No. 98-730

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

MARIA WALTERS, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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1. *Jurisdiction.* We explain in our certiorari petition (at 14-16) that the district court lacked jurisdiction to enjoin respondents' deportation because of 8 U.S.C. 1252(g) (Supp. II 1996). That Section provides that, notwithstanding any other provision of law, no court (other than a court of appeals on petition for review of a removal order) "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." Respondents' principal argument (Br. in Opp. 16) is that this case does not fall within Section 1252(g)'s bar on district court juris-

diction because they are supposedly challenging, not their *deportation* proceedings, but rather the separate document-fraud proceedings commenced against them under 8 U.S.C. 1324c (1994 & Supp. II 1996). That contention cannot withstand scrutiny.

Respondents' case has always been predicated on the *immigration-related* consequences of a final document-fraud order entered under Section 1324c—namely, that such an order entered against an alien renders the alien deportable and inadmissible. Respondents have not alleged, for example, that the notice forms initiating the Section 1324c order were invalid because they failed adequately to inform the recipient that a fine would result from entry of a document-fraud order (cf. Br. in Opp. 22). Rather, they have contended that the notice forms commencing Section 1324c proceedings are inadequate because they fail adequately to inform the recipient that deportation or exclusion will result from entry of a final order. See Resp. C.A. Br. 17-25. Respondents therefore requested, in the prayer for relief in their complaint, that the district court enjoin the Immigration and Naturalization Service (INS) from relying on any final Section 1324c order as basis for an order of deportation or exclusion, see C.A.E.R. 25, ¶ 3, and the district court responded by prohibiting the INS from "enforcing or taking any action" against respondents in reliance on a Section 1324c order, see Pet. App. 94a.

The district court's injunction thus runs afoul of Section 1252(g) in that it prevents the INS from deporting or excluding respondents. When the Attorney General acts to remove an alien from the United States because that alien has been found to have committed document fraud in violation of Section 1324c, she "commence[s] proceedings, adjudicate[s] cases, or execute[s] a removal order[]" against that alien, within the meaning of

Section 1252(g). Respondents' case is predicated on the theory that such a removal is a deprivation of liberty without due process of law because they were not adequately apprised that their removal would result from their waiver of, or failure to request, a Section 1324c hearing. But if that is so, then it must be equally true that their claim to prevent such a removal, based on the contention that the removal would be an unconstitutional deprivation of liberty, is a "claim arising from" the action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders under the Immigration and Nationality Act.[1]

Respondents suggest (Br. in Opp. 22) that not all of the class members' claims may fall within the terms of Section 1252(g) because some class members may

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[1] Respondents argue (Br. in Opp. 22-23) that they did not challenge only the immigration-related consequences of the Section 1324c order, and that they alleged, for example, that the forms commencing Section 1324c proceedings failed to provide adequate notice because they were served only in English, used unduly complicated language, and were served in tandem with forms used to commence deportation proceedings. The difficulty with that argument is that the allegedly defective forms have no constitutional significance unless they affect a liberty or property interest under the Due Process Clause. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). Thus, without a claim that the allegedly defective forms impaired some ultimate liberty or property interest, "there is no such interest for process to protect." *Ibid.* Moreover, in their brief to the court of appeals, respondents, in relying on the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), made clear that the "private interest" they were seeking to vindicate (in other words, the liberty interest at stake) was the interest in avoiding deportation. See Resp. C.A. Br. 11-13; see *id.* at 21-29 (discussing risk of "erroneous deprivation" in terms of potentially erroneous deportation).

accept voluntary departure rather than go through removal proceedings, and the INS may neglect to pursue removal proceedings against others; thus, they argue, such aliens would not be seeking to challenge their removal proceedings. As an initial matter, we note that none of the named class-action plaintiffs is in either situation, and so it is unclear how the named respondents' maintenance of a class action on behalf of such persons would be proper.[2] See Fed. R. Civ. P. 23(a)(3) (requiring that claims or defenses of class representatives be "typical of the claims or defenses of the class"). In any event, respondents' objection is without substance, because the district court's injunction would plainly prevent the INS from relying on a Section 1324c order in removal proceedings if the INS either (a) sought to remove such an alien, if it has not done so already, or (b) sought to remove an alien who had accepted voluntary departure, if such an alien ever attempted to return to the United States, see 8 U.S.C. 1225(b)(2)(A) (Supp. II 1996).[3] Thus, even as to those

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[2] We are informed by the INS that respondent Maria Walters was served with an Order to Show Cause based on her overstaying her visa; respondents Caesar Corona-Alvarez, Antonio Alvarez, Ninfa de Adames, and Camila Garcia-Cruz were served with Orders to Show Cause based on their entering the United States without inspection; and respondent Omar Kayyam Meziab was deported from the United States in 1994 based on his overstay. Respondents William Walters, Guadalupe Adames, and Leslie Meziab are United States citizens who sued only as spouses of the above-named individual respondents, see C.A.E.R. 3-4; their claims were dismissed by the district court for lack of standing, see *id.* at 38-39, and that dismissal was not disturbed in the court of appeals.

[3] It is difficult to see in any event how a due process claim could be maintained on behalf of an alien who has accepted voluntary departure, since aliens abroad—especially aliens like the individual

class members who have not yet been placed in removal proceedings, the district court's injunction contravenes Section 1252(g).

Respondents also suggest (Br. in Opp. 20) that our jurisdictional argument is unlikely to have relevance as to removal proceedings commenced after April 1, 1997, when the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, came into effect. Nothing in the district court's injunction, however, suggests that it does not apply to removal proceedings that the INS might seek to

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respondents who have not previously been admitted for lawful permanent residence—ordinarily have no liberty interest in their admission to the United States. See *Fiallo* v. *Bell*, 430 U.S. 787, 792-793 (1977); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). A permanent resident alien returning to the United States and detained at the border may have a right to due process in her removal proceedings there, see *Landon* v. *Plasencia*, 459 U.S. 21, 32-35 (1983), but any liberty interest of an alien formerly present here unlawfully who has accepted voluntary departure and thereafter attempts to gain readmission to the United States would not include a right to challenge the factors that might have previously motivated her to waive a Section 1324c hearing and accept voluntary departure from the United States. An alien who wishes to preserve a due process claim similar to that presented in this case may, when removal proceedings are commenced against her, elect not to accept voluntary departure, but choose instead to pursue such removal proceedings, raising her due process claim along with any other challenges and defenses she may have to the charge of deportation against her. Cf. C.A.E.R. 19 (complaint, noting that respondent Garcia-Cruz initially accepted voluntary departure but then, after consulting with an attorney, requested a deportation hearing). Once a final removal order is entered against that alien, she may challenge such an order directly by filing a petition for review in the court of appeals, pursuant to 8 U.S.C. 1252(a) (Supp. II 1996).

commence after April 1, 1997, and it is difficult to believe that respondents would agree to such a suggestion. Further, the jurisdiction-limiting provision of Section 1252(g) took effect immediately on IIRIRA's enactment on September 30, 1996, and continued in effect without change after April 1, 1997. And although respondents state (see Br. in Opp. 20 n.18) that they based jurisdiction in part on 8 U.S.C. 1329 (1994), which was amended by IIRIRA, they also alleged jurisdiction based on 28 U.S.C. 1331, which was not amended by IIRIRA.

Finally, respondents argue (Br. in Opp. 16-19) that the Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee (AADC)*, No. 97-1252 (argued Nov. 4, 1998), which also involves Section 1252(g), is unlikely to have implications for this case. They argue (Br. in Opp. 18) that neither party to *AADC* disputes that the respondents in that case are challenging their removal proceedings within the meaning of Section 1252(g), and therefore *AADC* does not involve the scope of that Section. The scope of Section 1252(g) is at issue in *AADC*, however, and the Court's construction of it could affect the outcome of this case. The *court of appeals* in *AADC* concluded that Section 1252(g) by its own terms did not apply to bar jurisdiction in that case, for two reasons. First, it concluded that Section 1252(g) incorporates by reference 8 U.S.C. 1252(f) (Supp. II 1996) (prohibiting classwide injunctions in immigration cases), which it read as *allowing* the district courts to take jurisdiction over cases involving "individual aliens against whom deportation proceedings have been initiated." *American-Arab Anti-Discrim. Comm.* v. *Reno*, 119 F.3d 1367, 1372 (9th Cir. 1997), cert. granted, No. 97-1252 (June 1, 1998). Second, it relied (*ibid.*) on the

principle that jurisdiction-limiting statutes should be interpreted to preserve the courts' authority to consider constitutional claims. And the court of appeals in this case relied on its decision in *AADC* to support its jurisdiction (Pet. App. 45a). Should this Court in *AADC* reject the Ninth Circuit's rationales for its construction of Section 1252(g) and conclude that the Section must be interpreted according to its plain terms —requiring that challenges to deportation orders be heard only in the courts of appeals on petitions for review—then a central basis for the court of appeals' jurisdictional holding in this case will be eliminated.

2. *Merits.* As we explain in our certiorari petition (at 18-19), the court of appeals' holding that the notice provided to respondents was inadequate was based centrally on its conclusion (Pet. App. 21a-23a) that those forms were inadequate under the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); see also Resp. C.A. Br. 11-31 (defending district court's injunction under *Mathews* v. *Eldridge*). But as we have further explained, that decision may well be undermined by this Court's decision this Term in *City of West Covina* v. *Perkins*, No. 97-1230 (argued Nov. 3, 1998), in which we have argued that the *Mathews* test is inapplicable to measuring the adequacy of the *notice* that must be provided for a deprivation of a property or liberty interest.

Respondents maintain (Br. in Opp. 25-26) that *City of West Covina* is irrelevant here because it involves the adequacy of post-deprivation notice, whereas this case involves a challenge to pre-deprivation notice. Our argument in *City of West Covina*, however, is not limited to the position that *Mathews* does not apply in the post-deprivation situation; we point out in our brief in *City of West Covina* (at 25) that, in *Memphis Light, Gas*

& Water Division v. *Craft*, 436 U.S. 1 (1978), a pre-deprivation case, the Court did not rely on *Mathews* when it evaluated the adequacy of the notice sent to the utility's customers, but rather relied on notice cases such as *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See *Memphis Light*, 436 U.S. at 13-14.

Respondents also quote selectively (Br. in Opp. 26) from our brief in *City of West Covina*, where, citing *Memphis Light*, we state (at 24) that, in the pre-deprivation context, notice about available procedures for challenging governmental action "may often be necessary to make the opportunity for a hearing a meaningful one." But as we state further, "[i]n *Memphis Light*, for example, customers were threatened with an immediate termination of service, 'the continuity of which [was] essential to health and safety.'" 97-1230 U.S. Amicus Brief at 24 (quoting *Memphis Light*, 436 U.S. at 15 n.16). In this case, by contrast, persons served with Section 1324c notices have 60 days in which to decide whether to contest the document-fraud allegations against them, as both the forms and published regulations make clear. See C.A.E.R. 598, 600; 8 C.F.R. 270.1-.3. Thus, recipients have sufficient time in which to make inquiries about the legal implications of waiving, or failing to request, a hearing on the Section 1324c charges. Furthermore, *Memphis Light* found a violation of due process in the utility's failure to inform its customers about procedures to challenge the proposed termination of utility service, when information about those procedures was not publicly available. See 436 U.S. at 15. That decision did not purport to establish a requirement that persons must be informed of the *legal consequences* of their failure to invoke a particular

procedure, when those consequences are explained fully in public statutes.

Finally, respondents argue (Br. in Opp. 27) that the deportation consequences of final orders in Section 1324c proceedings cannot be considered collateral to those orders because both sets of proceedings are initiated by the INS. But as respondents elsewhere emphasize (*id.* at 1-2), Section 1324c proceedings and deportation proceedings are entirely separate; the former are held before administrative law judges (ALJs) and are reviewed by the Office of the Chief Administrative Hearing Officer, whereas the latter are heard by immigration judges and are reviewed by the Board of Immigration Appeals. An ALJ's determination that an alien has committed document fraud in violation of Section 1324c does not automatically lead to the alien's deportation, just as an alien's conviction and sentencing for a crime rendering him deportable and ineligible for discretionary relief from deportation does not. Cf. Pet. App. 3a (court of appeals' conclusion that deportation is "automatic" when alien is found to have violated Section 1324c). In both circumstances the INS must exercise its discretion to initiate deportation proceedings against the alien.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be held for the Court's decisions in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252, and *City of West Covina* v. *Perkins*, No. 97-1230, and then disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

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