No. 17-1233

IN THE

Supreme Court of the United States

EMILIO ESTRADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Like the court below, the government admits that there is "disagreement among the circuits" on the question presented. Opp. 11; *see* Pet. 9-11. And the government does not deny that the resolution of this question is very important for lawful permanent residents in removal proceedings and criminal defendants facing prosecution for illegal reentry after removal. *See* Pet. 17-19. These concessions alone show that this case warrants review.

The government nonetheless opposes certiorari because it believes (Opp. 7) the decision below was correct and this case "is not a suitable vehicle." The government's arguments lack merit. The respondent almost always believes the decision below was correct, but that is not a reason to deny a petition squarely pre-

senting a question subject to an entrenched circuit split. In any event, the decision below is incorrect for the reasons shown in the petition, which the government studiously avoids. Nor does the government present any genuine "vehicle" problem; it does not deny that this case presents the question that has divided the circuits, nor that that was the *only* ground of decision in the courts below. Rather, the government simply asserts that, if the Court reverses on the question presented and remands for further proceedings, the government might win on *other* grounds. But the presence of unaddressed alternative arguments for affirmance does not create a vehicle problem. Moreover, the government's alternative arguments are wrong in any event. The petition should be granted.

I. THE SIXTH CIRCUIT'S DECISION IS WRONG AND CONFLICTS WITH THIS COURT'S PRECEDENT

The government predictably asserts that the decision below is correct. But that is not a reason to deny certiorari when the question presented has intractably split the circuits, as the government admits it has. *See* Shapiro et al., *Supreme Court Practice* § 4.17, at 278 (10th ed. 2013) ("'the fact a case may have been rightly decided'" is not "'enough to preclude certiorari'" (quoting Justice Harlan, *Manning the Dikes*, 13 Rec. Ass'n B. N.Y. City 541, 551 (1958))).

In any event, the decision below is wrong. The government's defense amounts to nothing more than repeating the proposition that "an alien does not have a constitutionally protected interest in purely discretionary relief." Opp. 8. As the petition explained, that line of argument is irrelevant for two reasons.

First, like the court of appeals' decision, the government's argument "collapse[s] th[e] distinction" be-

tween "a right to seek relief and the right to that relief itself." *United States* v. *Copeland*, 376 F.3d 61, 72 (2d Cir. 2004); Pet. 11-13. This Court observed in *INS* v. *St. Cyr* that "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." 533 U.S. 289, 307 (2001), *quoted in* Pet. 12. Consistent with this distinction, Mr. Estrada does not claim a constitutional right to a *grant* of discretionary relief from removal; he claims only that the Constitution protects his opportunity to pursue available discretionary relief.

The government's brief never acknowledges—let alone comes to grips with—this self-evident and well-established distinction. Instead, the government tries (Opp. 10) to dismiss *St. Cyr* as not "address[ing] constitutional due process." The government's argument founders on the Court's conclusion that Congress's repeal of discretionary relief from removal did not apply retroactively, because retroactive application would be contrary to "'considerations of fair notice, reasonable reliance, and settled expectations'"—considerations that sound in due process. *St. Cyr*, 533 U.S. at 323-324 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)); *see Landgraf*, 511 U.S. at 266 ("The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation ….").

The only support the government can muster for its position is a citation to the *dissent* in *St. Cyr*. Opp. 10. Of course, nothing in the dissent suggests that the *Court* somehow rejected a due process claim premised on this distinction, particularly given the Court's express statement that the due process concepts of notice, reliance, and settled expectations apply to eligibility for discretionary relief from removal.

Second, the government ignores the actual liberty interest at issue, which is not any interest in a particular form of *relief*, but the well-established liberty interest in *remaining in the country*. The government tries (Opp. 10-11) to distinguish the many cases cited in the petition recognizing that noncitizens have a liberty interest in remaining here and that they are entitled to constitutional due process in removal proceedings to protect that interest. *See* Pet. 15-16. But pointing out that those cases involved "other forms of immigration relief" (Opp. 10) in no way undercuts Mr. Estrada's claim that this recognized entitlement to due process also governs his ability to avoid removal through statutorily available discretionary relief.

Finally, the government does not face the consequences of its position. If Congress could truly switch off the Due Process Clause by making relief from removal discretionary, then nothing would stop the government from affirmatively discouraging immigrants in Mr. Estrada's position from applying for statutorily available relief—or even coercing them to give up their right to do so. Due process, therefore, must protect the ability of immigrants to seek whatever relief from removal the statute makes available. The court of appeals was wrong to suggest that the liberty interest in remaining in this country somehow vanishes when the avenue for protecting that interest is an appeal to agency discretion.

II. THIS CASE IS A SUITABLE VEHICLE TO DECIDE THE QUESTION PRESENTED

The government argues (Opp. 11) that this case is "an unsuitable vehicle" for three reasons. The government is wrong about each—in fact, the government's arguments are not even properly classified as vehicle

problems, as they do not relate to any obstacle to the Court's consideration of the question presented.

A. The government contends (Opp. 11-12) that Mr. Estrada "was not in fact eligible for discretionary relief from removal." But that assertion is not a vehicle problem; it is merely an alternative argument that neither the court of appeals nor the district court addressed and would thus be open on remand. The Court routinely grants certiorari in the face of such arguments, leaving it to the lower courts to address them in the first instance on remand. *Compare* Br. in Opp. 35-38, *Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, No. 12-786 (U.S. Apr. 3, 2013) (raising unaddressed alternative ground for affirmance in opposition to certiorari), *with Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, 134 S. Ct. 2111, 2120 (2014) (reversing judgment on the question presented and declining to address respondents' argument regarding alternative ground for affirmance); *compare* Br. in Opp. 11-22, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 07-1125 (U.S. May 5, 2008) (raising unaddressed alternative grounds for affirmance in opposition to certiorari), *with Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (reversing judgment on the question presented and declining to address respondents' arguments regarding alternative grounds for affirmance). As in those cases, the question presented here deserves review, regardless of whether Mr. Estrada ultimately prevails on remand.

In any event, the government's argument is incorrect, because Mr. Estrada would be eligible for Section 212(h) relief. According to the government (Opp. 12 & n.2), a waiver under Section 212(h) of the INA is available "only where the alien is applying or reapplying 'for a visa, for admission to the United States, or adjustment of status'" (quoting 8 U.S.C. §1182(h)(2)), and, the

government says, Mr. Estrada "does not appear to have been eligible for such an adjustment." But at the time of the removal hearing, Mr. Estrada's wife was less than one year away from being eligible to seek naturalization as a U.S. citizen.[1] A competent attorney would have known to request an individual calendar hearing to be scheduled as soon as Mr. Estrada's wife was able to naturalize and then to file an immediate-relative petition for Mr. Estrada, pursuant to which a visa would have been immediately available. 8 U.S.C. §1151(a), (b)(2)(A)(i) (spouse of U.S. citizen is exempt from numerical limits on visas for permanent residence). Thus, had competent counsel (or the IJ) advised Mr. Estrada and his family of this opportunity, any barrier to eligibility could have been overcome. The failure to inform him of this possibility is another way in which the proceeding was fundamentally unfair.

B. Next, the government contends (Opp. 13-15) that Mr. Estrada "cannot meet the other requirements for collateral attack" on a removal order. Besides showing that the removal order was fundamentally unfair, the noncitizen must show that he "exhausted any administrative remedies that may have been available to seek relief against the [removal] order" and that "the deportation proceedings at which the order was issued

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[1] A person is eligible for naturalization if, among other criteria, she has been a lawful permanent resident "resid[ing] continuously" in the United States "during the five years immediately preceding the date of filing [her] application." 8 U.S.C. §1427(a). An application for naturalization "may be filed up to 3 months" before the five-year period ends. §1445(a). Mr. Estrada's wife became a lawful permanent resident on May 1, 2005, and resided in the United States continuously thereafter. Consequently, she could have applied for naturalization by February 1, 2010.

improperly deprived [him] of the opportunity for judicial review." 8 U.S.C. §1326(d). The government says (Opp. 13-14) that Mr. Estrada "waived" his right to appeal the removal order to the Board of Immigration Appeals and "has never sought … to reopen his immigration proceeding."

This too is just an argument for affirmance on an alternative ground that was not addressed below. Again, that is not a genuine vehicle problem.

Moreover, these other requirements do not stand in the way of Mr. Estrada's collateral attack under Section 1326(d). First, Mr. Estrada was deprived of the opportunity for judicial review. In *United States* v. *Mendoza-Lopez*, this Court held that noncitizens "were deprived of judicial review of their deportation proceeding" because "the waivers of their rights to appeal were not considered or intelligent." 481 U.S. 828, 840 (1987). The Court explained that the waivers were defective because the IJ "permitted waivers of the right to appeal that were not the result of considered judgments by [the noncitizens], and failed to advise [the noncitizens] properly of their eligibility to apply for suspension of deportation." *Id.*

The same is true here—but worse because of the deficient performance of Mr. Estrada's lawyers. Mr. Estrada's waiver of his right to appeal could not be said to be knowing or intelligent, because he was never informed by the IJ or either of his lawyers of his ability to pursue discretionary relief. In fact, one of his lawyers stated on the record that no relief was available. *See* Pet. 5-6. Under such circumstances, Mr. Estrada would have had no reason to think that appeal could have been worthwhile. *See, e.g.*, *United States* v. *Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004) ("Be-

cause the IJ erred when she told Pallares that no relief was available …, Pallares' waiver of his right to appeal was not 'considered and intelligent' and 'deprived [him] of his right to judicial review' under § 1326(d)(2)."); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1950 (9th Cir. 2004); *United States* v. *Cerna*, 603 F.3d 32, 40 (2d Cir. 2010).

Additionally, Mr. Estrada did not even purport to waive his right to appeal. The ultimate authority to waive an appeal rests with the client, not counsel. *McCoy* v. *Louisiana*, No. 16-8255, 2018 WL 2186174, at *5 (U.S. May 14, 2018); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Esposito* v. *INS*, 987 F.2d 108, 111 (2d Cir. 1993) (immigration counsel provided ineffective assistance by failing to heed client's instruction to appeal removal order to BIA). Mr. Estrada's lawyer, however, purported to waive appeal without conferring with Mr. Estrada on the matter. *See* Pet. 5-6. Thus, Mr. Estrada never actually waived anything.

Second, the same failures by the IJ and Mr. Estrada's immigration lawyers excuse Mr. Estrada from the obligation to exhaust administrative remedies. *See, e.g.*, *Pallares-Galan*, 359 F.3d at 1096 ("Because the IJ erred when she told Pallares that no relief was available, Pallares' failure to exhaust his administrative remedies cannot bar collateral review of his deportation proceeding."); *Ubaldo-Figueroa*, 364 F.3d at 1950; *Cerna*, 603 F.3d at 38.

None of the cases cited by the government (Opp. 13-14) suggests otherwise. Neither *St. Cyr* nor *Mohammed* v. *Ashcroft*, 261 F.3d 1244 (11th Cir. 2001), discussed the exhaustion or judicial-review requirements. The Court's decision in *Bousley* v. *United States* actually supports Mr. Estrada because it recog-

nized that a guilty plea—which is a type of waiver of the right to a jury trial—is not "intelligent" and thus "constitutionally invalid" if predicated on the district court's misstatement about the elements of the offense. 523 U.S. 614, 618-619 (1998). The district court's misstatement there did not excuse the defendant's failure to challenge the waiver's validity on direct appeal only because there was no contention—unlike here—that the misstatement had undermined the defendant's ability or motive to seek direct appeal. *See id.* at 622-623.

The government also faults Mr. Estrada for not seeking to reopen his immigration proceeding. Opp. 14-15. But the record indicates that the 90-day period in which to move to reopen, 8 U.S.C. §1229a(c)(7)(C)(i), expired long before Mr. Estrada became aware of the possible availability of discretionary relief.

C. Finally, the government asserts (Opp. 15) that "the question presented is of limited practical significance to" Mr. Estrada because he has served his sentence and may not suffer collateral consequences. Once again, this argument is not a vehicle problem; it does not prevent the Court from resolving the question presented. Moreover, the government's only cited authority is a civil case where a lack of collateral consequences deprived the federal courts of jurisdiction. *Spencer* v. *Kemna*, 523 U.S. 1, 12 (1998). But this is a *direct appeal* of a *criminal conviction*. This Court has never suggested that a criminal defendant can lose the right to clear his name if he serves out his sentence before his direct appeal ends. That would be particularly troubling in this context, where sentences for unlawful reentry will typically be completed long before direct appeal can run its course. *See* 8 U.S.C. §1326(a) (absent specified aggravating circumstances, maximum sentence for unlawful reentry is two years). Indeed, the

government does not actually argue any jurisdictional defect. Nor does the government explain why the fact that the appellate process takes longer than the criminal sentence should weigh against the grant of a petition for certiorari on direct appeal of a conviction. *Cf.* S. Ct. R. 10.

In any event, a federal conviction is certainly not a matter of indifference to Mr. Estrada. It is at the very least a stain on his reputation that he wishes to remove; it could also be a basis for denial of employment or other opportunities. And "'it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences'"—so much so that the Court generally presumes the existence of such consequences for jurisdictional purposes. *Spencer*, 523 U.S. at 12. Consequently, Mr. Estrada has a sufficient interest in appealing his criminal conviction even though his sentence is complete. *Id.* at 7.

Moreover, if Mr. Estrada succeeds in his challenge to the original removal order stemming from the 2007 conviction, his conviction in this case for illegal reentry will be vacated and the original removal order will be invalid. Whether the government then sought to reinstate the original removal order or initiated new removal proceedings, Mr. Estrada could apply for discretionary relief from removal, and if that were to be granted, he could remain in the country—and remain without the illegal-reentry conviction on his record. *See Villa-Anguiano* v. *Holder*, 727 F.3d 873, 873-879 (9th Cir. 2013) (discussing immigration process after removal order is successfully challenged under §1326(d)). The government's assertion that this case has "limited" significance to Mr. Estrada is therefore baseless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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