

No. _____

IN THE
Supreme Court of the United States

ELIEL NUNEZ SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Application for Extension of Time Within Which
to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth
Circuit

**APPLICATION OF PETITIONER TO THE
HONORABLE ELENA KAGAN AS CIRCUIT
JUSTICE**

CUAUHTEMOC ORTEGA
Federal Public Defender
HOLT ORTIZ ALDEN*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Holt_Alden@fd.org

Attorneys for Applicant
**Counsel of Record*

APPLICATION FOR EXTENSION OF TIME

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Eliel Nunez Sanchez requests a 60-day extension of time within which to file a petition for a writ of certiorari in this Court, to and including February 23, 2026. Mr. Nunez's petition will challenge the United States Court of Appeals for the Ninth Circuit's published decision affirming his conviction on direct appeal. *United States v. Nunez*, 140 F.4th 1157 (9th Cir. 2025), *reh'g denied* Sept. 24, 2025. The panel opinion and denial of panel and en banc rehearing are reproduced in the appendix.

The Ninth Circuit entered judgment on June 18, 2025 and denied panel and en banc rehearing on September 24, 2025. This Court has jurisdiction over any timely filed petition for a writ of certiorari pursuant to 28 U.S.C. § 1254. Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, Mr. Nunez's time to petition for a writ of certiorari expires on December 23, 2025. In accordance with Rule 13.5, Mr. Nunez now files this application more than 10 days in advance of that date.

REASONS JUSTIFYING AN EXTENSION OF TIME

An extension is warranted because of the importance of the issue presented and undersigned counsel's need for additional time to prepare a petition that will assist the Court in deciding whether to grant certiorari.

Importance of issue presented. Mr. Nunez's petition will present an important question of statutory interpretation and constitutional law concerning 8 U.S.C. § 1326(d). Section 1326 makes it unlawful for an individual to reenter the country after being deported and is one of the most commonly charged federal criminal statutes. Section 1326(d) permits a defendant to challenge the validity of his underlying deportation order, subject to certain limitations. To prevail on a motion to dismiss under § 1326(d), a defendant must establish that (1) they exhausted available "administrative remedies"; (2) the deportation proceeding "improperly deprived" them of "judicial review"; and (3) "the entry of the [deportation] order was fundamentally unfair." § 1326(d)(1)-(3).

Mr. Nunez was charged with illegal reentry under § 1326. During the pretrial proceedings, he filed a motion to dismiss challenging his 2010 removal order. The district court denied the motion. On appeal, Mr. Nunez again challenged the removal order, arguing in part that the immigration judge (IJ) omitted material information regarding the nature of an appeal

and the consequences of failing to appeal, which precluded him from entering a considered and intelligent waiver of that right.

The Ninth Circuit affirmed. The court held that even assuming Mr. Nunez’s waiver of appeal to the Board of Immigration Appeals (BIA) “was not considered and intelligent,” the waiver’s invalidity was “immaterial” to whether he satisfied § 1326(d)(1)’s exhaustion requirement because Nunez was not “*actively misled* as to the rights available to him.” App. 15. The court also held that Mr. Nunez failed to satisfy the requirements of § 1326(d)(2) and (d)(3). App. 16, 19.

This Court has long held that an invalid waiver of the right to appeal an immigration judge’s decision renders administrative remedies unavailable for purposes of § 1326(d)(1)’s exhaustion requirement. *United States v. Mendoza-Lopez*, 481 U.S. 828, 841 (1987) (holding that an invalid appeal waiver “render[s] direct review of [a]n Immigration Judge’s determination unavailable”). But the Ninth Circuit reached the opposite conclusion in Mr. Nunez’s case—it held that establishing a noncitizen’s waiver of appeal to the BIA was invalid is insufficient to satisfy § 1326(d)(1). App. 15 (reasoning that whether appeal waiver is “considered and intelligent” is “immaterial” to § 1326(d)(1)). The Ninth Circuit determined that following this Court’s decision in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021), only an “exceedingly narrow set of circumstances” would satisfy § 1326(d)(1), namely

the “three specific circumstances” listed in *Ross v. Blake*, 578 U.S. 632 (2016). App. 15.

The Ninth Circuit rule—that an invalid appeal waiver does not satisfy § 1326(d)(1)—conflicts with *Mendoza-Lopez* and the rule in five other circuits. *United States v. Castro-Aleman*, 141 F.4th 576, 580 n.2 (4th Cir. 2025); *Richardson v. United States*, 558 F.3d 216, 219-220 (3d Cir. 2009); *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004); see *United States v. Tomayo-Baez*, 820 F.3d 308, 313 (8th Cir. 2016); *United States v. Chavez-Alonso*, 431 F.3d 726, 728 (10th Cir. 2025).

This issue is exceptionally important because it involves a legal defense to one of the most commonly charged federal criminal statutes. It also implicates critical due process rights because individuals charged with a crime as a result of an “administrative determination,” such as a removal proceeding, are “entitled to have the factual and legal determinations upon which [their] convictions are based subjected to the scrutiny of an impartial judicial officer.” *Mendoza-Lopez*, 481 U.S. at 841. The Ninth Circuit’s erroneous rule precludes a large swath of defendants from obtaining such review. See *id.* at 841-42.

Counsel’s need for additional time. Undersigned counsel has substantial professional commitments that have prevented him from working exclusively on preparing a petition that fully and concisely addresses this

important issue of statutory and constitutional law. These commitments warrant the requested extension of time, which seeks to accommodate counsel's legitimate needs and is not sought for purposes of delay.

Undersigned counsel currently has the following briefing deadlines: a petition for a writ of certiorari in *United States v. Diaz Gonzalez*, No. 24-3951 (9th Cir.), due on December 12, 2025; an opening brief in *United States v. Wallin*, No. 25-3178 (9th Cir.), due on January 23, 2026; an answering brief in *United States v. Skinner*, No. 25-5357 (9th Cir.), due on February 2, 2026; an opening brief in *United States v. Middleton*, No. 25-5838 (9th Cir.), due on February 9, 2026; and an opening brief in *United States v. Ware*, No. 25-3917 (9th Cir.), due on February 9, 2026.

CONCLUSION

Mr. Nunez respectfully requests a 60-day extension of time, up to and including February 23, 2026, within which to file a petition for a writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender



HOLT ORTIZ ALDEN
Deputy Federal Public Defender
Attorneys for Applicant

DECEMBER 10, 2025