No. __-_____

IN THE

Supreme Court of the United States

ISIDORO GONZALEZ-FERRETIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Mendoza-Lopez*, 481 U.S. 828, 840 (1987), this Court held that the Fifth Amendment prevents the government from using a deportation order to satisfy an element of a crime if the alien defendant's right to judicial review had been "effectively eliminated" by defects in the proceeding. It held that any waiver of appeal of the deportation order must be "considered and intelligent." Over the intervening thirty three years, the lower courts have reached an impass regarding what advice is required to make a *pro se* alien's waiver of appeal "considered and intelligent." The Second and Ninth Circuits (together accounting for about a quarter of all illegal reentry prosecutions) require that the alien be made aware of the right to dispute any dispositive issue. The First, Fourth, Fifth, Seventh, and Tenth Circuits do not require that any advice be provided.

This case asks whether a *pro se* alien's waiver of the right to appeal is "considered and intelligent" under *Mendoza-Lopez* in the absence of an opportunity to dispute whether his prior conviction is an aggravated felony.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Gonzalez-Ferretiz*, No. 19-4409, United States Court of Appeals for the Fourth Circuit. Judgment entered May 13, 2020.

(2) *United States v. Gonzalez-Ferretiz*, No. 3:18-CR-117, United States District Court for the Eastern District of Virginia. Judgment entered May 28, 2019.

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PETITION FOR WRIT OF CERTIORARI

Isidoro Gonzalez-Ferretiz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 8a of the appendix to the petition and is available at 813 F. App'x 837 (4th Cir. 2020). The district court's memorandum opinion appears at pages 9a to 17a of the appendix, and is available at 2019 WL 943388 (E.D. Va. 2019).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on May 13, 2020. This Court's order of March 19, 2020, extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

Title 8, U.S. Code § 1326(d) provides:

> **(d) Limitation on collateral attack on underlying deportation order** In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) 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

Introduction

Isidoro Gonzalez-Ferretiz is a Mexican citizen, and he speaks English proficiently. App. 9a, 10a. In 2014, he was convicted of "Theft from a Motor Vehicle" in Pennsylvania, given an indeterminate sentence of "time served 4/24/14-6/2/14" to 23 months, and immediately paroled at the sentencing hearing. App. 2a. He was taken into ICE custody and served a Form I-851, Notice of Intent to Issue a Final Administrative Removal Order ("NOI"), which he acknowledged receiving. App. 9a. This form is used in administrative removal proceedings under 8 U.S.C. § 1228(b). *See* 8 C.F.R. § 1238.1(b)(1). The NOI alleged that Mr. Gonzalez was deportable on the ground that his Pennsylvania conviction was an aggravated felony. App. 2a.

The NOI provides the alien with a checkbox to apply for Withholding of Removal, and four checkboxes for contesting deportability:

☐ I Wish to Contest and/or to Request Withholding of Removal

☐ I contest my deportability because: *(Attach any supporting documentation)*

- ☐ I am a citizen or national of the United States.
- ☐ I am a lawful permanent resident of the United States.
- ☐ I was not convicted of the criminal offense described in allegation number 6 above.
- ☐ I am attaching documents in support of my rebuttal and request for further review.

☐ I request withholding or deferral of removal to _____ [Name of Country or Countries]:

- ☐ Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
- ☐ Under the Convention Against Torture, because I fear torture in that country or those countries.

(Signature of Respondent) (Printed Name of Respondent) (Date and Time)

App. 19a. There is no checkbox available to admit the *fact* of conviction, but also contest the *legal* conclusion that it constitutes an aggravated felony.

Instead, Mr. Gonzalez had checked and signed the portion of the form below this, stating that he did not contest deportability and waived the right to remain in the United States for 14 days to file a petition for review in the Circuit Court of Appeals. App. 3a. An immigration officer signed the removal order based on this concession and Mr. Gonzalez was removed 16 days later. App. 3a. Mr. Gonzalez was subsequently found in the Eastern District of Virginia and charged under 8 U.S.C. § 1326 with being a deported alien found in the United States. App. 3a.

Proceedings in the District Court

Mr. Mr. Gonzalez filed a motion to dismiss the indictment, attacking his prior removal order. App. 3a. He argued that his Pennsylvania conviction was not an aggravated felony, and therefore the entry of the removal order was an *ultra vires* action and invalid. App. 12a. The district court rejected that argument, holding that 8 U.S.C. § 1326(d) was the sole method of attacking a prior removal order in a § 1326 prosecution. App. 12a-13a.

Mr. Gonzalez also argued for dismissal under §1326(d). App. 13a. He argued his prior conviction was not an aggravated felony; but Form I-851, the NOI, does not provide an option to contest the classification of his conviction. App. 13a. Therefore, he reasoned, he was excused from exhausting any administrative remedies and deprived of the opportunity for judicial review under (d)(1) and (d)(2). He pointed out that the Fourth Circuit had held in *Etienne v. Lynch*, 813 F.3d 135 (4th Cir. 2015), that exhaustion was satisfied because Form I-851provided no opportunity to challenge the classification of the conviction. App. 4a. Last, he argued that removal of an alien who is not deportable as charged violates due process and is prejudicial, making the entry of the order fundamentally unfair. App. 15a. The district court did not reach the issue of fundamental unfairness. Instead it held that Mr. Gonzalez's waiver of appeal was valid, despite the lack of opportunity on the forms to challenge whether his conviction was an aggravated felony. App. 13a-15a.

Mr. Gonzalez pled guilty with a conditional plea agreement, preserving his right to appeal the denial of the motion, and received a sentence of 21 months. App. 3a.

Proceedings in the Court of Appeals

On appeal before the Fourth Circuit, Mr. Gonzalez advanced the same arguments. App. 3a. The Fourth Circuit resolved the challenge under § 1326(d) by focusing only on whether Mr. Gonzalez had been deprived of the opportunity for judicial review under § 1326(d)(2). App. 4a.

The Fourth Circuit acknowledged the argument that Mr. Gonzalez was deprived of judicial review because "he was unaware of his right to contest whether his

underlying conviction qualified as an aggravated felony[.]" App. 4a. It first distinguished *Etienne v. Lynch* by noting that Mr. Etienne had checked the box indicating he wished to contest his removal. App. 4a-5a. It held that, despite the lack of an option to contest the legal conclusion of deportability, his waiver was valid. According to the court, the inability to dispute the legal question did not affect his awareness of or ability to seek judicial review generally. App. 5a.

REASONS FOR GRANTING THE PETITION

The decision below rested on the conclusion that Mr. Gonzalez, as a pro se respondent in a removal proceeding, had validly waived his right to appeal his order of removal, even though he was not provided an opportunity to dispute whether his conviction was an aggravated felony. Therefore, the Fourth Circuit held, he could not satisfy the requirement of 8 U.S.C. § 1326(d)(2) that "the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review[.]"

There are sharp disagreements both between and within the Circuit Courts of Appeals on what is required to show that an alien has made a considered and intelligent waiver of the right to appeal. The Second and Ninth Circuits, joined by dissenting judges in the Eighth and Tenth Circuits, hold that an alien must be informed of, and provided an opportunity to challenge, any dispositive issue in order for an appellate waiver to be considered and intelligent. But the First, Seventh, Eighth, and Tenth Circuits, and now the Fourth, have held that an appellate waiver

is still considered and intelligent even without such advice or such an opportunity to challenge a dispositive issue.

This Court's intervention is needed to resolve the split and establish a uniform rule on this important issue. The illegal reentry statute is the most frequently charged federal felony, and a collateral attack on the prior removal order is the most frequently asserted defense. This Court has not revisited this area of law since establishing the Fifth Amendment right to challenge the use of the removal order in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), 33 years ago. The split in authority that has developed in the meantime is well-developed, longstanding, and intractable.

I. The Circuit Courts of Appeals Disagree About Whether a Pro Se Alien Must be Provided a Meaningful Opportunity to Contest the Charges or Apply for Relief in Order to Make a Considered and Intelligent Decision on Whether to Appeal

In *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987), this Court held that an alien defendant is deprived of the opportunity for judicial review where the waiver of the right to appeal is "not considered or intelligent[.]" The petitioners in *Mendoza-Lopez* purported to waive their rights to appeal on the record, but this Court still held they were "deprived of their rights to appeal" because "the only relief for which they would have been eligible was not adequately explained to them[.]" *Id*. at 842.

The court below, however, asserted that the waiver of appeal in *Mendoza-Lopez* was invalid because of a "language barrier." App. 4a. It held that Mr. Gonzalez was not deprived of the opportunity for judicial review because he was advised of the right to appeal generally. App. 4a-5a. This holding is the subject of

an entrenched split in the federal courts of appeals.

Several other Circuits, like the Fourth, hold that explanations of the right to contest legal issues such as the classification of a prior conviction as an aggravated felony are actually not required for a considered and intelligent waiver. The departure is clear and sufficiently widespread that this Court must intervene in order to return the circuits to the rule set out in *Mendoza-Lopez*.

A. Circuits Holding That Incorrect or Incomplete Advisals Do Not Render a Waiver Invalid

Despite this Court's holding in *Mendoza-Lopez*, many courts have held that lacking or erroneous advice by an immigration judge or official does not prevent the government from using the removal order against the defendant, often over vigorous dissent. *United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015); *United States v. Cordova-Soto*, 804 F.3d 714, 722-24 (5th Cir. 2015); *United States v. Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003); *United States v. Rodriguez*, 420 F.3d 831, 834 (8th Cir. 2005); *id.* at 836 (Heaney, J. dissenting); *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004) (en banc); *id.* at 1210 (Holloway and Seymour, J.J., dissenting); *United States v. Rivera-Nevarez*, 418 F.3d 1104 (10th Cir. 2005); *id.* at 1115-16 n.4 (Lucero, J. dissenting).

Most of these courts collapse the due process and deprivation-of-judicial review requirements. They reason that an alien does not have a vested liberty interest in relief from removal that is discretionary; and therefore the failure to advise a person about the availability of relief is not a due process violation which could have deprived them of the opportunity for administrative or judicial review.

See, e.g., *United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015); *United States v. Cordova-Soto*, 804 F.3d 714, 724 (5th Cir. 2015) (holding stipulation waiving right to contest removal hearing valid despite any misadvice about aggravated felony status by immigration officer).

The saga of Mr. Aguirre-Tello in the Tenth Circuit illustrates the deep divisions throughout the lower courts. In that case, the district court, relying on *Mendoza-Lopez*, granted Mr. Aguirre-Tello's motion to dismiss the indictment, holding that the immigration judge's failure to properly explain discretionary INA § 212(c) relief prevented him from making a considered and intelligent waiver of his right to appeal. *United States v. Aguirre-Tello*, 181 F. Supp. 2d 1298,1306-07 (D. N.M. 2002). On appeal, panel affirmed the dismissal over a dissent, agreeing with the district court that the immigration judge's "failure to inform [the defendant] of the relief available to him and of the legal assistance available to him to pursue that relief . . . deprived him of the judicial review." *United States v. Aguirre-Tello*, 324 F.3d 1181, 1198 (10th Cir. 2003). The dissenting judge would have held, in part, that *no* advice on relief was required, and that it was sufficient that the defendant had been told he was eligible for "some kind of relief[.]" *Id*. at 1197 (Anderson, J., dissenting). The Tenth Circuit, sitting *en banc*, reversed the panel, holding that due process does not require any advice on eligibility for discretionary relief; and that therefore, the defendant's appellate waiver was valid despite any deficiencies in the advice he received. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *id*. at 1210 n.9 ("The record shows that Aguirre-

Tello was informed of his right to appeal, and he knowingly and voluntarily waived that right."). Again, there was a dissent, arguing that *pro se* alien respondents are entitled by due process to be informed of the nature of discretionary relief. *Id*. at 1210 (Holloway and Seymour, J.J., dissenting). This single case produced five competing opinions at three stages of judicial review. So even within individual Circuits, there is significant divergence of opinion.

B. Circuits Holding That Incorrect or Incomplete Advisals Render a Waiver Invalid

In the opposite camp are the Second and Ninth Circuits, along with dissenting judges in the Eighth and Tenth Circuits, who hold that incorrect or incomplete advisals by immigration officers can prevent an appellate waiver from being considered and intelligent. *See United States v. Lopez*, 445 F.3d 90, 100 (2d Cir. 2006); *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001) (waiver of appeal not considered and intelligent where immigration judge failed to advise of eligibility for INA § 212(h) relief); *United States v. Valdivia-Flores*, 876 F.3d 1201, 1205-06 (9th Cir. 2017); *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1115-16 n.4 (10th Cir. 2005) (Lucero, J. dissenting); *United States v. Rodriguez*, 420 F.3d 831, 836 (8th Cir. 2005) (Heaney, J. dissenting).

A thorough exploration of the deprivation-of-judicial-review requirement was made by then-Judge Sotomayor in *Lopez*. In that case, the Second Circuit addressed two arguments. The alien defendant first argued that the failure of the immigration judge to inform him that he had a right to habeas review. 445 F.3d at 95. The court rejected that argument, holding that aliens have constructive notice

of the availability of habeas review. *Id*. at 95-96. However, the court held, the proper inquiry for § 1326(d)(2) is whether the alien had a "realistic opportunity" to avail himself of judicial review. *Id*. at 96. After surveying and analyzing circuit precedent, the court held that "the IJ and BIA's affirmative misstatements to Lopez that he was not eligible for any relief from deportation functioned as a deterrent to seeking relief" and deprived him of the opportunity for judicial review. *Id*. at 100.

The Ninth Circuit's recent decision in *Valdivia-Flores* is a direct parallel to this case, and reaches the opposite result. Both Mr. Valdivia-Flores and Mr. Gonzalez were placed in administrative removal proceedings under 8 U.S.C. § 1228(b); both were provided the same form I-851, which alleged removability based on a purported aggravated felony conviction. Neither was represented by counsel, and neither received any advice beyond what appeared on the form. Neither petitioned for review of the order at the time it was entered. Both argued in a later illegal reentry prosecution that their prior convictions were not aggravated felonies, rendering the removal order invalid and unavailable for an illegal reentry prosecution.

The Ninth Circuit noted that the form "did not explicitly inform [Mr. Valdivia-Flores] that he could refute, through either an administrative or judicial procedure, the legal conclusion underlying his removability." *Id*. at 1205-06. The seemingly exlusive list of checkboxes providing other avenues to challenge the removal "suggested just the opposite." meant his waiver of his right to seek judicial review was "not considered and intelligent." *Id*. at 1206.

The Fourth Circuit's opinion in this case directly contradicts the Ninth Circuit's holding in *Valdivia-Flores*. Despite receiving identical advice, on the same forms, the Fourth Circuit held that Mr. Gonzalez's waiver of his right to judicial review was still considered and intelligent. As outlined above, the root of the disagreement concerns the nature of advice a *pro se* alien must received before his or her waiver is held to be "considered and intelligent." Certiorari is therefore indicated under Rule 10(a).

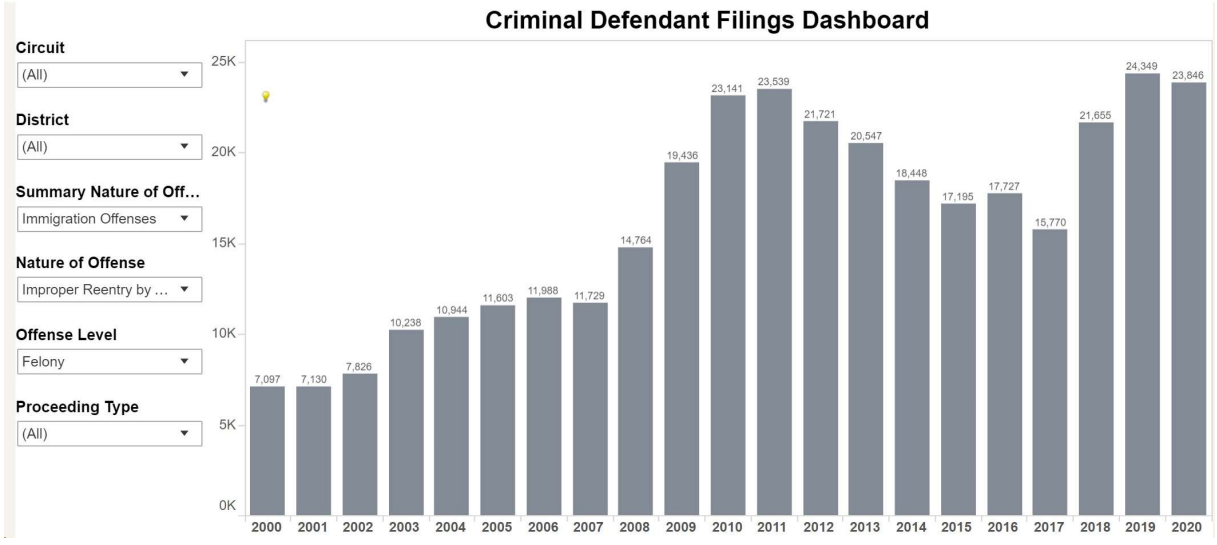
II. The Issues Presented Are Important Questions Because They Concern a Constitutional Defense to One of the Most Common Federal Felonies Involving a Fluid Area of Law

Certiorari is warranted not only due to the split in authority, but also the importance of the issue. S.Ct. R. 10(c). First, illegal reentry under 8 U.S.C. § 1326 is one of the most commonly prosecuted federal felonies, and a challenge to the prior removal order the most commonly asserted defense. Uncertainty on the standards governing these challenges place a high burden on district courts as well as the courts of appeals. Second, whether aliens were eligible for relief or, as in Mr. Gonzalez's case, deportable on the grounds charged, depends almost entirely on how their convictions are characterized under the categorical approach. Frequent and dramatic changes in how the lower courts apply the categorical approach to various prior convictions introduce uncertainty in defendants and district courts about how to treat removal orders predicated directly or indirectly on erroneous and changing characterizations of prior convictions.

A. This Issue Concerns a Core Standard for the Most Frequently Asserted Defense to the Most Frequently Charged Federal Felony

Illegal reentry is the most commonly prosecuted federal felony. According to the U.S. Sentencing Commission, out of the 76,538 defendants sentenced in fiscal year 2019, 22,077 were sentenced under the illegal reentry guideline, U.S.S.G § 2L1.2. That is 30.7% of all federal sentencings – more than all drug trafficking cases combined, and more than three times more than all federal firearms cases. United States Sentencing Commission, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* at 71, 128 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf).

The continued prosecution of illegal reentry offenses is unlikely to abate. Although it varies, prosecution rates have not dipped below 15,000 per year since before 2010, and reached peaks in 2011 and 2019. *Sourcebook* at 136.



Administrative Office of the Courts, *U.S. District Caseload Explorer* (available at http://jnet.ao.dcn/resources/data-analysis/us-district-caseload-explorer) (accessed Oct. 10, 2020).

The burden of litigation extends to the courts of appeals. According to the Administrative Office of the Courts, almost 10% of federal criminal appeals, year after year, are for immigration offenses generally. And a survey of the caselaw makes clear that a collateral attack on a prior removal order under § 1326(d) is the most commonly asserted defense to an illegal reentry charge. A circuit-level case concerning § 1326(d) is issued on average about every 6 days over the last year (63 cases). Analyzing the various arguments invoking contradictory authority in such a volume of cases is a heavy burden on district courts and appellate courts alike. Distribution among Circuits is uneven, which makes the split of authority between them more important. District courts in the Ninth and Fifth Circuits, on opposite sides of the split, account for 4,578 and 12,745 illegal reentry cases, respectively, in the 12 months ending June 30, 2020, according to the Administrative Office of the U.S. Courts.

The question presented is therefore important because it affects the most commonly asserted defense to the most commonly charged federal felony. And the geographical distribution of cases give an outsized effect to splits in authority between the Circuit Courts. Mr. Valdivia-Flores in the Ninth Circuit avoids conviction altogether while Mr. Gonzalez in the Fourth Circuit, on the same material facts and legal arguments receives a conviction and imprisonment. This

Court has not clarified or spoken in any way on this important defense to this common crime since announcing it as a constitutional defense 33 years ago in *Mendoza-Lopez*. Enough ink has been spilled in the lower courts to justify intervention, to provide definitive answers to immigrant petitioners, defendants, the attorneys who advise them, prosecutors, and district courts who must bear the burden of litigation in these cases.

B. Flux in the Categorical Approach

This case also provides the Court an opportunity to clarify how to treat removal orders entered under erroneous understandings of the law – particularly the categorical approach. The immigration consequences of most criminal convictions is governed by the categorical approach. Having an aggravated felony or a crime relating to a controlled substance, for example, can make even lawful immigrants automatically deportable and ineligible for any form of discretionary relief. *See* 8 U.S.C. §§ 1229b (cancellation); 1229c (voluntary departure); 1158 (asylum); *see also, e.g.*, *Sessions v. Dimaya,* 138 S.Ct. 1204, 1211 (2018) (discussing aggravated felony consequences); *Mellouli v. Lynch*, 575 U.S. 798 (2015) (concerning removal of lawful permanent resident for drug paraphernalia).

The government has pushed hard over the last twenty years to expand the reach of such statutes, arguing at points that crimes such as DUI, simple possession of small amounts of drugs and paraphernalia should have the harshest consequences. It has persuaded at times most of the lower courts, but this Court has rejected most of its arguments in a long line of cases. *See Descamps v. United*

States, 133 S.Ct. 2276, 2287 (2013) (restricting universe of documents courts may consult under categorical analysis); *Mathis v. United States*, 136 S.Ct. 2243, 2254 (2016); (same, again); *Mellouli v. Lynch*, 575 U.S. 798 (2015) (paraphernalia conviction not crime relating to a controlled substance); *Moncrieffe v. Holder*, 569 U.S. 184, 206 (2013) (social sharing of marijuana not drug trafficking aggravated felony); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (numerically second simple possession drug conviction not an aggravated felony drug trafficking unless so charged in court of conviction); *Lopez v. Gonzales*, 549 U.S. 47, 56-57 (2006) (simple possession of controlled substance not an aggravated felony); *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004) ("Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties. But this fact does not warrant our shoehorning it into statutory sections where it does not fit.").

But what is to be done with the thousands of immigrants deported under prior erroneous precedent for minor convictions, and whose removal orders are used against them to impose punishment when they, like Mr. Gonzalez, attempt to return to their families in the United States, albeit illegally?

The Fourth Circuit in this case did not reach the question of whether Mr. Gonzalez's conviction was an aggravated felony. But the question presented here is important to the resolution of that broader issue, because it concerns the threshold issue of whether an alien must be given a chance to contest the legal question in the first place in order for his waiver to be deemed valid. Here, the legal categorization

of Mr. Gonzalez's conviction as an aggravated felony was never presented to him as an issue he could contest, as the Fourth Circuit acknowledged. Without such an opportunity, the judicial review of which he was deprived could have resulted in the same review afforded other aliens who have successfully challenged the categorization of their minor crimes as aggravated felonies. And without being aware of that opportunity, his waiver was not "considered and intelligent."

III. Courts That Hold A Waiver By a Pro Se Alien Is Considered and Intelligent Despite Lacking or Erroneous Advice on a Dispositive Issue Are Wrong

The majority of Circuits have departed from *Mendoza-Lopez,* having either failed to examine the holding closely, or by misunderstanding it. In *Mendoza-Lopez*, the immigration judge gave the respondents a confusing explanation of suspension of deportation – a discretionary form of relief – and failed to answer a question which showed the respondent had not understood the explanation. 481 U.S. at 831, *id*. at n.4.[1] This Court held:

> The Immigration Judge permitted waivers of the right to appeal that were not the result of considered judgments by respondents, and failed to advise respondents properly of their eligibility to apply for suspension of deportation. Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding. The Government may not, therefore, rely on those orders as reliable proof of an element of a criminal offense.

Mendoza-Lopez, 481 U.S. at 840. Thus, whatever else its holding, this Court clearly

[1] There is no indication that this was due to a "language barrier" as the Fourth Circuit asserted, App. 4a, as opposed to simply "cursory and confusing" treatment by the immigration judge. *Mendoza-Lopez*, 481 U.S. at 831 n.4.

held that the failure to properly explain a form of relief for which the respondent is eligible prevents any subsequent appellate waiver from being "considered and intelligent." An alien's failure to understand a dispositive issue "effectively eliminates" the opportunity for judicial review of the result. *Id*. at 839. Therefore it cannot be truethat an alien who is not notified of, or provided an opportunity to challenge a dispositive issue can validly waive the right to judicial review.

Courts on the other side of the split invoke different arguments. The First Circuit explicitly relied on *Brady v. United States*, 397 U.S. 742, 757 (1970), in holding that legal advice on an unresolved question of law is not necessary to render a waiver knowing and intelligent. *Soto-Mateo*, 799 F.3d at 123. There is admittedly tension between *Mendoza-Lopez* and this Court's opinion in *Brady*. In *Brady*, this Court held that a guilty plea to avoid the death penalty, made with the advice of counsel, under a sentencing regime later ruled unconstitutional was still voluntarily and intelligently made. *Brady*, 397 U.S. at 757. *Brady* should not control, however, for three reasons. First, the availability of competent counsel was key to the Court's holding in *Brady*. *Id*. Counsel, of course, can inform defendants and respondents of the legal context, and the notion that one can dispute the government's or even courts' interpretation of the law and sometimes succeed. Therefore, Mr. Brady knew, presumably, that he had the option of challenging the constitutionality of the death penalty in his circumstance and chose to forego it. In contrast, as an alien in civil removal proceedings, Mr. Gonzalez had no right to court-appointed counsel, and was unrepresented. App. 2a, 9a-10a.

Second, *Brady* itself noted that "misrepresentation . . . by state agents" could still render a plea invalid. *Id*. In criminal proceedings like *Brady*, neither the judge nor the prosecutor advise the defendant. However, in immigration proceedings with *pro se* respondents, the immigration judge or service are the only possible sources of the knowledge necessary to make considered and intelligent decisions. And Form I-851 used in all administrative removal proceedings does mislead aliens into believing that there is no option to challenge classification of their conviction. *See Valdivia-Flores*, 876 F.3d at 1206 (exclusive list of checkboxes on Form I-851 lacking option to challenge classification of conviction is misleading to *pro se* alien).

Last, *Mendoza-Lopez* should control. It was decided 17 years after *Brady,* and was specific to the context of challenges to the use of prior removal orders under § 1326.

IV. This Case is an Ideal Vehicle for Resolving the Question Presented

This case presents a good vehicle to resolve the circuit split. The legal questions are clear-cut, and the opposing views of the Circuits are well developed through published opinions and numerous dissenting opinions.

Likewise, there are no factual disputes in the record. The forms used in the removal proceedings are in the record, black and white, and allege as the sole ground of deportability that Mr. Gonzalez had been convicted of an aggravated felony. The government presented testimony that the forms were the entirety of the advice provided to Mr. Gonzalez in removal proceedings, and Mr. Gonzalez, for his

part, did not contest that he speaks English proficiently.

The legal issues are also appropriately narrow. Most of the Circuits on the Fourth Circuit's side of the split – including the Fourth Circuit itself – have acknowledged in published opinions that aliens in administrative removal proceedings do not have an opportunity to contest whether their convictions are aggravated felonies. *See Etienne v. Lynch*, 813 F.3d 135, 141-42 (4th Cir. 2015) ("In light of the contents of Form I-851, we cannot say that DHS's expedited removal procedures offer an alien the opportunity to challenge the legal basis of his or her removal."); *Valdiviez-Hernandez v. Holder*, 739 F.3d 184 (5th Cir. 2013) ("The relevant statutes and corresponding regulations therefore did not provide Valdiviez with an avenue to challenge the legal conclusion that he does not meet the definition of an alien subject to expedited removal" due to an aggravated felony conviction.); *see also Victoria-Faustino v. Sessions*, 865 F.3d 869, 873 (7th Cir. 2017) (finding jurisdiction to review aggravated felony classification despite petitioner's failure to respond to NOI); *Valdivia-Flores*, 876 F.3d at 1205-06 ("[T]he Notice of Intent . . . did not explicitly inform [the defendant] that he could refute, through either an administrative or judicial procedure, the legal conclusion underlying his removability. In fact, the Notice of Intent's three check boxes suggested just the opposite – that removability could only be contested on factual grounds."). This wide agreement that administrative removal proceedings provide no opportunity to contest the legal question of removability allows this Court to review the narrow question of whether an alien's waiver of appeal can be "considered and intelligent"

despite this deficiency.

Therefore, this case presents a clear-cut, resolvable, narrow, dispositive issue of pure law: whether a "considered and intelligent" waiver of appeal can be obtained froma *pro se* alien who is not advised that he may dispute a dispositive issue or provided an opportunity to do so.

The opinion was unpublished; however, that should not be a reason to deny certiorari in this case. The issue presented was thoroughly litigated in both the district court and the Fourth Circuit. The district court issued a written and exhaustive memorandum opinion. App. 9a-17a. The Fourth Circuit reviewed the issue *de novo* and issued a 9-page reasoned opinion. As some Justices have noticed, the Fourth Circuit declines to publish decisions that satisfy its own criteria for publication. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., and Scalia, J., dissenting from denial of certiorari). This case satisfies at least three of those criteria; it "establishes . . a rule of law within [the] Circuit;" it "involves a legal issue of continuing public interest;" and it "creates a conflict with a decision in another circuit." 4th Cir. Local R. 36(a)(i), (ii), (v). The Fourth Circuit is unlikely to change its position; it has affirmed a denial of, and rejected rehearing of a case raising the same issue. *See United States v. Segura-Virgen*, 799 F. App'x. 214 (4th Cir. 2020) (affirming and adopting 390 F. Supp. 3d 681 (E.D.Va. 2019)) (motion for rehearing denied May 19, 2020). The issue is fully ready for this Court's review, and this case presents a suitable opportunity to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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