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November 9, 2005

VIA HAND DELIVERY
Troy Cahill, Esq.
Chambers of The Honorable Anthony M. Kennedy
United States Supreme Court
1 First Street NE
Washington, DC 20543

Re: EMERGENCY Application for Stay of Removal Pending Review

Dear Mr. Cahill:

I am writing to submit an original and ten (10) copies of Petitioner Germar Rudolf's (formerly Scheerer) Emergency Application to Stay Removal Pending Review.

As the attached application indicates, Rudolf is in the custody of the Department of Homeland Security, and DHS Counsel Russell Verby confirmed with my office yesterday that Rudolf's removal to Germany is scheduled for **Monday, November 14, 2005.**

Rudolf's consolidated and fully briefed Petition for Review, challenging the Immigration Judge's denial of his application for asylum, the Immigration Judge's finding that the application was frivolous, and the Department of Homeland Security's regulations at 8 C.F.R. §§ 245.1(c)(8) & 1245.1(c)(8), is pending before the U.S. Court of Appeals for the Eleventh Circuit with oral argument scheduled for January 24, 2006.

The Eleventh Circuit yesterday denied Rudolf's Petition for Stay Pending Review. He now submits this emergency application to Justice Kennedy.

Please let me know if there is any other information that His Honor may need to see in order to make his determination. Because of the emergency nature of this

application, and the Veteran's Day holiday on November 11, 2005, if His Honor is inclined to grant this motion, as a practical matter, we would need any order granting the stay via email by 5 pm on Thursday, November 10, 2005.

Thank you for all your courtesies in getting this application reviewed so quickly and for your kindness to me and my staff.

Sincerely,

Nicholas Woodfield

cc: Ben Dalbey
Adam Augustine Carter
Germar Rudolf

Record No. _____

Eleventh Circuit Case
Nos. 04-16212, 05-11303

IN THE SUPREME COURT OF THE UNITED STATES

GERMAR SCHEERER,
(Agency No. A78 660 016)

Petitioner,

v.

ALBERTO R. GONZALES,
United States Attorney General,

Respondent.

EMERGENCY APPLICATION TO STAY REMOVAL PENDING REVIEW

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Scheerer v. Gonzales
04-16231, 05-11303

EMERGENCY APPLICATION TO STAY
REMOVAL PENDING REVIEW

Introduction

Petitioner Germar Rudolf (formerly Scheerer) ("Rudolf"), by and through undersigned counsel, hereby requests an emergency stay of removal before judgment in the U.S. Court of Appeals for the Eleventh Circuit.

Petitioner makes this emergency application because the Eleventh Circuit failed to stay Petitioner's removal to Germany, currently scheduled for **Monday, November 14, 2005**, and his removal will moot the case pending before the Eleventh Circuit, currently scheduled for an oral hearing on January 24, 2006. *See* November 8, 2005, order denying stay, attached as Ex. 1; October 20, 2005, March 3, 2005, BIA Denial of Motion to Reopen and November 8, 2004, Affirmance without Opinion, attached as Ex. 2; June 3, 2003, Decision and Order of the Immigration Judge, attached as Ex. 3; Letter Confirming Removal on November 14, 2005, attached as Ex. 4; October 20, 2005, Oral Argument Notice, attached as Ex . 5.

A stay of removal pursuant to this Court's Rule 23.3 is justified in this case because if Rudolf is removed, it will moot the case pending before the Eleventh Circuit and any subsequent Petition for Writ of Certiorari filed with this Court.

Background

After a hearing before an Immigration Judge ("IJ"), Rudolf was determined to have filed a frivolous asylum application without any warning from the IJ and without being given the chance to explain any discrepancies in violation of 8 C.F.R. § 208.20. Rudolf filed his application for asylum in the United States because he will be imprisoned upon his removal to Germany for the crime of allegedly denying the Holocaust as a result of his scientific studies concerning the trace chemicals that can be found in the surfaces at Auschwitz. After the Board of Immigration Appeals ("BIA") affirmed the IJ's determination without opinion, Rudolf appealed to the Court of Appeals for the Eleventh Circuit (No. 04-16212). While this appeal was pending, Rudolf married a U.S. Citizen who filed an immigrant petition on his behalf with the Department of Homeland Security ("DHS"). Rudolf filed a motion to reopen at the BIA in light of his wife's then-pending immigrant petition. The BIA denied the motion to reopen finding Rudolf ineligible for relief as an arriving alien in removal proceedings and thus unable to apply for adjustment of status. Rudolf appealed that decision to the Eleventh Circuit as well (No. 05-11303) and the two appeals were consolidated and are now fully briefed. The Eleventh Circuit has scheduled an oral hearing for January 24, 2006. *See* Ex. 5.

On October 19, 2005, Rudolf attended his scheduled interview at the Chicago District of the DHS for adjudication of his U.S. citizen wife's immigrant petition. *After DHS approved Mrs. Rudolf's petition on her husband's behalf*, Rudolf was taken in to custody and is being held by the DHS pending removal to Germany on Monday, November 14, 2005. *See* DHS Notice Approving Immigrant Petition, attached hereto as Ex. 6. On November 8, 2005, the Eleventh Circuit denied Rudolf's emergency motion for a stay of removal pending review. *See* Ex. 1.

Standard of Review

In *Kenyeres v. Ashcroft,* 538 U.S. 1301, 1303-05, 123 S. Ct. 1386 (2003), Justice Kennedy noted that the Circuits are split on the standard for obtaining a stay of removal pending judicial review.

The Eleventh Circuit is the only judicial circuit to have accepted the argument that § 242(f)(2) of the Immigration and Nationality Act governs stays of removal pending federal court review of a final order of removal. *See Weng v. Attorney General*, 287 F.3d 1335, 1337-38 (11th Cir. 2002). The standard set forth in *Weng* is that a petitioner must show "by clear and convincing evidence that the entry and execution of [his or her removal] order is prohibited as a matter of law."

Id. at 1337 (quoting INA § 242(f)(2)).[1] At least two judges in the Eleventh Circuit have requested an *en banc* review of the standard of review set forth in *Weng*. *See Bonhomme-Ardouin v. Attorney General*, 291 F.3d 1289, 1290-91 (11th Cir. 2002) (Barkett and Wilson, JJ., concurring) (explaining how standard for injunction under INA § 242(f)(2) ought not to be same as standard for temporary stay of removal pending review of agency decision during federal court appeal).

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[1] *Weng* has been the subject of significant criticism and has not been followed by many other federal courts. In fact, this approach, although proffered by the Government in at least seven circuits, has been rejected by six and embraced in a holding by only one. *See Tesfamichael v. Gonzales*, 411 F.3d 169, 171 n.4 (5th Cir. 2005); *see also Maharaj v. Ashcroft,* 295 F.3d 963, 964-66 (9th Cir. 2002) (stay pending appeal of denial of habeas petition); *Bejjani v. INS,* 271 F.3d 670, 687-89 (6th Cir. 2001) (stay pending petition to review INS decision to reinstate order of removal); *Andreiu v. Ashcroft,* 253 F.3d 477, 479-83 (9th Cir. 2001) (stay pending petition to review INS decision denying asylum claim); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004) (rejecting *Weng* standard); *Mohammed v. Reno*, 309 F.3d 95, 99-100 (2d Cir. 2002) ("We therefore conclude that the heightened standard of review required by subsection 242(f)(2) did not apply to the District Court's consideration of a stay pending appeal, nor does it apply to our consideration of the motion to lift the stay"); *Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003) ("The most sensible way to give operative effect to both words in this statutory scheme is to treat the word "enjoin" as referring to permanent injunctions and the word "restrain" as referring to temporary injunctive relief (such as a stay)"); *Lal v. Reno,* 221 F.3d 1338 (7th Cir. 2000) (unpublished table opinion); *Kahn v. Elwood*, 232 F. Supp. 2d 344, 347-349 (M.D. Pa. 2002); *Kelly v. Farquharson*, 256 F. Supp. 2d 93, 100 (D. Mass. 2003); *Kanivets v. Riley*, 286 F. Supp. 2d 460, 464-65 (E.D. Pa. 2003); *Hor v. Gonzales*, 400 F.3d 482, 483-85 (7th Cir. 2005). *See generally Kenyeres v. Ashcroft,* 538 U.S. 1301, 1303-05, 123 S. Ct. 1386 (2003) (discussing differing standards applied by various Courts of Appeals but declining to decide issue).

The Sixth, Seventh, and Ninth Circuits apply different tests than the one announced in *Weng*. *See, e.g., Andreiu v. Ashcroft,* 253 F.3d 477, 483 (9th Cir. 2001) (*en banc*) (petitioner seeking temporary stay of deportation pending appeal must demonstrate "(1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor"); *Sofinet v. INS,* 188 F.3d 703, 706 (7th Cir. 1999) (to merit temporary stay of deportation pending appeal, petitioner must demonstrate "(1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest"); *Bejjani v. INS,* 271 F.3d 670, 687-89 (6th Cir. 2001) (same, citing *Andreiu* and *Sofinet*). If Rudolf were appealing in any other circuit than the Eleventh Circuit, there is no question that a stay of his removal pending review would have been granted.

Discussion

I. RUDOLF MEETS THE STANDARDS FOR A TEMPORARY STAY.

In *Kenyeres*, Justice Kennedy wrote the Supreme Court should "examine and resolve the question [of the split in the Circuits] in an appropriate case." *Kenyeres* at 1305. *Kenyeres* was not an appropriate case because the Petitioner could not prevail under either the Eleventh Circuit's more stringent standard in *Weng*, or the more lenient standards of the other circuits. *See id.* Here, because Rudolf meets both the *Weng* standard and the equities standard of the other circuits, this Court may both stay his deportation pending review and resolve the dissonance among the Circuits.

A. The *Weng* Standard.

Right or wrong, the *Weng* standard is that a petitioner must show "by clear and convincing evidence that the entry and execution of [his or her removal] order is prohibited as a matter of law." *Weng*, 287 F.3d at 1337 (quoting INA § 242(f)(2)). Rudolf does this by showing that his removal will moot his case. It is beyond peradventure that if all petitioners like Rudolf (even ones with cases of first impression) seeking judicial review of agency decisions to issue orders of removal could simply be taken in to custody and removed, the Government could avoid judicial review of agency decisions altogether. This cannot be what Congress intended by § 242(f)(2) of the INA, or what the Eleventh Circuit meant in *Weng*.

But even if the *Weng* standard is applied to Rudolf, he shows that it would be a violation of law (Constitutional due process and the mootness doctrine) for the Government to avoid hearing and review by summarily removing Rudolf to Germany, such that his right to review is vitiated entirely.

While the Eleventh Circuit has found that a foreign national's removal from the United States does not moot a petition for review when the "injury would be redressed by a favorable ruling from this Court" after removal, Rudolf's injury cannot be redressed after removal because he will be in prison in Germany. *See Moore v. Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

The court in *Moore* found removal did not moot a petition for review because INA § 242 does not remove federal jurisdiction in the event a petitioner is removed from the United States and because after removal "there continue[d] to exist a live case or controversy under Article III, section 2 of the United States Constitution." *Id.* Specifically, the court found after removal, the Petitioner's "injury would be redressed by a favorable ruling from [the Eleventh Circuit]." *Id.*

The same cannot be said in this case. Rudolf will unquestionably be placed in prison in Germany upon his removal from the United States. His certain incarceration is the very basis of his claim to asylum now on appeal.[2]

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[2] Should the Eleventh Circuit or the Supreme Court agree with Rudolf that his prosecution in Germany was in fact persecution, his removal to Germany would also be in violation of section 208(c) of the Immigration and Nationality Act [8

Rudolf's removal will result in his imprisonment by the German government for a period of years. For the publication of his study, the German government has already sentenced Rudolf to a 14-month prison term, and the record shows he will face additional jail time for his publications on the internet since leaving Germany. *See* Certified Administrative Record Excerpts at 265-66, 391, 543-44, 2265-66, attached hereto as Ex. 7.

Upon removal, Rudolf will be separated from his U.S. citizen spouse and infant child and he will face continued persecution by the German government. *See id.* After removal, these injuries could not then be redressed by any favorable ruling from this Court.

Further, Rudolf's removal will moot his claim that 8 C.F.R. §§ 245.1(c)(8) & 1245.1(c)(8) are unlawful regulations because he will no longer have the status of an arriving alien applying for adjustment of status in removal proceedings. Thus, Rudolf's removal will violate his right to due process under the Fifth Amendment to the United States Constitution, and will enable DHS to avoid a challenge to a regulation now found to be unlawful by the First, Third and Ninth Circuits simply by removing the challenger from the United States. *See Succar v. Ashcroft,* 394 F.3d 8 (1st Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir.

U.S.C. §1158(c)]: "In the case of an alien granted asylum … the Attorney General shall not remove or return the alien to the alien's country of nationality . . . ."

2005); *Bona v. Gonzales*, ___ F.3d ___, 2005 WL 2401874 (9th Cir. Sept. 30, 2005).

The Fifth Amendment to the United States Constitution provides in part that no "person" may be deprived of life, liberty, or property without due process of law." U.S. Cost., Amend. 5. As a general rule, aliens who are physically present in the United States are within the protection of the Fifth Amendment and are accorded the full panoply of traditional due process rights. *See Brownell v. We Shung*, 352 U.S. 180, 77 S. Ct. 252 (1956); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472 (1953); *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *on reh'g*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846, 105 S. Ct. 2992 (1985). Thus, an illegal alien possesses an identifiable liberty interest protected by due process in being accorded all opportunity to be heard on questions involving his right to be in, and remain in, the United States before being deported. *See Rusu v. I.N.S.*, 296 F.3d 316 (4th Cir. 2002). However, what it means to be heard at a meaningful time and in a meaningful manner, as required by due process, will vary with the different circumstances, and due process calls only for those procedural protections demanded by a particular situation. *See id.* at 321.

B. The Balance of the Equities Standard.

Unlike other similar cases, Rudolf also demonstrates convincingly that the balance of equities tips sharply in his favor and that he enjoys a likelihood of

success on the merits. The harm to Rudolf of being deported and removed to Germany where he faces a prison sentence is total. He loses his case, he loses his freedom, he loses his marriage and child, he loses his right to review of an illegal ruling by the IJ, he loses his right to review of the regulation on which his motion to reopen proceedings was denied. If Rudolf is removed he loses everything. The harm to the United States Government by issuance of a temporary stay, by sharp contrast, is nothing. Whether the Government deports Rudolf now or after all judicial review is exhausted costs the Government nothing. Indeed, the only cost associated with waiting is if the Government holds Rudolf for that time and has to pay for his incarceration. Such a cost could be avoided entirely by any appearance bond or other assurances of self-surrender.

On the merits and Rudolf's chances of success (and without rearguing all that has been set forth in the briefs before the Eleventh Circuit) suffice it to say that Rudolf is challenging an indefensible finding by the IJ that his application for asylum was "frivolous," a finding made in direct violation of 8 C.F.R. § 208.20. In addition, Rudolf notes that now three circuit court decisions from the First, Third and Ninth Circuits are all weighing in favor of Rudolf's argument that the regulation being used to deny his motion to reopen is invalid as against Congressional intent. *See Succar v. Ashcroft,* 394 F.3d 8 (1st Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. Sept. 08, 2005); *Bona v. Gonzales*, ___ F.3d ___,

2005 WL 2401874 (9th Cir. Sept. 30, 2005). Moreover, Rudolf has tremendous merit to his asylum application, supported by unrebutted expert testimony and extensive documentation. Finally, DHS has approved Rudolf's wife's immigrant petition filed on his behalf, rendering him eligible for adjustment of status in the absence of the regulation challenged here and found invalid by three other circuits. *See* Ex. 6.

II. EFFICIENT USE OF JUDICIAL RESOURCES REQUIRES A STAY.

It almost goes without saying that if the Government could avoid all judicial review of removal orders at the agency level by simply taking the aliens into custody and removing them, what has been the point of allowing this Petitioner and the Government counsel to go to the trouble, time and expense of filing significant briefs on complicated subjects and on legal and Constitutional issues of some importance? What is the point of the Eleventh Circuit having gone to the trouble of reviewing this case and deciding that oral argument should be scheduled in this matter? Efficient use of scarce judicial resources should be a matter of concern to all parties here as well as to the Court itself. Unless Rudolf's imminent removal is stayed immediately, all the time and effort expended on this case will be wasted.

Conclusion

WHEREFORE, and for all the foregoing reasons, the Petitioner respectfully requests that this Court enter an order prior to November 14, 2005, staying his removal from the United States pending judicial review.

Respectfully submitted,

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Dated: November 9, 2005

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Petitioner's Emergency Application to Stay Removal Pending Review was served by electronic mail and First Class Mail on Respondent's counsel on November 9, 2005, addressed to:

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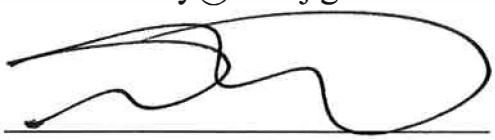

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