No. 18-5322

IN THE SUPREME COURT OF THE UNITED STATES

SANTIAGO HUM RODRIGUEZ-APARICIO, 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 under 8 U.S.C. 1326 for illegal reentry into the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 888 F.3d 189.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2018. The petition for a writ of certiorari was filed on July 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial 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). 15-cr-453 Judgment. He was sentenced to 27 months of imprisonment, with no period of supervised release. Id. at 2. The court of appeals affirmed. Pet. App. 1a-11a.

1. a. Petitioner is a citizen of El Salvador. Pet. App. 2a. He was admitted into the United States as a lawful permanent resident in 1994, ibid., and then convicted of three misdemeanors between 1997 and 1999, Presentence Investigation Report (PSR) ¶¶ 28-30. In 2006, petitioner pleaded nolo contendere to carrying a concealed firearm in a vehicle, in violation of California law, and to failing to appear while on bail. PSR ¶¶ 31-32. He was sentenced to concurrent terms of 16 months of imprisonment on both counts. Ibid.

In 2007, Immigration and Customs Enforcement (ICE) charged that petitioner was removable under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., because of his firearms conviction. Pet. App. 2a; see id. at 27a-30a. ICE served petitioner with a "Stipulated Request for Removal Order and Waiver of Hearing Made by Respondent Who is Unrepresented," which petitioner reviewed and signed. Id. at 2a; see id. at 31a-36a. Through the waiver, which was written in English and Spanish, petitioner admitted that he was a citizen of El Salvador who had been convicted of a firearm offense, which rendered him removable.

Id. at 30a, 33a. He acknowledged and waived his right to obtain counsel, have a hearing before an immigration judge (IJ), and appeal the IJ's decision. Id. at 32a-34a. Petitioner also agreed that he "d[id] not wish to apply for any relief from removal under the Immigration and Nationality Act or any other provision of law." Id. at 34a. Petitioner further acknowledged that "[s]uch relief may include voluntary departure." Ibid. An IJ accepted petitioner's stipulation and waiver and ordered petitioner removed to El Salvador. Id. at 39a. Petitioner was subsequently removed from the United States. Id. at 41a.

b. In January 2009, police officers in Las Vegas conducted a traffic stop of a car in which petitioner was a passenger. PSR ¶ 33. When officers questioned the driver of the car, petitioner jumped out of the car and fled on foot. Ibid. An officer pursued petitioner and observed petitioner reach into his waistband, retrieve an object, and throw it to the ground. The officer ran past the object and recognized it to be a firearm. Petitioner was apprehended with a .380 caliber bullet in his hand. Ibid. A search revealed that petitioner was carrying a small bag containing 33 more bullets. Ibid.

A grand jury in the District of Nevada charged petitioner with illegal reentry after being removed from the United States, in violation of 8 U.S.C. 1326; possession of a firearm and ammunition by an alien, in violation of 18 U.S.C. 922(g)(5); and

possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). 09-cr-60 Indictment 1-2; see Gov't C.A. Br. 4; Pet. App. 2a. Petitioner moved to dismiss the illegal-reentry charge based on a collateral attack on the underlying removal order. Pet. App. 2a. Without responding to the merits of petitioner's motion, the government moved to dismiss the illegal-reentry charge, and the district court granted the government's motion. Ibid. A jury found petitioner guilty of the remaining two counts, and the court sentenced petitioner to 41 months of imprisonment. Ibid.; PSR ¶ 33.

In January 2009, petitioner was released to ICE custody. PSR ¶ 33. Several weeks later, "while in administrative custody," petitioner "made an unsolicited request to a deportation officer for an interview and requested removal to El Salvador." Ibid. Petitioner "provided a sworn statement as to his alienage, identity, and prior removal from the United States." Ibid. He was subsequently removed from the United States. Ibid.

2. In March 2015 petitioner was again found in the United States, when Customs and Border Patrol agents encountered petitioner near the Rio Grande River. Pet. App. 3a; see PSR ¶ 4. A grand jury in the Southern District of Texas returned an indictment charging petitioner with illegal reentry into the United States, in violation of 8 U.S.C. 1326(a) and (b). Pet. App. 3a; see PSR ¶ 1. Petitioner filed a motion to dismiss the

indictment under 8 U.S.C. 1326(d) arguing that his initial removal order in 2007 had been fundamentally unfair, on the ground that the IJ had not advised him of his eligibility for voluntary departure from the United States. 15-cr-453 D. Ct. Doc. 21, at 1 (Dec. 9, 2015); see id. at 8 & n.3. Petitioner acknowledged, however, that his argument was foreclosed by Fifth Circuit precedent establishing that "the decision concerning whether to grant voluntary departure is discretionary, and deportation errors involving discretionary relief do not violate due process." Id. at 2 (citation omitted). The district court denied petitioner's motion as foreclosed by Fifth Circuit precedent. C.A. ROA 231-232. A jury then found petitioner guilty of the illegal-reentry charge. PSR ¶ 2. The district court sentenced petitioner to 27 months of imprisonment, with no term of supervised release to follow. 15-cr-453 Judgment 2.

According to the Department of Homeland Security, petitioner was removed from the United States in April 2017.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court agreed with the district court and petitioner that petitioner's challenge to his prior order of removal was foreclosed by United States v. Lopez-Ortiz, 313 F.3d 225 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003), which had held that "eligibility for discretionary relief 'is not a liberty or property interest warranting due process protection.'" Pet. App. 11a

(quoting Lopez-Ortiz, 313 F.3d at 231). The court of appeals noted that its precedent accorded with the determinations of most other circuits that had addressed the issue. Id. at 11a n.2.

ARGUMENT

Petitioner renews his challenge (Pet. 8-17) to the denial of his motion to dismiss the illegal-reentry charge against him 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 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 informed that he might be entitled to discretionary relief but waived his right to a hearing at which an IJ would advise him concerning such avenues, and because petitioner's collateral attack would fail even if petitioner satisfied the fundamental-unfairness requirement. This Court has repeatedly denied review of the question presented, see, 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 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. IV, Subtit. D. 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).

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 seeking purely discretionary relief does not deprive the alien of due process and render removal proceedings fundamentally unfair, because an alien does not have a constitutionally protected interest in purely discretionary relief. Pet. App. 11a (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) (citations 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. 15), this principle is consistent with this Court's decisions in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), and INS 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 265; 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.") (emphasis omitted).

In St. Cyr, the Court held that the 1996 amendments to the INA 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; see id. 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].").

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) (en banc); 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 from removal. As the government explained below, petitioner was advised of his possible eligibility for voluntarily departure, but he expressly waived a hearing at which he would obtain further advice on such relief from an IJ. Specifically, petitioner was notified in writing that he had the right to a hearing, at which he would be "advised by the immigration judge * * * of any relief from removal for which you may appear eligible including the privilege of departing voluntarily." Pet. App. 29a; see Gov't C.A. Br. 37. Petitioner waived that right in writing, and agreed to removal as a final disposition of his immigration case. Pet. App. 32a-35a. In his signed waiver, which was written in English and Spanish and witnessed by a DHS official, petitioner affirmed that he "d[id] not wish to apply for any relief from removal under the Immigration and Nationality Act or any other provision of law." Id. at 34a; see id. at 35a. Both because petitioner was advised that the relief available to him "may include voluntary departure," id. at 34a, and because petitioner "request[ed] that [his] removal

proceedings be held without a hearing," and waived his right to seek such relief, id. at 33a-34a, petitioner's case does not implicate the question of whether an immigration hearing is rendered fundamentally unfair by an IJ's failure to advise an alien of available discretionary relief.

Second, this case would be an unsuitable vehicle for addressing the question presented because even if petitioner's removal order had been "fundamentally unfair," 8 U.S.C. 1326(d)(3), petitioner cannot meet Section 1326(d)'s other requirements for collateral attack, namely, that he exhausted administrative remedies and was improperly deprived of his ability to seek judicial review, 8 U.S.C. 1326(d)(1) and (2). Petitioner elected not to pursue administrative remedies with respect to his removal order. He was advised that he had the right to appeal the IJ's decision, but nevertheless affirmed that he did "not wish to appeal the written order of the Immigration Judge," Pet. App. 34a, and he did not thereafter seek review of his removal order.

Moreover, petitioner has never subsequently sought to exhaust administrative remedies 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."); see also 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). Such decisions have noted that an alien's claims should generally "be first presented to the [Board of Immigration Appeals] because * * * 'the [Board] can reopen the proceedings'" and develop an evidentiary record to assist in evaluating the alien's claims. Perez, 330 F.3d at 101 (citation omitted). Petitioner's failure to exhaust administrative remedies and failure to demonstrate that he was improperly denied judicial review make his case a poor vehicle for examining the other requirements for collateral relief.

Finally, this Court's 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 received a 27-month sentence, with no supervised release to follow. He has now served that sentence and been removed from the United States. And because petitioner has two or more convictions and has been sentenced, in the aggregate,

to more than five years in custody, he is inadmissible regardless of the illegal re-entry conviction and sentence at issue here. See 8 U.S.C. 1182(a)(2)(B); PSR ¶¶ 28-33; see also 8 U.S.C. 1101(a)(48)(B) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."). Petitioner's negligible stake in the resolution of the question he raises is further reason that his case is an unsuitable vehicle for review of that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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