No. 09-1009

In the Supreme Court of the United States

ULISES FRANCISCO MARTINEZ SILVA ET AL.,
PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' (Board's) determination that petitioners failed to demonstrate that their removal would result in exceptional and extremely unusual hardship to qualifying family members, a prerequisite to be eligible for discretionary cancellation of removal under 8 U.S.C. 1229b(b).

2. Whether the court of appeals' application of 8 U.S.C. 1252(a)(2)(B)(i) to preclude judicial review of the Board's denial of cancellation of removal violates petitioners' asserted constitutional right to maintain family unity.

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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 reprinted in 329 Fed. Appx. 142. The decisions of the Board of Immigration Appeals (Pet. App. 4a-5a) and the immigration judge (Pet. App. 6a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2009. A petition for rehearing was denied on September 24, 2009 (Pet. App. 15a). On December 14, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 22, 2010. On January 7, 2010, Justice Kennedy further extended the time to February 22, 2010, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b.[1] The discretion of the Attorney General to grant relief from removal 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). To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. See, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008). The alien bears the burden of proving eligibility for cancellation of removal. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d).

To demonstrate statutory eligibility for cancellation of removal, an alien who is not a lawful permanent resident must show that he has been physically present in the United States for a continuous period of at least ten years; that he has been a person of good moral character during that period; that he has not committed certain listed crimes; and (as relevant here) "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1). To demonstrate "exceptional and extremely unusual hardship," the alien must show that the hardship to his quali-

[1] All references to 8 U.S.C. 1229b are to the 2006 edition of the United States Code and the 2008 Supplement.

fying relatives is "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *In re Monreal*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (internal quotation marks omitted).

b. Since 1996, the INA has barred federal court review of certain discretionary decisions made by the Attorney General in immigration cases. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b [the INA's cancellation of removal provision].

8 U.S.C. 1252(a)(2)(B)(i).

In 2005, Congress qualified this jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioners are natives and citizens of Mexico. Pet. App. 1a; Administrative Record (A.R.) 43, 234-235, 647-648. The lead petitioner, Ulises Francisco Martinez Silva, entered the United States illegally in 1988, Pet. App. 7a, and his wife, petitioner Saturnina Martinez,

entered the United States illegally in 1980, *id.* at 1a, 7a; A.R. 29.

In February 2001, petitioners filed an application for asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 7a; A.R. 366-373, 430. The Department of Homeland Security (DHS) referred the application to an immigration judge (IJ) and charged petitioners with being removable as aliens present in the United States without being admitted or paroled. Pet. App. 6a-7a; A.R. 427-428, 746-747; see 8 U.S.C. 1182(a)(6)(A)(i).

Petitioners conceded that they are removable as charged and withdrew their application for asylum, withholding of removal, and CAT protection. Pet. App. 7a; A.R. 43. They then filed applications for cancellation of removal under 8 U.S.C. 1229b. Pet. App. 7a. In the alternative, they sought voluntary departure. *Id.* at 14a.

The IJ determined that petitioners were removable as charged, denied their requests for cancellation of removal, and granted their requests for voluntary departure. Pet. App. 6a-14a. Regarding cancellation of removal, the IJ determined that petitioners had been physically present in the United States for ten years, had demonstrated good moral character, and had not committed any disqualifying crimes. *Id.* at 7a-8a. But the IJ found petitioners statutorily ineligible for cancellation of removal because they failed to show that their qualifying relatives would experience exceptional and extremely unusual hardship if petitioners were removed to Mexico. *Id.* at 10a-14a.

The IJ explained, citing Board of Immigration Appeals (Board) precedent, that "exceptional and extremely unusual hardship" is hardship "substantially beyond" hardships that would ordinarily be expected to result from removal and is limited to "truly exceptional" situations. Pet. App. 8a. The IJ then considered the impact of petitioners' removal on their two United States-citizen children. *Id.* at 8a-11a. The IJ noted petitioners' testimony that they planned to have their children return to Mexico with them. *Id.* at 10a. The IJ observed that the children were young and healthy, and that petitioners are bilingual, so that "any language difficulty that these young children will experience will [be] able to be transitioned" by their parents. *Ibid.* The IJ also noted that petitioners had saved money in the United States and that the money could "be used to help them get on their feet when they return to Mexico." *Ibid.* Further, the IJ noted that petitioners were healthy and had work skills (as a carpenter and as a cashier and babysitter) that were "clearly transferrable" to Mexico. *Ibid.* The IJ therefore concluded that removal would not be an "exceptional and extremely unusual hardship on either child, either individually or collectively." *Id.* at 11a.

The IJ then concluded that petitioners did not establish the requisite hardship to the lead petitioner's parents. Pet. App. 11a-13a. The IJ noted that "[t]he father * * * is retiring soon" after working for 26 years, has "no significant medical issues," and will receive social security benefits to supplement his investments and "assets in his home." *Id.* at 11a-12a. The IJ observed that "the mother * * * is a dedicated housewife" who can "also ameliorate some of the hardship both emotionally and financially" from petitioners' removal. *Id.* at

12a. The IJ determined that although the lead petitioner did "help out [his parents] financially," his parents are not significantly dependent on him. *Id.* at 12a.[2] The IJ then granted petitioners' request for voluntary departure. *Id.* at 14a.

3. The Board dismissed petitioners' appeal. Pet. App. 4a-5a. The Board "adopt[ed] and affirm[ed]" the IJ's decision that petitioners "fail[ed] to establish exceptional and extremely unusual hardship to their two United States citizen children" and to the lead petitioner's "lawful permanent resident mother and United States citizen father." *Id.* at 4a (citing *In re Burbano*, 20 I. & N. Dec. 872, 874 (B.I.A. 1994) (adoption or affirmance of an IJ decision is "a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision")). The Board then granted petitioners 60 days in which to voluntarily depart from the United States. *Id.* at 4a-5a.[3]

4. The court of appeals dismissed petitioners' petition for review in an unpublished memorandum opinion. Pet. App. 1a-3a. The court explained that 8 U.S.C. 1252(a)(2)(B)(i) precludes judicial review of cancellation of removal decisions, including a decision that an alien failed to demonstrate "exceptional and extremely unusual hardship" to a qualifying relative. Pet. App. 2a. The court noted that 8 U.S.C. 1252(a)(2)(D) provides an

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[2] The IJ did not consider hardship to petitioner Saturnina Martinez's sister and her sister's children, because they are not qualifying relatives under 8 U.S.C. 1229b(b)(1)(D). Pet. App. 13a.

[3] Petitioners sought a stay of removal from the court of appeals, which was granted. Under circuit law in effect at that time, the court's grant of a stay of removal also stayed the voluntary departure period. See *Desta* v. *Ashcroft*, 365 F.3d 741, 745-750 (9th Cir. 2004).

exception for "constitutional claims or questions of law," but concluded that petitioners did not raise such a claim. Pet. App. 2a. The court explained that for it to "retain jurisdiction to review [a constitutional] challenge[], a petitioner must allege at least a *colorable* constitutional violation," meaning a claim with "some possible validity." *Ibid.* (brackets in original; citation omitted).

The court concluded that "[n]either of [p]etitioners' asserted constitutional violations is colorable." Pet. App. 2a. First, the court determined that petitioners' due process challenge to "the manner in which the IJ weighed the evidence" did not restore jurisdiction, because "traditional abuse of discretion challenges recast as alleged due process violations do not constitute colorable constitutional claims that would invoke our jurisdiction." *Id.* at 2a-3a (citation omitted).

Second, the court determined that petitioners' second claim—that it would be unconstitutional to preclude judicial review of the hardship determination because it implicates a "fundamental right to family unity"—also failed. Pet. App. 3a. In so holding, the court relied on its decision in *De Mercado* v. *Mukasey*, 566 F.3d 810, 816 (9th Cir. 2009), a case raising the same issue on similar facts. Pet. App. 3a. In *De Mercado*, the court explained that accepting the argument that a fundamental right to family unity overrides the judicial-review bar in 8 U.S.C. 1252(a)(2)(B)(i) would "swallow the rule itself," because "*every* hardship determination by the agency affects the members of the [alien's] family." 566 F.3d at 816. The court also determined that the "asserted right to family unity is implausible," because although the Supreme Court has recognized a constitutional right to "the freedom of personal choice in matters of marriage and family life," "the right of parents to custody of their

biological children," and "parents' decision-making authority in matters of child rearing and education," the "denial of an application for cancellation of removal implicates none of those rights." *Id.* at 816 n.1. The court noted that the *De Mercado* petitioners identified "no authority to suggest that the Constitution provides them with a fundamental right to reside in the United States simply because other members of their family are citizens or lawful permanent residents." *Ibid.*

5. Petitioners filed a petition for rehearing en banc, which was denied, with no judge requesting a vote on the petition. Pet. App. 15a.

ARGUMENT

Petitioners contend (Pet. 8-16) that 8 U.S.C. 1252(a)(2)(B)(i), which precludes judicial review of cancellation of removal decisions, is unconstitutional because it violates an asserted constitutional right to family unity. The court of appeals correctly rejected that claim and held that it lacked jurisdiction to consider petitioners' challenge to the Board's decision. No court has accepted petitioners' contention, and petitioners do not allege any disagreement in the circuits on the question presented. Even if the court of appeals had jurisdiction here, petitioners' claim would fail, because they have not demonstrated the hardship required by statute to be eligible for cancellation of removal. In any event, petitioners have recently been granted deferred action status, which will enable them to remain in the United States. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that it lacked jurisdiction over petitioners' challenge to the Board's decision that they failed to demonstrate exceptional and extremely unusual hardship. The INA pro-

vides that no court shall have jurisdiction to review "any judgment regarding the granting of relief under section * * * 1229b * * * of this title." 8 U.S.C. 1252(a)(2)(B)(i). The denial of cancellation of removal on the ground that petitioners failed to demonstrate the requisite hardship is a "judgment regarding the granting of relief under" 8 U.S.C. 1229b. Pet. App. 2a (quoting 8 U.S.C. 1252(a)(2)(B)(i)). Every court of appeals to consider the question has held that hardship determinations under 8 U.S.C. 1229b are discretionary judgments made unreviewable under 8 U.S.C. 1252(a)(2)(B)(i), except to the extent that they raise colorable constitutional claims or genuine questions of law under 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Arambula-Medina* v. *Holder*, 572 F.3d 824, 828 (10th Cir. 2009), cert. denied, No. 09-664 (Apr. 10, 2010); *Aburto-Rocha* v. *Mukasey*, 535 F.3d 500, 502-503 (6th Cir. 2008); *Barco-Sandoval* v. *Gonzales*, 516 F.3d 35, 38-39 (2d Cir. 2008); *Zacarias-Velasquez* v. *Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Martinez* v. *United States Att'y Gen.*, 446 F.3d 1219, 1222-1223 (11th Cir. 2006); *Bencosme de Rodriguez* v. *Gonzales*, 433 F.3d 163, 164 (1st Cir. 2005); *Obioha* v. *Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005); *Martinez-Rosas* v. *Gonzales*, 424 F.3d 926, 929-930 (9th Cir. 2005); *Rueda* v. *Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004); *Leyva* v. *Ashcroft*, 380 F.3d 303, 305-306 (7th Cir. 2004); *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003).

Petitioners do not raise any colorable constitutional challenge to the Board's denial of cancellation of removal. They have abandoned the due process claim they raised before the court of appeals. Pet. 7. And they do not contend that denying them cancellation of removal in itself violated their asserted constitutional right to

family unity. Pet. 9. Instead, petitioners assert (Pet. 17-19) that the court of appeals' decision "is not consistent with the text of 8 U.S.C. § 1252(a)(2)(D)," which preserves judicial review over constitutional claims. But the court of appeals recognized the import of that section, stating (in accordance with the views of other courts of appeals) that it would have jurisdiction to review any colorable constitutional claim, meaning any constitutional claim with "some possible validity." Pet. App. 2a (citation omitted). The court explained that petitioners' family unity claim was not colorable, and it therefore found jurisdiction lacking. *Id.* at 3a. Accordingly, the court correctly concluded that it lacked jurisdiction under 8 U.S.C. 1252(a)(2).

2. Apparently accepting that Section 1252(a)(2) bars judicial review of their claim, petitioners contend (Pet. 8-16) that preclusion of review violates an asserted constitutional right to family unity, and therefore violates the Due Process Clause of the Fifth Amendment and separation-of-powers principles. Petitioners do not identify any court that has accepted their argument. That is not surprising, because such a rule would wreak havoc on the immigration laws. Any alien subject to a removal order with relatives in the United States could claim the right petitioners assert. Indeed, petitioners state repeatedly (Pet. 8, 9, 12) that this asserted right would be implicated every time the Board makes a hardship determination under 8 U.S.C. 1229b. See *De Mercado* v. *Mukasey*, 566 F.3d 810, 816 (9th Cir. 2009) (asserted family unity right "would swallow" the judicial-review bar because "*every* hardship determination * * * affects the members of [the alien's] family"). Petitioners also have not identified any disagreement in

the courts of appeals on the question presented. Review should be denied on that basis alone.

In any event, the court of appeals correctly denied petitioners' claim. As the Ninth Circuit explained in *De Mercado*, although this Court has recognized a constitutional right to "the freedom of personal choice" in certain "matters of marriage and family life," it has never recognized any right for an alien illegally present in the United States to remain here in order to be around family members who live here. 566 F.3d at 816 n.5 (finding "no authority to suggest that the Constitution provides them with a fundamental right to reside in the United States simply because other members of their family are citizens or lawful permanent residents"). Petitioners not only assert that the Constitution affords a right to family unity, but they also assume that right is absolute. They do not explain what level of scrutiny of government action would be required for their asserted right, but instead take the position that if it is implicated, it is violated, and no consideration of the government's interest is required. Petitioners do not identify any precedent of this Court that supports such an extraordinary rule.

Petitioners cite (Pet. 8) *Stanley* v. *Illinois*, 405 U.S. 645 (1972), but that case did not hold that the Constitution guarantees the integrity of the family unit as against the immigration laws. There, the Court held that the Due Process Clause required that an unwed father be granted a hearing on his fitness as a parent before his children could be taken from him after the death of their mother. *Id.* at 657-658. Petitioners also cite (Pet. 9) the plurality opinion in *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977), but that case also did not consider any family-related privacy inter-

ests in the context of the immigration laws. There, the Court invalidated a city ordinance that "selects certain categories of relatives who may live together and declares that others may not," concluding that the ordinance lacked a sufficient justification. *Id.* at 498-499. *Smith* v. *Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), is similarly inapposite. There, the Court did not recognize a particular family-related constitutional privacy right, instead assuming that foster parents had such a right but finding that it was not infringed by the State's procedures for removing a foster child from a foster home. *Id.* at 848-855. None of those cases arose in or addressed the immigration context, and none of them held that there is a broad-based, absolute right for family members to live together.[4]

Even assuming that there exists a freestanding constitutional right to "family unity" that is implicated here, the Board's denial of cancellation of removal does not infringe that right, because petitioners do not contend that their children will be taken from them. The Board's decision does not require petitioners to be separated from their children, and indeed petitioners informed the IJ that, if they are removed, they planned to take their children with them to Mexico. Pet. App. 10a. See, *e.g.*, *Cabrera-Alvarez* v. *Gonzales*, 423 F.3d 1006, 1013 (9th

[4] The other cases petitioners cite (Pet. 11) likewise do not support their broad claim. In *Troxel* v. *Granville*, 530 U.S. 57 (2000), the Court addressed parents' rights to control the "care, custody, and control of their children," not a right for family members to live together. *Id.* at 65. *Quilloin* v. *Walcott*, 434 U.S. 246 (1978), concerned an unwed father who wished to veto the adoption of his child; the Court determined that the father, who had never been involved in the child's life, had no such right. *Id.* at 254. Neither case concerned the immigration context.

Cir. 2005) (observing that aliens facing removal make a "*decision* between family unity and the children's ability to enjoy the educational and economic advantages of living in the United States," but determining that that choice was not contrary to either international law or Congress's intent in enacting 8 U.S.C. 1229b) (emphasis added).[5] Moreover, even if there was some infringement of petitioners' asserted right, the government's compelling interests in the enforcement of the immigration laws would provide a sufficient justification for it. Cf. *Stanley*, 405 U.S. at 651 (finding that the State lacked a sufficiently "powerful countervailing interest").

Apparently recognizing that they do not have a substantive right to remain together as a family in the United States, petitioners contend (Pet. 10) that the asserted constitutional right affords them only a right to judicial review of the Board's denial of cancellation of removal. In petitioners' view, they have a separation-of-powers and due process right to judicial review of their cancellation claim because the effect of the Board's decision is to deny them family unity.[6] The premise of petitioners' argument is mistaken. As explained above, the Board's decision does not require petitioners to be separated from their children or the lead petitioner's parents. See pp. 12-13 & note 5, *supra*. For petitioners to prevail, they would have to show not only a right to stay together, but a right to stay *in the United States*. But

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[5] To the extent that the lead petitioner claims a constitutional right to remain with his parents, that claim also fails. As the IJ noted, the lead petitioner did not live with his parents in the United States. Pet. App. 11a. And the lead petitioner could maintain family unity if his parents moved with him to Mexico.

[6] Petitioners do not explain why their asserted right would afford them judicial review, but not a substantive right to remain together.

petitioners long have conceded that they are removable from the United States. Pet. App. 7a. Thus, even if petitioners' asserted right were cognizable under the Constitution, it would not be infringed by the Board's decision, and thus is not implicated by limitations on judicial review of the Board's decision.

3. Even assuming that petitioners were correct and the court of appeals had jurisdiction over this case, review would be unwarranted, because petitioners cannot prevail on their contention that the Board erred in concluding that they failed to demonstrate "exceptional and extremely unusual hardship." As the IJ noted, it is well-established that "exceptional and extremely unusual hardship" is hardship "substantially beyond" that which would ordinarily result from removal. Pet. App. 8a (citing *In re Monreal*, 23 I. & N. Dec. 56 (B.I.A. 2001), *In re Andazola*, 23 I. & N. Dec. 319 (B.I.A. 2002), and *In re Recinas*, 23 I. & N. Dec. 467 (B.I.A. 2002)). By its plain meaning, that standard requires "truly exceptional" circumstances. *Ibid.* The hardship determination is a quintessentially discretionary decision, Pet. App. 2a, and if it were judicially reviewable, it would be reviewed for abuse of discretion.

Petitioners could not show abuse of discretion here. As the IJ explained in a thorough opinion, petitioners and their children are young and healthy; petitioners can make a living in Mexico; petitioners have the financial resources to establish themselves in Mexico; and petitioners have the skills to help their children make the language transition in Mexico. Pet. App. 8a-11a. There is likewise no sufficient hardship with respect to the lead petitioner's parents. As the IJ explained, they have other children living with them in the United States and financial resources that are independent of

any support petitioners provide. *Id.* at 11a-13a. To the extent that petitioners' removal would impose hardship on their children or the lead petitioner's parents, these are the ordinary hardships that arise as a result of removal, as opposed to "exceptional and extremely unusual hardship." Petitioners make no argument to the contrary in their certiorari petition.

4. In any event, DHS has exercised its administrative discretion to permit petitioners to remain in the United States. On April 26, 2010, DHS informed petitioners that they have been granted deferred action status for an indefinite period of time. Deferred action is an "exercise in administrative discretion" whereby DHS declines to institute proceedings, terminates proceedings, or declines to execute a final order of deportation. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999); see *ibid.* ("Approval of deferred action status means that, for * * * humanitarian reasons * * *, no action will thereafter be taken to proceed against an apparently deportable alien."). This exercise of DHS's prosecutorial discretion provides another reason why further review in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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