No. 18-

IN THE
Supreme Court of the United States

MARCO ANTONIO GARCIA-ECHAVERRIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit–that a non-citizen has no constitutional right to be informed of the right to apply for discretionary relief from removal–conflicts with the decisions of other Circuits such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Marco Antonio Garcia-Echaverria:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MARIO ANTONIO GARCIA-ECHAVERRIA, respectfully requests this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit which held that it was not a constitutional violation for the immigration judge to fail to advise Mr. Garcia-Echaverria that he was eligible for discretionary relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

> The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Marco Antonio Garcia-Echaverria*, No. 17-40368 (5th Cir. Apr. 5, 2018), appears at Appendix A to this petition and is unreported.
>
> The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, McAllen Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

> None.

GROUNDS FOR JURISDICTION

On April 5, 2018, the United States Court of Appeals for the Fifth Circuit affirmed the conviction and sentence imposed on Mr. Garcia-Echaverria for illegal reentry into the United States of America after being excluded, deported, or removed. A copy of this Order appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. A copy of the Judgment issued by the United States District Court for the Southern District of Texas, McAllen Division, is attached at Appendix B.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Mario Antonio Garcia-Echaverria was arrested on June 21, 2016, and charged with illegally reentering the United States after deportation. ROA.10. On January 5, 2017, Mr. Garcia-Echaverria pleaded guilty to the single count in the indictment. ROA.224-25. There was no plea agreement. ROA.224-43. A United States Probation Officer prepared a Presentence Investigation Report ("PSR" or "the report"). Although Mr. Garcia-Echaverria's attorney did not file a document styled "Objections to the PSR," the Court nonetheless addressed Mr. Garcia-Echaverria's objections to the report at sentencing because these same matters had been raised by defense counsel in a motion to dismiss the indictment. (ROA.335-38). The Court

denied the objections at the end of this discussion and the Judge sentenced Mr. Garcia-Echaverria. (ROA.338-43).

As noted, prior to Mr. Garcia-Echaverria pleading guilty, defense counsel filed a Motion to Dismiss the Indictment With Prejudice pursuant to 8 U.S.C. § 1326(d). (ROA.50-116). This motion includes factual information, a review of previous legal events relevant to immigration and deportation, and an analysis of the legal precedent supporting the specific request for dismissal of the indictment with prejudice filed in this case. (ROA.50-116). The final conclusion asserted in the motion is that this prosecution was a violation of Mr. Garcia-Echaverria's right to due process because an immigration judge, at a prior deportation hearing, failed to provide him notice of his right to discretionary review of his deportation. (ROA.50-116). This is particularly important because the underlying offense of possession of marijuana was not an aggravated offense and, therefore, Mr. Garcia-Echaverria would have been entitled to § 212 relief. *Lopez v. Gonzales,* 549 U.S. 47, 50 (2006). The District Court denied the motion. (ROA.338-43). Mr. Garcia-Echaverria appealed that ruling to the Fifth Circuit and the Appellate Court affirmed. (Appendix A). Mr. Garcia-Echaverria now files this Petition for Writ of Certiorari with this Honorable Court.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
Introduction

Mr. Garcia-Echaverria, a Mexican citizen, appealed the District Court's denial of his motion to dismiss his indictment, which was premised on a collateral attack of

a prior removal order. (Appendix A, page 1). He argued the immigration judge ("IJ") who presided over his prior removal proceeding violated his due process rights by failing to advise him of his eligibility for discretionary relief under § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182. *Id.* at 1-2. The Appellate Court ruled that this argument is foreclosed by Circuit precedent in *United States v. Lopez-Ortiz,* 313 F.3d 225, 230 (5th Cir. 2002), which holds that "eligibility for § 212(c) relief is not a liberty or property interest warranting due process protection." *Id.* (quoting *Lopez-Ortiz*). Consequently, Mr. Garcia-Echaverria failed to show that the District Court erred by denying his motion to dismiss the indictment. *Id.* at 2.

A non-citizen being prosecuted for the offense of illegal reentry following removal may challenge the validity of the underlying removal order by establishing that "the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d)(3). Thus, petitioners like Mr. Garcia-Echaverria have challenged reentry prosecutions on the ground that the entry of a prior removal order was fundamentally unfair because the petitioner was deprived of the opportunity to seek discretionary relief from removal. However, there is a division in the circuit as to whether the deprivation of a non-citizen's opportunity to pursue statutorily available discretionary relief from removal can render entry of the removal order fundamentally unfair. Admittedly, a majority of the Circuits agree with the Fifth Circuit that, where the relief at issue is discretionary, deprivation of the opportunity to seek such relief cannot render the entry of the removal order fundamentally unfair. *United States v. Estrada,* 876 F.3d 885, 888 (6th Cir. 2017);

United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006); *Bonhometre v. Gonzalez,* 414 F.3d 442, 448 n.9 (3d Cir. 2005); *United States v. Aguirre-Tello,* 353 F.3d 1199, 1205 (10th Cir. 2004)(en banc); *Smith v. Ashcroft,* 295 F.3d 425, 430 (4th Cir. 2002); *Oguejiofor v. Attorney Gen. of U.S.,* 277 F.3d 1305, 1309 (11th Cir. 2002); *Escudero-Corona v. INS,* 244 F.3d 608, 615 (8th Cir. 2001).

However, two Circuit courts have reviewed a defendant's collateral attack on the deportation order which was the predicate for a conviction and found a cognizable liberty or property interest at stake which warrants due process protection. In *United States v. Lopez-Velasquez,* 629 F.3d 894, 897 (9th Cir. 2010), the Ninth Circuit Court of Appeals, sitting en banc, noted that the Court has "repeatedly held that an IJ's failure to" advise a non-citizen of his or her potential eligibility for discretionary relief violates due process. In *United States v. Copeland,* 376 F.3d 61, 71 (2d Cir. 2004), the Second Circuit Court of Appeals explained its "belie[f] that a failure to advise a potential deportee of a right to seek Section 212(c) [discretionary] relief can, if prejudicial, be fundamentally unfair within the meaning of Section 1326(d)(3)." The *Lopez-Velasquez* and *Copeland* opinions are important because these Circuit Courts resolve a large number of immigration appeals. *Copeland* is additionally important because it is the precursor to an opinion wherein then-Judge Sonia Sotomayor emphasized that a removal proceeding is fundamentally unfair when a non-citizen is erroneously denied information regarding the right to seek discretionary relief. *United States v. Lopez,* 445 F.3d 90, 100 (2d Cir. 2006). Given the division in the Circuit

Courts, there is a compelling reason to proceed further to review the issues raised in this Petition.

II.
The Fifth Circuit's Decision Conflicts With This Court's Precedent

Although the Circuit division in and of itself sufficiently warrants further consideration by this Court, the Fifth Circuit's analysis is contrary to this Court's prior decisions. Specifically, the decision by the Fifth Circuit erroneously "collapsed the distinction" between "a right to seek relief and the right to that relief itself." *Copeland,* 376 F.3d at 72. This distinction is well established in this Court's precedent involving another case before the Fifth Circuit.

In *INS v. St. Cyr,* 533 U.S. 289, 292-93 (2001), a non-citizen brought a habeas petition challenging the retroactive elimination of his eligibility "for a waiver of deportation at the discretion of the Attorney General" under Section 212(c) of the INA. As part of a discussion determining that jurisdiction existed to hear the habeas petition, this Court noted 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." *Id.* at 307. This Court explained that "[e]ligibility that was governed by specific statutory standards provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" *Id.* at 307-08 (quoting *Jay v. Boyd,* 351 U.S. 345, 353-54 (1956)).

The Fifth Circuit, in the decision upon which the Fifth Circuit relied in this case, dismissed *St. Cyr* on the ground that its "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 a statute. *Lopez-Ortiz,* 313 F.3d at 231. Respectfully, this fails to consider the point recognized by the Second and Ninth Circuits: even if the relief itself is based on a statute, the Due Process Clause may nonetheless apply to the procedures affecting the non-citizen's ability to pursue available discretionary relief under the statutory standards. *Copeland,* 376 F.3d at 72-73; *United States v. Ubaldo-Figueroa,* 364 F.3d 1042, 1048 (9th Cir. 2004); *but see United States v. Torres,* 383 F.3d 92, 105 (3d Cir. 2004)(recognizing "a meaningful distinction may exist between the claim that an alien has a due process interest in being considered for statutorily available discretionary relief on the one hand, and the very different claim that an alien has a due process interest in the favorable exercise of that relief" but then concluding there was "no explicit mandatory language" that could create any expectation of entitlement to relief which was protected).

The Fifth Circuit and other Circuits have observed that the "fundamentally unfair" requirement of § 1326(d)(3) is part and parcel of "procedural" due process. *Torres,* 383 F.3d at 103-04; *Lopez-Ortiz,* 313 F.3d at 230; *see also United States v. Mendoza-Lopez,* 481 U.S. 828, 841-42 (1987)(explaining that where "fundamental procedural defects of the deportation hearing . . . render[] direct review of the Immigration Judge's determination unavailable," the "deportation proceeding . . . may

not be used to support a criminal conviction"). The Fifth Circuit nonetheless determined that Mr. Garcia-Echaverria's due process claim must be rejected on the ground that the interest in obtaining discretionary relief from removal is not a constitutionally protected liberty or property interest because, in the end, it is discretionary. (Appendix A; page 2 (citing *Lopez-Ortiz,* 313 F.3d at 231)).

Respectfully, this analysis errs in presuming that the relevant interest is merely the obtaining of the discretionary relief when, in reality, the liberty interest is one of remaining in the United States, which is protected by the Due Process Clause. It is therefore "well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores,* 507 U.S. 292, 306 (1993); *see also Bridges v. Wixon,* 326 U.S. 135, 154 (1945)(explaining that due process governs procedural requirements in deportation proceeding because "the liberty of an individual is at stake"); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 50 (1950), *modified by* 339 U.S. 908 (1950)("A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."); *Ng Fung Ho v. White,* 259 U.S. 276, 284 (1922) (explaining that removal "may result . . . in loss of both property and life, or of all that makes life worth living").

Finally, by ignoring the well-established liberty interest that a non-citizen has in remaining in the United States, the Fifth Circuit failed to evaluate whether the circumstances which affected Mr. Garcia-Echaverria's ability to seek relief rendered

the process he received inadequate to protect that interest. This error is particularly egregious considering the procedural flaw in this case: the IJ went beyond the mere failure to provide an admonishment as to the availability of relief under § 212(c), he pretermitted Mr. Garcia's right to seek discretionary relief because the previous conviction for possession of marihuana was not an aggravated felony and thus he was eligible for § 212(c) relief. *Lopez v. Gonzales,* 549 U.S. 47, 50 (2006). As this Court discussed in *St. Cyr,* 533 U.S. at 325, "[t]here is a clear difference . . . between facing possible deportation and facing certain deportation."

CONCLUSION

These circumstances establish the entry of Mr. Garcia-Echaverria's deportation order was fundamentally unfair and, therefore, the Fifth Circuit reversibly erred in concluding there is no constitutionally protected interest involved in this case. Additionally, it is in the public's interest to grant review to ensure national uniformity in the treatment of non-citizens facing removal or prosecution for reentry who were deprived of the opportunity to seek relief from removal.

WHEREFORE, Petitioner, MARCO ANTONIO GARCIA-ECHAVERRIA, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit.

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