No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PRAXEDIS SAUL PORTILLO-GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender

* DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
* *Counsel of Record*

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QUESTION PRESENTED

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court held that noncitizens have a due process right to collaterally attack their removal orders where their "waivers of their rights to appeal were not considered or intelligent" because, at their removal hearing, the immigration judge failed to properly advise them regarding a form of relief from removal. Congress codified this holding by enacting 8 U.S.C. § 1326(d), which recognizes a noncitizen's right to bring such collateral attacks, and also limits such attacks to cases in which the noncitizen exhausted "available" administrative remedies (§ 1326(d)(1)), the deportation process improperly deprived the noncitizen of the opportunity for judicial review (§ 1326(d)(2)), and the entry of the order was fundamentally unfair (§ 1326(d)(3)). In the instant case, the court of appeals held in a published opinion that § 1326(d)(1) and (2) bar collateral attacks on removal orders despite the immigration judge's errors, unless those errors pertain directly to the appeal process. Does the court of appeals' holding conflict with *Mendoza-Lopez*?

RULE 14.1(b) STATEMENT

(i) All parties to the proceeding are listed in the caption.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings: *United States v. Portillo-Gonzalez*, No. 19-cr-01331-DJH (D. Ariz.) (judgment entered September 1, 2021); *United States v. Portillo-Gonzalez*, No. 21-10260 (9th Cir.) (judgment entered August 31, 2023; petition for rehearing denied November 27, 2023).

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Petitioner Praxedis Saul Portillo-Gonzalez respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 31, 2023. App. A.

OPINIONS BELOW

The court of appeals' memorandum is published at 80 F.4th 910. The order of the district court denying petitioner's motion to dismiss the indictment is unpublished, but is available on Westlaw at 2021 WL 2401407 and on Lexis at 2021 U.S. Dist. LEXIS 109188.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal criminal charges against Mr. Portillo-Gonzalez pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 31, 2023. App. A at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution reads as follows:

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

U.S. Const. amend. V.

8 U.S.C. § 1326(d) reads as follows:

> **(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.

8 U.S.C. § 1326(d).

STATEMENT OF THE CASE

A. In *United States v. Mendoza-Lopez*, this Court held that a noncitizen has a due process right to collaterally attack a flawed prior removal that serves as a predicate for an unlawful reentry charge.

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court reviewed two noncitizens' unlawful reentry convictions. *Id*. at 830. The Court found that, during the noncitizens' removal hearings, the Immigration Judge (IJ) had failed to "advise [the noncitizens] properly of their eligibility to apply for suspension of deportation." *Id*. at 840. In light of this failure, the Court held, the noncitizens' waivers of their right to appeal the removal orders "were not the result of considered judgments," and they had a due process right to collaterally attack the orders in their unlawful reentry prosecutions. *Id*.

Nine years later Congress codified *Mendoza-Lopez* in 8 U.S.C. § 1326(d). Section 1326(d) acknowledges a reentry defendant's ability to collaterally attack a predicate removal order, provided that: (1) the noncitizen "exhausted any administrative remedies that may have been available to seek relief against the order," (2) the removal proceedings at which the order was issued improperly deprived the noncitizen of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d) (*added by* Pub. L. No. 104-132, Tit. IV, Subt. D, § 441 (Apr. 4, 1996)).

B. Mr. Portillo was removed from the United States in 2000.

Praxedis Saul Portillo-Gonzalez is a 41-year-old home-framer from a small town in Sinaloa, Mexico. In 2000, Mr. Portillo entered the United States. Sixth months later he pleaded guilty in Arizona state court to possession of drug paraphernalia and was sentenced to three years of probation. One week later Mr. Portillo—who had just turned 18, spoke no English, and had no counsel—was brought before an IJ for a removal hearing.

Mr. Portillo could have avoided removal by obtaining "voluntary departure"—a mechanism that permits a noncitizen to depart voluntarily and thereby avoid restrictions on his ability to apply for admission later. However, the IJ—apparently relying on a regulation that had been rescinded three years earlier—mistakenly told him that in order to apply for voluntary departure he had to produce five dollars to pay for his bus ride to the border. App. A at 7–8 & n.2. When Mr. Portillo

acknowledged that he had entered the United States without inspection and did not have five dollars on his person, the IJ summarily ordered him removed.

C. When Mr. Portillo was charged with illegal reentry in 2019, he moved to dismiss the charge in light of the invalidity of the 2000 removal.

In 2019 Mr. Portillo was apprehended in the United States and charged with illegal entry after removal in violation of 8 U.S.C. § 1326(a). He moved to dismiss the charge, arguing that the IJ's erroneous advisal regarding voluntary departure at the 2000 removal hearing rendered his waiver of administrative appeal of the removal order not knowing and intelligent. Because administrative appeal is a necessary precursor to judicial review, the invalidity of Mr. Portillo's waiver of administrative appeal also invalidated his waiver of judicial review. *United States v. Palomar-Santiago*, 593 U.S. 321, 327 n.3 (2021). The district court held a hearing on Mr. Portillo's motion in May of 2021.

D. This Court issued its opinion in *United States v. Palomar-Santiago*.

Later that month, this Court issued its opinion in *United States v. Palomar-Santiago*. The case involved an unlawful-reentry defendant who collaterally challenged his underlying removal. *Palomar-Santiago*, 593 U.S. at 325. The defendant had been found removable on the premise that his DUI conviction qualified as an "aggravated felony" (8 U.S.C. § 1227(a)(2)(A)(iii)), but this Court's subsequent precedent made plain that this label did not apply to the conviction. *Palomar-Santiago*, 593 U.S. at 325. The court of appeals' precedent permitted such a change in substantive law to authorize a collateral challenge, holding that

unlawful-reentry defendants were "'excused from proving the first two requirements' of § 1326(d) if they were 'not convicted of an offense that made [them] removable.'" *Id*. (*quoting United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017)). The district court accordingly dismissed the indictment, and the court of appeals affirmed. *Id*.

This Court granted certiorari to address the "narrow question" of whether an unlawful-reentry defendant is "excused" from making the exhaustion and deprivation-of-judicial-review showings under § 1326(d)(1) and (2) if "his prior removal order was premised on a conviction that was later found not to be a removable offense." *Id*. at 1619, 1622 n.4. The Court concluded that he is not, holding that § 1326(d)(1) and (2)'s "procedural requirements" are not satisfied "just because a noncitizen was removed for an offense that did not in fact render him removable." *Id*. at 1621.

E. The district court denied Mr. Portillo's motion to dismiss.

After receiving supplemental briefs addressing *Palomar-Santiago*, the district court denied Mr. Portillo's motion on grounds unrelated to that opinion. App. B. The parties entered into a plea agreement that preserved Mr. Portillo's right to appeal the district court's denial of his motion to dismiss. The district court accepted the plea agreement and sentenced Mr. Portillo to 42 months of imprisonment, followed by a 3-year term of supervised release.

F. The court of appeals affirmed the district court's judgment.

On appeal, Mr. Portillo argued that the district court erred in holding that he did not satisfy the prerequisites for a collateral attack on a prior removal set forth in 8 U.S.C. § 1326(d). With respect to § 1326(d)(1) and (2), Mr. Portillo argued that the court of appeals' precedent applying *Mendoza-Lopez* established that the IJ's error at his 2000 removal hearing rendered his waiver of his right to appeal not knowing and voluntary.

The court of appeals affirmed the district court's judgment in a published opinion. App. A. The court agreed with Mr. Portillo that the IJ erred in requiring an immediate five-dollar payment to seek voluntary departure, but concluded that *Palomar-Santiago* abrogated the court of appeals' "line of cases" holding that an IJ's incorrect statements to a noncitizen in the course of a removal hearing may satisfy the requirements of § 1326(d)(1) and (2). App. A at 4, 7–8, 14.

In light of *Palomar-Santiago*, the court of appeals reasoned, an IJ's incorrect statement to a noncitizen regarding a form of relief from removal cannot "'effectively' satisfy" § 1326(d)(1) or (2). App. A at 14–15. The court characterized the IJ's misstatement as a "substantive error," and stressed that, under *Palomar-Santiago*, "[a] substantive error of immigration law 'does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error.'" *Id*. at 16 (*quoting Palomar-Santiago*, 593 U.S. at 328).

The court of appeals rejected Mr. Portillo's reliance on § 1326(d)(1)'s limitation of the exhaustion requirement to "available" remedies. Mr. Portillo noted that in *Ross v. Blake*, 578 U.S. 632 (2016), this Court held—with respect to the Prison Litigation Reform Act of 1995 (42 U.S.C. § 1997e(a)) (PLRA)—that the word "available" constituted the statute's "own, textual exception to mandatory exhaustion." *Ross*, 578 U.S. at 642. The *Ross* Court noted that an administrative remedy for adverse prison conditions may be "officially on the books" and yet "unavailable" when (*inter alia*) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 643–44 (emphasis added). Mr. Portillo argued that these principles applied to the IJ's erroneous advice to him in his 2000 removal hearing.

The court of appeals disagreed, reasoning that, rather than misleading Mr. Portillo "*as to the procedural steps for pursuing administrative remedies*," the IJ had made "a substantive mistake as to the availability of relief from removal." App. A at 19–20 (latter emphasis added). As a result, the court reasoned, voluntary departure was "available" to Mr. Portillo notwithstanding the IJ's false representation that he had to produce five dollars in order to pursue it. *Id.* at 20.

Mr. Portillo filed a petition for panel or en banc rehearing, which the court of appeals denied. App. C.

REASONS FOR GRANTING THE WRIT

The court of appeals' opinion conflicts with this Court's opinion in *United States v. Mendoza-Lopez*, and its error largely nullifies an important defense to one of the most frequently charged of all federal crimes.

The court of appeals opinion conflicts with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). In that opinion, this Court held that noncitizens have a due process right to collaterally attack their removal orders where their "waivers of their rights to appeal were not considered or intelligent" because, at their removal hearing, the IJ failed to properly advise them regarding a form of relief from removal. *Id.* at 840. Contrary to *Mendoza-Lopez*, the court of appeals' opinion holds that 8 U.S.C. § 1326(d)(1) and (2) bar collateral attacks on removal orders despite the IJ's errors, unless those errors pertain directly to the appeal process. The question implicated by the court of appeals' holding is of exceptional importance because the court's holding sharply curtails an important defense to one of the most frequently charged of all federal crimes, and allows unlawful-reentry defendants to be convicted of felony offenses predicated on legally invalid removal orders. This Court should accordingly grant a writ of certiorari and correct the court of appeals' error.

I. The court of appeals' opinion conflicts with *Mendoza-Lopez*.

A. *Mendoza-Lopez* holds that an IJ's erroneous advice regarding a form of relief from removal may render a waiver of appeal not knowing and voluntary.

The court of appeals' opinion cannot be reconciled with *Mendoza-Lopez*. In that opinion, this Court reviewed the dismissal of two noncitizens' indictments for

unlawful reentry after removal in violation of 8 U.S.C. § 1326. *Mendoza-Lopez*, 481 U.S. at 830. In the removal proceeding underlying the reentry charges, the IJ had failed to adequately advise the noncitizens regarding their ability to seek suspension of removal, including by: (a) failing to answer one noncitizen's question regarding application for suspension of removal, (b) addressing the wrong noncitizen while discussing eligibility for a remedy, (c) failing to make clear how much time he would allow them to apply for a remedy, and (d) failing to "explain further" how the remedy worked after one of them asked a question that demonstrated that he did not understand it. *Id*. at 832 n.4. The lower courts held that the IJ's actions entitled the noncitizens to collaterally challenge their removals, notwithstanding the absence of a statutory provision authorizing such a challenge. *Id*. at 832.

This Court affirmed, holding that if § 1326 authorized a criminal penalty "for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceedings may have been, the statute does not comport with the constitutional requirement of due process." *Id*. at 837. The Court held that the noncitizens' removal orders could not be used as predicates for unlawful-reentry charges, because the IJ had "permitted waivers of the right to appeal that were not the result of considered judgments by [the noncitizens], and failed to advise [the noncitizens] properly of their eligibility to apply for suspension of deportation." *Id*. at 840. These "fundamental procedural defects," the Court held, "rendered direct review of the [IJ's] determination unavailable to [the noncitizens]." *Id*. at 841. Nine

years later Congress "codified th[e] principle" of *Mendoza-Lopez* by adding subsection (d) to § 1326. *United States v. Arias-Ordonez*, 597 F.3d 972, 976 (9th Cir. 2010).

In the twenty-seven years since § 1326(d)'s enactment, the court of appeals issued numerous opinions that construed and applied it in a manner consistent with the due process holding of *Mendoza-Lopez* that it codified—*i.e.*, as permitting a collateral attack on a prior removal where the noncitizen's waiver of his right to appeal and seek judicial review was not knowing and intelligent, in light of the omissions or misrepresentations of the IJ or other officials. *See, e.g., United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1131 (9th Cir. 2013) (noncitizen who waived right to appeal to BIA can satisfy § 1326(d)(1) and (2) by showing that waiver was not considered and intelligent); *United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012) (IJ "never asked [the noncitizen] whether he wanted to apply [for voluntary departure] and, instead, said that any such application would be futile"); *Arias-Ordonez*, 597 F.3d at 975 (noncitizen was sent order to report for removal that incorrectly stated that no administrative relief was available); *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (noting that "an alien who is not made aware that he has a right to seek relief necessarily has no meaningful opportunity to appeal the fact that he was not advised of that right").

A narrow subset of the court of appeals' cases applying § 1326(d) took the position that a noncitizen seeking to collaterally attack a prior removal was "excused" from satisfying § 1326(d)(1) and (2) when his prior removal suffered from

a particular substantive flaw: He had been deemed subject to removal in light of a prior criminal conviction, but later caselaw had established that the conviction did not qualify as a removable offense. *See, e.g., Ochoa*, 861 F.3d at 1015 (*cited in Palomar-Santiago*, 593 U.S. at 326).

The question presented in *Palomar-Santiago* was carefully phrased to isolate that narrow slice of the court of appeals' caselaw, addressing: "whether a defendant automatically satisfies all three of [the § 1326(d)] prerequisites solely by showing that he was removed for a crime that would not be considered a removable offense under current circuit law, even if he cannot independently demonstrate administrative exhaustion or deprivation of the opportunity for judicial review." *United States v. Palomar-Santiago*, No. 20-437, Pet. for Cert. (2020 WL 5947898) at I (emphasis added). Consistent with this Court's Rule 14.1(a), this question, and questions fairly included within it, was the sole matter the Court addressed in its opinion. The Court answered the question in the negative, holding that the fact that a noncitizen's prior removal order "was premised on a conviction that was later found not to be a removable offense" does not "excuse[]" the noncitizen from satisfying § 1326(d)(1) and (2). *Palomar-Santiago*, 593 U.S. at 323.

Nothing in *Palomar-Santiago* suggested any overruling or limiting of *Mendoza-Lopez*. To the contrary, the Court cited *Mendoza-Lopez* approvingly, and expressly declined to reach a due process argument the noncitizen had raised, noting that it was "outside the scope of the narrow question th[e] Court granted certiorari to decide." *Palomar-Santiago*, 593 U.S. at 324, 328 n.4. Nevertheless, as

explained below, the court of appeals' opinion effectively holds that § 1326(d) and *Palomar-Santiago* have largely nullified *Mendoza-Lopez*.

In *Mendoza-Lopez* this Court held that "fundamental procedural defects" in a removal hearing may render the noncitizen's waiver of appeal not knowing and voluntary, and create a due process right to prevent the removal from being used as the predicate for a reentry prosecution. *Mendoza-Lopez*, 481 U.S. at 841. The court of appeals held that such defects cannot entitle a noncitizen to bring such a collateral attack unless they relate directly to the appeal process. App. A at 19–20. But the defects at issue in *Mendoza-Lopez* did not involve the IJ's explanation of the appeal process—they involved the IJ's discussion of the noncitizens' ability to seek "suspension of deportation." *Mendoza-Lopez*, 481 U.S. at 832 n.4, 840. This did not prevent the Court from holding that these defects "rendered direct review of the [IJ's] determination unavailable to [the noncitizens]," giving rise to a due process right to a collateral attack. *Id*. at 841. Moreover, by noting that an IJ's "substantive error of immigration law" cannot excuse a failure to exhaust, and then categorically rejecting the suggestion that § 1326(d)'s requirements "apply differently to substantive errors than to procedural[] ones" (App. A at 16–17), the court appears to rule out the possibility that *any* defects in a removal hearing can satisfy § 1326(d)(1) and (2).

In its discussion of the significance of the word "available" in § 1326(d)(1), however, the court of appeals recognizes a crucial distinction between substantive and procedural errors, suggesting that an IJ's "misleading statements *as to the*

procedural steps for pursuing administrative remedies" could effectively render such remedies "unavailable" under the statute. App. A at 19–20. The court of appeals stresses that the IJ did not make misrepresentations as to "the existence of a right to appeal or as to the rules or procedural steps governing such appeals." *Id*. at 20. In addition to contradicting the court's insistence that the substance/procedure distinction has no effect upon the application of § 1326(d), the court's reasoning suffers from two independently fatal flaws.

First, it is refuted by *Mendoza-Lopez*, which held that an IJ's misleading statements as to a form of relief from removal (as opposed to appeal from a removal order) "rendered direct review of the [IJ's] determination *unavailable* to [the noncitizens]." *Mendoza-Lopez*, 481 U.S. at 841 (emphasis added). Because the language of § 1326(d) is "taken from [*Mendoza-Lopez*]" (140 Cong. Rec. 9901 (May 11, 1994)) and "precisely tracks the remedy that *Mendoza-Lopez* prescribed" (Gov. Reply Br. in *United States v. Palomar-Santiago*, 2021 WL 1501523 (U.S. No. 20-437) at *18), it is evident that Congress's inclusion of the word "available" in § 1326(d)(1) was intended to codify this understanding of "available" remedies.

Second, the court of appeals' understanding of the nature of "substantive" errors is so capacious that it effectively eclipses the category of "procedural" errors that might hypothetically render an appeal "unavailable." The court of appeals' treatment of the IJ's error in Mr. Portillo's removal hearing—relying on an outdated regulation to tell Mr. Portillo that he had to produce five dollars in order to seek voluntary departure—makes this plain. Per the IJ, the first procedural step Mr.

Portillo had to take, in order to pursue voluntary departure, was to produce five dollars. This purported pay-to-play requirement was presented to Mr. Portillo as the functional equivalent of a filing fee—which, as the court of appeals has recognized, is quintessentially procedural. *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997). It was clearly not a matter calling for the IJ to conduct any legal analysis, or exercise any discretion. Yet the court of appeals characterizes the IJ's misstatement as a "substantive" error regarding "the scope of voluntary departure." App. A at 17–18.

The court of appeals' analysis permits a wide array of errors that would normally be considered procedural to be "recast . . . in [substantive] garb." *Id.* at 17. Indeed, while the court purports to distinguish the PLRA cases on which Mr. Portillo relies on the ground that they involved procedural errors (*id.* at 19–20), they, too, may fall withing the court's elastic definition of "substantive" error.

In *Nunez v. Duncan*, 591 F.3d 1217 (9th Cir. 2010), for example, the court found a prison grievance process "unavailable" in light of the Warden's citation of an inapplicable BOP Program Statement. *Id.* at 1220, 1224–26. By the court's logic in the instant case, however, the Warden "substantively" erred by relying on an inapplicable regulation—just as the IJ did in Mr. Portillo's removal hearing. App. A at 20.

In *Hardy v. Shaikh*, 959 F.3d 578 (3d Cir. 2020), the Third Circuit found a grievance appeal "unavailable" where the inmate's counselor failed to inform the inmate that he had to write the word "appeal" on his grievance in order for it to be

deemed an appeal. *Id*. at 583, 588–90. Under the court of appeals' analysis here, the counselor "substantively" erred by failing to recognize that the "scope of [the grievance appeal process]" is limited to grievances that have the word "appeal" written on them. App. A at 18.

If an IJ were to tell a noncitizen that he could not apply for voluntary departure because he failed to complete Form X (which had been retired twelve years earlier), the court of appeals would find that the IJ "substantively" erred in failing to recognize that the "scope of voluntary departure" extended to noncitizens who had not filled out the phantom form. Under the court of appeals' reasoning, these would all be "substantive" errors that would leave administrative review "available," and thus would not satisfy § 1326(d)(1)'s exhaustion requirement.

In short, the court of appeals' opinion gives the lower courts broad license to sidestep *Mendoza-Lopez*'s due process holding, whether by adopting the court of appeals' categorical declaration that an IJ's procedural errors are incapable of satisfying § 1326(d)(1) and (2), or by employing the court's expansive definition of "substantive" errors.

II. The question presented is exceptionally important.

The question presented in this petition is exceptionally important, for two reasons. First, the court of appeals' holding sharply narrows the circumstances in which a defendant may prevail upon a motion to dismiss a charge of unlawful entry after removal in violation of 8 U.S.C. § 1326(a)—one of the most frequently charged of all federal offenses. *See* U.S. Sent'g Comm'n, Fiscal Year 2021 Overview of

Federal Criminal Cases 18 (April 2022) (11,565 unlawful reentry and unlawful remaining cases in fiscal year 2021). Second, it affects the ability of the thousands of noncitizens removed each year—most of whom lack resources, legal counsel, and English skills—to prevent removal orders that were entered in violation of their fundamental right to due process from later being used as predicates for their criminal prosecution and punishment. *See* Dep't of Homeland Security, Office of Immigration Statistics, 2021 Yearbook of Immigration Statistics 105 (tbl. 39) (Nov. 2022) (237,861 noncitizens removed in 2020; 89,191 noncitizens removed in 2021).

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted on February 26, 2024.

JON M. SANDS
Federal Public Defender

s/ *Daniel L. Kaplan*
*DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
* *Counsel of Record*