No._____

In the

Supreme Court of the United States

MIGUEL ANDRES LARA-UNZUETA

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

1. Does a deportation proceeding deprive a removable alien of the opportunity for judicial review under 8 U.S.C. §1326(d)(2) where neither the IJ nor the BIA provide advice of such right nor advice of the various requirements of 8 U.S.C. § 1252 for such a petition??

II.

2. Is petitioner entitled to a presumption of prejudice in the absence of a record resulting from the erroneous refusal to conduct a § 212 (c) hearing? If so, may the court consider the expanded record where the standard of review is not plain error?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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STATUTES

Petitioner MIGUEL ANDRES LARA-UNZUETA respectfully requests that a Writ of Certiorari be issued to review the Memorandum Decision and Denial of Rehearing in the United States Court of Appeals for the Ninth Circuit entered on April 15, 2021, and on May 25, 2021, respectively.

ALL PROCEEDINGS BELOW

1. Transcripts of decision of the Deportation Proceedings - "Appendix A".

2. Notice of Appeal to the Board of Immigration Appeals - "Appendix B".

3. Decision of the BIA - "Appendix C".

4. Order of Hon. Michael J. Liburdi – Appendix "D".

5. Memorandum Decision of the Circuit Court of Appeals - "Appendix E".

6. Order denying appellant's Motion for Panel Rehearing - "Appendix F".

JURISDICTION

The Immigration Judge had jurisdiction pursuant to a Notice to Appear. The United States District Court for the District of Arizona had jurisdiction pursuant to 18 U.S.C. § 3231. The final judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 15, 2021. A Petition for Panel Rehearing was denied on May 25, 2021.

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

(g) STATUTE(S) SET OUT VERBATIM

8 USC § 1326(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 section (a)(1) of this section or subsection (b) of this section 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.

(g) STATEMENT OF FACTS

Nature of the Case: Petitioner became a legal permanent resident of the United States at an early age. He was raised in Chicago as part of an intact family free of abuse or neglect consisting of both natural parents and two sisters. He attended school in Chicago and then went to work to assist in the support of his family. While still a juvenile (age 17), he entered into a plea agreement in the Cook County Circuit Court whereby he pled guilty to two serious felonies – attempted First Degree Murder and Armed Violence. Although still a juvenile, he was sentenced as an adult to six years in state prison.

At the time when petitioner entered his plea in state court on March 1, 1996, Section 212(c) of the Immigration and Naturalization Act (8 USC §1182(c)(1994)) permitted deportable LPRs to have a hearing to avoid deportation and maintain their status as a legal permanent resident – at the discretion of the Attorney General, e.g. the Immigration Judge. One month after being sentenced, Congress

passed the Anti-terrorism and Effective Death Penalty Act known as "AEDPA". (Pub. L. No. 104-132, 110 Stat. 1214,1277). It eliminated the Attorney General's discretion under §212(c) to "admit" legal permanent residents convicted of an aggravated felony. The Act was not specific as to whether it was intended to be applied retroactively or merely applied to cases after its enactment. Shortly thereafter on September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act known as "IIRIRA". It is codified at 8 USC § 1182(c). It eliminated § 212(c) entirely.

Petitioner's deportation hearing was on August 14, 1997 – one month after AEDPA was enacted. Petitioner requested a § 212(c) hearing. The IJ "denied a §212(c) hearing on the ground that appellant wasn't eligible after the enactment of AEDPA" based on the BIA precedent established in *In re Soriano, 21 I & N Dec. 516 (decided by BIA on 6/27/96 and by AG on 2/21/97). (United States v. Lara-Unzueta, Unpubl, No. 04-1954, filed 1/17/2006).*

An administrative appeal was taken to the BIA which affirmed on the same ground. Removal was June 25, 1998. Neither the proceedings at the deportation hearing nor the BIA provided any advice or information that petitioner's "sole and exclusive means for judicial review" was a petition for judicial review to the circuit court under 8 U.S.C.§ 1252(a)(5)(regarding the defendant's right to petition

the appropriate circuit court for judicial review). Nor was there any provision as to the requirements of 8 U.S.C.§ 1252(b) for such a petition, e.g. 30 day deadline, petition may be typewritten, required content, and merits brief, etc.

A few years later, this Court confronted the issue of the retroactivity of loss of opportunity for§ 212(c) relief for permanent residents in *INS v. St. Cyr, 533 US 289 (2001).* This Court ruled:

> We therefore hold that § 212(c) relief remains available for aliens … whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.
> (121 S.Ct. at 2293).

On May 14, 2019, petitioner was indicted in Arizona for Illegal Entry of Removed Alien pursuant to 8 U.S.C. § 1326(a). He filed a timely pretrial motion for dismissal of the indictment based upon the erroneous denial of his right to §212(c) consideration as established in *INS v. St. Cyr, supra.* When denied, he proceeded to trial to the court and then timely filed notice of appeal to the Ninth Circuit Court of Appeals. The government admitted that both the IJ and the BIA were in error. And, the government "does not argue that Defendant failed to exhaust his administrative remedies pursuant to 8 U.S.C. § 1326(d)(1)". (Order of Hon. Michael Liburdi,p.5).

The Court of Appeals ruled that the fact that petitioner "did not understand the requirements for a § 1326 collateral attack at the time of his 1998 removal" did not constitute "an actual or constructive inability to seek judicial review, related to an alleged error or obstacle in the deportation proceedings" as required by 8 U.S.C. § 1326(d)(2). And, the circuit court also ruled that the fact that "the record as to his § 212(c) eligibility had not been developed because of the error" was not an obstacle in the deportation proceeding.

Petitioner now asks that this Court grant writ of certiorari to the Ninth circuit to review its decision.

(g) REASONS FOR GRANTING THE WRIT

Argument No. 1 Summary: **The Court of Appeals ruling conflicts with this courts decision in INS v. *Lopez-Mendoza*. (Supreme Court Rule 10).**

The decision of the court of appeals conflicts with the decision of this court in INS v. *Lopez-Mendoza, 468 US 1032 (1984)* and its progeny. Mr. Mendoza-Lopez was an alien who had previously been deported but who had entered the United States without authorization. At that point in time, § 1326 of Title 8 consisted only of the first paragraph. The government's position vis-vis the then version of 8 USC § 1326 was that there was "absolutely no due process limitations

to the enforcement of Section 1326". *United States v. Mendoza-Lopez, 481 US 828, 839 n.14 (1987).*

This Court ruled: "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". Here, the "defect" in the proceeding(s) is the absence of any advice or explanation either by the IJ or by the BIA of either the right or the obligation to comply with the requirements for a petition for judicial review under 8 U.S.C. § 1252. Without the right to collaterally obtain judicial review of an underlying removal order, the statute "does not comport with the constitutional requirement of due process". The ruling was: "a collateral challenge to the use of a deportation proceeding must be permitted where the deportation proceeding effectively eliminates the right of the (noncitizen) to obtain judicial review". The proceedings below did not provide the information necessary for the noncitizen to make a knowing and intelligent decision as is required for a valid waiver of his right, and obligation, to petition for judicial review. Thus, the right to petition for judicial review was effectively eliminated.

The issue in this case (whether the right to judicial review can be waived "knowingly and intelligently" without advice of that right) was presaged in *Mendoza*. The *Mendoza-Lopez* decision had specifically put off to another day "the determination … that respondent's rights to due process were violated by the failure of the immigration judge to explain adequately … their right to appeal" (id.). The phrase "right to appeal" referenced an administrative appeal to the BIA as a precondition of the right to petition for judicial review. In any event, the "other day" is presented by this petition.

When Congress provided a legislative response to *Mendoza-Lopez*, it also imposed certain what it called "limitations". The limitation in this case is § 1326(d)(2) which is both a right of a noncitizen as well as an obligation for consideration in a collateral action. While (d)(2) requires that the alien pursue judicial review, such review was eliminated in the district court. Instead, 8 U.S.C. § 1252(a)(5) provides that the exclusive means of review is "a petition for review filed with an appropriate court of appeals ... shall be the sole and exclusive means for judicial review of an order of removal". As stated in *Nasrallah v. Barr 140 S.Ct. 1683, 1690 (2020):* "By … eliminating review in the district courts … and supplying review in the courts of appeal, the ACT (IIRIRA) expedites judicial review of final orders of removal". This congressional scheme is not a matter of

common knowledge among aliens ordered deported. It can only be "knowingly and intelligently" waived if affirmatively advised. Here, there was no such advice at either the IJ proceeding or the BIA review.

This court's ruling in *INS v. St. Cyr, 533 US 289, 326 (2001)* was based on familiar consideration of fair notice, reasonable reliance, and settled expectations in a defendant's decision to enter a plea in a state court. Hence, if Congress' intent was to legislate retroactively so as to thwart those reasonable expectations, this court required that "Congress make its intention plain". (ftne 55). Where the honorable Justices of this Court were in disagreement over the intent of Congress (*St.Cyr* was 5-4) as well as the judges of the BIA being in disagreement (also a plurality), certainly one could not expect a noncitizen to understand the ADEPA legislation at the time of the deportation hearing.

Decisions of the appellate court support petitioner's position. There is a defect in administrative proceedings when a removed alien "is not made aware that he has a right to seek (judicial) relief (he) necessarily has no meaningful opportunity to appeal the fact that he was not advised of that right". *United States v. Vidal-Mendoza, 705 F.3d 1012, 1015 (9th Cir. 2013)* quoting *United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000)*.

The single page affirmance Order of the BIA appears in Appendix "C". When an IJ, or the BIA, breaches its obligation to provide information sufficient so that an alien can make a reasoned and considered intelligent decision as to whether or not to seek judicial review, the alien's right to procedural due process is violated. *Also, United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1050 (9th Cir. 2004)(t*he right of an alien in removal proceedings to be informed of "his or her ability to apply for relief from removal" emanates from the due process clause). Also, *United States v. Leon-Paz, 340 F.3d 100 (9th Cir. 2003)*.

Long ago this court established that a "waiver" of a constitutional right is required to be "a knowing and intelligent waiver of a known right". *Johnson v. Zerbst, 304 US 458. (1938)*. Here, the court of appeal ruled that the fact that "he did not understand the requirements for a §1326 collateral attack" was sufficient to comply with the ruling in *Mendoza-Lopez*. It is not sufficient so certiorari should be granted.

2. Argument No.2 – Prejudice.

> **Argument No. 2 Summary**: **The Court of Appeals ruling conflicts with this court's decision in Ja*e Lee v. United States, 137 Ct. 1858 (2017)*. And, the government may not attempt to rebut such presumed prejudice by reference to an expanded record where the review standard is not plain error.**

(Supreme Court Rule 10).

The court of appeals has ruled that the fact that "the record as to his § 212(c) eligibility had not been developed because of the error" did not actually or constructively deprive petitioner of the right to judicial review. Without a record being made in a lower court, there can be no transcript. Without a transcript, a petitioner has no basis for review in a higher court. Hence, without a record a petitioner is effectively denied the right of judicial review.

The law should coalesce around the proposition that where an appellant was entitled to a particular proceeding which never took place, judicial review under normal standards is not possible. In *Roe v. Flores-Ortega, 528 US 470 (2000),* defendant was entitled to a trial that never took place. The court ruled: "we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain, …we cannot accord any such presumption to judicial proceedings that never took place".

More recently, in Ja*e Lee v. United States, 137 Ct. 1858, 198 L.Ed.2d 476 (2017),* a defendant was erroneously denied his right to a jury trial which he had little to no chance of winning in hopes of avoiding deportation. As the Court phrased it, Lee had "no *bona fide* defense, not even a weak one". Yet, regarding the prejudice issue, the Court ruled that when the difference is between "certain

deportation" and "almost certain deportation", that "almost" could make all the difference. The plausibility of success "has no place where, as here, a defendant was deprived of a proceeding altogether". (*Jae Lee* quoting *Flores-Ortega* at 483).

A related question is whether a court may consult a presentence report in the underlying state case to resolve whether petitioner has suffered "prejudice" in his immigration case. In *Greer v. United States, 141 S.Ct. 2090 (2021)*, this court ruled that an appellate court conducting plain-error review may consider the entire record in the case including the presentence report. In contrast, the presentence report in this immigration matter is not part of this case but was prepared in the underlying state criminal case.

In his Notice of Appeal to the Board of Immigration Appeals (Appdx, "B"), petitioner listed some of his positive attributes, e.g. he was a long time LPR, his extended family are all either residents or citizens, he has never gone out of the United States, does not speak Spanish well and has no close relative in Mexico. These positives when coupled with a presumption created by the lack of a record could tip the scale in his favor.

CONCLUSION

For the reasons above, the Petition for a Writ of Certiorari should be granted.

DATED: August 18, 2021.

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CERTIFICATE OF SERVICE

Service of this Petition for Certiorari was made by depositing a true copy with the United States Postal Service, with no less than first-class postage prepaid addressed to the Solicitor General of the United States at the following address pursuant to Supreme Court Rule 29 (3) & (4):

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
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/s/ ATMORE L. BAGGOT
A Member of the Bar of this Court
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