No. 17-1233

In the Supreme Court of the United States

EMILIO ESTRADA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly rejected petitioner's collateral challenge to the removal order underlying his prosecution under 8 U.S.C. 1326 for illegal reentry into the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaty, statutes, and regulations:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 876 F.3d 885. The order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 13a-20a) is not published in the Federal Supplement but is available at 2016 WL 10933062. The order of the district court denying petitioner's amended motion to dismiss the indictment (Pet. App. 9a-12a) is not published in the Federal Supplement but is available at 2016 WL 10950005.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2017. The petition for a writ of certiorari was filed on March 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of illegal reentry into the United States following a conviction of an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). He was sentenced to time served, with no period of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. 1a-8a.

1. Petitioner is a citizen of Mexico. Pet. App. 2a-3a. In 2007, "undercover officers attempting a controlled purchase of methamphetamine arrested" petitioner—then a lawful permanent resident of the United States—"upon finding meth in his pocket and a rifle and ammunition in his car." *Id.* at 2a. He pleaded guilty to possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3) and 924(a)(2). Pet. App. 2a. He was sentenced to 12 months of imprisonment, to be followed by two years of supervised release. *Ibid.*

The Department of Homeland Security (DHS) served petitioner with a notice to appear for removal proceedings, informing him that his conviction for an aggravated felony rendered him removable. Pet. App. 2a; see 8 U.S.C. 1101(a)(43)(E)(ii) (classifying violations of 18 U.S.C. 922(g)(3) as aggravated felonies); 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

At petitioner's initial appearance in immigration court, an immigration judge (IJ) advised petitioner of his right to secure counsel, challenge the proof supporting his removal, and contest the IJ's decision on appeal. Gov't C.A. Br. 2-3. The IJ also ensured that petitioner had received a document outlining the appeal process.

Id. at 3. Petitioner confirmed that he understood his rights and informed the IJ that he had hired an attorney. *Ibid.* Because the attorney was not present, the IJ continued petitioner's case to a later date. *Ibid.*

Several months later, petitioner appeared before the IJ with a different attorney. Gov't C.A. Br. 3. The IJ stated that he had previously advised petitioner of his rights in immigration proceedings and that he was confident that petitioner's counsel had also done so, and then asked if petitioner "require[d] any additional explanation." *Ibid.* (citation omitted). Petitioner's counsel declined on his behalf. *Ibid.* Through his counsel, petitioner then admitted that he was a native and citizen of Mexico who had been convicted of possession of a firearm by an unlawful user of a controlled substance, and he conceded his removability. Pet. App. 2a; see Notice to Appear 2. The IJ "[n]ot[ed] the unavailability of other relief" and "ordered [petitioner] removed to his home country of Mexico." Pet. App. 2a-3a. Petitioner waived his right to appeal, and was removed in March 2009. *Id.* at 3a.

2. In 2013, a grand jury in the Eastern District of Tennessee returned an indictment charging petitioner with illegal reentry into the United States following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). Indictment 1. Petitioner was arrested on that charge in 2015. D. Ct. Doc. 2 (Mar. 13, 2015).[1]

Petitioner moved to dismiss the indictment. Pet. App. 3a; see Mot. to Dismiss 1-5 (June 30, 2015); see also

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[1] After petitioner's arrest, a grand jury returned a superseding indictment adding a second illegal reentry count that charged petitioner with being unlawfully found in the United States in 2015. Superseding Indictment 1-2.

Am. Mot. to Dismiss 2-22 (June 23, 2016). He argued that the indictment should be dismissed because his removal order had been fundamentally unfair, on the ground that the IJ had not advised him of the possibility of discretionary relief from removal under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h). Pet. App. 3a.

The district court denied petitioner's motion. Pet. App. 13a-20a. The court explained that an alien may collaterally challenge a deportation order in a later criminal case only if he "demonstrates that (1) [he] exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived [him] the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." *Id.* at 16a (quoting 8 U.S.C. 1326(d)).

The district court began with the third requirement, and concluded that petitioner had not shown that entry of his order of deportation was "fundamentally unfair." Pet. App. 17a (citation omitted). The court explained that an alien can establish that a deportation order is fundamentally unfair only by demonstrating that his "due process rights were violated by defects in the underlying deportation proceeding" and that "he suffered prejudice as a result." *Ibid.* (quoting *United States* v. *Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004)). The court next noted that a person is denied due process only if he is deprived of a constitutionally protected interest. *Id.* at 17a-18a. The court determined that no such deprivation could have occurred in petitioner's case because the relief as to which petitioner argued he should have be advised was entirely "discretionary." *Ibid.* It explained that the Sixth Circuit had found "no

constitutionally-protected liberty interest in obtaining discretionary relief from deportation." *Id.* at 17a (quoting *Ashki* v. *INS*, 233 F.3d 913, 921 (6th Cir. 2000)). Because the court determined petitioner's deportation proceeding was not fundamentally unfair on that basis, it "decline[d] to address" whether petitioner also failed to demonstrate that the proceeding against him was fundamentally unfair because petitioner was not "eligib[le] for Section 212(h) relief" to begin with, or because petitioner had suffered no prejudice. *Id.* at 20a n.4.

In addition, because petitioner had "failed to satisfy one element of 8 U.S.C. § 1326(d)"—the fundamental-unfairness requirement—the district court did not address whether petitioner also failed to satisfy one or both of the other elements, either by failing to exhaust available remedies or by failing to establish that he had been denied the opportunity for judicial review in the immigration proceedings. Pet. App. at 16a, 20a; see 8 U.S.C. 1326(d).

Petitioner subsequently filed an amended motion to dismiss the indictment, which asserted that the removal proceedings against him were fundamentally unfair because his attorney had performed ineffectively by failing to advise him of the availability of discretionary relief under Section 212(h). Am. Mot. to Dismiss 2-22 (June 23, 2016). The district court concluded that this claim failed on the same ground as the initial claim: Because petitioner had "no constitutionally-protected liberty interest in obtaining discretionary relief," the court wrote, petitioner was unable to demonstrate a deprivation of due process, and was therefore unable to demonstrate that his removal proceeding was fundamentally unfair. Pet. App. 11a; see *id.* at 9a-12a.

Petitioner pleaded guilty to one count of illegal reentry into the United States following a conviction of an aggravated felony under a plea agreement in which he reserved his right to appeal the denial of his motions to dismiss the indictment. Pet. App. 3a. The district court sentenced petitioner to time served, with no term of supervised release to follow. Judgment 2.

According to DHS, petitioner was then removed from the United States in 2017.

3. The court of appeals affirmed. Pet. App. 1a-8a. It agreed with the district court that petitioner had failed to demonstrate that his deportation order was fundamentally unfair. *Id.* at 4a-5a. It explained that "[t]o prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice." *Ibid.* And it concluded that petitioner could not establish a due process violation because he had no life, liberty, or property interest in purely discretionary immigration relief. *Id.* at 5a-6a. Because petitioner "ha[d] not established a due process violation," the court did not "decide whether [petitioner] exhausted all available administrative remedies or whether his deportation proceedings improperly deprived him of judicial review," *id.* at 8a (citation omitted), or address the government's arguments that petitioner was ineligible for relief under Section 212(h) to begin with.

ARGUMENT

Petitioner renews his challenge (Pet. 9-19) to the district court's denial of his motion to dismiss the illegal-reentry charges against him on the ground that his deportation order was fundamentally unfair. He contends that this Court should review a disagreement among the

courts of appeals over whether an IJ's failure to advise an alien about his eligibility for discretionary relief can render the alien's deportation order fundamentally unfair under 8 U.S.C. 1326(d)(3). Petitioner's case, however, is not a suitable vehicle for review of that question. This Court has repeatedly denied review of the question presented, *e.g.*, *Cordova-Soto* v. *United States*, 136 S. Ct. 2507 (2016) (No. 15-945); *Soto-Mateo* v. *United States*, 136 S. Ct. 1236 (2016) (No. 15-7876); *Garrido* v. *United States*, 134 S. Ct. 513 (2013) (No. 13-5415); *Avendano* v. *United States*, 562 U.S. 842 (2010) (No. 09-9617); *Madrid* v. *United States*, 560 U.S. 928 (2010) (No. 09-8643); *Acosta-Larios* v. *United States*, 559 U.S. 1009 (2010) (No. 09-7519); *Barrios-Beltran* v. *United States*, 558 U.S. 1051 (2009) (No. 09-5480), and the same result is warranted here.

1. In *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), this Court considered the question "whether a federal court [in an illegal reentry prosecution] must *always* accept as conclusive the fact of the deportation order." *Id.* at 834. The Court held that, because the "determination made in an administrative [deportation] proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." *Id.* at 837-838. The Court concluded that "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 838 (emphasis omitted).

After this Court issued its decision in *Mendoza-Lopez*, Congress amended 8 U.S.C. 1326 to add Subsection (d), which allows a collateral attack on a removal order in an illegal reentry prosecution under specified circumstances. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441, 110 Stat. 1279. Under Section 1326(d), an alien charged with illegal reentry may challenge the validity of the earlier removal only if he shows that (1) he "exhausted any administrative remedies that may have been available," (2) the "deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," and (3) "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). "To establish fundamental unfairness, a defendant must show both that his due process rights were violated and that he suffered prejudice from the deportation proceedings." See, *e.g.*, *United States* v. *Arita-Campos*, 607 F.3d 487, 493 (7th Cir. 2010).

Consistent with the approaches of most courts of appeals, the court below correctly determined that failure to inform an alien about the possibility of seeking purely discretionary relief does not deprive the alien of due process and thereby render removal proceedings "fundamentally unfair," because an alien does not have a constitutionally protected interest in purely discretionary relief. Pet. App. 5a-8a; see *United States* v. *Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015), cert. denied, 136 S. Ct. 1236 (2016); *United States* v. *Alegria-Saldana*, 750 F.3d 638, 642 (7th Cir. 2014); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 555 U.S. 997 (2008); *United States* v. *Torres*, 383 F.3d 92, 105-106 (3d Cir. 2004); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1204-1205 (10th Cir. 2004) (en banc); *United States*

v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003). Even when an alien has met the statutory criteria to apply for discretionary relief, a grant of such relief is "not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Such relief, which lies in the Attorney General's sole discretion, is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted); cf. *Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983) (holding that prisoners lack constitutionally protected liberty interest in discretionary prison assignments). Because aliens have no constitutionally protected entitlement to be considered for discretionary relief, failure to inform aliens about such relief cannot deprive an alien of a constitutionally protected interest, and thereby render removal proceedings fundamentally unfair.

Contrary to petitioner's contention (Pet. 12-13), this principle is consistent with this Court's decisions in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and *Immigration and Naturalization Service* v. *St. Cyr*, 533 U.S. 289 (2001). Those cases did not involve due process challenges. Rather, they permitted habeas corpus challenges to executive non-compliance with statutory or regulatory provisions for determining eligibility for discretionary relief. In *Accardi*, the Court held that an alien could pursue a habeas challenge to the Attorney General's alleged non-compliance with regulations governing adjudication of the alien's application for discretionary relief. 347 U.S. at 267; see *id.* at 268 ("[W]e object to the Board's alleged failure to exercise its own discretion, *contrary to existing valid regulations*" because, "[i]f successful," the alien "will have been

afforded that due process *required by the regulations* in such proceedings.") (emphases added; emphasis omitted).

In *St. Cyr*, the Court held that the 1996 amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not strip federal courts of habeas corpus jurisdiction to decide "pure questions of law" bearing on an alien's eligibility for discretionary relief. 533 U.S. at 305-307. Neither *Accardi* nor *St. Cyr* addressed constitutional due process, much less authorized the imposition of extra-statutory procedures governing applications for discretionary relief. To the contrary, as Justice Scalia explained in his dissent for four Justices in *St. Cyr*, the due process arguments were "insubstantial[]" and the majority "d[id] not even bother to mention them." *Id.* at 345; see *Lopez-Ortiz*, 313 F.3d at 231 ("*St. Cyr*'s holding was not grounded in § 212(c) relief having the status of a constitutionally protected interest; rather, it was based on the Court's interpretation of [an immigration statute].").

Petitioner also invokes (Pet. 15-16) decisions recognizing that aliens have constitutionally protected interests in other forms of immigration relief. See *Landon* v. *Plasencia*, 459 U.S. 21, 22, 34-35 (1982) (stating that a permanent resident returning from a visit abroad "has a right to due process" in a hearing on whether she should be excluded from the country under the INA); *Bridges* v. *Wixon*, 326 U.S. 135, 150, 156 (1945) (granting habeas corpus relief to an alien found deportable based on ties to the Communist Party, when the deportation order rested "on a misconstruction of the term 'affiliation'" and relied on consideration of statements in violation of immigration regulations); cf. *Reno* v. *Flores*, 507 U.S. 292, 306-307 (1993) (policy governing detention of juvenile aliens implicates liberty interests); *Wong*

Yang Sung v. *McGrath*, 339 U.S. 33, 50 (1950) (requirements of Administrative Procedure Act governed deportation hearings that were required "in order to save [a deportation] statute from invalidity" because "[w]hen the Constitution requires a hearing, it requires a fair one"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) ("To deport one who * * * claims to be a citizen[] obviously deprives him of liberty" and "may result also in loss of both property and life."). But those decisions do not suggest that an alien properly found removable has a constitutionally protected interest in those forms of immigration relief that are purely discretionary—akin to a pardon or a matter of grace. *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), is even further afield: that case held that the Sixth Amendment requires counsel in criminal cases to advise defendants regarding whether a guilty plea would carry a risk of removal, because deportation is a "consequence of a criminal conviction" with a uniquely "close connection to the criminal process." *Id.* at 366.

2. The Second and Ninth Circuits have concluded that an immigration proceeding can be collaterally attacked as fundamentally unfair based on the failure to notify an alien of his eligibility for purely discretionary relief for removal. See *United States* v. *Lopez-Velasquez*, 629 F.3d 894, 897 n.2 (9th Cir. 2010); *United States* v. *Copeland*, 376 F.3d 61, 70-73 (2d Cir. 2004); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1049-1050 (9th Cir. 2004). But petitioner's case is an unsuitable vehicle for reviewing that disagreement among the circuits.

First, petitioner's case does not at bottom present the issue whether an immigration proceeding can be rendered fundamentally unfair as a result of failure to

inform an alien of his eligibility for discretionary relief from removal because—as the government explained below—petitioner was not in fact eligible for discretionary relief from removal. See Gov't C.A. Br. 14-16; see also Gov't Resp. to Second Mot. to Dismiss 9-10 (July 14, 2016). Petitioner invokes Section 212(h) as though it can supply a freestanding ground of relief from removal. See Pet. 7-8. But Section 212(h) allows waiver of a ground of inadmissibility only "where the alien is applying or reapplying 'for a visa, for admission to the United States, or adjustment of status.'" *In re Rivas*, 26 I. & N. Dec. 130, 131 (B.I.A. 2013) (quoting 8 U.S.C. 1182(h) (Supp. II 1990)) (emphasis omitted); see, *e.g.*, *Poveda* v. *U.S. Attorney Gen.* 692 F.3d 1168, 1177 (11th Cir. 2012); *Cabral* v. *Holder*, 632 F.3d 886 (5th Cir. 2011); *Klementanovsky* v. *Gonzales*, 501 F.3d 788, 791-792 (7th Cir. 2007); *Osuchukwu* v. *INS*, 744 F.2d 1136, 1139 n.7 (5th Cir. 1984). Petitioner has not filed any application for adjustment of status—and, indeed, does not appear to have been eligible for such an adjustment.[2] Accordingly, he was not eligible for discretionary relief from deportation under Section 212(h).

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[2] An alien may receive an adjustment of status only if, *inter alia*, "an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. 1255(a)(3). A visa is only available to an intending immigrant when the earlier-filed cases of other intending immigrants in the same visa preference category have been resolved. See 2 Austin T. Fragomen, Jr. et al., *Immigration Procedures Handbook* § 19.5 (2016-2017 ed.). The monthly visa bulletins when petitioner was in immigration proceedings indicate that no immigrant visa would have been immediately available to petitioner based on his marriage to a lawful permanent resident alien, because visas were only available to nationals of Mexico married to lawful permanent residents whose visa petitions had been pending since 2001-2002. And the government does not have any indication that

Second, this case would also be an unsuitable vehicle for addressing the question presented for the further reason that even if petitioner's order had been "fundamentally unfair," 8 U.S.C. 1326(d)(3), petitioner cannot meet the other requirements for collateral attack, by demonstrating that he exhausted administrative remedies and was deprived of his ability to seek judicial review, 8 U.S.C. 1326(d)(1) and (2). Petitioner was advised of his right to appeal to the Board of Immigration Appeals (BIA), but expressly waived that right.

The IJ's determination that petitioner was ineligible for discretionary relief does not excuse petitioner from seeking appellate review of that decision, as many aliens have done. See, *e.g.*, *St. Cyr*, 533 U.S. at 289 (alien sought habeas corpus relief after the BIA determined that he was ineligible for discretionary relief); *Mohammed* v. *Ashcroft*, 261 F.3d 1244, 1246-1247 (11th Cir. 2001) (pro se alien who was told by an IJ that he was ineligible for discretionary relief appealed to the BIA and then sought judicial review of the BIA's adverse ruling). If an immigration official's legal error in finding an alien ineligible for discretionary relief excused the alien from exhausting administrative remedies, 8 U.S.C. 1326(d)(1), and showing a deprivation of judicial review, 8 U.S.C. 1326(d)(2), then those requirements would impose no independent limitations on an alien's ability to contest the prior removal order in an illegal-reentry prosecution. In other contexts, this Court has recognized that a government official's mistaken advice about the law does not excuse failure to challenge that advice on appeal. See *Bousley* v. *United States*, 523 U.S. 614, 621-622 (1998) (holding that a defendant who claimed that the

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petitioner would have been eligible for an employment-based preference that would have allowed him immediate visa issuance.

district court had erroneously advised him of the nature of the charge procedurally defaulted by failing to challenge the validity of his guilty plea on direct appeal); cf. *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 358-360 (2006) (holding that state officials' failure to inform a detained alien of his rights to consular notification and communication under Article 36 of the Vienna Convention on Consular Relations and Optional Protocol on Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292-294, does not excuse the alien's procedural default if the alien fails to raise an Article 36 claim at trial or on direct appeal).

Moreover, despite asserting that his waiver of appellate review below resulted from ineffective assistance of counsel, petitioner has never sought to exhaust administrative relief concerning that claim by seeking to reopen his immigration proceeding. See 8 C.F.R. 1003.23(b) ("An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision."); 8 C.F.R. 1003.2(c)(1) (providing that a motion to reopen proceedings "for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation"). Courts have treated such actions—not attempted here—as satisfying the exhaustion requirement of Section 1326(d). See, *e.g.*, *Copeland*, 376 F.3d at 67; *United States* v. *Perez*, 330 F.3d 97, 101 (2d Cir. 2003). In doing so, they have noted that an alien's claims should generally "be first presented to the BIA because * * * the BIA can reopen the proceedings" and develop an evidentiary record to assist in evaluating the alien's claims. *Perez,* 330 U.S. at 101 (ci-

tation and internal quotation marks omitted). Petitioner's failure to exhaust administrative remedies or demonstrate that he sought and was denied judicial review makes his case a poor vehicle for examining the other requirements for collateral relief.

Third, this Court's review is additionally unwarranted because the question presented is of limited practical significance to petitioner. Although convictions ordinarily have "collateral consequences adequate to meet Article III's injury-in-fact requirement," *Spencer* v. *Kemna*, 523 U.S. 1, 14 (1998), any collateral consequences in petitioner's case are highly attenuated. Petitioner received a sentence of time served, with no supervised release to follow, and he was subsequently removed from the United States. Moreover, because petitioner was previously removed from the United States following an aggravated felony conviction, petitioner is subject to the bar on reentry for removed aliens without regard to his current conviction. See 8 U.S.C. 1182(a)(9)(A)(ii). Petitioner's limited stake in the resolution of the question he raises is further reason that his case is a poor vehicle for review of that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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