No. 26-_____

In the
Supreme Court of the United States

Manuel Zumba Mejia,

Petitioner,

-v-

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court held that where "fundamental procedural defects of [a] deportation hearing ... rendered direct review of the Immigration Judge's determination unavailable," review of that deportation order must be made available in a later illegal-reentry case. *Id.* at 841. The Court specified one circumstance where review was "unavailable": where a noncitizen was not correctly informed about available discretionary relief from removal, and the facts then showed that the noncitizen did not knowingly waive the right to further review. *Id.* at 832. Congress codified this due-process holding in 8 U.S.C. § 1326(d), which requires a noncitizen to exhaust only "available" administrative remedies, § 1326(d)(1), and show that he was "deprived of the opportunity for judicial review," § 1326(d)(2), before collaterally attacking a "fundamentally unfair" deportation order, § 1326(d)(3).

Then, five years ago, this Court decided *United States v. Palomar-Santiago*, 593 U.S. 321 (2021). That case considered whether a noncitizen was excused from satisfying § 1326(d)(1) and (d)(2) whenever the immigration judge erred in the substantive determination of removability. As a matter of statutory construction, and while expressly reserving any constitutional questions, this Court said no: "The immigration judge's error on the merits does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error." *Id.* at 328. *Palomar-Santiago* did not purport to overrule *Mendoza-Lopez* and did not address procedural errors. But courts have since split over whether a noncitizen can still collaterally attack his removal order if an immigration judge procedurally errs in misadvising a noncitizen about discretionary relief from removal, and that error renders a waiver of appeal unknowing and involuntary.

The question presented is: Whether a defendant can still collaterally challenge his removal order under the circumstances described in *Mendoza-Lopez*, as the Fourth Circuit has held, or whether *Palomar-Santiago* prevents a noncitizen from pursuing relief even if his waiver of appeal was unknowing, as the Second and Ninth Circuits have held.

PARTIES TO THE PROCEEDING

Petitioner Manuel Zumba Mejia was the defendant in the Southern District of New York and the defendant-appellee in the Second Circuit.

Respondent is the United States of America, which was the appellant in the Second Circuit.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. Mejia, No. 24-cr-275 (Oct. 29, 2024) (opinion and order granting motion to dismiss the indictment)

United States Court of Appeals (2d Cir.):

United States v. Mejia, No. 24-3086 (Apr. 9, 2026) (opinion reversing order granting motion to dismiss)

United States v. Mejia, No. 24-3086 (July 8, 2026) (order denying petition for rehearing en banc)

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
RELATED PROCEEDINGS iii
TABLE OF AUTHORITIES v
OPINIONS AND ORDERS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 2
A. Introduction 2
B. Legal Background 4
C. Factual Background 8
REASONS FOR GRANTING THE PETITION 11
I. There is an entrenched circuit split on whether, after *Palomar-Santiago*, a noncitizen can collaterally challenge his removal order under the circumstances described in *Mendoza-Lopez*. 11
A. The Fourth Circuit holds that *Palomar-Santiago* did not overrule *Mendoza-Lopez* and a noncitizen can collaterally challenge his removal order under the circumstances described in *Mendoza-Lopez*. 12
B. The Second and Ninth Circuits hold that, even under the precise circumstances described in *Mendoza-Lopez*, a noncitizen cannot collaterally challenge his removal order. 14
II. The decision below is wrong. 17
III. The question presented is recurring and important. 21
IV. This case presents an excellent vehicle for resolving the split. 23
CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Dada v. Mukasey,
554 U.S. 1 (2008) 8, 9
Dickerson v. United States,
530 U.S. 428 (2000) 21
In re Sanchez Mendez,
2014 WL 3698203 (BIA June 4, 2014) 9
Reno v. Flores,
507 U.S. 292 (1993) 23
Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 24
United States v. Adame-Orozco,
607 F.3d 647 (10th Cir. 2010) 3
United States v. Brown,
354 F. Supp. 3d 362 (S.D.N.Y. 2018) 9
United States v. Calderon,
391 F.3d 370 (2d Cir. 2004) 9
United States v. Castro-Aleman,
141 F.4th 576 (4th Cir. 2025) 2, 8, 12, 13
United States v. Gonzalez-Villalobos,
724 F.3d 1125 (9th Cir. 2013) 6
United States v. Lopez,
445 F.3d 90 (2d Cir. 2006) 10
United States v. Mendoza-Lopez,
481 U.S. 828 (1987) 2, 4, 5, 12, 13, 17, 18, 19, 22
United States v. Nunez,
140 F.4th 1157 (9th Cir. 2025) 14, 16, 24
United States v. Ochoa,
861 F.3d 1010 (9th Cir. 2017) 6
United States v. Palomar-Santiago,
593 U.S. 321 (2021) 2, 6, 7, 10, 20

United States v. Portillo-Gonzalez,
80 F.4th 910 (9th Cir. 2023) 2, 8, 12, 14
United States v. Sosa,
387 F.3d 131 (2d Cir. 2004) 6, 9, 15

Statutes

8 U.S.C. § 1229c(a)(1) 8
8 U.S.C. § 1326(d) 2, 4, 5, 9, 11, 15, 19, 22
8 U.S.C. § 1326(d)(1) 11, 14, 17, 18
8 U.S.C. § 1326(d)(2) 19

Other Authorities

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Br. for United States, *United States v. Palomar-Santiago*, No. 20-437 (U.S. Feb. 22, 2021), 2021 WL 720352 ..... 7, 20
Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, Vera Inst. of Just. (Nov. 2017), https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation 23
Pet. for Cert., *United States v. Palomar-Santia*go, No. 20-437 (U.S. Oct. 6, 2020), 2020 WL 5947898 19
Reply Br. for Pet'r United States, *United States v. Palomar-Santiago*, No. 20-437 (U.S. Dec. 23, 2020), 2020 WL 7681475 ..... 7, 20
U.S. Sent'g *Comm'n, Quarterly Data Report, 3rd Quarter Release, Preliminary FY* 2026 Data, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_FY26.pdf 21
U.S. Sent'g Comm'n, *Quick Facts: Illegal Reentry Offenses, Fiscal Year 2025*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY25.pdf 21

U.S. Sent'g Comm'n, Statistical Information Packet, Fiscal Year 2025, tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2025/2c25.pdf 21

OPINIONS AND ORDERS BELOW

The Second Circuit's decision reversing the district court's grant of Petitioner's motion to dismiss is published at 173 F.4th 28 and appended at Pet. App. 2a–19a. The Second Circuit's order denying rehearing en banc is unreported but appended at Pet. App. 1a. The district court's grant of Petitioner's motion to dismiss is available at 2024 WL 4604644 and appended at Pet. App. 20a–38a.

JURISDICTION

The court of appeals issued its decision on April 9, 2026, Pet. App. 2a, and denied the petition for rehearing en banc on July 8, 2026, Pet. App. 1a. By order dated September 15, 2026 in No. 26A347, Justice Sotomayor granted an extension of time, until November 5, 2026, to petition for a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3731. The district court had jurisdiction under 18 U.S.C. § 3231.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part, that no "person ... shall ... be deprived of life, liberty, or property, without due process of law."

Subsection (d) of Section 1326 of Title 8 of the United States Code provides:

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

> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d).

STATEMENT OF THE CASE

A. Introduction

Since this Court's decision in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021), the courts of appeals have split on how to reconcile it with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). The courts have disagreed on whether, in essence, *Mendoza-Lopez* is still good law: whether, after *Palomar-Santiago*, a noncitizen can still pursue a collateral challenge to a removal order under the circumstances described in *Mendoza-Lopez*. *Compare United States v. Castro-Aleman*, 141 F.4th 576, 580 n.2 (4th Cir. 2025), *cert. denied*, 146 S. Ct. 1439 (2026), *with United States v. Portillo-Gonzalez*, 80 F.4th 910, 919 (9th Cir. 2023). With its opinion below, the Second Circuit deepened the split.

This Court must step in. The 2–1 split shows no sign of abating, and a split on how to reconcile this Court's own precedents is particularly worthy of intervention. And this case is an excellent vehicle for addressing the split. The issue was presented at every stage below, and the question presented is

outcome-determinative, as Petitioner's case is materially identical to *Mendoza-Lopez*.

While certiorari would be warranted even if the decision below were correct, intervening is particularly appropriate here because the Second Circuit was wrong. Nothing about *Palomar-Santiago* disturbed *Mendoza-Lopez*'s due-process directive: that collateral review must be made available in an illegal-reentry prosecution if, due to misadvice about discretionary relief from removal, a noncitizen's waiver of further review was unknowing. After all, *Palomar-Santiago* was a purely statutory decision, one that did not address any constitutional issues more generally or purport to overrule *Mendoza-Lopez* more specifically. And the statute *Palomar-Santiago* was interpreting—Section 1326(d)—"was enacted in response to *Mendoza-Lopez* and in an effort to incorporate the Court's judgment into statutory law." *United States v. Adame-Orozco*, 607 F.3d 647, 654 (10th Cir. 2010) (Gorsuch, J.) (internal quotation marks and alterations omitted). Further, *Palomar-Santiago* addressed an idiosyncratic rule that excused a noncitizen from complying with exhaustion rules anytime an immigration judge erred in the substantive determination of removability; it did not address procedural errors like those in *Mendoza-Lopez* that could make further direct review "unavailable."

Finally, this issue is recurring and important. Illegal reentry is currently the most commonly charged federal crime, and its share of criminal cases is

only increasing. The question of when, and under what circumstances, a defendant can collaterally challenge his prior removal order in such a case is a question that affects thousands of defendants every single year. And whether a noncitizen who does not knowingly waive their right to appeal in a removal proceeding can then be *criminally convicted* based on that proceeding—even where that proceeding was fundamentally unfair—is a question of critical importance for this Court. The petition for a writ of certiorari should be granted.

B. Legal Background

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court established the due process minimum afforded to a defendant charged with illegal reentry. Illegal reentry is one of the rare offenses where "the result of an administrative proceeding"—a removal proceeding—"establish[es] an element" of the crime itself. *Id.* at 839 n.15. Addressing a predecessor version of 8 U.S.C. § 1326, the Court held, "If the statute envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process." *Id.* at 837.

As such, the Court ruled that "where [a] deportation proceeding effectively eliminates the right of the alien to obtain judicial review," due

process requires that the noncitizen be able to mount a collateral challenge to a later use of that proceeding as an element of a criminal offense. *Id.* at 839. That is, where "fundamental procedural defects of the deportation hearing ... rendered direct review of the Immigration Judge's determination unavailable," review of the deportation order must be made available via a collateral attack in the later criminal proceeding. *Id.* at 841.

The Court went on to specify one circumstance where defects in the removal proceeding rendered review "unavailable": where the noncitizens were not correctly informed about available discretionary relief from removal. *Id.* at 832. That's what happened to the respondents in *Mendoza-Lopez*: they were not adequately informed about suspension of deportation, and the Court ruled that due to that misinformation, they had not made knowing and intelligent waivers of their right to appeal their deportations. *Id.* at 832, 840. The government, therefore, could not "rely on those orders as reliable proof of an element of a criminal offense." *Id.* at 840. The Court so held even though "the judge asked respondents whether they wished to accept his ruling that they were deportable, appeal the ruling, or reserve decision, and respondents each stated that they accepted the judge's ruling." *Id.* at 842, 845 (Rehnquist, J., dissenting).

Congress codified *Mendoza-Lopez*'s holding in 8 U.S.C. § 1326(d), which allows a noncitizen to collaterally challenge an underlying deportation order

if: "(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." Given *Mendoza-Lopez*'s holding and the statute's language—limited, among other things, to "available" remedies—many circuits held that a noncitizen's failure to pursue administrative remedies under (d)(1) or judicial relief under (d)(2) bars a collateral challenge only if their waiver of those rights was "knowing and voluntary." *See, e.g.*, *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004); *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1130 (9th Cir. 2013).

Then, five years ago, this Court decided *United States v. Palomar-Santiago*, 593 U.S. 321 (2021). *Palomar-Santiago* concerned a rule, unique to the Ninth Circuit, "providing that defendants are 'excused from proving the first two requirements' of § 1326(d) if they were 'not convicted of an offense that made [them] removable.'" *Id.* at 326 (quoting *United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017)).

This Court rejected this idiosyncratic rule, finding it "incompatible with the text of § 1326(d)." 593 U.S. at 326. Focusing solely on the text and expressly declining to reach any "constitutional" questions (*id.* at 328 n.4), the Court noted that § 1326(d)'s three "requirements are connected by the conjunctive

'and,' meaning defendants must meet all three. When Congress uses 'mandatory language' in an exhaustion provision, 'a court may not excuse a failure to exhaust.'" *Id.* at 326 (citation omitted). Thus, the Court held that "each of the statutory requirements of § 1326(d) is mandatory" and held that a court could not excuse these requirements simply because the defendant had been removed for a non-removable offense. *Id.* at 329.

Palomar-Santiago did not hold that noncitizens misadvised about discretionary relief, like those in *Mendoza-Lopez*, are barred from collaterally attacking their removal orders where their waivers of review are not knowing or voluntary. In seeking certiorari in *Palomar-Santiago*, the government assured this Court that that case "does not present th[e] discretionary-relief issue" addressed in *Mendoza-Lopez*, Reply Br. for Pet'r United States 5–6, *United States v. Palomar-Santiago*, No. 20-437 (U.S. Dec. 23, 2020), 2020 WL 7681475; it similarly argued in its merits briefing that the "logic" of the "discretionary-relief" rule "has no application to the class of cases at issue here." Br. for United States 11, *United States v. Palomar-Santiago*, No. 20-437 (U.S. Feb. 22, 2021), 2021 WL 720352.

Accordingly, this Court did not purport to overrule *Mendoza-Lopez*. Nevertheless, in *Palomar-Santiago*'s wake, the lower courts have been split about whether *Palomar-Santiago* bars *all* collateral challenges when the defendant fails to exhaust administrative remedies or pursue judicial review,

even when that failure is due to an unknowing and involuntary waiver of appeal. *Compare Castro-Aleman*, 141 F.4th at 580 n.2, *with Portillo-Gonzalez*, 80 F.4th at 919. This case deepened that split.

C. Factual Background

Petitioner Manuel Zumba Mejia—then-resident in the U.S. for over a decade—was serving a prison sentence for reckless assault when immigration officials identified him as a noncitizen and moved to deport him. Pet. App. 21a. Petitioner's deportation hearing took place by video, and took only about eight minutes. He did not have a lawyer. He also only spoke Spanish while the immigration judge (IJ) spoke English, and the Spanish-language interpreter translated only portions of what the IJ said. Pet. App. 21a–23a.

After Petitioner asked about a form of relief called voluntary departure, the IJ responded that Petitioner could not leave the country voluntarily because of his "crime" and because he was "in prison," meaning he could not "actually leave whenever [he] would want." Pet. App. 22a. But this was incorrect: As the government has since conceded, and as even the opinion below acknowledged, Pet. App. 7a n.7, Petitioner *was* eligible for voluntary departure.

Voluntary departure is a "discretionary form of relief" that allows individuals "to leave the country willingly." *Dada v. Mukasey*, 554 U.S. 1, 8 (2008); *see also* 8 U.S.C. § 1229c(a)(1). It "facilitates the possibility of

readmission" by allowing a noncitizen to avoid a deportation order. *Dada*, 554 U.S. at 8. And "[b]ecause a prior deportation order is an element of the crime, a noncitizen who was granted voluntary departure, rather than deported or removed, cannot be prosecuted for illegal reentry." *United States v. Brown*, 354 F. Supp. 3d 362, 368 (S.D.N.Y. 2018). Neither Petitioner's conviction nor the fact that he was in custody prevented him from receiving voluntary departure. *See In re Sanchez Mendez*, 2014 WL 3698203 (BIA June 4, 2014). But Petitioner was wrongly told the precise opposite by the IJ.

At the end of the eight-minute hearing, the IJ told Petitioner that he had been ordered deported to Ecuador. He then asked if Petitioner wished to "accept" that decision or "appeal it." Having been told, mistakenly, that he could not pursue voluntary departure, Petitioner said he accepted the decision and was giving up his right to appeal. Pet. App. 23a.

Around ten years after he was deported, Petitioner was arrested for a DUI in New York and charged with illegal reentry, 8 U.S.C. § 1326. Petitioner moved to dismiss the charge under *Sosa*, 387 F.3d at 136, and its progeny: Circuit precedent that, relying on *Mendoza-Lopez*, held that noncitizens who were misadvised about discretionary relief from removal had not knowingly and voluntarily waived their remedies, and thus could be deemed to have satisfied § 1326(d)(1) and (in some cases) (d)(2). *See also United States v.*

Calderon, 391 F.3d 370, 373 (2d Cir. 2004); *United States v. Lopez,* 445 F.3d 90, 91 (2d Cir. 2006) (Sotomayor, J.).

The district court granted Petitioner's motion to dismiss the indictment. The court, in relevant part, held § 1326(d)(1) and (2) satisfied because Petitioner's failure to pursue an appeal resulted from the IJ's incorrect statements about voluntary departure, which rendered Petitioner's waiver of appeal "not knowing and voluntary." Pet. App. 36a. And the court rejected the government's claim that *Palomar-Santiago* had abrogated prior Circuit precedent. Pet. App. 35a.

The court acknowledged that *Palomar-Santiago* "reaffirmed that the requirements of Section 1326(d) are mandatory" and "rejected a Ninth Circuit rule that excused a defendant from proving the first two requirements of Section 1326(d) if he were convicted of a crime that was later found not to be a removable offense." Pet. App. 35a. But it held that *Palomar-Santiago* was "a purely statutory decision": "[T]he Supreme Court expressly declined to reach any constitutional arguments, such as those at issue in *Sosa*" and *Mendoza-Lopez*. Pet. App. 35a (citing *Palomar-Santiago*, 593 U.S. at 328 n.4).

The government appealed, and a Second Circuit panel (Cabranes, J., joined by Sullivan, J., and Gonzalez, D.J.) reversed. Pet. App. 2a–19a. Although the government did not contest that Petitioner's deportation was fundamentally unfair under § 1326(d)(3), the panel held that *Palomar-*

Santiago had abrogated *Sosa* and its progeny and that Petitioner therefore could not bring a collateral challenge under § 1326(d)(1) and (d)(2). According to the panel, "[t]he conflict between *Sosa* and *Palomar-Santiago* is irreconcilable: *Sosa* held that courts may excuse a failure to exhaust; *Palomar-Santiago* holds that they may not." Pet. App. 6a.

The panel minimized the conflict between its holding and *Mendoza-Lopez*. Despite acknowledging *Mendoza-Lopez*'s "basic holding"—"that a constitutional violation would be found where an IJ permitted waivers of the right to appeal that were not 'considered or intelligent' and failed to advise aliens of their eligibility for discretionary relief"—it held that after *Palomar-Santiago*, that holding could not apply to the indistinguishable facts here. Pet. App. 13a–16a. The Circuit then denied rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. There is an entrenched circuit split on whether, after *Palomar-Santiago*, a noncitizen can collaterally challenge his removal order under the circumstances described in *Mendoza-Lopez*.

After *Palomar-Santiago*, the circuits have split on whether a noncitizen who has been misadvised about discretionary relief can collaterally challenge their removal order under 8 U.S.C. § 1326(d). The Fourth Circuit has held that if "[a] procedural error ... render[ed] further review of an adverse decision unavailable"—including where the noncitizen was misadvised about relief from removal—the noncitizen can be deemed to have satisfied 8 U.S.C.

§ 1326(d)(1) and (d)(2). *Castro-Aleman*, 141 F.4th at 580 n.2 (internal quotation marks omitted). But the Second and Ninth Circuits hold the opposite: They hold that § 1326(d)(1) and (d)(2) bar collateral review of a removal order, even if an immigration judge procedurally errs in misadvising a noncitizen about discretionary relief from removal, and that error renders a waiver of appeal unknowing and involuntary. *See* Pet. App. 13a–16a; *Portillo-Gonzalez*, 80 F.4th at 919.

A. The Fourth Circuit holds that *Palomar-Santiago* did not overrule *Mendoza-Lopez* and a noncitizen can collaterally challenge his removal order under the circumstances described in *Mendoza-Lopez*.

The Fourth Circuit has held that, even after *Palomar-Santiago*, a noncitizen can still collaterally challenge their removal order if "[a] procedural error ... render[ed] further review of an adverse decision unavailable." *United States v. Castro-Aleman*, 141 F.4th 576, 580 n.2 (4th Cir. 2025) (internal quotation marks omitted), *cert. denied*, 146 S. Ct. 1439 (2026). That includes the circumstances described in *Mendoza-Lopez*: where an IJ failed "'to explain adequately their right to suspension of deportation or their right to appeal.'" *Castro-Aleman*, 141 F.4th at 580 n.2 (quoting *Mendoza-Lopez*, 481 U.S. at 839) (emphasis omitted).

The Fourth Circuit acknowledged the confusion over *Palomar-Santiago*, noting that "*Palomar-Santiago* contains language suggesting that there can be

no excusal of § 1326(d)(1)'s administrative exhaustion requirement." *Id.* But, it explained, *Palomar-Santiago* was limited to "substantive challenges to a removal order—i.e., claims that the IJ erred in determining the alien's removability on the merits." *Id.* Those types of errors "are precisely what administrative and judicial review proceedings are for." *Id.*

And the "reasoning for substantive errors does not apply to some procedural errors," as "[a] procedural error that would render further review of an adverse decision unavailable would, by definition, not be able to be fixed on further review." *Id.* (internal quotation marks omitted). "As confirmation" that *Palomar-Santiago* was limited to substantive errors, the Fourth Circuit pointed to *Mendoza-Lopez*, which "permitted aliens to collaterally challenge their § 1326(a) illegal reentry charges because of the Immigration Judge's 'failure' 'to explain adequately their right to suspension of deportation or their right to appeal'", thus depriving them "of the opportunity to fix any errors in their removal orders on review." *Castro-Aleman*, 141 F.4th at 580 n.2 (quoting *Mendoza-Lopez*, 481 U.S. at 839) (emphasis omitted). "Reading *Palomar-Santiago* to categorically bar any excusal of § 1326(d)(1)'s administrative exhaustion requirement would amount to overturning this core holding of *Mendoza-Lopez*," which "seems implausible given *Palomar-Santiago*'s recitation of *Mendoza-Lopez*'s holding without comment." *Id.*

B. The Second and Ninth Circuits hold that, even under the precise circumstances described in *Mendoza-Lopez*, a noncitizen cannot collaterally challenge his removal order.

The Ninth Circuit—and now the Second Circuit—has held the opposite. In those courts, even procedural errors that render a noncitizen's waiver of appeal unknowing and involuntary—including the failure to advise about relief from removal, the precise error at issue in *Mendoza-Lopez*—do not make administrative remedies or judicial relief "unavailable" within the meaning of the statute.

Unlike the Fourth Circuit, the Ninth Circuit has held that "*Palomar-Santiago* did not limit its holding to an IJ's substantive errors." *Portillo-Gonzalez*, 80 F.4th at 919. Applying that logic, the Ninth Circuit held that a noncitizen who was wrongly told that he was ineligible for relief from removal could not be deemed to have satisfied § 1326(d)(1) and (d)(2). *Id.* at 920–21. The Ninth Circuit then made a sweeping general holding: Even if a noncitizen's waiver of the right to appeal "were not 'considered and intelligent,' that alone would not excuse [the noncitizen's] failure to exhaust administrative remedies pursuant to § 1326(d)(1)." *United States v. Nunez*, 140 F.4th 1157, 1165 (9th Cir. 2025), *cert. denied sub nom. Nunez Sanchez v. United States*, 146 S. Ct. 1866 (2026).

The Second Circuit now agrees. Before this case, the Second Circuit agreed with the Fourth: § 1326(d)(1) and (often) (d)(2) did not bar a noncitizen's

collateral attack if he was misadvised about relief from removal. *Sosa*, 387 F.3d at 136–37. As the Second Circuit noted, while § 1326(d)(1) speaks of exhausting available administrative remedies, § 1326(d) was intended as a codification of *Mendoza-Lopez*. *Id.* at 136. So its "administrative exhaustion requirement must be subject to at least one significant exception to render it consistent with" that decision. *Id*. "There was almost certainly no administrative exhaustion in *Mendoza-Lopez* itself, … yet the Court held that collateral review of the underlying deportation order was constitutionally required. Therefore, the exhaustion requirement must be excused where an alien's failure to exhaust results from an invalid waiver of the right to an administrative appeal. Otherwise, Section 1326(d) would violate *Mendoza-Lopez* …." *Id*.

Now, however, the Second Circuit has held that *Palomar-Santiago* abrogated that precedent. The court insisted that *Palomar-Santiago* "[r]eject[ed] any distinction between procedural and substantive errors on the part of the IJ," Pet. App. 16a, and makes exhaustion "mandatory" with no exceptions. *See* Pet. App. 18a. As such, the court held, "[e]ven assuming that the IJ's erroneous statement about voluntary departure rendered [Petitioner's] removal proceedings 'fundamentally unfair' under § 1326(d)(3), that error did not excuse [Petitioner's] independent failure to satisfy §§ 1326(d)(1) and (2)—requirements that the statute does not permit a court to excuse." Pet. App. 18a. Quoting the Ninth Circuit, it noted that "'[e]ven if [the defendant's] waiver

were not "considered and intelligent," that alone would not excuse [the defendant's] failure to exhaust administrative remedies pursuant to § 1326(d)(1).'" Pet. App. 18a n.40 (quoting *Nunez*, 140 F.4th at 1165). The Second Circuit denied rehearing en banc, Pet. App. 1a, meaning its holding is here to stay.

* * *

The courts of appeals are thus hopelessly divided on how to square *Palomar-Santiago* with *Mendoza-Lopez*. One circuit holds that *Palomar-Santiago* cannot be read to bar collateral challenges under the circumstances described in *Mendoza-Lopez*: where a failure to advise about relief from removal renders a waiver of appeal unknowing and involuntary. But two circuits, including the Second Circuit, hold the opposite: that *Palomar-Santiago* bars *all* collateral challenges when the defendant fails to exhaust administrative remedies or pursue judicial review, even when that failure is due to an unknowing and involuntary waiver of appeal. And those circuits have so ruled in the precise circumstances faced by the defendants in *Mendoza-Lopez*: where the noncitizens were not correctly advised about discretionary relief from removal.

This 2–1 split shows no sign of abating. It means that defendants in the Fourth Circuit can still pursue § 1326(d) motions—and have their illegal-reentry charges dismissed—while identically situated defendants in the

Second and Ninth Circuits cannot. And only this Court can resolve a dispute about how to reconcile two of its own precedents.

II. The decision below is wrong.

This square split would warrant review even if the Second Circuit's holding were correct. But certiorari is all the more necessary because the Second Circuit was wrong. Its holding runs afoul of *Mendoza-Lopez*, effectively ruling that *Palomar-Santiago* had overruled it *sub silentio*. It also contradicts the plain text of § 1326(d), which—among other things—requires a defendant to exhaust only "*available*" administrative remedies. 8 U.S.C. § 1326(d)(1) (emphasis added). And it violates due process principles. This result was not dictated by *Palomar-Santiago*, which did not address the question presented.

Mendoza-Lopez concluded that in certain circumstances, the Constitution requires judicial review of a deportation order before that order could "be used to establish conclusively an element of a criminal offense." 481 U.S. at 838. This Court reasoned: "If the statute envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process." *Id.* at 837 (emphasis in original). And "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an

alternative means of obtaining judicial review *must* be made available." *Id.* at 838 (emphasis added).

Importantly, *Mendoza-Lopez* went on to specify one circumstance in which due process requires judicial review: where the noncitizen, like Petitioner, had not been properly advised about discretionary relief from removal. Because the respondents in *Mendoza-Lopez* were not adequately informed about available discretionary relief from removal, they had not made knowing and intelligent waivers of their right to appeal their deportations, meaning that respondents' deportation proceedings had "effectively eliminate[d]" the right to judicial review. *See* 481 U.S. at 832, 840 ("Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding."). That was so, even though, like Petitioner, the noncitizens in *Mendoza-Lopez* had been advised of their right to appeal. *Id.* at 842, 845 (Rehnquist, J., dissenting). At bottom, the procedural errors "rendered direct review of the Immigration Judge's determination unavailable to respondents." *Id.* at 841.

Congress codified *Mendoza-Lopez's* due-process holding in Section 1326(d). Section 1326(d)(1) requires an individual seeking to collaterally attack his removal proceedings to have "exhausted any administrative remedies that may have been *available* to seek relief against the order." 8 U.S.C. § 1326(d)(1) (emphasis added). That text accounts for this Court's language that "direct

review of the [IJ]'s determination [was] *unavailable* to respondents" because "the waivers of their rights to appeal were not considered or intelligent." *Mendoza-Lopez*, 481 U.S. at 840–41 (emphasis added). Similarly, § 1326(d)(2) requires the noncitizen to show that the "deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review." 8 U.S.C. § 1326(d)(2). Thus, as both a constitutional matter and a statutory matter, a noncitizen who is misadvised about discretionary relief from removal—and, under the circumstances presented, has unknowingly waived their right to further agency review—can still challenge the underlying removal order in a § 1326 prosecution where that error also foreclosed judicial review.

Nothing in *Palomar-Santiago* disturbed this understanding. In *Palomar-Santiago*, the government petitioned for certiorari on the limited question of "whether a defendant automatically satisfies all three prerequisites [of § 1326(d)] solely by showing that he was removed for a crime that would not be considered a removable offense under current circuit law, even if he cannot independently demonstrate administrative exhaustion or deprivation of the opportunity for judicial review." Pet. for Cert. i, *United States v. Palomar-Santiago*, No. 20-437 (U.S. Oct. 6, 2020), 2020 WL 5947898. The government expressly disclaimed raising the distinct issue decided in *Mendoza-Lopez*: whether a noncitizen misadvised about discretionary relief from removal could

collaterally challenge their removal order, even without appealing to the BIA or seeking judicial review in the first instance. *See, e.g.*, Reply Br. for Pet'r United States 5–6, *United States v. Palomar-Santiago*, No. 20-437 (U.S. Dec. 23, 2020), 2020 WL 7681475 (promising that that case "does not present th[e] discretionary-relief issue" addressed in *Mendoza-Lopez*).

Against that backdrop, nothing about *Palomar-Santiago* can be read to disturb *Mendoza-Lopez* or its due-process holding. The opinion did not purport to overrule *Mendoza-Lopez*; it accepted its holding without comment. 593 U.S. at 324. It did not decide whether administrative remedies or judicial review are "available" when a noncitizen is misadvised about discretionary relief, as was the case in *Mendoza-Lopez* itself. And while *Palomar-Santiago* declared all three requirements of § 1326(d) "mandatory" as a statutory matter, it did not address any circumstances under which they could be deemed satisfied as a constitutional matter. Indeed, *Palomar-Santiago* expressly declined to decide any "constitutional claims" because "they were not raised below and are outside the scope of the narrow question this Court granted certiorari to decide." 593 U.S. at 328 n.4.

At bottom, while *Mendoza-Lopez* preceded—and, in fact, motivated—§ 1326(d)'s passage, its constitutional holding remains: A noncitizen *must* have the opportunity for judicial review of a prior deportation where he was not advised about discretionary relief from removal and then made an unknowing

waiver of further review. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede [this Court's] decisions interpreting and applying the Constitution."). And absent an opportunity for judicial review—such as a collateral challenge—the deportation cannot serve as a predicate for an illegal-reentry conviction.

III. The question presented is recurring and important.

The question presented is bound to recur often, as illegal reentry is one of the most commonly charged federal offenses in the nation. In fact, in fiscal year 2025, illegal reentry cases outnumbered all other federal crimes. *See* U.S. Sent'g Comm'n, *Quick Facts: Illegal Reentry Offenses, Fiscal Year 2025* (hereinafter, "2025 Quick Facts: Illegal Reentry"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY25.pdf; *see also* U.S. Sent'g Comm'n, *Statistical Information Packet, Fiscal Year 2025*, tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2025/2c25.pdf. And the number of illegal-reentry cases is only increasing. The 2025 illegal-reentry caseload represented a 45 percent increase from the previous year. 2025 Quick Facts: Illegal Reentry. And through the third quarter of fiscal year 2026, the number of defendants sentenced for illegal reentry was already approaching the total for all of fiscal year 2025. *See* U.S. Sent'g Comm'n, *Quarterly Data Report, 3rd*

Quarter Release, Preliminary FY 2026 Data, tbl. 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_FY26.pdf (listing number of cases with the primary Guideline of § 2L1.2).

Filing a § 1326(d) motion is one of the most common methods of contesting this already-ubiquitous charge. The question of when, and under what circumstances, a defendant can satisfy § 1326(d)(1) and (d)(2) is a question that affects thousands of defendants every single year.

And whether a noncitizen who faces a fundamentally unfair removal proceeding can then be *criminally convicted* based on that proceeding is a question of critical importance for this Court. As this Court recognized in *Mendoza-Lopez*, even with the right to collateral attack, "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling." 481 U.S. at 839 n.15. That's particularly true in immigration proceedings. Noncitizens have no right to appointed counsel; indeed, "removal proceedings are the only legal proceedings in the United States where people are detained by the federal government and required to litigate for their liberty against trained government attorneys without any assistance of counsel." Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and*

Community Unity, Vera Inst. of Just. 7 (Nov. 2017), https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation. And in recent years, even unaccompanied children—some as young as five years old—have faced removal proceedings without the assistance of any lawyer. Associated Press, *Trump administration halts legal aid for migrant children, leaving some to navigate courts alone* (Feb. 19, 2025), https://apnews.com/article/trump-legal-aid-unaccompanied-children-immigration-court-5b5573cc022ebfdf8dc6b961bfcc0768. Regardless of whether these practices violate due process, *see Reno v. Flores*, 507 U.S. 292, 306 (1993), the calculus changes when that removal serves as a predicate for a criminal conviction—and the noncitizen has no defense to the conviction simply because they made an unknowing and involuntary waiver of the right to appeal.

IV. This case presents an excellent vehicle for resolving the split.

Finally, this case is an ideal vehicle for addressing the continued vitality of *Mendoza-Lopez* and whether—as a statutory or a constitutional matter—a defendant can collaterally challenge his removal order without exhausting administrative remedies or seeking direct judicial review. The issue was presented at every stage below: before the district court, which granted Petitioner's motion to dismiss, and before the Second Circuit, which issued a published opinion holding that *Palomar-Santiago* abrogated its prior

precedent. And the key facts are all undisputed. Under the correct reading of the relevant immigration statutes, *see Rivers v. Roadway Express*, *Inc.*, 511 U.S. 298, 312–13 (1994), Petitioner was eligible for voluntary departure; the immigration judge wrongly told him he wasn't; and Petitioner did not appeal based on that misadvice. *See* Pet. App. 7a & n.7. The Second Circuit did not dispute the district court's finding that Petitioner's appeal waiver was not "knowing and voluntary," *see* Pet. App. 33a, 36a–37a; it instead held that, after *Palomar-Santiago*, that fact was irrelevant. *See* Pet. App. 18a n.40 ("Even if the defendant's waiver were not considered and intelligent, that alone would not excuse the defendant's failure to exhaust administrative remedies pursuant to § 1326(d)(1)." (quoting *Nunez*, 140 F.4th at 1165 (internal quotation marks and alteration omitted))).

Moreover, the question presented is outcome-determinative. Petitioner's case is materially identical to *Mendoza-Lopez*: Like the defendants in *Mendoza-Lopez*, Petitioner was not properly advised about discretionary relief from removal. And there are no alternative holdings that could complicate review: The Second Circuit reversed entirely on its reading of *Palomar-Santiago*. *See* Pet. App. 18a–19a.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

By: _____

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