

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*

REPLY BRIEF FOR PETITIONER

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

Counsel for Petitioner

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Reply Brief of Petitioner

The Ninth Circuit and the Fifth Circuit have split over whether an expedited removal accomplished through a waiver on Form I-851 deprives a noncitizen of judicial review.¹ Compare *United States v. Cortez-Zepeda*, Case No. 24-50418, 2025 WL 1904482 (5th Cir. July 10, 2025) with *United States v. Valdivia-Flores*, 876 F.3d 1201, 1205–06 (9th Cir. 2017). The government urges three arguments against granting the petition.

First, the government believes that the Ninth Circuit may overrule its precedent in light of this Court’s decision in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021). (Resp. 8–9). But *Palomar-Santiago* addressed hearings before an immigration judge, not expedited removals, and said nothing about whether Form I-851’s waiver misleads noncitizens and, thereby, deprives them of judicial review.

Further, the Ninth Circuit has rejected the government’s argument. The government reads *Palomar-Santiago* to mean that a person must actually seek judicial review, not merely be deprived of it, to satisfy 8 U.S.C. § 1326(d)(2). The Ninth Circuit rejected that argument in *United States v. Valdivias-Soto*, 112 F.4th 713 (9th Cir. 2024), holding that procedural defects in a removal proceeding can deprive a noncitizen of judicial review when the defects cause the noncitizen not to seek review. Ac-

¹ That deprivation was relevant to this litigation because Cortez-Zepeda was charged with illegal re-entry in violation of 8 U.S.C. § 1326(a) and sought to challenge the lawfulness of the predicate removal, pursuant to 8 U.S.C. § 1326(d). As part of that challenge, the courts addressed whether the removal proceedings deprived him of judicial review. 8 U.S.C. § 1326(d)(2).

cordingly, both the Ninth Circuit and its district courts have continued to grant motions to dismiss that rely on *Valdivia-Flores* since the decision in *Palomar-Santiago* in 2021.

Second, the government claims that *Valdivia-Flores* was fact specific. (Resp. 10). The government misreads *Valdivia-Flores*, which was based solely on the inadequacy of Form I-851, as was this case. Further, the Ninth Circuit's consistent application of *Valdivia-Flores* beyond its facts shows that it was not fact specific.

Third, the government claims a vehicle problem. (Resp. 10–13). The government concedes that Cortez-Zepeda urged that Form I-851 deprived him of judicial review both in the district court and the court of appeals. (Resp.4–6). Instead, the government urges that Cortez-Zepeda was removable, regardless of whether he should have been subject to an *expedited* removal. The government does not explain why Cortez-Zepeda's removability means he would not be entitled to relief under the Ninth Circuit's understanding of § 1326(d). Instead, the claimed vehicle problem is simply another split that the government believes the Ninth Circuit decided incorrectly.

Cortez-Zepeda urges the Court to grant his petition because the split is clearly presented, recurring, important, and will not be resolved without the Court's intervention.

Another case pends before this Court that raises the same split over the application of § 1326(d)(2), in addition to another split over the application of § 1326(d)(3). *See Ortiz-Rodriguez v. United States*, Case No. 25-5962 (Rescheduled Feb. 19, 2026). This Court often considers multiple cases together when the two cases present the

same issues through different underlying facts, even when the relevant circuits have not decided the issue in both cases. *See, e.g., Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). Thus, if the Court grants the petition in *Ortiz-Rodriguez*, Cortez-Zepeda urges the Court to grant his petition as well to help illuminate the fundamental unfairness issue. Alternatively, if the Court grants *Ortiz-Rodriguez*, Cortez-Zepeda urges the Court to hold his petition pending its outcome. *See, e.g., United States v. Perez-Gallan*, 144 S. Ct. 2707 (2024) (granting, vacating, and remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024)).

I. The split—over whether an expedited removal through a misleading waiver deprives a noncitizen of judicial review—endures despite this Court’s holding in *Palomar-Santiago*.

In this case, the Fifth Circuit squarely held that Form I-851 did not deprive Cortez-Zepeda of judicial review, writing “Cortez-Zepeda expressly declined the opportunity to seek . . . judicial review” and that “[n]othing in the Notice or waiver implied that Cortez-Zepeda could only challenge the factual—as opposed to legal—basis for his removal.” *Cortez-Zepeda*, 2025 WL 1904482, at *3. Just as clearly, the Ninth Circuit has held that Form I-851 deprives noncitizens of judicial review, writing “the Notice of Intent’s three check boxes suggested . . . 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. Indeed, the Fifth Circuit, shortly after issuing its

decision here, explicitly held that its approach is incompatible with the Ninth Circuit's. *United States v. Ortiz-Rodriguez*, 145 F.4th 594, 603 (5th Cir. 2025) (“*Valdivia-Flores* is inconsistent with our precedents, and we decline to follow it.”).

The government claims that *Palomar-Santiago* may change the Ninth Circuit's holding that Form I-851 contains a waiver that is not knowing or intelligent. (Resp. 9) (citing *Palomar-Santiago*, 593 U.S. at 327, 329). It cannot and has not.

In *Palomar-Santiago*, this Court held that “each of the statutory requirements of § 1326(d) is mandatory.” 593 U.S. at 329. That holding has nothing to do with the government's implementation of expedited removals by obtaining a waiver on Form I-851. Nor could it; *Palomar-Santiago* dealt with a removal ordered by an immigration judge not an expedited removal. *Id.* at 325–26. And, it repudiated a Ninth Circuit rule, not at issue in *Valdivia-Flores*, that “excused” defendants “from proving the first two requirements of § 1326(d) if they were not convicted of an offense that made them removable” as aggravated felons. *Id.* at 325–26.

The government attempts to read *Palomar-Santiago* more broadly than its holding, as requiring a person to actually file an appeal in the relevant circuit court to show that he was deprived of judicial review. (Resp. 7–9). The Ninth Circuit has declined to interpret *Palomar-Santiago* in the manner suggested by the government. *Valdivias-Soto*, 112 F.4th at 731–33.

In *Valdivias-Soto*, the Ninth Circuit held that a person was deprived of judicial review when an immigration judge erroneously told him—due to a translation error—that he could challenge his removal only by hiring an attorney. *Id.* at 722–24, 728–

29, 733. Interpreting *Palomar-Santiago*, the Ninth Circuit concluded that a “substantive error of immigration law does not excuse a defendant from” seeking further review “if further administrative review, and then judicial review if necessary, exists to fix that very type of error. On the other hand, administrative [and judicial] remedies are not available if the [official or judge] misled the defendant as to the existence or rules of the process for obtaining them.” *Id.* at 731–33.²

Valdivia-Flores held that expedited removals, achieved through the waiver in Form I-851, misled noncitizens into believing they cannot not challenge the categorization of their conviction as an aggravated felony. 876 F.3d at 1206. *Valdivias-Soto*, therefore, illustrates that *Valdivia-Flores* survives *Palomar-Santiago* because *Valdivia-Flores* concerned an error that “misled the defendant as to the existence or rules of the process for obtaining” judicial review—the ability to challenge the aggravated felony finding. *Valdivias-Soto*, 112 F.4th at 732.

Further, the government has consistently declined to ask the Ninth Circuit to revisit *Valdivia-Flores*. This Court decided *Palomar-Santiago* in May 2021, and the Ninth Circuit has reaffirmed *Valdivia-Flores* in at least one post-*Palomar-Santiago* opinion. *United States v. Mangas*, Case No. 19-50319, 2022 WL 898594, at *1 (9th Cir. Mar. 28, 2022). Perhaps more probative, district courts throughout the Ninth

² The Ninth Circuit is not alone in this holding. The Fourth Circuit has also held, post-*Palomar-Santiago*, that a noncitizen can satisfy § 1326(d)(1) and (2) when procedural defects make administrative remedies and judicial review practically unavailable. *United States v. Castro-Aleman*, 141 F.4th 576, 580 n.2 (4th Cir. 2025) (“[T]he government argues that the Supreme Court’s recent decision in *Palomar-Santiago* has foreclosed the option for an alien to excuse their failure to administratively exhaust under § 1326(d) This is incorrect. . . . Reading *Palomar-Santiago* to categorically bar any excusal of § 1326(d)(1)’s administrative exhaustion requirement would amount to overturning th[e] core holding of *Mendoza-Lopez*. . . . We therefore reject the government’s reading of *Palomar-Santiago*.”).

Circuit have consistently dismissed cases on facts identical to those in *Valdivia-Flores*; yet, the government has not pursued an appeal in a single one of those cases.³ The inescapable conclusion is that *Valdivia-Flores* is consistent with *Palomar-Santiago*. Both require satisfaction of all three elements of § 1326(d). *Valdivia-Flores* explains how Form I-851 misleads noncitizens about their rights to and the grounds upon which they can seek judicial review, as required by *Palomar-Santiago*. The Fifth Circuit’s directly contrary decision on that question has created an ongoing split that merits review.

II. The split is not fact specific.

The government claims that *Valdivia-Flores* was fact specific, cherry picking two minor details: that the defendant in *Valdivia-Flores* requested an immigration hearing before signing the waiver on Form I-851, and that the government did not introduce evidence beyond Form I-851. (Resp. 10) (citing *Valdivia-Flores*, 876 F.3d at 1206).

The fact that the noncitizen had requested a hearing before signing Form I-851 and that the government “relie[d] on the sufficiency of the form’s text” played no role in the conclusion that the form misleads when it outlines for noncitizens the choice of three grounds upon which the expedited removal could be challenged—conspicuously omitting the fourth. Instead, the Ninth Circuit sought to rebut the suggestion that

³ *United States v. Gutierrez-Lopez*, 793 F.Supp.3d 1297 (E.D. Wash. 2025); *United States v. Morales-Rodriguez*, 744 F. Supp. 3d 1036 (S.D. Cal. 2024); *United States v. Ledezma-Mejia*, No. 6:20-cr-403, 2023 WL 4053577 (D. Or. June 16, 2023); *United States v. Castanon-Sanchez*, No. 3:22-cr-41, 2023 WL 3601043 (D. Nev. May 22, 2023); *United States v. Sam-Pena*, 602 F. Supp. 3d 1204 (D. Ariz. 2022).

the noncitizen might have learned about the ability to challenge the aggravated felony finding through another method. *Valdivia-Flores*, 876 F.3d at 1206. Because there was not a hearing or evidence beyond the text of the form, the Ninth Circuit rejected the idea that the record supported the possibility of a broader explanation. *Id.*

Here too, no such hearing occurred and there was no evidence of an explanation beyond the text of the form. True, the form contains a box where the immigration official certifies that he “explained and/or served this Notice of Intent to” Cortez-Zepeda. C.A. ROA. 88. Nothing suggests that box was absent or unchecked in *Valdivia-Flores*. *Id.* And, here, nothing suggests that the immigration official explained the form to, instead of merely serving the form on, Cortez-Zepeda. Indeed, the fact that he signed the “form in a foreign language in under a minute, without a hearing or counsel” suggests that it was not explained. *Cortez-Zepeda*, 2025 WL 1904482, at *5 (Dennis, J., dissenting).

Perhaps most illustrative that *Valdivia-Flores* was not fact specific, the Ninth Circuit and its district courts have applied it consistently beyond its facts.⁴

III. This is an ideal vehicle to resolve the split.

The government concedes that the deprivation of judicial review issue was raised and decided below. (Resp. 4–6). Thus, this case presents an ideal vehicle to resolve

⁴ *Gutierrez-Lopez*, 793 F.Supp.3d at 1304; *Morales-Rodriguez*, 744 F. Supp. 3d at 1047; *Ledezma-Mejia*, 2023 WL 4053577, at *3; *Castanon-Sanchez*, 2023 WL 3601043, at *4; *Sam-Pena*, 602 F. Supp. 3d at 1210.

the split over whether the government deprives noncitizens subject to expedited removals of judicial review when it effects those expedited removals through Form I-851.

The government suggests this is not the right case to decide the deprivation of judicial review issue because Cortez-Zepeda “would have been removable even without the mistaken classification of his prior offense as an aggravated felony.” (Resp. 7, 10–13). That belief misapprehends the issue presented and the nature of the circuit split. Cortez-Zepeda’s removability has nothing to do with deprivation of judicial review, under 8 U.S.C. § 1326(d)(2). Instead, removability goes to prejudice, which is part of the fundamental fairness inquiry, under 8 U.S.C. § 1326(d)(3), an issue the Fifth Circuit did not reach in this case. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

The absence of a vehicle problem is clear from examining what would have happened to Cortez-Zepeda’s case in the Ninth Circuit: it would have been dismissed.⁵ The Ninth Circuit finds that the entry of the order of removal was fundamentally unfair when it was done through a form that obtains a misleading waiver of the right to appeal—a violation of due process—and the noncitizen had not been convicted of an aggravated felony—prejudice. *Valdivia-Flores*, 876 F.3d at 1210. Thus, under the Ninth Circuit’s approach, removability is not a bar to finding fundamental unfairness

⁵ *Valdivia-Flores*, 876 F.3d at 1203–04, 1210 (removable noncitizen deported through an expedited removal, reentered, and motion to dismiss should have been granted); *Mangas*, 2022 WL 898594, at *1–2 (same); *Gutierrez-Lopez*, 793 F.Supp.3d 1297, 1299, 1306 (removable noncitizen deported through an expedited removal, reentered, motion to dismiss granted); *Morales-Rodriguez*, 744 F. Supp. 3d at 1043–45, 1058 (same); *Ledezma-Mejia*, 2023 WL 4053577, at *1, *4 (same); *Castanon-Sanchez*, 2023 WL 3601043, at *1, *5 (same); *Sam-Pena*, 602 F.Supp.3d at 1206–07, 1212–12 (same).

under § 1326(d)(3) and, ultimately, relief from the illegal reentry prosecution. *See id.*, at 1203, 1210 (finding the noncitizen’s collateral attack “should have been successful” though he “entered the United States without inspection,” which made him removable).

The Fifth Circuit has split with the Ninth Circuit’s fundamental unfairness analysis. *Ortiz-Rodriguez*, 145 F.4th at 605–10. But, in this case, the Fifth Circuit only addressed the deprivation of judicial review prong. *Cortez-Zepeda*, 2025 WL 1904482, at *4. In *Ortiz-Rodriguez*, the Fifth Circuit further found that the noncitizen had not shown prejudice because his conviction, Texas evading arrest, was considered an aggravated felony under prevailing Fifth Circuit law at the time of his removal. 145 F.4th at 609–10. The Fourth Circuit similarly holds that the prevailing circuit law at the time of removal controls the prejudice analysis. *United States v. Lopez-Collazo*, 824 F.3d 453, 466 (4th Cir. 2016). The Ninth Circuit, however, applies the law at the time of the § 1326(d) challenge to determine whether the noncitizen was prejudiced when he was misled into waiving his right to make that challenge as a defense to the expedited removal. *Valdivia-Flores*, 876 F.3d at 1206–09.

If the Court takes *Ortiz-Rodriguez*, it will be required to resolve the § 1326(d)(2) split. Further, this case could also illuminate the resolution of the § 1326(d)(3) split because *Cortez-Zepeda*’s conviction was not considered an aggravated felony at removal. *Rodriguez v. Holder*, 705 F.3d 207, 213 (5th Cir. 2013). Thus, *Cortez-Zepeda* urges the Court to grant his petition; or, alternatively, to grant his petition and hear it alongside *Ortiz-Rodriguez*, as it has done in prior cases. *See, e.g., Students for Fair*

Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023) (considering whether two college admissions programs were lawful under the Equal Protection Clause and doing so, in one of those cases, before the appellate court entered a judgment). Alternatively, Cortez-Zepeda urges the Court to hold his petition pending the outcome of *Ortiz-Rodriguez* to be granted, vacated, and remanded if the Court reverses *Ortiz-Rodriguez*. See, e.g., *United States v. Perez-Gallan*, 144 S. Ct. 2707 (2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024)).

IV. The Ninth Circuit’s approach to this issue better comports with this Court’s precedent and the text of the statute.

The Ninth Circuit’s approach to the judicial review issue is more consistent with the text of § 1326(d) as well as this Court’s previous holdings. The government argues that Cortez-Zepeda’s waiver was knowing and intelligent because the form—when disparate parts are read together—informed him that he was charged with being convicted of an aggravated felony and that he could remain in the country to rebut the charge. (Resp. 8).

The crux of the dispute between the circuits is (1) whether the government has an obligation to inform noncitizens of the grounds upon which they can contest or seek review of the removal and (2) whether, having decided to inform them of *some* of the grounds, the government must include *all* of the grounds. The Court’s holding in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), suggests that the answer to both questions is yes.

In *Mendoza-Lopez*, this Court considered whether the actions of an immigration judge “amounted to a complete deprivation of judicial review of the determination” that they should be deported. *Id.* at 840. In finding a deprivation, this Court relied on the fact that the “Immigration Judge permitted waivers of the right to appeal that were not the result of considered judgments by respondents, and failed to advise respondents properly of their eligibility to apply for suspension of deportation.” *Id.*

This Court’s reasoning confirms what common sense dictates: for a waiver of the right to appeal to be considered and intelligent, it must do more than the bare minimum necessary to obtain a waiver: tell a person they have a right to appeal and get a waiver. Instead, the waiver must explain the relief the noncitizen could seek through the appeal.

But, even if that is not true, the government cannot obtain a valid waiver by misleading noncitizens. If the government chooses to purport to articulate the possible grounds, it must articulate *all* the grounds, or else it affirmatively misleads, as Form I-851 currently does. *Valdivia-Flores*, 876 F.3d at 1206; *Cortez-Zepeda*, 2025 WL 1904483, at *4–5 (Dennis, J., dissenting); *Ortiz-Rodriguez*, 145 F.4th at 615 (Douglas, J., dissenting in part).

This Court should grant the petition to correct the Fifth Circuit’s holding that a waiver is considered and intelligent when it is obtained on a misleading form, presented in less than a minute, to an unrepresented noncitizen.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SHANE O'NEAL
O'NEAL LAW

Counsel for Petitioner

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