No. _____

In the

Supreme Court of the United States

_____

Juan Jesus Barrieta-Barrera,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Section 1326(b)(2) of Title 8 provides an elevated penalty for illegally re-entering the country following an "aggravated felony." Does a district court's finding that the defendant should be punished under Subsection (b)(2) bind future decision-makers on the question of whether he has ever been convicted of an "aggravated felony"?

PARTIES TO THE PROCEEDING

Petitioner is Juan Jesus Barrieta-Barrera, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Jesus Barrieta-Barrera seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Barrieta-Barrera*, No. 21-10879, 2022 WL 885091 (5th Cir. March 25, 2022)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 25, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE

Section 1101(a)(43) of Title 8 reads in relevant part:

> The term "aggravated felony" means—
>
> ***
>
> (O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph…

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Juan Jesus Barrieta-Barrera pleaded guilty to one count of illegally re-entering the United States following a prior removal. A Presentence Report named three prior convictions. (Record in the Court of Appeals, at 124-126). The first of these involved a 2003 violation of Minn. Stat. § 609.344. (Record in the Court of Appeals, at 124). The second of these involved a prior violation of 8 U.S.C. §1326, the illegal re-entry statute. (Record in the Court of Appeals, at 125). The third involved another prior violation of 8 U.S.C. §1326. (Record in the Court of Appeals, at 125-126).

In the instant case, the district court imposed a sentence of 21 months, run consecutive to a pending state charge and to the revocation of the defendant's supervised release in the third conviction named above. (Record in the Court of Appeals, at 57). The judgment in the instant case named, as the statute of conviction, 8 U.S.C. §1326(b)(2), which corresponds to illegal re-entry following an aggravated felony. (Record in the Court of Appeals, at 56).

B. Appellate Proceedings

Petitioner appealed, contending that the district court erred in designating his current offense of conviction as 8 U.S.C. §1326(b)(2), and asked the court of appeals to strike the designation, or remand to the district court to do so. *See* Initial Brief in *United States v. Barrieta-Barrera*, No. 21-10878, 2021 WL 6280199, at **2-8 (5th Cir. Filed December 27, 2021)("Initial Brief"). He contended that his Minnesota statute of conviction, Minn. Stat. § 609.344, does not constitute an "aggravated felony." *See*

Initial Brief, at **4-6. Specifically, he contended that at least one non-severable, *see Mathis v. United States*, 579 U.S. 500 (2016), provision of this statute, Minn. Stat. § 609.344(1)(*l*), may be committed without engaging in conduct referenced in the definition of an "aggravated felony." *See id.*

But he conceded that his prior re-entry conviction stated that he had been convicted under §1326(b)(2). *See id.* at **6-7; Record on Appeal in *United States v. Barrieta-Barrera*, No. 21-10878, at 59 (5th Cir.). And he further conceded that this constituted a finding that his re-entry offense amounted to an "aggravated felony," which bound the district court under Fifth Circuit precedent, namely *United States v. Gamboa-Garcia*, 620 F.3d 546 (5th Cir. 2010), and *United States v. Piedra-Morales*, 843 F.3d 623 (5th Cir. 2016). *See* Initial Brief, at **6-7. To preserve review, he argued that these precedents were wrongly decided, and did not adhere to the text of 8 U.S.C. §1101(a)(43)(O). *See id.*

The court of appeals affirmed. *See* [Appx. A]; *United States v. Barrieta-Barrera*, No. 21-10879, 2022 WL 885091, at *1 (5th Cir. March 25, 2022)(unpublished). Its decision cited only *Gamboa-Garcia* and *Piedra-Morales* as the reason for its decision, giving no other rationale. *See Barrieta-Barrera*, No. 21-10879, 2022 WL 885091, at *1.

REASONS FOR GRANTING THE PETITION

Section 1326(b)(2) of Title 8 provides an elevated penalty for illegally re-entering the country following an "aggravated felony." The courts of appeals have taken opposite positions as to the effect of a district court's finding that the defendant should be punished under Subsection (b)(2). The court below has held that a finding of this sort binds all future decision-makers as to the nature of the prior conviction, forcing them to treat it as an aggravated felony even if intervening precedent reveals that is not. The Eighth Circuit has expressly disagreed with this position.

Section 1101(a)(43) of Title provides a definition for the term "aggravated felony" as it is used – sometimes idiosyncratically – in the Immigration Code. An "aggravated felony" can render someone ineligible for cancellation of removal, even if he or she has strong ties to the country and equities strongly favor allowing him or her to remain. *See* 8 U.S.C. §1229b. And it doubles the maximum sentence for re-entering the country after removal, from ten years imprisonment to twenty. *See* 8 U.S.C. §1326(b). For re-entry defendants found before November 1, 2016, an "aggravated felony" can substantially increase the defendant's Federal Sentencing Guideline range. *See* USSG §2L1.2 (b)(1)(C)(2015).

Section 1101(a)(43)(O) defines an aggravated felony to include:

> an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph…

8 U.S.C. §1101(a)(43)(O). But the courts of appeals have divided quite directly over the meaning of this paragraph.

The court below has held that a district court's judgment of conviction referencing 8 U.S.C. §1326(2) binds all future decision-makers to the extent that it characterizes a prior conviction as an "aggravated felony." *See United States v. Gamboa-Garcia*, 620 F.3d 546, 549 (5th Cir. 2010), and *United States v. Piedra-Morales*, 843 F.3d 623, 624-624 (5th Cir. 2016). So if a defendant is convicted of illegal re-entry and the judgment names the offense of conviction as 8 U.S.C. §1326(b)(2), future courts must treat the offense as an "aggravated felony." *See Gamboa-Garcia*, 620 F.3d at 549; *Piedra-Morales*, 843 F.3d at 624-624. This is so even if no other conviction prior to the defendant's removal falls within the definition of "aggravated felony." *See Gamboa-Garcia*, 620 F.3d at 549; *Piedra-Morales*, 843 F.3d at 624-624. The court below has thus effectively interpreted the phrase "conviction for an offense described in another subparagraph of this paragraph" to mean any "conviction that a district court has *said* or *found* to be for an aggravated felony." Indeed, rule applies even if the law regarding "aggravated felonies" changes. *See Piedra-Morales*, 843 F.3d at 625.

The Eighth Circuit has taken a diametrically opposite view, and has acknowledged the disagreement. In *Lopez-Chavez v. Garland*, 991 F.3d 960 (8th Cir. 2021), an immigration judge found Mr. Lopez-Chavez, an alien, ineligible for cancelation of removal. *See Lopez-Chavez*, 991 F.3d at 964 Mr. Lopez-Chavez had been convicted of a Missouri drug offense, and, subsequently, of illegal re-entry. *See*

id. at 962-963. Although the Missouri drug offense did not constitute an "aggravated felony," the government argued that Mr. Lopez-Chavez was nonetheless ineligible for cancellation of removal "because [he]pleaded guilty in 2006 to 'Illegal Reentry into the United States Subsequent to an Aggravated Felony Conviction' in violation of § 1326." *Id*. at 964.

The Eighth Circuit, however, thought that the plain language of the §1101(a)(43)(O) – and in particular the phrase "on the basis of" – required "an independent inquiry into whether Lopez-Chavez's deportation was on th[e] basis" of a true "aggravated felony." *Id.* at 965. In doing so, it expressly acknowledged a difference of opinion with the court below:

> The government urges us to adopt the reasoning of our sister circuit in *United States v. Gamboa-Garcia*, 620 F.3d 546 (5th Cir. 2010) and *United States v. Piedra-Morales*, 843 F.3d 623 (5th Cir. 2016). We decline to do so. For the reasons outlined in this opinion, we believe the rule adopted in *Gamboa-Garcia* and applied in *Piedra-Morales* to be inconsistent with the plain language of § 1101(a)(43)(O).

Id. at 966. There is accordingly no real question but that the Fifth and Eighth Circuits have taken opposite positions on a question of federal law.

The division of authority merits review. As noted, the meaning of the term "aggravated felony" affects multiple provisions of Title 8, implicating both criminal and immigration law. A division of authority regarding the class of aliens who must be removed from the country is especially troublesome, and should be quickly resolved. Conflicts of this sort prevent well-meaning immigrants – as well as their loved ones, employers, and business partners – from planning their lives based on predictable rules. A conflict between circuits may also cause immigrants to engage in

economically irrational behavior, such as relocating to the more favorable jurisdiction to take advantage of the more favorable rule. The critical national interest in uniform immigration law even finds recognition in the text of the Constitution, which gives Congress the power "To establish a uniform rule of naturalization…" U.S. Const. Art. I, Sec. 8.

The particular conflict at issue here – whether immigrants may take advantage of court rulings holding that their prior convictions are not aggravated felonies, when those decisions occur after re-entry convictions – is likely to recur. The sprawling definition of "aggravated felony" found in 8 U.S.C. §1101(a)(43) gives rise to frequent circuit splits, requiring this Court periodically to weigh in on the meaning of its provisions. *See Sessions v. Dimaya*, __U.S.__, 138 S.Ct. 1204 (2018); *Esquivel-Quintana v. Sessions*, __U.S.__, 137 S.Ct. 1562 (2017); *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). This Court should provide advance guidance as to when those decisions can benefit immigrants convicted of those crimes.

The court below resolved the case entirely on the basis of its decisions in *Gamboa-Garcia* and *Piedra-Morales*. *See* [Appx. A]; *United States v. Barrieta-Barrera*, No. 21-10879, 2022 WL 885091, at *1 (5th Cir. March 25, 2022)(unpublished). This Court should grant review on the question presented, and remand for further proceedings if it decides that question in Petitioner's favor. If it holds that these cases are wrongly decided, this may assist the defendant in obtaining immigration relief in the appropriate case.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 22nd day of June, 2022.

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