No. 25-

In the Supreme Court of the United States

ISMAEL ADAN ORTIZ-RODRIGUEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

PETITION FOR A WRIT OF CERTIORARI

SHANE O'NEAL
O'NEAL LAW
101 E. AVENUE B
ALPINE, TEXAS 79830
(432) 538-7070
SHANE@SHANEONEALLAW.COM

Counsel for Petitioner

QUESTION PRESENTED

A noncitizen, unlawfully present in the United States, may be deported through an expedited removal if an immigration officer finds that the noncitizen was convicted of a crime categorized as an aggravated felony. Often, the full process that such a noncitizen receives is an immigration official presenting him with a form that waives his rights to challenge the expedited removal. That form, I-851, informs him that he can contest the removal if he is a United States citizen, lawfully admitted permanent resident, or did not commit the crime alleged. The form does not inform him of his ability to challenge the aggravated felony finding. This case presents a question that has divided the circuits:

> Whether an alien wrongly subject to an expedited removal—due to a mischaracterization of his prior conviction as an aggravated felony—meets the requirements of 8 U.S.C. § 1326(d) by showing that he was misled by the form and would not have otherwise been subject to an expedited removal.

RELATED PROCEEDINGS

United States District Court for the Western District of Texas:

United States v. Ortiz-Rodriguez, No. 4:23-cr-257 (Nov. 3, 2025)

United States Court of Appeals for the Fifth Circuit:

United States v. Ortiz-Rodriguez, 145 F.4th 593 (July 10, 2025)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

In the Supreme Court of the United States

ISMAEL ADAN ORTIZ-RODRIGUEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ismael Adan Ortiz-Rodriguez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

Illegal reentry after deportation, in violation of 8 U.S.C. § 1326, is one of the most frequently charged federal offenses. The overwhelming majority of those charges are brought in district courts located in the Fifth and Ninth Circuit Courts of Appeals. In fiscal year 2025, the Department of Justice reported filing 28,854 illegal reentry cases. Of those 28,854 cases, 10,778 were filed in the

Ninth Circuit and 11,550 were filed in the Fifth Circuit. Meaning, more than 77% of illegal reentry cases are decided under the laws of one of those two courts of appeals. [1]

Those two courts of appeals are deeply divided over how to treat illegal reentry cases where the defendant alleges a defect in the underlying deportation by filing a motion to dismiss under 8 U.S.C. § 1326(d). That division is illustrated most clearly in the case of expedited removals—a type of deportation where a noncitizen is removed with minimal process after having been convicted of a subset of crimes referred to as "aggravated felonies." Due to frequent litigation and opinions changing whether a crime is considered an aggravated felony, noncitizens are often subject to expedited removals for committing a crime that some courts consider an aggravated felony, only for it later to be determined that the crime was not an aggravated felony. Often, the noncitizen would not otherwise have been subject to an expedited removal.

A hallmark of an expedited removal is the lack of process due to a noncitizen subject to it. When an immigration official determines someone is subject to an expedited removal, he serves

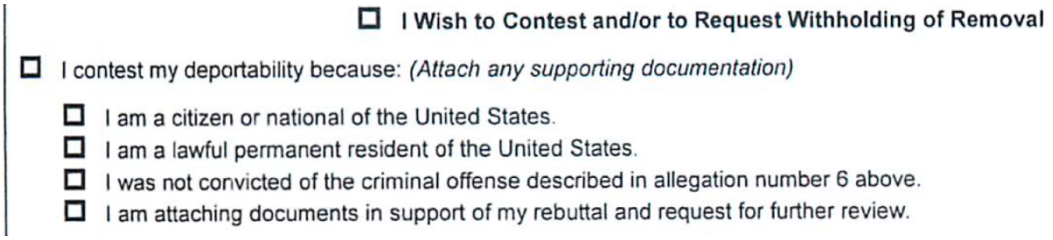
---

[1] Prosecuting Immigration Crimes Report, Department of Justice 8 U.S.C. § 1326 FY25 Monthly Def Filed (September 2025) *available at* https://www.justice.gov/usao/resources/PICReport.

them with a Notice of Intent to Issue a Final Administrative Removal Order, also called Form I-851.

The form explains that the person is accused of being a noncitizen, having entered without inspection, lacking lawful permanent residence, and having been convicted of a crime. The form then charges that the person has been convicted of "an aggravated felony," without further explanation other than a statutory citation of the definition of aggravated felony.

On the second page of the form, there is an option for the person to contest the removal or waive any contest. Critically, the form purports to articulate the grounds for a contest but omits the most important, whether the crime the person committed is accurately characterized as an aggravated felony:



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

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

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

C.A. ROA 82.

If a noncitizen waives those grounds to contest deportability, a deportation order is issued, and he is then deported. If, however, an immigration officer finds that a noncitizen "is not amenable to removal under [8 U.S.C. § 1228(b)], the [officer] shall terminate the

expedited proceedings . . . and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under [8 U.S.C. § 1229a]." 8 C.F.R. § 238.1(d)(2)(iii).

Those procedures bear strongly on what happens if the noncitizen later re-enters, attempts to re-enter, or is found in the United States. He can then be charged with illegal reentry under 8 U.S.C. § 1326. Because the prior deportation is an element of that crime, both the Constitution, [2] and the statute, 8 U.S.C. § 1326(d), authorize him to challenge the underlying order of deportation. The statute permits the noncitizen to collaterally attack the deportation order if he can show that (1) he exhausted any administrative remedies available;[3] (2) the deportation proceedings at which the order was issued improperly deprived him of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d)(1)–(3).

---

[2] *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

[3] Because a noncitizen subject to an expedited removal cannot appeal to an immigration judge or the Board of Immigration Appeals, he does not have any administrative remedies to exhaust. *Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013); *see also United States v. Morales-Rodriguez*, 744 F.Supp.3d 1036, 1047 (S.D. Cal. Aug. 13, 2024) ("The Ninth Circuit has recognized that a Notice of Intent and the accompanying Certificate of Service do not provide an 'administrative . . . procedure' to contest the legal validity of an alleged aggravated felony.").

It is over the application of this test than a split has emerged. The Ninth Circuit has found that Form I-851's exclusion of the ability to contest the aggravated-felony determination deprives the noncitizen of the opportunity for judicial review because it misleads him about its availability. "[A]lthough the Notice of Intent described the window in which Valdivia-Flores could respond to the charges against him or file a petition for judicial review, it did not explicitly inform him 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. The list of options available to 'check off' did not include an option to contest the classification of the conviction as an aggravated felony . . . ." *United States v. Valdivia-Flores*, 876 F.3d 1201, 1206 (9th Cir. 2017) *overruled on other grounds by Alfred v. Garland*, 64 F.4th 1025 (9th Cir. 2023)).

In this case, the Fifth Circuit explicitly rejected that conclusion and broke with the Ninth Circuit. The Fifth Circuit wrote, "*Valdivia-Flores* is inconsistent with our precedents, and we decline to follow it." *United States v. Ortiz-Rodriguez*, 145 F.4th 593, 603 (5th Cir. 2025).

The circuits are further divided over whether an expedited removal based on an erroneous aggravated felony determination is fundamentally unfair. In *Valdivia-Flores*, the Ninth Circuit held that because the defendant's conviction did not qualify as an aggravated felony, it could not support the asserted basis for his removal, making the entry of the order of removal fundamentally unfair. *Valdivia-Flores*, 876 F.3d at 1201. Here, again, the Fifth Circuit explicitly rejected the Ninth Circuit's approach, "With great respect to our sister circuit, we decline to adopt the Ninth Circuit's approach." *Ortiz-Rodriguez*, 145 F.4th at 606.

Due to this split in the circuits, identically situated defendants charged with § 1326(d) receive dramatically different results depending on where the charges are brought. In the Ninth Circuit, when a person is charged with an illegal reentry based on an erroneous expedited removal, the case is dismissed. *See, e.g.*, *United States v. Gutierrez-Lopez*, _ F. Supp. 3d _, 2025 WL 2004693 (E.D. Wash. Jul. 17, 2025).[4] Here Ortiz-Rodriguez's case was not dismissed; instead, he was convicted of illegal reentry and

---

[4] *See also United States v. Morales-Rodriguez*, 744 F. Supp. 3d 1036 (S.D. Cal. Aug. 13, 2024); *United States v. Ledezma-Mejia*, 2023 WL 4053577 (D. Or. Jun. 16, 2023); *United States v. Castanon-Sanchez*, 2023 WL 3601043 (D. Nev. May 22, 0223); *United States v. Sam-Pena*, 602 F.Supp.3d 1204 (D. Ariz. May 6, 2022); *United States v. Rosas-Ramirez*, 2019 WL 2617096 (N.D. Cal. Jun. 26, 2019).

sentenced to "fifty-one months' imprisonment." *Ortiz-Rodriguez*, 145 F.4th at 599. In another Fifth Circuit case dealing with an identically situated defendant, the defendant was sentenced "to 27 months' imprisonment." *United States v. Cortez-Zepeda*, Case No. 24-50418, 2025 WL 1904482, at *2 (5th Cir. Jul. 10, 2025).

Further, this issue is unlikely to be resolved without the Court's intervention. The district courts in the Ninth Circuit have continued to apply the same analysis, despite this Court's decision in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021). As one district court wrote, "The Supreme Court's decision in *Palomar-Santiago* does not undermine *Valdivia-Flores*'s rule regarding the requirements for a considered and intelligent waiver of the right to judicial review." *Gutierrez-Lopez*, 2025 WL 2004693, at *5.

Though *Gutierrez-Lopez* was decided in July of 2025, the government has not pursued an appeal to urge the Ninth Circuit to revisit *Valdivia-Flores*. *See United States v. Gutierrez-Lopez*, Case No. 25-5180, DktEntry 5, "Appellant United States' Motion to Dismiss Appeal" (9th Cir. Sept. 24, 2025) ("Having further considered the matter and having consulted with the Department of Justice, the United States now voluntarily foregoes its appeal of the district court's order dismissing the indictment); *see also See United States v. Gutierrez-Lopez*, Case No. 25-5180, DktEntry 6,

Order (9th Cir. Oct. 6, 2025) (granting voluntarily dismissal of appeal).

OPINION BELOW

The Fifth Circuit's published opinion is reported at 145 F.4th 593 and reproduced here at App. 1a–22a.

JURISDICTION

The Fifth Circuit entered its judgment on July 23, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V.

Section 1326 of Title 8 of the United States Code provides, in relevant part:

(a) . . . any alien who—has been . . . deported . . . and thereafter enters, attempts to enter, or is at any time found in, the United States . . . shall be guilty of a felony . . . .

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the detention order descripted in subsection (a)(1) . . . 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

A. Legal background.

Congress has made it a crime for a noncitizen to enter, attempt to enter, or be found in the United States after having deported, unless the Attorney General has consented to his reapplying for admission. 8 U.S.C. § 1326. This crime is commonly referred to as "illegal reentry."

In its original version, § 1326 did not contain a statutory provision to permit "challenges to deportation orders in proceedings under § 1326." *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987). This Court, however, held that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *Id.* (emphasis original). Thus, "where the defects in an administrative proceeding foreclose judicial review of that

proceeding . . . review [must] be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense." *Id*. at 838–39.

The Court's holding in *Mendoza-Lopez* caused Congress to pass 8 U.S.C. § 1326(d), creating a statutory mechanism to bring a collateral attack on an underlying deportation order. *United States v. Palomar-Santiago*, 593 U.S. 321, 324 (2021). Section 1326(d) requires a noncitizen to show that he (1) exhausted any administrative remedies available against the order; (2) that the order was issued at proceedings which improperly deprived him of judicial review, and (3) that the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d).

B. Proceedings below.

Ortiz-Rodriguez moved to the United States with his family in 1997, when he was four years old. C.A. ROA 170–76. "In February 2017, Ortiz-Rodriguez pleaded guilty in Texas state court to 'Evading Arrest or Detention' with a vehicle, a third-degree felony." *Ortiz-Rodriguez*, 145 F.4th at 597 (citing Tex. Penal Code § 38.04). He was sentenced to two years' imprisonment. *Id*.

While he was imprisoned, Ortiz-Rodriguez was visited by an immigration official who served him with a Notice of Intent to Issue a Final Administrative Removal Order. C.A ROA 82–83. The

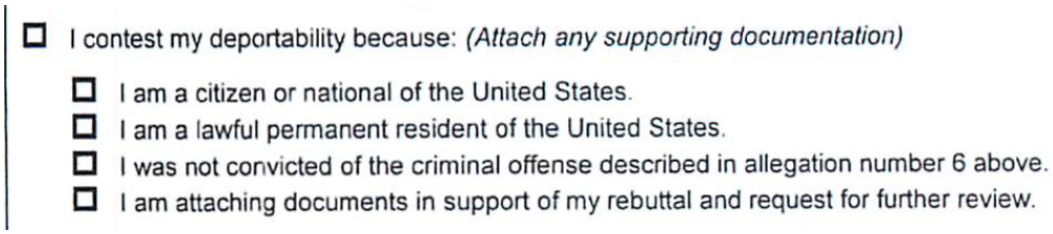
notice first stated a series of allegations: that Ortiz-Rodriguez (1) was not a citizen of the United States, (2) was a citizen of Mexico, (3) entered the United States near El Paso, Texas, in 1999, (4) entered without being inspected, (5) was not lawfully admitted for permanent residence, and (6) was convicted on February 22, 2017, of evading arrest with a motor vehicle. C.A. ROA 82.

In a separate paragraph, the form "charged" that Ortiz-Rodriguez had been convicted of an aggravated felony in violation of 8 U.S.C. § 1101(a)(43)(F). Though it did not provide an explanation, the statutory citation implied that the immigration official believed Oritz-Rodriguez's evading arrest conviction was an aggravated felony because it was a crime of violence as defined in 18 U.S.C § 16. C.A. ROA 82.

On a second page, an immigration officer signed that he had served the form on Ortiz-Rodriguez on October 13, 2017, at 8:45. The form gave Ortiz-Rodriguez the ability "to contest and/or to request withholding of removal" or to not "contest and/or to request withholding of removal." C.A. ROA.83. Ortiz-Rodriguez's form has his signature on a line indicating that he received the form, the boxes checked indicating that he did not wish to contest or request withholding of removal, and his signature on the line below the

option to waive the ability to contest or request withholding of removal. C.A. ROA 83.

Importantly, in the section that gave Ortiz-Rodriguez the ability to challenge his deportation, the form permitted him to challenge his deportability only on the grounds that he was a citizen, that he was a permanent residence, or that he was not convicted of the crime described on the first page.


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

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

C.A. ROA 83. It is also worth noting that the immigration officer documented serving the form on Ortiz-Rodriguez and obtaining his signature within the span of a minute. C.A. ROA 83.

An immigration officer later prepared a final administrative removal order that was served on Ortiz-Rodriguez on January 8, 2018. C.A. ROA 94. Ortiz-Rodriguez was deported to Mexico on foot on January 10, 2018. C.A. ROA 96. Prior to the commencement of this case, Ortiz-Rodriguez illegally re-entered the United States twice, in 2019 and 2020. Both times he pleaded guilty without raising a challenge and was deported pursuant to a reinstatement of the original administrative removal order. C.A. ROA 97–104.

This case began when, in May 2023, Border Patrol arrested Ortiz-Rodriguez while he walked along a highway. C.A. ROA 171. The government charged him with violating 8 U.S.C. § 1326 because he had previously been deported. C.A. ROA 22. Ortiz-Rodrigues moved to dismiss, collaterally challenging his previous deportations. C.A. ROA 46–68.

The district court denied the motion. In a stipulated bench trial, the district court found Ortiz-Rodriguez guilty of illegal reentry and sentenced him to 51 months' imprisonment.

Ortiz-Rodriguez appealed to the Fifth Circuit where he raised solely that the district court had erred by denying his motion to dismiss. In a divided opinion, the Fifth Circuit found that Ortiz-Rodirguez "had not satisfied" the requirements of 18 U.S.C. "(d)(2)or (d)(3), so his challenge fails." *Ortiz-Rodriguez*, 145 F.4th at 599. The Fifth Circuit held Oritz-Rodriguez had failed to satisfy (d)(2) because form I-851 adequately advised him of his right to judicial review, meaning that his waiver of that right was knowing and voluntary. *Id*. at 601–02.

In dissent, Judge Douglas focused on the three boxes, outlining Oritz-Rodriguez's right to appeal, noting that "read together, one could reasonably believe that he has a right to petition for review, but only on the three factual grounds identified by the checkboxes."

Id. at 614 (Douglas, J., dissenting in part). Judge Douglas concluded that the "fundamentally misleading and deficient form" combined with Ortiz-Rodirguez's lack of legal counsel and inability to appear before an immigration judge showed that his "waiver of the right to seek judicial review was not considered and intelligent." *Id.* at 615.

The Fifth Circuit continued to evaluate whether Ortiz-Rodriguez satisfied § 1326(d)(3). *Id.* at 609–10. The majority held that the existence of the right to appeal, regardless of the misleading form or the immigration judge's error in determining that Ortiz-Rodriguez had been convicted of an aggravated felony, was sufficient to show that "Ortiz-Rodriguez was not deprived of due process." *Id.* at 609. The majority also held that Ortiz-Rodriguez had not shown prejudice because he was legally deportable, under Fifth Circuit law at the time of his removal. *Id.* at 609–10.

In dissent, Judge Douglas urged that Ortiz-Rodirguez had shown that he was deprived of due process because his "removal order was premised upon a conviction later determined not to be an aggravated felony," which "renders the order defective." *Id.* at 615–618 (Douglas, J., dissenting in part). Judge Douglas ultimately concurred in part; she agreed with the majority that

Ortiz-Rodriguez, though deprived of the opportunity for judicial review and due process "suffered no prejudice." *Id*. at 615.

Both the majority and dissent referred heavily to an unpublished decision, also from the Fifth Circuit, issued thirteen days before *Ortiz-Rodriguez*. *United States v. Cortez-Zepeda*, No.24-50418, 2025 WL 1904482 (5th Cir. July 10, 2025). That decision was also divided with Judge Dennis writing a dissent. *Id*. at *4–5. Cortez-Zepeda has sought and received an extension of time to file a petition for a writ of certiorari in this Court. *Andis Noe Cortez-Zepeda, Applicant v. United States*, Case No. 24-50418 (Oct. 7, 2025) (order extending time to file until November 7, 2025).

REASONS FOR GRANTING THE PETITION

I. The circuits are divided over a case-dispositive issue: whether a person erroneously subject to an expedited removal, as an aggravated felon, who was not advised of his right to challenge that categorization, can be convicted of illegal reentry in reliance on that removal.

The Fifth and Ninth Circuits have come to an acknowledged split over how to treat a person charged with illegal reentry who was subject to an expedited removal as an aggravated felon. If an illegal reentry defendant can show that he was subject to an expedited removal, using form I-851, and that expedited removal was authorized only by a conviction for a crime erroneously

considered an aggravated felony, he has met the requirements of 8 U.S.C. § 1326. The Fifth Circuit has reached the opposite conclusion.

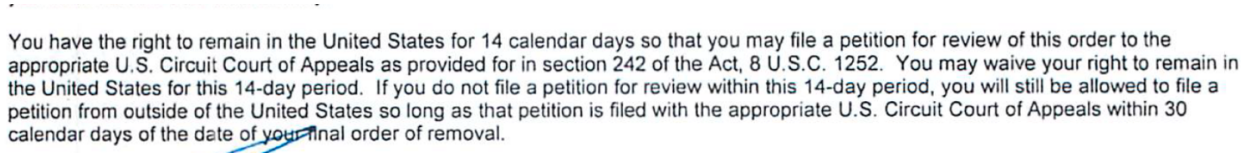
A. The Fifth and Ninth Circuits disagree about whether Form I-851 deprives a noncitizen of judicial process under 8 U.S.C. § 1326(d)(2)

In *Mendoza-Lopez*, this Court found that a deportation proceeding deprived noncitizens of judicial review because, during the proceeding, the noncitizens executed "waivers of their rights to appeal" that "were not considered or intelligent." 481 U.S. at 840.

The Fifth and Ninth Circuits agree that a noncitizen's waiver of his right to seek judicial review of an expedited removal must be considered and intelligent. *See Oritz-Roriguez*, 145 F.4th at 600 (finding that Oritz-Rodriguez failed to meet § 1326(d)'s requirements because "he has not shown that any waiver of the right to appeal was unknowing or involuntary"); *Valdivia-Flores*, 876 F.3d at 1205 ("The government must show by clear and convincing evidence that the waiver was valid, and it may not

simply rely on the signed document purportedly agreeing to the waiver.").[5]

The dispute between the Fifth and Ninth Circuits hinges on two portions of a two-page form, the I-851.



You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

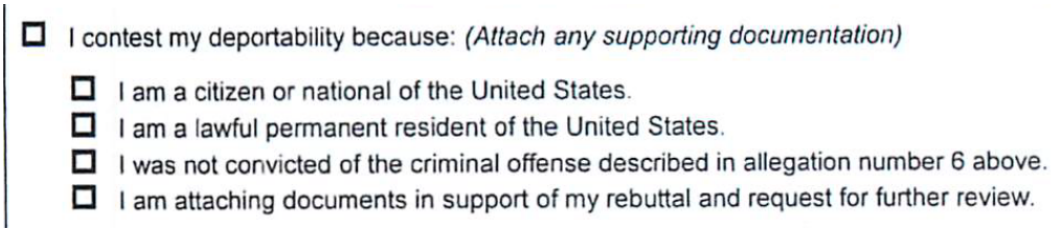
C.A. ROA 82. On the first page, in the last paragraph, in rather small and inconspicuous type, the form informs a noncitizen that he has "the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the

---

[5] The Fifth Circuit located the crux of its disagreement with the Ninth Circuit on a burden difference, writing "the analysis in *Valdivia-Flores* is based on an evidentiary burden that is reversed in this circuit. We place the burden on the 'defendant to show that [a] stipulation and waiver was invalid.' By contrast, *Valdivia-Flores* requires the Government to show by clear and convincing evidence that the waiver is valid . . . ." *Id.* at 603 (quoting *United States v. Hernandez Velasquez*, 120 F.4th 1294, 1297 (5th Cir. 2024)). As Judge Douglas explained in her partial dissent, "the majority places great weight on the differing evidentiary approaches among our circuits. But even accounting for these differences, *Valdivia-Flores* addresses the crux of the issue presented here today: a fundamentally misleading and deficient form." *Id.* at 615; *see also Cortez-Zepeda*, 2025 WL 1904482, at *4 (Dennis, J, dissenting) ("Admittedly the Ninth Circuit places the burden on the government to prove the waiver was *valid*, while the Fifth Circuit places it on the defendant to prove the waiver was *invalid*. But even placing the burden on Cortez-Zepeda, he has carried it."). In sum, Ortiz-Rodriguez urges that he has met the burden to show a deprivation of judicial review by producing the form as well as evidence that he was subject to expedited removal without the guidance of an attorney.

appropriate U.S. Circuit Court of appeals." C.A. ROA 63. The form also says the petition can be filed from outside the United States. *Id.*

On the second page of the form, the page that contains the waiver, the form gives the noncitizen three options for contesting his removal, by showing (1) that he is a citizen, (2) that he is a lawful permanent resident, or (3) that he was not convicted of the offense described on the first page:


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

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

C.A. ROA 83. Neither portion of the form explains to the noncitizen that he has the ability, in the relevant Circuit Court of Appeals to challenge the determination that his crime of conviction legally qualifies as an aggravated felony.

The Ninth Circuit and two judges on the Fifth Circuit read these two portions of the form as showing that a noncitizens "waiver of the right to seek judicial review was neither considered nor intelligent. *Valdivia-Flores*, 876 F.3d at 1206. The Ninth Circuit notes, "although the Notice of Intent described the window in which Valdivia-Flores could respond to the charges against him or file a

petition for judicial review, it did not explicitly inform him 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 boxes suggested just the opposite—that removability could only be contested on factual grounds. The list of options available to 'check off' did not include an option to contest the classification of the conviction as an aggravated felony, and the only check box relevant to the conviction itself only allowed Valdivia-Flores to contest that he 'was not convicted of the criminal offense described.' The forms deficiencies are magnified because Valdivia-Flores was not represented and never had the benefit of appearing before an immigration judge, who, we presume, would have adequately conveyed both his appeal options and the finality associated with waiving appeal." *Id.* at 1205–06; *see also Cortez-Zepeda*, 2025 WL 1904482, at *5 (Dennis, J., dissenting) ("Logically, the form's delineated reasons for filing an appeal should explain how a defendant . . . can pursue the appeal described on the first page of the form. Yet none of those listed options apply to Cortez-Zepeda. Although he was convicted of the 'criminal offense described in allegation number 6 above,' nowhere does the form indicate that he could challenge the classification of that crime as an aggravated felony."); *Ortiz-Rodriguez*, 145 F.4th at 613 ("Those

three checkboxes offer only factual grounds for contesting removal, and a legal challenge to the aggravated-felony classification of his evading-arrest conviction plainly does not fall within any of the enumerated options.").

Two panels of the Fifth Circuit have found form I-851 sufficient to constitute a knowing and intelligent waiver of a noncitizens right to seek judicial review of an expedited removal. In *Oritz-Rodriguez*, the Fifth Circuit wrote that the "first page of the Notice of Intent, located above the checkboxes that permitted Ortiz-Rodirguez to admit or contest removability, advised him that he had other options and rights. The page stated he had the right to seek counsel from a 'list of available free legal services provided to him.' It also stated he had the right to respond to the charges within thirteen calendar days and that his response could request, for good cause, an extension of time, to rebut the charges . . . The page further stated he could file a petition for review in a United States Court of Appeals." 145 F.4th at 604; *see also Cortez-Zepeda*, 2025 WL 1904482, at *4 ("The Notice makes clear that 'charge' refers not to the factual 'allegations,' but rather to the legal conclusion that Cortez-Zepeda was deportable because he committed an aggravated felony.'").

This Court should grant the petition to resolve this clear divide between the Fifth and the Ninth circuits.

B. The Fifth and Ninth Circuits also disagree about whether an entry of an order erroneously premised on an aggravated-felony determination is fundamentally unfair.

The courts of appeals also disagree about whether a noncitizen erroneously subject to an expedited removal has shown that the entry of that removal order "was fundamentally unfair." 8 U.S.C. § 1326(d)(3).

The Ninth Circuit holds that a person meets this standard if he can "show that it was plausible that he would have received some form of relief from removal had his rights not been violated in the removal proceedings." *Valdivia-Flores*, 876 F.3d at 1206. The Ninth Circuit engages in a straightforward application of the categorical approach to determine whether the underlying conviction was an aggravated felony. *Id.* at 1206–10. If the conviction "does not qualify as an aggravated felony under the categorical approach, it cannot support the asserted basis for [a noncitizen's expedited] removal." *Id.* at 1210. The Ninth Circuit then concludes that the person was "prejudiced from his inability to seek judicial review for that removal." *Id.* If, however, the government can show that a separate conviction that actually did qualify as an aggravated

felony supported the expedited removal, the Ninth Circuit finds that the noncitizen did not suffer prejudice.

The Fifth Circuit, here, disagreed holding that "fundamental unfairness is a question of procedure, which is not altered by later substantive changes in the law" and because "[t]he right to appeal the determination of whether a conviction is an aggravated felony as a substantive matter provides due process." 145 F.4th at 609. The Fifth Circuit further concluded that a noncitizen erroneously deported as an aggravated felony does not suffer prejudice if "he was legally deportable under then-existing Fifth Circuit precedents." *Id.* at 610. The Fifth Circuit's conclusion splits with a related Tenth Circuit holding that, "Decisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law always meant." *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005) (citing *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312–13 (1994)).

* * *

The two circuits that handle nearly 80% of illegal reentry charges, the most-frequently charged federal offense, split on two dispositive issues. Those splits mean a defendant charged in the Ninth Circuit has his felony charges dismissed and faces only a misdemeanor punishable by up to six months imprisonment. 8

U.S.C. § 1325. But, in the Fifth Circuit, an identically situated defendant faces up to ten years' incarceration, 8 U.S.C. § 1326(b)(1); in the case of Ortiz-Rodriguez, he was sentenced to 51 months in prison.

II. These issues are not resolved by this Court's decision in *Palomar-Santiago*.

This Court decided a similar though notably distinct issue in *United States v. Palomar-Santiago*. That case did not involve an expedited removal but rather "a hearing before an immigration judge." *Palomar-Santiago*. 593 U.S. at 324. Thus, the noncitizen's challenge there did not focus on a procedural deficiency, like not being adequately informed of his right to appeal, but instead hinged on the immigration judge's erroneous determination that a prior conviction made him removable. 593 U.S. at 327.

This Court correctly held that "the substantive validity of the removal order is quite distinct from whether a noncitizen exhausted his administrative remedies (by appealing the immigration judge's decision to the BIA) or was deprived of judicial review (by filing a petition for review of a BIA decision with a Federal Court of Appeals."). *Id*.

This issue is critically distinct. Ortiz-Rodriguez urges the immigration official's error only to show that the entry of the order of expedited removal was fundamentally unfair because he was not

convicted of an aggravated felony and misled in his ability to assert that defense. To show a deprivation of judicial review, Ortiz-Rodriguez asserts a basis completely distinct from that asserted in *Palomar-Santiago*: that an immigration official misled him into waiving his right to seek judicial review by presenting him, in a proceeding in which he was not represented by counsel, with the misleading I-851 form. As Judge Douglas explained, the Fifth Circuit "majority opinion's reliance upon *United States v. Palomar Santiago*, is . . . misplaced. . . . The majority opinion extends the Court's reasoning in *Palomar-Santiago* to § 1326(d)(3), noting that like § 1326(d)(1) and (2), the fundamental fairness prong presents a question of procedure, not substance. . . . Ortiz-Rodriguez does not dispute this point. The question he presents is whether he has satisfied those mandatory prerequisites for collateral attack of his removal order. The *Palomar-Santiago* Court did not consider the question because the narrow question the Court granted certiorari to decide asked only whether the defendant was excused from satisfying the first two statutory requirements of § 1326(d)." *Ortiz-Rodriguez*, 154 F.4th at 617 (Douglas, J., dissenting).

Indeed, courts within the Ninth Circuit have continued to apply *Valdivia-Flores* despite this Court's holding in *Palomar-Santiago*. As Judge Pennell has explained, "The impact of

Palomar-Santiago on the waiver context is that misadvice as to an immigrant's eligibility for relief from deportation will not render a waiver of judicial review invalid. After all, the nature of the right of judicial review is to correct a decision-maker's substantive errors. But if an immigration officer or an immigration form misleads an immigrant about the availability to apply for relief, then the Government cannot carry its burden of establishing a waiver of the right to review." *Gutierrez-Lopez*, 2025 WL 2004693, at *6.

III. This is a critically important and recurring question.

The Court should grant the petition because the question is critically important and recurring. This Court has decided an array of cases that have caused the lower courts to re-evaluate whether certain crimes should properly be considered "aggravated felonies." *See, e.g., Borden v. United States*, 593 U.S. 420 (2021)*; Sessions v. Dimaya*, 584 U.S. 148 (2018). As was the case here, an untold number of noncitizens were likely deported pursuant to expedited removals using the form I-851 and some of them are likely to return and face criminal charges of illegal reentry. *See Ortiz-Rodriguez*, 145 F.4th at 615 (Douglas, J., dissenting in part) ("Ortiz-Rodriguez is not alone in claiming confusion stemming from the Notice of Intent's limited checkboxes. Indeed, this court

grappled with the identical issue in a recently decided unpublished decision.").

Courts within the Ninth Circuit continue to apply *Valdivia-Flores* and dismiss cases where the government seeks a conviction for illegal reentry in reliance on an expedited removal involving form I-851 and an erroneous aggravated felony determination. *Gutierrez-Lopez*, 2025 WL 2004693, at *6; *Morales-Rodriguez*, 744 F. Supp. 3d at 1058; *Ledezma-Mejia*, 2023 WL 4053577, at *4; *Castanon-Sanchez*, 2023 WL 3601043, at *5; *Sam-Pena*, 602 F.Supp.3d at 1212.

With this published opinion, that avenue of relief—that leads dismissal of felony charges—is foreclosed for the nearly 40% of illegal reentry defendants charged in courts in the Fifth Circuit.

IV. This case is an ideal vehicle for addressing this question.

This case presents an ideal vehicle for addressing whether a noncitizen erroneously subject to an expedited removal, through form I-851, may bring succeed in a motion to dismiss based on 8 U.S.C. § 1326(d). The case cleanly presents a purely legal issue. There are no jurisdictional problems, factual disputes, or preservation issues.

Oritz-Rodriguez thoroughly briefed the issue in the district court and the court of appeals. The district court squarely

addressed both challenges, C.A. ROA 113–25, as did the Fifth Circuit in a precedential opinion. App. 1a–22a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SHANE O'NEAL
O'NEAL LAW

Counsel for Petitioner

October 21, 2025