No. 12-95

In the Supreme Court of the United States

GABRIELA CORDOVA-SOTO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner's petition for review, filed almost five years after the issuance of her final removal order, where 8 U.S.C. 1252(b)(1) expressly provides that a petition for review of a removal order "must be filed not later than 30 days after the date of the final order of removal."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 659 F.3d 1029. The decision of the Department of Homeland Security reinstating petitioner's removal order (Pet. App. 17a-18a) is unreported. The decision of the immigration judge ordering petitioner removed (Administrative Record (A.R. 38)) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2011. A petition for rehearing was denied on March 23, 2012 (Pet. App. 15a-16a). On June 12, 2012, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including July 23, 2012, and the petition was filed on that date.

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

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a petition for review of a final order of removal "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). The time limit for filing a petition for review in an immigration case is "mandatory and jurisdictional." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (citation omitted).

When an alien who has previously been removed or who departed voluntarily under an order of removal illegally reenters the United States, the Department of Homeland Security (DHS) may reinstate the prior removal order and execute it a second time. 8 U.S.C. 1231(a)(5); see 8 C.F.R. 241.8(a); see also *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 33-35 (2006). In those circumstances, "the prior order of removal is reinstated from its original date," and it "is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5). Moreover, the alien "is not eligible and may not apply for any relief under [the INA]." *Ibid.*

For purposes of judicial review, "an order reinstating a prior removal order is 'the functional equivalent of a final order of removal.'" *Dinnall* v. *Gonzales*, 421 F.3d 247, 251 n.6 (3d Cir. 2005) (quoting *Arevalo* v. *Ashcroft*, 344 F.3d 1, 9-10 (1st Cir. 2003)). Thus, judicial review of a reinstated order of removal is also subject to the 30-day time limit for filing a petition for review provided in 8 U.S.C. 1252(b)(1).

2. Petitioner is a native and citizen of Mexico. Pet. App. 2a. She illegally entered the United States and adjusted her status to that of a lawful permanent resident.

Ibid. Petitioner then was convicted of several crimes in Kansas, including felony possession of methamphetamine, theft, and forgery. *Ibid.*; A.R. 103. As a result of those convictions, DHS charged petitioner with being removable as (1) an aggravated felon, see 8 U.S.C. 1227(a)(2)(A)(iii); (2) an alien convicted of two crimes involving moral turpitude, see 8 U.S.C. 1227(a)(2)(A)(ii); and (3) an alien convicted of a controlled substance offense, see 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. 2a.

After consulting with an attorney, petitioner waived her right to a hearing, admitted that she was removable as charged, and stated that she would not seek any forms of relief from removal. Pet. App. 2a-3a; A.R. 116. In particular, petitioner signed a stipulated request for the issuance of a final removal order, in which she expressly "waived her right to be represented by counsel in the removal proceedings; admitted all factual allegations in the [notice to appear]; conceded all charges of removability; waived any right to apply for relief from removal; waived her right to appeal the removal order; and attested that she had executed the Stipulation voluntarily, knowingly, and intelligently." Pet. App. 2a-3a.

Based on that stipulation, the immigration judge (IJ) found petitioner removable as charged and ordered her removed to Mexico. Pet. App. 3a. The removal order specifically warned petitioner that "she was prohibited from entering or attempting to enter the United States at any time" and that "she would be required to obtain permission from the Attorney General in order to reapply for admission." *Ibid.* The IJ entered the removal order on November 8, 2005, and petitioner was removed to Mexico on November 10, 2005. *Id.* at 3a-4a; A.R. 38.

3. Five years later, DHS officials discovered that petitioner was living illegally in the United States. Pet.

App. 4a. DHS issued a notice of its intent to reinstate the prior removal order, explaining that petitioner was subject to removal under 8 U.S.C. 1231(a)(5). Pet. App. 4a; see A.R. 111. In response, petitioner submitted a sworn statement stating that she had reentered the United States on November 27, 2005, less than three weeks after her removal. Pet. App. 4a; A.R. 99. She argued that her reentry was lawful because she had taken a taxi to a border checkpoint with other passengers, pretended to look for an identification card when the border inspector questioned the other passengers, and was then "waved in" by the inspector. Pet. App. 4a-5a; A.R. 113-115. Petitioner acknowledged that she had not applied to the Attorney General for permission to reenter the United States. Pet. App. 5a.

An immigration officer, after "review[ing] all available evidence, the administrative file and any statements made or submitted in rebuttal," reinstated petitioner's prior order of removal. Pet. App. 5a, 17a-18a; see A.R. 1; see also 8 U.S.C. 1231(a)(5).

Petitioner filed a petition for review of the reinstatement order in the court of appeals. She argued that her original removal order was defective because she received poor legal advice about whether she was removable and whether she was eligible for relief from removal, Pet. C.A. Br. 8-13, and that her reentry into the United States was legal, *id.* at 13-18.

4. The court of appeals denied the petition for review. Pet. App. 1a-14a. As relevant here, the court held that it lacked jurisdiction to review petitioner's challenges to her original removal order. *Id.* at 5a-6a. The court noted petitioner's acknowledgement that an underlying removal order "is not subject to being reopened or reviewed" under 8 U.S.C. 1231(a)(5), and it explained

that a petition for review of a removal order "must be filed not later than 30 days after the date of the final order of removal" under 8 U.S.C. 1252(b)(1). Pet. App. 6a. Here, the court explained, petitioner did not seek judicial review within 30 days of her original removal order, and the INA does not permit her to challenge the original removal order after it had been reinstated (even if she could challenge whether the statutory criteria for reinstatement had been met). *Ibid.*

The court rejected petitioner's contention that it could review her challenges to her underlying removal order by virtue of 8 U.S.C. 1252(a)(2)(D). Pet. App. 6a. Section 1252(a)(2)(D) provides that nothing in 8 U.S.C. 1252(a)(2)(B) or (C), or in any other provision of the INA (except Section 1252) "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." The court explained that this provision restored jurisdiction over certain types of claims where Congress had otherwise limited jurisdiction, but it does not override the 30-day time limit for seeking judicial review of a removal order contained in Section 1252(b)(1). Pet. App. 6a. The court noted that by its text, Section 1252(a)(2)(D) "does not apply to jurisdictional limitations *within*" Section 1252, except for those in Section 1252(a)(2)(B) and (C). *Ibid.* Accordingly, the court declined to review petitioner's 2005 removal order. *Ibid.*[1]

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[1] The court also rejected petitioner's challenges to her reinstated removal order and her argument that her reentry was legal. Pet. App. 7a-14a. Petitioner does not renew those arguments before this Court.

5. Petitioner filed a petition for rehearing en banc, which the court of appeals denied, with no judge in regular active service calling for a poll. Pet. App. 15a-16a.

ARGUMENT

Petitioner contends (Pet. 12-17) that the court of appeals erred in dismissing her untimely challenge to her 2005 removal order, contending that 8 U.S.C. 1252(a)(2)(D) trumps the 30-day time limit for seeking review of a final removal order in 8 U.S.C. 1252(b)(1). The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, this case would provide a poor vehicle for resolving the question presented because petitioner did not timely present the jurisdictional argument to the court of appeals and because she would not prevail even if the court of appeals could consider her challenge to her removal order. Further review is therefore unwarranted.

1. The court of appeals correctly rejected petitioner's challenge to her original removal order. Petitioner was ordered removed in 2005. The INA sets out the "[e]xclusive means of review" of removal orders, 8 U.S.C. 1252(a)(5), and it specifically provides that a "petition for review must be filed not later than 30 days after the date of the final order of removal," 8 U.S.C. 1252(b)(1). Petitioner did not seek judicial review of her November 2005 removal order within 30 days of that order. Instead, she expressly "waived her right to appeal the removal order," and then attempted to relitigate her removal order five years later, after she had illegally reentered the United States and been found by DHS. Pet. 2a-5a. The INA is clear that petitioner could not at that point relitigate her removal order from scratch. Indeed, Congress provided that, if "the Attorney Gen-

eral finds that an alien has reentered the United States illegally after having been removed," then "the prior order of removal is reinstated from its original date and *is not subject to being reopened or reviewed*." 8 U.S.C. 1231(a)(5) (emphasis added).

The court of appeals correctly recognized that Section 1252(a)(2)(D) does not provide for judicial review in this case. Section 1252(a)(2)(D) allows jurisdiction for courts to review "constitutional claims or questions of law" in situations where Congress has otherwise "limit[ed] or eliminate[d] judicial review." 8 U.S.C. 1252(a)(2)(D). Significantly, Section 1252(a)(2)(D) is not a freestanding grant of jurisdiction to review any legal or constitutional claim in an immigration case. Rather, it provides a rule of construction that applies to certain provisions that limit or eliminate judicial review. See *ibid.* The rule of construction is inapplicable here by its very terms. It applies to limits on judicial review in "subparagraph (B) or (C)" of Section 1252(a)(2) and "in any other provision of this chapter (other than this section) which limits or eliminates judicial review." 8 U.S.C. 1252(a)(2)(D). As the court of appeals explained, it does not apply to Section 1252 itself (other than to Section 1252(a)(2)(B) and (C)), and it therefore does not override the basic requirements for seeking judicial review of a final removal order that are set out in Section 1252. Pet. App. 6a.

As relevant here, Section 1252(b)(1) provides that an alien must seek any judicial review of a removal order within 30 days. 8 U.S.C. 1252(b)(1). Petitioner did not seek judicial review of her removal order within 30 days, and Section 1252(a)(2)(D) does not allow her to attempt to now seek that review five years after the fact. See, *e.g.*, *Lorenzo* v. *Mukasey*, 508 F.3d 1278, 1281 (10th Cir.

2007) ("Under § 1252(a)(2)(D), only the jurisdictional limitations found in § 1252—excepting those in § 1252(a)(2)(B) & (C) * * * apply generally to our review of constitutional claims or questions of law." (internal quotation marks omitted)); *Sharashidze* v. *Mukasey*, 542 F.3d 1177, 1178-1179 (7th Cir. 2008) ("[Section] 1252(a)(2)(D), which authorizes this court to decide constitutional claims and questions of law, is explicitly constrained by the 30-day time limit in § 1252(b)(1).") (quoted in Pet. App. 6a). Judicial review is also barred because petitioner failed to exhaust her administrative remedies with respect to the original removal order, as is required by 8 U.S.C. 1252(d)(1). *Ramirez-Molina* v. *Ziglar*, 436 F.3d 508, 514 n.7 (5th Cir. 2006). The conclusion that judicial review is foreclosed by Section 1252 itself is confirmed by Section 1252(a)(5), which expressly provides that a petition for review filed "in accordance with this section [1252]"—necessarily including compliance with the 30-day time limit and the exhaustion requirements in 8 U.S.C. 1252(b)(1) and (d)(1)—"shall be the sole and exclusive means for judicial review of [that] order of removal." 8 U.S.C. 1252(a)(5). And of course Section 1231(a)(5) reflects that same conclusion by providing that an alien may not attempt to relitigate her original removal order by seeking judicial review of the reinstatement of that order. 8 U.S.C. 1231(a)(5). See Pet. App. 5a-6a.

Accordingly, if an alien wishes to challenge the original basis for her removal, she must do so within thirty days of her removal order under 8 U.S.C. 1252(b)(1). The rule petitioner urges cannot be what Congress intended, because it would allow an alien to forgo administrative appeals and timely judicial review and then attempt to revive her claim in the future simply by reen-

tering the United States. When an alien illegally reenters the United States and DHS reinstates the removal order, the alien may seek judicial review of the DHS officer's determination that the criteria for *reinstatement* have been met, but the original removal order "is not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5), as dictated by 8 U.S.C. 1252(a)(5), (b)(1) and (d)(1).

Petitioner contends (Pet. 12-13) that the court of appeals had jurisdiction to review her claim because Section 1252(a)(2)(D) trumps Section 1231(a)(5)'s declaration that a reinstated removal order "is not subject to being reopened or reviewed." She is mistaken for two reasons. First, it is not correct to assume that Congress intended Section 1252(a)(2)(D) to apply to removal orders that are the subject of a reinstatement. Congress could not have spoken more clearly in Section 1231(a)(5): when the Attorney General determines that the alien has illegally reentered the United States, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed"; "the alien is not eligible and may not apply for any relief"; and "the alien shall be removed under the prior order." 8 U.S.C. 1231(a)(5). Section 1252(a)(2)(D) provides a rule of construction for ordinary challenges to removal orders; it allows review of constitutional and legal issues "raised upon a petition for review filed with an appropriate court of appeals in accordance with [Section 1252]." 8 U.S.C. 1252(a)(2)(D). An alien has no right, simply by seeking judicial review of the *reinstatement* of the original order, to challenge the underlying removal order itself. Although the alien may seek judicial review of whether the criteria for reinstatement have been met, Section 1231(a)(5)—especially when read together with

8 U.S.C. 1252(a)(5), (b)(1), and (d)(1)—makes clear that she cannot obtain review of the underlying removal order itself. See, *e.g.*, *Garcia de Rincon* v. *DHS*, 539 F.3d 1133, 1137 (9th Cir. 2008).

Second, Section 1252(a)(2)(D) by its own terms does not override the 30-day time limit in Section 1252(b)(1) and the exhaustion requirement in Section 1252(d)(1). As the court of appeals explained, that conclusion is fatal to petitioner's jurisdictional argument. See Pet. App. 6a.

Petitioner is likewise mistaken in contending (Pet. 13-14) that not allowing her to challenge her removal order five years after the fact would be inconsistent with the possibility that an alien may make a limited challenge to her removal order in a criminal proceeding for illegal reentry under 8 U.S.C. 1326. Congress has specifically provided that an alien may collaterally attack her underlying removal order in a prosecution for illegal reentry, but only if the alien "exhausted any administrative remedies that may have been available to seek relief against the order"; "the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review"; and "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). Even if this were a criminal prosecution, petitioner would not be able to challenge her removal order because she has not satisfied those criteria. As particularly relevant here, petitioner waived administrative appeal and judicial review of the removal order and therefore did not exhaust the administrative remedies available to her as of right; that alone would preclude a collateral challenge in a Section 1326 prosecution. In any event, the fact that Congress permitted a collateral challenge in the context of a criminal proceeding does not

mandate that a similar avenue be available in removal proceedings, where the Act does not so provide, because those proceedings are civil in nature and therefore do not entail the same constitutional protections as criminal proceedings. Compare *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 837-839 (1987), with *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984). See *Ramirez-Molina*, 436 F.3d at 514 n.9 ("[T]he statutorily-granted authority to entertain a collateral attack on a removal order underlying a criminal indictment does not extend to a collateral attack on a removal order underlying a reinstatement order, which is civil in nature."). That is particularly true in the context of a reinstated removal order, "where an alien's rights and remedies are severely limited." *Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484, 497-498 (9th Cir. 2007) (en banc).

Finally, petitioner is wrong to say (Pet. 15-16) that the court of appeals' holding raises Suspension Clause concerns. In *INS* v. *St. Cyr*, 533 U.S. 289, 300-301 (2001), this Court observed that "[a] construction of the amendments [to the INA] at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." See also U.S. Const. Art. I, § 9, Cl. 2 (Suspension Clause). Petitioner has not been deprived of any judicial review of a legal claim. She had a right to a hearing before an immigration judge, an administrative appeal to the Board of Immigration Appeals, and judicial review before the court of appeals. She voluntarily waived those rights after consultation with an attorney. Pet. App. 2a-3a; A.R. 116. Having expressly waived those rights, petitioner cannot credibly claim that the court of appeals' decision not to let her relitigate her removal order five years after it became final violates the Sus-

pension Clause. Further, petitioner could have sought to reopen her removal order under 8 U.S.C. 1229a(c)(7). See also 8 C.F.R. 1003.23; see *Altamirano-Lopez* v. *Gonzales*, 435 F.3d 547, 549 (5th Cir. 2006) (alien filed motion to reopen challenging the validity of a stipulated removal order); see also *Luna* v. *Holder*, 637 F.3d 85, 87, 104 (2d Cir. 2011); *Iasu* v. *Smith*, 511 F.3d 881, 892 (9th Cir. 2007); *Mohamed* v. *Gonzales*, 477 F.3d 522, 525-526 (8th Cir. 2007); *Alexandre* v. *United States Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006). Petitioner identifies no court that has held that it would violate the Suspension Clause to preclude judicial review in these circumstances.

2. Contrary to petitioner's contention (Pet. 7-12), the decision below does not conflict with a decision of another court of appeals. To the contrary, the decision below is consistent with the only other decision that has addressed circumstances like those here.

a. The only other court to consider a situation like this one reached the same conclusion as the court below. In *Avila* v. *United States Attorney General*, 560 F.3d 1281 (11th Cir. 2009) (per curiam), an alien who had been removed pursuant to an order of removal reentered the United States illegally and was found by DHS officials. *Id.* at 1283. DHS reinstated his prior order of removal, and the alien filed a petition for review, seeking to relitigate his original removal order. *Ibid.* The court of appeals held that "[b]ecause [the alien] failed to exhaust his administrative remedies or seek timely review of his [original] deportation order," the court "lack[ed] jurisdiction to review the underlying validity of that order." *Id.* at 1285. The Eleventh Circuit's conclusion is therefore consistent with the conclusion reached by the court below.

In *Villegas de la Paz* v. *Holder*, 640 F.3d 650 (6th Cir. 2010), the alien entered the United States illegally, was apprehended and brought before an IJ, and was removed. *Id.* at 652. The alien then illegally reentered the United States, and DHS issued an order reinstating her prior removal order. *Id.* at 653. The situation in *Villegas* is unlike the situation here for several reasons. As an initial matter, it was unclear whether a formal removal order had been entered in that case, and the court of appeals properly permitted judicial review of that issue, which went to the propriety of the reinstatement. Here, the court of appeals noted that petitioner had a clear opportunity to seek administrative and judicial review of her removal order, and she knowingly and voluntarily waived her rights to do so. See Pet. App. 2a-4a, 5a-7a. Moreover, the *Villegas* court did not consider the issue that was dispositive to the court of appeals here, namely, whether an alien could obtain judicial review of a legal or constitutional claim pertaining to the original removal order, when such review was barred by Section 1252(b)(1). It is true that the *Villegas* court's statement that 8 U.S.C. 1252(a)(2)(D) "re-vests the circuit courts with jurisdiction over constitutional claims or questions of law raised in the context of reinstatement proceedings," 640 F.3d at 656, is in some tension with the reasoning of the court below. But because that case concerned different circumstances, and because the *Villegas* court did not consider the interplay between Section 1252(b)(1) and (a)(2)(D), *Villegas* does not conflict with the decision below.

b. Petitioner is likewise mistaken in relying (Pet. 8-12) on other court of appeals decisions addressing the more general question whether and under what circumstances 8 U.S.C. 1252(a)(2)(D) permits judicial review of

constitutional and legal challenges to a reinstated removal order. As an initial matter, the decisions petitioner cites addressed the interplay between Section 1231(a)(5) and Section 1252(a)(2)(D); none addressed the effect of 8 U.S.C. 1252(b)(1) and (d)(1).

Moreover, both *Ramirez-Molina* v. *Ziglar*, *supra*, and *Debeato* v. *Attorney General of the United States*, 505 F.3d 231 (3d Cir. 2007), cert. denied, 553 U.S. 1067 (2008), considered a significantly different procedural posture—pre-2005 habeas corpus proceedings. Those cases, initially filed in district court as habeas corpus petitions, were subsequently transferred to the courts of appeals (or converted to petitions for review) pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 310-311. See *Ramirez-Molina*, 436 F.3d at 510; *Debeato*, 505 F.3d at 232. There was no strict time limit on the aliens' original habeas petitions, and the 30-day filing deadline was waived in REAL ID Act transfer cases. *Ruiz-Martinez* v. *Mukasey*, 516 F.3d 102, 113 (2d Cir. 2008); see REAL ID Act § 106(c), 119 Stat. 311. Section 1252(b)(1) therefore was not a bar to judicial review in those proceedings, and those courts did not consider whether that provision would bar review of a reinstated removal order. Accordingly, those decisions do not conflict with the decision below, where the court rested its holding on Section 1252(b)(1).[2]

Garcia de Rincon v. *DHS*, *supra*, is likewise inapposite. In that case, an expedited removal order was entered under 8 U.S.C. 1252(e) against an alien who false-

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[2] Moreover, as petitioner notes (Pet. 9), the *Ramirez-Molina* court's conclusion is consistent with the conclusion of the court below, because the *Ramirez-Molina* court declined to consider a claim because the alien had not shown a gross miscarriage of justice. 436 F.3d at 514-515 & n.7

ly claimed citizenship. 539 F.3d at 1135. The alien was removed, she illegally reentered the United States, DHS reinstated her prior removal order, and she filed a petition for review and a habeas corpus petition in federal court. *Id.* at 1135-1136. The court held that it lacked jurisdiction to consider the alien's challenge to her underlying removal order because even if Section 1252(a)(2)(D) would in some circumstances allow judicial review of the removal order underlying the reinstatement, the alien's claim was barred by two other provisions, 8 U.S.C. 1252(a)(2)(A) and (e). 539 F.3d at 1138-1139.

Garcia is inapplicable here for several reasons. That case addressed the reinstatement of an *expedited* removal order, which is governed by its own distinct statutory framework (including a bar to judicial review in Section 1252(e)). 539 F.3d at 1137-1142; see 8 U.S.C. 1252(a)(2)(A) and (e). Of particular significance here, the *Garcia* court expressly recognized that the restoration of jurisdiction in 8 U.S.C. 1252(a)(2)(D) does not apply to other provisions of 8 U.S.C. 1252 itself (except 8 U.S.C. 1252(a)(2)(B) and (C)). *Garcia*, 539 F.3d at 1138-1139. Just as the *Garcia* court declined to review the alien's claims because bars to review in Section 1252(a)(2)(A) and (e) applied, here the court of appeals declined to review petitioner's claim because Section 1252(b)(1) applied. Thus, to the extent *Garcia* is relevant to this case, it supports the decision below.

3. This case would provide a poor vehicle to address the question presented because petitioner's claims would fail even if Section 1252(b)(1) did not bar review. First, petitioner did not make any argument about the effect of Section 1252(a)(2)(D) on Sections 1231(a)(5) and 1252(b)(1) in her appellate briefs. In her opening brief,

petitioner argued simply that the court had jurisdiction to review a reinstated removal order under 8 U.S.C. 1252(a)(1). Pet. C.A. Br. 1. The government argued that the court of appeals lacked jurisdiction to consider petitioner's petition for review under Section 1252(b)(1), Gov't C.A. Br. 12-14, and petitioner did not file a reply brief. It was not until her petition for rehearing en banc that petitioner first argued that Section 1252(a)(2)(D) would restore jurisdiction over constitutional claims and questions of law. See Pet. for Reh'g 4-14. Because petitioner failed to timely develop her legal arguments on the question presented before the court of appeals, this case would be a poor vehicle for consideration of that question by this Court.

Second, petitioner's claim likely would not be reviewable under the standards articulated by the circuits that have entertained challenges to the underlying removal orders, because she has not shown that she has suffered a gross miscarriage of justice in her initial removal proceeding. All of the courts that might allow judicial review of a reinstated removal order (albeit without yet considering the effect of Section 1252(b)(1)) require such a showing, and petitioner has not made that showing here. See *Garcia*, 539 F.3d at 1138; *Debeato*, 505 F.3d at 235; *Ramirez-Molina*, 436 F.3d at 514.

Third, petitioner's claims would fail on the merits in any event because she cannot show a constitutional or legal error in her initial removal order. Petitioner asserts that her removal proceeding was "legally problematic" (Pet. 16), but it is undisputed that petitioner consulted with an attorney about her case prior to waiving her challenges to her removal order and that she understood English, the language used in the document containing her waivers. The stipulation also included all of

the records of petitioner's convictions that established that she was removable as charged. A.R. 9-36. Regulations expressly permit an IJ to enter a stipulated removal order "without a hearing and in the absence of the parties" based on the IJ's own "review of the charging document, the written stipulation, and supporting documents, if any." 8 C.F.R. 1003.25(b). The IJ in this case conducted that review and concluded that "[b]ased upon [petitioner's] admissions, the charges of removal are sustained by evidence that is clear and convincing." A.R. 38.[3]

Further, petitioner does not dispute that she was removable on at least two grounds. She now contends that her felony drug possession offense was not an aggravated felony, but even if that were true, she would be removable on two other grounds (for having been convicted of two crimes of moral turpitude and for having been convicted of a controlled substance offense). See Pet. App. 2a. Petitioner is wrong to assert that, at the time she conceded removability, her felony drug possession offense was not an aggravated felony. See Pet. 4-5. At the time her removal order was entered, the Tenth Circuit had held that a state felony conviction for drug possession, such as petitioner's conviction, could qualify as an aggravated felony, see *United States* v. *Cabrera-*

[3] As petitioner notes (Pet. 16), the IJ was required to "determine that the alien's waiver is voluntary, knowing, and intelligent," 8 C.F.R. 1003.25(b). Here there was ample basis in petitioner's statements in the stipulation, as well as her statements about her consultation with an attorney, to conclude that she voluntarily, knowingly, and intelligently waived her rights. Pet. App. 3a; see A.R. 9-12. Moreover, petitioner does not contend that her waiver was not a knowing, voluntary, and intelligent one. See, *e.g.*, *Witjaksono* v. *Holder*, 573 F.3d 968, 975 (10th Cir. 2009) (alien must show prejudice to demonstrate a denial of due process and obtain relief).

Sosa, 81 F.3d 998, 1000, cert. denied, 519 U.S. 885 (1996), and it was not until one year after the entry of petitioner's removal order that this Court held to the contrary, see *Lopez* v. *Gonzales*, 549 U.S. 47, 52-60 (2006). Petitioner therefore cannot establish that, at the time the IJ entered the removal order, it was error to find that she was an aggravated felon. Finally, even if petitioner were not categorized as an aggravated felon, she would be removable on the other grounds noted above and could not obtain cancellation of removal or similar relief because she illegally reentered the United States. See 8 U.S.C. 1231(a)(5) ("If the Attorney General finds that an alien has reentered the United States illegally after having been removed * * * under an order of removal, * * * the alien is not eligible and may not apply for any relief under this chapter."). For these reasons as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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