No. 18-5190

IN THE SUPREME COURT OF THE UNITED STATES

MARCO ANTONIO GARCIA-ECHAVERRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH 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 for illegal reentry into the United States under 8 U.S.C. 1326.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 717 Fed. Appx. 505.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2018. The petition for a writ of certiorari was filed on July 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following an unconditional guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of illegal reentry after being removed from the United States, in violation of 8 U.S.C. 1326(a) and (b)(2). Presentence Investigation Report (PSR) ¶ 2; Pet. App. B1. He was sentenced to 18 months of imprisonment, with no period of supervised release. Pet. App. B2. The court of appeals affirmed. Id. at A1-A2.

1. Until 1996, Section 212(c) of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 187 (8 U.S.C. 1182(c) (1994)) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion from the country. By its terms, Section 212(c) "was literally applicable only to exclusion proceedings," but it was construed as permitting an alien to seek discretionary relief from removal in deportation proceedings as well. INS v. St. Cyr, 533 U.S. 289, 295 (2001).

In 1996, Congress amended Section 212(c) to make any alien previously convicted of an "aggravated felony" ineligible for discretionary relief from removal. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV, Subtit. D, § 440(d), 110 Stat. 1277 (28 U.S.C. 2241 et seq.). AEDPA took effect in April 1996. Ibid.

A measure that took effect the following year repealed Section 212(c) altogether, replacing it with a more limited form of discretionary relief known as cancellation of removal. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, § 304(b), 110 Stat. 3009-597. Any alien convicted of an aggravated felony is ineligible for cancellation of removal under IIRIRA. 8 U.S.C. 1229b(a)(3).

In INS v. St. Cyr, supra, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony based on a plea agreement that was made when the resulting conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a citizen of Mexico. PSR 2; see PSR ¶ 4. He became a lawful permanent resident of the United States in 1990. PSR ¶ 34.

In 1996, police officers conducted a traffic stop on a vehicle being driven by petitioner and discovered approximately one pound of marijuana and a motel-room key. PSR ¶ 26. Officers searched the motel room to which the key corresponded and found two more bricks of marijuana. Ibid. In December 1996, after AEDPA's limitations on discretionary relief from removal had taken effect, petitioner pleaded guilty to trafficking over eight ounces but

less than five pounds of marijuana, a felony, in violation of Ky. Rev. Stat. Ann. § 218A.1421(3) (1995). Garcia-Echaverria v. United States, 376 F.3d 507, 510 (6th Cir. 2004). The state court sentenced petitioner to five years of imprisonment. Ibid.

After petitioner was convicted of the drug-trafficking crime, the Immigration and Naturalization Service sought petitioner's removal because, inter alia, his drug conviction was an aggravated felony. Garcia-Echaverria, 376 F.3d at 510. Petitioner appeared before an immigration judge (IJ), who advised petitioner of his right to secure counsel, challenge the proof supporting his removal, and contest the IJ's decision on appeal. C.A. ROA 59-65. Petitioner admitted that he was a citizen of Mexico who had been convicted of trafficking more than eight ounces but less than five pounds of marijuana. Id. at 62-63. The IJ asked the government whether it was aware of any basis for relief from removal, and the government responded that it was not. Id. at 64. The IJ determined that petitioner was removable and that, because his conviction had been for an aggravated felony, petitioner was ineligible for relief from removal. Id. at 66-67.

Petitioner appealed to the Board of Immigration Appeals (Board). C.A. ROA 81. He argued that the IJ erred by not permitting him to seek relief from removal under Section 212(c) of the INA. Ibid.

The Board dismissed petitioner's appeal. C.A. ROA 81-82. It found "no error" in the IJ's determinations that petitioner was "subject to removal as charged" and that he "ha[d] been convicted of an 'aggravated felony.'" Id. at 81 (citation omitted). The Board also determined that Section 212(c) relief was not available to petitioner in light of his aggravated-felony conviction, reasoning that IIRIRA had repealed Section 212(c). Id. at 82; Garcia-Echaverria, 376 F.3d at 510. The Board further explained that petitioner's aggravated-felony conviction rendered him statutorily ineligible for cancellation of removal under the post-IIRIRA immigration laws. Ibid.

Petitioner was subsequently removed from the United States. PSR ¶ 8.

3. In 2001, officers stopped petitioner for speeding in Ohio and thereby discovered that petitioner had returned to the United States. Garcia-Echaverria, 376 F.3d at 510. A grand jury in the Northern District of Ohio charged petitioner with illegal reentry after being removed from the United States, in violation of 8 U.S.C. 1326(a) and (b). Garcia-Echaverria, 376 F.3d at 510. Petitioner filed a motion to dismiss the indictment, which the district court denied. Ibid. Petitioner also filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 (2000) challenging his detention based on the claim that the Board had erred in concluding that his Kentucky drug conviction was an aggravated

felony that rendered him deportable and ineligible for relief from removal. Garcia-Echaverria, 376 F.3d at 510. After the district court denied petitioner's motion to dismiss the indictment, petitioner entered a guilty plea to the illegal-reentry charge. Ibid. The district court then denied the petition for a writ of habeas corpus. Ibid.

The Sixth Circuit affirmed the denial of a writ of habeas corpus. Garcia-Echaverria, 376 F.3d at 509-516. The court found that the Board had "correctly determined that [petitioner's] drug conviction constitutes an 'aggravated felony' within the meaning of the INA." Id. at 511. In particular, the court determined, petitioner's Kentucky drug conviction constituted a "drug-trafficking crime" -- a type of aggravated felony -- under 8 U.S.C. 1101(a)(43)(B) because it has the same requirements as its federal analogue under 21 U.S.C. 841(a)(1) and (b)(1)(D) (1994). Garcia-Echaverria, 376 F.3d at 513-514. The court also rejected petitioner's claim that the Board's denial of the "opportunity to apply for a waiver of deportation pursuant to § 212(c) of the INA had an impermissible retroactive effect." Id. at 515. The court explained that AEDPA had made aggravated felons ineligible for Section 212(c) relief by the time petitioner pleaded guilty to the Kentucky drug offense. Ibid. The court further explained that St. Cyr had held that "denying the opportunity to apply for § 212(c) relief" had "an impermissible retroactive effect" only

for "aliens who had pleaded guilty in reliance upon the opportunity to apply for such relief" under Section 212(c). Ibid. (citing St. Cyr, 533 U.S. at 321-324). Here, the court wrote, petitioner "could not have pleaded guilty in reliance on his ability to obtain a discretionary cancellation of removal because under the AEDPA he was not eligible for relief at the time he pleaded guilty." Id. at 516.

Petitioner was removed again after completing his illegal-reentry sentence. PSR ¶ 8.

4. Petitioner was next found in the United States in 2016. PSR ¶ 4. A grand jury in the Southern District of Texas 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). PSR ¶ 1.

Petitioner filed a motion to dismiss the indictment under 8 U.S.C. 1326(d). D. Ct. Doc. 19 (Nov. 18, 2016). He argued that his initial deportation 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(c) of the INA, 8 U.S.C. 1182 (1994 & Supp. IV 1998). D. Ct. Doc. 19, at 2-8. But he acknowledged that his argument was foreclosed by circuit precedent holding that failure to advise an alien of eligibility for discretionary relief under Section 212(c) cannot render a deportation order fundamentally unfair. Id. at 3. The district

court denied the motion, agreeing with petitioner that his claim was foreclosed by circuit precedent holding "that 'eligibility for § 212(c) relief is not a liberty or property interest warranting due process protection," and that, accordingly, an IJ's "'error in failing to explain [defendant's] eligibility does not rise to the level of fundamental unfairness.'" D. Ct. Doc. 20, at 1 (Nov. 29, 2016) (quoting United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003)) (brackets in original).

Petitioner subsequently entered an unconditional guilty plea to the illegal-reentry charge. Judgment 1. The district court sentenced petitioner to 18 months of imprisonment, with no term of supervised release to follow. Judgment 2. According to the Department of Homeland Security, petitioner was again removed from the United States in October 2017.

5. The court of appeals affirmed petitioner's conviction in an unpublished per curiam opinion. Pet. App. A1-A2. Like the district court, the court of appeals observed that petitioner's claim was foreclosed by its prior decision in Lopez-Ortiz, which had determined that "[e]ligibility for § 212(c) relief is not a liberty or property interest warranting due process protection." Id. at A2.

ARGUMENT

Petitioner renews (Pet. 3-9) his challenge to the district court's denial of his motion to dismiss his most recent illegal-reentry charge on the ground that his original 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 from removal under Section 212(c) can render the alien's deportation order fundamentally unfair under 8 U.S.C. 1326(d)(3). Petitioner's case is not a suitable vehicle for review of that question because petitioner was not eligible for Section 212(c) relief and because petitioner actually raised a Section 212(c) claim in his deportation proceeding. In addition, petitioner forfeited his right to further review of his collateral challenge to his initial deportation order when he entered an unconditional guilty plea to the charge in this case. This Court has repeatedly denied review of the question presented, e.g., Estrada v. United States, 138 S. Ct. 2623 (2018) (No. 17-1233); 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, 571 U.S. 992 (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 (emphasis omitted). 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 (emphasis omitted). 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.

After this Court issued its decision in Mendoza-Lopez, Congress amended Section 1326 to add subsection (d), which allows a collateral attack on a removal order in an illegal reentry prosecution under specified circumstances. See AEDPA § 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." 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 has correctly recognized that failure to inform an alien about the possibility of 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. A1-A2 (citing United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003)); see United States v. Estrada, 876 F.3d 885, 888 (6th Cir. 2017), cert. denied, 138 S. Ct. 2623 (2018); 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).

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. 6-7), this principle is consistent with this Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001). St. Cyr held that the 1996 amendments to the 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, and that IIRIRA did not foreclose Section 212(c) relief for certain aliens (not including petitioner). 533 U.S. at 305-307, 314-326. St. Cyr did not establish that an alien has a constitutionally

protected interest in purely discretionary relief, or authorize the imposition of extra-statutory procedures governing applications for discretionary relief. To the contrary, St. Cyr turned on statutory interpretation, and 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].").

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. Copeland, 376 F.3d 61, 70-73 (2d Cir. 2004); United States v. Lopez-Velasquez, 629 F.3d 894, 897 n.2 (9th Cir. 2010); 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 present the question whether an immigration proceeding can be rendered fundamentally unfair as a result of an IJ's failure to inform an alien of his eligibility for discretionary relief under Section 212(c) because

-- as the Sixth Circuit squarely held in petitioner's previous illegal-reentry case -- petitioner was not eligible for relief under Section 212(c) at all. Garcia-Echaverria, 376 F.3d at 513-514. As the Sixth Circuit explained, petitioner's drug-trafficking offense qualified as an aggravated-felony conviction. Id. at 511-514. IIRIRA -- under which petitioner was removed -- repealed Section 212(c) and does not itself permit aggravated felons to seek discretionary relief from removal. Id. at 515; see St. Cyr, 533 U.S. at 297. And although St. Cyr held that the IIRIRA and AEDPA provisions denying aggravated felons the opportunity to obtain discretionary relief under Section 212(c) do not apply to those aliens "who had pleaded guilty in reliance upon the opportunity to apply for such relief," the Sixth Circuit correctly recognized that petitioner was not such an alien. Garcia-Echaverria, 376 F.3d at 515. As the court explained, petitioner pleaded guilty after Congress had enacted AEDPA, which barred aggravated felons from seeking Section 212(c) relief. Id. at 516. Accordingly, petitioner was not eligible for discretionary relief under St. Cyr. His case therefore does not present the question whether an immigration proceeding can be rendered fundamentally unfair by an IJ's failure to inform an alien of his Section 212(c) eligibility.

Second, petitioner's case is also an unsuitable vehicle for considering whether an immigration proceeding can be rendered

fundamentally unfair by an IJ's failure to advise an alien of discretionary relief under Section 212(c) because petitioner actually pursued Section 212(c) relief before the Board, which found petitioner ineligible. The Board explained that petitioner "argue[d] that the Immigration Judge erred by pretermitting his application[] for relief under section[] 212(c)," and then rejected that claim, determining that "a waiver of inadmissibility under section 212(c)" was "not a form of relief that is available" because of petitioner's aggravated-felony conviction. C.A. ROA 81-82. Although the Board's reasoning did not anticipate St. Cyr, the Board's determination that petitioner was ineligible for relief was correct for the reasons explained above.

Petitioner identifies no court that has held that an immigration proceeding is rendered fundamentally unfair because an IJ fails to advise an alien about discretionary relief that the alien actually pursues. To the contrary, the Second and Ninth Circuits -- the courts on whose decisions petitioner relies -- have held that an IJ's erroneous failure to advise an alien of relief is relevant only if the error prejudiced the alien. See Copeland, 376 F.3d at 73 (requiring "a reasonable probability that, but for the IJ's unprofessional errors, the alien would have been granted Section 212(c) relief"); Ubaldo-Figueroa, 364 F.3d at 1051 (describing removal order as fundamentally unfair only if "the IJ's unconstitutional failure to inform [the alien] that he was

eligible for § 212(c) relief prejudiced him"). Here, the fact that petitioner actually raised a Section 212(c) claim before the Board -- which rejected the claim -- demonstrates that petitioner suffered no prejudice from the IJ's failure to advise him regarding Section 212(c).

Third, petitioner's case is an unsuitable vehicle for addressing the question presented because petitioner entered an unconditional guilty plea to the illegal-reentry charge in this case. As a general matter, a defendant who pleads guilty admits "all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence" and therefore generally extinguishes any defenses that the defendant might have had. United States v. Broce, 488 U.S. 563, 569 (1989). Although Class v. United States, 138 S. Ct. 798 (2018), established that a defendant who enters an unconditional guilty plea retains the right to challenge the constitutionality of his statute of conviction, id. at 805, Class also reaffirmed that such a plea forfeits any challenge to "case-related constitutional defects that 'occurred prior to the entry of the guilty plea,'" id. at 804-805 (quoting Blackledge v. Perry, 417 U.S. 21, 30 (1974)). And Class did not suggest that a defendant who enters an unconditional guilty plea may resurrect on appeal any statutory defenses. Accordingly, because petitioner elected to admit the illegal-reentry charge by entering an unconditional guilty plea,

he has forfeited the right to press his Section 1326(d) claim on appeal. See C.A. ROA 241.

Finally, further review is particularly 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 has completed his term of imprisonment and been removed from the United States. Moreover, because petitioner was also removed from the United States following his earlier 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 a 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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