

No. _____

IN THE
Supreme Court of the United States

ELIEL NUNEZ SANCHEZ AND
JUAN L. CALDERON NONBERA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court held that, in an illegal-reentry prosecution, the fact that the defendant’s waiver of the right to appeal the underlying removal order was “not considered or intelligent” marked a defect in the removal proceedings that “rendered direct review of the Immigration Judge’s determination unavailable.” *Id.* at 840–41. Congress codified that decision at 8 U.S.C. § 1326(d), which expressly allows defendants charged with illegal reentry to collaterally challenge the validity of their underlying removal orders after demonstrating, among other things, that they “exhausted any administrative remedies that may have been available to seek relief against the order.” 8 U.S.C. § 1326(d)(1). Five circuits hold, consistent with *Mendoza-Lopez*, that an invalid waiver of the right to appeal an immigration judge’s decision renders administrative remedies unavailable for purposes of Section 1326(d)(1). In these cases, by contrast, the Ninth Circuit held that whether a defendant’s appeal waiver was “considered and intelligent” is “immaterial” for purposes of Section 1326(d)(1).

The question presented is:

When a person waives the right to appeal an immigration judge’s removal order, but that waiver is invalid, has the person exhausted available administrative remedies for purposes of satisfying Section 1326(d)(1)?

PARTIES TO THE PROCEEDING

Petitioners are Eliel Nunez Sanchez and Juan L. Calderon Nonbera, each of whom was the defendant in the district court and the appellant in the court of appeals.

Respondent is the United States of America, which was the plaintiff in the district court and the appellee in the court of appeals.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Eliel Nunez Sanchez, No. 2:20-cr-00083-RGK-1 (Apr. 5, 2022)

United States v. Juan L. Calderon Nonbera, No. 2:19-cr-00725-ODW-1 (Mar. 2, 2022)

United States Court of Appeals (9th Cir.):

United States v. Eliel Nunez Sanchez, No. 22-50072 (June 18, 2025), *reh'g denied* (Sept. 24, 2025)

United States v. Juan L. Calderon Nonbera, No. 22-50040 (Oct. 9, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Eliel Nunez Sanchez and Juan L. Calderon Nonbera respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases. They join in a single petition presenting the same question for this Court's review. S. Ct. R. 12(4).

INTRODUCTION

Nearly 40 years ago, this Court held that due process requires providing an individual charged with illegal reentry meaningful judicial review of the underlying deportation order. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987). Congress subsequently codified this Court's due process holding in 8 U.S.C. § 1326(d). Under Section 1326(d), a person charged with illegal reentry “may not challenge the validity of the deportation order” unless they have “exhausted any administrative remedies that may have been available,” were “deprived . . . of the opportunity for judicial review,” and the entry of the removal order “was fundamentally unfair.” The question presented is whether an individual in a deportation proceeding who does not enter a valid waiver of their right to appeal an immigration judge's order has satisfied Section 1326(d)(1)'s administrative-exhaustion requirement.

This Court has answered the question presented affirmatively. In *Mendoza-Lopez*, the Court held that the lack of a knowing and intelligent appeal waiver “render[s] direct review of [an] Immigration Judge's determination unavailable.” 481 U.S. at 841. And that holding was codified in Section 1326(d)(1), which re-

quires exhaustion of only those administrative remedies that are “available.” Thus, in the Second, Third, Fourth, Eighth and Tenth Circuits, an individual who establishes that his waiver of appeal was invalid—for example, because it was not considered and intelligent—has satisfied Section 1326(d)(1)’s administrative-exhaustion requirement.

The Ninth Circuit, however, reached the opposite conclusion in these cases and held that the validity of an individual’s waiver of appeal to the Board of Immigration Appeals is “immaterial” to the Section 1326(d)(1) inquiry. Pet. App. 5a; see *id.* at 24a. That decision is contrary to this Court’s holding in *Mendoza-Lopez*, the text of Section 1326(d)(1), and the rule in five other circuits. Only this Court can resolve this important conflict. Until it does so, criminal defendants in the Ninth Circuit will continue facing criminal liability for fundamentally unfair immigration proceedings in which they never entered a valid waiver of appeal, thereby depriving them of any avenue to vindicate their due process rights.

OPINIONS BELOW

In *Nunez*, the opinion of the court of appeals (Pet. App. 1a–9a) is reported at 140 F.4th 1157. The order of the district court (Pet. App. 10a–16a) is unreported.

In *Calderon*, the memorandum disposition of the court of appeals (Pet. App. 24a–25a) is unreported but is available at 2025 WL 2860607. The order of the district court (Pet. App. 26a–29a) is unreported.

JURISDICTION

In *Nunez*, the judgment of the court of appeals was entered on June 18, 2025. A petition for rehearing was

denied on September 24, 2025. Justice Kagan extended the deadline to petition for a writ of certiorari to February 21, 2026.

In *Calderon*, the judgment of the court of appeals was entered on October 9, 2025. Justice Kagan extended the deadline to petition for a writ of certiorari to February 21, 2026.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part: “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 U.S. Code provides in relevant part:

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) 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.

8 U.S.C. § 1326(d).

STATEMENT

A. Legal Background

1. The Immigration and Nationality Act (INA) subjects certain noncitizens to removal from the United States. Under 8 U.S.C. § 1182(a)(6)(A)(i), a noncitizen who is “present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” In turn, under 8 U.S.C. § 1227(a)(1)(A), a noncitizen who “at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”

People in removal proceedings have the “the privilege of being represented, at no expense to the Government, by counsel of [their] choosing who is authorized to practice in such proceedings.” 8 U.S.C. § 1229a(b)(4)(A). At the outset of the proceeding, the person must be given written notice specifying that they “may be represented by counsel,” and that they “will be provided . . . a current list of counsel” who “have indicated their availability to represent pro bono aliens.” 8 U.S.C. § 1229(a)(1)(E), (b)(2); see 8 C.F.R. § 1003.61(b) (stating that a list of pro bono legal services providers “shall be provided to individuals in removal . . . proceedings before an immigration court”).

The removal process typically includes an administrative hearing and the right to both administrative and judicial review. In general, a person facing removal from the United States receives a hearing before an immigration judge (IJ). 8 U.S.C. § 1229a(a)(1). In addition to presenting defenses, the person may apply for certain forms of relief in lieu of removal, such

as pre-conclusion voluntary departure. 8 U.S.C. § 1229c(a)(1); 8 C.F.R. § 1240.26(b); see *Thapa v. Gonzales*, 460 F.3d 323, 327 (2d Cir. 2006) (pre-conclusion voluntary departure “enables aliens identified by the government as being illegally present in the United States to leave the country of their own accord without being forcibly removed”). If an IJ enters an order of removal, the noncitizen has a right to administratively appeal to the Board of Immigration Appeals (BIA). 8 U.S.C. § 1229a(c)(5); 8 C.F.R. §§ 1003.1(b), (d)(3), 1240.15. And if that fails, the noncitizen may seek judicial review in a federal court of appeals. 8 U.S.C. §§ 1101(a)(47)(B), 1252(d).

2. Noncitizens who were removed from the United States and later reenter the country without permission can be criminally prosecuted. 8 U.S.C. § 1326(a). And in some cases, noncitizens “whose removal was subsequent to a conviction for commission of an aggravated felony” can face up to 20 years in federal prison. 8 U.S.C. § 1326(b)(2).

Illegal reentry is one of the most commonly charged federal offenses. U.S. Courts, Criminal Federal Judicial Caseload Statistics 2025, Tbl. D-3A (Mar. 31, 2025), <https://perma.cc/B8L4-9485>. During the 12-month period ending March 31, 2025, the government charged 24,347 defendants nationwide with illegal reentry, accounting for nearly 35% of all federal criminal cases filed during that period. *Id.*; see U.S. Dep’t of Just., Prosecuting Immigration Crimes Report, 8 U.S.C. § 1326 Defendants Charged: District Court (2025) (in fiscal year 2025, federal prosecutors charged 28,854 people nationwide with illegal reentry in violation of Section 1326), <https://perma.cc/73HN-5CB9>. Between fiscal years 2019 and 2023, the average sentence for all individuals sentenced for illegal

reentry was 12 months, and 95.7 percent were sentenced to prison. U.S. Sent'g Comm'n, Quick Facts: Illegal Reentry Offenses (F.Y. 2024), <https://perma.cc/RD45-X3WH>.

3. As originally enacted, Section 1326 did not allow defendants to challenge the validity of their underlying removal orders as an affirmative defense. *United States v. Palomar-Santiago*, 593 U.S. 321, 324 (2021). But in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court noted that “the use of the result of an administrative proceeding to establish an element of a criminal offense” was “troubling.” *Id.* at 839 n.15. If Section 1326 permitted a court to “impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been,” the statute would “not comport with the constitutional requirement of due process.” *Id.* at 837. At minimum, this Court held, “a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review.” *Id.* at 839.

This Court then concluded that defects in the defendants’ deportation hearings wrongly deprived them of such review: “The [IJ] 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.” *Mendoza-Lopez*, 481 U.S. at 840. “Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding.” *Id.*; see *id.* at 842 (“Because respondents

were deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them, the deportation proceeding in which these events occurred may not be used to support a criminal conviction.”). Thus, “the fundamental procedural defects of the deportation hearing . . . rendered direct review of the [IJ]’s determination unavailable to respondents.” *Id.* at 841.

“Congress responded [to *Mendoza-Lopez*] by enacting § 1326(d).” *Palomar-Santiago*, 593 U.S. at 324; see *United States v. Hernandez-Perdomo*, 948 F.3d 807, 810 (7th Cir. 2020) (explaining that, “[i]n 1996, Congress amended the statute to codify the holding of *Mendoza-Lopez* by adding subsection (d)”); *United States v. Adame-Orozco*, 607 F.3d 647, 654 (10th Cir. 2010) (Gorsuch, J.) (“Section 1326(d) was enacted in response to *Mendoza-Lopez* and in an effort to incorporate[] [the Court’s judgment] into statutory law.” (internal quotation marks omitted)).

Section 1326(d) now expressly authorizes defendants to collaterally challenge their removal orders. To do so, defendants must demonstrate that: (1) they “exhausted any administrative remedies that may have been available to seek relief against the [removal] order”; (2) the removal proceedings “improperly deprived [them] of the opportunity for judicial review”; and (3) “entry of the order was fundamentally unfair.” 8 U.S.C. § 1326(d). If each requirement is satisfied, the challenged removal order cannot be used to establish any element of an illegal-reentry offense. *Palomar-Santiago*, 593 U.S. at 326; see *Mendoza-Lopez*, 481 U.S. at 839–40.

B. Facts and Proceedings Below

Petitioners were each charged with illegal reentry under Section 1326. They filed motions to dismiss their indictments, which challenged their underlying removal orders. Their motions were denied, and the Ninth Circuit affirmed. In each case, the Ninth Circuit held that establishing the person's waiver of appeal to the BIA was invalid is insufficient to overcome the exhaustion requirement of Section 1326(d)(1).

Nunez's Proceedings Below

1. Nunez, a citizen of Mexico, was brought to the United States when he was about six years old. Pet. App. 2a. He attended school in the Los Angeles area and participated in his high school's cross-country team. 20-cr-83 Doc. Nos. 31-6, 31-8 (Nov. 29, 2021). His first daughter was born in 2008. 20-cr-83 Doc. No. 31-6 (Nov. 29, 2021). Soon after, he met and became engaged to a woman with two children of her own, and they eventually had child together in 2011. 20-cr-83 Doc. No. 31-10 (Nov. 29, 2021). Nunez supported all his children and step-children financially and emotionally. *Id.*

In 2006, Nunez sustained a felony conviction for possession of a controlled substance with a firearm. Pet. App. 2a. In July 2010, he was arrested for possession of a controlled substance for sale. *Id.*

2. In August 2010, the Department of Homeland Security initiated deportation proceedings against Nunez. Pet. App. 2a. Nunez received a notice to appear, which claimed that he would be provided with a list of qualified attorneys and organizations who might represent him at no cost. *Id.* The certificate of service did not reflect that Nunez was actually given that list. 20-cr-83 Doc. No. 31-5 (Nov. 29, 2021).

After receiving written notice of the proceedings, Nunez appeared in immigration court, without counsel, and with 13 other noncitizens. Pet. App. 2a. The IJ first spoke to the group as a whole. *Id.* The group affirmed that they had received a document that explained their appeal rights, although the document is not in the administrative record. Pet. App. 2a, 6a. The IJ also told the group that anyone who disagreed with his decision could appeal to the BIA. Pet. App. 2a. The IJ said that if anyone wanted to appeal, their decision would not be final that day. *Id.*

The IJ later held an individual colloquy with Nunez. The IJ found him removable to Mexico and told him that his prior conviction would “prevent [him] from ever lawful[ly] immigrating to this country, unless the immigration laws change.” 20-cr-83 Doc. No. 31-1, at 36 (Nov. 29, 2021). When Nunez asked the IJ for voluntary departure, the IJ told him that he would not order voluntary departure because “it won’t do you any good.” *Id.* The IJ ordered Nunez deported to Mexico and asked if he wanted to appeal. Nunez said no. Pet. App. 2a. He was deported soon after.

Nunez was subsequently removed from the United States seven times. Pet. App. 2a. Each removal was based on a reinstatement of the 2010 removal order. *Id.*

3. In 2020, Nunez was charged with illegal reentry under Section 1326. Nunez filed a motion to dismiss that challenged the validity of the deportation order under Section 1326(d). He argued that the IJ violated his due process rights by misinforming him of his eligibility for voluntary departure, failing to obtain a valid waiver of his right to counsel, failing to provide the statutorily-required list of free attorneys in advance of the hearing, and failing to obtain a valid

waiver of his right to appeal. Pet. App. 7a. Nunez also argued that he satisfied the requirements in Section 1326(d)(1) and (2)—exhaustion of available administrative remedies and deprivation of judicial review—because his waiver of appeal was invalid. Pet. App. 3a.

The district court denied the motion. *Id.* Nunez then entered a conditional guilty plea that reserved his right to appeal the district court’s denial of the motion to dismiss. After the district court sentenced Nunez to 24 months’ imprisonment and three years of supervised release, he appealed. *Id.*

4. On appeal, Nunez argued in relevant part that he satisfied Section 1326(d)(1)’s administrative-exhaustion requirement because his waiver of appeal was not considered and intelligent. Nunez contended that during his group deportation hearing, the IJ omitted material information regarding the nature of an appeal and the consequences of failing to appeal, thereby precluding him from entering a considered and intelligent waiver of that right. He also argued that the notices he received prior to the hearing did not explain adequately the consequences of waiving his right to appeal, and the IJ’s group advisement was inadequate because it never explained what an appeal entails and what competing consequences of appeal and waiver might mean for him and his family. Further, the IJ never confirmed with Nunez individually that he understood his right to appeal.

The Ninth Circuit affirmed, in a published decision, on three alternative grounds. First, the court held that even assuming Nunez’s waiver of appeal “was not considered and intelligent,” the waiver’s invalidity was “immaterial” to whether he had satisfied Section 1326(d)(1)’s exhaustion requirement because Nunez was not “*actively misled* as to the rights available to

him.” Pet. App. 5a. Second, the court held that Nunez was not deprived of the opportunity for judicial review because his appeal waiver was considered and intelligent. Pet. App. 6a. Third, the court held that the deportation order was not fundamentally unfair. Pet. App. 7a.

Nunez sought panel rehearing and rehearing en banc. He emphasized this Court’s holding in *Mendoza-Lopez*, as well as the view of five other circuit courts that an invalid appeal waiver satisfies Section 1326(d)(1). 22-50072 C.A. Pet. for Reh’g 7–20. The court of appeals denied rehearing. Pet. App. 23a.

Calderon’s Proceedings Below

1. Calderon is a native and citizen of Mexico. Pet. App. 24a. He was brought to the United States when he was just eight years old. *Id.*

Calderon showed promise as a child. 19-cr-725 Doc. No. 20, at 2 (Apr. 19, 2021). He attended schools in Los Angeles, worshiped at a Catholic church, and participated in the Junior Reserve Officers’ Training Corps. *Id.* Calderon dreamed of one day enlisting in the U.S. military but was unable to do so because of status. *Id.*

As a teenager, Calderon started getting into trouble with the law. 19-cr-725 Doc. No. 20, at 2–3 (Apr. 19, 2021). In 1999, he was charged in state court with burglary and attempted grand theft. *Id.* He was convicted and sentenced to three years of probation and 180 days in county jail. *Id.* Soon after, Calderon was charged in state court with misdemeanor domestic battery. *Id.* He was convicted and sentenced to three years of probation and 53 days in county jail. *Id.* And in 2002, Calderon was charged in state court with possession of methamphetamine and forging an official

seal, along with misdemeanor possession of drug paraphernalia and driving without a license. *Id.* He received three years of probation and a suspended sentence of 365 days in county jail. *Id.*

2. In December 2002, Calderon was placed in immigration detention and served with a Notice to Appear (NTA). 19-cr-725 Doc. No. 20, at 3 (Apr. 19, 2021). He was charged as removable on the ground of being “an alien present in the United States without being admitted or paroled.” 19-cr-725 Doc. No. 20-1, at 72 (Apr. 19, 2021). He was also ordered to appear before an IJ to show cause why he should not be removed from the country. *Id.*

The NTA stated that Calderon could obtain legal representation, at no expense to the government, and would be provided with “[a] list of qualified attorneys and organizations who may be available to represent [him] at no cost.” 19-cr-725 Doc. No. 20-1, at 73 (Apr. 19, 2021). But the certificate of service does not reflect that Calderon was given such a list; instead, the applicable check box on the form was left blank. *Id.* The NTA also stated that Calderon would be “advised by the [IJ] . . . of any relief from removal for which [he] may appear eligible[,] including the privilege of departing voluntarily,” and would be “given a reasonable opportunity to make any such application to the [IJ].” *Id.*

About a week later, Calderon appeared pro se at a group removal proceeding. 19-cr-725 Doc. No. 20, at 4 (Apr. 19, 2021). There were 11 other noncitizens present at the hearing. *Id.*

The IJ first played the group a pre-recorded statement, in which he discussed certain rights. 19-cr-725 Doc. No. 20-1, at 78 (Apr. 19, 2021). Among other

things, the IJ informed the group that they have “the right to be represented by an attorney, but the government will not pay for that attorney.” *Id.* He explained that the men “should have all received a list of the free legal services . . . before [the] hearing,” and that it was “up to [them] to contact the attorneys on that list.” *Id.* at 78–79.

The IJ also informed the group that they “may be eligible for the relief called ‘voluntary departure.’” 19-cr-725 Doc. No. 20-1, at 80 (Apr. 19, 2021). He explained that, if awarded, such relief requires a person to “return to [his] home country voluntarily, paying [his] own way back.” *Id.* He said that “[t]he cost of the transportation from this location to Mexico is \$7,” which is “for the bus transportation.” *Id.* at 81. The IJ reiterated that each man must be “eligible for voluntary departure” and “have the amount of money necessary to pay [his] own way back.” *Id.*

The IJ next showed the group a “list of free legal services” and a “form explaining [their] appellate rights.” 19-cr-725 Doc. No. 20-1, at 83 (Apr. 19, 2021). The IJ said “[p]lease raise your hand if you did not get this list” or “did not receive this form.” *Id.* The IJ stated for the record that “no one raised their hand to either question.” *Id.*

The IJ eventually called Calderon’s case, addressing him directly for under three minutes. 19-cr-725 Doc. No. 20, at 5 (Apr. 19, 2021). As relevant here, the IJ asked whether Calderon understood his “legal rights.” 19-cr-725 Doc. No. 20-1, at 84 (Apr. 19, 2021). Calderon said, “[y]es.” *Id.* The IJ also asked whether Calderon wanted his case “postponed to try to get an attorney” or instead “decided today.” *Id.* Calderon said he wanted the case “decided today.” *Id.*

The IJ ultimately concluded that Calderon was “subject to removal as charged” and “not eligible” to remain in the United States. 19-cr-725 Doc. No. 20-1, at 85–87 (Apr. 19, 2021). Toward the end of the hearing, the IJ asked Calderon the following question: “Do you have the \$7 for voluntary departure?” *Id.* at 87. Calderon said, “[n]o.” *Id.*

The IJ ordered Calderon removed to Mexico. 19-cr-725 Doc. No. 20-1, at 90 (Apr. 19, 2021). He asked whether Calderon wanted to “file an appeal” or instead accept the decision as “final today, waiving appeal.” *Id.* at 87. Calderon said that he wanted to “waive [his] appeal.” *Id.*; see Pet. App. 24a.

Calderon was subsequently removed from the United States on at least six occasions. Pet. App. 24a. In each instance, immigration officials reinstated the 2002 order and removed Calderon from the country. 19-cr-725 Doc. No. 20-1, at 92–102 (Apr. 19, 2021).

3. Calderon was again found in the United States in August 2019. Pet. App. 24a. A few months later, a grand jury in the Central District of California returned an indictment against him. *Id.* He was charged with one count of being a noncitizen “found in” the United States in violation of Sections 1326(a) and (b)(2). *Id.*

Calderon moved to dismiss the indictment under Section 1326(d). Pet. App. 24a. He argued that his 2002 removal proceeding violated due process because: (i) he did not timely receive a list of free legal services providers; and (ii) the IJ did not provide a meaningful opportunity for him to apply for voluntary departure. 19-cr-725 Doc. No. 20, at 8–15 (Apr. 19, 2021). Calderon also maintained that it is plausible an IJ who considered and weighed all the relevant factors

would have granted him voluntary departure. *Id.* at 15–19. Calderon further argued that he satisfied Section 1326(d)’s administrative exhaustion and deprivation of judicial review requirements because his appeal waiver was invalid. *Id.* at 19–20; see 19-cr-725 Doc. No. 73, at 2 (Aug. 25, 2021); 19-cr-725 Doc. No. 38, at 8–12 (June 2, 2021).

The district court denied relief. Pet. App. 26a–29a. It concluded that Calderon’s removal was not fundamentally unfair because he was deprived of neither a list of free legal services providers nor a meaningful advisal regarding voluntary departure. Pet. App. 28–29a. Because the court determined that Calderon’s removal proceeding was not fundamentally unfair, it stated that “his derivative argument that his appeal waiver was invalid necessarily also fails.” Pet. App. 29a.

Calderon then entered a conditional guilty plea, while reserving his ability to appeal the denial of his Section 1326(d) motion. Pet. App. 24a The district court ultimately sentenced Calderon to 60 days in prison, with credit for time served, to be followed by three years of supervised release. *Id.*

4. The Ninth Circuit affirmed. Pet. App. 24a–25a. It acknowledged Calderon’s argument that “he has not failed to exhaust available administrative remedies because his appellate waiver was invalid and therefore no administrative remedies were available to him.” Pet. App. 24a. Relying on *Nunez*, however, the court explained that it had recently held “an invalid waiver of appeal ordinarily does not render administrative remedies unavailable for purposes of section 1326(d)(1).” *Id.* In other words, “*Nunez* forecloses his argument that he satisfies the first component of section 1326(d).” *Id.* Because Calderon “cannot show he

exhausted administrative remedies,” the court concluded, he is “barred under section 1326(d) from challenging his indictment by collaterally attacking his 2002 removal order.” *Id.* The court did not address the parties’ remaining arguments. *Id.*¹

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED.

The Ninth Circuit has held that whether an individual’s waiver of appeal to the BIA was considered and intelligent is “immaterial” to determining whether he has satisfied the exhaustion requirement in 8 U.S.C. § 1326(d)(1). Pet. App. 5a; see *id.* at 24a. The Second, Third, Fourth, Eighth, and Tenth Circuits, however, have reached the opposite conclusion and held that when an individual’s appeal waiver is invalid, Section 1326(d)(1) does not bar collateral review. The Sixth Circuit’s conflicting precedents make its position unclear, and the First and Fifth Circuits have declined to address the issue. This 5-1 split in circuit authority warrants review.

¹ The government alternatively argued that Calderon should be estopped from collaterally challenging his 2002 removal order because he purportedly admitted, as part of a plea agreement in a separate and subsequent prosecution, that the removal order was lawful. 22-50040 Gov’t C.A. Br. 54–58. The Ninth Circuit did not address this alternative argument; and it denied as moot the government’s request to take judicial notice of the documents supposedly supporting this argument, which were not part of the record on appeal. Pet. App. 24a.

A. The Ninth Circuit has ruled that an invalid appeal waiver does not satisfy Section 1326(d)(1).

In *Nunez*, the Ninth Circuit held that whether an appeal waiver was “considered and intelligent” is “immaterial” to Section 1326(d)(1)’s exhaustion requirement because the requirement can be excused only pursuant to an “exceedingly narrow set of circumstances” that were absent from Nunez’s case. Pet. App. 5a. The Court therefore held that “even if Nunez’s waiver were not ‘considered and intelligent,’ that alone would not excuse Nunez’s failure to exhaust administrative remedies pursuant to § 1326(d)(1).” Pet. App. 6a.

The Ninth Circuit reached that conclusion by relying on *United States v. Palomar-Santiago*, 593 U.S. 321 (2021). In *Palomar-Santiago*, this Court held that “§ 1326(d)’s first two procedural requirements”—which require administrative exhaustion and deprivation of judicial review—“are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable.” *Id.* at 327. The Ninth Circuit, however, interpreted *Palomar-Santiago* more expansively. The court of appeals concluded that an individual who fails to appeal to the BIA may satisfy or be excused from Section 1326(d)(1)’s exhaustion requirement only in the “three specific circumstances—all extreme examples”—specified in *Ross v. Blake*, 578 U.S. 632 (2016).² Pet. App. 5a. And because the lack of a considered and intelligent appeal waiver was not one of the circumstances enumerated in *Ross*, the

² In *Ross*, the Court interpreted the administrative exhaustion requirement found in the Prison Litigation Reform Act of 1995. 578 U.S. at 635–36.

Ninth Circuit reasoned, whether an appeal waiver is considered and intelligent is “immaterial” to the Section 1326(d)(1) analysis. *Id.*

B. The Second, Third, Fourth, Eighth, and Tenth Circuits have held that an invalid appeal waiver satisfies or excuses Section 1326(d)(1).

Five other circuits have taken a contrary view and held that, when a waiver of appeal to the BIA is invalid, Section 1326(d)(1) does not bar collateral review.³

The Second Circuit has held that “the exhaustion requirement must be excused where an alien’s failure to exhaust results from an invalid waiver of the right to an administrative appeal.” *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004); see *United States v. Cerna*, 603 F.3d 32, 38 (2d Cir. 2010) (same). “Otherwise, Section 1326(d) would violate *Mendoza-Lopez* by prohibiting collateral attacks of deportation proceedings that were fundamentally unfair because they denied the alien an opportunity for judicial review.” *Sosa*, 387 F.3d at 136. District courts in the Second Circuit have continued to rely on *Sosa* following *Palomar-Santiago*. See, e.g., *United States v. Ramos de la Rosa*, No. 21-cr-210-JSR, 2021 WL 2784610, at *2–3 (S.D.N.Y. July 1, 2021) (Rakoff, J.); *United States*

³ Some courts have said that an invalid appeal waiver “excuse[s]” the administrative-exhaustion requirement. *E.g.*, *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004); *United States v. Castro-Aleman*, 141 F.4th 576, 580 (4th Cir. 2025). In this context, “excused” and “satisfied” are used interchangeably. Whether an invalid appeal waiver satisfies Section 1326(d)(1) by establishing that no administrative remedies were “available,” or excuses the requirement pursuant to *Mendoza-Lopez* and due process, the result is the same: the exhaustion requirement “cannot bar collateral review.” *Richardson v. United States*, 558 F.3d 216, 220 (3d Cir. 2009) (citation omitted).

v. *Holmes*, No. 21-cr-147 (NGG), 2022 WL 1036631, at *5 & *12 (E.D.N.Y. Apr. 6, 2022).

The Third Circuit has similarly held that a noncitizen’s “waiver of [his] right to administrative review of deportation will bar collateral review under 8 U.S.C. § 1326(d) only when it is voluntary and intelligent.” *Richardson v. United States*, 558 F.3d 216, 219–20 (3d Cir. 2009) (citing *Sosa*, 387 F.3d at 136). District courts in the Third Circuit have also continued to rely on *Richardson* subsequent to *Palomar-Santiago*. See, e.g., *United States v. Salinas*, No. 1:22-cr-00467-NLH, 2022 WL 7538856, at *3 (D.N.J. Oct. 12, 2022) (“In evaluating the exhaustion requirement, a waiver of appeal rights in an immigration proceeding must be knowingly and intelligently made.”).

The Fourth Circuit recently held that, in accord with its pre-*Palomar-Santiago* precedent, a “procedural error that would ‘render further review of an adverse decision unavailable,’” such as an IJ’s “failure to explain adequately . . . [the] right to appeal,” excuses Section 1326(d)(1)’s exhaustion requirement. *United States v. Castro-Aleman*, 141 F.4th 576, 580 n.2 (4th Cir. 2025) (citations and emphasis omitted). The court also noted its alignment with the Second and Third Circuits by citing *Sosa* and *Richardson*. *Id.* at 580.

The Eighth Circuit has similarly held that a noncitizen’s *knowing and voluntary* waiver of “his right to appeal an order of deportation” means he has “fail[ed] to exhaust administrative remedies” under Section 1326(d)(1). *United States v. Tamayo-Baez*, 820 F.3d 308, 313 (8th Cir. 2016); see *United States v. Saucedo*, 956 F.3d 549, 554–55 (8th Cir. 2020) (same). And again, district courts within the circuit have relied on that recitation of law following *Palomar-Santiago*.

See, e.g., *United States v. Garcia-Olivas*, No. 8:24-cr-164, 2025 WL 452449, at *1 (D. Neb. Feb. 3, 2025).

Finally, the Tenth Circuit has also held that a noncitizen “who knowingly waives the right to appeal an immigration judge’s order of deportation fails to exhaust administrative remedies under § 1326(d)(1).” *United States v. Chavez-Alonso*, 431 F.3d 726, 728 (10th Cir. 2005); see *Tamayo-Baez*, 820 F.3d at 313 (citing *Chavez-Alonso*). And district courts in the Tenth Circuit have, likewise, continued to rely on *Chavez-Alonso* following *Palomar-Santiago*. See, e.g., *United States v. Hernandez-Agustin*, No. 21-cr-1886 KG, 2022 WL 980284, at *2 (D.N.M. Mar. 31, 2022).⁴

C. The Sixth Circuit’s position is unclear.

The Sixth Circuit has issued published decisions on the question presented that are in tension with one another, making its ultimate position unclear. Before *Palomar-Santiago*, the court of appeals took the majority position that Section 1326(d)(1)’s exhaustion requirement “cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process.” *United States v. Martinez-Rocha*, 337 F.3d 566, 569 (6th Cir. 2003) (quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001)). And in *Palomar-Santiago*, this Court cited *Martinez-Rocha* as an example of the Sixth Circuit properly applying “§ 1326(d)’s first two requirements.” 593 U.S. 326 & n.1.

⁴ The Seventh Circuit appears to have implicitly agreed that an invalid appeal waiver satisfies the administrative-exhaustion requirement, but did not explicitly so hold. *United States v. Gil-Lopez*, 825 F.3d 819, 822–23 (7th Cir. 2016).

More recently, however, the court of appeals explained that “an alleged procedural defect” does not “excuse” Section 1326(d)(1)’s exhaustion requirement. *United States v. Flores-Perez*, 1 F.4th 454, 458 (6th Cir. 2021). In *Flores-Perez*, the defendant argued that he did not receive sufficient notice of the removal proceeding, in violation of due process, and that error excused Section 1326(d)(1)’s exhaustion requirement. *Id.* at 457–58. The Sixth Circuit found the defendant’s position untenable following *Palomar-Santiago* because even a flawed removal proceeding did not excuse his “failure to comply with a mandatory exhaustion requirement.” *Id.* at 458 (quoting *Palomar-Santiago*, 593 U.S. at 328). Although that reasoning appears at first glance to align with the Ninth Circuit’s decision in *Nunez*, the court further explained that the procedural flaw the defendant identified—insufficient notice of the removal proceeding—was specifically contemplated by the INA, and the defendant therefore could have moved to reopen his “removal order entered in absentia ‘at any time’ based on a demonstrated lack of proper notice.” *Id.* (quoting 8 U.S.C. § 1229a(b)(5)(C)(ii)). Thus, *Flores-Perez* could be read broadly and in accord with *Nunez*, or narrowly and consistent with *Martinez-Rocha* and the majority position.⁵

⁵ The Fourth Circuit read *Flores-Perez* to abrogate the Sixth Circuit’s prior precedent in light of *Palomar-Santiago*. 141 F.4th 580 n.2. Because the Fourth Circuit maintained its majority view and concluded that *Palomar-Santiago* had no impact on whether procedural errors precluded further direct review, it concluded that it had “part[ed] ways with the Sixth Circuit.” *Id.*

D. The First and Fifth Circuits have recognized and declined to answer the question presented.

The First and Fifth Circuits have identified the question presented and declined to answer it. In *United States v. Soto-Mateo*, the First Circuit noted that “[s]everal courts have recognized an exception to the exhaustion requirement for cases in which the alien’s waiver of administrative review was not knowing and intelligent.” 799 F.3d 117, 120–21 (1st Cir. 2015) (collecting cases). The court nonetheless “reserved judgment on whether to recognize such an exception.” *Id.* at 121.

The Fifth Circuit has also noted and expressly declined to address the question presented. *United States v. Hernandez Velasquez*, 120 F.4th 1294, 1297 (5th Cir. 2024).

* * *

In sum, there is a clear 5-1 split on the question presented. The division in authority will not resolve itself—the Ninth Circuit denied rehearing en banc despite Nunez highlighting the contrary decisions in other circuits. Pet. App. 23a. And the court of appeals again applied its rule to foreclose Calderon’s claim. Pet. App. 24a. Review is therefore warranted to establish nationwide consistency.

II. THE NINTH CIRCUIT’S RULE IS WRONG.

A. The Ninth Circuit’s rule conflicts with *Mendoza-Lopez*, the text of Section 1326(d)(1), and due process principles.

1. The Ninth Circuit’s holding that an invalid appeal waiver does not satisfy the administrative-exhaustion requirement squarely contradicts *Mendoza-*

Lopez. In *Mendoza-Lopez*, this Court held that a defendant charged with illegal reentry has a Fifth Amendment right to collaterally challenge his removal order when no meaningful judicial review of that order was previously available. 481 U.S. at 837–38. The case involved defendants who, during their immigration proceedings, waived their right to appeal to the BIA. *Id.* at 840. But “[b]ecause the waivers of their rights to appeal were not considered or intelligent,” the Court held, “respondents were deprived of judicial review of their deportation proceeding.” *Id.* The Court further explained that this “fundamental procedural defect[] . . . rendered direct review of the Immigration Judge’s determination *unavailable* to respondents.” *Id.* at 841 (emphasis added). The same procedural defect—lack of a considered and intelligent appeal waiver—exists in these cases.

2. The statutory text is in accord. Congress subsequently codified *Mendoza-Lopez*’s due process holding in Section 1326(d)(1), which requires an individual seeking to collaterally attack his removal proceedings to have “exhausted any administrative remedies that may have been *available* to seek relief against the order.” 8 U.S.C. § 1326(d)(1) (emphasis added). That text parallels this Court’s language that “direct review of the [IJ]’s determination [was] *unavailable* to respondents” because “the waivers of their rights to appeal were not considered or intelligent.” *Mendoza-Lopez*, 481 U.S. at 840–41 (emphasis added). Thus, under both *Mendoza-Lopez* and Section 1326(d)(1), a person’s waiver of appeal to the BIA that is not considered and intelligent is a core example of a circumstance in which administrative appeal is unavailable, and the person’s failure to pursue an appeal in such circumstances does not constitute failure to exhaust

available remedies. When the same person is in criminal proceedings and seeks to collaterally attack his removal order, he has therefore satisfied Section 1326(d)(1).

3. Finally, as explained in *Mendoza-Lopez*, this outcome is independently mandated by due process. “[W]here 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.” *Mendoza-Lopez*, 481 U.S. at 837–38. “This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.” *Id.* at 838. Because an individual’s appeal waiver that was “not the result of considered judgment[]” ultimately “render[s] direct review of the Immigration Judge’s determination unavailable,” due process requires an opportunity for the individual “to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial officer.” *Id.* at 840–41.

Nunez’s contrary holding is wrong and violates critical statutory and due process rights held by the criminally accused.

B. *Palomar-Santiago* did not address the question presented.

The Ninth Circuit’s reasoning finds no support in *Palomar-Santiago*, which neither considered nor implicated the question presented.⁶

First, *Palomar-Santiago* addressed a specific question: whether a defendant is “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 (citation omitted). The Court held that “§ 1326(d)’s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable.” *Id.* at 327. It further reasoned that an “immigration judge’s error on the merits does not excuse the noncitizen’s failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error.” *Id.* at 328. The Court thus resolved “the narrow question [it] granted certiorari to decide.” *Id.* at 328 n.4.

Second, reading *Palomar-Santiago* to bar the satisfaction of Section 1326(d)(1)’s administrative-exhaustion requirement where an IJ fails to adequately

⁶ Prior to *Nunez*, the Ninth Circuit held that Section 1326(d)(1) “cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process.” *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004) (quoting *Muro-Inclan*, 249 F.3d at 1183–84). And a “waiver of the right to appeal a removal order does not comport with due process when it is not ‘considered and intelligent.’” *Id.* (quoting *Muro-Inclan*, 249 F.3d at 1183–84). It reaffirmed this rule even after *Palomar-Santiago* was published, *United States v. De la Mora-Cobain*, 18 F.4th 1141, 1147 (9th Cir. 2021), but changed tack in *Nunez*.

explain an individual's right to appeal, and thus deprives the individual of "the opportunity to fix any errors in their removal orders on review," "would amount to overturning [a] core holding of *Mendoza-Lopez*." *Castro-Aleman*, 141 F.4th at 580 n.2. And that is "implausible given *Palomar-Santiago*'s recitation of *Mendoza-Lopez*'s holding without comment." *Id.*

Third, *Palomar-Santiago* cited the Sixth Circuit's opinion in *Martinez-Rocha* as an example of a decision that did "not excuse . . . unlawful-reentry defendants from meeting § 1326(d)'s first two requirements." 593 U.S. at 326 & n.1. As explained above, *Martinez-Rocha* considered whether the defendant's waiver of appeal before the IJ "was considered and intelligent." 337 F.3d at 569. And it cited the Ninth Circuit's pre-*Nunez* decision in *Muro-Inclan* for the proposition that "[t]he exhaustion requirement of 8 U.S.C. § 1326(d) cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process." *Id.* (quoting *Muro-Inclan*, 249 F.3d at 1183). Had this Court intended to silently overrule its holding in *Mendoza-Lopez* that an invalid appeal waiver cannot preclude collateral attack on a deportation order, surely it would not have identified *Martinez-Rocha* as an exemplar of the proper application of Section 1326(d)'s requirements.

Moreover, two other cases cited by the Court in *Palomar-Santiago* also considered whether defendants' waivers of appeal to the BIA were considered and intelligent. *United States v. Rodriguez*, 420 F.3d 831, 834 (8th Cir. 2005) (explaining that a "subsequent change in the law does not render Rodriguez's waiver of his right to appeal 'not considered or intelligent'" (quoting *Mendoza-Lopez*, 481 U.S. at 840));

United States v. Gil-Lopez, 825 F.3d 819, 822–23 (7th Cir. 2016) (concluding defendant failed to establish that he “did not knowingly and voluntarily withdraw his appellate rights” and therefore “did not exhaust his administrative remedies”). *Palomar-Santiago* has no bearing on the question presented.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT.

The question presented is important because it involves one of the primary—and most powerful—defenses to an illegal-reentry prosecution. And, as explained above, illegal reentry is currently one of the most commonly charged federal offenses in the nation. See U.S. Courts, Criminal Federal Judicial Caseload Statistics 2025, Tbl. D-3A (Mar. 31, 2025), <https://perma.cc/B8L4-9485>. The Ninth Circuit’s outlier rule also has outsized impact, as a plurality of national Section 1326 prosecutions are brought in the districts that comprise the Ninth Circuit. In the 12-month period ending in March 2025, 10,780 of the 24,347 illegal reentry cases charged nationally were prosecuted within the Ninth Circuit, representing 44% of the total. *Id.* It is untenable for thousands of individuals charged with illegal reentry to be subject to the Ninth Circuit’s rule, while thousands of others are subject to a different one, based solely on the accident of geography.

Moreover, illegal-reentry prosecutions result in prison sentences more than 95 percent of the time, underscoring the importance of mounting a collateral attack on the underlying removal order. U.S. Sent’g Comm’n, Quick Facts: Illegal Reentry Offenses (F.Y. 2024), <https://perma.cc/RD45-X3WH>. And those prison terms are often lengthy, particularly relative to the nature and seriousness of the offense. On average,

those convicted of illegal reentry are sentenced to 12 months in prison, and the statutory maximum sentence jumps from two to 20 years for individuals who were removed from the country after being convicted of an “aggravated felony.” 8 U.S.C. § 1326(b)(2).

The question presented also implicates critically important due process rights that prevent error-prone administrative proceedings from forming the basis of federal criminal convictions. As explained above, this Court has found that using “the result of an administrative proceeding to establish an element of a criminal offense” is “troubling.” *Mendoza-Lopez*, 481 U.S. at 838 n.15. That concern is indeed at its apex in immigration proceedings, where individuals do not have a right to court-appointed counsel, are subject to mass and expedited proceedings, and often “face practically insurmountable barriers to administrative appeal and judicial review.” Br. of Amici Curiae The Nat’l Immigration Project, et al., *United States v. Palomar Santiago*, No. 20-437, p. 3 (Mar. 31, 2021). Most individuals in removal proceedings do not speak English, or speak it poorly, and appeals to the BIA and judicial review in the courts of appeals “are both conducted in English, without guaranteed interpretation or translation services.” *Id.* at 4.

Further, for individuals in immigration detention, seeking administrative appeal and judicial review is often contingent on remaining in custody, rather than accepting removal and thereby securing release. Immigration detention often lasts “for months or even years”; in 2021, the average immigration case took 870 days to be completed. *Id.* at 5, 16. Only 14 percent of people in detention have legal representation, and for all removal cases, only about 2.1 percent of appeals are taken without counsel. *Id.* at 10–11. The upshot is

that many people in removal proceedings—lacking counsel, their freedom, and English language skills—do not understand whether or how to appeal. When those individuals later face criminal prosecution and imprisonment based in part on their administrative immigration proceedings, they must be permitted to collaterally attack their removal as a means of vindicating due process.

To be sure, many people in removal proceedings who lack counsel will enter a valid waiver of their right to appeal, which precludes a collateral challenge under Section 1326(d). But for the individuals who were never told of, or never understood, the benefits and consequences of appeal, and subsequently face criminal prosecution, the question whether they are permitted to obtain judicial review of their deportation order is of the utmost constitutional importance.

IV. THESE CASES ARE GOOD VEHICLES FOR RESOLVING THE QUESTION PRESENTED.

The legal question at issue here—whether Section 1326(d)(1)'s administrative-exhaustion requirement bars collateral review where the person's waiver of appeal was invalid—was appropriately teed up in these cases. In each case, the petitioner argued in district court that he satisfied the administrative-exhaustion requirement because his appeal waiver was invalid. See pp. 9–10, 14–15, *supra*. And in each case, the petitioner raised that same argument in the court of appeals. See pp. 10–11, 15–16, *supra*.

The Ninth Circuit also squarely addressed the question presented in these cases. Indeed, in Nunez's case, the court of appeals discussed the issue at length and precedentially held that an invalid appeal waiver

does not render administrative remedies unavailable. Pet. App. 5a. It then declined to rehear the issue en banc, despite being alerted to the conflict with *Mendoza-Lopez* and decisions in five other circuits. Pet. App. 23a; see 22-50072 C.A. Pet. for Reh'g 19–20. And in Calderon's case, the court relied on its then-recent decision in *Nunez* to conclude that the argument was “foreclose[d]” by circuit precedent. Pet. App. 24a.

Moreover, this Court's resolution of the question presented would have a practical impact here. To be sure, the Ninth Circuit's decision to affirm Nunez's conviction rested on two alternative grounds, i.e., that Nunez was not deprived of the opportunity for judicial review under Section 1326(d)(2), and that his removal order was not fundamentally unfair under Section 1326(d)(3). Pet. App. 6a–7a. But the same is not true for Calderon's case. There, the court's decision to affirm the conviction turned exclusively on the administrative-exhaustion rule it had announced in *Nunez*. Pet. App. 24a. Thus, Calderon's case is a particularly suitable vehicle for the Court to address the question presented and resolve the circuit split.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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