No. 20-6066

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

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Mr. Segura submits this supplemental brief under this Court's Rule 15.8 to explain how this Court's opinion in *United States v. Palomar-Santiago*, --- S.Ct. ----, 2021 WL 2044540 (May 24, 2021) affects his arguments in support of a grant of certiorari.

Palomar-Santiago resolves the first question presented in Mr. Segura's favor, and does not resolve his second question presented. In fact, this case would be the ideal vehicle to follow *Palomar-Santiago* and clarify when an administrative remedy is not "available" under 8 U.S.C. § 1326(d)(1) and an alien has been "deprived of the opportunity for judicial review" under § 1326(d)(2). Therefore, this Court should grant Mr. Segura's petition for certiorari. Or, in the alternative, Mr. Segura requests that the Court remand his case to the Fourth Circuit to further analyze in light of *Palomar-Santiago*.

1. Rodolfo Segura was brought to the United States as a child, grew up and attended school in the United States, and speaks English fluently. App. 7a. At age 19, he was convicted of a violation of California Penal Code § 261.5(c). Then in 2001, he was served with a Form I-851, which alleged that he was deportable and ineligible for relief because his conviction was an aggravated felony. In 2017, this Court held that California Penal Code § 261.5(c) convictions are not aggravated felonies. *See Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017).

In the district court, Mr. Segura challenged his indictment under 8 U.S.C. § 1326(d). He pointed out that Form I-851 does not provide any avenue for a noncitizen to admit the fact of conviction, but challenge whether the conviction is an

aggravated felony. App. 13a. Therefore there were no administrative remedies to exhaust, and any waiver of the right to judicial review was not considered and intelligent under *Mendoza-Lopez*.

The district court agreed that "there was no available administrative remedy" and § 1326(d)(1) was satisfied. App. 14a. But it held that Mr. Segura's general waiver of the right to appeal, even without being provided an opportunity to challenge the classification of his conviction, was valid. App. 15a-16a.

Second, relying on *United States v. Lopez-Collazo*, 824 F.3d 453, 467 (4th Cir. 2016), the district court held that ICE "did not misapply the law" despite *Esquivel-Quintana*, because the law at the time of Mr. Segura's removal order governed, and not subsequently-decided precedent. App. 17a. The Fourth Circuit adopted the reasoning of the district court. App. 2a.

2. Mr. Segura's petition presented two questions: First, whether courts evaluating a prior removal order under § 1326(d) should apply the law as it is now understood, or instead as understood by immigration officers at the time of removal, as the courts below held. Second, Mr. Segura 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." *See* Pet. ii.

a. *Palomar-Santiago* resolves the first question presented in Mr. Segura's favor. There, the order of removal at issue was entered by an immigration judge under binding BIA precedent declaring convictions for driving under the influence

(DUI) to be aggravated felonies; it was entered years before this Court held in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) that driving under the influence is not a "crime of violence" aggravated felony. The government argued there (as the district court held in this case) that the immigration judge had "accurately classified" Mr. Palomar's DUI as an aggravated felony "under the law that existed at the time" of Mr. Palomar's removal order. *Brief of the United States*, 2021 WL 720352 at *22; *see id.* at *24 ("[I]t was an accurate statement of the substantive law at the time of respondent's removal hearing.").

This Court rejected that argument, holding "Palomar-Santiago's DUI conviction *was not* a crime of violence[.]" *Id.* at *3 (emphasis added, past tense in original). "Palomar-Santiago's removal order thus never should have issued." *Id.* In support of the retroactive application of *Leocal*, this Court cited *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994), which held that decisions interpreting statutes are statements of what the law meant "before as well as after the decision of the case giving rise to that construction." *Id.*

Thus *Palomar-Santiago* and this Court's invocation of *Rivers* resolves the first question presented in Mr. Segura's favor. Mr. Segura's conviction under Cal. Penal Code § 261.5(c), as interpreted by *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), "was not" an aggravated felony and his removal order "never should have issued." The Fourth Circuit's holding to the contrary in *United States v. Lopez-Collazo*, 824 F.3d 453 (4th Cir. 2016) has been abrogated and the Circuit split

on that issue resolved in Mr. Segura's favor. Therefore the first basis of the decision below has been undermined.

b. However, as this Court noted, an "error on the merits does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement[.]" *Palomar-Santiago*, 2021 WL 2044540 at *4. Anticipating that this might be so, the second question presented concerns whether the opportunity for judicial review was available to Mr. Segura.[1] Pet. ii.

In particular, Form I-851, used in all administrative removals, provides no avenue to challenge whether the noncitizen's conviction is an aggravated felony. Instead it provides an exclusive checklist that forecloses that option:

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. Most circuits that have examined Form I-851 agree that disputing the legal characterization of the prior conviction is not an available option in

[1] Here, the district court and Fourth Circuit below held that there were no administrative remedies available to Mr. Segura under § 1326(d)(1), applying *Etienne v. Lynch*, 813 F.3d 135, 141-142 (4th Cir. 2015). Therefore only § 1326(d)(2) is at issue, and Mr. Segura must show that he was deprived of the opportunity for judicial review. *Palomar-Santiago*'s holding applies to both requirements. *Id.* at *4.

administrative removal proceedings. *Etienne v. Lynch*, 813 F.3d 135, 141-42 (4th Cir. 2015); *Valdiviez-Hernandez v. Holder*, 739 F.3d 184 (5th Cir. 2013); *United States v. Valdivia-Flores*, 876 F.3d 1201, 1205-06 (9th Cir. 2017); *Victoria-Faustino v. Sessions*, 865 F.3d 869, 873 (7th Cir. 2017); *but see Malu v. Atty. Gen.*, 764 F.3d 1282, 1289 (11th Cir. 2014).

The administrative removal proceedings used here stand in direct contrast to the immigration court hearing that Mr. Palomar-Santiago enjoyed, where the noncitizen can "proffer defenses . . . including that the conviction identified in the charging documents is not a removable offense." *Id.* at *2. In Mr. Segura's case no such option was provided; therefore *Palomar-Santiago* cannot control whether there were available administrative remedies or judicial review.

Instead, this case presents a *procedural* question concerning whether a waiver of appeal can be considered and intelligent when a noncitizen is precluded from disputing the classification of his conviction. This question is "distinct" from the "substantive validity" of the order itself. *Palomar-Santiago*, 2021 WL 2044540 at *4. In other words, Mr. Segura did not have the opportunity for judicial review because ICE told him he could not dispute the classification of his conviction, and not simply because they reached the wrong result.

3. The circuit split outlined in Mr. Segura's petition for certiorari, Pet. 14-18 is not resolved by *Palomar-Santiago*. This is because it concerns the portion of *Mendoza-Lopez* that this Court left unaddressed in *Palomar-Santiago*.

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), the noncitizens waived appeal on the record at their deportation hearings. This Court held that the noncitizens 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. This rendered their waivers of the right to file an administrative appeal "not considered or intelligent[.]" *Id.*

Palomar-Santiago did not purport to overrule *Mendoza-Lopez* and its direct holding on the deprivation-of-judicial-review requirement, which § 1326(d)(2) adopted untouched. This Court reserves to itself the "prerogative . . . to overrule one of its precedents[.]" *Bosse v. Oklahoma*, 137 S.Ct. 1, 3 (Thomas, J., concurring) (citations omitted). Thus the circuit court precedents analyzing whether a purported waiver of appeal was "considered or intelligent" under *Mendoza-Lopez* will stand. The only relevant holding of *Palomar-Santiago* on this point is that a legal error on deportability does not alone render a waiver of appeal invalid, where an alien was provided an opportunity to dispute the allegation of deportability. *Palomar-Santiago*, 2021 WL 2044540 at *4 ("§ 1326(d)'s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable."). Here, the procedures used never provided Mr. Segura an *opportunity* to dispute deportability – he invokes a procedural deficiency, not a substantive one. Therefore, *Mendoza-Lopez* will continue to control the outcome of the circuit split.

For all of these reasons, *Palomar-Santiago* does not control this case, and the split of authority Mr. Segura invoked will be persist unless this Court intervenes. The petition for certiorari should be granted.

Respectfully submitted,

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