No. _____

IN THE
Supreme Court of the United States

JOSE PANIAGUA-PANIAGUA,
Petitioner

v.

UNITED STATES,
Respondent

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

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QUESTION PRESENTED FOR REVIEW

Whether a court reviewing the fundamental fairness of a prior removal order under 8 U.S.C. § 1326(D) can consider the current understanding of the nature of a prior criminal conviction, or is it instead bound to apply the law as it was incorrectly applied at the time of the removal proceeding?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes & Regulations

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- v –

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Jose Paniagua, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed Petitioner's conviction for illegal entry after deportation in the face of claims that the conviction underlying his deportation was not an aggravated felony, thus invalidating the prior removal.[1] The Ninth Circuit held that Petitioner was correct that his prior Washington state conviction was overbroad, citing a published decision by the same

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[1] *See United States v. Paniagua-Paniagua*, 721 F. App'x 700 (9th Cir. 2018). A copy of the memorandum decision is attached in Appendix A.

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panel,[2] but affirmed his conviction anyway because of the panel's belief that the law at the time of Petitioner's removal would have treated the prior conviction as an aggravated felony.[3]

Petitioner sought rehearing en banc, arguing that the decision conflicted with this Court's precedent and that of sister circuits interpreting it, and Petitioner argued that even the law at the time of his deportation demonstrated his prior conviction wasn't an aggravated felony. On April 6, 2018, the panel denied the petition for rehearing, and the full court declined to hear the matter en banc.[4]

JURISDICTION

On January 29, 2018, the Ninth Circuit affirmed Petitioner's conviction.[5] On April 6, 2018, it denied his petition for rehearing.[6] The Court has jurisdiction under 28 U.S.C. § 1254(1).

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[2] *See id.* at 701 (citing *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017).

[3] *Id.* (citing *United States v. Ibarra-Galindo, 206 F.3d 1337, 1341 (9th Cir. 2000), overruled on other grounds as recognized by United States v. Figueroa-Ocampo, 494 F.3d 1211, 1216 (9th Cir. 2007); United States v. Verduzco-Padilla, 155 Fed. App'x 982 (9th Cir. 2005)* (upub'd mem).

[4] A copy of the order denying rehearing is attached in Appendix B.

[5] *See* Appendix A.

[6] *See* Appendix B.

STATUTORY AND OTHER PROVISIONS

The Fifth Amendment of the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

8 U.S.C. §1326(d) provides, in relevant part: "In a criminal proceeding under [8 U.S.C. §1326], an alien may not challenge the validity of the deportation order . . . unless the alien demonstrates that: (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."

STATEMENT OF THE CASE

Petitioner was removed from the United States in 2008 after sustaining a Washington state conviction for unlawful possession of methamphetamine in violation of RCW 69.50.401 in 2007. Following his sentence in that matter, he was placed in removal proceedings. His notice to appear alleged that Petitioner had entered the United States without inspection in 1995 and had been convicted of RCW 69.50.401 in 2007. It also alleged that Petitioner was removable due to entry without inspection and on the ground that immigration officers had reason to believe he was an alien who was involved in illicit trafficking in a controlled substance.

Petitioner was brought before an immigration judge (IJ) on February 1, 2008. He admitted under questioning that he was not a citizen of the United States, that he had entered without inspection in 1995, and that he had been convicted of possession of methamphetamine with intent to deliver in 2007, thus admitting the factual allegations in the NTA. At no point during the proceedings did the IJ advise Petitioner regarding any forms of relief from removal, including pre-conclusion voluntary departure. Nor did the IJ ever make any sort of inquiry into the nature of Petitioner's prior conviction or conclude that it was an aggravated felony, a determination which would have precluded Petitioner from consideration for discretionary relief such as pre-conclusion voluntary departure. Petitioner was then deported to Mexico.

In this case, Petitioner attempted to return to the United States without permission and was convicted of being a removed alien found in the United States, in violation of 8 U.S.C. § 1326, after the district denied his collateral challenge to the 2008 removal underlying his conviction. The district court premised its ruling solely on the fact that it believed Petitioner's 2007 Washington state conviction under RCW 69.50.401 for possession of methamphetamine with intent to deliver was an aggravated felony. Petitioner appealed.

Petitioner's case was argued and submitted to a Ninth Circuit panel on November 10, 2016, the same day as a companion case, *United States v. Valdivia-Flores*. The appellant in *Valdivia* had first entered the United States without

inspection in 1995, the same year as Petitioner.[7] And in 1997, Valdivia was convicted of violating RCW 69.50.401, the same Washington drug trafficking statute under which Petitioner was convicted. Again, like Petitioner, Valdivia was placed into immigration proceedings in 2009 by virtue of sustaining that same prior Washington state conviction. But unlike Petitioner, who was charged only with being deportable due to entry without inspection and because immigration officers had reason to believe he was an alien involved in illicit trafficking of a controlled substance, immigration authorities decided to charge Valdivia as being removable an aggravated felon by virtue of that RCW 69.50.401 conviction. And he was subsequently deported.

As Petitioner did before both the district and this Court, Valdivia challenged the validity of his prior deportation under 8 U.S.C. §1326(d), arguing that his conviction under RCW 69.50.401 was categorically overbroad to qualify as an aggravated felony, specifically because Washington's drug trafficking statute contains a form of aiding and abetting liability that's substantially broader than generically understood.[8] In a published opinion, the panel agreed with this argument and reversed Valdivia's conviction.[9]

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[7] *See Valdivia-Flores*, 876 F.3d at 1203.

[8] *Compare* Appellant's Opening Brief (AOB) at 16-28 *with Valdivia-Flores*, 876 F.3d at 1207.

[9] *Valdivia*, 876 at 1210.

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Petitioner, however, received no such relief. In an unpublished memorandum, the panel agreed that RCW 69.50.401 was overbroad and indivisible for the same reasons stated in *Valdivia-Flores*.[10] But it affirmed Petitioner's conviction because of the panel's conclusion that "[a]t the time of Appellant's 2008 deportation proceedings, convictions under Wash. Rev. Code §69.50.401 were treated as aggravated felonies," citing a Ninth Circuit decision from 2000 that doesn't address the aiding and abetting overbreadth issue and is nowhere cited or discussed in *Valdivia*, as well as an unpublished disposition from 2005 that also doesn't address this issue.[11] The panel further concludes that "Ninth Circuit law at the time also permitted application of the modified categorical approach for overbroad statutes so that the documents underlying Appellant's Washington drug-trafficking conviction could have been used to confirm that he was convicted as a principal and not as an accomplice," citing the Ninth Circuit's en banc decision in *Navarro-Lopez v. Gonzales*,[12] which was subsequently overruled by *United States v. Aguila-Montes de Oca*,[13] which itself was overruled by this Court in *Descamps v. United States*.[14] Because the panel held that Petitioner's prior conviction was an aggravated felony "at the time" of his deportation, he wasn't eligible for voluntary

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[10] *Paniagua-Paniagua*, 721 F. App'x at 701.

[11] *Id.* (citing *Ibarra-Galindo*, 206 F.3d at 1341 and *Verduzco-Padilla*, 155 Fed. App'x 982).

[12] 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc).

[13] 655 F.3d 915 (9th Cir. 2011) (en banc).

[14] 133 S. Ct. 2276, 2280 (2013) (holding that *Aguila-Montes de Oca* "has no roots in this Court's precedents").

departure, thus suffered no prejudice warranting relief now.

REASON FOR GRANTING THE PETITION

When this case is compared to a companion case argued and submitted on the same day before the same panel, one thing is clear: two individuals with identical prior convictions, charged with the same federal felony offense, nevertheless face completely opposite outcomes. One, Jose Valdivia-Flores, is not subject to felony liability for illegal reentry into the United States because a proper application of the law reveals that his prior conviction doesn't support his prior deportation as an aggravated felon.[15] Yet the other, Mr. Paniagua, the Petitioner here, suffers—and continues to remain liable for—the consequences of what the Ninth Circuit concedes is bad law, simply because under that bad law, Mr. Paniagua would have been ineligible for voluntary departure, a form of discretionary relief.[16] What is not clear is why there is this disparity between nearly identically situated individuals. And neither the Ninth Circuit's memorandum nor the cases it relies upon explain any coherent rational for this disparity.

So, in what appears to be an intra-circuit split, whether a defendant would have been eligible for discretionary versus mandatory relief from removal currently impacts whether or not he would be liable for a violation of 8 U.S.C. §1326. Yet,

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[15] *See Valdivia-Flores*, 876 F.3d 1201.
[16] *See Paniagua*, 721 F. App'x at 701.
--Continued--

there is nothing in the Supreme Court's holding in *United States v. Mendoza-Lopez*, which gave rise to the need for review of prior deportations in the criminal context,[17] or in Congress's enactment of §1326(d), which codified this due process requirement, to indicate that the Ninth Circuit's apparent distinction should play any role in the analysis. Moreover, the panel's approach conflicts with the decisions of at least one other circuit.[18] This Court should grant the petition to resolve this intra and inter-circuit tension, and one that conflicts with Supreme Court's precedent as well.

I. THE COURT SHOULD GRANT CERTIORARI TO OVERRULE THE DIFFICULT-TO-APPLY, BACK-IN-TIME APPROACH OF CASES SUCH AS *VIDAL-MENDOZA* AND INSTEAD APPLY AN ACROSS-THE-BOARD APPROACH TO COLLATERAL REVIEW CONSISTENT WITH THE LAW AS CURRENTLY AND CORRECTLY UNDERSTOOD.

In *United States v. Mendoza-Lopez*, the Court held that if 8 U.S.C. §1326 permits a court to impose a criminal penalty for reentry after, "*any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process."[19] Consequently, "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative

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[17] 481 U.S. 828 (1987).
[18] *See United States v. Rivera-Nevarez*, 418 F.3d 1104 (10th Cir. 2005).
[19] 481 U.S. 828, 837 (1987).
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proceeding."[20] However, this Court maintained that, "[e]ven with this safeguard, the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling," and, "the propriety of using an administrative ruling in such a way remains open to question." *Id.* at n. 15.

In response to *Mendoza-Lopez*, Congress amended 8 U.S.C. §1326 to permit district courts to dismiss an indictment for unlawful entry into the United States after removal if they find that the defendant's removal was fundamentally unfair, provided he can show that he exhausted his administrative remedies and was deprived of the right to judicial review.[21] Subsequent cases established that a fundamentally unfair proceeding is one in which the non-citizen was deprived of his right to due process of law and suffered prejudice as a result.[22]

And after *Mendoza-Lopez*, appellate courts around the country developed conflicting approaches to reviewing motions to dismiss an indictment pursuant to §1326(d) when those motions rely on evolving understandings of the nature of a defendant's prior convictions. The Ninth Circuit for its part has distinguished different approaches: Some Ninth Circuit panels apply the classification of the defendant's prior conviction as it was incorrectly understood at the time of the removal proceeding, such as in *United States v. Vidal-Mendoza* where the

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[20] *Id.*at 837-38.
[21] *See* 8 U.S.C. §1326(d).
[22] *See, e.g., United States v. Gomez*, 757 F. 3d 885, 892 (9th Cir. 2014).
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underlying failure concerned discretionary relief,[23] while other panels apply the correct and contemporary understanding of the law as was the case in *United States v. Aguilera-Rios* where the IJ's error constituted the entire basis for removal.[24]

The same panel's disparate treatment of Mr. Paniagua and Valdivia's cases here —despite involving the same underlying prior conviction—demonstrates this divergence. And it is a divergence with an ironic result beyond the simple fact that only one of them gets relief from felony criminal conviction and punishment under §1326. Mr. Validivia was charged and deported as an aggravated felon, a removal decision that precluded any possible relief. Yet when the correct and contemporary understanding of his underlying conviction is discerned, his deportation is a nullity, and he may be able to avail himself of relief or adjustment of status in some form. Mr. Paniagua, on the other hand, was charged as being deportable under lesser allegations that should have afforded him consideration for relief from deportation (such as pre-conclusion voluntary return) as well as future felony liability for illegal reentry. But the IJ's mistaken understanding of the law precludes the possibility of such relief under the reasoning of cases such as *Vidal-Mendoza*. His deportation remains valid, and the IJ's failure to consider, much less advise Petitioner of potential relief remains permanent.

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[23] 705 F.3d at 1016-19.
[24] 769 F.3d 626, 631-33 (9th Cir. 2014).

The various ways the Ninth Circuit and sister circuits have attempted to address this issue demonstrate the need for this Court's clarification. In *United States v. Rivera-Nevarez*, the Tenth Circuit held that the Supreme Court's 2004 decision in *Leocal v. Ashcroft* applied to the 1999 removal hearing under consideration in Rivera-Nevarez's §1326(d) motion.[25] Rivera was ordered removed in 1999 because a prior conviction for DUI was, at that time, classified by the Bureau of Immigration Appeals (BIA) as an aggravated felony.[26] Subsequent interpretations of the law by both the BIA and the Tenth Circuit established that DUI was not an aggravated felony.[27] However, the district court denied Rivera's motion to dismiss his §1326 indictment, holding that his "deportation was valid under then-existing law as interpreted by the Board of Immigration Appeals and...the Tenth Circuit."[28] While Rivera's appeal was pending, the Supreme Court decided *Leocal*, "conclusively" establishing that DUI is not an aggravated felony.[29]

Explaining that decisions of statutory interpretation are fully retroactive because "they do not change the law, but rather explain what the law has always meant," the Tenth Circuit held that *Leocal*, "provides the correct interpretation of

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[25] 418 F. 3d 1104, 1107 (10th Cir. 2005), citing *Leocal*, 543 U.S. 1 (2004).

[26] *Rivera-Nevarez*, 418 F.3d at 1105-06.

[27] *See United States v. Lucio-Lucio,* 347 F. 3d 1202, 1204-06 (10th Cir. 2003); *In Re Ramos*, 23 I. & N. Dec. 336, 347 2002 WL 1001049 (BIA 2002).

[28] *Id.* at 1006.

[29] *Id.* at 1007.

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the law as it stood in 1999 when Rivera-Nevarez was deported."[30] As a result, the Tenth Circuit held that the "district court's conclusion that Rivera-Nevarez's removal was valid at the time it occurred was therefore in error."[31]

The court then assumed, without deciding, that Rivera-Nevarez's removal proceeding was fundamentally unfair.[32] The court did not make an ultimate finding on this issue however, because it went on to hold that Rivera-Nevarez could not show that he was deprived of the opportunity for judicial review of his removal order.[33] The court relied on the fact that the Fifth Circuit, where Rivera-Nevarez was located at the time of his removal hearing, had not conclusively held that a DUI was an aggravated felony prior to his removal.[34] Therefore, the court held, Rivera-Nevarez could have argued in a direct appeal to the Fifth Circuit that it was not. *Id.* Implicit in this holding is that, had Rivera-Neverez been located in the Tenth Circuit at the time of his removal proceeding, he would have satisfied the deprivation of judicial review prong of the 1326(d) analysis because, in the Tenth Circuit, judicial review would not have remedied the error in his removal proceeding given the incorrect classification of DUIs in that circuit at the time.

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[30] *Id.* at 1107, citing, *Rivers v. Roadway Express Inc.,* 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.").

[31] *Id.*

[32] *Id.* at 1108.

[33] *Id.* at 1111.

[34] *Id.*

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In sharp contrast, the Fifth Circuit held in *United States v. Villanueva-Diaz*[35] that a 2001 court of appeals case holding that a Texas DWI is not an aggravated felony could not be used to analyze the prejudice prong of the §1326(d) analysis challenging a removal proceeding that took place only one year earlier, in 2000. The Fifth Circuit held that "what would have happened" if Villaneuva-Diaz had sought review of his removal order was "an exceedingly speculative inquiry" because, at the time, its jurisprudence "was clear," that his DWI conviction *was* an aggravated felony.[36] While the Fifth Circuit revisited that jurisprudence less than a year later in *United States v. Chapa-Garza*,[37] it held that it was "sheer speculation" to say that Mr. Villaneuva-Diaz "would have been Chapa-Garza" had he sought judicial review at the time of his removal proceeding.[38]

Similarly, the Seventh Circuit has held in two published opinions that precedent clarifying the nature of a prior conviction issued after a removal

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[35] 634 F. 3d 844, 852 (5th Cir. 2011).

[36] *Id.*

[37] , 243 F.3d 921, 927 (5th Cir. 2001).

[38] *Villanueva-Diaz*, 634 F. 3d at 852. The Fifth Circuit's decision in *Villanueva-Diaz* is perplexing given that the Tenth Circuit's view, as expressed in *Rivera-Nevarez*, is that the law was not clear regarding the classification of a DUI in 1999. *See Rivera-Nevarez*, 418 F.3d at 1111. And, a careful review of the jurisprudence as set out in *Villanueva-Diaz* itself reveals that the circuit actually went back and forth regarding how to classify a DWI conviction in 2000, the year of Mr. Villanueva-Diaz's removal. *See Villanueva-Diaz*, 634 F. 3d at 847. Thus, it does not appear that Mr. Villanueva was merely speculating in arguing that he could have been the defendant in the case in which the circuit court decided that a DWI was not an aggravated felony.

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proceeding cannot be relied on to analyze either the due process or the prejudice prongs of the fundamental fairness analysis under §1326(d).[39] And, in *United States v. Soto-Mateo*, the First Circuit held that the defendant's failure to exhaust his administrative remedies was not excused by the fact that his removal papers led him to believe that he was an aggravated felon when, based on subsequent circuit case law, he was not.[40] The court explained further that the law governing the classification of his offense was unsettled at the time of the defendant's removal.[41] Thus, the court held, even if the defendant had met the exhaustion prong of the 1326(d) analysis, he could not demonstrate prejudice resulting from any due process violation because there was not a reasonable likelihood that the result would have been different given the state of the law at the time.[42]

Finally, as discussed above, the Ninth Circuit has taken multiple and somewhat confusing positions as to whether a court reviewing a §1326(d) motion is bound by the classification of the defendant's prior conviction that immigration

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[39] *See United States v. Baptist*, 759 F. 3d, 690, 698 (7th Cir. 2014) (the law in effect at the time of Baptist's challenged removal is what matters to our analysis); *United States v. Alegria-Saldana*, 750 F. 3d 638, 642 (2014) (courts should apply the governing case law at the time of removal in assessing whether the immigration judge erred in failing to consider discretionary relief for the defendant and in assessing whether there was a reasonable probability that the defendant would have received such relief).

[40] 799 F.3 117, 123 (1st Cir. 2015) (citing *United States v. Ozuna-Cabrera*, 663 F.3d 496, 500-01 (1st Cir. 2011)).

[41] *Id.*

[42] *Id.* at 124.

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officials or the BIA erroneously applied at the time of the defendant's removal. Two Ninth Circuit cases – one from 2004 and one from 2014 – applied the correct and contemporary understanding of the nature of the defendants' prior convictions where there was no circuit court precedent on point at the time of the removal proceeding, but immigration judges and the BIA were interpreting the statutes in a way that, in hindsight, was incorrect.[43]

Numerous other panels of the Ninth Circuit have addressed how a court should proceed with a 1326(d) challenge when a subsequent clarification changes the way the Circuit itself applied *Taylor* to a given state statute. In 2006, a panel of the Ninth Circuit in *United States v. Camacho-Lopez* recognized that vehicular manslaughter was no longer an aggravated felony in light of *Leocal*.[44] As a result, the panel in *Camacho-Lopez* granted a motion to dismiss a §1326 indictment, holding that the removal proceeding was fundamentally unfair because the defendant's Notice to Appear, "charged him as removable only for having committed

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[43] *See Pallares-Galan*, 359 F.3d at 1093 (the Immigration Judge believed the defendant's conviction was an aggravated felony because the BIA had expressly held that a conviction for the same offense in another state was an aggravated felony, but under a proper *Taylor* analysis, it was not); *United States v. Garcia-Santana*, 774 F. 3d 528, 533 (9th Cir. 2014) (applying the *Taylor* analysis post-*Descamps* to invalidate a 2002 finding that the defendant's conspiracy conviction was an aggravated felony).

[44] *Camacho-Lopez*, 450 F. 3d at 929-30.

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an aggravated felony" and, based on the clarification provided by *Leocal*, he was not actually removable as charged.[45]

After *Camacho-Lopez*, however, a different panel of the Ninth Circuit held that when reviewing removal proceedings in which the prejudice alleged was an inability to obtain only discretionary relief from removal, "we look to the law at the time of the deportation hearing to determine whether an alien was eligible for relief from deportation."[46] The *Gomez* panel relied on two earlier Ninth Circuit cases also holding that a subsequent "change in the law" cannot be relied on in determining whether a §1326 defendant would have been eligible for discretionary relief at the time of his deportation hearing.[47] *Gomez*, and the cases it relied on, based their refusal to apply the law as requested by the §1326 defendant on the assertion that "the post-removal precedent ... created a new, previously unavailable, possibility of relief by making a 'deviation' from 'longstanding Ninth Circuit and BIA precedent.'"[48]

These cases distinguished the "deviations" at issue in their fact patterns from the "narrow circumstance" addressed in yet another Ninth Circuit case, *United*

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[45] *Id.*

[46] *Gomez*, 757 F. 3d at 899.

[47] *Id.* (citing, *Vidal-Mendoza*, 705 F.3d 1012 and *United States v. Lopez-Velasquez*, 629 F. 3d 894 (9th Cir. 2010)).

[48] *Gomez*, 757 F. 3d at n. 11 (citing *Vidal-Mendoza*, 705 F.3d at 1018 (quoting, *Lopez-Velasquez*, 629 F. 3d at 898)).

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States v. Leon-Paz.[49] In *Leon-Paz*, the Ninth Circuit held that this Court's decision in *I.N.S. v. St. Cyr* merely clarified whether a change in the law regarding discretionary relief under 8 U.S.C. §212(c) was retroactive.[50] The panel in *Leon-Paz* therefore applied the clarification to dismiss a §1326 indictment, finding that the defendant should have been eligible for discretionary relief from removal, even though the removal order was issued prior to this Court's decision in *St. Cyr.*[51]

In distinguishing its case from *Leon-Paz*, the *Gomez* court ignored the fact that *Leon-Paz* involved discretionary relief, holding that *St. Cyr* merely clarified the law, while the post-removal precedent in its own case created a "deviation" from longstanding precedent.[52] However, in distinguishing its case from *Camacho-Lopez,* the *Gomez* court did exactly the opposite, ignoring the fact that *Leocal* simply clarified existing law, and focusing instead on the fact that it believed (wrongly) that discretionary relief was not at issue in *Camacho-Lopez.*[53]

The confusion in the Ninth Circuit culminates (at least at this point) with *United States v. Aguilera-Rios.*[54] Decided after *Gomez*, this panel applied the

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[49] *See Gomez*, 757 F.3d at n. 11, citing *Leon-Paz*, 340 F.3d. 1003 (9th Cir. 2003); *Vidal-Mendoza*, 705 F.3d at 1017-18; *Lopez-Velasquez*, 629 F. 3d at 898.

[50] *Leon-Paz*, 340 F.3d at 1005, citing, *I.N.S. v. St. Cyr,* 533 U.S. 289 (2001).

[51] *Id.*

[52] *Gomez*, 757 F.3d at n. 11.

[53] *Gomez*, 757 F.3d at n.12. (*Camacho-Lopez* "is inapposite" because it concerned whether the defendant was removable as charged – not whether, although removable, he was entitled to discretionary relief).

[54] 769 F.3d 626, 635-36 (9th Cir. 2014).

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Taylor analysis, as clarified by the Supreme Court in *Moncrieffe v. Holder*, to a removal proceeding that took place prior to *Moncrieffe*.[55] To reconcile this seemingly retroactive application of the law with the holding in *Gomez*, the *Aguillera-Rios* court repeated the distinction that *Gomez* made between cases involving a grant of discretionary relief from removal and those involving whether the defendant was "removable as charged."[56] The *Aguillera-Rios* court concluded that its case was not like *Gomez*, which involved the failure to grant discretionary relief, but instead like *Camacho-Lopez*, which (it claims) did not.[57]

Gomez and *Aguillera-Rios*, however, mischaracterize *Camacho-Lopez*. While that case was about the fundamental unfairness that arises when the specific basis for removability alleged in a non-citizen's notice to appear ends up not being a valid basis for removal, it also involved eligibility for discretionary relief.[58] Moreover, the panel in *Camacho-Lopez* never engaged in a discussion of whether the defendant would have received the discretionary relief that he was eligible for given that he did not have an aggravated felony conviction. In discussing the prejudice prong of 1326(d), it simply held that because Camacho-Lopez was removed when he should not have been, he "clearly suffered prejudice."[59]

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[55] *See Aguilera-Rios*, 769 F.3d at 635-36, citing, *Moncrieffe*, 133 S. Ct. 1678.

[56] *See id.* at 635-36.

[57] *Id.*

[58] *See Camacho-Lopez*, 450 F. 3d at 929 ("the IJ erroneously advised Camacho that he was ineligible for discretionary relief when the IJ implicitly characterized Camacho's conviction as an aggravated felony.").

[59] *See id.*

Considering the above array of circuit court decisions, whether one can be forced to stand trial for the felony offense of unlawful reentry after removal depends on which circuit the person happens to be found in after re-entry and which circuit he happens to have been in at the time of his removal. This Court should grant certiorari to resolve this unjust conflict.

II. This Court should grant certiorari because the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

In *Mendoza-Lopez*, this Court noted that, even with the safeguard of a collateral attack for those cases in which a removal proceeding was not previously subjected to judicial review, "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling."[60] The Court went on to hold that, "the propriety of using an administrative ruling in such a way remains open to question."[61] Mr. Paniagua's petition asks this Court to revisit this question for that narrow set of cases in which we know that the administrative ruling was based on an incorrect understanding of the law. This is an important question of due process of law under the Fifth Amendment to the United States Constitution that the Court should address.

This question is particularly important at this juncture in our federal jurisprudence because the nature of prior criminal convictions —the legal question

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[60] 481 U.S. at n. 15.
[61] *Id.*

underlying the administrative errors here — is a critical issue that this Court has repeatedly addressed in recent years. Following suit, courts around the country are clarifying the nature of the prior convictions that have led so many non-citizens to be removed from this country in years past. Today, those same non-citizens would either be permitted to voluntarily depart (and avoid liability under §1326 upon their return) or would be permitted to remain here lawfully.

Moreover, this Court and lower courts have been applying decisions regarding the nature of prior convictions retroactively to provide relief to many criminal defendants in the past few years. This retroactive application is consistent with the rule of law established by this Court, and relied on by the Tenth Circuit in *Rivera-Nevarez.*[62] There is no reason why this clearly established rule of law should not also apply in the context of a motion to dismiss an indictment pursuant to 8 U.S.C. §1326(d).

In addition, in at least one federal circuit, whether a defendant would have been eligible for discretionary versus mandatory relief from removal currently impacts whether or not he would be liable for a violation of §1326. There is nothing in this Court's holding in *Mendoza-Lopez*, or in Congress's enactment of §1326(d), to indicate that this consideration should play any role in the analysis. This Court should grant the petition to address this aspect of the lower court decisions as well.

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[62] 418 F.3d at 1107.

Lastly, the First, Fourth, Fifth, and Seventh Circuits, and parts of the Ninth Circuit, now permit a removal order issued because of an incorrect understanding of the law to perpetually give rise to felony criminal liability; even where ICE itself has set that removal order aside.[63] In situations in which a non-citizen would actually be entitled to relief from removal today, it is difficult to see how prosecuting that person for felony unlawful reentry serves any purpose in terms of securing our nations' borders or furthering immigration policy goals. For all of these reasons, this Court should consider this important question of federal law.

III. This Court should grant certiorari because this case is an excellent vehicle to resolve the circuit split and address this important federal question.

While the circuit split highlights the myriad of somewhat confusing approaches courts have taken when addressing this issue, the opinion below is an excellent vehicle to resolve the circuit split and address this important federal question because of the highly simplistic approach it chose to take. The opinion

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[63]On the other hand, dismissing an illegal reentry indictment does nothing at all to the removal order upon which an indictment is based. If Mr. Paniagua wanted to challenge the removal order itself and assert his right to qualify for voluntary departure, or some other relief, he would have had to do that in immigration court. The only effect a 1326(d) dismissal has is on the government's ability to criminally prosecute a non-citizen for the felony offense of unlawfully re-entering the country; prosecution is still available for entering unlawfully pursuant to 8 U.S.C. §1325. And, if there is a presently valid basis to remove the non-citizen, ICE is free to initiate a new removal proceeding on that basis and, in the future, that new removal order can be relied on in a 1326 prosecution.

below did not address the different approaches taken by other circuits and it did not address the type of relief Petitioner could have sought had ICE not classified his prior conviction as an aggravated felony. Instead, the court issued a straight-forward legal ruling that this Court can address, regardless of the various nuances and distinctions raised by other lower court opinions.

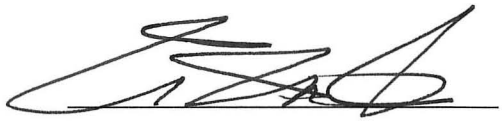
Additionally, these are issues that Petitioner clearly preserved below, and this case presents an ideal vehicle for this Court to resolve the circuit split and address the important question presented.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Date: July 5, 2018

Respectfully submitted,



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