No. __-_____

IN THE

Supreme Court of the United States

RODOLFO SEGURA-VIRGEN,

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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QUESTIONS PRESENTED

I. Four terms ago, in *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), this Court held that a conviction under California Penal Code § 261.5(c) is not an aggravated felony, and that the statute defining aggravated felonies was unambiguous in that regard. In 2001, Mr. Segura-Virgen was deported on the sole ground that his conviction under California Penal Code § 261.5(c) was an aggravated felony. He was not provided an opportunity to contest this legal question in removal proceedings. The resulting removal order was used to convict Mr. Segura-Virgen in 2019 of illegal reentry after deportation. The courts below affirmed the use of this removal order against Mr. Segura because, they held, they were required to ignore *Esquivel-Quintana* and defer to the immigration officer's underlying determination that the conviction was an aggravated felony. The First, Fourth, Seventh, and (sometimes) Ninth Circuits follow this approach. The Second, Fifth, Tenth and (sometimes) Ninth Circuits, on the other hand, look to the law as it currently stands.

This petition therefore first presents the question whether courts evaluating a a prior removal order in the context of a criminal prosecution for illegal reentry are required to apply the law as it is now understood, or instead are required to defer to individual immigration officers' prior erroneous determinations.

II. In *United States v. 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 33 years, the lower courts have reached an impassible disagreement on what advice is required to make a *pro se* alien's waiver of appeal "considered and intelligent." The Second and Ninth Circuits (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 any advice be provided.

This case therefore asks, second, 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. Segura-Virgen*, No. 19-4659, United States Court of Appeals for the Fourth Circuit. Judgment entered April 2, 2020; Petition for Rehearing Denied May 19, 2020.

(2) *United States v. Segura-Virgen*, No. 3:18-CR-149, United States District Court for the Eastern District of Virginia. Judgment entered September 4, 2019.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provision, Statutes, Regulations, and Rules

Other Sources

PETITION FOR WRIT OF CERTIORARI

Rodolfo Segura-Virgen 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 page 1a of the appendix to the petition and is also available at 799 F. App'x. 214 (4th Cir. 2020). The district court's memorandum opinion appears at pages 2a to 20a of the appendix, and is also available at 390 F. Supp. 3d 681 (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 April 2, 2020, and denied a timely filed petition for rehearing on May 19, 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 or denial of a timely petition for rehearing. 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.

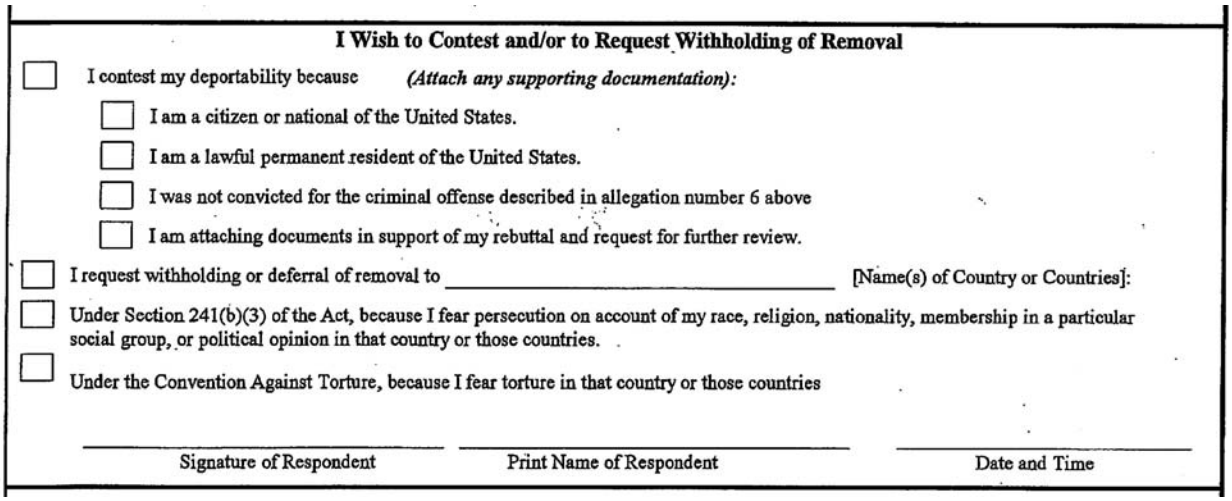
STATEMENT OF THE CASE

Introduction

Rodolfo Segura-Virgen was brought to the United States from Mexico at age nine. App. 7a. Three years later, his mother filed a petition to adjust his status, which was never adjudicated. App. 7a. He grew up and attended school in the United States, and speaks English fluently. App. 18a. At age 19, Mr. Segura was convicted of a violation of California Penal Code § 261.5(c). App. 7a. In 2001, 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 having received. App. 8a. This form is used in administrative removal proceedings under 8 U.S.C. § 1228(b). *See* 8 C.F.R. § 1238.1(b)(1). In administrative removal proceedings, there is no formal hearing; immigration officers may themselves order the removal of an alien, but only on the ground of an aggravated felony conviction. *See* 8 U.S.C. § 1228(b); 8 C.F.R. § 1238.1.

The NOI alleged that Mr. Segura was deportable on the ground that his conviction for Cal. Penal Code § 261.5(c) was an aggravated felony as sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A). App. 8a; 21a.

The reverse side of 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 for 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(s) of Country or Countries]:

☐ Under Section 241(b)(3) of the Act, 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 | Print Name of Respondent | Date and Time

App. 22a. There is no checkbox available to admit the *fact* of conviction, but contest the legal conclusion that it constitutes an aggravated felony.

Instead, Mr. Segura 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 Court of Appeals. App. 3a. An immigration officer signed the removal order based on this concession and he was removed to Mexico on foot the next day. App. 9a. Mr. Segura was found in California in 2003 and removed by reinstating the 2001 order. App. 10a. He was subsequently found in the United States in 2018 and charged in Eastern District of Virginia with being a deported alien found in the United States under 8 U.S.C. § 1326. App. 10a.

Proceedings in the District Court

Mr. Segura filed a motion to dismiss the indictment, attacking his prior removal order. App. 8a. At an evidentiary hearing, the ICE officer who drafted the NOI testified. When asked how he determined that Mr. Segura's conviction was an aggravated felony, he testified that officers had a list of state convictions that qualified. C.A.J.A. 110.[1] He did not know who prepared the list, but it "would have had to have been [ICE's] legal office." *Id*. He testified that he did not compare the elements of the aggravated felony definition and the elements of the California crime. C.A.J.A. 112. He did not know how or where to get a copy of the list that was in effect at the time of Mr. Segura's removal. *Id*.

In support of the motion, Mr. Segura argued that his Cal. Penal Code § 261.5(c) conviction was not an aggravated felony under *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017). App. 12a. The government, however, argued that even after *Esquivel-Quintana*, § 261.5(c) convictions could still count as aggravated felonies. App. 12a. The district court agreed with Mr. Segura, and held that under *Esquivel-Quintana*, a conviction for Cal. Penal Code § 261.5(c) does not qualify as an aggravated felony. App. 12a.

Mr. Segura next argued that, because he was not deportable on the grounds alleged in the NOI, immigration officers had no authority to order his removal, and the order was *ultra vires* and a legal nullity. App. 12a. The district court rejected that

[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals. *See* Joint Appendix*, United States v. Segura-Virgen,* No. 19-4659, Doc. 16 (filed Dec. 23, 2019).

argument, holding that 8 U.S.C. § 1326(d) was the sole means of attacking a prior removal order in a § 1326 prosecution. App. 12a-13a.

Mr. Segura also made an argument 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 was deprived of the opportunity for judicial review under § 1326(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 under § 1326(d)(3), and thus satisfying the elements of a collateral attack. App. 15a.

The district court first agreed that *Etienne* governed, and held that Mr. Segura had satisfied § 1326(d)(1), the exhaustion requirement, because "there was no available administrative remedy" to challenge the classification of his conviction as an aggravated felony. App. 14a.

But the district court gave two reasons for denying the motion. First, the district court held that Mr. Segura was not deprived of the opportunity for judicial review under § 1326(d)(2). It held that Mr. Segura's waiver of appeal was valid, despite the lack of opportunity on the forms to challenge whether his conviction was an aggravated felony. App. 15a-16a. The district court reasoned that courts are not

required to "inform defendants of each aspect of their case that they may appeal." App. 16a. Instead, knowledge in general of the right to appeal is all that the district court required to find a considered and intelligent waiver. App. 15-16a. It found a considered and intelligent waiver here becuase Mr. Segura read and understood the part of Form I-851 advising of the right to appeal generally. *Id*.

Second, the district court held that the entry of the removal order was not fundamentally unfair under § 1326(d)(3), because there was no due process violation. App. 16a. The district court did acknowledge that Mr. Segura's conviction under Cal. Penal Code § 261.5(c) was not an aggravated felony under *Esquivel-Quintana*, and therefore Mr. Segura was not deportable as charged. App. 12a. However, the Fourth Circuit had held in *United States v. Lopez-Collazo*, 824 F.3d 453 (4th Cir. 2016) that an alien cannot show a due process violation from an error of law unless it was "a misapplication of the law as it existed at the time – not as understood in light of subsequent judicial decisions[.]" App. 17a (quoting *Lopez-Collazo*, 824 F.3d at 467) (emphasis in district court opinion). It surveyed cases at the time in the Ninth Circuit (where the removal proceedings occurred), which were inconclusive. App. 18a. However, because the immigration officer testified that he referred to a list of California statutes prepared by ICE, and there was "no authority at the time holding otherwise[,]" the officer "did not misapply the law." App. 18a; 24a-27a (testimony of ICE officer on process for determining whether a conviction is an aggravated felony). Mr. Segura pled guilty with a conditional plea agreement, preserving his right to appeal the denial of the motion.

Proceedings in the Court of Appeals

Mr. Segura renewed his argument in the Fourth Circuit, which issued a one-paragraph per curiam opinion adopting the reasoning of the district court. App. 2a. Mr. Segura then filed a petition for panel rehearing in light of *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020) (Petition for Writ of Certiorari filed Oct. 5, 2020, No. 20-444), arguing that it supported his contentions that a mistake of law could render a waiver involuntary in light of after-decided precedent. *See United States v. Segura-Virgen*, No. 19-4659 (4th Cir.), Doc. 34. The Fourth Circuit denied the petition. *Id.*, Doc. 36 (May 19, 2020).

REASONS FOR GRANTING THE PETITION

The decision below rested on two conclusions, both of which are the subject of decades of disagreement in the Courts of Appeals. And both are important because they concern the core standards for evaluating the most common defense to the most frequently charged federal felony.

First, the Courts of Appeal disagree about what law to apply to evaluate the validity of a prior removal order under 8 U.S.C. § 1326(d). The First, Fourth, and Seventh Circuits examine the law as it existed at the time of the removal hearing. The First and Fourth Circuits have gone the furthest along this road, and defer to immigration officers' incorrect and unreasonable determinations so long as they were not foreclosed by binding precedent at the time. On the other side, the Second, Fifth, and Tenth Circuits apply the law as currently understood. The Ninth Circuit follows a split rule, applying current precedent to whether the alien was deportable

or eligible for INA § 212(c) relief, and the law at the time of the removal to questions of eligibility for other kinds of relief.

Second, sharp disagreements both between and within the Courts of Appeals persist 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 opportunity.

This Court's intervention is needed to resolve these splits and establish a uniform rule on these important issues. 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 Courts of Appeals Disagree About Whether to Apply the Law at the Time of the Removal Hearing or the Law As Currently Understood to Evaluate Challenges to Prior Removal Orders in Illegal Reentry Prosecutions

This Court first recognized a due process right to challenge the use of a prior removal order as an element of the crime of illegal reentry in *United States v.*

Mendoza-Lopez, 481 U.S. 828 (1987). Courts deciding such motions are often confronted with a situation where the interpretation of the statutes governing deportability or eligibility for relief from removal have changed between the removal hearing and the government's later use of the order in a prosecution for illegal reentry. They must decide whether to evaluate alleged errors under then-prevailing standards on the one hand, or in light of precedent only decided after the removal proceedings, on the other. The approaches of various courts conflict and cannot be reconciled. This Court's resolution is required.

A. Courts Applying the Current Understanding of the Law

The Second, Fifth, and Tenth Circuits, echoed by a dissenting judge in the Fourth Circuit, apply the law as currently understood. *See United States v. Copeland*, 376 F.3d 61, 70-73 (2d Cir. 2004); *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002); *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005); *United States v. Lopez-Collazo*, 824 F.3d 453, 468 (4th Cir. 2016) (Gregory, C.J. dissenting). The Fifth and Tenth Circuits and the dissent in the Fourth Circuit base this approach on this Court's admonition in *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) that "[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."

United States v. Rivera-Nevarez, 418 F.3d 1104, 1107 (10th Cir. 2005) involved an alien who was barred from relief because his DUI was considered an aggravated felony. After his removal, this Court held in *Leocal v. Ashcroft*, 543 U.S.

1 (2004) that the aggravated felony statute did not cover DUIs. Under *Rivers*, *Leocal* was "retroactively applicable to the time of Rivera-Nevarez's removal hearing." *Id*. In *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002), and alien was barred for relief under ("Therefore, [*INS v.*] *St. Cyr*[, 533 U.S. 289 (2001)] established Lopez-Ortiz's eligibility for § 212(c) relief at the time of his removal, and the Immigration Judge's contrary understanding, although in compliance with BIA precedent, was an erroneous application of the law. This error informs our evaluation of the fundamental fairness of the removal hearing.").

B. Courts Applying the Understanding of Law at the Time of Removal Proceedings

The First, Fourth, and Seventh Circuits all hold that courts should examine and apply the interpretation of the law as it existed at the time of the removal proceeding. *See United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015); *United States v. Lopez-Collazo*, 824 F.3d 453 (4th Cir. 2016); *United States v. Baptist*, 759 F.3d 690, 697-98 (7th Cir. 2014).

The reasoning in the Seventh Circuit is perfunctory, but its holding is clear. In *Baptist*, the defendant, charged with illegal reentry, had been a lawful permanent resident from Belize. 759 F.3d at 692. He was convicted three times of simple possession of a controlled substance. *Id.* He was charged with removability for having a drug *trafficking* aggravated felony, and for violation of a law relating to a controlled substance. *Id*. at 693. He stipulated to a removal order and was expelled. *Id*. The Seventh Circuit acknowledged that under *Lopez v. Gonzales*, 549 U.S. 47, 56-57 (2006), decided after Baptist's removal order, his convictions were not

actually aggravated felonies. *Id*. at 697. However, because simple possession of drugs did qualify as an aggravated felony "under the law in effect at the time of his removal," there was no error because "the law in effect at the time of Baptist's challenged removal is what matters[.]" *Id*. at 697-98.

The First Circuit and Fourth Circuits go further, and extend deference to erroneous agency decisions that were not *forbidden* by binding precedent at the time. *See United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015) ("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."); *Lopez-Collazo*, 824 F.3d at 467 (error of law not a due process violation unless it was "a misapplication of the law as it existed at the time – not as understood in light of subsequent judicial decisions[.]"); App. 17a (same).

In *Lopez-Collazo*, the published case governing the outcome below, *see* App. 17a, the alien defendant had been convicted of second degree assault in Maryland, with all but 72 days suspended. 824 F.3d at 456. He was served with an NOI written in English, which was never translated to him in a language he could understand. *Id*. at 461-62. He was ordered removed on the ground that his assault conviction was an aggravated felony. *Id*. at 457-58. The Fourth Circuit acknowledged that the defendant had never received notice of the charges that he could understand, and that his conviction for second degree assault was not an aggravated felony, meaning he was not deportable as charged. *Id*. at 462, 466-67. It still reversed the district court's decision to grant the motion to dismiss because,

it held, the government would have continued to misapply the aggravated felony statute to him at the time of removal, and therefore he could not show prejudice. *See id.* at 467.

Chief Judge Gregory dissented. He noted that it was never the law, properly understood, that Maryland second degree assault is an aggravated felony, invoking this Court's admonition in *Rivers* that judicial interpretations are "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Id.* at 468.

C. The Ninth Circuit's Split Approach

The Ninth Circuit applies different sets of law for different questions in challenges to removal orders under § 1326(d). It first applies the law as currently understood from post-removal precedent, in the case of an alien who was eligible for INA § 212(c) relief, but erroneously advised to the contrary before this Court's opinion in *St. Cyr*. *See United States v. Leon-Paz*, 340 F.3d 1003,1100-01 (9th Cir. 2004). A later panel held, however, that the law at the time of the removal proceeding governs questions of eligibility for relief from removal other than § 212(c). *See United States v. Vidal-Mendoza*, 705 F.3d 1012, 1017 (9th Cir. 2013). It distinguished *Leon-Paz* on the ground that the retroactive availability of § 212(c) relief at issue in *Leon-Paz* was not an issue on which the BIA was entitled to deference. *Id.* at 1018 n.6. A subsequent panel then distinguished *Vidal-Mendoza* and held that issues governing whether the alien was deportable as charged are evaluated by the current understanding of the law, not the law at the time of

removal. *United States v. Aguilera-Rios*, 769 F.3d 626, 631-32 (9th Cir. 2014). So in the Ninth Circuit, current law applies to eligibility for § 212(c) relief and deportability; while eligibility for other forms of relief are governed by precedent in effect at the time of the removal proceedings. Thus there is a split between the circuits, and even within a circuit depending on the specific immigration relief at issue. The disagreement in the courts below is deep and established, and this Court is the only one who can end it.

II. The 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 "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review." The Court further held that alien defendant is deprived of the opportunity for judicial review where a purported waiver of the right to appeal is "not considered or intelligent[.]" *Id.* 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 held that Mr. Segura was not deprived of the opportunity for judicial review because he was advised of the right to appeal generally. App. 4a-5a. The Courts of Appeals differ on what is required to satisfy the requirement of a

collateral attack that the alien have been deprived of the opportunity for judicial review. The Second and Ninth Circuits hold that pro se aliens who waive appeal without being advised of the right to contest dispositive issues are deprived of the opportunity for judicial review. The First, Fourth, Fifth, Seventh, Eighth and Tenth disagree, and require no advice.

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. Segura 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 exclusive list of checkboxes providing other avenues to challenge the removal "suggested just the opposite." This 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. Segura'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 S.Ct. R. 10(a).

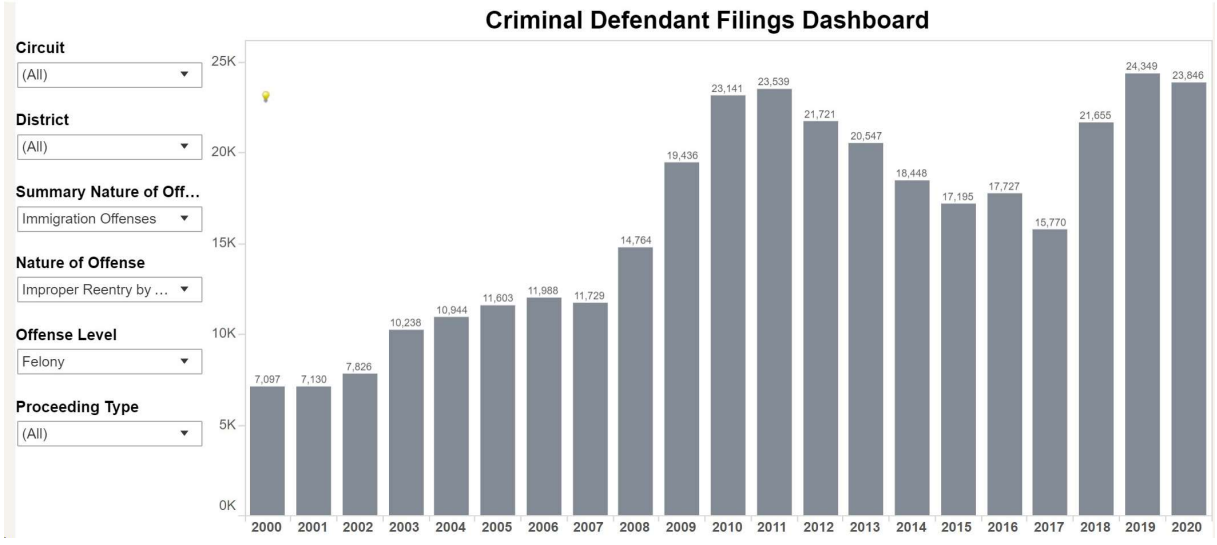
III. The Issues Presented Are Important Questions Because They Concern a Constitutional Defense to One of the Most Common Federal Felonies Involving a Fluid Area of Law

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 is 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. Segura's case, deportable on the grounds charged, depends almost entirely on how their convictions are characterized under the categorical approach. Courts' interpretations of the categorical approach has changed drastically and frequently over the last twenty years. This flux, in turn, leads to uncertainty in defendants and district courts about how to treat removal orders predicated directly or indirectly on erroneous characterizations of prior convictions.

A. This Issue Concerns Core Standards 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, for example, 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 questions presented are therefore important because they affect 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. Segura 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. Segura, attempt to return to their families in the United States, albeit illegally?

The questions presented here are important to the resolution of that broader issue, because they concern both 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, and the later question of whether the government can resort to criminal immigration enforcement when it has entered an order on an erroneous basis. Here, the legal categorization of Mr. Segura'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."

IV. The Fourth Circuit's Decision Was Wrong

A. The Law as Currently Understood Should Govern Motions to Dismiss Under *Mendoza-Lopez* and § 1326(d).

The refusal of the Fourth Circuit and its sister circuits to apply this Court's precedent to motions to dismiss current prosecutions is wrong for three reasons. First, it violates a legal principle a thousand years old and never previously questioned. Second, it introduces serious separation of powers concerns. Third, it creates a new form of extreme deference to an executive administrative agency. And last, as this case illustrates, it is unworkable.

1. Courts that follow the Fourth Circuit's approach characterize change in governing precedent as a subsequent change in "the law," and discuss "the law" at the time of the removal order. This is common shorthand, but inaccurate in a fundamental way, as this Court explained in *Rivers*. When this Court overrules a Circuit Court on a matter of statutory interpretation as it did in *Esquivel-Quintana*, *Mathis*, *Descamps*, *Mellouli*, *Moncrieffe*, *Carachuri-Rosendo*, *Lopez*, *Leocal*, *St. Cyr* and other cases, it "held and therefore established that the prior decisions of the Courts of Appeals . . . were *incorrect*." *Rivers*, 511 U.S. at 312 (emphasis in

original). "[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 312 n. 12. It is "not accurate to say that the Court's decision[s in those cases] 'changed' the law[.]" *Id.* Rather, those opinions explained what the immigration statutes "had *always* meant" and how "the Courts of Appeals had misinterpreted the will of the enacting Congress." *Id.* (emphasis in original).

2. Thus, the retroactive operation of judicial decisions, which has been the rule "for near a thousand years," *see id.* at 312, has important separation-of-powers implications. When courts treat their own erroneous prior interpretations as "the law," they are untethered to any actual act of the legitimate lawmaking branch of government. So much the worse when they, like the courts below Mr. Segura's own case, treat the uninformed decisions of low level law enforcement officers as "law."

3. The Fourth Circuit's approach goes beyond any previously recognized principles of agency deference and defers to unreasonable and non-public legal opinions of low level immigration officials. In this case, the courts below acknowledged that there was no caselaw answering in particular whether the crime at issue was an aggravated felony. The immigration officer who charged Mr. Segura-Virgen with deportability testified that he would have consulted a list of qualifying convictions (never disclosed) prepared by another ICE "legal office." The list was never produced. C.A.J.A. 112.

This Court has countenanced strong deference to reasoned, published, and binding agency opinions, *see Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 1227 (1984), and weaker deference to informal opinions, *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), where the governing statute is ambiguous. But it has never extended deference to informal, unreasoned agency decisions on a matter of law contrary to an unambiguous statute, as the Fourth Circuit did here – in a criminal case, to boot. *Esquivel-Quintana* itself considered and rejected any deference to contrary interpretations of the aggravated felony provision at issue, holding that the statute "unambiguously forecloses" the BIA's interpretation. 137 S.Ct. at 1572. The First and Fourth Circuits's rule reduces to this: immigration officers' determinations on questions of law stand, no matter how unreasonable, and can be used in a later criminal prosecution, unless binding precedent at the time contradicts them. This flips the roles of courts and administrative agencies with no justification.

4. The Fourth Circuit's approach is unworkable. As this Court has recognized, administrative concerns can actually be harmed by non-retroactivity. *Henderson v. United States*, 568 U.S. 266, 277 (2013) ("[T]he competing 'time of error' rule . . . works practical administrative harm."). *Lopez-Collazo* has turned out to be an administrative nightmare, as this case illustrates. Under *Esquivel-Quintana*, this case is easy. A violation of Cal. Penal Code § 261.5(c) is not an aggravated felony, and it never was. It was error to order Mr. Segura removed from the country on a charge that he had been convicted of an aggravated felony. But instead, the *Lopez-Collazo* approach forces district courts to delve into the mess of categorical-approach caselaw in 2001 in another circuit, to try to parse what

particular wrong interpretation of the law may have governed an immigration officer's decision.

5. This Court has already adopted the rule Mr. Segura argued for in two analogous contexts. First, in *Sicurella v. United States*, 348 U.S. 385 (1955), this Court considered a collateral attack on an administrative agency order as an element of a criminal offense – there, a draft board order. It held that the Department of Justice's use of an erroneous standard to evaluate a conscientious objector claim, which this Court construed for the first time in that case, was an "error of law" that "vitiate[d] the entire proceedings." *Id*. at 392.

More recently, this Court has reaffirmed that, even on plain-error review, the interpretation of law at the time of decision controls. *See Henderson*, 568 U.S. at 278 ("[P]lain-error review is not a grading system for trial judges."); *compare Lopez-Collazo*, 824 F.3d at 456 (immigration officers need not be "clairvoyant"). The Fourth Circuit's focus on the decisionmaker is misplaced; it only matters *whether* the defendant's due process rights were respected, not by whom or how subjectively diligent they were.

B. 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. 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 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. Segura had no right to court-appointed counsel, and was unrepresented. App.10a; C.A.J.A. 89-91.

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.

V. This Case is an Ideal Vehicle for Resolving the Questions Presented

This case presents a good vehicle to resolve the circuit splits. The legal questions are clear-cut, and the opposing views of the Circuits well developed through decades' worth of published opinions and dissents on both sides of the issues.

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. Segura had been convicted of an aggravated felony. The government presented testimony that the forms were the entirety of the advice provided to Mr. Segura in removal proceedings, C.A.J.A. 89-91, and Mr. Segura, for his part, stipulated that he speaks English proficiently. App. 18a.

The legal issues are also appropriately narrow. First, there can be no dispute that Mr. Segura's conviction is not, and never was, an aggravated felony in light of *Esquivel-Quintana* as the courts below acknowledged. App. 12a. Therefore this Court need not conduct any further analysis under the categorical approach, and can directly address the narrower issue of whether precedent at the time of removal or time of collateral attack should control.

Regarding deprivation of judicial review, 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 clear-cut, resolvable, narrow, dispositive issues of pure law: (1) should courts disregard precedential opinions issued subsequent to the removal order, and (2) what advice is required to a pro se alien to render his decision to appeal considered and intelligent?

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." Fourth Circuit Local Rule 36(a)(i), (ii), (v). The Fourth Circuit is unlikely to change its position; since *Lopez-Collazo*, it denied a petition for rehearing in this case, and has rejected a materially identical claim in another case. *See United States v. Gonzalez-Ferretiz*, F. App'x. 837 (4th Cir. 2020) (petition for certiorari filed October 13, 2020, No. __-____). These issues are fully ready for this Court to review, and this case presents a suitable opportunity to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

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