No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN GUADALUPE CARDIEL-RUIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Mendoza-Lopez*, 481 U.S. 828, 838-41 (1987), this Court held that an illegal-reentry defendant has a due process right to collaterally attack the removal order underlying his prosecution where defects in the immigration proceeding effectively foreclosed judicial review of that order. Applying this constitutional principle, this Court continued to hold that a noncitizen's waiver of their right to appeal must be "considered" and "intelligent"; this standard is not met when an immigration judge fails to properly advise about eligibility for relief; and the noncitizen's invalid appeal waiver renders direct review (i.e., administrative appeal) "unavailable" and amounts to a deprivation of judicial review. Congress subsequently enacted 8 U.S.C. § 1326(d) to codify *Mendoza-Lopez* and collateral attacks to removal orders.

The question presented is: Under *Mendoza-Lopez*, does a defendant satisfy § 1326(d)(1) (requiring only the exhaustion of "available" administrative remedies) and § 1326(d)(2) (requiring a deprivation of the opportunity for judicial review) when the defendant's waiver of their right to appeal their removal proceeding was not considered and intelligent?

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. Cardiel-Ruiz*, No. 20-CR-00376 CRB (N.D. Cal.) (judgment entered April 13, 2021); *United States v. Cardiel-Ruiz*, No. 21-10139 (9th Cir.) (judgment entered August 13, 2024) (petition for rehearing denied November 19, 2024).

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Petitioner Martin Guadalupe Cardiel-Ruiz ("Cardiel") 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 13, 2024. *See* App. 1a-4a.

OPINIONS BELOW

The court of appeals' decision, *see* App. 1a–4a, is unpublished, but is available at 2024 WL 3770327 (9th Cir. 2024). The district court's order granting petitioner's motion to dismiss the indictment, *see* App. 5a-17a, is reported at 533 F. Supp. 3d 846 (N.D. Cal. 2021).

JURISDICTION

The court of appeals issued its decision on August 13, 2024. App. 1a. The court of appeals issued an order denying Cardiel's petition for rehearing on November 19, 2024. App. 18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment of 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.

Title 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).

From 1961 to 1996, 8 U.S.C. § 1105a(c) provided in relevant part:

> **(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings**
>
> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

STATEMENT OF THE CASE

I. Mr. Cardiel was brought to the United States as an infant and lived here for twenty years. He was removed from the United States in 2011.

Martin Cardiel was brought to the United States when he was three months old, lived in the Bay Area with his parents and siblings for the next twenty years, completed high school, married a U.S. citizen, and became a stepfather to his spouse's two-year-old daughter. ER at 136-37.[1]

In April 2011, while Cardiel was incarcerated at a local jail on a misdemeanor under-the-influence-of-a-controlled-substance conviction, he was interviewed by an immigration agent. *See* ER at 6, 81. A later-written report noted Cardiel's decades-long residency in the country, his under-the-influence conviction, and another

[1] "ER" refers to the Excerpts of Record. *See* Ninth Circuit Rule 30-1. "AOB" refers to Appellant's Opening Brief, "CAB" to Cardiel's Answering Brief, and "CSUP" to Cardiel's Supplemental Brief.

misdemeanor under-the-influence-of-a-controlled-substance conviction from May 2011. *Id.* Cardiel was served a Notice to Appear (NTA) alleging he was a Mexican citizen who entered the country unlawfully and was removable on that ground alone. ER at 83.

In July 2011, Cardiel appeared before an immigration judge (IJ) for removal proceedings along with ten other persons. ER at 6, 86. The IJ first held a "group initial hearing," during which he advised about certain rights, including the right to appeal. ER at 86-89. Regarding that right, the IJ said it meant the noncitizens could appeal "to higher courts" if they disagreed with "the decision of the immigration judge." ER at 89.

The IJ also said he would consider each person for "voluntary departure." ER at 90. Voluntary departure is a form of discretionary relief that allows noncitizens to depart the country voluntarily and at their own expense, thereby avoiding a removal order and the attendant limitations on their ability to apply for admission at a later time. *Dada v. Mukasey*, 554 U.S. 1, 8-12 (2008). However, the IJ did not explain to those at the hearing what voluntary departure was, its benefits, its eligibility requirements, the factors an IJ considers when deciding whether to grant relief, or what must be shown to obtain relief. *See* ER at 90-91. He merely said he would deny voluntary departure if the noncitizen had "a bad criminal record, or a bad immigration record." *Id.*

The IJ subsequently held Cardiel's individual removal hearing. Cardiel did not have an attorney. ER at 6, 92. The IJ determined he was removable as charged. *Id.*

The IJ then began asking questions to determine if Cardiel qualified for any relief from removal. ER at 92. The IJ learned that Cardiel was brought to the United States as an infant, lived here his whole life, had parents and siblings who lived here, recently married a United States citizen, and was the stepfather to her young daughter, who also was a United States citizen. ER at 92-94. After determining that Cardiel's wife had not yet petitioned to obtain him a "green card" (i.e., adjust his status to lawful permanent resident (LPR)), the IJ told Cardiel he had "two choices" regarding relief from removal. ER at 7, 92-94.

The first was seeking cancellation of removal, which the IJ described at length. *Id.* Cardiel's "other choice" was to "ask for a voluntary departure." ER at 95. Regarding that relief, the IJ stated only, "[t]hat avoids a deportation" and allowed him "to go back to Mexico and wait" while his wife filed to adjust his status. ER at 94-95. The IJ still did not explain the eligibility requirements for voluntary departure, that Cardiel met them, the factors relevant to a voluntary-departure determination, how to apply for that relief, what a noncitizen must show to support his application, or the applicable hearing procedures. ER at 6, 14, 95–99. Nor did the IJ fully explain what voluntary departure was. *Id.* Despite the IJ's meager explanation, Cardiel said he wanted voluntary departure: "I'll do that." ER at 7, 95.

After Cardiel expressed his desire to pursue voluntary departure, government counsel told the IJ he had "two controlled substances convictions," but omitted that both were under-the-influence misdemeanors. ER at 95-99, 142. No mention was made of the conviction dates, the code provisions involved, or the sentences; no conviction documents were presented. ER at 95–99, 142. The IJ nonetheless said

the convictions might disqualify Cardiel from cancellation of removal, and that he "probably [was not] going to get voluntary departure." ER at 8. After confirming Cardiel had "drug convictions," government counsel opposed voluntary departure on that basis. ER at 8.

Without further discussion or inquiry, the IJ said, "I'm not going to grant voluntary departure." *Id.* The IJ still had never fully explained what voluntary departure was, its eligibility requirements, that Cardiel met them, the factors relevant to a voluntary-departure determination, or the applicable hearing procedures. *Id.*

The IJ ordered Cardiel's removal to Mexico. ER at 9. Even though Cardiel stated that he wanted voluntary departure, the IJ puzzlingly stated: "Since you didn't really ask for voluntary departure, I won't make any decision about granting or denying it. I'll just make an order that you be deported today to Mexico." *Id.* The IJ asked if Cardiel wanted to appeal "my decision," and he replied, "[n]o." ER at 97.

The IJ's written deportation order also indicated he made no decision about voluntary departure. ER at 103. Cardiel allegedly was removed the next day. *See* ER at 105.[2]

II. Cardiel was charged federally. The district court granted his motion to dismiss the indictment.

In October 2020, a grand jury returned an indictment in the United States District Court for the Northern District of California, charging Cardiel with illegal

[2] Following his July 2011 removal order, Cardiel allegedly re-entered the United States and was removed three times, each based on a reinstatement of the original removal order. ER at 9, 107–09.

re-entry after removal in violation of 8 U.S.C. § 1326. ER at 149–50. The district court had jurisdiction under 18 U.S.C. § 3231.

Cardiel moved to dismiss the indictment, arguing his July 2011 removal order was fundamentally unfair on multiple grounds, *see* § 1326(d)(3), including because the IJ failed to properly advise him about his right to seek voluntary departure (e.g., by explaining the circumstances under which voluntary departure is available and what must be shown to warrant it).[3] ER at 127–32. He also argued the IJ's various errors prejudiced him because he had a plausible claim for voluntary-departure. ER at 132-34.

Regarding the administrative-exhaustion and deprivation-of-judicial-review requirements for a collateral attack on the removal order, *see* § 1326(d)(1)-(2), Cardiel primarily argued his appeal waiver at the removal proceeding was not considered and intelligent, and was, therefore, invalid. ER at 125-26, 134. Cardiel argued that under controlling precedent, a defendant satisfies § (d)(1) and § (d)(2) if his appeal waiver was not considered and intelligent. ER at 125 (cleaned up).[4] He argued his waiver was not considered and intelligent because, *inter alia*, the IJ failed to properly advise him about voluntary departure.

The district court granted Cardiel's motion. App. 5a-17a. The court held the IJ committed multiple due-process violations during the removal proceedings underlying the indictment. App. 11a–16a. Noting Cardiel undisputedly was eligible

[3] Because the July 2011 removal order was invalid, Cardiel argued, the reinstatements of that order could not serve as an element of a § 1326 offense. *See United States v. Arias-Ordonez*, 597 F.3d 972, 982 (9th Cir. 2010).

[4] Cardiel alternatively asserted an invalid waiver excuses satisfaction of § 1326(d)(1)-(2). ER at 125, 134.

for voluntary departure in July 2011, the court held the IJ did not meaningfully advise him about that relief. App. 13a. The court found the IJ failed to explain "the eligibility requirements for voluntary departure"; failed to tell Cardiel he met those requirements; failed to give Cardiel a genuine opportunity to present evidence favoring relief; and improperly communicated that a voluntary-departure application "would be futile" by stating he would not grant relief because of Cardiel's convictions. App. 13a-16a. Finding that Cardiel also had a plausible voluntary-departure claim in July 2011, the court held his removal order was fundamentally unfair under § 1326(d)(3). App. 15a-16a.

Regarding § 1326(d)(1)-(2), the district court explained that an IJ must properly advise a noncitizen about his apparent eligibility for relief from removal. *Id.* (citing *United States v. Gonzalez-Flores*, 804 F.3d 920, 926 (9th Cir. 2015), in turn citing 8 C.F.R. § 1240.11(a)(2)). Discussing Ninth Circuit precedent, the court explained that where the IJ breaches this obligation, the noncitizen need not further prove "exhaustion of administrative remedies under § 1326(d)(1) **because the alien's waiver of the right to administrative appeal was not sufficiently 'considered and intelligent**.'" App. 12a (quoting *Gonzalez-Flores* and *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1015 (9th Cir. 2013)) (cleaned up) (bold added). Additionally, the "breach" and invalid appeal waiver also meant "the alien was necessarily deprived of the opportunity for judicial review under § 1326(d)(2)." App. 12a (citing, e.g., *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)). Because the presiding IJ "breached" his duty to properly advise Cardiel about voluntary departure, and his immigration-appeal waiver was therefore invalid, App.

12a-13a, the court held that Cardiel satisfied § 1326(d)(1)-(2): he was relieved from further proving administrative exhaustion and had shown deprivation of judicial review. App. 15a-17a. The court entered judgment in favor of Cardiel. App. 4a.

The government timely filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit. ER at 157. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

Weeks later, this Court issued its opinion in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021), which overruled a distinct line of Ninth Circuit precedent that entirely "excused" an illegal-reentry defendant from proving the requirements of § 1326(d)(1)-(2) if he had been "removed for an offense" later determined not to "render him removable." *Id.* at 326-27.

III. Appellate Proceedings.

The government's appeal did not dispute that the IJ failed to properly advise Cardiel about voluntary departure, that he had a plausible voluntary-departure claim, or that his removal proceedings were, therefore, fundamentally unfair under § 1326(d)(3). *See* AOB at 7, App. 13a-17a. It instead rested on *Palomar-Santiago*, claiming the district court improperly "excused" Cardiel from satisfying § 1326(d)(1)-(2) under Ninth Circuit precedent. AOB at 7-8. The government broadly proclaimed that the Ninth Circuit's "prior decisions" regarding § 1326(d) were clearly irreconcilable with *Palomar-Santiago* and improperly "excused" illegal-

reentry defendants from meeting § 1326(d)(1)-(2) when an IJ erroneously advised them about discretionary relief. AOB at 12-14.[5]

Cardiel disagreed. Rather than being "excused," Cardiel argued he independently *satisfied* § 1326(d)(1)-(2) under this Court's opinion in *United States v. Mendoza*-Lopez, 481 U.S. 828 (1987), because: (1) the district court correctly held his immigration-appeal waiver was not "considered and intelligent" due to the IJ's inadequate voluntary-departure advisal; and (2) *Mendoza-Lopez* itself held that (a) due process requires a noncitizen's immigration-appeal waiver to be considered and intelligent, (b) this standard is not met where an IJ fails to properly advise the noncitizen about relief from removal, and (c) the noncitizen's invalid appeal waiver renders his administrative remedies "unavailable" and completely deprives him of judicial review. *See* CAB at 17-28, 30-46, 49-54 (discussing *Mendoza-Lopez*). Cardiel further argued that because § 1326(d) was enacted to codify *Mendoza-Lopez*, and the statute must be read in that context, *Mendoza-Lopez* controlled the § 1326(d)(1)-(2) analysis in his case, the Ninth Circuit's prior § 1326(d) precedent was consistent with *Mendoza-Lopez*, and *Palomar-Santiago* did not disturb *Mendoza-Lopez*'s holdings. *Id.*

After appellate briefing was complete, the Ninth Circuit *sua sponte* stayed appellate proceedings pending its resolution of *United States v. Portillo-Gonzalez*, another then-pending appeal which apparently presented similar legal questions.

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[5] Notwithstanding the numerous Ninth Circuit opinions cited by the district court, and the Ninth Circuit's extensive § 1326(d) jurisprudence, the government actually cited only one case, *United States v. Muro-Inclan*, 249 F.3d 1180 (9th Cir. 2001), while roundly proclaiming all of the Circuit's "previous cases excusing defendants" from proving § 1326(d)(1)-(2) were clearly irreconcilable with *Palomar-Santiago*—and then failed to engage in any analysis of *Muro-Inclan*. AOB at 13.

When the *Portillo-Gonzalez* opinion issued, *see* 80 F.4th 910 (9th Cir. 2023), the parties submitted supplemental briefing addressing its effect on the government's appeal in this case.

Cardiel's supplemental brief maintained that *Mendoza-Lopez* controlled the § 1326(d)(1)-(2) analysis here; *Portillo-Gonzalez* did not consider or address *Mendoza-Lopez*'s invalid-appeal-waiver holdings; and his administrative remedies also were unavailable within the meaning of *Ross v. Blake*, 578 U.S. 632 (2016), because the IJ made extraordinarily confusing and misleading statements about Cardiel's ability to appeal. CSUP at 3-5, 8-12.

The Ninth Circuit heard oral argument on August 6, 2024. One week later, the court issued a memorandum disposition reversing the district court. *See* App. 1a-4a. The court's decision was based almost entirely on its prior opinion in *Portillo-Gonzalez* and that opinion's application of *Palomar-Santiago*. Erroneously stating the IJ committed "substantive" error concerning voluntary-departure "eligibility" when the district court actually found procedural errors—failing to inform Cardiel about the eligibility requirements of voluntary departure, failing to tell Cardiel he met those requirements, and improperly communicating that a voluntary-departure application "would be futile"—the court of appeals concluded that Cardiel's argument that he satisfied § 1326(d)(1)-(2) was foreclosed by *Portillo-Gonzalez* and *Palomar-Santiago*. *See* App. 2a.[6] According to the court, the IJ's purported "error on

[6] The court also rejected Cardiel's *Ross*-based argument that an administrative appeal was not "available" under § 1326(d)(1) because of the IJ's misleading statements about Cardiel's right to appeal. App. 3a.

the merits" regarding Cardiel's eligibility for voluntary departure did not render administrative appeal and judicial review of the proceeding unavailable. App. 2a.

Despite Cardiel's repeated claim that *Mendoza-Lopez* controlled the § 1326(d)(1)-(2) analysis because the IJ's failure to properly advise him about relief from removal rendered his immigration-appeal waiver constitutionally invalid, and that invalid appeal waiver rendered his administrative remedies "unavailable" and deprived him of judicial review, the Ninth Circuit did not cite, let alone discuss, *Mendoza-Lopez*. App. 1a-4a. The Ninth Circuit's opinion in *Portillo-Gonzalez*, the primary basis of the court of appeals' decision here, did not consider or address *Mendoza-Lopez*'s invalid-appeal-waiver holdings either. *See* discussion *infra*.

Cardiel subsequently petitioned for panel rehearing and/or rehearing en banc. The court of appeals denied that petition on November 19, 2024. App. 18a.

REASONS FOR GRANTING THE WRIT

I. This Court's opinion in *United States v. Mendoza-Lopez* controls the § 1326(d)(1)-(2) analysis in invalid-appeal-waiver cases. The Ninth Circuit's opinion in *Portillo-Gonzalez*, the basis for its decision here, conflicts with *Mendoza-Lopez*.

A. *Mendoza-Lopez* and direct review of removal proceedings.

Pursuant to 8 U.S.C. § 1326, once a noncitizen has been deported or removed[7] from the United States, it is a crime for that person to re-enter the country without authorization. 8 U.S.C. § 1326(a). *See also Palomar-Santiago*, 593 U.S. at 324 (discussing § 1326). In *United States v. Mendoza-Lopez*, this Court held that a

[7] "What was formerly known as 'deportation' is now called 'removal.'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 n.1 (2006). Immigration-law vocabulary was revamped by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *Id.*

defendant charged with illegal reentry under § 1326 has a Fifth Amendment due process right to collaterally attack the validity of his underlying removal order if defects in the removal proceedings effectively foreclosed judicial review of those proceedings. 481 U.S. at 838-40.

In particular, *Mendoza-Lopez* considered (1) whether the then-present version of § 1326 permitted criminal defendants to collaterally attack a deportation order underlying their prosecution; and (2) if not, whether such an attack was constitutionally required because the administrative immigration order was an element of their present § 1326 prosecution.[8] *See id.* at 832-34. As to the former question, the Court held the text of § 1326 did not permit collateral attacks to underlying deportation orders, and the statute's background did not indicate congressional intent to do so either. *Id.* at 834-37. As to the latter, the government argued that the Constitution did not require the availability of a collateral attack because the noncitizens could have pursued review of their underlying deportation order via the governing direct-review process provided by 8 U.S.C. § 1105a: (1) administrative appeal under 8 C.F.R. § 242.21, followed by (2) a petition for review under 8 U.S.C. § 1105a. *See, e.g.*, *Mendoza-Lopez*, Brief for the United States, 1986 WL 728061 (U.S. 1986), at *3 n.1 ("Respondents could have appealed the immigration judge's order to the Board of Immigration Appeals (8 C.F.R. § 242.21) and then to a federal court of appeals (8 U.S.C. 1105a(a))."); *id.* at *15 ("[U]nder §

[8] Several Courts of Appeals had permitted such collateral attacks by construing § 1326 as requiring a "lawful" deportation as a material element of the offense. *Id.* at 832 & n.6. Others had held such collateral attacks were entirely barred by the statute. *See id.*

1105a, an alien may obtain review of a deportation order by exhausting his administrative remedies and filing a petition for review."). This Court disagreed.

Rather, *Mendoza-Lopez* held that where "defects in an administrative proceeding foreclose judicial review of that proceeding," the Due Process Clause of the Fifth Amendment requires that a criminal defendant be permitted to collaterally attack the proceeding before the resulting "administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 837-38. Applying this constitutional rule to the facts before it, the Court continued to hold the noncitizen-defendants there were denied due process because their waivers of the right an appeal were not "considered" and "intelligent"; the waivers were not "considered" and "intelligent" because of, *inter alia*, the IJ's failure to adequately advise the defendants regarding their ability to seek suspension of deportation (a form of relief from deportation);[9] and the invalid appeal waivers "rendered direct review" of the IJ's decision "*unavailable*" and deprived the noncitizens of judicial review. *Id.* at 839-41 (emphasis added). *See also id.* at 840 ("The [IJ] permitted waivers of the right to appeal that were not the result of considered judgments by [the noncitizens], and failed to advise respondents properly of their eligibility to apply for suspension of deportation. Because the waivers of their rights were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding."); *id.* at 842 (holding noncitizens' deportation proceeding

[9] The IJ's failure to adequately advise about relief from deportation included: (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 relief from deportation worked after one noncitizen asked a question indicating he did not understand it. *Id.* at 832 n.4.

could not "support a criminal conviction" because "respondents were deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them").

Nine years later, Congress enacted 8 U.S.C. § 1326(d) to codify *Mendoza-Lopez*. *See* 140 Cong. Rec. 28,440-41 (Oct. 6, 1994) (Statement of Sen. Smith) (summarizing proposed subsections (1) through (3) [of § 1326(d)] and noting "this language" "is taken directly from" *Mendoza-Lopez* and "is intended ensure minimum due process is followed"); 140 Cong. Rec. 9990-01 (May 11, 1994) (noting same); 139 Cong. Rec. 6324-25 (Mar. 24, 1993) (Statement of Sen. McCollum) (noting same); *see also Palomar-Santiago*, 593 U.S. at 325 ("Congress responded to [*Mendoza-Lopez*] by enacting § 1326(d)."). Section 1326(d) recognizes an illegal-reentry defendant's ability to collaterally attack a predicate removal order, provided: (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* Antiterrorism and Effective Death Penalty At of 1996, Pub. L. No. 104-132, § 441 (Apr. 24, 1996)).

A removal order is "fundamentally unfair" under § 1326(d)(3) when: (a) the noncitizen-defendant's "due process rights were violated by defects in the underlying removal proceeding" and (b) "he suffered prejudice as a result of the defects." *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 (9th Cir. 2004) (cleaned up); *see also, e.g.*, *United States v. Gambino-Ruiz*, 91 F.4th 981, 985 (9th Cir. 2024)

(recognizing same). A defendant is prejudiced by defects in his underlying removal proceeding where there were plausible grounds on which he could have been granted relief from removal. *E.g., United States v. Ramos*, 623 F.3d 672, 684 (9th Cir. 2010); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004).

Meanwhile, the procedural requirements of § 1326(d)(1) and (d)(2) are concerned with (1) the exhaustion of "available" administrative remedies and (2) the deprivation of judicial review. In the context of a noncitizen who an IJ has ordered to be removed, administrative remedies and judicial review are encompassed by direct review of the IJ's removal order.

Direct review of a removal order proceeds in two steps. First, the noncitizen appeals to the BIA. *Palomar-Santiago*, 593 U.S. at 324; 8 C.F.R. 1003.1(b); 8 C.F.R. § 1240.15 (stating "an appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals"). The regulatory provisions governing BIA appeals are set forth in 8 C.F.R. § 1003 *et seq.* *See also* 8 C.F.R. § 1240.15.

Second, if the BIA appeal is unsuccessful, the noncitizen "can seek review of the BIA's decision before a federal court of appeals." *Palomar-Santiago*, 593 U.S. at 324. Title 8 U.S.C. § 1252 governs direct judicial review of removal orders and requires the noncitizen to exhaust "all administrative remedies available to [him] as a matter of right." 8 U.S.C. § 1252(d)(1). In turn, administrative exhaustion is accomplished by "appealing the immigration judge's decision to the BIA"—the first step discussed above. *Palomar-Santiago*, 593 U.S. at 327. *See also, e.g.*, *Jimenez v. Sessions*, 902 F.3d 955, 959 (9th Cir. 2018) (recognizing same).

Direct review of deportation/removal orders has proceeded under these two steps for decades. The current judicial-review and administrative-exhaustion provisions of § 1252(b)-(d) were relocated there in September 1996. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 306, 110 Stat. 3009, 3009-607–12 (Sept. 30, 1996). For the preceding thirty-five years, these provisions resided at 8 U.S.C. § 1105a. *See* 8 U.S.C. 1105a(a)-(c); Pub. L. 87-301, § 5, 75 Stat. 650, 651–53 (Sept. 26, 1961). Indeed, § 1105a(c)'s administrative-exhaustion provision was materially indistinguishable from its successor:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not *exhausted the administrative remedies available to him* as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

8 U.S.C. § 1105a(c) (1961-1996) (emphasis added). *See also* 8 C.F.R. § 242.21 (1964-1996) (directing noncitizens to file appeals with the BIA).

Thus, for more than fifty years, noncitizens have followed the same statutorily prescribed, two-step process for obtaining direct review of an immigration judge's removal/deportation order: (1) filing an appeal with the BIA (thereby exhausting administrative remedies); and (2) seeking review by a federal court. This direct-review process governed when *Mendoza-Lopez* held that a noncitizen's invalid appeal waiver rendered "direct review" of an IJ's decision "unavailable" and amounted to a "deprivation of judicial review." 481 U.S. at 841;[10] *see* pp. 13-14 *supra*. It governed when Congress enacted § 1326(d) to codify *Mendoza-Lopez*. And the same two-step, direct-review process has continued thereafter.

[10] The proceedings underlying *Mendoza-Lopez* took place in 1984. *Id.* at 830.

B. *Mendoza-Lopez* controls the analysis of § 1326(d), a statue enacted to codify its holdings.

Mendoza-Lopez not only established a § 1326 defendant's constitutional right to collaterally attack the removal proceeding underlying his prosecution, but it also controls the question whether a defendant satisfies § 1326(d)(1)'s exhaustion-of-"available"-administrative-remedies requirement and § 1326(d)(2)'s deprivation-of-judicial-review requirement in cases where the appeal waiver a defendant entered during his underlying removal proceedings was not considered and intelligent. The answer is yes.

In holding that a noncitizen-defendant's invalid appeal waiver renders "direct review" of their removal order "unavailable" and deprives them of "judicial review," *Mendoza-Lopez* did so under the same circumstances as here: a direct-review statute that required noncitizens to first exhaust "available" administrative remedies before seeking judicial review. *See* 8 U.S.C. § 1105a(c) (1961-1996). Indeed, the mandatory-exhaustion provision in § 1326(d)(1) is materially indistinguishable from the mandatory-exhaustion provision in 8 U.S.C. § 1105a(c). *Compare* 8 U.S.C. § 1326(d)(1) (requiring defendant's exhaustion of "available" administrative remedies) *with* 8 U.S.C. § 1105a(c) (1961-1996) (requiring noncitizen to exhaust "available" administrative remedies). Both statutes contain the same "built-in exception" requiring the exhaustion only of "available" administrative remedies. *Ross v. Blake*, 578 U.S. 632, 635-42 (2016); *see also United States v. Valdivias-Soto*, 112 F.4th 714, 730 (9th Cir. 2024) (recognizing same "textual exception to mandatory exhaustion" in § 1326(d)(1)).

Accordingly, *Mendoza-Lopez*'s holding that a noncitizen-defendant's invalid appeal waiver renders "direct review" (including administrative appeal) of his immigration proceeding "unavailable" under § 1105a(c), and deprives the noncitizen of judicial review, applies with equal force to the parallel provisions of § 1326(d)(1) (requiring exhaustion of "available" administrative remedies) and § 1326(d)(2) (requiring deprivation of the opportunity for judicial review). Indeed, Congress "did not write [§ 1326(d)] on a blank slate." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 236 (2020). Rather, it expressly enacted § 1326(d) to codify *Mendoza-Lopez* and ensure collateral challenges consistent with that opinion, *see* p. 14 *supra*, and it did so with knowledge about existing law pertinent to that legislation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents[.]"); *United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1065 (9th Cir. 2007) ("Under the rules of statutory construction, we presume that Congress acts with awareness of relevant judicial decisions.") (cleaned up).

Section 1326(d)(1)-(2) "must thus be read in that context." *Guerrero-Lasprilla*, 589 U.S. at 235. When so read, *Mendoza-Lopez* plainly controls the § 1326(d)(1)-(2) analysis in cases where, as here, a noncitizen's waiver of appeal was not considered

and intelligent in light of an IJ's inadequate advisal about relief—and establishes that those subsections are satisfied. *Mendoza-Lopez*, 481 U.S. at 840-42.

C. The Ninth Circuit's precedent was consistent with *Mendoza-Lopez* for years.

For more than two decades after § 1326(d)'s enactment, the court of appeals issued numerous opinions that construed and applied that statute consistent with *Mendoza-Lopez*'s invalid-appeal-waiver holdings. *United States v. Muro-Inclan*, for example, noted an illegal-reentry defendant cannot collaterally attack a removal order "if he validly waived the right to appeal that order," but recognized that if the appeal waiver was not "considered and intelligent," the "exhaustion requirement of 8 U.S.C. § 1326(d) cannot bar collateral review." 249 F.3d at 1182-83 (quoting *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000); citing *Mendoza-Lopez*, 481 U.S. at 840).

United States v. Melendez-Castro, 671 F.3d 950 (9th Cir. 2012), also aligned with *Mendoza-Lopez*. After concluding due process was violated because the noncitizen-defendant was not properly advised about relief from removal (i.e., voluntary departure), the court of appeals explained the defendant's appeal waiver was, therefore, "neither considered nor intelligent," and he was deprived of both administrative remedies and judicial review. *Id.* at 954. *Cf. Mendoza-Lopez*, 481 U.S. at 840-41. *See also, e.g.*, *Ortiz-Lopez*, 385 F.3d at 1204 & n.2 (defendant's appeal waiver not considered and intelligent where IJ failed to advise him about eligibility for voluntary departure; § 1326(d)(1)-(2) requirements met).

Indeed, when surveying its § 1326(d) precedents in *United States v. Gonzalez-Villalobos*, 724 F.3d 1125 (9th Cir. 2013), the court of appeals identified

constitutionally invalid appeal waivers as a procedural violation that consistently satisfied § 1326(d)(1)-(2) because a noncitizen is thereby deprived of "administrative remedies" and "the opportunity to seek judicial review." *Id.* at 1126-31. *See also, e.g.*, *Ramos*, 623 F.3d at 681 (incompetent translation and advisal rendered appeal waiver invalid, § 1326(d)(1)-(2) satisfied).

D. *Palomar-Santiago* left *Mendoza-Lopez* undisturbed.

While much of the Ninth Circuit's § 1326(d) precedent was consistent with *Mendoza-Lopez*, a narrow subset of its cases took the position that a noncitizen collaterally attacking a prior removal was entirely "excused" from satisfying § 1326(d)(1)-(2) when his prior removal suffered from a particular flaw: the IJ deemed the noncitizen removable because of a prior criminal conviction, but later caselaw established the conviction did not qualify as a removable offense. *See United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017). This Court addressed this distinct line of Ninth Circuit precedent in *United States v. Palomar-Santiago*.

There, an illegal-reentry defendant was found removable during immigration proceedings because the IJ determined his DUI conviction qualified as an "aggravated felony"; a subsequent opinion of this Court, however, held the opposite. *Palomar-Santiago*, 593 U.S. at 325 (citing *Leocal v. Ashcroft*, 543 U.S. 1 (2004)). The defendant successfully challenged his removal under Ninth Circuit precedent holding that defendants were "excused from proving the first two requirements of § 1326(d)" if they were not actually convicted of "an offense that made them removable." *Id.* (cleaned up).

This Court granted review to address a narrow question presented by the above-discussed line of Ninth Circuit caselaw: "whether a defendant automatically satisfies all three [§ 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. *Palomar-Santiago*, Pet. for Cert., 2020 WL 5947898, *i (U.S. Oct. 2020) (emphasis added). The Court answered in the negative, holding a noncitizen cannot be "excused" from satisfying § 1326(d)(1)-(2) "just because" his prior removal was premised on a conviction "later found not to be a removable offense," since such an excusal amounted to an "extrastatutory exception" to § 1326(d). *Palomar-Santiago*, 593 U.S. at 323-27.

In so holding, this Court left *Mendoza-Lopez* completely intact. *Palomar-Santiago* cited *Mendoza-Lopez* approvingly, and nothing in this Court's opinion suggested any overruling or limiting of *Mendoza-Lopez*. Indeed, *Palomar-Santiago* did not involve an IJ's failure to properly advise about discretionary relief—the parties agreed the "case does not present the discretionary-relief issue." *Palomar-Santiago*, Brief for the United States, 2021 WL 720352, * 32 (Feb. 22, 2021). Rather, the defendant was an LPR whose immigration proceedings turned on whether he was removable because his DUI was an aggravated felony. *See Palomar-Santiago*, 593 U.S. at 325-26. If it was not, he was not removable and needed no relief; if it was, no discretionary relief was available. Brief for United States, *supra*, at *32. Thus, unlike *Mendoza-Lopez*, *Palomar-Santiago* did not address an appeal waiver that was invalid because an IJ did not properly advise about relief from removal, or

the satisfaction of § 1326(d)(1)'s "built-in" exception to exhaustion when remedies are rendered "unavailable" by such an invalid waiver.

E. *Portillo-Gonzalez* was wrongly decided, failed to consider or address *Mendoza-Lopez*'s invalid-appeal-waiver holdings, and erroneously strays from that opinion.

Despite its years of precedent aligning with *Mendoza-Lopez*'s holding that a noncitizen-defendant's invalid appeal waiver renders administrative and judicial review of his immigration proceedings "unavailable," 481 U.S. at 840-41, the court of appeals strayed from that controlling opinion in *United States v. Portillo-Gonzalez*. There, an illegal-reentry defendant claimed his removal proceedings were fundamentally unfair because an IJ failed to properly advise him about voluntary departure—erroneously stating he was only eligible if he possessed $5 for travel costs—and that because of this due-process violation, he also satisfied § 1326(d)(1)-(2). *Portillo-Gonzalez*, 80 F.4th at 913-14, 917. Specifically, the defendant relied "on a line of [Ninth Circuit] cases" holding that an appeal waiver is invalid if a noncitizen is not properly advised of their eligibility for relief, and argued his invalid appeal waiver meant no administrative appeal was "available" for purposes of § 1326(d)(1), and he was deprived of judicial review for purposed of § 1326(d)(2). *See id*. at 917-18 (citing, e.g., *Gonzalez-Villalobos*).

The court of appeal disagreed, concluding the "line of [Circuit] case authority" the defendant relied on "did not survive" *Palomar-Santiago*. *Portillo-Gonzalez*, 80 F.4th at 913-14. According to *Portillo-Gonzalez*, this followed because *Palomar-Santiago* rejected a purportedly "comparable" argument the defendant there made under *Ross v. Blake*. *Id.* at 918. Although the lower had relied on an "excusal" rule

to hold that § (d)(1)-(2)'s requirements did not bar relief, the *Palomar-Santiago* defendant argued in the alternative that administrative review was not "available" to noncitizens generally because they "cannot be expected to know that the [IJ] might be wrong" in their substantive rulings about removability. *Id.* at 918; *Palomar-Santiago*, 593 U.S. at 327. This Court disagreed, stating an IJ's "substantive error of immigration law" does not "alone" mean "an appeal is unavailable" or "'excuse" noncompliance with § 1326(d)(1). *Portillo-Gonzalez*, 80 F.4th at 918-19 (quoting *Palomar-Santiago*).

Drawing a parallel to the purportedly "comparable" argument in *Palomar-Santiago*, *Portillo-Gonzalez* recast the "gravamen" of the defendant's claim as "substantive [IJ] error" (applying an incorrect legal standard regarding voluntary-departure eligibility)—instead of the procedural error he actually claimed (failing to properly advise about relief from removal)—and stated that under *Palomar-Santiago*, "substantive error" cannot "render further review unavailable" or excuse exhaustion. *Id.* at 918-19 (cleaned up). Applying the same logic (framing the IJ's improper advisal as substantive error), *Portillo-Gonzalez* also rejected defendant's claim that his appeal waiver had been vitiated by the error and his administrative appeal was therefore unavailable. *Id.* at 919. Significantly, even though *Palomar-Santiago* did ***not*** address whether an invalid immigration-appeal waiver renders administrative and judicial review unavailable—as *Mendoza-Lopez* did—*Portillo-Gonzalez* held that *Palomar-Santiago*'s rejection of the above-discussed "comparable" argument abrogated the Ninth Circuit precedent defendant relied upon for his vitiated-appeal-waiver argument. *Id.* at 919.

Portillo-Gonzalez was wrongly decided and is at odds with *Mendoza-Lopez*. Most glaringly, while broadly proclaiming that the Ninth Circuit's invalid-appeal-waiver precedent the defendant relied upon was abrogated by *Palomar-Santiago*, the court of appeals completely failed to recognize or address this Court's directly applicable, invalid-appeal-waiver holdings in *Mendoza-Lopez*. *See* 80 F.4th at 912-20; pp. 13-14 *supra*; CAB at 17-28, 30-42, 52-54.[11] Although Mr. Portillo-Gonzalez's appeal-waiver arguments were based only on circuit precedent,[12] that did not authorize the *Portillo-Gonzalez* court to ignore *Mendoza-Lopez*'s direct application to § 1326(d)(1)-(2). Under *Mendoza-Lopez*, a noncitizen's appeal waiver is not "considered" and "intelligent" when an IJ fails to properly advise him regarding eligibility for relief from removal. 481 U.S. at 841. In cases involving such constitutionally invalid appeal waivers, direct review is ***not*** "available" and the deprivation of judicial review is "complete." *Id.* at 840-42. Because *Mendoza-Lopez*'s invalid-appeal-waiver holdings readily apply to the parallel exhaustion-of-"available"-administrative remedies requirement of § 1326(d)(1) and the deprivation-of-judicial-review requirement of § 1326(d)(2), and because *Palomar-Santiago* left *Mendoza-Lopez* intact, those statutory provisions are satisfied whenever a defendant's immigration-appeal waiver was not considered and intelligent, and therefore, was constitutionally invalid.

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[11] *Portillo-Gonzalez* acknowledged only one *Mendoza-Lopez* holding: that illegal-reentry defendants have a constitutional right to collaterally challenge immigration proceedings that deprived them of judicial review. 80 F.4th at 920.

[12] Portillo-Gonzalez argued he satisfied § (d)(1)-(2) under "circuit precedent" that *Palomar-Santiago* did not abrogate, citing *Mendoza-Lopez* only for general due-process principles—not its invalid-appeal-waiver holdings. *United States v. Portillo-Gonzalez*, Appellant's Opening Brief, 2022 WL 792406, *33-38 (9th Cir. Mar. 10, 2022); *see United States v. Portillo-Gonzalez*, Appellant's Reply Brief, 2022 WL 3130139, *6-11 (9th Cir. July 28, 2022).

The court of appeals' decision in this case repeated *Portillo-Gonzalez*'s complete failure to acknowledge or address *Mendoza-Lopez*'s controlling invalid-appeal-waiver holdings. Characterizing Cardiel's position as arguing that he satisfied § 1326(d)(1)-(2) because the IJ's "failure to properly advise him of his eligibility for voluntary departure rendered further administrative appeal and judicial review 'unavailable,'" the court of appeals simply followed *Portillo-Gonzalez* and its application of *Palomar-Santiago*, and thereby deemed Cardiel's argument "foreclosed." App. 2a. But as Cardiel has consistently argued throughout these appellate proceedings, it was his *constitutionally invalid appeal waiver* that "rendered direct review" (including administrative appeal) of his immigration proceeding "unavailable" and also deprived him of judicial review—just like the defendants in *Mendoza-Lopez*. *See* 481 U.S. at 839-41; CAB at 18-20, 27-31, 33-49; CSUP at 1-5, 8-11. And like the invalid appeal waivers in *Mendoza-Lopez*, Cardiel's appeal waiver was not "considered" and "intelligent" because, *inter alia*, the presiding IJ failed to properly advise him about relief from removal.[13] *See Mendoza-Lopez*, 481 U.S. at 840; CAB at 16-17, 34-38, 60-61; CSUP at 1-4, 8-10. Thus, despite Cardiel's consistent arguments that *Mendoza-Lopez*'s invalid-appeal-waiver holdings controlled the § 1326(d)(1)-(2) analysis in this case, the court of appeals'

[13] Cardiel's appeal waiver did not satisfy *Mendoza-Lopez*'s "considered" and "intelligent" standard for an additional reason: the IJ's exceedingly confusing and misleading statements regarding his right to appeal. Specifically, having initially told Cardiel his appellate rights applied to the IJ's "decision," the IJ expressly stated he was *not* making "any decision" about voluntary departure—and then asked Cardiel only if he wanted to appeal "my decision." ER at 89, 97; *see* discussion *supra*. The IJ's written order also indicated no decision had been made regarding voluntary departure. ER at 103. Together, these statements misled Cardiel about his appeal rights, essentially telling him the issue of voluntary departure was not appealable: there was no "decision" to appeal. CSUP at 11-12. *See also* CAB at 60-61.

decision ignored the constitutionally relevant determination under *Mendoza-Lopez*: whether Cardiel's immigration-appeal waiver was "considered" and "intelligent." *See* App. 2a-4a. Indeed, the court of appeals ignored *Mendoza-Lopez* completely. *See* App. 1a-4a.

As discussed above, *Mendoza-Lopez*'s invalid-appeal-waiver holdings are directly applicable to § 1326(d)(1)'s requirement that a defendant exhaust "available" administrative remedies and § 1326(d)(2)'s requirement that the defendant show a deprivation of judicial review. Indeed, those statutory provisions were expressly enacted to codify *Mendoza-Lopez*, and § 1326(d) must be interpreted consistent with that opinion. Under *Mendoza-Lopez*, the district court correctly determined that Cardiel's immigration-appeal waiver was not "considered" and "intelligent" because the IJ did not properly advise him about relief from removal. *Mendoza-Lopez*, 481 U.S. at 840; App. 12. And under *Mendoza-Lopez*, Cardiel's invalid appeal waiver rendered administrative review "unavailable" under § 1326(d)(1) and amounted to a deprivation of judicial review under § 1326(d)(2). *Mendoza-Lopez*, 481 U.S. at 840-41. The court of appeals' decisions in *Portillo-Gonzalez* and this case, however, impermissibly ignored *Mendoza-Lopez*'s invalid-appeal-waiver holdings instead of following them—and therefore directly conflicts with this Court's controlling precedent.

This Court should grant Cardiel's instant petition and affirm *Mendoza-Lopez*'s continued vitality and direct applicability to collateral challenges under § 1326(d).

II. The question presented is exceptionally important, and this case presents an excellent vehicle to answer it.

Not only are the court of appeals' decisions in *Portillo-Gonzalez* and this case at odds with *Mendoza-Lopez*, but this petition presents an exceptionally important question. Immigration crimes are among the most frequently charged of all federal offenses, with illegal re-entry violations comprising a substantial portion of those offenses. *See, e.g.*, U.S. Sent'g Comm'n, *2023 Annual Report* at 14 (available at https://www.ussc.gov/about/annual-report-2023 (last visited Feb. 6, 2025) [https://perma.cc/F2ND-H9TV] (in fiscal year 2023, "immigration offenses were most common, accounting for 30.0 percent of the total sentencing caseload"); U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at 98-99, fig. I-1 & Table I-1 (Immigration Crimes) (last visited Feb. 6, 2025) (available at https://www.ussc.gov/research/sourcebook-2023) [https://perma.cc/79P5-QRKF] (in fiscal year 2023, 71.1% of immigration offenses (12,820) were sentenced under USSG § 2L1.2, the guideline for unlawfully entering or remaining in the United States). Those numbers are likely to increase over the next several years. *See* U.S. Dep't of Just., *Memorandum from the Attorney General: General Policy Regarding Charging, Plea Negotiations, and Sentencing* (Feb. 5, 2025) at 3, (available at https://www.justice.gov/ag/select-publications) (last visited Feb. 6, 2025) [https://perma.cc/7PNU-YDUJ] (identifying prosecution of criminal immigration-related offenses, including violations of 8 U.S.C. § 1326, as a particular focus). The court of appeals' continued disregard of *Mendoza-Lopez* will therefore impact a significant number of federal criminal cases annually unless it is corrected by this Court.

This case also presents an excellent vehicle to affirm *Mendoza-Lopez*'s application to the § 1326(d)(1)-(2) analyses in invalid-appeal-waiver cases. The government's present appeal does not dispute the district court's holding that Cardiel's removal order was "fundamentally unfair" under 8 U.S.C. § 1326(d)(3). Nor does it contest the district court's predicate conclusions that (1) the IJ failed to properly explain the eligibility requirements for voluntary departure, failed to tell Cardiel he met those requirements, failed to give Cardiel a genuine opportunity to present evidence favoring relief, and improperly communicated that a voluntary-departure application "would be futile" by stating he would not grant relief because of Cardiel's convictions; and (2) Cardiel suffered prejudice because he had a plausible voluntary departure claim. *See* AOB at 7 (stating the government "appeals solely" the district court's § 1326(d)(1)-(2) rulings). Thus, this case squarely presents *Mendoza-Lopez*'s controlling application to the requirements of § 1326(d)(1)-(2).

CONCLUSION

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

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