ORAL ARGUMENT REQUESTED

No. 14-50053

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

GABRIELA CORDOVA-SOTO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

OPENING BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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September 29, 2014

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. L. R. 28.2.3, Appellant Gabriela Cordova-Soto requests oral argument.

Ms. Cordova-Soto was brought to the United States as an infant and became a lawful permanent resident in 1991. More than twenty years later, in 2005, the government instituted removal proceedings against her. After an immigration officer misinformed her that she had no avenue to challenge removal, Ms. Cordova-Soto, who was proceeding *pro se*, signed a stipulated request for removal and was deported. She later reentered the United States to be with her family, including her four young children, and was prosecuted for illegal reentry.

This case addresses whether an alien can collaterally attack an underlying removal order pursuant to 8 U.S.C. § 1326(d) where the alien's *pro se* stipulated request for removal—which waived her right to receive a hearing, challenge removal, and obtain appellate review—was unknowing and unintelligent and the Immigration Judge charged with ensuring that the stipulation was valid failed to do so. The district court, in denying Ms. Cordova-Soto's motion to dismiss the indictment for illegal reentry, adopted reasoning that conflicts directly with decisions of this Court and other courts of appeals. Oral argument will help the Court to resolve the issues presented by this case and by the district court's erroneous decision.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. It entered final judgment on January 13, 2014. (ROA.182, 297.) Ms. Cordova-Soto filed a timely notice of appeal on January 15, 2014. (ROA.170.) *See* Fed. R. App. P. 4(b). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Ms. Cordova-Soto was brought to the United States as an infant and became a lawful permanent resident in 1991. More than twenty years later, in 2005, the government instituted removal proceedings against Ms. Cordova-Soto and detained her. An immigration officer persuaded her to sign a stipulated request for removal by telling her that she was foreclosed from challenging removal. This legal advice was incorrect. Then, the Immigration Judge ("IJ"), in violation of regulatory requirements and due process, entered the final order of removal without determining whether Ms. Cordova-Soto's stipulation was voluntary, knowing, and intelligent. Ms. Cordova-Soto later reentered the United States to be with her four young children and was prosecuted for illegal reentry.

This case presents a single issue: Whether the district court erred in denying Ms. Cordova-Soto's motion to dismiss the indictment for illegal reentry under 8 U.S.C. § 1326(d) without holding an evidentiary hearing where Ms. Cordova-Soto's *pro se* stipulated request for removal—which waived her right to receive a

hearing, challenge removal, and obtain appellate review—was unknowing and unintelligent and the IJ entered a final order of removal without determining whether the stipulation was valid.

STATEMENT OF THE CASE

A. Ms. Cordova-Soto Has Resided in the United States Since She Was an Infant.

Gabriela Cordova-Soto entered the United States in 1978, when she was eight months old. (ROA.386-87.)[1] In 1991, at the age of 13, Ms. Cordova-Soto became a lawful permanent resident. (*Id.* at 134; AR 163.) Ms. Cordova-Soto's husband is a U.S. citizen. (*Id.* at 386; AR 163.) She and her husband have four children, all of whom are U.S. citizens. (*Id.*)

B. Ms. Cordova-Soto Waived Her Due Process Rights and Stipulated to Removal Based on a Government Agent's Incorrect Legal Advice.

In 2002, Ms. Cordova-Soto was convicted of misdemeanor theft, and the following year of giving a worthless check. (ROA.134; AR 262.) Then, in 2005, she was convicted of possession of methamphetamine, which was categorized as a

[1] *See also Cordova-Soto v. Holder*, Certified Administrative Record, Case No. 12-3392, ECF No. 7 (7th Cir.), at AR 163 (hereinafter "AR"). This Court may take judicial notice of the Certified Administrative Record filed in Ms. Cordova-Soto's related Seventh Circuit case. *See Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 410 (5th Cir. 2010) ("a court may take judicial notice of the record in prior related proceedings, and draw reasonable inferences therefrom"); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 952 (9th Cir. 2008) (taking judicial notice of administrative record).

felony offense in Kansas. (*Id.*) The conviction was based on a guilty plea, and she was sentenced to probation. *See* Entry of Judgment, Kansas v. Cordova, Case No. 05-cr-386 (Ford Cty. Dist. Ct. Oct. 21, 2005).[2] Immigration and Customs Enforcement ("ICE") agents then arrested Ms. Cordova-Soto, and the government initiated removal proceedings against her. She was served with a Notice to Appear ("Notice") on October 28, 2005. (ROA.112; AR 261-63.) The Notice alleged that she was removable for three reasons: (1) as an aggravated felon, based on her 2005 methamphetamine conviction, (2) as an alien convicted of two crimes of moral turpitude, based on her 2002 and 2003 convictions for theft and giving a worthless check, and (3) as an alien convicted of violating a law relating to a controlled substance, again based on her 2005 methamphetamine conviction. (*See* AR 261-63.)

At the ICE processing center, an immigration officer presented Ms. Cordova-Soto with forms and advised her that she should sign them if she wanted to be removed quickly. (ROA.63; AR 164.) Ms. Cordova-Soto had powerful incentives to pursue any possible avenue for avoiding removal, even if that would have meant remaining in immigration detention while her case was being decided. Specifically, Ms. Cordova-Soto's youngest child was less than a year old, and her

[2] This Court may take judicial notice of this state court record from Ms. Cordova-Soto's 2005 criminal proceeding. *Enriquez-Gutierrez*, 612 F.3d at 410.

three other children all were under the age of ten. (ROA.135-36.) Her children and their father all are U.S. citizens, and Ms. Cordova-Soto herself had lived in the United States since infancy. (*Id.*) Removal to Mexico thus would have separated Ms. Cordova-Soto from her family, including her four young children, unless they left the country too, and either alternative promised extreme hardship for all of them.

But, notwithstanding the strength of Ms. Cordova-Soto's reasons to pursue any avenues for avoiding removal, she was misinformed that she had none. The immigration officer told her that, regardless of whether she signed the stipulation, she would be deported, and that any attempts to challenge her removal would only serve to prolong her detention. (AR 164.) He told her she could call a legal services organization and provided a list of phone numbers. During a brief conversation, the person who answered the phone advised her that she "did not have any way to fight her case." It is unclear whether this person was an attorney. (*Id.*)[3]

[3] The district court did not hold an evidentiary hearing and made no findings with respect to these allegations, which were set forth in the motion to dismiss. (*See* ROA.135-37.) Rather, the district denied the motion to dismiss the indictment without expressly questioning the truth of these allegations, or even acknowledging them. (*See* ROA.142.)

C. Under a Correct Interpretation of the Statute, Ms. Cordova-Soto Was Not Removable for an Aggravated-Felony Conviction and Had a Strong Possibility of Avoiding Removal.

The government's representation that Ms. Cordova-Soto did not have a way to avoid removal was incorrect because her state drug conviction was not an "aggravated felony" for purposes of federal immigration law. As a result, the primary ground for removal charged by the government—*i.e.*, conviction of an aggravated felony—was invalid. And, unlike an aggravated-felony conviction (for which a noncitizen is "conclusively presumed to be deportable," 8 U.S.C. § 1228(c)), the government's two other grounds for removal did not mandate removal and, specifically, did not preclude Ms. Cordova-Soto from applying for cancellation of removal. Thus, under a correct interpretation of the law, Ms. Cordova-Soto was statutorily eligible for cancellation of removal because she was a lawful permanent resident and her conviction for possession of methamphetamine was not an "aggravated felony." *See* 8 U.S.C. § 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is . . . deportable from the United States if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than five years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of an aggravated felony.").

At the time Ms. Cordova-Soto signed the immigration officer's document (titled "Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing"), the Courts of Appeals were divided over whether an "aggravated felony" for purposes of § 1229b(a) included a state drug conviction that is a felony under state law but would be only a misdemeanor under federal law.[4] The Board of Immigration Appeals ("BIA") held that, for immigration proceedings in circuits that had resolved the question, the law of the circuit would control the determination. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390, 396-97 (BIA 2002). For proceedings in circuits that had not resolved the question, however, the BIA held that a state felony drug conviction was an "aggravated felony" for immigration purposes. *See id.* at 394-95, 397. As discussed *infra* at 26-27, the BIA's interpretation of the statute was incorrect.

Ms. Cordova-Soto's case was before an IJ in Chicago, Illinois, which is in the Seventh Circuit. (ROA.113 (showing that the stipulated request was submitted

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[4] *Compare United States v. Wilson*, 316 F.3d 506 (4th Cir. 2003) (holding, prior to *Lopez v. Gonzales*, 549 U.S. 47 (2006), that a state law drug conviction could be an aggravated felony); *United States v. Hernandez-Avalos*, 251 F.3d 505, 507-08 (5th Cir. 2001) (same); *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999) (same); *United States v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997) (per curiam) (same); *United States v. Cabrera-Sosa*, 81 F.3d 998 (10th Cir. 1996) (same); *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996) (same), *with United States v. Palacios-Sanchez*, 418 F.3d 692 (6th Cir. 2005) (holding that a state-law felony is not an aggravated felony); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 909-18 (9th Cir. 2004) (same); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002) (same).

to the Immigration Review Office in Chicago, Illinois).) At the time the immigration officer gave Ms. Cordova-Soto the forms to stipulate to removal in November of 2005, the Seventh Circuit had not resolved whether a state felony drug conviction was an "aggravated felony" for immigration purposes. (ROA.113.) The question, however, was squarely before the Seventh Circuit in *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006). The Supreme Court too was considering the issue. *See Lopez v. Gonzales*, 549 U.S. 47 (2006), petition for writ of certiorari filed Oct. 31, 2005.

Nevertheless, the government agent told Ms. Cordova-Soto, who was proceeding *pro se*, that she was foreclosed from challenging removal and persuaded her to sign a stipulated request for removal. (ROA.113-16.) The stipulated request for removal conceded Ms. Cordova-Soto's removability "as charged in the Notice" (*id.* at 114, ¶ 8) and contained several waivers. In particular, the stipulated request for removal waived (1) the right to be represented, (2) the right to a hearing before an IJ, (3) the right to apply for relief from removal, including cancellation of removal, and (4) the right to appeal the removal order or challenge it in any proceedings. (*Id.* at 114-17, ¶¶ 3a, 5, 10, 13, 17.)

The government agent did not tell Ms. Cordova-Soto that the Seventh Circuit had not addressed the very issue on which her possibility of avoiding removal hinged—*i.e.*, whether a conviction for drug possession constituted an

"aggravated felony" for immigration purposes. Nor was she told that the Seventh Circuit was preparing to decide the issue. And, worse than simply remaining silent as to Ms. Cordova-Soto's chances of avoiding removal, the officer affirmatively misstated that she had no way to remain in the country. If this had been true, then refusing to sign the stipulation would have assured prolonged detention followed by inevitable removal, with no possible benefit. Misinformed that she had no avenue to challenge removal, Ms. Cordova-Soto waived her rights to an immigration hearing, to challenge the charges against her, and to appellate review.

D. The IJ Entered the Final Order of Removal Without Determining Whether Ms. Cordova-Soto's Waivers Were Valid As Required By Regulation and Due Process.

The Government submitted the *pro se* stipulated request for removal to the Chicago immigration court. (ROA.113-16.) The IJ did not speak with Ms. Cordova-Soto or review other evidence to determine whether Ms. Cordova-Soto's stipulated request for removal was valid. Based on Ms. Cordova-Soto's waiver, the IJ also did not hold a hearing on the government's alleged grounds for removal or on Ms. Cordova-Soto's potential grounds for relief from removal. On November 8, 2005, the IJ entered a removal order. (*Id.* at 112.) Because Ms. Cordova-Soto was unrepresented, the IJ had an obligation under 8 C.F.R. § 1003.25(b) "to determine that the alien's waiver is voluntary, knowing, and intelligent." 8 C.F.R. § 1003.25(b). The IJ did not make this finding. (ROA.112.)

Four months after the IJ entered the final order of removal against Ms. Cordova-Soto, the Seventh Circuit decided *Gonzales-Gomez* and held that a state conviction for possession of a controlled substance is an "aggravated felony" for immigration purposes only if it is a felony under federal law. 441 F.3d at 535 (noting that "[a]llowing cancellation of removal to depend on how severely a particular state punishes drug crimes would have the paradoxical result of allowing states, in effect, to impose banishment from the United States as a sanction for a violation of state law"). The Supreme Court agreed with this interpretation in *Lopez*, 549 U.S. 47, issued later that same year.

E. Ms. Cordova-Soto Reentered the United States to Be with Her Family and Challenged the Removal Order.

After she was removed to Mexico, Ms. Cordova-Soto reentered the United States to be reunited with her family, including her infant son and other young children. (ROA.135-36.) In 2010, she was detected by local law enforcement in Kansas and taken into the custody by the Department of Homeland Security ("DHS"), which reinstated her original order of removal. (*See id.* at 136.) Ms. Cordova-Soto filed an appeal in the Tenth Circuit, challenging her initial removal order as well as the recent order reinstating that initial order. *See Cordova-Soto v. Holder*, 659 F.3d 1029 (10th Cir. 2011). The court found that it lacked jurisdiction to review collaterally the earlier removal order, and it rejected Ms. Cordova-Soto's

argument regarding the reinstatement. *See id.* at 1032. Ms. Cordova-Soto was again removed to Mexico. (ROA.18.)

In January 2012, Ms. Cordova-Soto filed a motion to reopen her removal proceedings in the Kansas City Immigration Court. *Cordova-Soto*, 732 F.3d 789, 792 (7th Cir. 2013). The IJ denied her motion. *Id*. Ms. Cordova-Soto appealed the denial to the BIA, which affirmed the IJ's decision. *Id*. She then challenged the IJ's denial of her motion to reopen in the Seventh Circuit (which had jurisdiction over the issuance of the 2005 removal order). The court affirmed the BIA, holding that Ms. Cordova-Soto was barred from reopening a removal order after it was reinstated when she returned to the United States. *Id*.

F. Ms. Cordova-Soto was Arrested in Texas and Convicted for Illegal Reentry.

In September 2012, Ms. Cordova-Soto was arrested in the Western District of Texas for illegal reentry in violation of 8 U.S.C. § 1326. (ROA.18.) She was indicted on that charge and filed a motion to dismiss the indictment, seeking to attack collaterally her original 2005 removal order. (ROA.62-75.) The district court denied the motion. (*Id.* at 138-44.) Ms. Cordova-Soto then entered a conditional guilty plea, preserving her right to appeal the denial of her motion to dismiss the indictment. (*Id.* at 306-11.) After being sentenced to time served, she filed a timely notice of appeal with this Court. (*Id.* at 170.)

STANDARD OF REVIEW

This Court reviews the denial of a motion to dismiss an indictment *de novo*. *See United States v. Villanueva-Diaz*, 634 F.3d 844, 848 (5th Cir. 2011).

SUMMARY OF THE ARGUMENT

The district court erred in denying Ms. Cordova-Soto's motion to dismiss the indictment for illegal reentry without holding an evidentiary hearing. Ms. Cordova-Soto's allegations, taken as true, demonstrate that she can collaterally attack the underlying removal order pursuant to 8 U.S.C. § 1326(d).

Specifically, Ms. Cordova-Soto's removal proceedings were fundamentally unfair. Absent a valid waiver, Ms. Cordova-Soto had a right to a removal hearing and a right to challenge the final removal order. But the IJ failed to determine, as required by regulation and due process, whether the waiver in her *pro se* stipulation was voluntary, knowing, and intelligent. In fact, the waiver was invalid because it was based on the government agent's incorrect legal advice that she had no avenue to challenge removal. Ms. Cordova-Soto was thus deprived of an immigration hearing in violation of due process.

Ms. Cordova-Soto can show that these fundamental procedural errors prejudiced her because, absent these errors, it is reasonably likely that she could have avoided removal and remained in the United States. It is reasonably likely that she would have successfully challenged the primary charge in the Notice to

Appear. It also is reasonably likely that she would have been found eligible to apply for cancellation of removal, and been granted that relief in lieu of being ordered removed, because she arrived in the United States when she was eight months old, had four young U.S.-citizen children, one of whom was an infant, and had a positive employment history.

Ms. Cordova-Soto also satisfies § 1326(d)'s other requirements. The invalid waiver of her right to challenge the final removal order deprived her of judicial review and also excused the requirement that she exhaust her administrative remedies. In any event, Ms. Cordova-Soto did exhaust her administrative remedies by filing a motion to reopen her immigration proceedings.

ARGUMENT

A predicate element of an illegal reentry offense under 8 U.S.C. § 1326 is that, before reentering, the defendant has been removed or otherwise has departed while a removal order is outstanding. § 1326(a)(1). If the defendant successfully challenges the validity of the predicate removal order, then the indictment must be dismissed. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 842 (1987).

An alien can collaterally challenge the validity of the removal order in the § 1326 criminal case if "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." § 1326(d). *See also Mendoza-Lopez*, 481 U.S. at 839 ("a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review"). For the collateral challenge to succeed, the defendant also must show that "the procedural deficiencies [tainting the removal order] caused the alien actual prejudice." *United States v. Lopez-Ortiz*, 313 F.3d 225, 229 (5th Cir. 2002).

Ms. Cordova-Soto's allegations regarding the predicate removal order satisfy each of these requirements.[5] The district court's reasons for concluding there was no fundamental unfairness and no actual prejudice are incorrect. And the district court did not address § 1326(d)'s additional requirements (exhaustion

[5] The indictment does not rely expressly on either the 2005 removal order or the 2010 reinstatement of that order. (ROA.12.) As the district court recognized, however, "a reinstatement of an invalid removal order is invalid itself." (ROA.136 n.5.) *See also Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 n.4 (5th Cir. 2006) (concluding that challenges to underlying deportation order could be heard in direct appeal from reinstatement order). The district court therefore was correct to "review the underlying [2005] order of removal." (ROA.136 n.5.) A successful challenge to the 2005 removal order requires dismissal of the indictment, "despite the Government relying on the reinstatement." (*Id.*) *See United States v. Arias-Ordonez*, 597 F.3d 972, 978-82 (9th Cir. 2010) (holding 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. Charleswell*, 456 F.3d 347, 352 (3d Cir. 2006) (holding that illegal reentry charges predicated on reinstatement order may be invalidated based on successful challenge to "either proceeding—the reinstatement or the original").

of administrative remedies and effective deprivation of judicial review), which Ms. Cordova-Soto's allegations also satisfy. Accordingly, Ms. Cordova-Soto was entitled to an opportunity to prove her allegations, and the district court erred in denying her motion to dismiss the indictment.

I. MS. CORDOVA-SOTO'S REMOVAL PROCEEDINGS WERE FUNDAMENTALLY UNFAIR BECAUSE HER *PRO SE* WAIVER OF A REMOVAL HEARING WAS INVALID AND ALSO BECAUSE THE IJ FAILED TO DETERMINE THE WAIVER'S VALIDITY.

Under § 1326(d), "[f]undamental fairness is a question of procedure." *Lopez-Ortiz*, 313 F.3d at 229-30; *see also United States v. Copeland*, 376 F.3d 61, 70 (2d Cir. 2004) (a showing of fundamental unfairness requires a showing of "fundamental procedural error").[6] Ms. Cordova-Soto's removal proceedings were fundamentally unfair because she did not receive a hearing on the government's charges or have an opportunity to challenge the charges, and the IJ did not make a determination on the validity of her *pro se* waiver, which was based on critical misinformation about the possibility of avoiding removal.

[6] *Copeland* and some other decisions include the "actual prejudice" requirement as part of "fundamental fairness," but *Lopez-Ortiz* and other decisions of this Court refer to fundamental unfairness and actual prejudice separately. The actual prejudice suffered by Ms. Cordova-Soto is addressed in Part II below.

A. An Unrepresented Alien Is Entitled to a Removal Hearing Unless She Validly Waives the Hearing and the IJ Determines that the Waiver Is Valid.

Due process requires that a legal permanent resident facing deportation be provided a full and fair hearing and a reasonable opportunity to present evidence to challenge her removal. *Lopez-Ortiz*, 313 F.3d at 230. Although this right can be waived, "such a waiver must be knowing[] and voluntar[]y." *Nose v. Att'y Gen.*, 993 F.2d 75, 79 (5th Cir. 1993). Thus, an alien cannot properly be deprived of a hearing on the basis of an invalid waiver. *Id.*; *see also Pelayo v. U.S. Border Patrol Agent #1*, 82 F. App'x 986, 988 (5th Cir. 2003) (per curiam) (finding alien's due process rights violated where alien did not knowingly waive right to a hearing because he lacked capacity to do so).

When an alien is not represented by counsel, it is especially important to ensure that any waiver of a removal hearing—if accepted at all—is voluntary, knowing, and intelligent. "Stipulated deportations . . . allow the prompt departure of imprisoned criminal aliens who have no apparent avenue of relief from [removal] and who wish to avoid immigration-related detention after having completed their criminal sentences." 60 Fed. Reg. 26,351, 26,352 (May 17, 1995). Without an attorney, there is a high risk that an alien will not be adequately informed about the key issue in deciding whether to stipulate to removal—whether she has an avenue to challenge removal. *Pro se* aliens are particularly vulnerable:

they usually are in detention, have little or no access to legal advice, and have little or no comprehension of complex immigration laws. *See Leslie v. Att'y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010) ("[m]any courts have recognized that 'our immigration statutory framework is notoriously complex'" and therefore lack of counsel can have major impact) (quoting *N-A-M v. Holder*, 587 F.3d 1052, 1058 (10th Cir. 2009)); *United States v. Ramos*, 623 F.3d 672, 678-79 (9th Cir. 2010) (describing stipulated removal process that creates risk of invalid *pro se* waivers); *Matter of Rodriguez-Diaz*, 22 I. & N. Dec. 1320, 1323 (BIA 2000) (noting that in "cases involving unrepresented aliens, more detailed explanations [of waivers of rights] are often needed"); *see also* Jennifer Lee Koh*, Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 497-520 (2013) (describing stipulated removal process).

The significance of this concern is underscored by the regulation governing stipulated removals. The rule originally did not authorize stipulated removals by unrepresented aliens. 8 C.F.R. § 3.25(b) (1995); *see also* 60 Fed. Reg. at 26,351 (proposed rule amended to "give sufficient emphasis to the requirement that only represented respondents/applicants may enter into stipulation requests"). When the rule later was revised to allow such stipulations, it was supplemented with a requirement that if "the alien is unrepresented, the Immigration Judge *must*

determine that the alien's waiver is voluntary, knowing, and intelligent." 8 C.F.R. § 1003.25(b) (emphasis added). In response to "due process concerns" about the validity of waivers by *pro se* aliens, the government maintained: "The requirement that the immigration judge determine if an unrepresented alien's waiver is voluntary, knowing and intelligent before granting a stipulated request for an order safeguards against an imprudent waiver of a formal adjudication on the part of an unrepresented alien." 62 Fed. Reg. 10,312, 10,322 (Mar. 6, 1997). The government also stated that the requirement of IJ approval means that "[i]f an immigration judge is confronted with a stipulated request raising due process concerns, he or she may examine that request in the context of a hearing." *Id.* Accordingly, where an unrepresented alien stipulates to removal, a determination by the IJ that the waiver was voluntary, knowing, and intelligent is necessary for a removal order without a hearing to comport with due process.

B. Ms. Cordova-Soto's *Pro Se* Waiver Was Not Knowing or Intelligent, and the IJ Failed to Make a Determination on the Waiver's Validity.

Here, Ms. Cordova-Soto's removal order was fundamentally unfair because the IJ failed to make the required determination whether the stipulation to removal was voluntary, knowing, and intelligent. Instead, the final removal order provides only that "[t]he respondent has submitted a statement wherein he/she waives a personal hearing before the Immigration Judge, and admits the truthfulness of the

allegations and the charges contained in the Notice to Appear." (R.112.) Because it is essential that the waiver of rights in the stipulation be valid, and because the risk of invalid waivers by unrepresented aliens is high, the failure to make this determination before ordering removal without a hearing rendered the removal proceedings fundamentally unfair. *See United States v. Gomez*, 757 F.3d 885, 893-96 (9th Cir. 2014) (fundamental fairness under 8 U.S.C. § 1326(d) established by IJ's failure to make valid determination that stipulation to removal was voluntary, knowing, and intelligent)[7]; *cf. Arzanipour v. INS*, 866 F.2d 743, 746 (5th Cir. 1989) ("[f]ailure to adhere to regulations can constitute a denial of due process of law" where "regulation is required by the constitution").

The IJ's failure to make the determination required by 8 C.F.R. § 1003.25(b) is akin to a court's failure to conduct a plea colloquy before accepting a guilty plea. *See* Fed. R. Crim. P. 11(b); *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). In the criminal context, a Rule 11 failure invalidates the plea—and thus invalidates the conviction—if there is "a reasonable probability that, but for the error, [the defendant] would not have entered the plea." *United States v. Benitez*, 542 U.S. 74, 76 (2004). The rights of aliens—even unrepresented aliens—entering into

[7] In *Gomez*, the IJ's decision included a determination that the waiver of rights was voluntary, knowing, and intelligent, but the Ninth Circuit concluded that this determination could not have been made correctly on the evidence before the IJ. 757 F.3d at 893, 896. Here, the failure to make the required determination is far clearer, since the IJ's decision did not even purport to include it.

removal stipulations are not identical to the rights of criminal defendants entering into plea agreements, and Rule 11 imposes greater requirements than § 1003.25(b). But, as discussed above, a stipulation to removal includes the waiver of constitutional rights, and an unrepresented alien is entitled to *some* process—the IJ's determination under § 1003.25(b)—to help ensure that her waiver is voluntary, knowing, and intelligent. The failure to make this determination, like a failure to comply with Rule 11, supports a challenge to the removal order where the alien was prejudiced. *See infra* at 28-37 (discussing requirement of actual prejudice).

The IJ's failure to make a § 1003.25(b) determination independently satisfies the fundamental procedural error element for a collateral challenge under 8 U.S.C. § 1326(d) because, in fact, Ms. Cordova-Soto's waiver of her rights was not knowing and intelligent. And, regardless of whether an IJ follows the required procedure in reviewing a removal stipulation, the entry of a final removal order based on the stipulation is fundamentally unfair where the alien did not voluntarily, knowingly, and intelligently waive her right to a hearing. *See supra* at 14-37.

A waiver is not knowing and intelligent—and thus is not valid—where an alien is misinformed about whether she can challenge her removal. In *Mendoza-Lopez*, for example, the IJ "failed to advise respondents properly of their eligibility to apply for suspension of deportation." 481 U.S. at 840. As a result, "[t]he District Court concluded that respondents had not made knowing and intelligent

waivers of their rights to apply for suspension of deportation or their rights to appeal." *Id.* at 831-32. The Supreme Court agreed: "Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding." *Id.* at 840; *cf. Lopez-Ortiz*, 313 F.3d at 229 (stating that "*Mendoza-Lopez* is instructive on the issue whether Lopez-Ortiz was deprived of judicial review" when he was not informed of his eligibility to apply for discretionary waiver of removal).[8]

The Supreme Court's ruling in *Mendoza-Lopez* on deprivation of judicial review—regardless of whether the Court also decided the issue of fundamental

[8] This Court ultimately held in *Lopez-Ortiz* that "the Immigration Judge's error in failing to explain Lopez-Ortiz's eligibility does not rise to the level of fundamental unfairness." 313 F.3d at 231. That holding is inapplicable here, however. The key fact in *Lopez-Ortiz* was that "[t]he record establishe[d], and Lopez-Ortiz d[id] not contest, that he was provided with" procedural protections including "a hearing before an executive or administrative tribunal" and "a fair opportunity to be heard." *Id.* at 230-31. As a result, in the Court's view, the failure to explain his eligibility for discretionary relief would have been fundamentally unfair only if that eligibility itself was "a liberty or property interest warranting due process protection." *Id.* at 231. Here, by contrast, the misinformation about Ms. Cordova-Soto's ability to avoid removal resulted in deprivation of her right to a removal hearing—which, as *Lopez-Ortiz* emphasized, *is* guaranteed by principles of due process. This case therefore is not governed by the *Lopez-Ortiz* holding on fundamental fairness. Nevertheless, Ms. Cordova-Soto also preserves the argument that the holding is incorrect and should be overturned by this Court *en banc* or by the Supreme Court in a case where it does apply. *See, e.g.*, *Copeland*, 376 F.3d at 70-73 (2d Cir. 2004).

fairness[9]—establishes that an alien's waiver of procedural rights is not knowing and voluntary when she is not properly advised about her eligibility for relief. *See Copeland*, 376 F.3d at 68 n.6 (citing *Mendoza-Lopez* and determining that alien's waiver of appeal "may not have been considered or intelligent because it was based on misleading information provided by the IJ about his eligibility for discretionary relief"); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049 (9th Cir. 2004) ("We do not consider an alien's waiver of his right to appeal his deportation order to be considered and intelligent when the record contains an inference that the petitioner is eligible for relief from deportation, but the Immigration Judge fails to advise the alien of this possibility and give him the opportunity to develop the issue.") (internal quotation marks omitted). Similarly, this Court held that a waiver of counsel in a deportation proceeding was not "competently and understandingly made" where the alien made the waiver "without being provided with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf and which her present counsel now presses in arguing for the reopening of her proceeding." *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir.

[9] In *Lopez-Ortiz*, this Court concluded that *Mendoza-Lopez* had not decided the issue of fundamental fairness. 313 F.3d at 229 n.4; *see* 481 U.S. at 840 (government had asked Court to assume fundamental unfairness). *But see* 481 U.S. at 846 n.1 (Rehnquist, C.J., dissenting) (fairness issue was properly before the Court and had been decided by the Court).

1979). These decisions reflect the fact—which the government also has recognized—that the central reason for stipulating to removal is to expedite removal where there is "no apparent avenue of relief from" that outcome. 60 Fed. Reg. at 26,352. When an unrepresented alien is misinformed that she has no avenue to challenge removal, the stipulation to removal is not knowing and intelligent.

Here, Ms. Cordova-Soto's waiver of rights was not knowing and intelligent and, thus, was not valid. An immigration officer induced her to sign a waiver by affirmatively misinforming her that she had no way to avoid removal. (AR 164.) This was incorrect because Ms. Cordova-Soto had been convicted for simple possession of drugs, which was a felony under state law but not an "aggravated felony" for purposes of federal immigration law. *See Lopez*, 549 U.S. at 53. As a result, the government's aggravated-felony ground for removal was invalid, and, in addition, Ms. Cordova-Soto could have sought cancellation of removal. In fact, Ms. Cordova-Soto had at least a reasonable probability of avoiding removal because of her strong connections to the United States—including her infant child and three other young children, all of whom are citizens. *See infra* at 28-37. And Ms. Cordova-Soto was not merely uninformed about this possibility of avoiding removal. Instead, she was affirmatively misinformed—by an immigration officer—that she had no way to stay in the country. This misinformation rendered

Ms. Cordova-Soto's waiver of rights invalid. For this reason as well, the removal proceedings were fundamentally unfair.

C. The District Court Erred in Concluding that Ms. Cordova-Soto Cannot Show Fundamental Unfairness.

The district court's reasoning on these issues is incorrect. According to the district court: "Though the record does not indicate that a hearing or colloquy was conducted to determine if the Defendant's Stipulation was given intelligently, knowingly, and voluntarily, the acceptance of the Stipulation supports an implicit finding that the IJ determined the Stipulation was given as such." (ROA.140) There is no basis for the district court's assumption of an "implicit finding" from nothing more than acceptance of the stipulation. Under this reasoning, one never could conclude that an IJ failed to enter required findings. The court's assumption is especially faulty here, where any determination by the IJ easily could have been recorded in a single sentence. Furthermore, "[i]n determining whether a waiver is knowing and voluntary, [courts] must indulge in every reasonable presumption against a waiver." *Nose*, 993 F.2d at 79 (internal quotation marks omitted). Given the reasons that the waiver was not knowing and intelligent (*see supra*), it cannot simply be presumed that the IJ found otherwise. *Cf. Gomez*, 757 F.3d at 897-98 (notwithstanding IJ's express determination that stipulated removal was voluntary, knowing, and intelligent, IJ had failed to make the required determination where record did not support it); *Ramos*, 623 F.3d at 683 (same).

Because the stipulation to removal was not knowing and intelligent, the entry of a removal order without a hearing was fundamentally unfair regardless of whether the IJ made an "implicit" determination to the contrary. On this issue, the district court erred in adopting the reasoning of a different IJ who, five years after Ms. Cordova-Soto's removal, denied her motion to reopen.[10] Contrary to the second IJ's reasoning, the misinformation given to Ms. Cordova-Soto about the possibility of avoiding removal cannot be overcome by the fact that the stipulation stated it was "voluntarily, knowingly and intelligently enter[ed] into." (ROA.116.) That statement itself, like the stipulation as a whole, was tainted by the misinformation upon which the stipulation was premised.

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[10] A threshold error was the district court's statement that "the BIA, the appellate body specifically tasked with determining whether immigration courts comply with their own regulations, found the Defendant's argument that the IJ's order of removal was procedurally defective to be without merit." (ROA.141.) The finding cited by the district court is from the decision of the IJ, not the BIA, on the motion to reopen. And an IJ's interpretation of immigration regulations is not entitled to deference. *See Zhu v. Gonzales*, 493 F.3d 588, 594 (5th Cir. 2007) (stating that deference is given to the "BIA's interpretation of the legislative scheme it is entrusted to administer"); *Lin v. Dep't of Justice*, 416 F.3d 184, 190 (2d Cir. 2005) (according no deference to IJs because "although the Attorney General has expressly delegated rule-making authority to the BIA" there is no "rule or regulation indicating that the Attorney General ever intended to—let alone did in fact—delegate similar rule-making authority to the IJs"). In any event, the passage relied upon by the district court did not address whether the original IJ had complied with 8 C.F.R. § 1003.25(b). Rather, the passage purports to assess, years later, whether the stipulation was voluntary, knowing, and intelligent. Even if that after-the-fact assessment had been made by the BIA rather than an IJ, it would have been entitled to no deference from federal courts deciding whether Ms. Cordova-Soto's removal proceedings were fundamentally unfair.

Under the regulation governing stipulated removals, moreover, a finding that an unrepresented alien's stipulation is voluntary, knowing, and intelligent cannot be based solely on the stipulation's recitation that this is so. The regulation requires *all* stipulated removal orders to state that the waiver of rights is voluntary, knowing, and intelligent. 8 C.F.R. § 1003.25(b)(6). Yet the regulation originally did not authorize unrepresented aliens to enter into these stipulations at all. *See* 8 C.F.R. § 1003.25(b) (1995); 60 Fed. Reg. at 26,351. If the boilerplate provision that the waiver is voluntary, knowing, and intelligent were sufficient to establish this fact for unrepresented aliens, then there would have been no reason not to allow such stipulations under the original rule.

Similarly, when the government amended the rule to allow stipulations by unrepresented aliens, it added the requirement that an IJ "determine" whether a *pro se* alien's waiver is voluntary, knowing, and intelligent "based on the record." The term "determination" "implies judgment and decision after weighing the facts." BLACK'S LAW DICTIONARY 405 (5th ed. 1979). Allowing the stipulation alone to establish a waiver's validity for *pro se* aliens would turn the separate requirement—that the IJ independently determine the validity of a *pro se* alien's waivers—into mere surplusage. This interpretation should be avoided. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented,

no clause, sentence, or word shall be superfluous, void, or insignificant.”). The regulation thus confirms that, when an alien is unrepresented, it cannot be assumed that a stipulation is voluntary, knowing, and intelligent, even though the stipulation always will recite that it is. *See also Ramos*, 623 F.3d at 683 (rejecting government’s argument that “the Stipulated Removal form, which stated ‘I submit this request for removal voluntarily, knowingly, and intelligently,’ was a sufficient basis from which the IJ could conclude that Ramos validly waived his rights”).

Lastly, the district court was wrong to rely on the reasoning of the second IJ (who denied the motion to reopen) regarding the misinformation given to Ms. Cordova-Soto. According to that reasoning, the immigration officer’s “advice was correct” at the time it was given, and, for Ms. Cordova-Soto waiver to be valid, she did not “need to be clairvoyant” about subsequent court decisions. (ROA.141.) On the contrary, Ms. Cordova-Soto’s conviction for simple possession of methamphetamine never was an aggravated felony under federal immigration law and, as a result, she had—at the time of her removal proceedings—an avenue both to defeat the aggravated-felony ground for removal and to seek cancellation of removal on other grounds. *See Lopez*, 549 U.S. at 53-55, 57 (holding that felony under state law is not aggravated felony for purposes of federal immigration law unless it would be a felony under federal law or falls within general term “illicit trafficking”); *id.* at 60 (“Congress generally treats possession alone as a

misdemeanor whatever the amount"); *Gonzales-Gomez*, 441 F.3d at 535-36; *Lopez-Ortiz*, 313 F.3d at 231 (holding that the Supreme Court's interpretation of the INA "finally decided what [the statute] had always meant" and "established [the alien's] eligibility for [ ] relief at the time of his removal").

It makes no difference that the "aggravated felony" issue was not addressed by the Seventh Circuit and by the Supreme Court until a few months after Ms. Cordova-Soto's removal proceedings. The question is not whether an avenue for relief from removal had been clearly established when the advice was given. Instead, the dispositive point is that an avenue for relief had not been *foreclosed* by the Supreme Court or the Seventh Circuit—a fact that required no clairvoyance.[11] This made it incorrect for the immigration officer to tell Ms. Cordova-Soto that she would be removed regardless of whether she entered into a stipulation. The fact that the relevant issue was pending before the Seventh Circuit and the Supreme Court during Ms. Cordova-Soto's removal proceedings only makes it clearer that the advice was wrong, even based on what could have been known at that time. This misinformation rendered the waiver unknowing and unintelligent, and ordering Ms. Cordova-Soto's removal without a hearing was fundamentally unfair.

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[11] The BIA had stated that it would apply circuit case law to determine the aggravated-felony question, *Yanez-Garcia*, 23 I. & N. Dec. at 396-97, and the Seventh Circuit had not yet decided that question.

II. MS. CORDOVA-SOTO WAS PREJUDICED BY THE ERRONEOUS DEPRIVATION OF A REMOVAL HEARING.

An alien suffers actual prejudice from a procedural defect where "there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported." *United States v. Benitez-Villafuerte*, 186 F.3d 651, 659 (5th Cir. 1999) (internal quotation marks omitted). This prejudice standard is analogous to the standard for claims of ineffective assistance of counsel, procedural errors in a plea colloquy, and failure to disclose exculpatory evidence, where the defendant must show a "reasonable probability that, but for the error," the outcome would have been different. *Benitez*, 542 U.S. at 81-82 (internal citation omitted). In those contexts, the standard requires that "the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Id.* at 83. Thus, "[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* at 83 n.9. Here, there is a reasonable likelihood that, but for the procedural errors, Ms. Cordova-Soto would have successfully challenged the aggravated-felon charge and, on the other charges, sought and received cancellation of removal.

The IJ's failure to determine whether Ms. Cordova-Soto's waiver was knowing and intelligent, along with the failure to provide her an immigration

hearing, prevented her from challenging the aggravated-felony charge in the Notice to Appear and applying for cancellation of removal. (*See* AR 366.) Had the IJ evaluated whether Ms. Cordova-Soto's stipulated removal order was knowing and intelligent, he would have determined that it was not. In fact, as discussed *supra* at 22-23, Ms. Cordova-Soto entered into the stipulated removal order based on the government's incorrect advice that she was foreclosed from challenging removal. And, had Ms. Cordova-Soto understood that she was not necessarily foreclosed from avoiding removal, it is "reasonably likely" that she would have successfully challenged the aggravated-felony charge and successfully sought cancellation of removal.

Ms. Cordova-Soto's conviction for simple possession under Kan. Stat. Ann. § 65-4160 (2003) was not an aggravated felony. *See supra* at 26-27. Thus, had Ms. Cordova-Soto challenged the aggravated-felony charge in administrative proceedings and before the Seventh Circuit, she would have been successful. Indeed, the Seventh Circuit decided this issue in her favor in *Gonzales-Gomez*, 441 F.3d at 535-36, only *four months* after Ms. Cordova-Soto's final removal order was entered. (ROA.142.) At that time, *In re Yanez-Garcia*, 23 I. & N. Dec. at 396-97, dictated that the BIA follow Seventh Circuit precedent in Ms. Cordova-Soto's case, and it is unlikely that the BIA would have heard her appeal until after the

Gonzales-Gomez decision.[12] And in the unlikely circumstance that Ms. Cordova-Soto's administrative appeal was resolved before *Gonzales-Gomez*, she could have appealed to the Seventh Circuit. Given the timing, that court would not have decided her appeal until after it had issued its binding precedent in *Gonzales-Gomez*, under which Ms. Cordova-Soto's conviction for simple possession was not an aggravated felony.

In addition, after the aggravated-felony charge was rejected, it was reasonably likely that Ms. Cordova-Soto would have sought and been granted cancellation of removal. To determine whether cancellation is appropriate, the agency assesses the "adverse factors evidencing [her] undesirability as a permanent resident" and "the social and humane considerations presented in [her] behalf to

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[12] Only 134 days passed from the date of the stipulated removal order until the Seventh Circuit's decision on March 22, 2006. The Immigration Court system aims to finish Immigration Judge adjudication of detained cases without relief applications within 30 days. *See* Office of the Inspector General, Management of Immigration Cases and Appeals by the Executive Office for Immigration Review, at 7 table 1 (October 2012) http://www.justice.gov/oig/reports/2012/e1301.pdf. After a removal order is entered by an immigration judge, the noncitizen has 30 days to perfect an appeal to the Board of Immigration Appeals. 8 C.F.R. § 1003.38. After receipt of the Notice of Appeal, the Board obtains the Record of Proceedings from the immigration court and orders production of a transcript. *Id.* § 1003.5. Once the transcript is available, a briefing schedule is set by the Board. *Id.* § 1003.3(c)(1). For detained individuals, the Board sets a 21-day briefing schedule, and one continuance may be sought. *Id*. The Board aims to adjudicate detained appeals within 150 days. *See supra* Management of Immigration Cases and Appeals, at 10, table 2. The average appeal for a detained individual is decided in 105 days. *Id*. at 43.

determine whether the granting of . . . relief appears in the best interest of this country." *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998) (omission in original). Specifically, favorable considerations include:

> [1] family ties within the United States, [2] residence of long duration in this country (particularly when the inception of residence occurred at a young age), [3] evidence of hardship to the [alien] and [her] family if [removal] occurs, [4] service in this country's armed forces, [5] a history of employment, [6] the existence of property or business ties, [7] evidence of value and service to the community, [8] proof of genuine rehabilitation if a criminal records exists, and [9] other evidence attesting to [an alien]'s good character.

Id. And adverse factors include:

> [1] the nature and underlying circumstances of the grounds of exclusion or [removal], [2] the presence of additional significant violations of this country's immigration laws, [3] the existence of a criminal record and, if so, its nature, recency, and seriousness, and [4] the presence of other evidence indicative of [an alien]'s bad character or undesirability as a permanent resident of this country.

Id. The ultimate determination must depend on "review of the record as a whole," keeping in mind that "there is no inflexible standard for determining who should be granted discretionary relief and each case must be judged on its own merits." *Id.* For example, in *Matter of C-V-T-*, the alien entered the country as a refugee in 1983 and became a lawful permanent resident in 1991. *See id.* at 9. In 1997, he was convicted of simple possession of cocaine and removal proceedings were

instituted against him. *Id.* at 10. The IJ denied his application for cancellation of removal. *Id.* at 13. The BIA reversed, noting that his criminal conviction, while serious, was isolated and mitigated by the fact that he had helped police arrest the supplier of the cocaine. *Id.* Moreover, the BIA noted "significant equities" in the alien's favor, namely that the alien had resided in the U.S. for 15 years, learned English, worked hard in this country, and been self-supporting. *See id.* at 14. With respect to rehabilitation, the BIA held that there was not sufficient evidence to make a finding because the alien had been confined since the time he committed the crime. *Id.* Still, it held that he was not "a serious ongoing threat to our society." *Id.* Based on the entire record, the BIA held that the alien "warrant[ed] a favorable exercise of discretion and a grant of cancellation of removal." *Id.*

Similarly, the Fourth Circuit has held that an alien was prejudiced where procedural errors prevented him from applying for a waiver of deportation because there was a reasonable probability that the government would have waived deportation. *See United States v. El Shami*, 434 F.3d 659, 665 (4th Cir. 2005). The court considered, in the waiver of deportation context, adverse and mitigating factors similar to the factors for cancellation of removal. *Id.* It then held:

> Although [the alien] had two serious felony convictions on his record, there is substantial mitigating evidence in the record. Specifically, [the alien] had lived in the United States for thirteen years at the time of the deportation hearing. Further, [the alien] had a wife and a son, both of whom were citizens of the United States and

> depended on him for financial support. At the time of his deportation hearing, [the alien] owned a small business in New Jersey, on which he paid federal income taxes. We also note that [the alien] complied with the terms and conditions of his release on bond from the time of his release in April 1993 until the final deportation hearing on October 1993. These are substantial facts that [the alien] could have presented at the time of his final deportation hearing to obtain . . . relief.

Id. at 665-66. Thus, the court held that the alien had been prejudiced and, because he met all of § 1326(d)'s requirements, vacated his illegal-reentry conviction. *See id.* at 666; *see also United States v. Scott*, 394 F.3d 111, 119-21 (2d Cir. 2005) (conducting a similar analysis, finding that the alien satisfied the prejudice requirement, and reversing the district court's denial of his motion to dismiss the indictment).

Similarly, here, the significant favorable equities demonstrate a reasonable likelihood that Ms. Cordova-Soto would have been granted cancellation of removal. In particular, she had strong family ties to the United States. Ms. Cordova-Soto arrived in the United States as an infant, a fact of "particular[]" significance to the BIA, and had been a lawful permanent resident for more than two decades. *Matter of C-V-T*, 22 I. & N. Dec. at 11. Her three siblings all resided in the United States and were U.S. citizens. (AR 139-40.) In addition, like the alien in *El Shami* who had a U.S.-citizen child, Ms. Cordova-Soto had children who were U.S. citizens and whose father was a U.S. citizen. *See* 434 F.3d at 665.

At the time she entered removal proceedings, Ms. Cordova-Soto's children were quite young: she had a son who was less than a year old, twin daughters who were eight years old, and another son who was nine. (AR 139-40.) None of the children spoke Spanish and, as a result, would face difficulty joining Ms. Cordova-Soto in Mexico if she were removed. (AR 199.) Her removal was certain to create profound hardship for her immediate family members, particularly her infant son. Ms. Cordova-Soto also had a history of employment, serving as a preschool teacher and children's librarian, and she regularly filed income taxes. (AR 134.) She would have been far better able to provide financial support to her four young children by remaining in the United States than by being returned to Mexico, where she had not lived since infancy. And her prospects for rehabilitation were good as well, as she was sentenced only to probation for her possession offense. *See* Entry of Judgment, *Kansas v. Cordova*, No. 05-cr-386 (Ford Cty. Dist. Ct. Oct. 21, 2005).

On the other hand, the grounds for removal of Ms. Cordova-Soto were misdemeanor crimes—theft and issuing a bad check—and simple possession of methamphetamine. (AR 262.) Although these crimes are not trivial, as in *Matter of C-V-T-*, they are outweighed by the significant favorable equities. *See* 22 I. & N. Dec. at 17-18. Moreover, at the relevant time (*i.e.*, the time of her removal proceedings), Ms. Cordova-Soto had not violated any other immigration laws, and

there was no other reason to believe that she was undesirable as a permanent resident. Thus, as in *Matter of C-V-T-*, Ms. Cordova-Soto's circumstances warranted a favorable exercise of discretion. *Id*. at 16-18. And, as in *El Shami*, she has shown that she was "reasonably probable" to have been granted discretionary relief (*i.e.*, cancellation of removal). 434 F.3d at 667. That Ms. Cordova-Soto had an infant and three other young children, along with her own arrival here as an infant, makes this a far more compelling case for cancellation than *Matter of C-V-T-* or *El Shami* because the aliens in those cases arrived in the United States as adults. *See Matter of C-V-T-*, 22 I. & N. Dec. at 16; *El Shami*, 434 F.3d at 661-62.

The district court's conclusion to the contrary was based on two fundamental legal errors. First, the district court indicated that it is *never* possible to show a reasonable likelihood that discretionary relief would have been granted. (ROA.143 (stating that Ms. Cordova-Soto "cannot assert without [sic] any reasonable degree of certainty or probability that the IJ would have granted" cancellation of removal because it was "a decision that ultimately rested within the discretion of the IJ").) As a result, the district court did not even mention—much less weigh—facts such as Ms. Cordova-Soto's young children or her arrival in the United States as an infant more than 35 years ago. This was wrong. The IJ's discretion in considering cancellation of removal—like discretion exercised in other settings—is not

unbounded. Rather, the IJ must consider specific mitigating and aggravating factors in determining whether cancellation is warranted. Thus, a court may assess the likelihood of a particular discretionary decision by considering these specific factors as well as prior decisions illustrating how the factors are balanced. Indeed, both *El Shami* and *Scott* held that an alien could demonstrate a reasonable likelihood that discretionary relief would be granted. *El Shami*, 434 F.3d at 665; *Scott*, 394 F.3d at 119-20. This Court too has evaluated whether an alien can demonstrate that "there existed a reasonable likelihood that he would have been granted discretionary relief" by considering mitigating and aggravating factors, such as the alien's family ties and his criminal history. *United States v. Mendoza-Mata*, 322 F.3d 829, 833-34 (5th Cir. 2003). The district court's refusal to consider the particular circumstances of Ms. Cordova-Soto's case is directly counter both to common sense and to these decisions.

The district court also erred in concluding that actual prejudice required more than a reasonable likelihood of cancellation of removal. After addressing cancellation of removal, the court gave an alternative reason for concluding that actual prejudice could not be shown: "Assuming *arguendo* that the Defendant would have contested her status as an aggravated felon, she offers no argument concerning how she would have overcome her two other grounds for removal—that is, her two prior convictions of theft and her possession of a controlled

substance." (ROA.144.) The court failed to recognize that cancellation of removal—which the court had just addressed—is precisely the relief that would have overcome the second and third grounds for removal in the Notice to Appear. In fact, the potential for cancellation was relevant *only* to the second and third of the alleged grounds for removal.[13] The reasonable likelihood that she would have been granted cancellation, therefore, means there is a reasonable likelihood that Ms. Cordova-Soto would not have been deported and would have remained in the United States. Nothing more is needed to establish actual prejudice.

III. MS. CORDOVA-SOTO WAS IMPROPERLY DEPRIVED OF THE OPPORTUNITY FOR JUDICIAL REVIEW BECAUSE THE STIPULATION WAIVING REVIEW WAS INVALID.

The district court did not address whether "the deportation proceedings at which the order was issued improperly deprived [Ms. Cordova-Soto] of the opportunity for judicial review." 8 U.S.C. §1326(d)(2). Nevertheless, taking Ms. Cordova-Soto's allegations as true, she can demonstrate that the violation of fundamental fairness during the deportation proceedings "amounted to a complete

[13] Cancellation of removal was not relevant to the primary charge in the Notice to Appear—that Ms. Cordova-Soto had been convicted of an aggravated felony. If Ms. Cordova-Soto's crime of conviction had been an aggravated felony, then an order of removal on that ground would have been valid, and she also would have been ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3) (cancellation of removal unavailable to alien who has been "convicted of any aggravated felony"). But, because her crime of conviction was not an aggravated felony, the order of removal on that ground was invalid. As to a charge that does not validly support a removal order, cancellation of removal is irrelevant.

deprivation of judicial review" of the final removal order. *Mendoza-Lopez*, 481 U.S. at 840.

Mendoza-Lopez held that aliens were deprived of judicial review where an "Immigration Judge permitted waivers of the right to appeal that were not the result of considered judgments" by the aliens. *Id*. In that case, the IJ did not "explain adequately [the aliens'] right to suspension of deportation or their right to appeal." *Id*. at 839. The Court reasoned that, as a result of this failure, "the [aliens'] waivers of their right to appeal were not considered or intelligent," and they "were deprived of judicial review of their deportation hearing." *Id*. at 840.

This case falls squarely within the rule of *Mendoza-Lopez*. Ms. Cordova-Soto waived her right to appeal the final removal order in the stipulated order of removal. (ROA.115.) But, as discussed *supra* at 14-27, this waiver was tainted by the government's incorrect advice to Ms. Cordova-Soto that she was foreclosed from challenging her removal. The IJ then entered the final order of removal without determining whether Ms. Cordova-Soto's waiver was voluntary, knowing, and intelligent as required by regulation and due process. *Supra* at 17-23. This final order provided that it was "a conclusive determination of the alien's removability from the United States" and that "[a]ppeal has been waived by the parties." (ROA.112.)

Like the aliens in *Mendoza-Lopez* whose "waivers of their rights to appeal were not considered and intelligent" because they were not properly advised about their eligibility for relief, Ms. Cordova-Soto's waiver of her right to appeal was "not considered or intelligent" because it was based on inaccurate information provided by the government. *Mendoza-Lopez*, 481 U.S. at 840. The IJ failed to correct this misinformation and ensure that Ms. Cordova-Soto's waiver was knowing and intelligent before entering the final removal order. (ROA.112.) Based on the invalid appellate waiver, therefore, Ms. Cordova-Soto was "deprived of judicial review" of her removal proceeding. *Mendoza-Lopez*, 481 U.S. at 840. *See also United States v. Gomez*, 757 F.3d 885, 897-98 (9th Cir. 2014) (alien denied judicial review where IJ fails to make determination of voluntariness required by 8 C.F.R. § 1003.25); *Ramos*, 623 F.3d at 682 (concluding that invalid waiver of the right to appeal "deprived [the alien] of the opportunity for meaningful judicial review").

IV. THE EXHAUSTION REQUIREMENT IS SATISFIED BOTH BECAUSE MS. CORDOVA-SOTO'S INVALID STIPULATION PREVENTED HER FROM APPEALING TO THE BIA AND BECAUSE SHE FILED A MOTION TO REOPEN.

The district court did not address whether Ms. Cordova-Soto exhausted the administrative remedies that were available to her. Generally, to bring a collateral challenge against a removal order in an illegal reentry case, an alien must show that she "exhausted any administrative remedies that may have been available to

seek relief against the order." 8 U.S.C. § 1326(d)(1). Because Ms. Cordova-Soto's waiver of her right to challenge the final order of removal was invalid, she is excused from the requirement that she exhaust her administrative remedies. In any event, Ms. Cordova-Soto *did* pursue a motion to reopen her immigration proceedings, which satisfies the exhaustion requirement.

An alien is not required to exhaust administrative remedies where "an alien's failure to exhaust results from an invalid waiver of the right to an administrative appeal." *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004). As *Sosa* explained, *Mendoza-Lopez* requires that the exhaustion requirement be excused in these circumstances: 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." *Id*. (citing *Mendoza-Lopez*, 481 U.S. at 838). Applying this rule, *Sosa* reasoned that "an invalid waiver of the right to administrative exhaustion will often result from the same lack of understanding that renders a waiver of judicial review invalid." *Id*. The Second Circuit then concluded that the alien was excused from exhausting his administrative remedies because he had not been informed of his right to apply for discretionary relief and thus his "waiver of his right to an administrative appeal was not knowing and intelligent." *Id*. at 137. *See also United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001) ("The exhaustion requirement of 8 U.S.C. § 1326(d) cannot

bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process.”).

Ms. Cordova-Soto’s allegations show that her waiver of her right “to appeal . . . or challenge” the final removal order was not knowing and intelligent and that her removal proceedings did not comport with due process. *Supra* at 14-37. Thus, the same “lack of understanding that renders [her] waiver of judicial review invalid” also renders Ms. Cordova-Soto’s waiver of the right to bring an administrative challenge invalid. *Sosa*, 387 F.3d at 136. Accordingly, Ms. Cordova-Soto was not required to exhaust her administrative remedies in order to collaterally challenge her removal order. *See id*.

In any event, Ms. Cordova-Soto *did* make efforts to exhaust her administrative remedies. After she learned that she could challenge the aggravated-felony charge, Ms Cordova-Soto filed a motion to reopen in immigration court, which was denied. (ROA.118-21.) She then appealed this decision to the BIA, which dismissed her appeal based on the reasoning of the IJ. (AR 4-6.)[14] It is well established that an alien satisfies § 1326(d)(1)’s exhaustion

[14] That the IJ and BIA concluded Ms. Cordova-Soto’s motion to reopen was procedurally improper does not show that she failed to exhaust her administrative remedies. This Court has held that an alien is required only to exhaust the administrative remedies that are available “to him.” *Villanueva-Diaz*, 634 F.3d at 849 (concluding that court should address alien’s challenge on the merits where alien was barred from filing a motion to reopen because he did not learn facts

requirement by filing a motion to reopen and appealing the denial of that motion to the BIA. *See United States v. Serrano-Vera,* 554 F. App'x 284, 285 (5th Cir. 2014) (per curiam) (alien may exhaust administrative remedies by filing a motion to reopen); *United States v. Alegria-Saldana*, 750 F.3d 638, 641 (7th Cir. 2014) (same); *United States v. Perez-Mazariegos*, 494 F. App'x 928, 929-30 (11th Cir. 2012) (per curiam) (same); *Copeland*, 376 F.3d at 67 (same). Ms. Cordova-Soto's pursuit of a motion to reopen, therefore, would fulfill the exhaustion requirement even if it were not already excused.

CONCLUSION

For the foregoing reasons, Ms. Cordova-Soto respectfully requests that this Court reverse the district court's denial of her motion to dismiss the indictment. She further requests a remand to the district court with instructions to vacate the judgment of conviction, to make findings on her factual allegations, and to enter appropriate relief consistent with those findings and with this Court's decision.

(continued…)

giving rise to collateral challenge until after he was removed). Thus, where an alien does not have any administrative remedies available to her at the time she learns of the facts giving rise to the collateral challenge, the court may address the merits of the challenge. *Id*.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for Appellant certifies that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 9,252 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman.

/s/Meghan Greenfield
Counsel for Appellant
Dated: September 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2014, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

/s/Meghan Greenfield
Counsel for Appellant
Dated: September 29, 2014