No. 25-6088

IN THE SUPREME COURT OF THE UNITED STATES

ANDIS NOE CORTEZ-ZEPEDA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was improperly deprived of the opportunity for judicial review under 8 U.S.C. 1326(d)(2) where he chose not to contest his expedited removal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is available at 2025 WL 1904482.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2025. On October 7, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 7, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of unlawful reentry into the United States after removal, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 2; see Judgment 1. He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2; see Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., provides that "[a]n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States." 8 U.S.C. 1228(c). Aliens with such convictions who are not lawful permanent residents may be subjected to expedited-removal proceedings. 8 U.S.C. 1228(b)(1) and (2)(A); 8 C.F.R. 238.1(b)(1); see, e.g., Valdiviez-Hernandez v. Holder, 739 F.3d 184, 187-191 (5th Cir. 2013) (per curiam). In those expedited-removal proceedings, after the government issues a Notice of Intent to Issue a Final Administrative Removal Order (Form I-851), the alien has ten days to respond by, among other options, rebutting the evidence. 8 C.F.R. 238.1(c)(1). If the alien does not timely rebut the charges, "or if the alien concedes deportability," an immigration enforcement agent issues a Final Administrative Removal Order. 8 C.F.R. 238.1(d)(1). The alien may not be removed until at least 14 days later, unless he waives the 14-

day waiting period. Ibid.; see 8 U.S.C. 1228(b)(3); 8 C.F.R. 238.1(f)(1).

The INA makes it a crime, codified at 8 U.S.C. 1326, for an alien who has previously been removed to reenter the United States without authorization. An alien charged with unlawful reentry "may not challenge the validity of the deportation order" underlying the charge "unless the alien demonstrates" that (1) he "exhausted any administrative remedies that may have been available to seek relief against the order"; (2) "the deportation proceedings * * * improperly deprived the alien of the opportunity for judicial review"; and (3) "the entry of the [deportation] order was fundamentally unfair." 8 U.S.C. 1326(d). "[E]ach of the statutory requirements of § 1326(d) is mandatory," and those requirements "are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable." United States v. Palomar-Santiago, 593 U.S. 321, 327, 329 (2021).

2. Petitioner is a citizen of Honduras. Pet. App. 1. In 2010, petitioner pleaded guilty in Texas state court to sexual assault, in violation of Tex. Penal Code Ann. § 22.011 (2010). Pet. App. 1, 4. While petitioner was serving his sentence for that offense, immigration officials instituted expedited-removal proceedings against him by filing a Notice of Intent to Issue a Final Administrative Removal Order, which informed petitioner that he was removable because his sexual-assault conviction was for an aggravated felony. Ibid. The Notice also informed petitioner

that "he had the right to, inter alia, rebut this charge, seek legal representation, and 'remain in the United States for 14 calendar days' to 'file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals.'" Id. at 1 (citation omitted).

In July 2015, petitioner signed the certificate-of-service portion of the Notice, acknowledging that he had received it. Pet. App. 2, 4. He further responded by checking several boxes. Id. at 2. Rather than indicating his intention to contest his deportability or request withholding of removal, petitioner checked a box stating that he "admit[ted] the allegations and charge in this Notice of Intent," that he "admit[ted] that [he was] deportable," and that he "waive[d] [his] right to rebut and contest the above charges." Ibid. He also checked another box indicating that he understood his "right to remain in the United States for 14 calendar days in order to apply for judicial review" and that he "waive[d] this right." Ibid. After the issuance of a Final Administrative Removal Order, petitioner was removed in August 2015. Ibid. Petitioner illegally returned to the United States a few months later. Ibid.

In 2023, petitioner was arrested in Texas "after he assaulted his girlfriend, attempted to light her car on fire, and threatened to burn her house down." Pet. App. 2. A grand jury in the Western District of Texas indicted him for illegal reentry after removal, in violation of Section 1326(a). Ibid. Petitioner moved to dis-

miss the indictment, contending that his 2015 removal was invalid because (1) "Texas sexual assault was not then and is not now an aggravated felony"; (2) the Notice of Intent that initiated his expedited-removal proceedings "indicat[ed] that he could only challenge the fact of the conviction, not its classification as an aggravated felony"; and (3) "he did not receive the information in a language he understood." Ibid. (brackets in original). The district court denied the motion to dismiss. Ibid. After a bench trial with stipulated facts, the court found petitioner guilty of illegal reentry and sentenced him to 27 months of imprisonment. Ibid.

3. The court of appeals affirmed. Pet. App. 1-6. The court first rejected petitioner's contentions that he never signed the Notice of Intent or received the instructions, claims that were contradicted by the Notice itself. Id. at 3. Next, the court held that petitioner could not show that he was "deprived of judicial review as required by § 1326(d)." Ibid. The court observed that whether immigration authorities "improperly classified [petitioner's] sexual assault conviction as an aggravated felony is immaterial to whether he was deprived of judicial review" because "'the substantive validity of the removal order is quite distinct from whether the noncitizen * * * was deprived of the opportunity for judicial review.'" Ibid. (quoting Palomar-Santiago, 593 U.S. at 327). And, the court explained, the Notice informed petitioner of "his right to seek judicial review[] in the appropriate United

States Court of Appeals, 'as provided for in section 242 of the Act, 8 U.S.C. 1252.'" Ibid. Even if petitioner "did not have actual knowledge" that the cited provision "authorizes judicial review of questions of law, he was not deprived of judicial review." Ibid. "Nothing in the Notice or waiver implied that [petitioner] could only challenge the factual -- as opposed to legal -- basis for his removal." Ibid. On the contrary, petitioner admitted to (and waived his right to contest) the "'charge'" in the Notice, and the Notice "makes clear that 'charge' refers not to the factual 'allegations,' but rather to the legal conclusion that [petitioner] was deportable because he committed an aggravated felony." Ibid. Accordingly, the court concluded that he was not deprived of judicial review. Id. at 4.

Judge Dennis dissented. Pet. App. 4-6. He pointed out that, even at the time of petitioner's removal, Fifth Circuit precedent "made clear" that Texas sexual assault did not categorically qualify as an aggravated felony. Id. at 4. And, in Judge Dennis's view, the Notice failed to inform petitioner "that he could challenge the classification of that crime as an aggravated felony." Id. at 5.

ARGUMENT

Petitioner contends (Pet. 15-26) that this Court's review is warranted to resolve whether a person erroneously subject to expedited removal was deprived of an opportunity for judicial review

under 8 U.S.C. 1326(d)(2).[1] The court of appeals correctly held that petitioner could not satisfy Section 1326(d)(2)'s requirement for collaterally attacking his removal order. Pet. App. 4. Petitioner overstates the extent of any disagreement among the circuits. And this case would be a poor vehicle for this Court's review because petitioner would have been removable even without the mistaken classification of his prior offense as an aggravated felony. Further review is unwarranted.

1. The court of appeals correctly determined that petitioner cannot show under 8 U.S.C. 1326(d)(2) that his removal proceedings "improperly deprived [him] of the opportunity for judicial review." Pet. App. 2 (brackets in original). As the court explained, petitioner "expressly declined the opportunity to seek such judicial review" of his removal order. Id. at 3. Specifically, petitioner signed a statement that said: "I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right." Id. at 4.

Petitioner contends (Pet. 18) that his waiver was not "considered nor intelligent" because Form I-851 does not "explain[] 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." In fact,

[1] Another pending petition for a writ of certiorari, filed by petitioner's counsel, presents the same question. See Ortiz-Rodriguez v. United States, No. 25-5962 (filed Oct. 21, 2025).

the Notice of Intent informed petitioner that he was charged with being removable "because [he] ha[d] been convicted of an aggravated felony as defined in * * * 8 U.S.C. 1101(a)(43)(A)" and that he had the right to "rebut th[e] charge" and to "'file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals.'" Pet. App. 1, 4. Petitioner therefore received reasonable notice that he could challenge the conclusion that he was an aggravated felon.

2. Contrary to petitioner's claim, the court of appeals' decision does not create a conflict that warrants review.

Petitioner contends (Pet. 16-22) that the court of appeals' conclusion that he was not deprived of judicial review under Section 1326(d)(2) conflicts with United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir. 2017), overruled on other grounds by Alfred v. Garland, 64 F.4th 1025 (9th Cir. 2023) (en banc). Valdivia-Flores held that an alien's waiver of his right to appeal in an administrative removal proceeding "was not considered and intelligent" because the Notice of Intent "did not explicitly inform him that he could refute, through either an administrative or judicial procedure," the "classification of [his prior] conviction as an aggravated felony." 876 F.3d at 1205-1206. Instead, the Notice of Intent "suggested * * * that removability could only be contested on factual grounds." Id. at 1206. The court concluded that the alien "was deprived of due process and satisfie[d] the first two prongs of 8 U.S.C. § 1326(d)." Ibid.

But this Court's subsequent decision in United States v. Palomar-Santiago, 593 U.S. 321 (2021), casts serious doubt on Valdivia-Flores's conclusion that an alien in expedited removal proceedings is "improperly deprived * * * of the opportunity for judicial review," 8 U.S.C. 1326(d)(2), simply because Form I-851 fails to note specifically that he could challenge his aggravated-felon designation. Before Palomar-Santiago, the Ninth Circuit held that illegal-reentry defendants "[we]re 'excused from proving the first two requirements' of § 1326(d) if they were 'not convicted of an offense that made [them] removable.'" 593 U.S. at 326 (quoting United States v. Ochoa, 861 F.3d 1010, 1015 (9th Cir. 2017) (per curiam), abrogated by Palomar-Santiago, 593 U.S. 321) (second set of brackets in original). This Court rejected the Ninth Circuit's view, which was "incompatible with the text of § 1326(d)," and it further held that "each of the statutory requirements of § 1326(d) is mandatory." Id. at 326, 329. The Court also rejected the defendant's argument that administrative and judicial review are not "available" when an immigration judge erroneously tells an alien that he is removable. Id. at 327-328 (citation omitted). The "substantive complexity of an affirmative defense" does not "alone render further review of an adverse decision 'unavailable.'" Id. at 328. Although the Ninth Circuit has not yet considered whether Palomar-Santiago abrogates Valdivia-Flores, that court might ultimately conclude that it does.

Moreover, Valdivia-Flores differs from this case in two important respects. First, unlike in this case, the alien in Valdivia-Flores "request[ed] a hearing before the Immigration Court" on a separate form before he waived his right to judicial review on the Notice of Intent. 876 F.3d at 1204. Second, the government in Valdivia-Flores "provide[d] no evidence that an immigration officer ever met with Valdivia-Flores to explain the [Notice of Intent] form or the issues it raised." Id. at 1206. Here, by contrast, the form that petitioner received indicates that agents "explained and/or served" the Notice of Intent to petitioner in Spanish, in which petitioner is fluent. Pet. App. 3. Thus, there is no conflict between the decision below and Valdivia-Flores's fact-specific conclusion that the alien in that case did not validly waive his right to appeal "[u]nder the[] circumstances." 876 F.3d at 1206.

3. Even if the question presented warranted this Court's review at this time, this would be a poor vehicle for its consideration because petitioner cannot satisfy Section 1326(d)'s requirement that the removal order be "fundamentally unfair." 8 U.S.C. 1326(d)(3). As the court of appeals explained, a removal order is "'fundamentally unfair' if the defendant (1) did not receive procedural due process and (2) suffered prejudice." Pet. App. 2 (citation omitted). But petitioner meets neither of those requirements.

Petitioner was removed in 2015 on the premise that his prior conviction for sexual assault, in violation of Tex. Penal Code Ann. § 22.011 (2010), was an aggravated felony. Pet. App. 1-2; see id. at 4. Fifth Circuit precedent at the time established that the offense was not categorically an aggravated felony. See Rodriguez v. Holder, 705 F.3d 207, 209 (2013). And the court of appeals later held that the offense is not divisible and therefore not amenable to the modified categorical approach. See United States v. Rodriguez-Flores, 25 F.4th 385, 389 (5th Cir. 2022) (per curiam). But petitioner's removal did not deprive him of procedural due process simply because it was based on an understanding of the law that later proved to be erroneous. "[A]n error of law, without more, will ordinarily not rise to the level of a due process violation." United States v. Lopez-Collazo, 824 F.3d 453, 467 (4th Cir. 2016), cert. denied, 580 U.S. 1058 (2017) (citation omitted); see United States v. Torres, 383 F.3d 92, 104 (3d Cir. 2004) (same); Sanchez-Cruz v. I.N.S., 255 F.3d 775, 780 (9th Cir. 2001) ("[A]n allegation of mere legal error does not constitute a colorable due process claim."); see also Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982) ("We have long recognized that 'a mere error of state law' is not a denial of due process.") (citation omitted); Brady v. United States, 397 U.S. 742, 757 (1970) ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."). In-

stead, petitioner must show some procedural shortcoming in the removal proceeding. He has not done so.

Petitioner contends (Pet. 22) that the Fifth and Ninth Circuits "disagree about whether an entry of an order erroneously premised on an aggravated-felony determination is fundamentally unfair" under Section 1326(d)(3). Although he admits that "[t]his split is not implicated by this case," he nonetheless contends that this case "provides a vehicle to resolve the split" because it "was fully developed in the factual record and briefed at both stages below." Ibid. But this Court's settled practice is to decline review of questions that were unaddressed by the lower court. See Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to resolve an issue because Court was "without the benefit of thorough lower court opinions to guide our analysis of the merits"); Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 175 (2004) ("The Court of Appeals * * * did not address this argument and, for that reason, neither shall we.") (citation omitted); National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). Petitioner offers no reason to depart from that rule in this case, and none is apparent.[2]

[2] Petitioner gestures (Pet. 23-26) at another alleged disagreement among the circuits as to whether error in removal proceedings is measured with respect to "prevailing circuit law at

In any event, petitioner cannot show any prejudice. Even if petitioner had not been subject to expedited removal based on a prior aggravated-felony conviction, he would still have been removable after full removal proceedings before an immigration judge. See 8 U.S.C. 1182(a)(6)(A)(i), 1229a(e)(2); Mejia-Castanon v. Attorney Gen. of the United States, 931 F.3d 224, 227 (3d Cir. 2019) ("[A]n alien who enters the United States without permission, and who is not admitted or paroled, is removable."). Petitioner might have been eligible for voluntary departure in that circumstance, but that is a form of discretionary relief that is not guaranteed to removable aliens. See 8 U.S.C. 1229c(a)(1) (stating that the Attorney General "may permit an alien voluntarily to depart the United States at the alien's own expense" in lieu of removal); United States v. Mendoza-Mata, 322 F.3d 829, 834 (5th Cir. 2003) (observing that it was "highly unlikely" the defendant would have been granted discretion relief "given his criminal history"). Petitioner cannot establish that, but for the alleged errors in his administrative removal proceedings, he would not have been removed. This case is therefore a poor vehicle for this Court's review.

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the time of the [removal] or the time [when the prior removal order] is challenged" in an unlawful-reentry prosecution. But petitioner concedes (Pet. 25-26) that "[t]his case does not implicate that additional question" and that the Court should not grant his petition for a writ of certiorari on that basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2026