrate that the stay standard established by the majority is not only draconian, but also is unsupported by the plain language of the Immigration and Nationality Act, and completely unworkable.

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ARGUMENT

The issue in this case is whether one provision of the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") repealed the standard used by this Court to adjudicate stay requests in immigration appeals, including under the IIRIRA transition rules. *See Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998). The majority held that 8 U.S.C. § 1252(f)(2) must be interpreted to create a new stay standard, even though that provision does not refer to stays and even though the only reference to a "stay" in the permanent rules -- § 1252(b)(3)(B) -- is functionally identical to the reference in the transitional rules, where a balancing test is employed. *See Abbassi*, 143 F.3d 513.¹

¹ Compare IIRIRA § 309(c)(4)(F) ("service of the petition shall not stay the deportation of the alien pending the court's decision on the petition, unless the court orders otherwise") with § 1252(b)(3)(B) ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise").

The majority's decision is wrong for numerous reasons. First, the plain language of § 1252(f)(2) applies only to court orders that "enjoin" removal.² The Supreme Court has differentiated between a stay and an injunction. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988). This Court must narrowly apply the plain meaning of the terms employed by Congress. Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. at 481-82 (1999).

Second, Congress cannot have intended § 1252(f)(2) to be a standard for stays of removal. Congress placed this provision in § (f) rather than § (b). Section (b) contains the rules for adjudicating petitions for review. Subsection (b)(3)(B) includes a provision explicitly governing stays. Subsection (b)(3)(B) says nothing about injunctions. Similarly, § (f) is titled "Limit on Injunctive Relief." It concerns collateral litigation, not petitions for review. Sensibly, then, subsection (f)(2) says nothing about stays of removal pending petitions for review.

The majority's interpretation of § 1252(f) is wrong also because it conflicts with this Court's decision under a functionally identical statutory provision in IIRIRA's transition rules. *See Abbassi*, 143 F.3d 513. In that case, this Court applied a balancing test, where the greater the likelihood of harm entailed by the petitioner's removal, the less the petitioner need show a likelihood of success on the merits. *See Abbassi*, 143 F.3d at 514.

The majority's standard also is harsh and unworkable. It would require the noncitizen to either "1) show by clear and convincing evidence that the order was based on an erroneous finding of fact; or 2) establish that the order was manifestly contrary to

² The definition of "enjoin" on which the majority relies - "[t]o legally prohibit or restrain by injunction" (Black's Law Dictionary 550 (7th ed. 1999)), - in fact expressly

law.” Slip op. at 11290. In practice, the Court would have to resolve the merits of a case in order to issue a stay. This represents a dramatic change from the balancing test standard applicable to transitional cases. Abbassi, 143 F.3d 513. Under the majority’s standard, hardship is irrelevant, and the petitioner must show not simply a likelihood, but rather a *certainty* of prevailing on the merits – that the removal order is based on erroneous fact or “manifestly contrary to law.”

Under the majority’s standard, because the Court (or the motions panel) must determine that the removal order was based on erroneous factual findings or is “manifestly contrary” to law, granting a stay will require the Court (or the panel) to find that the petitioner will prevail on the merits. Further, the majority’s standard would necessitate full-blown briefing at the very outset of the petition for review process. In most if not all cases, the Petitioner will have to satisfy this standard even before he or she has received a copy of the administrative record.

Moreover, because the standard for a stay is higher than the standard to prevail on the merits, many noncitizens who would ultimately win their cases will be forced to return to their home countries. Although the legal standard to prevail on the merits is *de novo* review, the majority’s standard requires that to grant a stay, “we must hold that a removal order is clearly antithetical to an existing law.” Slip op. at 11290. Immigration cases frequently present novel issues and holdings that would be difficult to categorize as “clearly antithetical to existing law.” A brief review of some of the recent cases in which this Court has overturned BIA rulings illustrates the problems posed by this stay standard.

Recent asylum and withholding cases provide many examples of such cases of first impression. Thus, in Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997), this Court

limits the term to “injunctions.” Slip. op. at 11282.

held that an asylum applicant need not prove that her persecutor harbored a subjective intent to harm her, and that her forced institutionalization and subjection to electroshock treatments to “cure” her of lesbianism constituted “persecution.” In Grava v. INS, 205 F.3d 1177 (9th Cir. 2000), this Court found that a government whistleblower who exposed corrupt officials could establish persecution based on political opinion. In Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996), this Court held that Cuba’s punishment of individuals for fleeing the country by prosecuting them as “traitors” constitutes persecution on account of political opinion. In Hernandez-Montiel v. INS, ___ F.3d ___, No. 98-70582 (9th Cir. Aug. 24, 2000), this Court found that gay men in Mexico who have female sexual identities constitute a particular social group for purposes of establishing eligibility for asylum and withholding. In Borja v. INS, 175 F.3d 732 (9th Cir. 1999)(*en banc*), this Court held that beatings and assaults inflicted on the petitioner for the purpose of financial extortion, where the abuse in part was motivated by political opinion, established eligibility for the mandatory relief of withholding of deportation.

In each of these cases, for the Court to grant a stay under the majority’s standard, a motions panel first would have to find the BIA’s decision below to be “manifestly contrary to law.” Yet in each of these cases, denial of a stay would have meant the immediate return of noncitizen to the country where he or she faced persecution. As Judge Thomas has pointedly noted, the consequences of removal in such cases “may be not only ‘severe’ but in many cases life-threatening.” Moreover, “limited access to courts in many countries, as well as the reluctance of persecuting governments to return successful asylum-seekers to the United States, will likely render any post-removal relief granted by our court moot.” Slip op. at 11291; *see also* Rodriguez-Roman 98 F.3d at 432

(9th Cir. 1996) (Kozinski, concurring, noting “the importance of independent judicial review in an area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death”).

Precisely the same concerns apply in cases of applicants for relief under the Convention Against Torture (CAT). In asylum, withholding, and CAT cases, removal of the noncitizen pending judicial rule directly conflicts with the purpose of the statutes and treaties that are intended to ensure this relief.

Nor is it only in these cases that the majority’s stay standard will result in irreparable harm. For example, cancellation of removal under 8 U.S.C. § 1229b(b) is available to individuals of good moral character who have lived in the United States for at least ten years and who show that their removal “would result in exceptional and extremely unusual hardship” to a U.S. citizen or permanent resident parent, spouse, or child. 8 U.S.C. § 1229b(b). To deny a stay in a cancellation case pending judicial review will result in the very exceptional and extremely unusual hardship to the citizen or permanent resident relatives that the statute was designed to prevent.

Cases of lawful permanent residents also present a strong likelihood that the majority’s standard of “manifestly contrary to law” will cause irreparable harm. Long-term permanent residents often have little connection with their home countries and their removal is likely to divide families. Again, recent decisions provide compelling examples.

In Ye v. INS, 214 F.3d 1128 (9th Cir. 2000), in a case of first impression, this Court determined that the California offense of vehicle burglary does not qualify as an “aggravated felony” because it is neither a “burglary” offense nor a “crime of violence”

under the statute. In Lujan-Armendariz v. INS, ___ F.3d ___, Nos. 96-70431, 99-70359, 2000 U.S. App. LEXIS 18298 (9th Cir. Aug. 1, 2000), this Court overturned a precedent BIA decision to hold that despite the new immigration definition of “conviction” (8 U.S.C. § 1101(a)(48)), a state court expungement of a drug conviction eliminates the immigration consequences of the conviction if the noncitizen could have qualified for an expungement under the Federal First Offender Act had he or she been charged with a federal offense.

In Gonzalez-Julio v. INS, 34 F.3d 820 (9th Cir. 1994), this Court held that the BIA’s procedures for filing notices of appeal violated the Due Process rights of appellants in Hawaii. In Ortega de Robles v. INS, 58 F.3d 1355 (9th Cir. 1994), the Court announced a new standard for accruing “lawful domicile” for purposes of § 212(c) relief under pre-IIRIRA law.

In short, the majority’s stay standard is unsupported by the plain language and structure of § 1252. It is draconian and unworkable, and constitutes a dramatic change in this Court’s judicial review procedures.³ The majority’s standard is an evisceration of the laws and treaties that afford protection to endangered noncitizens.

CONCLUSION

The express language of § 1252(f)(2), the structure of the statute, and the great practical problems presented by the majority’s stay standard all show that § 1252(f)(2) cannot have been intended and cannot be interpreted as a standard for stays. For the foregoing reasons, the Court should grant reconsideration or rehearing en banc.

³ Had Congress intended § 1252(f)(2) to have such dramatic ramifications, Congress would have said so, and the legislative history would reflect that intent. No such evidence exists. The only references to stays in the legislative history of IIRIRA concern §

Dated: September 25, 2000

Respectfully submitted,

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1252(b)(3)(B), the provision that a stay is not automatic. *See* H.R. Conf. Rep. 828, 104th Cong., 2d Sess. (Sept. 24, 1996).