July 31, 2020

Lyle W. Cayce, Clerk of Court
United States Court of Appeals, Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Solorzano v. Nielson*, No. 19-50220 (Oral Argument Feb. 5, 2020 before Judges Elrod, Southwick, and Haynes)

Supplemental Letter Brief of Amici Curiae Regarding *Nolasco v. Crockett*, 958 F.3d 384 (5th Cir. 2020)

Dear Mr. Cayce:

On July 21, 2020, the Court requested supplemental letter briefs regarding whether it has jurisdiction to hear the case of Plaintiff-Appellee Luis Orlando Rodriguez Solorzano (Mr. Solorzano), given the recent decision of another panel of this Court in *Nolasco v. Crockett*, 958 F.3d 384 (5th Cir. 2020). *See* July 21 Court Directive. Amici curiae the American Immigration Council, the American Immigration Lawyers Association and the Northwest Immigrant Rights Project, who previously submitted an amicus brief and participated in oral argument, proffer this letter brief in support of Mr. Solorzano's supplemental brief, to emphasize that the Court retains jurisdiction over this case.

A. Because Mr. Solorzano cannot be placed in removal proceedings, *Nolasco* does not apply and this Court retains jurisdiction.

As the Court Directive quoted, this Court held that "federal courts lack jurisdiction over challenges to the denial of [noncitizens'] applications for LPR status unless and until the challenge has been exhausted in removal proceedings." *Nolasco*, 958 F.3d at 387. But, pursuant to 8 C.F.R. § 244.18(a), the U.S. Department of Homeland Security (DHS) *cannot* issue Mr. Solorzano a charging document, a necessary precondition to placing him in removal proceedings. *See* 8 U.S.C. § 1229(a); 8 C.F.R. §§ 1003.14(a), 1239.1(a). Because DHS cannot initiate removal proceedings, a jurisdictional bar that applies where an individual *may* face removal proceedings cannot apply to this case.

AILA Doc. No. 20080534. (Posted 8/5/20)

In *Nolasco*, the Court considered whether it had jurisdiction under the Administrative Procedure Act (APA) to review the denial of an adjustment of status application by U.S. Citizenship and Immigration Services (USCIS). 958 F.3d at 385. The Court found, relying on a prior case that addressed jurisdiction in non-APA cases, that it had no jurisdiction because Mr. Nolasco had failed to exhaust administrative remedies. *Id*. at 386 (citing *Cardoso v. Reno*, 216 F.3d 512 (5th Cir. 2000)). Specifically, the Court held that noncitizens denied adjustment "must 'renew [their] request[s] upon the commencement of removal proceedings.'" *Id*. (quoting *Cardoso*, 216 F.3d at 518, which cited 8 C.F.R. § 245.2(a)(5)(ii)) (alterations in original).[1]

Nolasco did not address the more specific scenario facing Mr. Solorzano: this Court's jurisdiction over a challenge to USCIS' denial of an application for adjustment of status where the applicant *cannot* be placed in removal proceedings. Where an individual such as Mr. Solorzano has Temporary Protected Status (TPS) and cannot be deported, *see* 8 U.S.C. § 1254a(a)(1)(A), specific regulations limit DHS' ability to initiate removal proceedings. "A charging document may be issued against an alien granted Temporary Protected Status on grounds of deportability or excludability which would have rendered the alien statutorily ineligible for such status pursuant to §§ 244.3(c) and 244.4." 8 C.F.R. § 244.18(a).[2] Absent triggering

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[1] This is a misreading of the relevant regulation, which does not *require* individuals to renew their adjustment applications in removal proceedings, but rather *permits* them to do so if they are placed in proceedings. *See* 8 C.F.R. § 245.2(a)(5)(ii) ("[T]he applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240."). For this reason, and the other reasons explained in the amici curiae brief filed in support of the pending Petition for Rehearing En Banc in *Nolasco*, amici believe that *Nolasco* was wrongly decided. *See* Brief of the American Immigration Council, National Immigration Litigation Alliance and American Immigration Lawyers Association as Amici Curiae in Support of Plaintiff-Appellant's Petition for Rehearing En Banc, *Nolasco v. Crockett*, No. 19-30646 (5th Cir. Jun. 19, 2020). Regardless, though, *Nolasco* does not bar the Court from reviewing Mr. Solorzano's claims.

[2] In contrast, where USCIS has cause to withdraw an individual's TPS or deny an application for TPS, USCIS must issue a charging document where the basis for the decision is "a ground of deportability or excludability which renders an alien ineligible for Temporary Protected Status under § 244.4 or inadmissible under § 244.3(c)." 8 C.F.R. §§ 244.10(c)(1), 244.14(b)(3). Those situations are not applicable here.

AILA Doc. No. 20080534. (Posted 8/5/20)

those grounds of removal, individuals with TPS cannot be placed in removal proceedings.

Mr. Solorzano is not subject to removal for any of the grounds of deportability or excludability which would have rendered him ineligible for TPS listed in 8 C.F.R. §§ 244.3(c) or 244.4. *See* Plaintiff-Appellee's Supplemental Letter Brief. Therefore, DHS cannot issue a charging document, and Mr. Solorzano cannot be placed in removal proceedings. *Nolasco*'s holding, which addressed the need to exhaust administrative remedies by appearing in removal proceedings, cannot apply; it would be nonsensical to require exhaustion in proceedings that an individual is barred from by regulation. Furthermore, it would be contrary to the exhaustion requirement of the APA, which provides that "an appeal to superior agency authority" is necessary for exhaustion only where statute or agency rule requires it. 5 U.S.C. § 704; *see also Darby v. Cisneros*, 509 U.S. 137, 154 (1993). Here, the exact opposite is true: rather than requiring administrative appeal, an agency rule expressly prevents Mr. Solorzano from appearing in removal proceedings to renew his adjustment application. *Cf. Arce-Vences v. Mukasey*, 512 F.3d 167, 171-72 (5th Cir. 2007) (noting that "exhaustion is not required when administrative remedies are inadequate") (quoting *Ramirez-Osorio v. Immigration and Naturalization Serv.*, 745 F.2d 937, 939 (5th Cir. 1984)); *Xia v. Tillerson*, 865 F.3d 643, 658 (D.C. Cir. 2017) (finding no exhaustion needed where "the relevant law does not require exhaustion and . . . exhaustion would have been futile").

This is true even though the plaintiff in *Nolasco* also has TPS and argued that any jurisdictional bar should not apply to individuals with TPS. *See Nolasco*, 958 F.3d at 387 n.2. Mr. Nolasco did not raise the specific argument at issue here: whether 8 C.F.R. § 244.18(a) impacted the jurisdictional analysis where an individual has TPS and is not subject to the grounds of deportability or excludability discussed in 8 C.F.R. §§ 244.3(c) and 244.4. *See id*. at 386 (noting that Mr. Nolasco "concede[d]" that "he has 'sought judicial review of [an] adjustment-of-status denial[] that could also be reviewed in removal proceedings'") (second and third alterations in original). The Court considered only whether Mr. Nolasco himself could trigger removal proceedings, not whether DHS was legally barred from initiating removal proceedings. *See id.* (noting that Mr. Nolasco has no "means of self-initiating" removal proceedings). As a result, the Court did not have the opportunity to consider the above argument in *Nolasco*. Because this issue was not "squarely addressed," *stare decisis* is not applicable. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the

AILA Doc. No. 20080534. (Posted 8/5/20)

court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

B. Because petitions for panel rehearing and rehearing en banc of *Nolasco* are pending before this Court, the Panel should not rely upon that decision.

The Court is currently assessing whether to rehear *Nolasco*. On June 8, 2020, the plaintiff-appellant in *Nolasco* filed petitions for panel rehearing and for rehearing en banc, arguing, inter alia, that the panel misapprehended the law related to the administrative exhaustion requirements for claims under the APA. *See* Petitions for Rehearing, *Nolasco v. Crockett*, No. 19-30646 (5th Cir. Jun. 8, 2020). The Court requested a response from the defendants-appellees, which they submitted, and permitted a reply by the plaintiff-appellant. *See* Court Directive, *Nolasco* (5th Cir. Jun. 19, 2020); Response/Opposition, *Nolasco* (5th Cir. Jun. 29, 2020); Reply, *Nolasco* (5th Cir. Jul. 7, 2020).

Even if this Court were to disagree with Mr. Solorzano and amici and find that the jurisdictional holding in *Nolasco* is applicable, it should not issue a decision based on *Nolasco* while that case is in a state of flux. Instead, at a minimum, the Court should hold Mr. Solorzano's case in abeyance while the rehearing petitions in *Nolasco* are resolved.

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For the foregoing reasons, amici urge this Court to find that it has jurisdiction over Mr. Solorzano's claims or, in the alternative, to hold this case in abeyance pending the resolution of the petitions for rehearing in *Nolasco*.

Sincerely,

s/ *Kristin Macleod-Ball*
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AILA Doc. No. 20080534. (Posted 8/5/20)

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AILA Doc. No. 20080534. (Posted 8/5/20)