No. __-_____

IN THE

Supreme Court of the United States

OMAR VILLARREAL SILVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A defendant charged with illegally reentering the United States after deportation or removal has a right under *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), and 8 U.S.C. § 1326(d) to collaterally attack his removal order. In light of this right, two questions are presented for review:

> Must a defendant show actual prejudice in order to prevail when collaterally attacking his removal order?
>
> If a defendant must show actual prejudice in order to prevail, is that prejudice evaluated under the discretionary factors used by immigration officers in removal proceedings where, as in this case, the government withheld and denied the existence of the Customs and Border Protection policy governing that relief?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Villarreal Silva*, No. 2:17-cr-00125, U. S. District Court for the Eastern District of Virginia. Judgment entered Aug. 27, 2018.

(2) *United States v. Villarreal Silva*, No. 18-4652, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 25, 2019

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PETITION FOR WRIT OF CERTIORARI

Petitioner Omar Villarreal Silva respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, appears at Pet. App. 1a-10a[1] and is reported at 931 F.3d 330 (4th Cir. 2019). The ruling of the district court appears at Pet. App. 11a-35a and is reported at 313 F. Supp. 3d 660 (E.D. Va. 2018).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on July 25, 2019. Petitioner did not seek rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution provides that "No person shall … be deprived of life, liberty, or property, without due process of law …." U.S. Const. amend V.

Section 1326 of Title 8, U.S. Code, captioned "Reentry of removed aliens," provides in relevant part:

[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals. *See* Joint Appendix, *United States v. Villarreal Silva*, No. 18-4652, Doc. 12 (filed Dec. 21, 2018).

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

….

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien 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 the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326.

STATEMENT OF THE CASE

Petitioner Omar Villarreal Silva's sole defense against his charge of being a deported alien found in the United States was a collateral attack on his prior removal order. His motion to dismiss the indictment was denied, and affirmed on appeal, because both the district court and the Fourth Circuit held that he had not shown prejudice for asserted due process violations in the form of a reasonable probability of a different outcome to his removal proceedings. While Mr. Villarreal had requested the relevant parts of the Customs and Border Protection policy governing relief from removal, the government refused to provide it. The district court and the Fourth Circuit therefore found a lack of prejudice based on a generalized equitable inquiry, and inferred from the record whether the individual immigration officer would have been willing to accord relief for which Mr. Villarreal was eligible.

A. Proceedings in the District Court.

Mr. Villarreal was charged in a single-count indictment with being a removed alien found in the United States in violation of 8 U.S.C. § 1326. C.A.J.A. 8. As an element, the government had to prove that Mr. Villarreal had previously been ordered removed from the country. *Id*.

Mr. Villarreal filed a motion collaterally attacking his prior removal order pursuant to *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). C.A.J.A. 10 *et seq*. First, he attacked a September 2014 order by an immigration judge. C.A.J.A. 18-24. However, the government rendered that issue moot by stating that it would not rely on that order of removal. C.A.J.A. 105-06.

Therefore the sole focus of the motion became a November 20, 2014 order of removal. The removal was an expedited removal order, entered under 8 U.S.C. § 1225(b). C.A.J.A. 46. Immigration records disclosed that Mr. Villarreal had applied for entry at the Paso Del Norte Port of Entry in El Paso, Texas, and claimed to be a U.S. citizen. C.A.J.A. 46. Officers began to interview him at 4:45 p.m. C.A.J.A. 44. At some point, the officers decided Mr. Villarreal would be charged criminally with illegal reentry and with using a false document. Therefore, at 5:20 p.m., one officer provided Mr. Villarreal with *Miranda* warnings in Spanish, which include the admonition that he had the right to have an attorney present during questioning, and noted that Mr. Villarreal requested an attorney after the warning. C.A.J.A. 44; *see also* C.A.J.A. 45 (copy of same form in English).

Once Mr. Villarreal invoked the constitutional right to an attorney as they themselves had told him he could do, however, the officers entered the removal order without his further participation. In place of where his answers to question would appear on a Record of Sworn Statement and Jurat, they wrote "Subject requested the presence of a lawyer at 1724 hrs. All questioning ceased at this moment." C.A.J.A. 42-43. Notes provided in discovery by the government confirm that the entry of the order followed immediately on Mr. Villarreal's invocation of his right to an attorney. They indicate "A sworn statement was not taken. Forms I-860, I-296 were completed and placed in the subject folder. … Subject was remanded to EPCDF to await prosecution proceedings." C.A.J.A. 93.

The officer entered a determination of inadmissibility and Order of Removal on the same day, November 20, 2014. C.A.J.A. 46. But officers did not serve the

order on Mr. Villarreal at that time. Instead, they waited over a year until he had pled guilty and served his entire 15-month sentence for the illegal reentry offense for which he was in fact prosecuted, and then served the order on him on November 25, 2015. C.A.J.A. 46; *id.* at 169 (stipulation noting conviction and sentence).

Before the district court, Mr. Villarreal argued that this proceeding violated due process because it forced him to choose between exercising his constitutional right to an attorney and his due process right to participate in removal proceedings, and also that it violated agency regulations requiring officers to allow the person an opportunity to provide a statement. C.A.J.A. 26, 91-94. He further argued that he suffered prejudice because there was a reasonable probability he would have been granted the relief of withdrawal of application. C.A.J.A. 98. In support, he submitted an example of an instance where immigration officers granted withdrawal to an individual who had pled guilty to making a false statement to federal officers (with a 12-month sentence), had previously been ordered deported, and had no pending applications for status. C.A.J.A. 177-78. Relying on this, Mr. Villarreal argued that relief would have been a reasonably probable outcome for him. C.A.J.A. 34.

Mr. Villarreal made an additional argument. The government withheld the relevant standards governing how officers decide whether to grant withdrawal. C.A.J.A. 98. Therefore he requested that the district court draw an inference adverse to the government: that the standards if disclosed would have supported his argument that withdrawal of his application was a reasonably probable outcome. Concurrent FOIA litigation disclosed that the previous Inspector's Field Manual, which described the factors for immigration officers to consider in deciding whether

to grant withdrawal, had been withdrawn in mid-2013. The new standards, which are part of the online Officers' Reference Tool, had not been disclosed publicly, and was at that moment subject of FOIA litigation. C.A.J.A. 25; *American Immigration Lawyers' Assoc. v. U.S. D.H.S.*, No. 1:16-cv-2470 (D.D.C.). Counsel requested the relevant document from government counsel in writing. C.A.J.A. 26.

The government contended that the document was not discoverable and not relevant. C.A.J.A. 79. On the merits, the government denied that forcing a person to choose between constitutional rights was wrong, and argued that Mr. Villarreal's invocation of his constitutional right to an attorney forfeited his right to participate in the removal proceedings. C.A.J.A. 71. The government also argued that Mr. Villarreal had failed to establish a reasonable probability he would have been granted withdrawal. C.A.J.A. 72 *et seq*.

The district court denied Mr. Villarreal's motion in a written opinion. *See* 313 F. Supp. 3d 660 (E.D. Va. 2018). The court first held that 8 U.S.C. § 1225(b)(1)(D), which purports to strip courts of jurisdiction to hear collateral attacks against expedited removal orders in § 1326 prosecutions, was impossible to reconcile with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), and was therefore unconstitutional. 313 F. Supp. 3d at 674.

Proceeding to the merits, the district court did not decide whether a due process violation had occurred, but denied the motion based on a failure to establish prejudice. 313 F. Supp. 3d at 677-83. The district court rejected Mr. Villarreal's request for an adverse inference due to the withholding of the relevant standards, because it asserted that Federal Rule of Criminal Procedure 16 and the Local Rules

of the Eastern District of Virginia required a motion to compel discovery before such a request could be made. And it rejected the argument that the example of withdrawal actually submitted was relevant, because it said that a single case is not sufficient, and because the circumstances in the prior case were distinguishable. *Id.* at 682-83.

B. Proceedings in the Court of Appeals.

On appeal, Mr. Villarreal again argued that the government had withheld the only standards under which actual prejudice could be evaluated, and requested an inference against the government. Brief of the Appellant, *United States v. Villarreal Silva*, No. 18-4652, Doc. 11, at 20-25 (filed Dec. 21, 2018). The government, for its part, denied that the policy existed, despite its listing in an index in a FOIA lawsuit. Brief of the United States, *United States v. Villarreal Silva*, No. 18-4652, Doc. 22, at 34 (filed Jan. 28, 2019).

In a published opinion on appeal, the Fourth Circuit first held, as the district court had, that 8 U.S.C. § 1225(b)(1)(D), which strips courts of jurisdiction to hear collateral attacks against expedited removal order in the context of an illegal reentry prosecution, was unconstitutional under *United States v. Mendoza-Lopez*. *United States v. Villarreal Silva*, 931 F.3d 330, 335 (4th Cir. 2019).

Proceeding to the merits, the Fourth Circuit held that Mr. Villarreal had not established prejudice. It noted all of his negative equities including prior voluntary returns and criminal history (and none of the positive equities), and most significantly that the immigration officer who entered the order referred Mr. Villarreal for prosecution. 931 F.3d at 338-39.

The Fourth Circuit did not address or mention Mr. Villarreal's argument concerning the withheld CBP policy on relief, and did not base its evaluation of prejudice on the actual CBP policy, resorting instead to generalized equitable considerations. 931 F.3d at 338-39.

Mr. Villarreal now seeks review of the Fourth Circuit's decision.

REASONS FOR GRANTING THE PETITION

Circuit courts disagree on nearly every aspect of the standards for collateral attacks of removal orders in criminal illegal reentry prosecutions, which constitute a quarter of all federal prosecutions. Prejudice has been the subject of vagueness and confusion in the thirty years since this Court recognized a right to collateral review in criminal cases. Although all of the circuits require some form of actual prejudice—that is, some probability of a different outcome—this Court's opinions in *Mendoza-Lopez* and *Lee v. United States* do not. Certiorari is justified to bring the circuit courts into compliance with this Court's clear precedent in an area of frequent litigation.

If, however, actual prejudice—meaning some probability of a different outcome—is required, then a second question is raised. The government in this case withheld from Mr. Villarreal and the courts its policy on granting relief from expedited removal orders. The Fourth Circuit's opinion ignored this, and conducted a generalized inquiry into the equities that was untethered to actual immigration officers' practices. The second question therefore concerns whether the government may thwart a defendant's attempt to show prejudice by withholding the relevant Customs and Border Protection policies.

I. The Court Should Grant Certiorari to Settle Uncertainty Concerning the Standard for Collateral Attacks on Removal Orders.

Illegal reentry after deportation is the second most frequently charged federal felony, behind only drug distribution.[2] In the last fiscal year, over a quarter of all federal prosecutions involved an illegal reentry charge,[3] and over 15,000 years of imprisonment were imposed under 8 U.S.C. § 1326.[4] A collateral attack on the prior removal order is the most frequently asserted defense to this charge, judging by the caselaw. Yet, since recognizing the Fifth Amendment right to collateral review of a removal order before it is used in a criminal case over thirty years ago, this Court has not revisited this area of law. In the meantime, significant uncertainty has developed in the lower courts over how to evaluate a claim that a prior removal order cannot be used in a criminal prosecution. This case presents the ideal vehicle to begin to resolve those uncertainties and bring them into conformity with this Court's precedents.

Over thirty years ago, in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court recognized a Fifth Amendment right to collaterally attack a prior removal order as a defense to a charge of illegal reentry after deportation under 8 U.S.C. § 1326. Since then, serious uncertainty has developed in the lower courts regarding not only what a defendant must show to succeed in a collateral attack, but who bears

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[2] United States Sentencing Commission, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics*, Table 20 (Federal Offenders Sentenced Under Each Chapter 2 Guideline (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table20.pdf).

[3] *Id*.

[4] United States Sentencing Commission, *Quick Facts – Illegal Reentry Offenses* (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf).

the burden and what facts are relevant. In the intervening three decades, clear circuit splits have developed on the most fundamental aspects of collateral attacks in criminal prosecutions. Courts disagree about whether, for example, a constitutional due process violation is required;[5] whether an alien has a right to be advised of eligibility for discretionary relief;[6] whether courts should use the law at the time of the removal hearing or as currently understood;[7] and the standard for prejudice.[8]

This petition concerns prejudice. The lower courts have held that one component of a successful collateral attack is a showing of prejudice. The courts have generally adopted the same prejudice inquiry as in Sixth Amendment cases involving ineffective assistance of counsel. *See, e.g.*, *United States v. Encarnacion-Galvez*, 964 F.2d 402, 407 (5th Cir. 1992) ("By a showing of prejudice, we mean that there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported."); *id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694-97 (1984)); *see also United States v. Copeland*, 376 F.3d 61, 73 (2d Cir. 2004) (adopting *Strickland* test for § 1326(d) prejudice inquiry).

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[5] *Compare United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002) (requiring vested liberty or property interest in discretionary relief) *with United States v. Barajas-Alvarado*, 655 F.3d 1077, 1085 (9th Cir. 2011) (recognizing non-constitutional procedural violations can render removal order fundamentally unfair).

[6] *See United States v. Lopez-Velasquez*, 629 F.3d 894, 897 n.2 (9th Cir. 2010) (describing circuit split).

[7] *Compare United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014) (using current understanding of law to evaluate claim that alien was not deportable as charged) *with United States v. Lopez-Collazo*, 824 F.3d 453 (4th Cir. 2016) (deferring to admittedly incorrect characterization of prior conviction for removal purposes because Circuit precedent at the time, since reversed, allowed it).

[8] *See United States v. Aguirre-Tello*, 353 F.3d 1199, 1208-09 (10th Cir. 2004) (describing split between circuits adopting "reasonable probability" standard and "plausible grounds for relief" standard).

The fit between the IAC prejudice test and collateral attacks on removal orders, however, is questionable. In *Mendoza-Lopez* itself, this Court held that due process barred prosecution, without inquiring into the individual equities of the aliens. But even under the "reasonable likelihood" standard, other circuits evaluate the likelihood of relief using the factors that the immigration official would have considered. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011) ("[A]n alien must show that, in light of the factors relevant to the form of relief being sought," relief was plausible).

The glaring problem with the Fourth Circuit's approach in this case is that the court did not *know* what factors are relevant to a grant of withdrawal (the only form of relief in expedited removal proceedings). Nor did the district court. Only the government knew, and it withheld the relevant standards from Mr. Villarreal and the courts, and denied that they exist despite public filings in other cases to the contrary. *See* Brief of the United States, *United States v. Villarreal Silva*, No. 18-4652, Doc. 22 at 34 (calling materials "non-existent", arguing that defendant "has not even established the sought manual(s) exist"); C.A.J.A. 26 (listing of withdrawal policy in index provided by CBP in FOIA litigation).

A. The Fourth Circuit's Ruling Contravenes This Court's Precedent.

This Court has never required a showing of actual prejudice in order to collaterally attack a removal order. In *Mendoza-Lopez*, this Court considered whether a defendant may be convicted for illegal reentry after a prior deportation under 8 U.S.C. § 1326 when the underlying removal order was invalid—specifically,

because the immigration judge had failed to advise the individuals that they were eligible to apply for discretionary relief in the form of suspension of deportation. *See* 481 U.S. at 831 n.3. Below, the Eighth Circuit had found that this error violated due process and caused the defendants prejudice because the failure to advise of available relief "materially affected" the outcome of the proceedings. *See United States v. Mendoza-Lopez*, 781 F.2d 111, 113 (8th Cir. 1985). In its petition for certiorari, the government asked the Court to assume prejudice if it found that the removal proceeding violated due process. *See* 481 U.S. at 839-40. However, at oral argument, the Solicitor General refused to concede that the defendants had suffered prejudice. *See id.* at 849 n.*.

The Court agreed with the Eighth Circuit that the immigration judge's failure to advise the defendants of their eligibility for relief violated due process. *Id.* at 839-40. But the Court did not end there. Rather, it then proceeded to consider whether "the violation of *respondents'* rights that took place *in this case* amounted to a complete deprivation of judicial review," concluding, "We think that it did." *Id.* at 840 (emphasis added). Thus, the Court flatly held that the defendants' deportation proceedings "may not be used to support a criminal conviction" and summarized its decision as follows:

> Because respondents were deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them, *the deportation proceeding in which these events occurred* may not be used to support a criminal conviction, and *the dismissal of the indictments against them was therefore proper*. The judgment of the Court of Appeals is
>
> *Affirmed.*

Id. at 842 (all but final emphasis added).

In other words, *Mendoza-Lopez* held that the defendants suffered prejudice because they were statutorily eligible for discretionary relief but had not been so advised. In doing so, the Court did not go on to consider the likelihood that such relief would be granted by delving into factual questions of family ties, length of residence, hardship, military service, employment history, property or business ties, evidence of value and service to the community, rehabilitation, and the defendants' good character, nor did it remand for a court below to conduct an inquiry into these equities. *See id.* at 840, 842. Rather, the Court flatly held that "the deportation proceeding … may not be used to support a criminal conviction" and vacated the defendants' convictions. *Id.* at 840, 842 (emphasis added). Thus, *Mendoza-Lopez* found that the immigration judge's failure to advise the defendants of available relief, without more, caused them prejudice.

Chief Justice Rehnquist's dissent confirms this. Noting the government's refusal to concede fundamental unfairness during oral argument, he found that the Court had reached the question of prejudice. *Id.* at 849 n.* (Rehnquist, C.J., dissenting). In this critical footnote, the Chief Justice stated:

> Because the fairness of these proceedings was litigated in the courts below and is a matter subsumed in the precise question presented for this Court's review, it cannot be seriously argued that the issue is not properly before this Court. Indeed, the Court itself has chosen to decide the issue, albeit in a manner different from that suggested here.

Id. Because the Chief Justice disagreed that the immigration judge's failure to advise of available relief had rendered the proceeding "presumptively prejudicial," he

dissented on this basis.[9] *Id.* And because no lower court had ever undertaken an examination of the defendants' equities, their convictions were vacated without any court having determined the likelihood that an immigration judge would have actually granted them relief.

This approach—to presume that failure to advise of, or provide a chance to apply for, statutorily available relief violates due process *and* prejudices the defendant—makes sense. In the context of other due process violations, it is easy to see how a defendant would not necessarily suffer prejudice; for instance, if a noncitizen is deprived of his right to appeal or right to counsel but still had no possible way to avoid removal, the absence of administrative error "could not have yielded a different result." *United States v. Proa-Tovar*, 975 F.2d 592, 595 (9th Cir. 1992) (en banc). But where a noncitizen was eligible for discretionary relief that could have resulted in an outcome other than a deportation order, the proper course is to find, as the Eighth Circuit did, that the defendant's missed opportunity to apply for relief was a due process violation that "materially affected" the outcome of the proceedings. *Mendoza-Lopez*, 781 F.2d at 113.

Although a deeper examination of *Mendoza-Lopez* reveals that a showing of statutory eligibility for relief is sufficient to show prejudice, circuit courts have abandoned this principle by dramatically expanding the prejudice analysis, i.e., by looking to a defendant's equities to determine the likelihood that an immigration

[9] In a separate dissent, Justice Scalia disagreed that the Court had reached the issue of prejudice, stating that it was not "subsumed within" the question presented. *Id.* at 847 n.1 (Scalia, J., dissenting).

judge or officer would actually have granted relief. *See, e.g.*, *United States v. Luna*, 436 F.3d 312, 32 (1st Cir. 2006); *United States v. Copeland,* 376 F.3d 61, 73 (2d Cir. 2004); *United States v. Wilson*, 316 F.3d 506, 511 (4th Cir. 2003), *abrogated on other grounds by Lopez v. Gonzales,* 549 U.S. 47 (2006); *United States v. Calderon-Pena*, 339 F.3d 320, 324 (5th Cir. 2003), *reh'g en banc granted*, 383 F.3d 254 (5th Cir. 2004); *United States v. Perez-Ponce*, 62 F.3d 1120, 1122 (8th Cir. 1995); *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996); *United States v. Aguirre-Tello,* 353 F.3d 1199, 1204 (10th Cir. 2004) (en banc); *United States v. Fellows*, 50 F. App'x 82, 85 (3d Cir. 2002). In other words, to determine prejudice, federal courts attempt to step into the shoes of an immigration judge and weigh a defendant's length of residence, family ties, employment history, criminal background, and other equities to determine whether the noncitizen might have been granted relief.[10]

But this equities-based approach is a completely inappropriate inquiry for Article III courts to undertake, because Congress has squarely prohibited federal courts from making discretionary determinations in the context of immigration relief. Before 1996, federal courts were permitted to judicially review of grants of discretionary relief by the agency. *Kalaw v. I.N.S.*, 133 F.3d 1147, 1149 (9th Cir. 1997). But in 1996, the Illegal Immigration Reform and Immigrant Responsibility

[10] To add to the confusion, most circuits look to whether there was a "reasonable likelihood" an immigration judge would have granted relief, while the Ninth Circuit considers whether the defendant had a "plausible ground" for relief. *Compare Aguirre-Tello,* 353 F.3d at 1208 (agreeing with a majority of the circuits that "the standard to apply in a case like [defendant's] is whether there is a reasonable likelihood" the defendant would have obtained relief) *with United States v. Arrieta*, 224 F.3d 1076, 1083 (9th Cir. 2000) (finding that it was "plausible" the defendant would have received a waiver).

Act (IIRAIRA) added the following jurisdictional provision concerning the denial of discretionary relief:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B). Thus, for the last two decades, Congress has precluded federal courts from reviewing any discretionary exercise of relief for cancellation of removal, waivers of inadmissibility, voluntary departure, adjustment of status, or withdrawal of application, which are committed exclusively to the Attorney General's discretion.

Yet in the context of a § 1326(d) prejudice analysis, circuit courts are undertaking *exactly* such an inquiry—weighing family ties, length of residence, employment history, criminal conduct, and other equities—to determine that the Attorney General would have exercised a favorable grant of discretionary relief. While no jurisdictional bar directly prevents this, IIRAIRA clearly demonstrates Congress's intent that federal courts be restricted to determining the *legal* question of statutory eligibility for discretionary relief. And notably, the Court in *Mendoza-*

Lopez declined to undertake such an equities-based approach even *before* IIRAIRA stripped federal courts of jurisdiction to review discretionary decisions. Thus, there is simply no reason that circuit courts should be undertaking an inquiry that both Congress and *Mendoza-Lopez* found to be outside the scope of judicial review.

The irony of this inconsistency can be seen in the federal appellate courts' own harsh rebukes of noncitizens who seek judicial review of a discretionary decision in federal court. When noncitizens have sought review of applications for discretionary relief, the circuit courts have frequently rejected this as a "value judgment" that is dependent upon "the person or entity examining the issue." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003) (citation and quotation omitted); *see also Jimenez-Galicia v. U.S. Atty. Gen.*, 690 F.3d 1207, 1210-11 (11th Cir. 2012) ("We have no jurisdiction to consider 'garden-variety abuse of discretion' arguments about how the BIA weighed the facts in the record."); *Argueta v. Holder*, 617 F.3d 109, 112-13 (2d Cir. 2010) ("[C]laims lie beyond our jurisdiction because they are directed to the manner in which the IJ balanced the equities in denying [the petitioner's] application for discretionary relief ...."); *Obioha v. Gonzales,* 431 F.3d 400, 405 (4th Cir. 2005) ("It is quite clear that the gatekeeper provision [of § 1252(a)(2)(B)(I)] bars our jurisdiction to review a decision of the BIA to actually deny a petition for cancellation of removal or the other enumerated forms of discretionary relief."). As such, courts have flatly declined to hear cases that "would require us step into the IJ's shoes and reweigh the facts in light of the agency's subjective treatment of purportedly similar cases," *Mendez-Castro v. Mukasey*, 552 F.3d 975, 980 (9th Cir. 2009)—while simultaneously undertaking precisely the same inquiry in the § 1326(d) context.

The circuit courts' competing approaches to this issue thus leads to absurd results. If an immigrant were denied discretionary relief and directly challenged that denial to a circuit court, the appeal would be immediately dismissed with no inquiry into the equities. But if the same immigrant challenged an immigration judge's failure to advise him of discretionary relief in a § 1326 proceeding, the Court would "step into the IJ's shoes" and make a "value judgment" by "reweigh[ing] the facts in light of the agency's subjective treatment of purportedly similar cases." *Mendez-Castro*, 552 F.3d at 980. Regardless of the statutory context, such an exercise is a matter of agency expertise and should be reserved for the Attorney General. *See St. Cyr*, 533 U.S. at 307 ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand."). In other words, the proper role of federal courts is *not* to issue murky predictions about whether the agency would have favorably exercised discretion. Rather, the proper role is to apply an objective test of statutory eligibility.

Here, the Fourth Circuit bypassed the question of whether Mr. Villarreal's due process rights were respected. But by forcing Mr. Villarreal to show that he was prejudiced twice—first by establishing his eligibility for relief and then by establishing the likelihood that it would be granted—circuit courts have become unnecessarily bogged down in a morass of discretionary adjudication that violates congressional intent and is a wholly inappropriate inquiry for Article III courts to undertake. Accordingly, circuit courts must return to the controlling authority set forth in *Mendoza-Lopez*.

B. The Varying Approaches of the Circuit Courts to Determining Prejudice Are Fundamentally Unworkable.

To demonstrate how unworkable the current approach is, an examination of circuit court methods of employing an equities-based analysis is necessary. One of the common methods of conducting such an analysis is to look to actual Board of Immigration Appeals decisions and compare the defendant's equities to those of other noncitizens who have applied for the same form of relief. *See Copeland*, 376 F.3d at 74 (stating that courts must determine prejudice by "taking into account actual cases in which similarly situated aliens have been granted or denied discretionary relief"); *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013) (stating that, in determining whether relief was plausible, "we focus on whether aliens with similar circumstances received relief"). The problem with this method is that the sheer breadth and volume of the agency's discretionary decisions, combined with their arbitrary and erratic nature, renders them nearly useless as a tool to achieve any type of reliable, comparative analysis.

1. Defendants and federal courts have access to fewer than 1% of agency decisions, and virtually none from expedited removal proceedings.

A comparison of a defendant's equities to those of other citizens is inherently unworkable because neither defendants nor federal courts have access to over 99.8% of agency decisions; and they have almost no access to decisions in expedited removal proceedings, where there is no administrative or judicial review in individual cases. *See* 8 U.S.C. § 1225(b)(1)(C) (limitation on administrative review); 8 U.S.C. § 1252(a)(2)(A) (no judicial review of individual expedited removal orders). That is, a

search of Westlaw or any other database will never show a single case on direct review of an expedited removal order, with which to compare and evaluate the probability of relief.

The due process implications of this lack of access boggle the mind. First, defendants are told that, in order to show prejudice, they must cite to cases they cannot access—a procedure that itself likely violates due process. Second, this limited access means that a federal court also lacks a reliable basis for determining whether immigration officers grant relief to noncitizens with equal or fewer equities than the defendant then before the court. It is difficult to envision a more dysfunctional and constitutionally suspect procedure for allegedly protecting a defendant's due process rights.

2. Immigration judges are wildly inconsistent.

Second, the decisions of immigration officers and judges do not provide a consistent barometer for determining whether relief would have been granted in a particular set of circumstances. For example, in comparing the grant rates for asylum—a discretionary form of relief, *see* 8 U.S.C. § 1158(b)(1)(A)—a 2006 study found that while certain immigration judges granted relief only 2% of the time, others granted relief as much as 90% of the time. Transactional Records Access Clearinghouse, *Immigration Judges: Asylum Seekers and the Role of the Immigration Court*, http://trac.syr.edu/immigration/reports/160/ (July 2006). In one of the starker examples cited, Colombians had an 88% chance of winning asylum from one judge in the Miami immigration court and a 5% chance from another judge in the same court. Similarly, one immigration judge in New York granted relief to Chinese asylum

applicants in 93.1% of cases while another New York immigration judge granted relief to the same group in only 5.5% of the cases. *Id.* And even after statistically controlling for nine of the most influential factors, such as nationality, access to counsel, and experience of the judge, applicants in San Francisco were still twelve times more likely than those in Atlanta to be granted relief. U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* (Sept. 25, 2008) (http://www.gao.gov/products/GAO-08-940).

These statistics demonstrate the difficulty of relying on a small number of cases to determine the likelihood that relief would have been granted. As the study shows, the outcome of an application for discretionary relief is just as dependent—if not more so—on the identity of the immigration judge than on the merits of the case. If the handful of cases a court examines for purposes of determining prejudice originated from one or more immigration judges on the extreme end of the spectrum, they cannot provide a reasoned, consistent foundation for determining the likelihood that a noncitizen would have been granted relief.[11]

[11] This Court has noted that 51.5% of all 212(c) applications were granted between 1989 and 1995, which suggests that this form of relief was not only possible, but probable. *I.N.S. v. St. Cyr*, 533 U.S. 289, 296 n.5 (2001). Yet circuit courts have nevertheless refused to rely on statistics for purposes of a § 1326(d) prejudice analysis. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011) (stating that a noncitizen must rely on "the unique circumstances of his own case" rather than "general statistic[s]") (quotations and citation omitted); *Aguirre-Tello,* 353 F.3d at 1210 (stating that, without any indication that the successful applicants had similar equities, reliance on statistics was "pure speculation, if not actually misleading"). The problem is compounded for expedited removals, because DHS stopped releasing statistics on how frequently relief is granted in those cases in 2004.

3. A noncitizen's access to counsel is a better indicator of success than his equities.

Unlike criminal proceedings, indigent noncitizens in civil immigration proceedings have no right to appointed counsel. *See* 8 U.S.C. § 1229a(b)(4)(A) (stating that, while a noncitizen has the right to counsel, it shall be "at no expense to the Government"). And aliens in expedited removal proceedings have no statutory or regulatory right to an attorney even at their own expense. *See Barajas-Alvarado*, 655 F.3d at 1088 ("Barajas-Alvarado himself identifies no legal basis for his claim that non-admitted aliens who have not entered the United States have a right to representation, and we are aware of no applicable statute or regulation indicating that such aliens have any such right.").

Yet the ability to retain an attorney is directly linked to a noncitizen's likelihood of success in removal proceedings. For instance, a report headed by Judge Robert Katzmann of the Second Circuit found that 67% of all immigrants with counsel had successful outcomes in their cases, while only 8% of those without lawyers prevailed. Kirk Semple, *In a Study, Judges Express a Bleak View of Lawyers Representing Immigrants*, N.Y Times (Dec. 18, 2011) (http://www.nytimes.com/2011/12/19/nyregion/judges-give-low-marks-to-lawyers-in-immigration-cases.html). As a result, representation has frequently been labeled "the single most important factor" affecting the outcome of an immigration case. Jaya

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Reply Brief of the Appellant, *United States v. Villarreal Silva*, No. 18-4652, Doc. 29, at 9-10 (filed Feb. 19. 2019).

Ramji-Nogales, et al., *Refugee Roulette: Disparities in Asylum Adjudication,* 60 Stan. L. Rev. 295, 340 (2007).

Yet in comparing a defendant's equities to those of other cases in which noncitizens applied for the same form of relief, there is no evidence that circuit courts take this factor into account. Without it, federal courts cannot accurately judge whether a grant of relief was attributable to a noncitizen's equities or the fact that he was represented by an attorney. Moreover, it is logical to believe that an unrepresented defendant who was properly advised of her eligibility to apply for relief would have attempted to hire an attorney, thereby increasing her chances of success and the likelihood of prejudice. Accordingly, the failure to consider whether a noncitizen was represented by an attorney—"the single most important factor" in predicting the outcome—renders the comparison of cases inherently unreliable.

4. In light of these factors, federal courts are actually making discretionary decisions in the first instance.

As shown above, when a federal court's prejudice determination is based on (1) fewer than 1% of the cases granted relief, (2) wildly inconsistent decisions by immigration judges, and (3) no consideration of whether the noncitizen was represented by counsel, the resulting decision carries no indicia of reliability as to what the agency would plausibly have done. At this point, the simple truth is that federal courts are not predicting what an immigration judge would have done—they are making their own discretionary decisions in the first instance.

Apart from violating congressional intent, the problem with this approach is that there is no guarantee that an Article III court's prediction bears any resemblance

to what an immigration judge or immigration officer would have *actually* done. Most federal judges have never worked as an immigration judge, nor observed immigration proceedings firsthand (and could not rely on this experience even if they did). Thus, federal courts have no way of knowing how liberally or frugally such relief is granted, nor how much weight is commonly assigned each of the relevant factors. In the absence of any such indication in the record, federal courts have absolutely no foundation on which to weigh the strength of a defendants application for relief, apart from their own speculation and conjecture. Thus, federal courts are not determining whether an *immigration judge* would have granted relief, but rather whether the *federal courts themselves* would have granted relief—a prospect that raises troubling separation-of-powers concerns regarding the judiciary's ability to intrude on the executive's and the legislative's domains regarding the creation and enforcement of immigration law.

This view of prejudice is reinforced by this Court's recent decision in *Lee v. United States*, 137 S. Ct. 1958 (2017). In *Lee*, the government argued that the outcome of any trial was an inevitable conviction, given the overwhelming evidence of guilt and lack of any viable theory of defense; thus there was no reasonable likelihood of a different outcome. This Court rejected the notion that showing a reasonable likelihood of a different outcome was a *per se* requirement for showing prejudice under the Sixth Amendment. *Id*. at 1966. It held that Mr. Lee could show prejudice by showing that he would have made a different decision on whether to go to trial. *Id*.

The Fourth Circuit, like most, has adopted the Sixth Amendment prejudice test for § 1326 collateral attacks. *See United States v. Wilson*, 316 F.3d 506, 511 (4th Cir. 2003), *abrogated on other grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006) (adopting "reasonable likelihood" standard and quoting *United States v. Encarnacion-Galvez*, 964 F.2d 402, 407 (5th Cir. 1992)). But the court continues to apply the "reasonably likelihood of a different outcome" test as a rigid, *per se* rule, in violation of *Lee*. In this case itself, the panel delved into the particular equities of Mr. Villarreal's case, and particularly whether the individual immigration officer who ordered him removed would have exercised his discretion to allow relief and avoid a removal order. *Villarreal Silva*, 931 F.3d at 330. But it did not dispute that Mr. Villarreal was *eligible* for relief, and that Mr. Villarreal was deprived of the opportunity to present his positive equities[12] when officers failed to provide him a chance to speak. *Id*. at 338. Under *Lee*, the inquiry would have stopped upon the finding of a due process violation depriving Mr. Villarreal of an entire stage of the removal process. Therefore, this Court should grant certiorari to ensure that *Lee* is followed in the context where the prejudice inquiry is most frequently raised:

[12] For example, Mr. Villarreal was born in Guerrero, Mexico; he was held back in school for several years and eventually stopped going at age 14. C.A.J.A. 169. He came to the United States the first time as a minor in 1996. C.A.J.A. 168. He was caught crossing the border and was voluntarily returned to Mexico a few times in the late 90s. C.A.J.A. 168. Mr. Villarreal accumulated several misdemeanor convictions, as well as a felony DUI with a 90-day sentence. C.A.J.A. 168-69. But he also contributed to his family. While in the United States, he worked in construction to support not only himself but his parents, and help them build a house, sending $300-$500 a month to them in Mexico. C.A.J.A. 169. He has U.S. citizen children who live in Virginia, and three of his six siblings live in the United States as well. C.A.J.A. 169.

collateral attacks on removal orders in the more than 18,000 illegal reentry prosecutions a year in which the order is used as an element of a criminal offense.

C. The Fourth Circuit's Opinion Ignored the Relevant Factors for Prejudice Because the Government Withheld the Relevant CBP Policy.

If actual prejudice—in the form of a reasonable probable alternative outcome—is the standard, then the Fourth Circuit's opinion still contains serious and important error. As the Ninth Circuit has held, the proper standard for evaluating whether an alien might have been granted relief is the factors that immigration officers themselves consider in making that decision. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011) ("[A]n alien must show that, *in light of the factors relevant to the form of relief being sought*," relief was plausible (emphasis added)).

The second question presented therefore asks whether the government may frustrate that inquiry by withholding (and even denying the existence of) the relevant standards from opposing counsel and the courts. The Fourth Circuit in this case ignored Mr. Villarreal's arguments; but without the CBP policy to rely on, it substituted a generalized equitable balancing test—one that may never be used by actual immigration officers in practice. It also created a split with the Ninth Circuit's position in *Barajas-Alvarado* by shifting the standard on prejudice from the factors relevant to immigration officers' determinations to a generalized equitable inquiry.

There is good reason as well to believe that the criteria used by immigration officers for allowing relief from expedited removal are quite different from a generalized balancing test. As Mr. Villarreal pointed out, at least one instance was known where an individual with prior removal orders was prosecuted for a federal

false statement felony, received a year-long prison sentence, and was still granted relief. C.A.J.A. 177; *cf. Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) ("To show [a] realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special manner for which he argues.").

Until this case, it appeared that the circuit courts applied an objective test to evaluate prejudice, by consulting the factors immigration officers would have considered, *see Barajas-Alvarado*, 655 F.3d at 1089, or by consulting relevant comparators that illustrate actual immigration practice to evaluate probability. *See Copeland*, 376 F.3d at 74 (stating that courts must determine prejudice by "taking into account actual cases in which similarly situated aliens have been granted or denied discretionary relief"). Here, however, the Fourth Circuit transformed the inquiry into a subjective one, and attempted to infer from the record what the subjective intent of the individual officer might have been. *Villarreal Silva*, 931 F.3d at 338 ("But perhaps most indicative was the fact that the immigration officer, to whom Villarreal would have requested withdrawal, exercised his discretion to refer Villarreal to the U.S. Attorney *for criminal prosecution*.").[13]

[13] The Fourth Circuit decided this point in the absence of any evidence in the record. In fact, it appears that Customs and Border Protections officers on the border do not necessarily have discretion about whether to refer individual cases for prosecution. *See, e.g.*, Jefferson Sessions, U.S. Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018) (directing immediate adoption of a "zero-tolerance policy" for illegal entry prosecutions).

Thus, the Fourth Circuit in this case has gone farther than any other court in severing the prejudice inquiry from actual immigration practice. It has transformed an already vague empirical inquiry (whether the proceeding would have turned out differently) into a standard-less equitable inquiry. Such an approach should remain within the executive branch; it has no place in the judicial determination of whether a prosecution violates the Due Process Clause.

II. This Case Presents an Excellent Vehicle for Deciding the Questions Presented.

The Fourth Circuit's holding on the merits in this case was limited exclusively to whether prejudice had been shown. It therefore squarely decided the questions presented, and no others. The Fourth Circuit in this case has gone further than any of its sister circuits in transforming the prejudice inquiry beyond any objective determination to a vague, subjective one, and ignored the government's withholding of relevant CBP policies, which the records clearly shows was requested beginning in the district court. For that reason, this case presents a clean vehicle for deciding the issues presented in it.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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