No. 25-

In the Supreme Court of the United States

ANDIS NOE CORTEZ-ZEPEDA, *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

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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. Cortez-Zepeda, No. 7:23-cr-190 (Feb. 22, 2024)

United States Court of Appeals for the Fifth Circuit:

United States v. Cortez-Zepeda, No. 24-50418 (July 10, 2025)

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Petitioner Andis Noe Cortez-Zepeda, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

This case presents a clear split between the Fifth and Ninth Circuits over whether a substantial group of people charged with violating 8 U.S.C. § 1326 have a complete defense to the charge or no defense at all. That split is most clearly defined by comparing the Ninth Circuit's decision in *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)), with the Fifth Circuit's decision in *United States v. Ortiz-Rodriguez*, 145 F.4th 593, 600–05 (5th Cir. 2025). A petition for this Court to review *Ortiz-Rodriguez* currently pends. *Ortiz-Rodriguez v. United States*, Case No. 25-5962 (Filed Oct. 21, 2025).

This case, decided two weeks before *Ortiz-Rodriguez*, differs from *Ortiz-Rodriguez* in two important ways that may cause the Court to decide it is the better vehicle. First, in this case, the Fifth Circuit chose only to address 8 U.S.C. § 1326(d)(2), one of a three-part test that Cortez-Zepeda would have to meet to successfully challenge his deportation. *Appendix*, at 1a–4a. In *Ortiz-Rodriguez*, however, the Fifth Circuit addressed, and split with the Ninth Circuit, on both of the prongs of the test that were genuinely disputed. 145 F.4th at 600–11.

Second, the crux of the underling error in the deportation proceeding that both defendants raise is that they were subject to expedited removals because they were found to have committed aggravated felonies. Cortez-Zepeda had committed the Texas crime of sexual assault, which the immigration official executing his expedited removal determined qualified as an aggravated felony. But, the Fifth Circuit's "binding precedent at the time made clear that it categorically did not." *Appendix*, at 4a–6a (Dennis, J.,

dissenting). In *Ortiz-Rodriguez*, however, the defendant had been subject to an expedited removal that involved a correct application of Fifth Circuit precedent *at the time* of his removal, though this Court would soon reverse that precedent. As the Fifth Circuit explained, "Ortiz-Rodriguez is correct that Texas evading arrest is not *currently* an 'aggravated felony,' at least under 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16(b). However, at the time of Ortiz-Rodriguez's October 2017 expedited removal proceedings (and his January 2018 deportation), his evading arrest conviction was considered to be an aggravated felony under our decision in *United States v. Sanchez-Ledezma*." 145 F.4th at 601 (citing *United States v. Sanchez-Ledezma*, 630 F.3d 447, 451 (5th Cir. 2011) *abrogated by Sessions v. Dimaya*, 584 U.S. 148, 161–62 (2018). This complicating factor will be explained in more detail in Section IC, *infra*.

Illegal re-entry 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 re-entry 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 re-entry 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 re-entry 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 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

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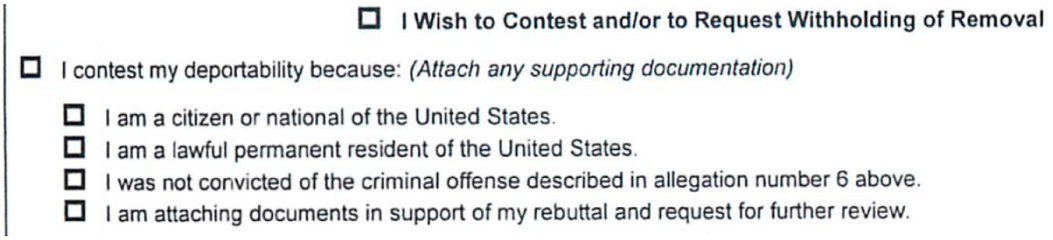
[1] Prosecuting Immigration Crimes Report, Department of Justice 8 U.S.C. § 1326 FY25 Monthly Def Filed (September 2025) *available at* https://www.justice.gov/usao/resources/PICReport.

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 88.

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 reenters, attempts to reenter, 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).

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[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 . . . ." *Valdivia-Flores*, 876 F.3d at 1206.

In both this case and a published decision issued two weeks later, the Fifth Circuit explicitly rejected that conclusion and broke with the Ninth Circuit. *Appendix*, at 3a–4a; *United States v. Ortiz-Rodriguez*, 145 F.4th 593, 600–05 (5th Cir. 2025). The Fifth Circuit wrote, in *Ortiz-Rodriguez*, that "*Valdivia-Flores* is inconsistent with our precedents, and we decline to follow it." *Id*.

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. Though the Fifth Circuit did not reach that issue, *Appendix*, at 5a n.1 (Dennis, J., dissenting) ("The majority addresses only the second prong, [§ 1326(d)(2),] so I focus there."). But, in Ortiz-Rodriguez, the Fifth Circuit went further and also 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, Cortez-Zepeda's case was not dismissed; instead, he was convicted of illegal reentry and sentenced "to 27 months' imprisonment." *Appendix*, at 2a. In *Ortiz-Rodriguez*, an identically situated defendant was sentenced to "fifty-one months' imprisonment." *Ortiz-Rodriguez*, 145 F.4th at 599.

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

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[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).

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 unpublished opinion is reproduced at *Appendix*, at 1a–6a.

JURISDICTION

The Fifth Circuit entered its judgment on July 10, 2025. Justice Alito extended the deadline to file this petition to November 7, 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 deportation 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 re-entry."

In its original version, § 1326 did not contain a statutory provision to permit "challenges to deportation orders in proceedings under § 1326." *United States v. Mendozza-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. § 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.

Cortez-Zepeda moved to the United States from Honduras when he was fourteen years old. C.A. ROA 164. When he was nineteen years old, he was accused of sexual assault in Fort Woth, Texas. C.A. ROA 66–67. Pursuant to a guilty plea, a Texas judge

found Cortez guilty of sexual assault, a violation of Texas Penal Code § 22.011(a)(1), and sentenced him to five years' imprisonment. C.A. ROA 63–64.

While he was imprisoned, Cortez-Zepeda was visited by an immigration official who served him with a Notice of Intent to Issue a Final Administrative Removal Order. C.A ROA 69–70. The notice first stated a series of allegations: that Cortez-Zepeda (1) was not a citizen of the United States, (2) was a citizen of Honduras, (3) entered the United States at an unknown place and time, (4) entered without being inspected, (5) was not lawfully admitted for permanent residence, and (6) was convicted on August 2, 2010 of sexual assault. C.A. ROA 69–70.

In a separate paragraph, the form "charged" that Cortez-Zepeda had been convicted of an aggravated felony in violation of 8 U.S.C. § 1101(a)(43)(A). Though it did not provide an explanation, the statutory citation implied that the immigration official believed Cortez-Zepeda's sexual assault conviction was an aggravated felony because it fell into the category of generic "rape" as defined in 8 U.S.C. § 1101(a)(43)(A). C.A. ROA 69.

On a second page, an immigration officer signed that he has served and explained the form to Cortez-Zepeda on July 27, 2015, at 10:15 a.m. The form gave Cortez-Zepeda 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.70. Cortez-Zepeda's form has his name written on a line indicating that he received the form, the boxes are checked indicating that he did not wish to contest or request withholding of removal, and his name is written on the line below the option to waive the ability to contest or request withholding of removal. C.A. ROA 70.

Importantly, in the section that gave Cortez-Zepeda 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.

On the same day that he was served with the notice, July 27, an immigration prepared a final administrative removal order that was served on Cortez-Zepeda on August 4. C.A. ROA 71. Cortez-Zepeda was deported to Honduras by plane on August 17, 2015. C.A. ROA 73.

Eight years after his deportation, Cortez-Zepeda was found in the United States. C.A. ROA 11. The government charged him with illegal re-entry after having been deported in violation of 8 U.S.C. § 1326. Cortez-Zepeda filed a motion to dismiss, collaterally attacking the final administrative order of removal.

In his motion to dismiss, Cortez-Zepeda made a proffer and offered to present supporting evidence at a hearing. C.A. ROA 41–42. Cortez-Zepeda proffered that he had no recollection of being served with or signing Form I-851. He also proffered that he had not wished to be deported and would have contested the deportation had he been advised that there were viable grounds available to him. C.A. ROA 41–42.

The district court did not hold a hearing and denied the motion. In a stipulated bench trial, the district court found Cortez-Zepeda guilty of illegal re-entry and sentenced him to 27 months' imprisonment. C.A. ROA 154.

Cortez-Zepeda appealed to the Fifth Circuit where he raised solely that the district court had erred by denying his motion to dismiss.

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 re-entry 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 re-entry 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.").

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

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 69. 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 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 70. 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 Appendix*, at 4a–6a (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.

Here, the Fifth Circuit wrote that the form was sufficient to advised Cortez-Zepeda of his right to challenge the aggravated-felony determination because "the Notice informed him of a different avenue to challenge the deportation: his right to seek judicial review, in the appropriate United States Court of Appeals, 'as provided in section 242 of the Act, 8 U.S.C. 1252.'" *Appendix*, at 3a (quoting C.A. ROA 69). Clearly, the reference to how to file a challenge in the appropriate Court of Appeals is not sufficient to show that person a person signing the form knows that the challenge they could raise in the Court of Appeals is a legal challenge disputing the aggravated felony classification of the underlying offense.

The Fifth Circuit further found that the waivers admission, "I admit the allegations and the charge in this Notice of Intent," was sufficient. *Appendix*, at 4a. The Fifth Circuit believed that line was sufficient to overcome the fact that the charge included the words, "you have been convicted of an aggravated felony as defined in . . . 8 U.S.C. 1101(a)(43)(A)." *Id*. But, those vague references, on two

separate pages, simply could not overcome the highly misleading inclusion of only factual grounds for a challenge while excluding the legal challenge. As Judge Douglas wrote, "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." *Ortiz-Rodriguez*, 154 F.4th at 613 (Douglas, J., dissenting in part).

Further, the Fifth Circuit's reasoning ignores the confines of the form. The form offers limited options: to either contest or waive. And, the form lists only three grounds upon which a contest can be raised. Implicit in the Fifth Circuit's conclusion is that Cortez-Zepeda should have left all of the boxes on Form I-851 blank and drawn in his own box saying that he wishes to contest the legal conclusion, implicit in the charge, that the crime of which he was convicted was correctly categorized as an aggravated felony. As Judge Douglas wrote in a case dealing with the same form, "[T]he majority opinion glosses over the very core of Ortiz-Rodirguez's argument: that the 'choices' the form presented were misleading and, therefore, his decision to check the wavier box was neither considered nor intelligent." *Id*.

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). This split is not implicated by this case because, here, the Fifth Circuit majority relied on its analysis of § 1326(d)(2) and did not reach § 1326(d)(3). *Appendix*, at 1a–4a. But, this case nonetheless provides a vehicle to resolve the split of § 1326(d)(3) as well as the issue was fully developed in the factual record and briefed at both stages below.

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 has 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." *Ortiz-Rodriguez*, 145 F.4th at 609.

C. This issue also involves a broadening split over whether an error in an underlying deportation should be determined based on the prevailing circuit law at the time of the deportation or the time it is challenged under § 1326(d).

The facts of this case also provide the Court a choice about whether to engage another percolating split in the lower courts. The Fourth Circuit has indicated that it might be inclined to follow the logic of the Ninth Circuit's holding in *Valdivia-Flores*, that there are "circumstances under which some courts would conclude that a misapplication of the law as it existed at the time . . . led to

a due process violation[, and] [u]nder such circumstances, it might be possible for the court to conclude that 'but for' the misapprehension of the law, defendant would not have been removed." *United States v. Lopez-Collazo*, 824 F.3d 453, 467 (4th Cir. 2016). But, the Fourth Circuit has adamantly insisted that the actions of an immigration agent must be measured against the law existing at the time of the deportation, apparently in the relevant circuit. "Under the law as it was understood at the time of Lopez-Collazo's removal, he cannot have suffered prejudice because he was understood to be statutorily ineligible for relief from removal, and therefore there was no reasonable probability that he would not have been deported." *Id*.

The Fifth Circuit has adopted that approach in *Ortiz-Rodriguez*, concluding that his crime was an aggravated felony under the Fifth Circuit precedent that prevailed at the time, meaning "he was legally deportable [through an expedited removal] under then-existing Fifth Circuit precedents." *Id*. at 610 (citing *Lopez-Collazo*, 824 F.3d at 466).

The Fifth and Fourth Circuit, therefore split with the Ninth Circuit's approach that looks to the classification of the underlying felony when the defendant alleges the error in the underlying deportation. *Valdivia-Flores*, 876 F.3d at 1206–10 (applying the

categorical approach to the underlying felony based on then-existing law). The Tenth Circuit's precedent would seem to mandate that it also follow the Ninth Circuit's approach. *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005)("Decisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law always meant." (citing *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312–13 (1994)).

This case does not implicate that additional question of which law controls because prevailing Fifth Circuit law, at the time of Cortez-Zepeda's deportation, showed that his underlying conviction was not an aggravated felony. Cortez-Zepeda had committed the Texas crime of sexual assault, which the immigration official executing his expedited removal determined qualified as an aggravated felony. But, the Fifth Circuit's "binding precedent at the time made clear that it categorically did not." *Appendix*, at 4a–6a (Dennis, J., dissenting) (citing *Rodriguez v. Holder*, 705 F.3d 207, 209 (5th Cir. 2014)).

Thus, if the Court wishes to address the burgeoning split over whether the time of deportation or time of prosecution for 8 U.S.C. § 1326 controls, it should grant the currently pending petition in *Ortiz-Rodriguez v. United States*, Case No. 25-5962 (Filed Oct. 21,

2025), and hold this case in abeyance. However, if the Court wishes to reserve that question for a later day, when the split has been able to more fully develop, it should grant the petition in this case.

* * *

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 Cortez-Zepeda, he was sentenced to 27 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. Cortez-Zepeda 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 the expedited removal. To show a deprivation of judicial review, Cortez-Zepeda 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 in *Ortiz-Rodriguez*, 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.

Cortez-Zepeda thoroughly briefed the issue in the district court and the court of appeals. The district court squarely addressed both challenges, C.A. ROA 120–25, thought the Fifth Circuit only addressed 8 U.S.C. § 1326(d)(2). *Appendix*, at 1a–4a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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