No. 15-985

IN THE

Supreme Court of the United States

GABRIELA CORDOVA-SOTO,

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

REPLY BRIEF FOR THE PETITIONER

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I. THE GOVERNMENT ACKNOWLEDGES THE DEEP CIRCUIT SPLIT AND DOES NOT DISPUTE THE ISSUE'S IMPORTANCE

a. The question presented in Ms. Cordova's petition for certiorari is: Whether due process applies to a removal proceeding where discretionary relief from removal is at issue. Pet. i. On this question, the Government's brief confirms an intractable circuit split, with the Second and Ninth Circuits applying a rule opposite to all other territorial courts of appeals, including the Fifth Circuit in the decision below. Opp. 12–13.

Perhaps that is why the Government does not even try to attack this question on its own terms. Instead, the Government seeks to distract the Court by reframing the question as "whether an alien has a constitutional due process right to be informed of her eligibility to apply for discretionary relief from removal," Opp. 16, or more generally, what precise process is due in removal proceedings, *id*. at 10, 12. But a fair reading of the cases cited in the petition, which the Government relies on in its own brief, makes clear that the question at issue cannot fairly be so constrained. The split is both real and persistent.

b. Likewise, the Government does not contest that the question presented is implicated in tens of thousands of criminal and civil proceedings annually. *Id*. at 12. *See also* Pet. 15–17. Nor does the Government dispute the question's undeniable importance. Under 8 U.S.C. § 1326(d) and this Court's decision in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), an alien prosecuted for illegal reentry can collaterally attack the underlying removal order and seek to dismiss the indictment, but only if her right

to due process was violated. *Id.* at 839. That is, of course, impossible if due process does not even apply. And, for individuals like Ms. Cordova, who are lawfully residing in the United States, the removal proceeding itself "govern[s] a matter of the utmost importance—whether lawful resident aliens with longstanding ties to this country may stay here." *Judulang v. Holder*, 132 S. Ct. 476, 490 (2011).

Indeed, the Government agrees that the circuit split includes decisions foreclosing due process claims in a whole host of contexts, including in the purely legal determination of whether an individual is eligible to apply for discretionary relief, in the consideration of evidence during the removal proceeding, and also in the ultimate decision of whether to grant relief, among others. Opp. 12–13; *see also* Pet. 10–13. Whether an alien in these circumstances has due process rights at all should not depend on whether she happens to be in a circuit on one side of the split or the other.

II. THE MAJORITY RULE IS UNTENABLE

The need for review is highlighted by the breadth of the majority rule the Government defends—that due process cannot apply to a proceeding whenever the ultimate decision depends on an exercise of discretion. *See* Opp. 12–15. The rightness or wrongness of this rule is what the petition asks this Court to determine on the merits.

a. The Government's proposed rule makes little sense where the law governing the relief at issue—here, cancellation of removal—requires both an initial legal determination on eligibility and also, for an eligible alien, consideration of enumerated factors to

decide whether relief should be granted. *See* 8 U.S.C. § 1229b(a); *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).[1] The Government ignores these constraints on the Attorney General's consideration of an application for cancellation and wrongly refers to cancellation as "purely discretionary," and so, according to it, undeserving of due process protection. Opp. 13.[2]

This argument fails on its own terms. The Government's authority itself distinguishes between the due process analysis that applies to the Attorney General's ultimate, discretionary decision on relief, from that which applies to the antecedent, *non*-discretionary determination of eligibility. *Jay v. Boyd*, 351 U.S. 345, 353–54 (1956) ("Eligibility for the relief here involved is governed by specific statutory standards which provide a right to a ruling on an applicant's eligibility. . . . [Qualified deportable] aliens have been given a right to a discretionary determination on an application for suspension . . . ."); *Yueh-Shaio Yang*, 519 U.S. at 30–31 (stating that

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[1] Many other forms of discretionary relief, including asylum, are similarly governed by set criteria. *See, e.g.*, 8 U.S.C. § 1158.

[2] The Government relies on *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996), as support for its position. Opp. 13. *Yeuh-Shaio Yang* addressed the statutory standard for suspension of deportation, and noted that the governing law "impose[d] no limitations on the factors that the Attorney General . . . may consider in determining who, among the class of eligible aliens, should be granted relief." 519 U.S. at 30. This absence of enumerated factors made the discretionary decision on suspension comparable to a Presidential pardon. *Id.* By contrast, the law governing cancellation requires consideration of set criteria.

statute "establishes certain prerequisites to eligibility"). *See also INS v. St. Cyr*, 533 U.S. 289, 307–08 (2001) (allowing challenge to decision where "specific statutory standards" constrained discretion).

b. Furthermore, the majority rule and the Government's defense of it run counter to longstanding precedent that applies due process to discretionary decisions. For example, this Court has applied due process to discretionary decisions in diverse contexts, including sentencing, *see, e.g.*, *Alabama v. Smith*, 490 U.S. 794, 798 (1989), as well as executive parole determinations, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment), and many others, *see* Pet. 23 n.3. The Government does nothing to explain how its rule can be squared with this established precedent.

c. The Government tries to avoid the extreme consequences of the majority rule by asserting that due process still applies to the initial determination of whether an alien is removable. Opp. 14–15. This narrow application provides no protection to tens of thousands of individuals like Ms. Cordova who are removable, but are also statutorily eligible to be considered for discretionary relief. And, it makes no sense on a practical level. Removal proceedings almost invariably involve questions of removability, which are never discretionary, and of relief, which often are. Both are often considered in the same hearing, and so the Government's approach would afford an alien due process rights for some parts of a hearing but not others.

Nor is the majority rule's impact mitigated by any source of constitutional protection other than the

Due Process Clause. The Government suggests that an alien can always challenge invidious governmental conduct (like race discrimination) in a removal proceeding on an alternative theory, such as that relied on by the plaintiff in *Wade v. United States*, 504 U.S. 181 (1992). Opp. 16. But, the Court in *Wade* relied on the *Due Process Clause*—not something else—to conclude that abuse of prosecutorial discretion was unconstitutional. 504 U.S. at 185 (citing *Wayte v. United States*, 470 U.S. 598, 608–09 (1985) (analyzing *Fifth Amendment* claim)). The complete denial of any constitutional protection thus allows for a wide variety of irremediable arbitrariness in removal proceedings. The Government's failed effort to disavow these consequences shows its position cannot be squared with the rule of law.

III. THE QUESTION PRESENTED IS SQUARELY IMPLICATED BY THE DECISION BELOW

While the key cert-worthiness markers of a split and its importance have been established, the Government spends most of its brief arguing that the split is (somehow) not implicated in this case. The Government protests too much. All of its arguments are meritless.

a. For one thing, the decision below plainly implicates the acknowledged circuit split. The Fifth Circuit's rejection of Ms. Cordova's due process claim, and denial of her motion to dismiss the indictment under 8 U.S.C. § 1326(d), turned on its rule that due process does not apply to removal proceedings where discretionary relief is at issue. The court reasoned that the ICE agent's misinformation to Ms. Cordova could never violate her due process rights

because the relief she sought (cancellation of removal) "constitutes discretionary relief" and "relief that is available within the broad discretion of the Attorney General is not a right protected by due process." App. 16a (citing *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002)).

In contrast, the Second and Ninth Circuits hold that due process *does* apply to removal proceedings where discretionary relief is at issue. Opp. 12. *See also* Pet. 10–11. It could not be clearer: the Fifth Circuit rejected Ms. Cordova's claim based on its contrary rule, and so this case squarely implicates the split. *See* App. 16a. The precise contours of the due process right in the Second and Ninth Circuits, (*see* Opp. 10–12), and whether Ms. Cordova could prevail under those circuits' tests (*id.*), are irrelevant to this Court's review of the question presented.

b. For another thing, the Government's contention that Ms. Cordova's due process rights were not violated because the ICE agent's advice reflected "controlling BIA precedent at the time," assumes—contrary to the decision below—that due process applies to Ms. Cordova's removal proceedings. Opp. 10–12, 16. If this Court overrules the Fifth Circuit's decision, the contours of the due process protection in removal proceedings where discretionary relief is at issue can be addressed on remand. And, besides, the Government's argument is wrong on multiple levels. When Ms. Cordova stipulated to removal, the BIA's decision on the dispositive issue—whether simple possession constituted an aggravated felony—expressly referenced and relied on a deepening circuit split. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394–97 (BIA 2002). *Yanez* also made clear that

the question remained open in the circuit where Ms. Cordova's proceedings were taking place. *Id.* In these circumstances, the ICE agent's advice would have been misleading even if it had been limited to a statement that Ms. Cordova had committed an "aggravated felony" under governing law.

And, even more critically, the ICE agent's misinformation was not simply that the BIA would find Ms. Cordova ineligible for discretionary relief. Rather, he made a blanket statement that she did not have *any* way to stay in the United States. App. 85a.[3] This "advice" was provided along with a form waiving Ms. Cordova's rights to appeal administratively and to seek judicial review. App. 45a. Absent that waiver, she could have challenged the aggravated felony determination and pursued cancellation of removal before the court of appeals. *See* 8 U.S.C. § 1252. It plainly was not correct that Ms. Cordova was precluded from challenging removal. And, again, the merits of her due process claim can be decided on remand.

c. Next, that the Fifth Circuit invoked "plain error review" in its consideration of Ms. Cordova's due process claim has no impact whatsoever on this Court's resolution of the question presented. The Government argues that because circuit precedent foreclosing Ms. Cordova's due process claim "was binding on the district court," its "alleged error was not 'plain'" under then governing law, and so "could

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[3] The Government did not contest that the ICE agent made these representations, nor did the district court hold an evidentiary hearing and weigh any evidence. *See* App. 20a-25a.

not be corrected under Rule 52(b)." Opp. 18. Specifically, the Government points to *Lopez-Ortiz*, the Fifth Circuit decision establishing the rule that this petition asks this Court to reject. According to the Government, *Lopez-Ortiz* prevented the error from being "plain under current law" at the time the district court ruled. Opp. 18.

The Government relies on this Court's decisions in *Henderson v. United States*, 133 S. Ct. 1121 (2013), and in *Johnson v. United States*, 520 U.S. 461 (1997), in support of this argument. *Id.* But *Johnson* "explicitly rejects" the argument the Government makes here: that a court must "apply[ ] the words 'plain error' as of the time when the trial judge acted." *Henderson*, 133 S. Ct. at 1127. Instead, it is "enough that an error be 'plain' at the time of appellate consideration" for that error to fall within Rule 52(b)'s category of "plain error." *Johnson*, 520 U.S. at 468. Here, the error may be plain based on a decision of this Court overruling precedent that was binding at the time the district court ruled. *Id.* Put another way, if this Court overrules *Lopez-Ortiz*, then this Court's decision supersedes *Lopez-Ortiz* as the appropriate reference for a "plain error" inquiry under Rule 52(b).[4]

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[4] The court of appeals correctly rejected the Government's related waiver argument based on Ms. Cordova's conditional plea agreement. App. 15a n.8; Opp. 17 n.10. The plea agreement broadly reserved the right "to appeal all issues relating to the district court's ruling on Defendant's Motion to Dismiss Indictment." *Id.* (citing C.A.R.E. 307). The issues raised in the court of appeals and here obviously are "related to the the [district] court's ruling on the motion to dismiss the indictment," which

d. The Government's arguments on prejudice, exhaustion, and judicial review are also unavailing, and they are properly resolved on remand in any event. *See* Opp. 18–21.

First, on prejudice, in speculating that Ms. Cordova would have stipulated to removal regardless of the ICE agent's advice, and thus could not be prejudiced by it, the Government misrepresents the record. *See id.* at 19. There is no evidence that Ms. Cordova made an "unsolicited request to speed up the removal process." *See* App. 18a. And, the record makes clear that Ms. Cordova reached out to a legal services organization only *after* the ICE agent told her she was foreclosed from challenging removal, and at the agent's suggestion. *Id.* at 66a. There simply is no basis to conclude that she would have contacted the legal services organization or sought to stipulate to removal had the ICE agent told her nothing. *See id.* Moreover, if Ms. Cordova had far better than a "long-shot chance of obtaining discretionary relief from removal." Opp. 19. She had a compelling case for discretionary relief. Pet. 3. She was brought to the United States as an infant. Her children and their father resided here, along with her siblings, and all were U.S. citizens. And, at the time of her removal, her youngest child was less than a year old. *Id.*

Second and third, the Government's arguments, that Ms. Cordova did not exhaust available adminis-

(continued…)

challenged the removal order as fundamentally unfair. App. 15a n.8.

trative remedies or seek judicial review of the removal order, miss the mark. This Court held in *Mendoza-Lopez* that the failure to exhaust administrative remedies or seek judicial review does not preclude aliens from successfully attacking an indictment for illegal reentry where "the [aliens'] waivers of their rights to appeal [in the removal proceeding] were not considered or intelligent." 481 U.S. at 840; *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004) (there was "almost certainly no administrative exhaustion in *Mendoza-Lopez* itself, yet the Court held that collateral review of the underlying deportation order was constitutionally required.").

Here, Ms. Cordova's waivers of her right to administrative remedies and to judicial review, which were included in the stipulation to removal, were "not considered or intelligent," just like the waivers at issue in *Mendoza-Lopez*. 481 U.S. at 840. Rather, they were based on the ICE agent's incorrect advice that she was foreclosed from challenging removal. *Id*. Thus, neither exhaustion nor judicial review is any impediment to attacking the indictment under 8 U.S.C. § 1326(d). *See id*.

The Government does not distinguish *Mendoza-Lopez*'s holding on exhaustion or judicial review in any respect.[5] And the cases on which the Government instead relies, *Bousley v. United States*, 523 U.S. 614 (1998) and *Sanchez-Llamas v. Oregon*, 548

[5] To the extent that the Government's arguments on exhaustion and judicial review are based on the position that Ms. Cordova's waivers were valid, those arguments fail because the waivers were not knowing and intelligent, and that issue is one for remand anyway.

U.S. 331 (2006), do not support its position. *See* Opp. 20. Neither of these cases involve immigration issues at all, let alone the scope of § 1326(d). *See Bousley*, 523 U.S. at 618 (addressing whether an individual could file a petition for habeas corpus challenging a firearms conviction); *Sanchez-Llamas*, 548 U.S. at 342–43 (addressing whether individuals could maintain habeas claims based on alleged violations of Vienna Convention).

e. The Government contends, citing five previous petitions, that this Court has "repeatedly denied review of the question presented." Opp. 8. But none of those petitions raised the question presented here. Four of the five petitions addressed the narrower question of whether an immigration judge has an affirmative obligation to inform an alien of available discretionary relief in the context of a removal hearing. *See* Petition for Writ of Certiorari at iv, *Soto-Mateo v. United States*, 136 S. Ct. 1236 (2016) (mem.) (No. 15-7876); Petition for Writ of Certiorari at i, *Avendano v. United States*, 562 U.S. 842 (2010) (mem.) (No. 09-9617); Petition for Writ of Certiorari at i, *Madrid v. United States*, 560 U.S. 928 (2010) (mem.) (No. 09-8643); Petition for Writ of Certiorari at i, *Acosta-Larios v. United States*, 559 U.S. 1009 (2010) (mem.) (No. 09-7519). Indeed, the petitions in *Avendano*, *Madrid*, and *Larios* were all were filed by the same lawyer and lacked any factual development regarding the purported due process violation. *Id.* And, in *Garrido* the question presented related narrowly to a misrepresentation by the immigration judge. *See* Petition for Writ of Certiorari at i, *Garrido v. United States*, 134 S. Ct. 513 (2013) (mem.) (13-5415); *see also* Brief in Opposition at 12,

Garrido v. United States, 134 S. Ct. 513 (2013) (mem.) (13-5415). Notwithstanding the conceded circuit split, this Court has not previously been presented with the important question raised here.

CONCLUSION

For the reasons stated above, Ms. Cordova's petition for a writ of certiorari should be granted.

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