No. 22-7095

IN THE SUPREME COURT OF THE UNITED STATES

EFRAIN AVILA-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly rejected petitioner's collateral challenge to the removal order underlying his prosecution under 8 U.S.C. 1326 for illegal reentry into the United States.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Va.):

United States v. Avila-Flores, No. 3:18-cr-152 (Sept. 30, 2019)

United States Court of Appeals (4th Cir.):

United States v. Avila-Flores, No. 21-1614 (Dec. 21, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is available at 2022 WL 17831443. The opinion of the district court (Pet. App. 4a-12a) is not published in the Federal Supplement but is available at 2019 WL 2913980.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2022. The petition for a writ of certiorari was filed on March 21, 2023. 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 Eastern District of Virginia, petitioner was convicted on one count of unlawful reentry into the United States, following removal, in violation of 8 U.S.C. 1326(a). Judgment 1. He was sentenced to time served, with no term of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. 1a-3a.

1. Petitioner is a citizen of Guatemala who entered the United States without authorization in 2003. Pet. App. 2a; C.A. App. 27.

On March 27, 2012, a federal immigration officer served petitioner with a Notice to Appear, charging that he was removable from the United States and ordering him to appear for a hearing at the immigration court in York, Pennsylvania, at a date and time to be set. C.A. App. 80. Petitioner was also served with a Notice of Custody Determination, finding that he would be detained in the custody of the Department of Homeland Security pending a final determination by the immigration judge (IJ) in his case. Id. at 82. Petitioner requested review of that decision. Ibid.

On April 23, 2012, petitioner appeared before an IJ. C.A. App. 29. At the hearing, an Immigrations and Customs Enforcement (ICE) attorney stated that petitioner was eligible for voluntary

departure from the United States.[1] Id. at 28. The IJ then asked if "there [was] anyone in the United States * * * who would be willing to purchase * * * an airline ticket that [petitioner] c[ould] give to immigration to deport [him] or to send [him] back to Guatemala?" Ibid. The following exchange then occurred:

> [Petitioner]: Deport, or voluntary?
> IJ: Well, it'd be voluntary.
> IJ: No?
> [Petitioner]: No, just deported.
> IJ: OK. I have signed your deport order. * * * Anything else?
> [Petitioner]: Yes, uh, I have one -- in how many years are you allowed to come back in?
> IJ: That's a great question for you to appear at the U.S. Embassy in Guatemala City and ask them, because they'll tell you.

Ibid. The IJ ordered petitioner removed from the United States. Id. at 141. Petitioner was subsequently removed to Guatemala on May 24, 2012. Ibid.

Thereafter, immigration officers encountered petitioner in the United States on two occasions: March 31, 2015, and September 16, 2015. C.A. App. 142. Both times, he was removed to Guatemala pursuant to the 2012 removal order. Ibid.

2. Petitioner again returned to the United States without authorization and, on November 29, 2018, was located by immigration officers. C.A. App. 142. A grand jury in the Eastern District of

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[1] Voluntary departure authorizes a noncitizen to leave the country at his own expense in lieu of deportation. Pet. App. 6a-7a (citing 8 U.S.C. 1229c).

Virginia charged petitioner with unlawful reentry following removal, in violation of 8 U.S.C. 1326(a). Id. at 7.

Petitioner filed a motion to dismiss the indictment under 8 U.S.C. 1326(d), arguing that his initial removal order in 2012 had been fundamentally unfair because (inter alia) the IJ had not properly advised him of his eligibility to seek voluntary departure. C.A. App. 14-15. The district court denied petitioner's motion. Pet. App. 4a-12a.

The district court first observed that, "[t]o demonstrate fundamental unfairness under § 1326(d), a defendant must show that (1) defects in his underlying deportation proceeding violated due process, and (2) he suffered prejudice as a result." Pet. App. 7a (citation omitted). The court found that petitioner "[could not] show prejudice based on the IJ's failure to adequately advise him about voluntary departure," noting that "[t]he IJ explicitly asked about [petitioner's] eligibility for voluntary departure," "the attorney for ICE responded that he was eligible," and "the IJ asked [petitioner] whether anyone in the United States could purchase him an airline ticket." Id. at 8a. In response, "[petitioner] said that he wanted to be deported." Ibid. Assuming petitioner's contention that the IJ applied the wrong legal standard or supplied incorrect information, the court found that "[petitioner] ha[d] failed to meet his burden to establish 'how having additional knowledge of voluntary departure would have changed his decision

not to seek it.'" Id. at 9a (brackets, citation, and ellipsis omitted). The court accordingly held that "[petitioner] ha[d] failed to demonstrate fundamental unfairness under § 1326(d)." Ibid.

The district court additionally observed that "[petitioner] did not exhaust his administrative remedies or seek judicial review of his deportation order, as § 1326(d) requires." Pet. App. 10a. And because petitioner failed to show that "the alleged errors [in his removal proceeding] prevented him from 'understanding that he had anything to appeal,'" the court "c[ould not] excuse [petitioner's] failure to exhaust administrative remedies or seek judicial review." Ibid. (brackets and citation omitted).

Petitioner pleaded guilty, and the district court sentenced him to time served. Judgment 1-2. According to the Department of Homeland Security, petitioner was removed from the United States on December 18, 2019.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1a-3a.

The court explained that "[t]o successfully attack an underlying removal order" in a criminal proceeding under Section 1326, "a defendant must show the following: (1) he exhausted any administrative remedies that may have been available to challenge the order of removal; (2) he was effectively deprived of his right to judicial review of the removal order; and (3) the entry of the

removal order was fundamentally unfair." Pet. App. 2a (citing 8 U.S.C. 1326(d)).

The court of appeals held that no due process violation occurred with respect to the IJ's allegedly improper or inadequate advisement regarding the possibility of voluntary departure because "[petitioner] 'had no due process right to be advised of discretionary relief.'" Pet. App. 3a (quoting United States v. Herrera-Pagoada, 14 F.4th 311, 320 (4th Cir. 2021)). The court further credited the district court's alternative finding that "[petitioner] failed to 'link the actual prejudice he claims to have demonstrated to the specific due process violations at issue' and demonstrate that 'but for the due process errors complained of, there was a reasonable probability that he would not have been deported.'" Ibid. (quoting United Sates v. Fernandez Sanchez, 46 F.4th 211, 220 (4th Cir. 2022) (brackets omitted)).

ARGUMENT

Petitioner renews his challenge (Pet. 5-12) to the denial of his motion to dismiss the illegal-reentry charge against him on the ground that his original deportation order was fundamentally unfair. The court of appeals correctly rejected that claim. Petitioner further contends that this Court should review a disagreement among the courts of appeals over whether an IJ's failure to advise a noncitizen about his eligibility for discretionary relief can render the noncitizen's deportation order fundamentally

unfair under 8 U.S.C. 1326(d)(3).[2] Petitioner's case is not a suitable vehicle for review of that question, however, because petitioner failed to demonstrate prejudice from the IJ's alleged errors, as required to show fundamental unfairness. In addition, petitioner's collateral attack would fail even if he satisfied the fundamental-unfairness requirement. This Court has repeatedly denied review of the question presented, see, e.g., Rodriguez-Aparicio v. United States, 139 S. Ct. 592 (2018) (No. 18-5322); Garcia-Echaverria v. United States, 139 S. Ct. 479 (2018) (No. 18-5190); Estrada v. United States, 138 S. Ct. 2623 (2018) (No. 17-1233); Cordova-Soto v. United States, 579 U.S. 927 (2016) (No. 15-945); Soto-Mateo v. United States, 577 U.S. 1169 (2016) (No. 15-7876); Garrido v. United States, 571 U.S. 992 (2013) (No. 13-5415); Avendano v. United States, 562 U.S. 842 (2010) (No. 09-9617); Madrid v. United States, 560 U.S. 928 (2010) (No. 09-8643); Acosta-Larios v. United States, 559 U.S. 1009 (2010) (No. 09-7519); Barrios-Beltran v. United States, 558 U.S. 1051 (2009) (No. 09-5480), and the same result is warranted here.

1. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), this Court considered the question "whether a federal court [in an illegal-reentry prosecution] must always accept as conclusive the fact of the deportation order." Id. at 834 (emphasis omitted).

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[2] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

The Court held 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 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 add Subsection (d), which allows a collateral attack on a removal order in an illegal reentry prosecution under specified circumstances. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441, 110 Stat. 1279. Under Section 1326(d), a noncitizen charged with illegal reentry may challenge the validity of the earlier removal only if he shows that (1) he "exhausted any administrative remedies that may have been available," (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)(1)-(3).

Consistent with the approaches of most courts of appeals, the court below has correctly recognized that failure to inform a

noncitizen about the possibility of seeking purely discretionary relief does not deprive the noncitizen of due process and render removal proceedings fundamentally unfair, because a noncitizen does not have a constitutionally protected interest in purely discretionary relief. Pet. App. 3a (citing United States v. Herrera-Pagoada, 14 F.4th 311, 320 (4th Cir. 2021)); see United States v. Soto-Mateo, 799 F.3d 117, 123 (1st Cir 2015), cert. denied, 577 U.S. 1169 (2016); United States v. Torres, 383 F.3d 92, 105-106 (3d Cir. 2004); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003); United States v. Estrada, 876 F.3d 885, 888 (6th Cir. 2017), cert. denied, 138 S. Ct. 2623 (2018); United States v. De Horta Garcia, 519 F.3d 658, 661 (7th Cir.), cert. denied, 555 U.S. 997 (2008); United States v. Alegria-Saldana, 750 F.3d 638, 642 (7th Cir. 2014); United States v. Aguirre-Tello, 353 F.3d 1199, 1204-1205 (10th Cir. 2004) (en banc); see also Bonhometre v. Gonzales, 414 F.3d 442, 448 n.9 (3d Cir. 2005) (noting that "the majority of the courts of appeals, including our own, agree that there is no constitutional right to be informed of possible eligibility for discretionary relief"), cert. denied, 546 U.S. 1184 (2006).[3]

[3] Petitioner incorrectly states (Pet. 7) that the Third Circuit would classify a removal proceeding as fundamentally unfair based on an IJ's failure to inform a noncitizen about the possibility of discretionary relief. The decision he cites, United States v. Charleswell, 456 F.3d 347 (3d Cir. 2006), addressed an immigration officer's failure to inform the noncitizen of his statutory right to appeal the officer's reinstatement of the

Even when a noncitizen has met the statutory criteria to apply for discretionary relief, a grant of such relief is "not a matter of right under any circumstances, but rather is in all cases a matter of grace." Jay v. Boyd, 351 U.S. 345, 354 (1956). Such relief, which lies in the Attorney General's sole discretion, is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." INS v. Yueh-Shaio Yang, 519 U.S. 26, 30 (1996) (citation omitted); cf. Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (holding that prisoners lack constitutionally protected liberty interest in discretionary prison assignments). Because noncitizens have no constitutionally protected entitlement to be considered for discretionary relief, failure to inform noncitizens about such relief cannot deprive a noncitizen of a constitutionally protected interest and thereby render removal proceedings fundamentally unfair.

In response, petitioner suggests (Pet. 10) that his removal order could be challenged as fundamentally unfair under Section 1326(d)(3) even absent a constitutional due process violation.

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noncitizen's earlier removal order. The court found that lack of notice, in combination with "misleading language contained in the reinstatement Notice of Intent form," to be a sufficiently "fundamental defect" that, "if prejudicial," would "render[] the proceeding fundamentally unfair" because it was "the functional deprivation of a statutory right to appeal" and hence "functionally deprive[d]" him of "judicial review." Id. at 360. The court distinguished those circumstances from those in a previous case, which involved "statutory language providing for discretionary relief" that "was not mandatory." Ibid.

Petitioner, however, did not raise that statutory interpretation question in the courts below. He instead conceded that "[t]he 'fundamentally unfair' prong requires a due process violation and prejudice." Pet. C.A. Br. 7 (citation omitted); see also C.A. App. 10 (same). This Court's ordinary practice "precludes a grant of certiorari" as to a question that "'was not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Deviation from that practice is particularly unwarranted in this case because petitioner fails to identify any appellate decision adopting a different construction of Section 1326(d)(3). Even the courts he invokes (Pet. 7) look to due process in assessing whether the noncitizen's removal order was "fundamentally unfair." See, e.g., Torres, 383 F.3d at 103-104; United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9th Cir. 2004); United States v. Fernandez-Antonia, 278 F.3d 150, 159 (2d Cir. 2002).

Petitioner further states (Pet. 11) that "a noncitizen in removal proceedings -- even one who entered illegally -- does have constitutional due process rights." But having other due process protections in this setting does not establish that a noncitizen a constitutionally protected interest in purely discretionary relief such as voluntary departure.

For the same reason, petitioner's analogy (Pet. 11) to a criminal defendant at a sentencing hearing fails. The fact that

a defendant receives many due process protections does not mean that he has a constitutionally protected interest in purely discretionary aspects of the proceeding -- such as the sentencing judge's authority to suspend the execution of the sentence, the President's authority to issue a pardon, or the Bureau of Prisons' authority to designate a custodial facility. See p. 10, supra.

2. The Second and Ninth Circuits have concluded that an immigration proceeding can be collaterally attacked as fundamentally unfair based on the failure to notify a noncitizen of his eligibility for purely discretionary relief for removal. See United States v. Copeland, 376 F.3d 61, 70-73 (2d Cir. 2004); United States v. Lopez-Velasquez, 629 F.3d 894, 897 n.2 (9th Cir. 2010) (en banc); Ubaldo-Figueroa, 364 F.3d at 1049-1050. But petitioner's case is an unsuitable vehicle for reviewing that longstanding and lopsided disagreement among the circuits.

First, petitioner's case does not present the question whether an immigration proceeding can be rendered fundamentally unfair as a result of an IJ's failure to inform a noncitizen of his eligibility for discretionary relief from removal. An ICE attorney at the removal hearing confirmed that petitioner was eligible for voluntary departure, and the IJ asked petitioner if he wanted to pursue that option or proceed with deportation. C.A. App. 28. Even assuming that the IJ misadvised petitioner at that point, the district court found that petitioner failed to prove

that he would have requested voluntary departure but for the defect, and he could not demonstrate the prejudice necessary for a finding of fundamental unfairness under Section 1326(d). See Pet. App. 8a-9a. The court of appeals affirmed that factbound, case-specific holding, see id. at 3a, and petitioner offers no reason for this Court to revisit it. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

Second, this case would be an unsuitable vehicle for addressing the question presented because even if petitioner's removal order had been "fundamentally unfair," 8 U.S.C. 1326(d)(3), petitioner cannot meet Section 1326(d)'s other requirements for collateral attack. The district court found that petitioner failed to exhaust his administrative remedies or seek judicial review of his removal order, as Sections 1326(d)(1) and (2) require. Pet. App. 10a; see generally United States v. Palomar-Santiago, 141 S. Ct. 1615, 1622 (2021) ("The Court holds that each of the stat-

utory requirements of § 1326(d) is mandatory."). Petitioner instead waived his right to appeal.[4] See C.A. App. 29.

Moreover, petitioner has never subsequently sought to exhaust administrative remedies by seeking to reopen his immigration proceeding. See 8 C.F.R. 1003.23(b) ("An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision."); see also 8 C.F.R. 1003.2(c)(1) (providing that a motion to reopen proceedings "for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation"). Courts have treated such actions -- not attempted here -- as satisfying the exhaustion requirement of Section 1326(d). See, e.g., Copeland, 376 F.3d at 67; United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003). Such decisions have noted that a noncitizen's claims should generally "be first presented to the [Board of Immigration Appeals] because * * * 'the [Board] can reopen the proceedings'" and develop an evidentiary record to assist in evaluating the noncitizen's claims. Perez, 330 F.3d at 101 (citation omitted). Petitioner's failure to exhaust administrative remedies and failure to demonstrate that he was improperly denied judicial

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[4] Petitioner contended below that his appeal waiver was invalid because he did not know his rights, but the district court found that petitioner had not carried his burden on that point. See Pet. App. 10a n.5. Petitioner has not renewed that contention in this Court. See Pet. i.

review make his case a poor vehicle for examining the other requirements for collateral relief.

Finally, this Court's review is particularly unwarranted because the question presented is of limited practical significance to petitioner. Although convictions ordinarily have "collateral consequences adequate to meet Article III's injury-in-fact requirement," Spencer v. Kemna, 523 U.S. 1, 14 (1998), any collateral consequences in petitioner's case are highly attenuated. Petitioner received a time-served sentence, with no supervised release to follow. He has now been removed from the United States. Petitioner's negligible stake in the resolution of the question he raises is further reason that his case is an unsuitable vehicle for review of that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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