PETITION APPENDIX

TABLE OF CONTENTS

140 F.4th 1157
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Eliel NUNEZ Sanchez, aka Eliel Nunez, Defendant-Appellant.

No. 22-50072
|
Argued and Submitted January 13, 2025 Pasadena, California
|
Filed June 18, 2025

Synopsis

Background: Following denial of his motion to dismiss indictment, defendant was convicted in the United States District Court for the Central District of California, R. Gary Klausner, J., of illegally reentering United States after having previously been subject to order of removal. Defendant appealed.

Holdings: The Court of Appeals, Bennett, Circuit Judge, held that:

immigration judge's (IJ) purported failure to inform defendant of his appeal rights was insufficient to excuse his failure to comply with mandatory exhaustion requirement for collateral review of removal order;

defendant's waiver of appeal at removal hearing was considered and intelligent;

defendant's waiver of his due process right to counsel during removal proceeding was valid; and

defendant failed to show that IJ's purported categorical foreclosure of voluntary departure relief for any noncitizens with criminal records prejudiced him.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

Appeal from the United States District Court for the Central District of California, R. Gary Klausner, District Judge, Presiding, D.C. No. 2:20-cr-00083-RGK-1

Attorneys and Law Firms

Laura A. Alexander (argued), Assistant United States Attorney, Environmental Crimes and Consumer Protection Section; Maxwell K. Coll and Rajesh R. Srinivasan, Assistant United States Attorneys; David R. Friedman, and Mack E. Jenkins, Assistant United States Attorneys, Chiefs, Criminal Division; E. Martin Estrada, United States Attorney; Office of the United States Attorney; United States Department of Justice, Los Angeles, California; for Plaintiff-Appellee.

Holt O. Alden (argued) and James H. Locklin, Deputy Federal Public Defenders; Cuauhtémoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellant.

Before: Ronald M. Gould, Mark J. Bennett, and Kenneth K. Lee, Circuit Judges.

OPINION

BENNETT, Circuit Judge:

***1160** Defendant-Appellant Eliel Nunez Sanchez (Nunez) [1] collaterally attacks the validity of a removal order entered against him in 2010. Pursuant to 8 U.S.C. § 1326(d), aliens presenting collateral attacks on removal orders must satisfy three requirements for such challenges to proceed: first, they must have exhausted all administrative remedies available to them; second, they must have been deprived of the opportunity for judicial review; and finally, entry of the removal order must have been "fundamentally unfair." 8 U.S.C. § 1326(d).

1 The opening and reply briefs refer to Defendant as "Nunez."

Nunez satisfies none of § 1326(d)'s three mandatory requirements. Nunez failed to exhaust his administrative remedies, and his challenge falls outside the narrow zone of procedural defects excusing a failure to exhaust administrative remedies. *See id.* U.S.C. § 1326(d)(1). Nunez also fails to demonstrate that he was deprived of the opportunity for judicial review. *Id.* § 1326(d)(2). Finally, Nunez fails to demonstrate that the entry of the removal

order against him was fundamentally unfair. *Id.* § 1326(d)(3). Because Nunez must satisfy each of § 1326(d)'s three requirements, but he satisfies none, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

1. Factual background

Nunez, a citizen of Mexico born in 1986, illegally entered the United States as a child (brought by his parents) in the early 1990s. In 2006, Nunez was convicted of possession of a controlled substance (methamphetamine) while armed and was sentenced to nine months in jail. When arraigned in that 2006 case, Nunez was informed that a conviction would subject him to "the consequences of deportation, exclusion from admission to the United States, or denial of naturalization."

In July 2010, Nunez was arrested for possession of a controlled substance (methamphetamine) for sale. The U.S. Department of Homeland Security (DHS) then initiated removal proceedings against Nunez. Nunez was concurrently provided with a notice of his right to a hearing before an immigration judge (IJ). That notice stated, among other things, that Nunez had the right to contact an attorney or legal representative to represent him at that hearing and that he could request a list of legal organizations that might provide free or low-cost representation.

On August 2, 2010, Nunez received a notice to appear in El Paso, Texas, for removal proceedings. That notice informed him that he would be provided with a list of qualified organizations and attorneys who might represent him at no cost; that the immigration judge conducting the proceeding would advise him of any relief from removal for which he was eligible (including voluntary departure); and that he would be given an opportunity to apply for such relief.

Nunez's removal proceeding took place before an IJ on August 30, 2010. Nunez ***1161** did not obtain counsel before the removal proceeding. At the proceeding, Nunez was one of fourteen noncitizens addressed collectively. A Spanish-language interpreter contemporaneously translated the proceedings. [2]

2 Nunez, who grew up in the United States, is fluent in English. When speaking with the IJ, Nunez requested to proceed in English.

The group was informed of their right to counsel. The group collectively confirmed that they had received a list of free legal service providers in the area. The IJ also informed the group of their right to appeal the IJ's eventual decision, as well as the procedures for conducting such an appeal. The IJ told the group that once a decision was made on their case, he would ask them if they wanted to appeal; that if they said "no," his decision would be final; and that if they said "yes," the decision would not be final.

The IJ informed the group that if any of them did not have a "clean police record," he would exercise his discretion in declining any requests for voluntary departure (relief that the IJ described as allowing those removed "to avoid some of the negative consequences of deportation"). The IJ then asked the group if they wanted more time to prepare their case or to seek representation, and to stand if so. Two members of the group stood. Nunez did not. The IJ then gave those two individuals one month to retain counsel and rescheduled their proceedings accordingly. He then once more asked the remaining noncitizens present if they wanted to seek representation, and if so, to stand up. Again, Nunez did not stand.

The IJ then individually spoke with each noncitizen present, including Nunez. When the IJ spoke with Nunez, Nunez confirmed he was a native and citizen of Mexico who had last entered the United States illegally. [3] Nunez sought voluntary departure, and the IJ denied that request based on Nunez's 2006 conviction for possession of a controlled substance while armed. [4] The IJ informed Nunez that he was going to order him deported to Mexico. The IJ asked Nunez if he wanted to appeal that decision, and Nunez said no. The IJ then ordered Nunez deported to Mexico (Removal Order). Nunez was deported to Mexico on September 1, 2010. Nunez did not appeal the Removal Order. Nunez also did not move to reopen.

3 The transcript reads: "[IJ]: Did you last enter the United States illegally, by sneaking in?" "[Nunez]: Yes."

4 The IJ asked Nunez what drug was involved, and Nunez said it was "meth."

Between 2010 and 2019, Nunez illegally reentered the United States eight times and was deported seven times. [5] Each of those removals was based on the Removal Order. In 2019,

Nunez was again apprehended by immigration authorities in the United States.

5 Nunez was convicted of felony possession of a controlled substance for sale following the July 2010 arrest and was sentenced to 36 months' probation and 12 days in jail. Nunez was also convicted of two felonies in 2012 related to the possession and distribution of dihydrocodeinone. Nunez was originally sentenced to 180 days in custody for those felonies but was resentenced to three years' imprisonment following a probation violation.

2. Procedural background

In February 2020, a grand jury in the Central District of California charged Nunez with illegally reentering the United States after having previously been subject to an order of exclusion, deportation, or removal, in violation of 8 U.S.C. §§ (a), (b)(1), and (b)(2). Nunez moved to dismiss the indictment on the ground that the Removal Order was invalid.

***1162** Nunez argued that he exhausted all "available" administrative remedies because due process errors in his 2010 deportation proceeding rendered his waiver of the right to appeal invalid and thus unavailable. He also argued that the supposedly invalid appeal waiver deprived him of the opportunity for judicial review. Nunez further argued that entry of the Removal Order was fundamentally unfair because his due process rights were violated at the 2010 removal proceeding. Nunez claimed that if not for the alleged due process violations, it was "at least 'plausible that he could have received voluntary departure.

The district court denied Nunez's motion to dismiss, finding that Nunez had failed to exhaust his administrative remedies because he had validly waived his right to appeal the Removal Order, and thus his collateral attack on the Removal Order was barred. Nunez subsequently entered a conditional plea of guilty to violations of § 1326(a) and (b)(2), preserving his right to appeal the district court's denial of his motion to dismiss. The district court sentenced Nunez to 24 months in custody followed by three years of supervised release, and this timely appeal followed.

II. JURISDICTION

We have jurisdiction under 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We review de novo the district court's denial of a motion to dismiss an indictment under 8 U.S.C. § 1326(d). *See United States v. Portillo-Gonzalez*, 80 F.4th 910, 915 (9th Cir. 2023).

IV. DISCUSSION

Nunez was charged with crimes that are applicable only to aliens who have been subject to "order[s] of exclusion, deportation, or removal." 8 U.S.C. § 1326(a)(1). We have held, however, that "a successful collateral attack on a removal order precludes reliance on a reinstatement of that same order in criminal proceedings for illegal reentry." *United States v. Arias-Ordonez*, 597 F.3d 972, 982 (9th Cir. 2010), *abrogated on other grounds as recognized in United States v. Portillo-Gonzalez*, 80 F.4th 910, 918 (9th Cir. 2023). Thus, if Nunez's collateral challenge has merit, we must reverse the district court and grant his motion to dismiss the indictment. But Nunez's challenge lacks merit, so we affirm.

Section 1326(d) provides that an alien may not collaterally challenge the validity of a deportation order (like the Removal Order here), unless:

> (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) (emphasis added).

1. Nunez fails to satisfy the exhaustion prong of § 1326(d)(1)

Nunez did not appeal the Removal Order or move to reopen. But Nunez argues that he did not fail to exhaust *available* administrative remedies because his waiver of appeal was invalid. As discussed below, we disagree and find the waiver valid. But even if Nunez were correct, the specific alleged defects identified by Nunez do not excuse any failure to exhaust administrative remedies.

Nunez claims that a limited set of procedural defects may excuse a failure to exhaust administrative remedies. Nunez relies on *United States v. Valdivias-Soto*, 112 F.4th 713 (9th Cir. 2024), in which we ***1163** identified a highly limited set of circumstances in which a noncitizen's failure to exhaust administrative remedies may be excused. *Id.* at 732–33. But Nunez makes no allegations that fall within the exceedingly narrow set of circumstances excusing a failure to exhaust under *Valdivias-Soto.*

Until 2021, this court held that defendants charged under § 1326 who had been ordered removed due to a criminal conviction were excused from proving the first two prongs of § 1326(d) if they had been removed as the result of a substantive legal error. *See, e.g., United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017) (per curiam) (forgiving a failure to exhaust if defendant "was not convicted of an offense that made him removable"). But in *United States v. Palomar-Santiago*, 593 U.S. 321, 141 S.Ct. 1615, 209 L.Ed.2d 703 (2021), the Supreme Court overruled this approach, holding that courts may not excuse § 1326(d)(1)'s exhaustion requirement and that "*each* of the statutory requirements of § 1326(d) is mandatory." *Id.* at 329, 141 S.Ct. 1615 (emphasis added). We have read *Palomar-Santiago* as establishing that "[a] substantive error of immigration law '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.' " *Portillo-Gonzalez*, 80 F.4th at 918 (quoting *Palomar-Santiago*, 593 U.S. at 328, 141 S.Ct. 1615).

Nunez tries to evade *Palomar-Santiago* by arguing that he is not mounting a "substantive" challenge to the IJ's decision. Instead, he claims he is advancing a "procedural" challenge—that his waiver of appeal was invalid because of procedural defects that violated his due process rights. According to Nunez, the Supreme Court in *Palomar-Santiago* "didn't consider to what extent any particular procedural error might satisfy § 1326(d)(1)." Nunez further argues that certain procedural defects may render the exhaustion requirement inapplicable. The government counters that *Palomar-Santiago* is far more expansive, and that "[i]t is no longer enough to argue, as defendant does, that a procedural error during removal proceedings excuses him from demonstrating administrative exhaustion or the deprivation of judicial review under §§ 1326(d)(1) and (2)."

Nunez is correct that under this court's caselaw, certain procedural defects may render administrative remedies unavailable such that a failure to exhaust them may be excused. In the wake of *Palomar-Santiago*, we initially understood that case as "not limit[ing] its holding to an IJ's substantive errors" and as "expressly reject[ing] the argument that § 1326(d)'s requirements apply differently to substantive errors than to procedural ones." *Portillo-Gonzalez*, 80 F.4th at 919. But in *Valdivias-Soto*, we held that a limited set of alleged procedural violations may render administrative remedies unavailable for the purposes of § 1326(d)(1)'s exhaustion requirement.[6] *See* 112 F.4th at 730–33.

6 The government states in its answering brief: "The government maintains that *Valdivias-Soto* is inconsistent with *Palomar-Santiago* and *Portillo-Gonzalez* and reserves its right to seek further review of that decision or the application of it to this case." *Valdivias-Soto*, however, is binding on this three-judge panel. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

In *Valdivias-Soto*, we looked to the Supreme Court's decision in *Ross v. Blake*, 578 U.S. 632, 136 S.Ct. 1850, 195 L.Ed.2d 117 (2016), which held that in a limited set of circumstances, administrative remedies may be functionally unavailable such that they need not be exhausted to satisfy a statutory exhaustion requirement. *Valdivias-Soto*, 112 F.4th at 730 (citing ***1164** *Ross*, 578 U.S. at 643–44, 136 S.Ct. 1850). *Ross* established that administrative remedies may not actually be available for the purposes of exhaustion when (1) they are effectively a "dead end"; (2) the requisite procedures are "so opaque" that they are "incapable of use"; or (3) "administrators [have] thwart[ed claimants] from taking advantage of a grievance process through machination, misrepresentation, or intimidation." 578 U.S. at 643–44, 136 S.Ct. 1850. As the *Ross* Court observed, "these circumstances will not often arise." *Id.* at 643, 136 S.Ct. 1850. *Valdivias-Soto* established that *Ross*'s holding was specifically applicable to certain failures to exhaust administrative remedies under § 1326(d)(1). 112 F.4th at 730.

In *Valdivias-Soto*, we found that an IJ's misrepresentation regarding defendant's right to counsel (the result of a translation error) fell within *Ross*'s third category of impermissible circumstances excusing a failure to exhaust. *Id.* at 732–33. There, an "IJ's erroneous advice about [defendant]'s right to counsel was ... not an 'error on the merits,' but a misstatement of the type described in *Ross* concerning the *procedural rules* for obtaining administrative remedies." *Id.* at 732. Given the IJ's affirmative

misrepresentations, we held that defendant had not failed to exhaust available administrative remedies under § 1326(d)(1).[7] *Id.* at 732–33.

7 *Valdivias-Soto* also held that "an IJ's 'error on the merits' does not, on its own, prevent a defendant from entering a 'considered and intelligent' waiver of their right to appeal." 112 F.4th at 726–27. But there, the petitioner suffered from a neurocognitive disorder, could only speak Spanish, and could not read or write in any language. *Id.* at 718–20. Thus, because of the IJ's misrepresentations, the petitioner was not even aware of his right to counsel and therefore could not have validly waived that right. *Id.* at 732.

But *Valdivias-Soto* does not stand for the claim that any waiver of appeal that is not considered and intelligent excuses a failure to exhaust, nor that any alleged procedural defect may overcome § 1326(d)(1)'s bar on collateral attacks to removal orders. Rather, it stands for the far more limited proposition that "administrative remedies are not 'available' " for the purposes of § 1326(d)(1) only "if the IJ 'misled' the defendant 'as to the existence or rules of the ... process' for obtaining them."[8] *Id.* at 732 (ellipsis in original) (quoting *Portillo-Gonzalez*, 80 F.4th at 920).

8 As noted, *Valdivias-Soto* also looked to two additional circumstances described in *Ross*: instances where administrative remedies may not actually be available for the purposes of exhaustion because (1) they are effectively a "dead end," or (2) the requisite procedures are "so opaque" that they are "incapable of use." 112 F.4th at 730 (citing *Ross*, 578 U.S. at 643–44, 136 S.Ct. 1850). Nunez makes no argument here that appeal to the Board of Immigration Appeals (BIA) would have effectively been a dead end or that the BIA's appeal procedures are so opaque that they are incapable of use.

This very limited exception does not help Nunez. Unlike the aggrieved parties in both *Ross* and *Valdivias-Soto*, Nunez makes no allegations that the IJ made any affirmative misrepresentations about the rights available to him. *Cf. id.* at 732–33; *Ross*, 578 U.S. at 648, 136 S.Ct. 1850. Nor does the record demonstrate that the IJ made any misrepresentations. Rather, Nunez claims that he overcomes § 1326(d)(1) because the record allegedly does not demonstrate that Nunez's right to appeal was considered and intelligent and that his waiver of appeal was thus invalid.

Nunez misunderstands *Valdivias-Soto*. The defendant in *Valdivias-Soto* did not overcome § 1326(d)(1)'s exhaustion bar solely because his waiver of appeal was not considered and intelligent. He overcame it ***1165** because the IJ made an affirmative misrepresentation which, under *Ross*, excused his failure to exhaust. *Valdivias-Soto*, 112 F.4th at 732 ("[Defendant]'s case ... falls squarely within the 'misrepresentation' category described in *Ross*."); *see also Portillo-Gonzalez*, 80 F.4th at 920 (identifying *Ross* as requiring "a misleading statement about appeal rights or procedures" to excuse a failure to exhaust administrative remedies). And for the same reason, defendant's waiver of appeal was not considered and intelligent. *Valdivias-Soto*, 112 F.4th at 732. ("[T]he erroneous translations that resulted in [defendant's] invalid waiver of his right to counsel also denied him the assistance of counsel....").

As discussed below, we disagree that Nunez's waiver was not considered and intelligent. But that disagreement is immaterial. Even if Nunez were correct, his claim cannot overcome *Palomar-Santiago* because Nunez makes no allegations within the exceedingly narrow set of circumstances in which a failure to exhaust may be excused pursuant to *Valdivias-Soto*.

Nunez claims that "[i]t matters not whether Nunez was inadequately informed due to incorrect information or insufficient information," because "the end result is the same," and that because the IJ accepted an allegedly invalid waiver of appeal, Nunez's appeal was " 'incapable of use and thus unavailable' for purposes of § 1326(d)(1)." (quoting *Valvidias-Soto*, 112 F.4th at 732). But this distinction is essential. *Ross* means what it says, highlighting three specific circumstances—all extreme examples—in which a litigant's failure to exhaust administrative remedies may be excused. *Valdivias-Soto* goes no further, simply finding that when a litigant is *actively misled* as to the rights available to him, such procedural error may excuse a failure to exhaust administrative remedies under § 1326(d)(1).

In *Valdivias-Soto*, we also expressly distinguished the facts before us from those in *Portillo-Gonzalez*, noting that in the latter case "the IJ had 'informed [defendant] of his right to appeal' and '[t]here was no *misrepresentation* ... as to the rules or procedural steps governing such appeals.' " 112 F.4th at 731 (alteration in original) (emphasis added)

(quoting *Portillo-Gonzalez*, 80 F.4th at 920). Those facts are the exact facts before us—the IJ informed Nunez and all those present at his deportation proceeding of their right to appeal and, unlike the IJ in *Valdivias-Soto*, made no affirmative misrepresentations about that right. Thus, 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).

2. Nunez was not deprived of the opportunity for judicial review under § 1326(d)(2)

Nunez argues that because his waiver of appeal was supposedly invalid, his deportation proceedings deprived him of the opportunity for judicial review. For a waiver of a BIA appeal to be valid, it must be considered and intelligent. *See id.* at 733. However, Nunez's waiver was considered and intelligent.

"The government bears the burden of proving valid waiver in a collateral attack of the underlying removal proceedings," and must "prove by 'clear and convincing evidence' that the alien received 'adequate advisement of the consequences of his waiver of appeal.' " *United States v. De La Mora-Cobian*, 18 F.4th 1141, 1148 (9th Cir. 2021) (quoting *United States v. Ramos*, 623 F.3d 672, 680–81 (9th Cir. 2010)).

Nunez argues that his waiver of the right to appeal was not "considered and intelligent" because, in his telling, his notice ***1166** to appear and the IJ did not fully explain the nature of an appeal; because the IJ did not inform him of the consequences of waiver; and because the IJ informed the group of noncitizens at Nunez's deportation hearing of their appellate rights *en masse*, when this court has held that "[m]ass silent waiver creates a risk that individual detainees will feel coerced by the silence of their fellows," *United States v. Lopez-Vasquez*, 1 F.3d 751, 754 (9th Cir. 1993) (per curiam).

To Nunez's first point, the government did not preserve a document allegedly given to Nunez at his removal proceeding explaining his appeal rights and containing a list of free legal service providers. But the record shows that the IJ addressed the document in the hearing and went over it, receiving affirmations from the group that they both received and understood the document. [9] The record thus indicates that Nunez both received and understood that document. And as discussed below, the IJ twice described the nature of an appeal by explaining that it would mean an individual "do[esn]'t accept the decision."

9 Nunez highlights the fact that his individual voice cannot be made out in the audio recording of the proceeding and that the transcript shows only the translator as affirmatively responding to the IJ's questions. The alleged inference is that Nunez (who was raised in the United States and is fluent in English) ignored or misunderstood the questions posed to him throughout the hearing, asked no questions, and that his supposed silence went unaddressed by the IJ, all of which made his alleged waiver of appeal invalid. This is simply speculation. Moreover, when directly addressed by the IJ regarding the prospect of appeal, Nunez showed no confusion or lack of understanding. Nunez also independently raised the possibility of filing for alternative relief in the form of an I-130 petition: "How about if my fiancé would apply for me? I mean, I put in a[n] I-130 petition." This further demonstrates Nunez's engagement and understanding during his deportation proceedings.

As to Nunez's second argument, that the IJ did not explain the consequences of any failure to appeal, the record demonstrates the opposite is true. The IJ informed those noncitizens present:

> After I tell you what decision I've made in your case, I'm going to ask if you want to appeal.... If you say "No," meaning you don't want to appeal, and that you accept the decision? It will be final on that day.... If you say "Yes," meaning you do want to appeal, and that you don't accept the decision? It will not be final on that day.

The IJ repeated this warning soon after. The consequences of any failure to appeal were thus directly explained twice to Nunez.

Nunez also argues that his waiver of appeal was not considered or intelligent because his proceedings were conducted in part *en masse*, and this court has noted that "[m]ass silent waiver creates a risk that individual detainees

will feel coerced by the silence of their fellows." *Id.* at 754. But this case is readily distinguishable from *Lopez-Vasquez*. In *Lopez-Vasquez*, the IJ never addressed potential deportees individually regarding their desire to waive their right to appeal. *Id.* at 752–53. Here, however, the IJ specifically asked Nunez, in an individual colloquy, if he wanted to appeal. Nunez explicitly declined to do so. [10]

10 The transcript reads: "[IJ]: Do you understand. I'm going to deny your request for voluntary departure, and instead order you deported to Mexico. Do you want to appeal that decision?" "[Nunez]: No."

In sum, the record shows that the IJ informed Nunez of his right to appeal and the nature of an appeal, explained the consequences of any failure to appeal, and provided Nunez with an individual opportunity to appeal (which Nunez declined). For these reasons, the government has ***1167** shown by "clear and convincing evidence" that Nunez's waiver of his right to appeal was considered and intelligent. *De La Mora-Cobian*, 18 F.4th at 1148 (quoting *Ramos*, 623 F.3d at 681).

3. Entry of the Removal Order was not unfair under § 1326(d)(3)

The third prong of § 1326(d) asks whether entry of the challenged deportation order was "fundamentally unfair." 8 U.S.C. § 1326(d)(3). As Nunez has not satisfied either § 1326(d)(1) or (2), it would not matter here if he did satisfy § 1326(d)(3). But he does not.

As our sister circuits have correctly held, "[w]hen Congress used the phrase 'fundamentally unfair' in § 1326(d)(3), it meant that aliens must show that they have been denied due process under the Fifth Amendment." *United States v. Castillo-Martinez*, 16 F.4th 906, 922 (1st Cir. 2021) (citing *United States v. Torres*, 383 F.3d 92, 103 (3d Cir. 2004) (collecting cases and noting that "[i]n measuring whether an alien's removal proceeding was 'fundamentally unfair,' most circuits ask whether the alien was denied due process")). And a due process violation alone does not mean that the entry of a removal order was "fundamentally unfair": "we must still consider whether such error resulted in prejudice." *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011).

Nunez alleges three due process violations rendered his removal proceedings fundamentally unfair: "[t]he immigration judge accepted an invalid waiver of appeal from Nunez"; "[t]he immigration judge did not obtain a valid waiver of counsel from Nunez"; and "[t]he immigration judge failed to properly advise Nunez about voluntary departure and to properly consider such relief." As discussed, Nunez's waiver of appeal was valid. For the reasons below, his waiver of counsel was also valid. And as to Nunez's third contention, Nunez could not have been prejudiced by any alleged failure to properly consider voluntary departure because it is not plausible that Nunez would have received voluntary departure.

a. Nunez's waiver of his right to counsel was valid

Nunez alleges that his due process right to counsel was violated because he did not validly waive it. But the record demonstrates that Nunez received several notices informing him of his right to counsel, both before and during his removal proceeding. The record also includes an immigration officer's certification that Nunez was expressly advised concerning his right to counsel when he was served with DHS's arrest warrant. Nunez also signed the notice of rights explicitly informing him that he "ha[d] the right to contact an attorney or other legal representative to represent [him] at [his] hearing, or to answer any questions regarding [his] legal rights in the United States."

This court has employed a three-part test to determine whether IJs have afforded noncitizens undergoing deportation proceedings the right to counsel: "[A]t a minimum [IJs] must (1) inquire whether the petitioner wishes counsel, (2) determine a reasonable period for obtaining counsel, and (3) assess whether any waiver of counsel is knowing and voluntary." *Ram v. Mukasey*, 529 F.3d 1238, 1241–42 (9th Cir. 2008) (cleaned up) (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005)).

At his removal proceeding, Nunez was given several opportunities to indicate that he wished to obtain counsel. And indeed, two members of Nunez's group *did* want extra time to try to obtain counsel. After those individuals expressed interest in obtaining counsel, the IJ rescheduled each of their proceedings in front of the entire group of noncitizens present, giving ***1168** the two each a month in which to seek representation. Further, after those two individuals' proceedings were rescheduled, the IJ again asked the other noncitizens present if they wished to seek counsel. Nunez, having just witnessed two individuals say they wanted to try to obtain counsel and receive time to do so, again did

not express a desire to seek counsel. The record reflects that the rest of the group then responded affirmatively that they wished to waive their right to counsel.[11] The record demonstrates that this waiver was knowing and voluntary.

11 Nunez reiterates that the audio recording does not allow for an understanding of "how any *particular* noncitizen answered." But we find this argument unavailing for the reasons explained *supra* note 9.

b. Nunez was not prejudiced by any violation regarding voluntary departure

Nunez argues that the IJ failed to properly consider his application for voluntary departure, resulting in a violation of his due process rights. He also argues that he was prejudiced by this alleged violation because it is plausible that an IJ who properly considered his claim would have granted him voluntary departure. Again, even if both contentions were true, this would not excuse Nunez's failure to overcome §§ 1326(d)(1) and (2). But neither is accurate.

"The Due Process Clause of the Fifth Amendment requires that an alien in immigration proceedings be 'made aware that he has a right to seek relief.' " *United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012) (per curiam) (quoting *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)). As we have held, IJs may violate due process if they "stat[e] that [an] alien is eligible for relief, but immediately negat[e] that statement." *United States v. Gonzalez-Flores*, 804 F.3d 920, 927 (9th Cir. 2015).

Nunez does not dispute that he was informed of his right to seek relief in the form of voluntary departure. Rather, Nunez claims that his due process rights were violated because the IJ categorically foreclosed voluntary departure relief for any noncitizens with criminal records. But Nunez must not only allege a violation: he must also demonstrate that he was prejudiced by the alleged violation. "To prove prejudice, an alien seeking a discretionary form of relief must make a 'plausible showing' that an IJ presented with all of the facts would exercise discretion in the alien's favor." *Id.* at 927 (citing *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263–64 (9th Cir. 2013), *abrogated on other grounds as recognized in Portillo-Gonzalez*, 80 F.4th at 918).

During Nunez's removal proceeding, the IJ concluded his explanation of voluntary departure by noting that "in all cases, you must have a clean police record, and clean immigration record, and prove you deserve voluntary departure," or he would deny any such request "in the exercise of [his] discretion." Nunez argues that this demonstrates that the IJ categorically foreclosed voluntary departure relief for all noncitizens seeking voluntary departure with criminal records.

But despite the IJ's blanket statement, the IJ conducted an individual colloquy with Nunez, specifically asking about his drug conviction. After being told by the government attorney that Nunez had been convicted of possession of a controlled substance while armed, and sentenced to 270 days in jail, the IJ asked Nunez what the ***1169** drug was, and Nunez answered that "it was meth." The IJ also, in response to Nunez's specific request for voluntary departure, told him that because of his conviction, voluntary departure would not "do [Nunez] any good." The IJ also asked Nunez whether "anybody would persecute [him] or torture [him] in Mexico," to which Nunez responded "[n]o." This demonstrates that the IJ, as he was required to do, exercised discretion.

And when the relevant form of relief is discretionary, as here, the noncitizen must also demonstrate prejudice by "mak[ing] a 'plausible' showing that the facts presented would cause the Attorney General to exercise discretion in his favor." *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998), *as amended on denial of reh'g* (Mar. 11, 1999). Plausibility requires more than a "showing of mere possibility or conceivability, which we have plainly held is insufficient to satisfy the prejudice prong of § 1326(d)(3)." *United States v. Valdez-Novoa*, 780 F.3d 906, 915 (9th Cir. 2015).

"The factors relevant to an IJ deciding whether to grant voluntary departure are the alien's negative and positive equities." *Id.* at 917. Positive equities include a noncitizen's length of residence in the United States, "close family ties to the United States, and humanitarian needs." *Rojas-Pedroza*, 716 F.3d at 1265. Factors counseling against relief include "the nature and underlying circumstances of the deportation ground at issue; additional violations of the immigration laws; [and] the existence, seriousness, and recency of any criminal record." *Id.* (quoting *In re Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999)). The plausibility inquiry also looks to whether "aliens with similar circumstances received relief." *Id.* at 1263.

Nunez highlights various positive equities supporting voluntary departure, such as his entering the United States

as a child; his engagement to a U.S. citizen, and his having a U.S. citizen daughter. But at the time of his removal proceedings, Nunez's criminal history included both a recent conviction for possession of methamphetamine while armed and an outstanding charge for possession of a controlled substance. And Nunez fails to cite a single case in which similarly situated noncitizens received relief in the form of voluntary departure. Further, as we have held, "the existence of a single case that is arguably on point means only that it is 'possible' or 'conceivable' that a similarly situated alien would be afforded voluntary departure." *Valdez-Novoa*, 780 F.3d at 920. Nunez does not even meet that bar. The facts of Nunez's criminal history thus make it implausible that Nunez would have received relief. Because Nunez cannot demonstrate prejudice, entry of the Removal Order against him was not fundamentally unfair.

* * *

Each element of § 1326(d)'s bar on collateral attacks to removal orders is mandatory. *See Palomar-Santiago*, 593 U.S. at 329, 141 S.Ct. 1615. And Nunez satisfies none of them: he did not exhaust his administrative remedies pursuant to § 1326(d)(1); he was not deprived of the opportunity for judicial review under § 1326(d)(2); and entry of the Removal Order was not fundamentally unfair under § 1326(d)(3). Accordingly, Nunez's collateral attack on the Removal Order cannot proceed.

V. CONCLUSION

For the reasons above, Nunez satisfies none of § 1326(d)'s three mandatory requirements. We therefore affirm the district ***1170** court's denial of Nunez's motion to dismiss his indictment.

AFFIRMED.

All Citations

140 F.4th 1157, 2025 Daily Journal D.A.R. 5185

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	2:20-cr-00083-RGK-1	Date	December 29, 2021

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE
Interpreter	N/A

Sharon L. Williams	Not Reported	Maxwell Coll and Laura Alexander Not Present
Deputy Clerk	*Court Reporter/Recorder*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Eliel Nunez Sanchez	N	X		Michael Parente, DFPD	N	X	

Proceedings: **Order re: Defendant's Motions to Dismiss the Indictment Under 8 U.S.C. § 1326(d) and Equal Protection [31], [35]**

I. INTRODUCTION

On February 14, 2020, the United States of America (the "Government") filed an indictment that charges Defendant Eliel Nunez Sanchez ("Defendant") with being an illegal alien found in the United States following deportation, in violation of 8 U.S.C. §§ 1326(a), (b)(1), and (b)(2). Currently before the Court are: (1) Defendant's Motion to Dismiss the Indictment under 8 U.S.C. § 1326(d) ("1326 Motion"); and (2) his Motion to Dismiss the Indictment under the Equal Protection clause ("Equal Protection Motion"). (ECF Nos. 31 and 35.) For the following reasons, the Court **DENIES** both motions.

II. FACTUAL BACKGROUND

Defendant's parents entered the United States illegally in 1992 with their children, including Defendant. (Def.'s 1326 Mot., Ex. 7 ¶ 1, ECF No. 31-6.) Until 2010, Defendant resided in the United States, completing high school and then working as an electrician. He has a fiancee and two daughters. (*See id.*, Ex. 8, ECF No. 31-7; Ex. 10 ¶ 2, ECF No. 31-9; Ex. 7 ¶¶ 4–5.)

In 2006, Defendant was convicted of being in possession of methamphetamine, a controlled substance, while carrying a firearm. He was sentenced to 270 days imprisonment in county jail. (*Id.* Ex. 3, ECF No. 31-2.) He was then arrested in 2010 for possessing a controlled substance, after which Immigration and Customs Enforcement ("ICE") took him into custody and served him with a notice to appear in immigration proceedings. (*Id.*, Ex. 6, ECF No. 31-5.) Defendant appeared before the immigration judge ("IJ") on his own behalf on August 30, 2010, for initial master calendar proceedings. Defendant was part of a group of 14 respondents appearing that day. (*See Id.*, Ex. 1, at 1, ECF No. 31-1.)

APPENDIX B Pet. App. 10a

At the proceedings, the IJ explained to the group that they had the right to an attorney, but at no cost to the government. He then stated that all respondents should have received a list of free legal service providers, and asked anyone who had not received the list to stand. Defendant did not stand. (*See id*. at 2.) The IJ later asked the group if anyone wanted more time to obtain an attorney, and two respondents answered that they did. Defendant did not. (*Id.* at 13.) A few minutes later, the IJ once again asked the group if anyone wanted more time to find an attorney, and if not, asked them to verbally confirm whether they were waiving their right to representation. The remaining respondents answered, "[y]es." (*Id.* at 14.)

The IJ explained two additional rights to the group. First, he explained that if anyone disagreed with his decision at the proceedings, they had the right to appeal to the Board of Immigration Appeals ("BIA"). He directed the respondents to a document that explained their appellate rights, and informed them that if they did not appeal, "[the decision] will be final on that day. If you say 'Yes,' meaning you do want to appeal, and that you don't accept the decision? It will not be final on that day." (*Id.* at 4.) The IJ then asked the group to confirm that they understood, and they answered, "[y]es." (*Id.*) The IJ then went on to explain the various forms of relief available to respondents if they were found deportable, one of which was voluntary departure. He explained that voluntary departure would still require a deportable respondent to leave the country, but would "allow [them] to avoid some of the negative consequences of deportation." (*Id.* at 11.) While listing the requirements for voluntary departure, he informed the respondents that he would exercise his discretion to deny relief unless the respondent had a "clean police record [] and a clean immigration record." (*Id.*)

The respondents then appeared individually before the IJ. The IJ found Defendant deportable based on his illegal entry with his family in the 1990s. The IJ asked Defendant questions about his family, and then asked if he wanted to seek relief from deportation. Defendant asked for voluntary departure. After confirming that Defendant had a prior drug conviction, the IJ stated that he was "[n]ot going to give you voluntary departure, sir, because you can't immigrate because of your drug conviction." (*Id.* at 36.) The IJ then asked if Defendant wanted to appeal the decision, and Defendant answered, "[n]o." (*Id.*).

Defendant was deported to Mexico on September 1, 2010. Since then, Defendant has reentered the United States eight times and been deported seven times. (*See* Alexander Decl., Exs. 6-12, ECF Nos. 42-7–42-13.) After his most recent entry, Defendant was charged with illegal reentry.

III. DISCUSSION

Defendant makes two arguments in his motions to dismiss the indictment. First, he argues that his 2010 deportation was not valid because of various due process violations, and therefore the government cannot meet an essential element for a conviction under 8 U.S.C. § 1326. Second, he argues that Section 1326 is racially discriminatory, which he argues is also grounds for dismissing the indictment. The Court addresses each argument in turn.

A. Validity of Defendant's 2010 Deportation

Defendant argues that his removal proceedings were: (1) fundamentally unfair due to several due process violations; (2) that these violations rendered his deportation invalid; (3) and, though he did not appeal his deportation to the BIA, he is excused from his failure to do so because the fundamental unfairness of his hearing deprived him of the ability to appeal. The Government's primary counter is that Defendant is not, in fact, excused from his failure to exhaust his administrative remedies. The Court agrees with the Government.

1. Defendant Failed to Exhaust his Administrative Remedies

To obtain a conviction under 8 U.S.C. § 1326, the Government must establish that "the alien left the United States under order of exclusion, deportation, or removal, and then illegally reentered." *United States v. Martinez*, 786 F.3d 1227, 1230 (9th Cir. 2015). A defendant, however, may collaterally attack the removal order that underlies a Section 1326 indictment by asserting that the removal proceedings violated his Fifth Amendment due process rights. *United States v. Melendez-Castro*, 671 F.3d 950, 953 (9th Cir. 2012). If the removal proceedings indeed violated the defendant's due process rights, the proceedings were invalid and "the Government may not rely on any resulting deportation order as proof of an element of a criminal offense." *United States v. Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994).

A defendant collaterally attacking his removal proceedings must establish that: (1) he exhausted all administrative remedies; (2) the deportation proceedings improperly denied him judicial review; and (3) the entry of the removal order was fundamentally unfair. *See* 8 U.S.C. § 1326(d)(1)-(3). Defendant argues that his removal proceedings were fundamentally unfair, violating his due process rights, for four reasons: (1) the IJ did not give him a genuine opportunity to apply for voluntary departure; (2) the IJ did not obtain a valid waiver of his right to appeal; (3) the IJ did not obtain a valid waiver of his right to counsel; and (4) he was not provided with the required list of free legal service providers prior to the proceedings.

Whether or not these alleged defects satisfy the "fundamentally unfair" element of Section 1326(d), Defendant does not—and cannot—argue that he satisfies the first element: exhaustion of administrative remedies. After all, the removal proceeding transcript demonstrates that he unequivocally answered "[n]o" when asked if he wanted to appeal the IJ's decision. (Def.'s 1326 Mot., Ex. 1, at 36.) Instead, Defendant argues he is automatically excused from exhaustion, citing the Ninth Circuit's "exhaustion excusal" precedent. This precedent holds that if removal proceedings are so fundamentally unfair that they deprive an alien "of his right to appeal, he satisfies both (d)(1) and (d)(2)," the first two elements of Section 1326(d). *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1130 (9th Cir. 2013). In other words, the Ninth Circuit found certain scenarios in removal proceedings so fundamentally unfair that a defendant subjected to them is "excused from" exhausting his remedies. *United States v. Palomar-Santiago*, 141 S. Ct 1615, 1619 (2021).

Under this precedent, Defendant's argument would be cognizable. However, the Supreme Court recently addressed the Ninth Circuit's exhaustion excusal rule. In a unanimous opinion, the Supreme Court held that "[t]he Ninth Circuit's interpretation is incompatible with the text" of the statute, and that "[w]hen Congress uses 'mandatory language' in an administrative exhaustion provision, a court may not excuse a failure to exhaust." *Id.* at 1620-21 (internal quotes omitted). Defendant argues that *Palomar-Santiago* dealt with exhaustion excusal in a different scenario, and that its holding should be contained to its facts.[1] The Ninth Circuit seems to disagree. Although the Ninth Circuit has yet to explicitly overrule its excusal precedent *in toto*, it has acknowledged that the Supreme Court "casts doubt on the continued vitality of our . . . rule." *Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir. 2021); *see also Alam v. Garland*, 11 F.4th 1133, 1137 (9th Cir. 2021) (Bennett, J., concurring) ("[Our excusal exceptions] appear[] to conflict with the Supreme Court's *Palomar-*

[1]The defendant in *Palomar-Santiago* argued that he was removed for a crime that was later found to not be a removable offense. He argued that he should be excused from exhausting his remedies due to the complexity of whether his crime was one that made him removable. *See Palomar-Santiago*, 141 S. Ct. at 1618, 1621.

Santiago decision . . . In my view, none of these rules survive *Palomar-Santiago*."). As a consequence, the Ninth Circuit has begun applying the exhaustion requirement far more rigorously than before. *See United States v. Sanchez*, 853 Fed. App'x 201, 202 (9th Cir. 2021) (holding that a defendant was not excused from exhausting his remedies even though the IJ "refus[ed] to consider evidence favoring voluntary departure"). Accordingly, given that the Supreme Court appears to have overruled the rule on which Defendant relies, Defendant's failure to exhaust his remedies is reason alone to deny his motion.

2. Defendant is not Entitled to Excusal of his Failure to Exhaust Remedies

It is possible, however, that some scenarios may still excuse a defendant from establishing exhaustion of administrative remedies. For instance, the potential excusal scenarios left unaddressed by *Palomar-Santiago* include: (1) where the IJ failed "to inform the alien that he had a right to appeal his deportation order"; (2) where the IJ failed "to inform the alien that he is eligible for a certain type of relief," such as voluntary departure; and (3) where an alien's waiver of the right to appeal was not "considered and intelligent." *Gonzalez-Villalobos*, 724 F.3d at 1130-31. Even if these scenarios survive *Palomar-Santiago*, none of them apply to Defendant's case, and he is not entitled to excusal from exhausting his remedies.

As to the first scenario, the IJ did not "fail[] to inform [Defendant] that he had a right to appeal his deportation order to the [Board of Immigration Appeals]." *Gonzalez-Villalobos*, 724 F.3d at 1130. Defendant was informed of his right to appeal as part of a group colloquy, given a sheet of paper that detailed the appeal rights, and then asked individually if he wanted to appeal. (*See* Def.'s 1326 Mot., Ex. 1, at 4, 36.); *see United States v. Estrada-Torres*, 179 F.3d 776, 781 (9th Cir. 1999), *overruled on other grounds* by *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (finding that an IJ properly informed a defendant of his appellate rights where the IJ gave a group explanation, then asked the defendant individually if he wanted to appeal).

As to the second scenario, the IJ did not "fail to inform" Defendant that he was eligible for voluntary departure. *Gonzalez-Villalobos*, 724 F.3d at 1130. Even if, as Defendant argues, the IJ did not properly analyze Defendant's voluntary departure application, that analysis does not mean he failed to inform Defendant about his *eligibility* for relief. First, the IJ did not inform the respondents that criminal convictions made them statutorily *ineligible* for voluntary departure; rather, he stated that he would "exercise [his] discretion" to refuse the relief to someone with a conviction. (*See* Def.'s 1326 Mot., Ex. 1, at 11.) It appears that Defendant understood he was eligible despite the IJ's admonishment, because he applied for voluntary departure in his individual colloquy. (*See* Def.'s 1326 Mot., Ex. 1, at 36.) His application led to the IJ's perfunctory denial. Where a defendant is "aware of his right to seek voluntary departure, applie[s] for it, and could have appealed the denial of that relief," an IJ's failure to fully analyze the equities "is not an error that, by its nature, affect[s] [a defendant's] awareness of or ability to seek judicial review." *Sanchez*, 853 Fed. App'x at 202 (9th Cir. 2021). Indeed, the IJ's error cannot excuse a failure to exhaust because "further administrative review, and then judicial review if necessary, could fix that very error." *Id*. (quoting *Palomar-Santiago*, 141 S. Ct. at 1621).

As to the third scenario, Defendant's waiver of his appeal rights was "considered and intelligent." Defendant speaks English, asked for his removal proceeding to be conducted in English, never expressed misunderstanding of his appellate rights, and affirmatively stated that he did not want to appeal. (*See* Def.'s 1326 Mot., Ex. 1, at 33-36.)

3. Conclusion

Accordingly, whether or not *Palomar-Santiago* entirely overruled the Ninth Circuit's precedent excusing defendants from exhausting their administrative remedies in certain "fundamentally unfair" scenarios, the record does not warrant excusal here. Therefore, because Defendant failed to exhaust his administrative remedies, the Court **DENIES** Defendant's 1326 Motion.

B. Equal Protection

Defendant also argues that the indictment should be dismissed because Section 1326 is racially discriminatory and therefore violates the Fifth Amendment's equal protection guarantee.

A law that discriminates based on race is subject to strict scrutiny. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). If a law is facially neutral, as here, then it is subject to strict scrutiny only if there is evidence of disparate impact and discriminatory purpose. *Valeria v. Davis*, 307 F.3d 1036, 1042 (9th Cir. 2002). Defendant, who is a citizen of Mexico, argues that Congress passed Section 1326 with a discriminatory purpose and that the law has disproportionately impacted Latinos.

The Government argues that Section 1326 is not presumptively unconstitutional and is instead subject to rational basis review. Courts "review equal protection challenges to federal immigration laws under the rational basis standard and uphold them if they are 'rationally related to a legitimate government purpose.'" *Hernandez-Mancilla v. Holder*, 633 F.3d 1182, 1185 (9th Cir. 2011) (quoting *Masnauskas v. Gonzalez*, 432 F.3d 1067, 1071 (9th Cir. 2005)). The Court agrees that "[f]ederal legislation that classifies on the basis of alienage, enacted pursuant to Congress' immigration *or* foreign policy powers," is subject to rational basis review. *See United States v. Lopez-Flores*, 63 F.3d 1468, 1475 (9th Cir. 1995). However, this holding does not preclude a strict scrutiny analysis if Defendant can show that Section 1326 is racially discriminatory.

The Court ultimately finds that Defendant fails to demonstrate both discriminatory purpose and disparate impact.

1. Discriminatory Purpose

Congress criminalized unlawful reentry for the first time in 1929 through the Undesirable Aliens Act ("UAA"). Congress then enacted the Immigration and Nationality Act of 1952 ("INA"), which codified the law criminalizing unlawful reentry under 8 U.S.C. § 1326. Congress subsequently amended Section 1326 in 1988, 1990, 1994, and 1996. *See* Pub. L. No. 104-132, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279 (1996); Pub. L. No. 104-208, 110 Stat. 3009 (1996); Pub. L. No. 103-322, § 130001(b), 108 Stat. 2023 (1994); Pub. L. No. 101-649, § 543(b)(3), 104 Stat. 5059 (1990); Pub. L. No. 100-690, § 7345(a), 102 Stat. 4471 (1988).

Defendant offers evidence of racial animus surrounding the enactment of the 1929 UAA, including reports and testimony by eugenics advocate Dr. Harry H. Laughlin, antagonistic statements by a few lawmakers, and historical context. (Def.'s Equal Protection Mot. at 3–12.) Defendant asserts that this evidence establishes that racism was a "motivating factor" in passing the law that criminalizes unlawful reentry. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (A challenger must show "proof that a discriminatory purpose has been a *motivating factor* in the decision"). Even if the stray statements by lawmakers in the 1920s and the relevant historical context can demonstrate a discriminatory purpose behind the UAA's original enactment in 1929, Defendant has failed to demonstrate discriminatory purpose behind Section 1326, which was codified in 1952 and amended most recently in 1996. Defendant has not sufficiently shown

Congress's discriminatory purpose when it passed the INA in 1952 or how the statute's five amendments since 1952 have failed to cleanse the alleged animus. The "presumption of legislative good faith [is] not changed by a finding of past discrimination." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The subsequent amendments attenuate any discriminatory purpose that Defendant may have shown behind the enactment of the UAA in 1929.

Only one court that has confronted this same issue has found a discriminatory purpose: *United States v. Carrillo-Lopez*, No. 20-cr-00026-MMD-WGC, 2021 WL 3667330 (D. Nev. Aug. 18, 2021). All other district courts have found no discriminatory purpose. *See, e.g.*, *United States v. Machic-Xiap*, No. 19-cr-407-SI, 2021 WL 3362738, at *14 (D. Or. Aug. 3, 2021) (finding that the defendant failed to prove that racial animus was a motivating factor in the enactment of Section 1326); *United States v. Novondo-Ceballos*, No. 21-cr-383-RB, 2021 WL 3570229, at *5 (D.N.M. Aug. 12, 2021) (finding that subsequent amendments purged the racial animus of the UAA); *United States v. Rios-Montano*, No. 19-cr-2123-GPC, 2020 WL 7226441, at *7 (S.D. Cal. Dec. 8, 2020) (finding no evidence of discriminatory motive in the 1990 amendment to the INA). The Court finds these opinions well-reasoned and persuasive.

2. Disparate Impact

Even if Defendant could show discriminatory purpose, Defendant fails to demonstrate a disparate impact on Latinos. Defendant asserts that "in 2019, 99% of people prosecuted for illegal reentry were Latino." (Def.'s Equal Protection Mot. at 13.) However, the Court cannot determine whether prosecution of Latinos is disproportional absent data that compares unlawful reentries to *prosecutions* for unlawful reentries. The reason that Latinos represent a large percentage of people prosecuted for illegal reentry could reasonably be that Latinos attempted a large percentage of illegal reentries. "[C]ommon sense suggests that it would be substantially more difficult for an alien removed to China to return to the United States than for an alien removed to Mexico to do so." *United States v. Arena-Ortiz*, 339 F.3d 1066, 1070 (9th Cir. 2003). An assertion that Latinos comprise a large percentage of people prosecuted under Section 1326 does not sufficiently establish disparate impact.[2]

3. Conclusion

Accordingly, the Court finds that Defendant has failed to establish the racial animus necessary to reexamine 8 U.S.C. § 1326, and **DENIES** his motion to dismiss on those grounds.

As a *coda* to his motion, Defendant requests an evidentiary hearing to further develop evidence on this issue. The Court considers the evidence already presented sufficient to rule on the issue, and **DENIES** Defendant's request for an evidentiary hearing.

IV. CONCLUSION

[2]The Supreme Court also rejected a similar assertion in *Department of Homeland Security v. Regents of the Univ. Of Cal.*, 140 S. Ct. 1891, 1915 (2020). There, the respondents argued that the President's rescission of the Deferred Action for Childhood Arrivals (DACA) program resulted in a "disparate impact . . . on Latinos from Mexico, who represent 78% of DACA recipients," evidencing racial animus. The Court reasoned that "because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program." *Id.* at 1915. If that fact was sufficient to establish disparate impact and racial animus, then "virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Id.* at 1916.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

For the foregoing reasons, the Court **DENIES** Defendant's Motions to Dismiss.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk _____

cc:

JS-3

United States District Court
Central District of California

UNITED STATES OF AMERICA vs. **Docket No.** 2:20-cr-00083-RGK-1

Defendant ELIEL NUNEZ SANCHEZ **Social Security No.** 4 4 5 6

akas: None. (Last 4 digits)

[redacted]

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
APR	04	2022

COUNSEL **Michael Parente, DFPD**
(Name of Counsel)

PLEA [X] **GUILTY,** and the court being satisfied that there is a factual basis for the plea. [ ] **NOLO CONTENDERE** [ ] **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of: Illegal Alien Found in the United States Following Deportation, in violation of 8 U.S.C. §§ 1326(a), as charged in Count 1 of the Single-Count Indictment.

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: **24 (twenty-four) MONTHS**.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.

2. The defendant shall not commit any violation of local, state, or federal law or ordinance.

3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.

4. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

5. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.

6. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.

7. The defendant shall comply with the immigration rules and regulations of the United States, and if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. The defendant is not required to report to the Probation & Pretrial Services Office while residing outside of the United States; however, within 72 hours of release from any custody or any reentry to the United States during the period of Court-ordered supervision, the defendant shall report for instructions to the United States Probation Office located at: the 300 N. Los Angeles Street, Suite 1300, Los Angeles, CA 90012-3323.

8. The defendant shall cooperate in the collection of a DNA sample from the defendant.

9. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

The Court orders that defendant be considered for participation in the Bureau of Prisons' 500 hour RDAP program.

Bond exonerated.

Defendant remanded into custody forthwith. Remand order furnished to the U.S. Marshal Service.

Defendant advised of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

April 5, 2022
Date

Gary Klausner
R. Gary Klausner, United States District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

April 5, 2022
Filed Date

By /s/ Joseph Remigio
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   - Non-federal victims (individual and corporate),
   - Providers of compensation to non-federal victims,
   - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U. S. Probation Officer/Designated Witness Date

FILED

SEP 24 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ELIEL NUNEZ SANCHEZ, AKA Eliel Nunez, Defendant-Appellant.	No. 22-50072 D.C. No. 2:20-cr-00083-RGK-1 Central District of California, Los Angeles ORDER

Before: GOULD, BENNETT, and LEE, Circuit Judges.

Defendant-Appellant Eliel Nunez Sanchez filed a petition for panel rehearing and/or rehearing en banc on September 2, 2025. Dkt. 69. The panel has unanimously voted to deny the petition for panel rehearing and for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and/or rehearing en banc is **DENIED**.

2025 WL 2860607
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Juan L. CALDERON Nonbera, aka Juan Calderon, aka Juan Louis Calderon, Defendant-Appellant.

No. 22-50040
|
Submitted October 6, 2025 * Pasadena, California
|
FILED OCTOBER 9, 2025

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appeal from the United States District Court for the Central District of California, Otis D. Wright II, District Judge, Presiding, D.C. No. 2:19-cr-00725-ODW-1

Attorneys and Law Firms

Criminal Appeals C.D.C.A., Appellate Criminal Chief USAO, Lyndsi Allsop, Assistant U.S. Attorney, Hava Arin Levenson Mirell, DOJ - Office of the U.S. Attorney, Criminal Division, Los Angeles, CA, for Plaintiff-Appellee.

Andrew Brian Talai, Office of the Federal Public Defender, Los Angeles, CA, for Defendant-Appellant.

Before: RAWLINSON, MILLER, and JOHNSTONE, Circuit Judges.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

***1** Following a conditional guilty plea, Juan Calderon Nonbera was convicted of reentering the United States after having been removed, in violation of 8 U.S.C. § 1326. He was sentenced to 60 days of imprisonment, to be followed by three years of supervised release. As permitted by his plea, Calderon appeals the district court's denial of his motion to dismiss the indictment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Calderon is a native and citizen of Mexico who came to the United States when he was eight years old. In 2002, he was ordered removed by an immigration judge. During his hearing before the immigration judge, Calderon stated that he wanted to waive his right to appeal. Since then, Calderon has repeatedly reentered the country and has been removed on at least six occasions. Shortly after his most recent removal in August 2019, Calderon was found in the United States again without inspection or permission, and a grand jury returned an indictment charging him with violating 8 U.S.C. § 1326(a) and (b)(2). Calderon moved to dismiss the indictment under 8 U.S.C. § 1326(d), and the district court denied his motion. We review de novo the district court's decision whether to dismiss an indictment under section 1326(d). *United States v. Valdivias-Soto*, 112 F.4th 713, 721 (9th Cir. 2024). A defendant charged with illegal reentry may not collaterally attack the validity of his removal order unless he demonstrates that (1) he exhausted any available administrative remedies; (2) he was improperly deprived of the opportunity for judicial review; and (3) the entry of the underlying removal order was fundamentally unfair. 8 U.S.C. § 1326(d); *see United States v. Palomar-Santiago*, 593 U.S. 321, 329 (2021).

Calderon did not exhaust his administrative remedies, as required by section 1326(d)(1), because he did not appeal his removal order. He argues 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. *See United States v. De La Mora-Cobian*, 18 F.4th 1141, 1147 (9th Cir. 2021) ("[A]n alien who did not validly waive his right to appeal is exempted from the exhaustion requirement.").

We recently held, however, that an invalid waiver of appeal ordinarily does not render administrative remedies unavailable for purposes of section 1326(d)(1). *United States v. Nunez*, 140 F.4th 1157, 1162–65 (9th Cir. 2025). Calderon concedes that *Nunez* forecloses his argument that he satisfies the first component of section 1326(d). Because he cannot show that he exhausted administrative remedies, Calderon is barred under section 1326(d) from challenging his indictment by collaterally attacking his 2002 removal order.

The government's motion for judicial notice (Dkt. No. 45) is denied as moot.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2025 WL 2860607

End of Document

O

United States District Court
Central District of California

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN L. CALDERON NONBERA, aka "Juan Calderon" and "Juan Louis Calderon,"

Defendant.

Case № 2:19-cr-00725-ODW

ORDER GRANTING MOTION TO WITHDRAW ARGUMENT AND MODIFY ORDER [72]; MODIFYING ORDER DENYING MOTION TO DISMISS [71]; AND DENYING MOTION TO DISMISS [74]

I. INTRODUCTION & BACKGROUND

Defendant Juan Calderon-Nonbera is an alien who has been officially deported and removed from the United States on at least seven prior occasions: December 19, 2002; July 3, 2003; June 2, 2010; June 27, 2016; February 17, 2019; June 1, 2019; and July 15, 2019. He was initially ordered removed on December 19, 2002, in a group immigration removal proceeding conducted by an Immigration Judge ("IJ"). By 2019, Defendant had reentered the United States without inspection or permission on at least six additional occasions. Each time, he was arrested for various criminal activity, his 2002 removal order was reinstated, and he was again removed. Shortly after his latest removal, on or about August 4, 2019, he was found in the United States again without inspection or permission and the Government charged him with

violating 8 U.S.C. §§ 1326(a) and (b)(2),[1] Illegal Alien Found in the United States Following Deportation. (Indictment 1, ECF No. 1.)

Defendant has moved to dismiss the Indictment twice. (*See* First Mot. Dismiss, ECF No. 20; Second Mot. Dismiss, ECF No. 21.) The Court denied both Motions. (*See* Order Den. First Mot., ECF No. 71; Order Den. Second Mot., ECF No. 70.) The Government now moves to withdraw a jurisdictional argument it made in opposition to Defendant's First Motion and to modify the Court's Order denying that motion. (Mot. Withdraw & Modify, ECF No. 72.) Defendant also moves for the third time to dismiss the Indictment, now on equal protection grounds. (Third Mot. Dismiss, ECF No. 74.) For the reasons that follow, the Court **GRANTS** the Government's Motion to Withdraw and Modify [72], **MODIFIES** the Order denying Defendant's First Motion [71], and **DENIES** Defendant's Third Motion [74].

II. DISCUSSION

The Court grants the Government's Motion to Withdraw and Modify [72]. Defendant does not oppose withdrawal and the Court has jurisdiction to consider Defendant's collateral attack on the 2002 removal order, which serves as a predicate element for the illegal reentry offense. 8 U.S.C. § 1326(d); *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620 (2021). The Court denies Defendant's First Motion on other grounds and therefore modifies the Court's prior Order [71], as discussed below.

The Court denies Defendant's First Motion [20], made pursuant to § 1326(d), on the grounds that Defendant has not satisfied the mandatory elements of § 1326(d) nor shown that his removal was fundamentally unfair. Under § 1326(d), a defendant charged with unlawful reentry may not collaterally attack the underlying removal order unless they demonstrate: (1) they have exhausted any administrative remedies, (2) they were deprived an opportunity for judicial review, and (3) "the entry of the order was fundamentally unfair." The Supreme Court recently held that each of these

[1] All subsequent statutory citations refer to Title 8 of the United States Code, unless otherwise noted.

statutory requirements is mandatory. *Palomar-Santiago*, 141 S. Ct. at 1621–22. As Defendant argues only that his 2002 removal order was fundamentally unfair under § 1326(d)(3), he has not demonstrated exhaustion or deprivation of judicial review and therefore may not now collaterally attack the 2002 removal order. *See id.*

Defendant contends Ninth Circuit precedent has established an "exhaustion excusal rule" that excuses compliance with the first two elements in certain circumstances when removal is shown to be fundamentally unfair. (Reply ISO First Mot. 8–12, ECF No. 38.) He argues that *Palomar-Santiago* did not touch this precedent. (*Id.*) Although the Ninth Circuit has recognized that *Palomar-Santiago* "casts doubt on the continued vitality" of the exhaustion excusal rule, it has so far declined to address the question directly. *See United States v. Bastide-Hernandez*, 3 F.4th 1193, 1197 (9th Cir. 2021). In any event, the Court need not resolve the effect of *Palomar-Santiago* here because, even assuming Defendant is correct and the Ninth Circuit's exhaustion excusal rule somehow survives *Palomar-Santiago*, Defendant has not demonstrated that his removal was fundamentally unfair.

First, the record does not reflect that Defendant was deprived of a pro bono legal services list. At the group removal proceeding, the IJ asked anyone who had not received the list to raise their hand and Defendant, who "speak[s] English with a native fluency," (First Mot. 2), did not raise his hand. Second, the record does not reflect that Defendant was deprived of a meaningful advisal regarding voluntary departure. The IJ adequately advised the group, at length, regarding potential eligibility for voluntary departure, and the IJ's subsequent direct inquiry of Defendant regarding his ability to depart "at his own expense" was not fundamentally unfair. *See Martinez-Valdez*, 322 F. App'x 507, 508 (9th Cir. 2009) (finding removal was not fundamentally unfair when IJ limited voluntary departure eligibility to those able to pay their own travel expenses and simply asked whether the defendant had the necessary funds); *but see United States v. Monje-Campos*, No. EDCR 18-00334 JGB, 2019 WL 7576679, at *4 (C.D. Cal. June 10, 2019) (finding IJ erred by limiting

inquiry to whether a defendant had the ability to pay). As Defendant fails to demonstrate that his removal was fundamentally unfair, his derivative argument that his appeal waiver was invalid necessarily also fails. Accordingly, Defendant's First Motion [20] is denied.

Finally, the Court denies Defendant's Third Motion [74], in which he challenges § 1326 on equal protection grounds. Section 1326 is a federal immigration-regulation statute meaning "[t]he scope of judicial inquiry . . . is exceedingly narrow." *United States v. Cupa-Guillen*, 34 F.3d 860, 862 (1994) (first alteration in original). Section 1326 satisfies the appropriately deferential standard—rational basis—because the "strong societal interest in controlling immigration . . . is furthered by enhancing punishment against persons who illegally enter the country." *See id.* at 863; *see also Hernandez-Mancilla v. Holder*, 633 F.3d 1182, 1185 (9th Cir. 2011) ("We review equal protection challenges to federal immigration laws under the rational basis standard and uphold them if they are rationally related to a legitimate government purpose." (internal quotation marks omitted)).

III. CONCLUSION

As discussed above, the Court **GRANTS** the Government's Motion to Withdraw and Modify [72]; **MODIFIES** the Order denying Defendant's First Motion, as stated above [71]; and **DENIES** Defendant's Third Motion [74].

IT IS SO ORDERED.

October 8, 2021

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

United States District Court
Central District of California

UNITED STATES OF AMERICA vs. **Docket No.** CR 19-00725-ODW

Defendant Juan L. Calderon Nonbera **Social Security No.** 2 0 7 4
Calderon, Juan Marcos
Also Known As: Nomera, Jose
Also Known As: Mendez, Jesus
Also Known As: Cortez, Juan
Also Known As: Calderon, John
Also Known As: Calderon, Juan Luis
Also Known As: Avevalo, Juan
Also Known As: Sanchez, Alvaro
Also Known As: Calderon, Juan Carlos
akas: Also Known As: Calderon, Juan

(Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
March	2	2022

COUNSEL **David Lee Menninger, DFPD**
(Name of Counsel)

PLEA ☐ **GUILTY,** and the court being satisfied that there is a factual basis for the plea. ☐ **NOLO CONTENDERE** ☐ **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of:
Count 1: 8:1326(a),(b)(2) ILLEGAL ALIEN FOUND IN THE UNITED STATES FOLLOWING DEPORTATION

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

60 days on the Single-Count Indictment with credit time served. This term shall run concurrently with any undischarged term of imprisonment imposed in any other matter.

It is ordered that defendant shall pay to the United States a special assessment of $100, which is due immediately.

Pursuant to Section 5E1.2(e) of the Guidelines, all fines are waived, as it is found that defendant does not have the ability to pay a fine.

Upon release from imprisonment defendant shall be placed on supervised release for a term of three (3) years under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.

2. The defendant shall not commit any violation of local, state, or federal law or ordinance.

3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.

4. The defendant shall cooperate in the collection of a DNA sample from himself.

5. The defendant shall comply with the immigration rules and regulations of the United States, and if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. The defendant is not required to report to the Probation & Pretrial Services Office while residing outside of the United States; however, within 72 hours of release from any custody or any reentry to the United States during the period of Court-ordered supervision, the defendant shall report for instructions to the United States Probation Office located at: the 300 N. Los Angeles Street, Suite 1300, Los Angeles, CA 90012-3323.

6. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name, other than the defendant's true legal name, nor shall the defendant use, any name other than the defendant's true legal name without the prior written approval of the Probation Officer.

Pursuant to 18 U.S.C. § 3553(a), the Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider --

1. The nature and circumstances of the offense and the history and characteristics of the defendant;
2. The need for the sentence imposed --
a. To reflect the seriousness of the offense; to promote respect for the law, and to provide just punishment for the offense;
b. To afford adequate deterrence to future criminal conduct;
c. To protect the public from further crimes of the defendant; and
d. To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
3. The kinds of sentences available;
4. The guideline sentencing range;
5. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct

USA vs. Juan L. Calderon Nonbera Docket No.: CR 19-00725-ODW

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

March 2, 2022
Date

U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

March 2, 2022
Filed Date

By Sheila English /s/
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications;
15. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

USA vs. Juan L. Calderon Nonbera Docket No.: CR 19-00725-ODW

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant must maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds must be deposited into this account, which must be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, must be disclosed to the Probation Officer upon request.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date