No. 19-6464

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO GARCIA-JACOBO, PETITIONER

v.

MARION FEATHER, WARDEN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JAVIER A. SINHA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entitled to challenge his ten-year-old removal order for the first time in a collateral attack on his convictions for illegal reentry following removal, in violation of 8 U.S.C. 1326.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

United States v. Garcia-Jacobo, No. 14-50207 (Mar. 26, 2015)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is not published in the Federal Reporter but is reprinted at 771 Fed. Appx. 787. The order of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2019. A petition for rehearing was denied on August 19, 2019 (Pet. App. 6a). The petition for a writ of certiorari was filed on October 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326. C.A. E.R. 82; Gov't C.A. E.R. 100. He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 82. During his supervised release, petitioner pleaded guilty to a second illegal-reentry offense, and served a sentence of 24 months of imprisonment for that offense. Gov't C.A. E.R. 108; C.A. E.R. 91-92. The district court in the first illegal-reentry case then determined that petitioner had violated the conditions of his supervised release, revoked his supervised release, and ordered a term of 24 months of imprisonment. C.A. E.R. 96. Petitioner filed a motion for postconviction relief under 28 U.S.C. 2255 or, in the alternative, a petition for a writ of habeas corpus under 28 U.S.C. 2241, which the district court dismissed for lack of jurisdiction. Pet. App. 1a-2a. The court of appeals affirmed. Id. at 3a-5a.

1. Petitioner is a native and citizen of Mexico. Presentence Investigation Report (PSR) ¶ 9; C.A. E.R. 64. He entered the United States without authorization and was later convicted of several crimes in California, including possession of a firearm by a felon, in violation of Cal. Penal Code § 12021(a)(1) (West Supp. 2003) and Cal. Penal Code § 12021(a)(1) (West Supp.

2006). Pet. App. 1a; see PSR ¶¶ 33-50; C.A. E.R. 64. As a result of those convictions, petitioner was charged by federal immigration authorities with being removable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). C.A. E.R. 64. Petitioner admitted the allegations against him, waived his right to contest the charges, and was removed to Mexico in December 2006. Id. at 65, 72.

In January 2007, petitioner reentered the United States without authorization. C.A. E.R. 72. A few months later, he was arrested and convicted for infliction of corporal injury on a spouse, in violation of Cal. Penal Code § 273.5(a) (West Supp. 2007). PSR ¶¶ 51-53. The Department of Homeland Security issued a notice of its intent to reinstate the prior removal order. C.A. E.R. 72. In April 2008, petitioner was removed under 8 U.S.C. 1231(a)(5), as an alien who had illegally reentered the United States after having been previously removed. C.A. E.R. 72, 75.

At some point thereafter, petitioner again entered the United States without authorization, and in January 2010 he was apprehended by law enforcement. PSR ¶ 13.

2. In February 2010, a federal grand jury in the Central District of California charged petitioner with illegally reentering the United States after removal following conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b); and possessing a firearm as an unlawfully present alien and

a felon, in violation of 18 U.S.C. 922(g). C.A. E.R. 77-79. Petitioner pleaded guilty to the illegal-reentry count (with the government dismissing the other count) and was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. Id. at 82-83; Gov't C.A. E.R. 100. After serving his sentence, petitioner was removed to Mexico in April 2012. Gov't C.A. E.R. 106, 109.

A few days later, petitioner again reentered the United States without authorization and was found by U.S. Border Patrol agents near the U.S.-Mexico border. Gov't C.A. E.R. 106-109. A federal grand jury in the Southern District of California charged petitioner with one count of illegally reentering the United States after removal following conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). C.A. E.R. 88. Petitioner pleaded guilty to that charge, Gov't C.A. E.R. 108, and was sentenced to 24 months of imprisonment, C.A. E.R. 91-93.

After petitioner served his sentence for the second illegal-reentry conviction in the Southern District of California, the Central District of California considered whether he had violated the terms of supervised release imposed for his first illegal-reentry conviction. C.A. E.R. 96. Petitioner admitted to his supervised-release violation, and the district court ordered a term of 24 months of imprisonment. Ibid. The court of appeals affirmed. 599 Fed. Appx. 669.

3. In 2016, petitioner filed a motion in the Central District of California under 28 U.S.C. 2255 or, in the alternative, a petition for a writ of habeas corpus under 28 U.S.C. 2241, requesting that the district court vacate both of his prior illegal-reentry convictions.[1] C.A. E.R. 22-48. Petitioner asserted that recent Ninth Circuit decisions had concluded that the California offense of possession of a firearm by a felon, Cal. Penal Code § 12021(a)(1), was not an aggravated felony under 8 U.S.C. 1101(a)(43)(E). C.A. E.R. 38; see United States v. Aguilera-Rios, 769 F.3d 626 (9th Cir. 2014); United States v. Hernandez, 769 F.3d 1059 (9th Cir. 2014) (per curiam). And he contended that, because his 2006 removal order was based on his California felon-in-possession convictions, his convictions for illegally reentering the United States following that removal order should be vacated. C.A. E.R. 37-40.

The district court dismissed the case for lack of jurisdiction. Pet. App. 1a-2a. The court explained that, under

[1] In December 2015, petitioner filed a petition for a writ of habeas corpus under Section 2241 in the District of Oregon, where he was serving his term of supervised release. 15-cv-2420 Pet. for a Writ of Habeas Corpus; see Gov't C.A. Br. 5. The government responded that a Section 2241 petition was improper because petitioner had not demonstrated that Section 2255 relief was inadequate or ineffective, see Gov't C.A. E.R. 148-157, and the district court agreed, see C.A. E.R. 10-21. The matter was transferred to the Central District of California, where petitioner filed the motion at issue. C.A. E.R. 21; see Pet. App. 1a.

8 U.S.C. 1252(a)(5), it lacked jurisdiction to review a challenge to an order of removal. Pet. App. 2a. And it determined that petitioner's challenge to his illegal-reentry convictions was "wholly intertwined with the merits of his removal order." Ibid. (quoting Galvan-Avila v. United States, 714 Fed. Appx. 693, 695 (9th Cir. 2017)).

4. The court of appeals affirmed. Pet. App. 3a-5a. The court explained that the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, "expressly eliminated habeas review over all final orders of removal." Pet. App. 4a (citations omitted). In particular, the court observed that 8 U.S.C. 1252(a)(5) makes a petition for review in a court of appeals the "sole and exclusive means for judicial review of an order of removal." Pet. App. 4a (citations omitted). The court explained that Section 1252(a)(5) bars any habeas petition that "directly implicates an order of removal and would require a district court to 'review the underlying merits' of the order." Ibid. (citation omitted). And the court reasoned that in this case, "[i]n order to grant [petitioner] relief from his illegal re-entry convictions, the district court would have necessarily had to first declare his order of removal invalid." Id. at 5a.

The court of appeals rejected petitioner's argument that the district court had jurisdiction to review a postconviction challenge to his removal order because he was challenging the

order's role in his criminal convictions rather than directly challenging his removal order itself. Pet. App. 5a. The court noted that 8 U.S.C. 1326(d) "permits an alien 'in a criminal proceeding under § 1326' to 'challenge the validity of the deportation order' under limited circumstances." Pet. App. 5a (quoting 8 U.S.C. 1326(d)) (brackets omitted). But the court observed that petitioner had not raised his challenge in the manner that Section 1326(d) requires. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 13-22) that the district court erred in dismissing his collateral attack on his illegal-reentry convictions. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, this case would be a poor vehicle for resolving the question presented because petitioner would not be entitled to challenge the removal order underlying his illegal-reentry convictions even if 8 U.S.C. 1252(a)(5) did not preclude the district court from asserting jurisdiction. Petitioner's alternative request (Pet. 26-28) that this Court hold his petition for its decision in Department of Homeland Security v. Thuraissigiam, No. 19-161 (oral argument scheduled for Mar. 2, 2020), is unsound.

1. Petitioner primarily contends (Pet. 13-22) that the court of appeals erred in determining that Section 1252(a)(5)

barred the district court from entertaining a collateral attack on his illegal-reentry convictions premised on the asserted invalidity of the underlying removal order. The court of appeals' decision was correct and consistent with the decisions of other courts of appeals. No further review is warranted.

a. Section 1252(a)(5), which was enacted as part of the REAL ID Act, § 106(a), 119 Stat. 310-311, eliminates habeas corpus review of final orders of removal and generally provides that the sole means of obtaining judicial review of a final order of removal is through a petition for review in the court of appeals pursuant to 8 U.S.C. 1252. Section 1252(a)(5) provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, * * * a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision.

8 U.S.C. 1252(a)(5).

In certain circumstances, an alien who was erroneously denied an opportunity for judicial review of a removal order in the removal proceedings themselves may challenge that removal order outside the petition-for-review process if he is later charged with illegal reentry, in violation of 8 U.S.C. 1326. In United

States v. Mendoza-Lopez, 481 U.S. 828 (1987), which was decided before the REAL ID Act was enacted, this Court considered the question "whether a federal court [in an unlawful-reentry prosecution] must always accept as conclusive the fact of the deportation order." Id. at 834 (emphasis omitted). The Court stated 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 thus 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 prescribe limited circumstances in which a defendant charged with reentering the United States unlawfully after removal may challenge the underlying removal order. In particular, Section 1326(d) recognizes that an alien "[i]n a criminal proceeding under this section" may challenge the validity of the removal order if he shows that: "(1) [he] 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 [him] of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d).

b. Petitioner took neither of the prescribed statutory routes to challenge his removal order: He did not file a petition for review of his removal order under Section 1252, nor did he seek to challenge the validity of the removal order in his illegal-reentry prosecutions under Section 1326. Instead, well after his convictions became final, he collaterally attacked them, asserting that the underlying removal order was invalid and invoking 28 U.S.C. 2255 and 2241. The court of appeals correctly determined that Section 1252(a)(5) bars petitioner's claim, which "directly implicates" his order of removal and would require the district court to "'review the underlying merits' of the order." Pet. App. 4a (citation omitted). As the court of appeals observed, "[i]n order to grant [petitioner] relief from his illegal re-entry convictions, the district court would have necessarily had to first declare his order of removal invalid," and the limited defense recognized in Section 1326(d) does not apply. Id. at 5a.

Petitioner asserts (Pet. 14-15) that Section 1252(a)(5) limits jurisdiction to challenge orders of removal only when that challenge is made on "direct judicial review." Pet. 14 (emphasis omitted). But the text of Section 1252(a)(5) is not so limited. The provision states that "a petition for review" filed in the

appropriate court of appeals is the "sole and exclusive means for judicial review of an order of removal" like petitioner's, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision." 8 U.S.C. 1252(a)(5).[2] Section 1252(a)(5) thus applies to any "judicial review of an order of removal," and is not limited only to direct challenges to an order of removal. Ibid. Indeed, the express reference to the habeas corpus provisions confirms that Section 1252(a)(5)'s jurisdictional bar encompasses collateral review, as well as direct review. Ibid.

Accordingly, consistent with the decision below, the courts of appeals have uniformly found that Section 1252(a)(5) precludes judicial review of indirect challenges to a removal order. See Martinez v. Napolitano, 704 F.3d 620, 622-623 (9th Cir. 2012) (determining that Section 1252(a)(5) "prohibits Administrative Procedure Act claims that indirectly challenge a removal order");

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[2] Section 1252(e) permits limited habeas review of removal orders issued under 8 U.S.C. 1225(b)(1), which allows an immigration officer to order the expedited removal of aliens arriving at a port of entry who are inadmissible because of fraud or lack of documentation and aliens inadmissible on those same grounds who were not admitted or paroled and who have been unlawfully present in the United States for a limited time. See 8 U.S.C. 1252(e)(2); see also 8 U.S.C. 1225(b)(1)(A)(i) and (iii). Such removal orders are not subject to judicial review except through habeas corpus proceedings. See 8 U.S.C. 1252(a)(2)(A) and (e)(2). Those provisions are not relevant here.

Delgado v. Quarantillo, 643 F.3d 52, 55 (2d Cir. 2011) (per curiam) (explaining that a collateral attack "which seeks to force an adjudication on the merits of an I-212 application * * * is indirectly challenging [the] reinstated order of removal" and "section 1252(a)(5)'s jurisdictional bar applies equally to preclude such an indirect challenge"); Mata v. Secretary of Dep't of Homeland Sec., 426 Fed. Appx. 698, 700 (11th Cir. 2011) (per curiam) (explaining that because "in substance, [the] complaint seeks review of his order of removal," "the proper method was not the complaint he filed in district court"); Estrada v. Holder, 604 F.3d 402, 408 (7th Cir. 2010) (affirming dismissal under Section 1252(a)(5) because "[i]f [petitioner] obtains the relief he seeks, the order of removal entered by the [immigration judge] and affirmed by the [Board of Immigration Appeals] -- which rested on the conclusion that [he] is no longer a lawful permanent resident -- would necessarily be flawed"); Haider v. Gonzales, 438 F.3d 902, 910 (8th Cir. 2006) (explaining that Section 1252(a)(5) applied "because [the] Petition for Writ of Habeas Corpus does nothing more than attack the [immigration judge's] removal order").

c. Petitioner's reliance (Pet. 17-20) on Section 1326(d) is misplaced. That provision codifies the limited "defense" recognized in Mendoza-Lopez, under which certain illegal-reentry defendants who were denied a prior opportunity for judicial review

of a removal order may challenge the use of that removal order to establish an element of the criminal offense of unlawful reentry. United States v. Ochoa-Oregel, 904 F.3d 682, 686 (9th Cir. 2018); see Mendoza-Lopez, 481 U.S. at 838-839. Even assuming that petitioner's collateral attack on his conviction here were part of a "criminal proceeding" within the meaning of 8 U.S.C. 1326(d), his failure to challenge his removal order during the prosecution itself would preclude him from doing so for the first time now. See United States v. Frady, 456 U.S. 152, 167-168 (1982).

Contrary to petitioner's characterization, his assertion that he satisfies Section 1326(d) is not a claim of "actual innocence" that could overcome his procedural default, but is instead an attempt to raise an affirmative defense that he did not properly assert at the appropriate time. See Bousley v. United States, 523 U.S. 614, 623 (1998) (explaining that a claim of "actual innocence" must be based on "factual innocence, not mere legal insufficiency"); cf. Musacchio v. United States, 136 S. Ct. 709, 718 (2016) (explaining that "[w]hen a defendant fails to press a limitations defense, the defense does not become part of the case"). "Although the government has the burden of proving the element of a prior deportation" to establish a violation of Section 1326, "'the lawfulness of the prior deportation is not an element of the offense.'" United States v. Medina, 236 F.3d 1028, 1030 (9th Cir. 2001) (quoting United States v. Alvarado-Delgado,

98 F.3d 492, 493 (9th Cir. 1996) (en banc), cert. denied, 519 U.S. 1155 (1997)); see Mendoza-Lopez, 481 U.S. at 834-835. As a result, petitioner cannot show that he is actually innocent of the crime of illegal reentry.

Moreover, even if Section 1326(d) applied to his collateral attack, petitioner would not be able to challenge his removal order because he has not satisfied the criteria in that provision. Even assuming that petitioner could show that his original removal order was "fundamentally unfair," he did not "exhaust[] any administrative remedies" and was never "improperly deprived * * * of the opportunity for judicial review." 8 U.S.C. 1326(d). As relevant here, petitioner waived administrative appeal or judicial review of the removal order. See C.A. E.R. 65, 72; Gov't C.A. E.R. 116-117. He has not asserted that the procedures underlying the waiver were themselves unfair, or that he was otherwise deprived of an opportunity to seek review of the removal order. That alone would preclude a collateral challenge in a Section 1326 prosecution.

d. Petitioner's contention that a district court has jurisdiction to entertain his collateral attack runs counter to the statutory scheme enacted by Congress. "Congress's intent in enacting the REAL ID Act provisions at issue was to streamline judicial scrutiny of removal orders by consolidating those proceedings in one forum and to eliminate the possibility of

piecemeal challenges." Singh v. United States Citizenship & Immigration Servs., 878 F.3d 441, 446 (2d Cir. 2018). Petitioner's theory, however, would allow aliens to "circumvent Congress's clear intent to consolidate review of challenges to orders of removal in the courts of appeals." Delgado, 643 F.3d at 55.

As relevant here, Section 1252 provides that an alien must seek any judicial review of a removal order within 30 days and that any such review must be made by a petition for review in the court of appeals. 8 U.S.C. 1252(a) and (b)(1). Section 1326(d), meanwhile, allows for an additional opportunity, subject to specific statutory limits, for a criminal defendant charged with illegal reentry to defend against that charge by challenging the underlying removal order. 8 U.S.C. 1326(d). Petitioner did not petition for review of his removal order within 30 days in the court of appeals and did not raise a Section 1326(d) defense during his illegal-reentry prosecutions. Then, a decade after his 2006 removal and several years after his 2010 and 2012 illegal-reentry convictions, Pet. App. 1a, petitioner attempted to collaterally attack his removal order by a different mechanism. It would undermine Congress's carefully crafted statutory scheme if an alien like petitioner -- who has forgone administrative appeals and timely judicial review and has additionally forgone a defense during his criminal proceedings for illegal reentry -- may later

attempt to revive his claim in a new collateral proceeding like this one.

Petitioner identifies no court of appeals that has entertained such a claim in similar circumstances. In any event, the court of appeals' decision here is unpublished and nonprecedential. No further review is warranted.

2. Petitioner also contends (Pet. 22-24) that Section 1252(a)(5)'s bar to collateral attack on his illegal-reentry convictions violates both the Due Process Clause and the Suspension Clause. But he has forfeited that contention, which is meritless in any event.

a. Petitioner failed to raise these constitutional claims until his reply brief in the court of appeals. See C.A. Reply Br. 26-27. The Ninth Circuit deems any claim raised for the first time in a reply brief to have been relinquished. See, e.g., United States v. Romm, 455 F.3d 990, 997 (9th Cir. 2006), cert. denied, 549 U.S. 1150 (2007); Bazuaye v. INS, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam). The court here accordingly did not consider the Due Process Clause or Suspension Clause issues that petitioner now raises. See Pet. App. 3a-5a. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970)); accord, e.g., EEOC v. Federal Labor

Relations Auth., 476 U.S. 19, 24 (1986) (per curiam) ("Our normal practice * * * is to refrain from addressing issues not raised in the Court of Appeals."); Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981). Petitioner provides no reason to depart from that longstanding practice in this case.[3]

b. Even if the Court were to overlook petitioner's waiver, neither constitutional claim has merit.

Petitioner first asserts (Pet. 22-23) that, under Mendoza-Lopez, supra, the Due Process Clause requires a district court to entertain a challenge to his prior order of removal. But he had the very opportunity that Mendoza-Lopez requires -- namely, the opportunity to challenge his order of removal during the criminal prosecution in accordance with Section 1326(d), which codifies Mendoza-Lopez. See United States v. Gonzalez-Flores, 804 F.3d 920, 926 (9th Cir. 2015), cert. denied, 136 S. Ct. 1234 (2016). Mendoza-Lopez did not require that an alien who had such an opportunity during the criminal prosecution have another

[3] Petitioner suggests (Pet. 22) that the doctrine of constitutional avoidance should apply here because the Court should "construe ambiguous statutes to avoid the need even to address serious questions about their constitutionality." United States v. Davis, 139 S. Ct. 2319, 2332 n.6 (2019). That argument was likewise not raised before his reply brief in the court of appeals and was not addressed by that court. In any event, for the reasons discussed above, Section 1252(a)(5) unambiguously bars jurisdiction over petitioner's collateral attack. See pp. 8-16, supra. And for the reasons discussed below, petitioner's claims do not raise a serious question about the constitutionality of the statutory scheme. See pp. 17-19, infra.

opportunity to bring such a challenge in a collateral attack under Section 2255 or 2241. In any event, even the due process right in Mendoza-Lopez is inapplicable to petitioner because, unlike in that case, here no alleged defect existed in petitioner's administrative proceedings that deprived him of his original right to petition for review of the final order of removal. See 481 U.S. at 831. Instead, petitioner had multiple opportunities to challenge the order of removal and each time chose to waive his right to do so. See C.A. E.R. 65, 72; Gov't C.A. E.R. 116-117.

Petitioner next contends (Pet. 23-24) that application of Section 1252(a)(5)'s jurisdictional bar would violate the Suspension Clause. In INS v. St. Cyr, 533 U.S. 289 (2001), this Court observed that "[a] construction of the [statutory provision] at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." Id. at 300. But, even treating St. Cyr as a constitutional holding, the REAL ID Act does not preclude an alien from seeking judicial review of a purely legal claim relating to his removal. Instead, it channels judicial review of final orders of removal into the courts of appeals by way of a petition for review. See 8 U.S.C. 1252(a)(5); cf. Elgin v. Department of the Treasury, 567 U.S. 1, 9-10 (2012). After his hearing before an immigration judge, petitioner had a right to an administrative appeal to the Board of Immigration Appeals, and then a right to

judicial review before the court of appeals. See 8 U.S.C. 1252(a) and (b)(1)-(2); 8 C.F.R. 1003.1(b), 1003.3(a). In appropriate circumstances, he would also have had the right to challenge his removal order under Section 1326(d) either time that he was prosecuted for illegal reentry. Having voluntarily forgone multiple opportunities for review of his removal order, petitioner identifies no basis for maintaining that the Suspension Clause guarantees him a new collateral attack now.

3. In any event, this case would be a poor vehicle in which to address the question presented because petitioner's guilty plea and supervised-release admission relinquished his right to collaterally challenge his removal order. With certain exceptions not applicable here, see Class v. United States, 138 S. Ct. 798, 804-805 (2018), an unconditional guilty plea waives all nonjurisdictional defenses to a prosecution. United States v. Broce, 488 U.S. 563, 569 (1989); Tollett v. Henderson, 411 U.S. 258, 267 (1973); see United States v. Brizan, 709 F.3d 864, 866-867 (9th Cir.), cert. denied, 571 U.S. 861 (2013). Thus, a defendant who pleads guilty to illegal reentry waives his right to challenge the validity of his underlying removal on appeal. See, e.g., United States v. Contreras-Leon, 540 Fed. Appx. 746, 747 (9th Cir. 2013).

Petitioner pleaded guilty to illegal entry without preserving any right to appeal on this issue, and he likewise unconditionally

admitted his supervised-release violation. Gov't C.A. E.R. 13, 116-117, 126-127. In fact, petitioner's plea agreements in both the Central District of California and the Southern District of California expressly waived his right to challenge his underlying removal order or collaterally attack his Section 1326 conviction. Id. at 13, 116-117. If an appeal or collateral attack raises issues that are encompassed by a valid and enforceable appellate waiver, or that have otherwise been relinquished, it should be dismissed. See, e.g., United States v. Jeronimo, 398 F.3d 1149, 1153 (9th Cir.), cert. denied, 546 U.S. 883 (2005); United States v. Vences, 169 F.3d 611, 613 (9th Cir. 1999).

4. Petitioner's request (Pet. 26-28) that, at a minimum, the Court hold his petition for its decision in Thuraissigiam is unsound.

The question presented in Thuraissigiam is whether 8 U.S.C. 1252(e)(2), which limits jurisdiction over habeas challenges to expedited-removal orders, violates the Suspension Clause as applied to the alien in that case. See Gov't Br. at I, Thuraissigiam, supra (No. 19-161). Among other things, Section 1252(e) provides that courts may not exercise habeas review to reconsider whether an alien ordered removed under expedited-removal procedures "is actually inadmissible or entitled to any relief from removal." 8 U.S.C. 1252(e)(5).

This case does not implicate that question. Petitioner was not ordered removed in expedited-removal procedures, and Section 1252(e) does not apply to him. Moreover, as noted, petitioner has not preserved any Suspension Clause claim. See pp. 16-17, supra. And even if he had preserved such a claim, he is differently situated from the respondent in Thuraissigiam because he cannot claim that the statutory provisions that applied to him foreclosed his challenge to his order of removal. Again, petitioner had opportunities to seek judicial review: Section 1252(a)(5) allowed petitioner to bring a petition for review challenging his removal order in the court of appeals, and Section 1326(d) allowed for a potential challenge to his removal order during either of his illegal-reentry prosecutions. He did not avail himself of any of those opportunities. Accordingly, the Court's resolution of the Suspension Clause question in Thuraissigiam will have little relevance here. A hold for Thuraissigiam is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JAVIER A. SINHA
Attorney

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