No. 19-8107

In the
Supreme Court of the United States

RAUL GUZMAN-IBAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Reply Brief for the Petitioner

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The question presented is whether the provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that expanded the definition of "aggravated felony" applies only to new immigration proceedings that were initiated after the date of its enactment (as the Fourth and Sixth Circuits have held) or applies whenever an immigration judge or the Board of Immigration Appeals issues a decision after that date (as the First, Third, Fifth, Seventh, and Ninth Circuits have held). Pet. ii. The government concedes that there is a circuit split on this issue, but it contends that the Court should not use this case to address it. BIO 9-19. Contrary to what the government claims, however, this conflict needs to be resolved and this case presents an excellent vehicle to do that.

1. The government argues that the Ninth Circuit's decision concerning the effective date of IIRIRA's aggravated-felony definition is correct. BIO 10-13. As explained in the petition, it is not. Pet. 10-16. But that is really beside the point at this stage because, whether the Ninth Circuit is correct or not, the circuits are split on this issue. Pet. 10-11; BIO 13-15.[1]

2. And this conflict must be resolved. Despite what the government asserts, the issue is not "of little or no ongoing significance." BIO 15; *see also* BIO 9. The correct resolution of this issue will have significant consequences for both aliens facing deportation and criminal

[1] The government's assertion that each circuit on one side of the split "could revisit the issue" and switch to the other side (BIO 15) is, of course, true for any circuit conflict.

defendants facing incarceration. Pet. 16-17. The government nevertheless argues that it is "unlikely" that the outcome of any future case will turn on this issue. BIO 15. In doing so, it ignores that, as stated in the petition (Pet. 17), six of the cases addressing this issue were decided in the past 14 years. *See United States v. Guzman-Ibarez*, 792 F.3d 1094 (9th Cir. 2015); *Saqr v. Holder*, 580 F.3d 414 (6th Cir. 2009); *Biskupski v. Attorney General*, 503 F.3d 274 (3rd Cir. 2007); *Garrido-Morato v. Gonzales*, 485 F.3d 319 (5th Cir. 2007); *Tran v. Gonzales*, 447 F.3d 937 (6th Cir. 2006), *abrogated on other grounds*, *Nasrallah v. Barr*, __ S. Ct. __, 2020 WL 2814299 (June 1, 2020); *Tobar-Barrera v. Holder*, 549 Fed.Appx. 124 (4th Cir. 2013). The government similarly disregards that the vast majority of immigration and criminal cases where this issue presents itself will not result in appellate decisions delving into the matter, particularly in those jurisdictions where these published cases control. Pet. 17. The issue therefore arises with enough frequency to merit review by this Court.

3. Finally, the government contends that this case is a "poor vehicle" to address and resolve the circuit conflict. BIO 9-10, 16-19. It is wrong.

a. The government first claims that Guzman-Ibarez's criminal conviction would stand even if his 1999 deportation is invalid because he was subsequently removed in 2000, 2002, 2004, and 2010. BIO 16-18. Each of these subsequent removals was a *reinstatement* of the 1999 deportation order, however. Pet. 7; Pet. App. 14a, 22a & n.2. "A 'reinstatement' is an administrative procedure through which immigration officials can rely on a prior removal order to effect an alien's departure from the country, bypassing the procedural requirements, and protections, of a regular removal proceeding." *United States v. Arias-Ordonez*, 597 F.3d 972,

978 (9th Cir. 2010). And the Ninth Circuit has held that "a successful collateral attack on a removal order precludes reliance on a reinstatement of that same order in criminal proceedings for illegal reentry." *Id*. at 982. Thus, it matters not whether the government might have been able to secure a valid deportation order in the later years based on Guzman-Ibarez's robbery conviction or his 2008 corporal-injury-on-a-spouse conviction *if* it had instituted new and full deportation hearings instead of simply reinstating the invalid deportation order. The cases cited by the government noting the general prejudice requirement for 8 U.S.C. § 1326(d) motions do not support its suggestion that a court could find that there was no prejudice from the due-process violations in the *actual* deportation proceedings at issue based on what might have happened in some alternate *hypothetical* deportation proceedings that never occurred. BIO 17-18. That certainly is not a viable argument under the above-noted Ninth Circuit precedent that will apply if the Court resolves the circuit conflict in Guzman-Ibarez's favor and remands for further proceedings in light of that ruling. If Guzman-Ibarez's 1999 deportation is invalid, then so is his criminal conviction.

b. Next, the government argues that the plain-error standard of review applies to the question presented. BIO 18-19. It doesn't. Guzman-Ibarez not only preserved the issue—he did so *repeatedly* in the original district court proceedings in 2013, in his first appeal to the Ninth Circuit in 2014-2015, in his prior certiorari petition to this Court in 2016, in the remand proceedings before the district court in 2017, and in his second appeal to the Ninth Circuit in 2018-2019.

1) The government's plain-error argument rests on its claim that Guzman-Ibarez forfeited the IIRIRA-retroactivity issue by not raising it in the district court "during the original proceedings" in 2013. BIO 18. In those proceedings, Guzman-Ibarez argued that his deportations were invalid. ER 48-73.[2] Indeed, that is the crux of any § 1326(d) motion. Although he did not specifically argue then that he was not deportable as charged in 1999, this Court has recognized that it is claims that are deemed waived or forfeited, not arguments. In *Lebron v. National Railroad Passenger Corporation*, the plaintiff argued below that Amtrack was a private entity yet still subject to constitutional requirements because it was closely connected with federal entities. 513 U.S. 374, 378-79 (1995). When the case got to this Court, however, the plaintiff argued for the first time that Amtrack was itself a federal entity. *Id*. at 379. The Court said that was okay. It noted the "traditional rule" that "'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Id*. (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). It therefore concluded that the contention about Amtrak being a federal entity was not a new claim but only a new argument to support the plaintiff's consistent claim that Amtrak violated his constitutional rights. *Id*. By the same token, Guzman-Ibarez has made one consistent claim—that his prior deportations were unlawful. He was therefore free to make any argument to support that claim on appeal.

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[2] "ER" refers to the appellant's excerpts of record filed in the Ninth Circuit on July 20, 2018 (Docket No. 16).

2) The government doesn't dispute that Guzman-Ibarez did raise the relevant issue in his first appeal and the Ninth Circuit addressed it. Pet. App. 15-16a. Although he argued that the plain-error standard did not apply given the *Lebron* rule, the Ninth Circuit, noting that it had to "consider the aggravated felony question in any event" due to the other issues, choose to consider the IIRIRA-retroactivity issue under its precedent holding that it is not limited to the plain-error standard where an appeal presents a pure question of law. Pet. App. 16a. Although the government contends that there is no such exception to the plain-error standard (BIO 18 n.5), the Ninth Circuit has been applying it for years, and either the government has not sought, or the Court has not granted, review to address that issue. *See, e.g., United States v. Dominguez*, 954 F.3d 1251, 1256 (9th Cir. 2020); *United States v. Echavarria-Escobar*, 270 F.3d 1265, 1267-68 (9th Cir. 2001).

3) Guzman-Ibarez presented the question in his previous certiorari petition and the Court ordered a response but then denied the petition after the government argued (among other things) that it was premature because the Ninth Circuit's decision was interlocutory at that point given the remand ordered by the Ninth Circuit. Pet. 5, 8; BIO 8-9.

4) On remand, Guzman-Ibarez argued in the district court that his robbery conviction should not have been treated as an aggravated felony under IIRIRA, recognizing that the Ninth Circuit had rejected that argument but raising it nevertheless to preserve it for possible review by this Court. Pet. 9. The government does not dispute that but asserts in a footnote—without analysis or supporting authority—that Guzman-Ibarez "cannot overcome forfeiture by raising on remand an argument that the court of appeals had already rejected[.]" BIO 18 n.5. The

government cannot have its cake and eat it too. If the Ninth Circuit's resolution of the legal issue in the first appeal precluded revisiting the matter on remand, then that opinion is also ripe for review by this Court now that it is no longer interlocutory. If that's not the case, however, then Guzman-Ibarez could (and did) cure any arguable plain-error problems by raising the issue again on remand to the district court.

5) Finally, in his second appeal to the Ninth Circuit, Guzman-Ibarez once again raised the IIRIRA-retroactivity issue. Pet. 9.

Under these circumstances, Guzman-Ibarez has preserved the issue presented for review by this Court.

For the foregoing reasons, and for the reasons set forth in the petition, this case presents an excellent vehicle to address a circuit conflict on an important issue that will have significant consequences for aliens and criminal defendants. The Court should therefore grant Guzman-Ibarez's petition for writ of certiorari.

June 3, 2020

Respectfully submitted,

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