No. 15-945

In the Supreme Court of the United States

GABRIELA CORDOVA-SOTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH 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 her prosecution for illegal reentry under 8 U.S.C. 1326.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 804 F.3d 714. The order of the district court (Pet. App. 20a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2015. The petition for a writ of certiorari was filed on January 21, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of illegal reentry into the United States, in violation of 8 U.S.C. 1326. Pet. App. 1a. The district court sentenced petitioner to time served. *Id.* at 37a. The court of appeals affirmed. *Id.* at 1a-19a.

1. In 1991, petitioner, a native and citizen of Mexico, became a lawful permanent resident. Pet. App. 2a, 95a. Between 2002 and 2005, petitioner was convicted of several crimes in Kansas state court, including three counts of theft in 2002, passing a worthless check in 2003, and felony possession of methamphetamine in 2005. *Id.* at 95a-96a.

2. Based on these convictions, the government initiated removal proceedings against petitioner. Pet. App. 2a, 90a-97a. On October 28, 2005, the Department of Homeland Security (DHS) detained petitioner and served her with a Notice to Appear before an Immigration Judge (IJ), charging her as removable based on her convictions of (1) an aggravated felony (under 8 U.S.C. 1227(a)(2)(A)(iii)); (2) two crimes involving moral turpitude (under 8 U.S.C. 1227(a)(2)(A)(ii)); and (3) a controlled substance offense (under 8 U.S.C. 1227(a)(2)(B)(i)). Pet. App. 80a, 90a, 95a-97a.

On November 1, 2005, after consulting by telephone with a legal services representative who told her "that [she] did not have any way to fight [her] case," Pet. App. 85a, petitioner signed and dated a stipulated request for issuance of a final order of removal (Stipulation), *id.* at 42a-48a, 85a. In the Stipulation, petitioner waived her rights to legal representation and to a hearing before an IJ, admitted the factual allegations contained in the Notice to Appear, conceded removability, and requested a removal order. *Id.* at 42a-46a. The Stipulation also provided that petitioner "waive[d] any right to make application for any relief from removal, including * * * cancellation of removal[] or any other possible relief under the Immigration and Nationality Act." *Id.* at 44a. It further stated that petitioner "underst[ood] that [she]

may not legally return to the United States at any time without special permission from the Attorney General." *Id.* at 45a. Petitioner's signature certified that she executed the Stipulation "voluntarily, knowingly, and intelligently, and fully underst[ood] its consequences." *Id.* at 46a. An immigration officer certified that he had read and explained the Stipulation to petitioner in English, which petitioner speaks fluently. *Id.* at 47a.

On November 8, 2005, an IJ sitting in Chicago reviewed the case and found petitioner removable based on her admissions. Pet. App. 41a. The IJ issued a removal order and petitioner was removed to Mexico. *Id.* at 40a-41a. On November 27, 2005, however, she reentered the United States without permission from the Attorney General. *Id.* at 3a. On September 15, 2010, DHS took petitioner into custody. *Ibid.* DHS reinstated the 2005 removal order and again removed petitioner to Mexico. *Ibid.*

3. On September 6, 2012, United States Customs and Border Patrol agents arrested petitioner near Eagle Pass, Texas, for being illegally present in the United States. C.A. R.E. 309. On October 3, 2012, she was indicted in the United States District Court for the Western District of Texas on one count of illegal reentry, in violation of 8 U.S.C. 1326. C.A. R.E. at 18.

Petitioner moved to dismiss the indictment under 8 U.S.C. 1326(d). Pet. App. 64a-79a. She admitted that she had been convicted of theft, passing a worthless check, and possession of methamphetamine, a felony under Kansas law. *Id.* at 65a-67a. She nonetheless contended that the underlying 2005 removal order was fundamentally unfair, and thus subject to collateral attack under 8 U.S.C. 1326(d), because the IJ had

failed to conduct a hearing and "[e]xpressly [d]etermine" that her waiver of rights in the Stipulation was voluntary, intelligent, and knowing—a hearing that, she claims, was required under applicable regulations. Pet. App. 72a; see *id.* at 72a-74a (citing 8 C.F.R. 1003.25(b)). Petitioner claimed that had the IJ scheduled a voluntariness hearing, her removal would have been stayed; intervening changes in decisional law would have made her eligible for discretionary relief (*Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 533-536 (7th Cir. 2006) (conduct that constitutes a felony under state law but a misdemeanor under federal drug law is not an "aggravated felony" categorically disqualifying an alien from discretionary relief under 8 U.S.C. 1229b(a)), and then *Lopez* v. *Gonzales*, 549 U.S. 47, 50 (2006) (same)); and the IJ would have granted discretionary relief. Pet. App. 31a-32a, 77a-78a.

The district court denied petitioner's motion because, it concluded, petitioner had not demonstrated that entry of the 2005 order was fundamentally unfair: Petitioner had not disputed, the court noted, that the Stipulation was in fact voluntary, intelligent, and knowing. Pet. App. 27a-28a. In addition, the court concluded, the IJ's 2005 removal order complied with the applicable regulations because the record before the IJ supported an implicit finding of voluntariness and the regulations did not require the IJ to hold a hearing or make express findings on that issue. *Id.* at 29a-31a. The court also held that petitioner could not demonstrate that the IJ's alleged errors prejudiced her because, *inter alia*, it was not reasonably likely that the IJ would have granted discretionary relief

even if petitioner had been statutorily eligible. *Id.* at 32a.

Petitioner signed a conditional plea agreement admitting the underlying charge of illegal reentry and preserving the limited right to appeal "issues relating to the district court's ruling on Defendant's Motion to Dismiss Indictment." C.A. R.E. 306-311. The court accepted her plea. *Id.* at 18, 161-162, 166. Petitioner was sentenced to time served and then removed to Mexico for a third time. Pet. App. 37a; Pet. 7.

4. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court of appeals rejected petitioner's renewed contention that the 2005 removal order was "fundamentally unfair" because the IJ did not make an express determination that the Stipulation's waiver was voluntary, intelligent, and knowing. Pet. App. 9a-15a. The court noted that petitioner had "*not* claim[ed] that the waiver was actually unknowing and involuntary." *Id.* at 13a. To the contrary, the court explained, petitioner was accorded "ample constitutional protection," including notice of the government's charges and of her right to legal representation, advice from a legal services organization, and an explanation that she could contest the charges in a hearing. *Id.* at 12a; see also *id.* at 10a-12a (citing *United States* v. *Benitez-Villafuerte*, 186 F.3d 651, 656-658 (5th Cir. 1999), cert. denied, 528 U.S. 1097 (2000)). The court also reviewed the evidence underlying the district court's factual finding that the IJ had made an implicit finding that the waiver was knowing and voluntary by accepting the Stipulation. *Id.* at 12a-13a. The court of appeals found no error, because the waiver was "written in plain, non-legalese language," petitioner "spoke Eng-

lish fluently," and she had received an explanation of the rights she was waiving. *Id.* at 13a.

b. The court of appeals also rejected petitioner's new due process claim, raised for the first time on appeal, that the 2005 order was "fundamentally unfair" because the immigration officer who read and explained the Stipulation to petitioner allegedly told her that her state-law felony drug conviction made her ineligible to apply for discretionary relief. Pet. App. 14a. Because petitioner had not raised that claim in the district court, the court of appeals reviewed it only for plain error. *Id.* at 8a-9a, 14a-15a, 18a. The court first observed that the agent's advice was consistent with the Board of Immigration Appeals' (BIA) controlling precedent at the time, *id.* at 15a (citing *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 397 (B.I.A. 2002) (en banc)), even though subsequent decisions by the Seventh Circuit (where petitioner's 2005 removal was processed) and this Court have held that someone with petitioner's conviction is eligible to apply for discretionary relief, *ibid.*

Next, the court of appeals reasoned that, under Fifth Circuit precedent, "relief that is 'available within the broad discretion of the Attorney General is not a right protected by due process'" and thus the government's "failure to explain the eligibility for such relief 'does not rise to the level of fundamental unfairness.'" Pet. App. 16a (quoting *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003)); see also *id.* at 17a n.9. Accordingly, the court concluded, the agent's alleged failure to explain that petitioner might become eligible for discretionary relief could not render the proceedings fundamentally unfair. *Id.* at 16a.

In addition, the court of appeals found that petitioner had failed to establish that the agent's advice "affected her substantial rights," as required under plain-error review, because she failed to show any prejudice. Pet. App. 18a. Specifically, petitioner did not show that the IJ would have given her any different advice or that she would have chosen to remain in detention while pursuing an appeal. *Ibid.*

c. The court of appeals also found that petitioner could not satisfy the remaining prongs of Section 1326(d), exhaustion of administrative remedies and deprivation of judicial review, because her waiver was valid. Pet. App. 19a. The court rejected petitioner's contention that a motion she filed in 2012 to reopen the 2005 proceedings, "years beyond the 90-day deadline," satisfied the exhaustion requirement. *Ibid.*; see *id.* at 23a.

ARGUMENT

Petitioner contends (Pet. 17-26) that the district court should have declared her 2005 removal order "fundamentally unfair" pursuant to 8 U.S.C. 1326(d) because an immigration officer allegedly told her that she was not eligible to apply for discretionary relief. Specifically, she argues (Pet. 10-13) that this Court's review is warranted because the courts of appeals disagree on whether procedural due process applies when a deportable alien seeks purely discretionary relief from removal. The decision below is correct, and does not implicate any circuit conflict, because the officer's alleged advice was accurate under the BIA's precedent at the time. Moreover, the failure to explain an alien's eligibility for purely discretionary relief does not render her removal proceedings fundamentally unfair. In any event, this case is not a

suitable vehicle for resolving any circuit conflict because petitioner forfeited her due process claim in the district court and because she cannot show prejudice. This Court has repeatedly denied review of the question presented, *e.g.*, *Soto-Mateo* v. *United States*, 136 S. Ct. 1236 (2016) (No. 15-7876); *Garrido* v. *United States*, 134 S. Ct. 513 (2013) (No. 13-5415); *Avendano* v. *United States*, 131 S. Ct. 69 (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), as well as of petitioner's prior challenges involving her removal, see *Cordova-Soto* v. *Holder*, 135 S. Ct. 85 (2014) (No. 13-1410); *Cordova-Soto* v. *Holder*, 133 S. Ct. 647 (2012) (No. 12-95), and should do so here as well.

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. 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. 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 8 U.S.C. 1326 to add sub-

section (d),[1] which allows a collateral attack on a removal order in an illegal reentry prosecution under specified circumstances. Under Section 1326(d), an alien charged with illegal reentry may challenge the validity of the earlier removal only if he shows that he "exhausted any administrative remedies that may have been available," that the "deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," and that the "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). "To establish fundamental unfairness, a defendant must show both that his due process rights were violated and that he suffered prejudice from the deportation proceedings." *United States* v. *Arita-Campos*, 607 F.3d 487, 493 (7th Cir. 2010).

2. Petitioner bases her Section 1326(d) collateral challenge on the allegation that an immigration officer violated her due process rights by advising her that she was ineligible to apply for discretionary relief because of her state-law felony conviction for possession of methamphetamine. Pet. 17-19, 21-26.[2] Petitioner's argument lacks merit. That alleged information, which petitioner concedes was confirmed by an independent legal services representative, Pet. App. 85a, accurately reflected the BIA's controlling position at the time. Moreover, as the majority of circuits to address the issue have correctly held, the government's failure to advise an alien in removal

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[1] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441, 110 Stat. 1279.

[2] Petitioner does not seek review of the court of appeals' ruling rejecting her claim that the IJ's failure to hold a hearing or make an express finding with respect to her waiver rendered the 2005 removal order fundamentally unfair. Pet. App. 72a.

proceedings about the possibility of seeking discretionary relief does not implicate due process or render the removal proceedings "fundamentally unfair" under 8 U.S.C. 1326(d)(3).

a. Because "the law in effect at the time of [an alien's] challenged removal is what matters," *United States* v. *Baptist*, 759 F.3d 690, 698 (7th Cir. 2014), an alien cannot claim a due process violation arising from the provision of then-accurate information. *United States* v. *Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015), cert. denied, 136 S. Ct. 1236 (2016). When petitioner's case came before an IJ in Chicago in 2005, five circuits had held that an alien convicted of any state-law drug felony had been convicted of an "felony punishable under the Controlled Substances Act," 18 U.S.C. 924(c)(2), and thus was ineligible to apply for discretionary relief under 8 U.S.C. 1229b(a). Only three circuits disagreed.[3] The Seventh Circuit, the jurisdiction in which petitioner's removal case was processed, had not decided the issue. Throughout petitioner's removal proceedings, the BIA adopted the majority approach in undecided circuits. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 397 (B.I.A. 2002) (en banc); see Gov't C.A. Br. 30-31. Accordingly, the BIA's precedent dictated that petitioner's state felony conviction for possession of methamphetamine disqualified her from discretionary relief. Pet. App. 15a. Only the following year, after petitioner had been removed to Mexico, did the Seventh Circuit and then the Supreme

[3] Compare *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 507-508 (5th Cir.) (majority position) (citing cases), cert. denied, 534 U.S. 935 (2001), with *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004) (minority position).

Court reject the BIA's approach.[4] Because the advice provided by the immigration officer faithfully reflected controlling BIA precedent at the time, petitioner cannot claim a due process violation.

Petitioner has not identified any authority for the proposition that a due process violation occurs if an immigration agent's advice, accurate when given, is later abrogated. To the contrary, courts have held that the relevant law is that in effect at the time of removal.[5] Petitioner nonetheless contends (Pet. 5) that the agent's alleged advice was "obviously incorrect" because the issue of whether all state drug felonies disqualified an alien from discretionary relief was "hotly disputed" among the courts of appeals, the question had been briefed in the Seventh Circuit, and a petition for a writ of certiorari had been filed in the case that ultimately settled the issue.[6] But petitioner correctly conceded in the court of appeals that due

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[4] See *Lopez* v. *Gonzales*, 549 U.S. 47, 50 (2006); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 535-536 (7th Cir. 2006).

[5] See, *e.g.*, *Soto-Mateo*, 799 F.3d at 123 ("Since the law governing the classification of aggravated identity theft was unsettled at the time of the appellant's removal, we cannot fairly conclude that the appellant was misled at all."); *United States* v. *Vidal-Mendoza*, 705 F.3d 1012, 1017 (9th Cir. 2013); *United States* v. *Torres*, 383 F.3d 92, 104 n.14 (3d Cir. 2004) ("[T]he IJ's understanding of the law was not erroneous at the time. We are extremely reticent to treat as fundamentally unfair an administrative official's failure to predict that binding law will change."); cf. *Ovalles* v. *Holder*, 577 F.3d 288, 299 (5th Cir. 2009) ("[A] change in the legal status of an underlying conviction does not create a constitutional right to reopen one's removal proceedings.").

[6] The petition in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006) (No. 05-547), was not docketed until November 1, 2005, the same day on which petitioner signed the Stipulation, Pet. App. 46a.

process does not require immigration officers to become de facto legal advisors and inform the alien of potentially relevant circuit splits, appeals pending before the courts of appeals, or petitions filed in this Court. C.A. Reply Br. 7; see, *e.g.*, *United States* v. *Vidal-Mendoza*, 705 F.3d 1012, 1017 (9th Cir. 2013) ("[A]n IJ need not anticipate[] future change[s] in law when determining an alien's apparent eligibility for relief from removal" because "IJs are not expected to be clairvoyant.") (citation and internal quotation marks omitted); *Vidal-Mendoza*, 705 F.3d at 1018 (petitioner's position "would [also] require the IJ to inform an alien about relief for which the alien is apparently *in* eligible [*sic*] during the hearing"); Pet. App. 30a (same).

b. The court of appeals below, like the majority of circuits to have addressed the issue, has held that because purely discretionary relief is not a right protected by due process, the failure to inform an alien about the possibility of seeking discretionary relief does not render her removal proceedings "fundamentally unfair." Pet. App. 16a-17a; *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003); see *Soto-Mateo*, 799 F.3d at 123 (1st Cir.); *United States* v. *Alegria-Saldana*, 750 F.3d 638, 642 (7th Cir. 2014); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 555 U.S. 997 (2008); *United States* v. *Torres*, 383 F.3d 92, 105-106 (3d Cir. 2004); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1204-1205 (10th Cir. 2004) (en banc). Petitioner points (Pet. 10-13) to the Second and Ninth Circuits' disagreement with those holdings. *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); *United States* v. *Ubaldo-Figueroa*,

364 F.3d 1042, 1049-1050 (9th Cir. 2004). But that conflict is not implicated here because, as noted, petitioner has not identified any misleading advice. See also pp. 16-17, *infra*. In any event, the majority rule is correct, because aliens have no constitutional entitlement to be considered for purely discretionary relief.

Even when an alien has met the statutory eligibility 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). As petitioner recognizes (Pet. 12-13), other circuits have adopted the same rule in rejecting procedural due process challenges to denials of discretionary relief on direct review. See, *e.g.*, *Alhuay* v. *Attorney Gen.*, 661 F.3d 534, 548-549 (11th Cir. 2011); *Ibrahimi* v. *Holder*, 566 F.3d 758, 766 (8th Cir. 2009); *Smith* v. *Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002); *Ashki* v. *INS*, 233 F.3d 913, 920-921 (6th Cir. 2000).[7]

Contrary to petitioner's contention (Pet. 22-23), this rule is consistent with this Court's decisions in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and *INS* v. *St. Cyr*, 533 U.S. 289 (2001). Those cases did not involve due process chal-

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[7] The Second and Ninth Circuits "agree that non-citizens cannot challenge denials of discretionary relief under the due process clause because they do not have a protectable liberty interest in a privilege created by Congress." *Ledezma-Cosino* v. *Lynch*, No. 12-73289, 2016 WL 1161260, at *2 (9th Cir. Mar. 24, 2016); see, *e.g.*, *Yuen Jin* v. *Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008).

lenges. Rather, they permitted habeas corpus challenges to executive non-compliance with statutory or regulatory provisions for determining eligibility for discretionary relief. In *Accardi*, the Court held that an alien could pursue a habeas challenge to the Attorney General's alleged non-compliance with regulations governing adjudication of the alien's application for discretionary relief. 347 U.S. at 265; see *id.* at 268 ("[W]e object to the Board's alleged failure to exercise its own discretion, *contrary to existing valid regulations*" because, "[i]f successful," the alien "will have been afforded that due process *required by the regulations* in such proceedings.") (emphases added). In *St. Cyr*, the Court held that the 1996 amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not strip federal courts of habeas corpus jurisdiction to decide "pure questions of law" bearing on an alien's eligibility for discretionary relief. 533 U.S. at 305-307. Neither *Accardi* nor *St. Cyr* addressed constitutional due process, much less authorized the imposition of extra-statutory procedures governing applications for discretionary relief. To the contrary, as Justice Scalia explained in his dissent for four Justices in *St. Cyr*, the due process arguments were "insubstantial[]" and the majority "d[id] not even bother to mention them." *Id.* at 345; see *Lopez-Ortiz*, 313 F.3d at 231 ("*St. Cyr*'s holding was not grounded in § 212(c) relief having the status of a constitutionally protected interest; rather, it was based on the Court's interpretation of [an immigration statute].").

c. Petitioner errs in asserting (Pet. 14) that the majority rule, articulated in *Lopez-Ortiz* and applied below, dispensed with "due process in * * * the removal proceeding" and "effectively gutted *Mendoza-*

Lopez." Under those decisions, procedural due process remains applicable to all non-discretionary aspects of the removal process, see, *e.g.*, *Lopez-Ortiz*, 313 F.3d at 230 (citing *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 597-598 (1953)), including the critical threshold determination whether the alien is removable. Those cases have merely declined to extend procedural due process to purely discretionary decisions entrusted to the Attorney General's sole discretion. That result does not conflict with *Mendoza-Lopez*, which did not resolve the issue. See 481 U.S. at 839-840 ("assum[ing] that respondents' deportation hearing was fundamentally unfair in considering whether collateral attack on the hearing may be permitted"); *id.* at 834 n.8; *United States* v. *Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006) ("Since *Mendoza-Lopez* was decided, * * * a majority of circuits have rejected the proposition that there is a constitutional right to be informed of eligibility for—or to be considered for—discretionary relief.").[8]

Petitioner also wrongly contends (Pet. 22) that the majority rule leaves applicants for discretionary relief without constitutional protection against, for example, discrimination "based solely on the alien's race or sexual orientation." Even when the government exer-

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[8] Petitioner observes (Pet. 14) that collateral attacks brought under 8 U.S.C. 1326(d) are rarely successful in the Fifth Circuit, but that is unremarkable. Given the ample procedural safeguards and avenues of appellate and judicial review accorded to aliens facing removal, see, *e.g.*, 8 U.S.C. 1229a(c)(6) (administrative reconsideration), 1229a(c)(7) (motions to reopen); 8 C.F.R. 1240.15 (BIA appeal); 8 U.S.C. 1252 (judicial review), defects in removal proceedings are ordinarily corrected as part of the removal process, not on collateral attack ancillary to a criminal prosecution for illegal reentry.

cises discretion that is not otherwise subject to review, invidious government action that is based on, for instance, "race or religion," is subject to review. *Wade* v. *United States*, 504 U.S. 181, 185-186 (1992) (exercise of prosecutorial discretion to seek a reduced sentence for substantial assistance). Petitioner has alleged no such violation in this case.

3. This case would be a poor vehicle to resolve any disagreement among the courts of appeals on the question presented.

a. Petitioner claims (Pet. i, 10-13) that review is warranted to resolve a circuit split on whether an alien has a constitutional due process right to be informed of her eligibility to apply for discretionary relief from removal. This case, however, does not turn on the Second and Ninth Circuits' disagreement with the majority approach because petitioner's claim does not meet the requirement that the advice be inaccurate when given. In the Ninth Circuit, the government's "duty is limited to informing an alien of a reasonable possibility that the alien is eligible for relief *at the time of the hearing*." *Vidal-Mendoza*, 705 F.3d at 1016 (citation omitted); see pp. 10-12 & n.5, *supra*. The Second Circuit has not addressed whether an agent or IJ has an affirmative duty to anticipate future legal developments.[9] Thus, because the immigra-

[9] Without addressing the timing issue, the Second Circuit held in *Copeland* that an IJ's ruling that the 1996 amendments to the INA had retroactively barred the alien from discretionary relief had misled the alien because the Supreme Court subsequently held those amendments prospective only in *St. Cyr* in 2001. *Copeland*, 376 F.3d at 63-65, 71. As the Ninth Circuit has explained, however, the retroactivity of the 1996 amendments "presents the only example of the narrow circumstances" warranting "appli[cation of] subsequent precedent in reviewing a deportation order." *United*

tion officer's advice here was consistent at the time with the precedent of the BIA and most of the courts of appeals to address the issue, petitioner cannot make out a claim of fundamental unfairness even under the minority rule adopted by the Second and Ninth Circuits. See pp. 10-12, *supra*.

b. Assuming she has not waived it, petitioner has forfeited her claim that she was entitled to procedural due process in connection with discretionary relief from removal.[10] At most, then, that claim is subject to plain-error review under Federal Rule of Criminal Procedure 52(b), which she cannot satisfy. See Pet. App. 8a-9a, 14a.

Although petitioner asserts (Pet. 21) that her prejudice argument was "based solely" on the advice she received from the immigration officer, she did not mention the agent's alleged advice anywhere in the argument section of her motion to dismiss, Pet. App. 71a-79a, instead alleging it only in passing as factual background, *id.* at 66a-67a. Indeed, as the district court noted, petitioner never contested that the Stipulation was in fact voluntary, intelligent, and knowing,

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States v. *Gomez*, 757 F.3d 885, 899 n.11 (2014) (citation and internal quotation marks omitted).

[10] As the government explained below, petitioner's conditional plea agreement affirmatively waived this claim, which is therefore unreviewable under any standard. Gov't C.A. Br. 27-28. Petitioner's plea agreement reserved only the right "to appeal all issues relating to the district court's ruling on Defendant's Motion to Dismiss Indictment." C.A. R.E. 307. Issues not raised or passed upon in the district court do not "relat[e] to the district court's ruling on [her] Motion to Dismiss Indictment." *Ibid.* The court of appeals rejected the government's construction of the plea agreement, Pet. App. 15a n.8, but the government can defend the judgment below on that ground.

but rather "simply argu[ed] that the IJ [had] failed to make that determination." *Id.* at 28a. As noted, petitioner's prejudice theory turned instead on her speculation that, "had the IJ conducted a hearing * * *, her removal order would have been stayed for an undetermined length of time," *id.* at 31a; the decisional law would eventually have changed, at which point she would have decided to contest her "aggravated felony" charge and seek discretionary relief; and the IJ would have decided to grant her that relief, *id.* at 31a-32a, 77a-78a; see p. 4, *supra*.

Petitioner cannot establish plain error. "[B]efore an appellate court can correct an error not raised at trial," the alleged error must, among other things, "be plain 'under current law.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 734 (1993)); see also *Henderson* v. *United States*, 133 S. Ct. 1121, 1124 (2013). But just the opposite is true here. Throughout the proceedings below, the "current law" in the Fifth Circuit has been *Lopez-Ortiz*, as petitioner recognizes. See Pet. 11, 20. Because petitioner's sole claim in this Court seeks to abrogate "long held" circuit precedent, Pet. 11, that was binding on the district court, Pet. 20, the district court's alleged error was not "plain" and could not be corrected under Rule 52(b).

c. Petitioner also cannot demonstrate that she suffered actual prejudice from the immigration officer's alleged error. "A showing of prejudice means that there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported." *United States* v. *Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003) (citation and internal quotation marks omitted); see *United States* v. *Espi-*

noza-Farlo, 34 F.3d 469, 471 (7th Cir. 1994); Pet. App. 18a. Petitioner has acknowledged that, before signing the Stipulation, she consulted a legal services organization, which also advised her, again consistent with BIA precedent at the time, that she "did not have any way to fight [her] case." Pet. App. 85a. In addition, petitioner has abandoned any claim that due process required the immigration officers to affirmatively provide information about the legal landscape at the time. C.A. Reply Br. 7. Given these concessions, petitioner cannot show prejudice. She cannot plausibly establish that, had the immigration officer said nothing at all about her eligibility for discretionary relief, she would have chosen to ignore the advice she received from the legal services organization, changed her mind about remaining detained, and instead opted for the "long-shot chance of obtaining discretionary relief from removal after a protracted legal battle." *Soto-Mateo*, 799 F.3d at 123. As in *Soto-Mateo*, petitioner's "unsolicited request to speed up the removal process is some indication that [s]he had no stomach for deportation proceedings (during which [s]he was likely to have been detained)." *Id.* at 123-124; Pet. App. 94a-95a.

d. Finally, petitioner cannot prevail in her collateral attack because she cannot show that she exhausted administrative remedies or was deprived of her ability to seek judicial review, as required by 8 U.S.C. 1326(d)(1) and (2). In the district court, petitioner claimed that she satisfied these requirements because the Stipulation constituted an invalid waiver of her appeal rights. Pet. App. 75a-76a. Because that contention fails, "this argument falls under its own weight." *Id.* at 19a.

Even an IJ's determination—let alone an immigration agent's statement—that an alien is ineligible for discretionary relief does not prevent the alien from seeking judicial review, as many aliens have done. See, *e.g.*, *St. Cyr*, 533 U.S. at 289 (alien sought habeas corpus relief after the BIA determined that he was ineligible for discretionary relief); *Mohammed* v. *Ashcroft*, 261 F.3d 1244, 1246-1247 (11th Cir. 2001) (pro se alien who was told by an IJ that he was ineligible for discretionary relief appealed to the BIA and then sought judicial review of the BIA's adverse ruling). If an immigration official's legal error in finding an alien ineligible for discretionary relief excused the alien from exhausting administrative remedies, 8 U.S.C. 1326(d)(1), and showing a deprivation of judicial review, 8 U.S.C. 1326(d)(2), then those requirements would impose no independent limitations on an alien's ability to contest the prior removal order in an illegal-reentry prosecution. In other contexts, this Court has recognized that a government official's mistaken advice about the law does not excuse failure to challenge that advice on appeal. See *Bousley* v. *United States*, 523 U.S. 614, 621-622 (1998) (holding that a defendant who claimed that the district court had erroneously advised him of the nature of the charge procedurally defaulted by failing to challenge the validity of his guilty plea on direct appeal); cf. *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 358-360 (2006) (holding that state officials' failure to inform a detained alien of his rights to consular notification and communication under Article 36 of the Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292-293, does not excuse the alien's

procedural default if the alien fails to raise an Article 36 claim at trial or on direct appeal).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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