ORAL ARGUMENT REQUESTED

No. 14-50053

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA

Appellee,

v.

GABRIELA CORDOVA-SOTO,

Defendant-Appellant.

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

REPLY BRIEF OF APPELLANT

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An illegal reentry charge under 8 U.S.C. § 1326 must be dismissed if the underlying removal order was fundamentally unfair and the alien suffered actual prejudice, exhausted administrative remedies, and was improperly deprived of judicial review. The Opening Brief shows that all of these criteria are met by Ms. Cordova-Soto, who stipulated to removal based on an immigration official's incorrect advice that she had no way to remain in the country.

The government fails to refute the showings of fundamental unfairness and actual prejudice. Ms. Cordova-Soto stipulated to removal and, as a result, did not receive a hearing on the government's removal charges. The Immigration Judge accepted the *pro se* stipulation and ordered Ms. Cordova-Soto's removal without entering a determination that the stipulation was voluntary, knowing, and intelligent. And, in fact, the stipulation was not knowing or intelligent. The government at this stage does not dispute that Ms. Cordova-Soto was told by an immigration officer that she would not succeed in challenging her removal. Nor does the government dispute that, contrary to this advice, Ms. Cordova-Soto *did* have a reasonable likelihood of successfully contesting removal and remaining in the country. Ms. Cordova-Soto had not been convicted of an aggravated felony, and, as a result, she could have defeated the government's primary removal charge and also could have sought cancellation of removal. Indeed, Ms. Cordova-Soto had a compelling case for cancellation. Among other factors, she had come to the

United States as an infant and, at the time of her removal, had four young children—including an infant—who were U.S. citizens with a U.S.-citizen father.

The government's arguments on exhaustion and judicial review—issues that the district court did not reach—also fail. Ms. Cordova-Soto's invalid stipulation to removal waived not only a removal hearing before an IJ but also an administrative appeal to the Board of Immigration Appeals and judicial review in federal court. She was promptly removed from the country and had no way to challenge the removal order, especially given her lack of knowledge that the immigration official's advice had been incorrect.

I. MS. CORDOVA-SOTO'S REMOVAL WAS FUNDAMENTALLY UNFAIR BECAUSE SHE WAS IMPROPERLY DEPRIVED OF A REMOVAL HEARING ON THE GOVERNMENT'S CHARGES.

The Opening Brief establishes that Ms. Cordova-Soto's removal was fundamentally unfair because she did not receive a removal hearing on the government's charges before she was removed.[1] The deprivation of a removal

[1] The government's brief confuses two types of hearings. As argued below and in the Opening Brief, due process required that Ms. Cordova-Soto receive a full and fair removal hearing, absent a valid waiver. (*See* Op. Br. at 15-23.) The government's brief mistakes this statement for an argument that the IJ was required to conduct an in-person hearing to determine whether Ms. Cordova-Soto's stipulation to removal was voluntary, knowing, and intelligent. (*See* Resp. Br. at 14-22.) Ms. Cordova-Soto does not make—and need not make to prevail—the argument attributed to her by the government. The IJ here failed to make a finding as to whether the stipulation was voluntary, knowing, and intelligent. As a result, this case does not present the question of what type of inquiry must support such a determination in cases where a determination actually is made.

hearing cannot be justified by Ms. Cordova-Soto's stipulation to removal which included a waiver of a removal hearing. The IJ did not determine, as required by 8 C.F.R. § 1003.25, that her *pro se* waiver was valid, and, in fact, this waiver was not knowing or intelligent because an immigration officer induced her to sign it by providing critical misinformation about whether she could avoid removal.

The government's arguments to the contrary are unavailing. *First*, the immigration officer's advice to Ms. Cordova-Soto was incorrect, notwithstanding its consistency with the BIA's erroneous view of the law at the time. *See infra* Section I.A. *Second*, the issue of whether the stipulation to removal was knowing and intelligent was raised and decided in the district court and, as a result, was preserved for appellate review. *See infra* Section I.B. *Third*, the IJ failed to comply with § 1003.25(b) and make a determination as to whether the stipulation was voluntary, knowing, and intelligent. This failure independently establishes that the stipulation to removal was invalid, making the removal order fundamentally unfair. *See infra* Section I.C. *Fourth*, regardless of Ms. Cordova-Soto's need for cancellation of removal, due process required that—absent a valid waiver—she receive a hearing to allow her to contest the government's removal charges and seek relief. *See infra* Section I.D.

A. Ms. Cordova-Soto's *Pro Se* Waiver Was Unknowing and Unintelligent Because She Was Affirmatively Misinformed by the Government That She Had No Way to Avoid Removal.

Ms. Cordova-Soto's waiver of a removal hearing was unknowing and unintelligent, and thus invalid, because an immigration officer induced her to sign the *pro se* stipulation by affirmatively misinforming her that she had no way to avoid removal. (Op. Br. at 22.) This advice was incorrect because Ms. Cordova-Soto was eligible for cancellation of removal. Also, the government's primary ground for removal—that Ms. Cordova-Soto's conviction for simple possession of drugs constituted an "aggravated felony" under federal immigration law—was legally erroneous. (*Id.*) Indeed, the government does not address—and so concedes—the Opening Brief's showing not only that Ms. Cordovo-Soto had a possible avenue for avoiding removal, but that it was reasonably likely she would have sought and received cancellation if the immigration officer had not given her incorrect advice. (Op. Br. at 28-37; *United States v. Saldana*, 427 F.3d 298, 306 n.21 (5th Cir. 2005) (finding that a party who fails to brief an issue is considered to have abandoned the claim).) Accordingly, the immigration officer's advice that Ms. Cordova-Soto had no way to remain in the country was a critical piece of misinformation that rendered her stipulation unknowing and unintelligent.

The government is wrong that the immigration officer's legal advice *was* correct because it reflected the *BIA*'s (incorrect) view of "the law at the time" the

advice was given. (Op. Br. at 30.) It is true that, at the time Ms. Cordova-Soto was removed, the BIA would have applied an interpretation of the Immigration and Nationality Act ("INA") that would have treated "state felony drug convictions" as "'aggravated felonies' for removal purposes." (Resp. Br. at 29 (citing *In re Yanez-Garcia*, 23 I & N Dec. 390 (BIA 2002)).) And it would have done so even where the proscribed conduct (like the simple drug possession for which Ms. Cordova-Soto was convicted) was not punishable as a felony under federal law. *Id.* This interpretation of the term "aggravated felony," however, was never a correct interpretation of the INA. (*See* Op. Br. at 26-27.) Shortly after Ms. Cordova-Soto was deported, both the Seventh Circuit and the Supreme Court held that a state felony drug conviction is an aggravated felony for removal purposes "only if it proscribes conduct punishable as a felony under . . . federal law." *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006); *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006) (same).

The government's position is not aided by the fact that *Lopez* and *Gonzales-Gomez* were not decided until after Ms. Cordova-Soto stipulated to removal. These decisions did not "change the law," as the government contends in its response. (*See* Resp. Br. at 30 (arguing that an IJ "need not anticipate future changes in law").) Indeed, the government's position is directly foreclosed by this Court's decision in *Lopez-Ortiz*, 313 F.3d 225.

Lopez-Ortiz addressed whether an IJ's understanding of the law was correct at the time of the removal hearing. Previously, "the Board of Immigration Appeals had decided that the abolition of § 212(c) relief [by the Illegal Immigration Reform and Immigration Responsibility Act] was applicable to aliens, such as Lopez-Ortiz, who had been convicted of aggravated felonies and whose removal proceedings commenced after the effective date of IIRIRA." 313 F.3d at 230. However, the Supreme Court's subsequent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), interpreted IIRIRA in such a way that "Lopez-Ortiz was eligible for § 212(c) relief." 313 F.3d at 230. This Court in *Lopez-Ortiz* rejected the government's position that "*St. Cyr* should not affect [the] evaluation" of the removal hearing's fairness. *Id.* The Court explained that *St. Cyr*, because it "was a case of statutory interpretation," did not "announc[e] a new rule" and "did not change the law." *Id.* Rather, the Supreme Court's interpretation of a statute "finally decide[s] what [the statute] always meant." *Id.* The *St. Cyr* decision thus "established Lopez-Ortiz's eligibility for § 212(c) relief at the time of his removal." *Id*. As a result, "*the Immigration Judge's contrary understanding, although in compliance with BIA precedent, was an erroneous application of the law*." *Id.* (emphasis added).

Lopez-Ortiz confirms that the Supreme Court's ruling in *Lopez v. Gonzales* "finally decided" what the term "aggravated felony" had "always meant" and "established [Ms. Cordova-Soto's] eligibility for [ ] relief at the time of [her]

removal." *Id.* Thus, the immigration officer's advice that Ms. Cordova-Soto could not challenge her removal, "although in compliance with BIA precedent," was incorrect at the time the advice was given. *Id*.[2] The government's brief says nothing on this point even though the same argument was made in the Opening Brief. (*See* Op. Br. at 27.)

Contrary to the government's argument, moreover, the invalidity of Ms. Cordova-Soto's stipulation in these circumstances does not mean that "due process requires an immigration officer to inform an alien of all circuit splits or all avenues of relief that have not been foreclosed" or that the immigration officer must act as a "*de facto* legal advisor." (Resp. Br. at 30-31.) If the immigration officer here had not given Ms. Cordova-Soto legal advice, then there would be no issue about the officer's failure to provide correct advice on whether she could avoid removal. Unfortunately, the immigration officer's conduct in this case is commonplace. As discussed in the brief of *amicus curiae* National Immigration Law Center,

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[2] It is even clearer here than in *Lopez-Ortiz* that the advice was incorrect. In *Lopez-Ortiz*, the relevant decision of the Supreme Court—*St. Cyr*—was not issued until "three years after Lopez-Ortiz's removal was final." 313 F.3d at 230. The relevant Supreme Court decision here—*Lopez*—was issued the year after Ms. Cordova-Soto was removed, and the petition for certiorari had been filed before the removal order was entered. *Lopez*, 549 U.S. 47, petition for writ of certiorari filed Oct. 31, 2005. In addition, the same question was squarely before the Seventh Circuit, which decided it only four months after Ms. Cordova-Soto was removed. *Gonzales-Gomez*, 441 F.3d 552. The immigration officer, however, unequivocally informed Ms. Cordova-Soto that she was foreclosed from challenging her removal. (*See* Op. Br. at 6-8.)

immigration officers were encouraged to persuade detained aliens to stipulate to removal and, in doing so, often give advice that is incorrect or misleading. (Br. of Amicus Curiae NILC at 11-16.) Thus, detained aliens' rights would be better safeguarded if immigration officers, in seeking to obtain stipulations to removal, did not give them legal advice at all. In any event, where an immigration officer does give an alien legal advice to persuade her to sign a stipulation to removal, the stipulation is invalid if the advice is materially incorrect. Here, Ms. Cordova-Soto was given incorrect advice that she had no way to avoid removal, rendering her stipulation invalid and thus making it fundamentally unfair to remove her without a hearing on the charges against her.

B. The Government's Waiver and Forfeiture Arguments Are Meritless.

Ms. Cordova-Soto's plea agreement did not waive her right to argue that the stipulation to removal was unknowing and unintelligent. The plea agreement provides that "Defendant expressly reserves the right, pursuant to Federal Rule of Criminal Procedure 11(a)(2), to appeal all issues relating to the district court's ruling on Defendant's Motion to Dismiss Indictment." (R.307.) In denying Ms. Cordova-Soto's motion to dismiss the indictment, the district court erroneously determined that the removal stipulation was voluntary, knowing, and intelligent. (ROA.140.) In fact, the government's brief to this Court specifically relies on that determination. (Resp. Br. at 32 ("The district court found, however, that the

Stipulation was in fact voluntary, intelligent, and knowing.").) The plea agreement clearly does not waive Ms. Cordova-Soto's right to argue here that, contrary to the district court's express determination in its ruling on the motion to dismiss, her stipulation to removal was not knowing or intelligent.

The government argues in the alternative that this issue is subject to plain-error review under Federal Rule of Criminal Procedure 52, but that is wrong for the same reasons. The fact that the issue was decided by the district court establishes that it was sufficiently raised below. *See, e.g.*, *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 n.4 (5th Cir. 1996) ("No 'bright-line rule' exists for determining whether a matter was raised below. . . . If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal." (internal quotation marks omitted)); *United States v. Clariot*, 655 F.3d 550, 556 (6th Cir. 2011) ("[w]hen a district court resolves an issue, the losing party can challenge it" regardless of whether it was expressly raised by the party below); *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009) (appellate review available "where the district court nevertheless addressed the merits of the issue" not explicitly raised by the party) (citation omitted).

Furthermore, the district court decided the issue because it was in fact raised below. In her motion to dismiss the indictment, Ms. Cordova-Soto described in detail how the immigration officer told her that she had no way to avoid removal,

and she explained why this advice was incorrect. (ROA.64-66.) Based on these facts, she argued that her removal was fundamentally unfair "[b]ecause the immigration judge failed to determine that Cordova's waiver of rights was voluntary, knowing, and intelligent." (ROA.70.) She further argued that, but for this failure, she would have contested removal and also sought judicial review of any adverse determination. (ROA.72-73.) These arguments necessarily depended on the point that the stipulation to removal had been unknowing and unintelligent, as demonstrated by the facts set forth in the motion.

The government, moreover, itself recognized and litigated the issue that it now claims was not raised. Indeed, in opposition to the motion to dismiss, the government asserted that Ms. Cordova-Soto's "logic . . . revolves around the argument that her waiver of rights in the Stipulated Request was not voluntary, knowing or intelligent." (ROA.105.) In response, the government argued that the waiver *was* voluntary, knowing, and intelligent. (ROA.106.) And the government continues to make that argument in this appeal, not just as a responsive argument but as an affirmative argument in support of the district court's ruling. (Resp. Br. at 32-33.)

The district court similarly understood Ms. Cordova-Soto's position to depend on the stipulation *not* having been voluntary, knowing, and intelligent. The district court stated: "The Defendant claims that had the IJ conducted a hearing or

colloquy to determine whether the Stipulation was given intelligently, knowingly, and voluntarily, the Immigration Court would not have accepted the Stipulation." (ROA.137.) If Ms. Cordova-Soto had not argued that the stipulation was unknowing and unintelligent, then there would have been no basis to claim that the IJ would have rejected the stipulation—*i.e.*, that she was prejudiced by the IJ's failure to make a determination on this issue. After considering this argument, the district court then rejected Ms. Cordova-Soto's claim by making a finding that the stipulation was voluntary, knowing, and intelligent. (ROA.140.) Ms. Cordova-Soto's argument in her motion to dismiss, considered with the government's opposition and the district court's specific findings on the validity of the stipulation to removal, preserved this issue for this Court's review.

In any event, it is clear that Ms. Cordova-Soto's stipulation to removal was not knowing and intelligent. (*See supra* at 4-8, Op. Br. at 22, 28-37.) And, as established in *Mendoza-Lopez*, 481 U.S. 828, convicting Ms. Cordova-Soto for unlawful reentry despite the underlying removal order's invalidity violates her substantial rights and seriously affects the fairness, integrity, and public reputation of the criminal proceedings. Accordingly, this Court should reverse regardless of the standard of review. But the plain-error standard need not be satisfied because the issue on which the government seeks plain-error review—whether the stipulation was knowing and intelligent—was raised by Ms. Cordova-Soto,

contested by the government, and decided by the district court.

C. The Removal Stipulation Was Invalid and the Removal Order Was Fundamentally Unfair for the Additional Reason That the IJ Failed to Make the Determination Required by 8 C.F.R. § 1003.25(b).

The Opening Brief shows that the IJ failed to enter a determination that Ms. Cordova-Soto's *pro se* stipulation to removal was voluntary, knowing, and intelligent. This determination was specifically required by regulation, and the regulatory history makes clear that this requirement was designed to prevent precisely the type of due process violation that occurred here. As that history reflects, the requirement that an IJ determine that a stipulation is valid prior to ordering removal is essential to ensure that *pro se* stipulations are consistent with due process given the high risk that unrepresented aliens will involuntarily, unknowingly, or unintelligently stipulate to removal so that they can be released from detention.

The government's arguments are unavailing. First, there is no basis to conclude that the IJ made the required determination *sub silentio*. *See infra* § I.C.1. Second, the failure to make the determination is not a mere regulatory violation. It further demonstrates that fundamental fairness was violated by the deprivation of a removal hearing based on an invalid stipulation to removal. *See infra* § I.C.2.

1. The IJ Failed to Comply with 8 C.F.R. § 1003.25(b).

Contrary to the government's argument, it cannot be presumed that the required determination has been made in every case where the IJ accepts a removal stipulation.[3] In fact, the BIA routinely remands cases to the IJ for further findings where the IJ has not made an express determination under § 1003.25(b) as to whether an unrepresented alien's stipulation is knowing, voluntary, and intelligent. *See, e.g.*, *In re Aquino-Artero*, 2014 WL 388983 (BIA July 8, 2014) (stating that the "'Order of the Immigration Judge' does not address th[e] regulatory requirement" in § 1003.25(b) and remanding to the IJ for further findings); *In re Medrano-Umanzor,* 2006 WL 3088805 (BIA Aug. 9, 2006) ("The Immigration Judge's decision does not address this regulatory requirement. We therefore find that a remand is warranted in this case in order to allow the Immigration Judge to make the requisite factual findings, in accordance with 8 C.F.R. § 1003.25(b), and

[3] The government also argues at length that the IJ was not required to *hold a hearing* to determine whether a stipulation to removal was voluntary, knowing, and intelligent. (*See* Resp. Br. at 14-22.) The Ninth Circuit has opined that there are "several other avenues" that immigration officers may pursue, without a full-blown hearing before an IJ, "to create a sufficient factual record" to support a determination that the stipulation was voluntary, knowing, and intelligent. *United States v. Gomez*, 757 F.3d 885, 898 (9th Cir. 2014). These avenues include providing "a written declaration by the immigration officer of the circumstances surrounding the alien's waiver, stating that avenues of relief were discussed and that the officer provided a competently translated, individualized explanation of the rights the alien waived." *Id.*

enter a new decision.").[4] These decisions are entitled to some measure of deference, *see Siwe v. Holder*, 742 F.3d 603, 607 (5th Cir. 2014), and they show that the BIA does not indulge in the presumption proposed by the government. The BIA's practice of remand also means that an IJ should have no doubt about the need to at least record a § 1003.25(b) determination in writing—an exceedingly simple step—in any case where he makes one.

Furthermore, "[i]n determining whether a waiver is knowing and voluntary, [courts] must indulge in every reasonable presumption *against* a waiver." *Nose v. Att'y Gen.*, 993 F.2d 75, 79 (5th Cir. 1993) (internal quotation marks omitted). This makes it particularly inappropriate for a court to presume that an IJ made a silent determination in *favor* of a waiver's validity. This same point was made in the Opening Brief, but the government has made no effort to reconcile its proposed rule with the strong presumption against waivers of constitutional rights. (*See* Op. Br. at 23.)

The cases cited by the government undermine its own argument. In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), the Supreme Court ordered that a case be remanded to the district court for additional

[4] *See also, e.g.*, *In re Boubacar-Doucoure*, 2006 WL 2008172 (BIA May 25, 2006); *In re Lagunes-Huerta*, 2005 WL 3709295 (BIA Dec. 28, 2005). Ms. Cordova-Soto also cited several of these decisions in her motion to dismiss. (ROA.69.) The government has not identified a single decision in which either the BIA or a federal court has presumed that an IJ silently made a § 1003.25(b) determination.

explanation of an evidentiary ruling because its "language [was] ambiguous." *Id.* at 386. The Court did not simply presume that the district court had made a particular determination—much less a determination as important as the one required by § 1003.25(b). And in *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218 (5th Cir. 1990) (per curiam), this Court concluded that an appealable partial final judgment exists where the record "reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b)." *Id.* at 1220. Here, by contrast, the IJ's acceptance of the stipulation to removal does not show—much less make it "unmistakable"—that the IJ considered the issue and found the stipulation to be voluntary, knowing, and intelligent.

Thus, neither of the cases cited by the government holds that a Court of Appeals may imply that a district court made a required finding where the record does not clearly convey the judge's intent. And even if "certain findings" can be, in some circumstances, "implicit in *judicial* action" (Resp. Br. at 20 (emphasis added)), this would not support a presumption that an administrative agency has made required findings. "A reviewing court should judge the action of an administrative agency based only on reasoning provided by the agency, and not based on grounds constructed by the reviewing court." *El Moraghy v. Ashcroft*, 331 F.3d 195, 203 (1st Cir. 2003). Applying this rule, courts have required IJs to make express findings on disputed issues "such that the reviewing court is not 'left

in the dark'" as to the IJ's conclusions. *Martins-De Oliveira v. U.S. Att'y Gen.*, 440 F. App'x 769, 771 (11th Cir. 2011) (per curiam) (concluding that IJ must make an express determination as to alien's credibility to allow for review).

In addition, the government is incorrect in asserting that "the record supports the conclusion that the IJ did in fact determine that the Stipulation was voluntary, intelligent, and knowing." (Resp. Br. at 21.) The removal order does not include an express determination or any other language indicating that a determination was made. (ROA.113-17.) The "record" cited by the government is simply the stipulation itself, with boilerplate language stating that an immigration officer read and explained the stipulation to Ms. Cordova-Soto. That Ms. Cordova-Soto spoke English and signed the stipulation does not show that it was voluntary, knowing, and intelligent. (*See* Resp. Br. at 21; *see also Gomez*, 757 F.3d at 896 (rejecting claim that fact that alien signed stipulation showed it was valid); *Bayo v. Napolitano*, 593 F.3d 495, 504 (7th Cir. 2010) (en banc) (rejecting claim that fact that alien signed a stipulation stating that waiver was knowing proved that the waiver was knowing because this would result in "substituting a *presumption* of knowledge for the requirement of *actual* knowledge" and "would have the practical effect of eliminating the knowledge requirement altogether").)

Most significantly, the stipulation was not knowing and intelligent. Given that fact, together with the presumption *against* finding waivers as well as the IJ's

failure to make an express determination, there is no basis to conclude that the IJ silently found otherwise.

2. The Failure to Make a § 1003.25(b) Determination Renders a Stipulation to Removal Invalid and Precludes the Entry of a Removal Order Without a Hearing on Removal.

The IJ's failure to comply with § 1003.25(b) is not merely "an independent regulatory violation" that did not affect the fairness of the removal proceedings. (Resp. Br. at 22.) It means that the removal order was entered without a determination that the *pro se* waiver of a removal hearing was voluntary, knowing, and intelligent. The government simply assumes that the requirement of a § 1003.25(b) determination is a matter of regulatory choice, and that it would not violate due process for IJs to accept *pro se* stipulations without making those determinations. *See Arzanipour v. INS*, 866 F.2d 743, 746 (5th Cir. 1989) (violation of regulation constitutes a fundamental procedural error where "regulation is required by the constitution"). This is incorrect.

Unrepresented aliens presented with stipulated removal orders are often in detention and have little understanding of complex immigration laws, making them particularly vulnerable to involuntary, unknowing, and unintelligent waivers. Thus, due process requires an IJ to make an affirmative finding based on record evidence that an alien's waiver is in fact valid prior to ordering removal. For example, *Gomez*, 757 F.3d 885, held that an unrepresented alien's stipulation to removal was

not "considered and intelligent," and thus violated due process, where the only evidence that the alien understood his waiver was that he had signed the stipulation. *Id*. at 893. The Ninth Circuit concluded that the IJ's review of the stipulated removal form, standing alone, "provided an inadequate basis" to evaluate his waiver of rights and enter a removal order. *Id*. *See also United States v. Ramos*, 623 F.3d 672, 682 (9th Cir. 2010) (*pro se* alien's stipulation to removal was invalid because he "lacked the benefit of counsel or a hearing before the IJ in navigating the 'labyrinth' of our immigration laws").[5] Section 1003.25(b) simply reflects the procedure that in all events is required to provide due process.

In fact, the original regulation governing stipulations to removal did not allow unrepresented aliens to stipulate to removal at all. 8 C.F.R. § 1003.25(b) (1995). 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). The government explained that § 1003.25(b) would "safeguard[ ] against an imprudent waiver of a formal adjudication on the part of an unrepresented alien" and allow "an

[5] The government contends that *Ramos*'s "due process and regulatory reasoning"—despite being characterized by the Ninth Circuit as a holding—was mere dicta. (Resp. Br. at 18.) Regardless of whether *Ramos*'s reasoning was dicta or not, the Ninth Circuit adopted *Ramos*'s due process rationale in *Gomez*. The Opening Brief discussed *Gomez* (*see, e.g.*, Op. Br. at 18), but the government does not address or try to distinguish it.

immigration judge [ ]confronted with a stipulated request raising due process concerns, [to] examine that request in the context of a hearing." *Ramos*, 623 F.3d at 683 (*citing* 62 Fed. Reg. 10,312, 10,322 (Mar. 6, 1997)). Thus, due process requires that an IJ make a determination that an unrepresented alien's waiver is valid prior to ordering removal.

Thus, the central point is that the acceptance of Ms. Cordova-Soto's stipulation to removal was invalid. It was invalid for three independent reasons: (1) it was invalid under the government's own regulation, which required the IJ to determine the stipulation's validity as a precondition to acceptance, (2) it was invalid under due process principles, which likewise required a determination of the stipulation's validity as a precondition to acceptance, and (3) most fundamentally, it was invalid because the stipulation was not in fact knowing and intelligent. Given that the acceptance of the stipulation was invalid, it was fundamentally unfair to enter a removal order without affording Ms. Cordova-Soto a hearing on the government's removal charges.

D. This Court's Decision in *Lopez-Ortiz* Supports Ms. Cordova-Soto's Challenge to the Removal Order.

The government is wrong in arguing that, under this Court's decision in *Lopez-Ortiz*, 313 F.3d 225, it was permissible to deprive Ms. Cordova-Soto of a removal hearing even absent a valid waiver. On the contrary, *Lopez-Ortiz* supports Ms. Cordova-Soto's position because, as this Court emphasized, that case did not

involve deprivation of a removal hearing.

In *Lopez-Ortiz*, the alien had received a removal hearing but, at the hearing, the IJ had not informed him that he was eligible for discretionary waiver of removal under Section 212(c) of the INA. 313 F.3d at 227. This Court stated:

> Fundamental fairness is a question of procedure. . . . The Supreme Court has stated that due process requires that an alien who faces deportation be provided (1) notice of the charges against him, (2) a hearing before an executive or administrative tribunal, and (3) a fair opportunity to be heard. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98, 73 S. Ct. 472, 97 L. Ed. 576 (1953). *The record establishes, and Lopez-Ortiz does not contest, that he was provided with these protections.* Because he was provided with the protections mandated by the Supreme Court, Lopez-Ortiz's challenge of the fundamental fairness of his removal hearing rests on the Immigration Judge's error in not explaining his eligibility for § 212(c) relief.

Id. at 230-31 (emphasis added). The Court held that, because § 212(c) merely authorized discretionary relief from removal, the IJ's failure to explain the eligibility for this relief at the removal hearing did not "rise to the level of fundamental unfairness." *Id.* at 231.

The government cannot extend *Lopez-Ortiz* to cases, like Ms. Cordova-Soto's, where there was no removal hearing. *Lopez-Ortiz* did not hold that an alien can be deprived of a removal hearing where only discretionary relief from removal is available. To the contrary, the alien in *Lopez-Ortiz* was claiming only an entitlement to seek discretionary relief, and this Court nevertheless stated that "a

hearing" and "a fair opportunity to be heard" were required by due process and thus "mandated by the Supreme Court." *Id*. at 230-31.[6] Here, by contrast, Ms. Cordova-Soto *was* denied a removal hearing and a fair opportunity to be heard, because her waiver of these "mandated" protections was invalid. (*See* Op. Br. at 15-17.) Thus, *Lopez-Ortiz* does not prevent Ms. Cordova-Soto from showing that the denial of a hearing on the government's removal charges was fundamentally unfair.

Furthermore, the holding of *Lopez-Ortiz* is distinguishable for the independent reason that Ms. Cordova-Soto was deprived of a hearing on more than

[6] The government's position gets no support from the statement in *Lopez-Ortiz* that "§ 212(c) relief, because it is available within the broad discretion of the Attorney General, is not a right protected by due process." 313 F.3d at 231. That statement is fully consistent with the Court's recognition in the same opinion—as noted above—that due process did require a removal hearing. This is confirmed by the Court's prior decision in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). Regarding another form of discretionary relief for aliens (political asylum), the Court held that although "[t]here is no constitutionally protected right to [the relief] itself," there is a right *to petition* for such relief. *Id.* at 1039 (alien is entitled to "at least send his message and be assured of the ear of the recipient"). "Whether this minimal entitlement be called a liberty or property interest," the Court explained, "it is sufficient to invoke the guarantee of due process." *Id.* An alien thus has a right to a hearing on the availability of such relief, *id.*, consistent with her general right to a removal hearing, *see United States v. Benitez-Villafuerte*, 186 F.3d 651, 657 (5th Cir. 1999). *See also Kwong Hai*, 344 U.S. at 597 (due process requires alien to receive removal hearing even where "it later may be established" at the hearing that the alien can lawfully "be expelled and deported"). Accordingly, the statement in *Lopez-Ortiz* about § 212(c) relief—that it is not a right protected by due process—does not conflict with the existence of a right to a hearing, which the Court expressly recognized in the same case. Similarly here, Ms. Cordova-Soto was entitled to a hearing, regardless of the fact that cancellation of removal is discretionary relief.

just her eligibility for discretionary relief. The primary ground for removal alleged by the government was that Ms. Cordova-Soto had been convicted of an aggravated felony. If not for the stipulation to removal, Ms. Cordova-Soto would have received a hearing on this issue. And the validity of this removal charge was not a discretionary issue. Because Ms. Cordova-Soto's removal stipulation was unknowing and unintelligent, she was entitled to a removal hearing addressing both the aggravated-felony charge and the availability of discretionary relief. The deprivation of this hearing rendered her removal fundamentally unfair.

II. MS. CORDOVA-SOTO WAS PREJUDICED BY THE DENIAL 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." *Benitez-Villafuerte*, 186 F.3d at 659 (internal quotation marks omitted). The Opening Brief establishes that if Ms. Cordova-Soto had received a hearing on the government's alleged grounds for removal, there is a reasonable likelihood that she would not have been removed. (Op. Br. at 28-37.) Specifically, Ms. Cordova-Soto had not been convicted of an aggravated felony, and there is a reasonable likelihood that she would have been granted cancellation of removal due to the significant equities in her favor. These equities included that she had arrived in the United States as an infant and, at the time of the removal proceedings, had four young children who were U.S. citizens with a U.S.-citizen

father. (*Id.* at 30-35.) The Opening Brief also shows that the district court's contrary conclusion was based on two fundamental legal errors—an erroneous view that it is *never* possible to show a reasonable likelihood that discretionary relief would have been granted, and an erroneous conclusion that actual prejudice required more than a reasonable likelihood of cancellation of removal. (*Id.* at 35-37.)

Significantly, the government does not dispute either of these points from the Opening Brief. The government instead argues only that there was no prejudice because, according to the government, the stipulation to removal "was in fact voluntary, intelligent, and knowing." (Resp. Br. at 32.) This argument relates to the fundamental unfairness issue, not the prejudice issue. (*See, e.g.*, ROA.140-41 (district court opinion addressing this issue under heading of fundamental unfairness).)[7] In all events, the government is wrong. As discussed above, the

[7] The government's discussion of this issue under the heading of prejudice is based on its erroneous view that the fundamental unfairness is limited to the IJ's failure to make a determination on the stipulation's validity. Under this view, the IJ's failure to make a validity determination was prejudicial if the IJ otherwise would have found the stipulation invalid and proceeded to a hearing on the removal charges. As discussed in Part I above, it is the deprivation of a removal hearing that rendered the removal order fundamentally unfair. The IJ's failure to make a determination regarding the stipulation's validity, as well as the fact that the stipulation was unknowing and involuntary, prevents the government from using the stipulation to excuse the deprivation of the removal hearing. But even if Ms. Cordova-Soto were required to establish a reasonable likelihood that the IJ would have found the stipulation invalid, such a requirement would be satisfied by the showing that the stipulation was in fact unknowing and unintelligent.

stipulation was unknowing and unintelligent due to the immigration officer's erroneous assertion that Ms. Cordova-Soto had no way to stay in the country. The government points to the district court's conclusion on this issue, but that conclusion rested on the same erroneous reasoning addressed above—*i.e.*, that the immigration officer's advice was correct at the time and that subsequent federal appellate decisions changed the law. (ROA.140-41.)[8] On the contrary, both the officer's advice and the BIA's interpretation of the statute at that time were incorrect, regardless of when the Seventh Circuit and the Supreme Court decided the issue. (*See supra* at 4-8; *see also* Op. Br. at 26-27.)

The government thus fails to overcome Ms. Cordova-Soto's showing that her stipulation to removal was invalid. And, as the government effectively concedes, Ms. Cordova-Soto had a reasonable likelihood of avoiding removal if the IJ, instead of accepting the stipulation, had held a hearing on the government's removal charges. Accordingly, Ms. Cordova-Soto has established actual prejudice.

[8] The district court took this reasoning from the opinion of an IJ who had ruled on Ms. Cordova-Soto's motion to reopen. As the Opening Brief explains, the district court incorrectly treated the IJ's opinion as an opinion of the BIA and gave it weight for that reason. (Op. Br. at 24 n.10.) The government does not dispute the showing that this was error.

III. THE INVALID STIPULATION TO REMOVAL EXCUSED MS. CORDOVA-SOTO FROM EXHAUSTING ADMINISTRATIVE REMEDIES AND DEPRIVED HER OF JUDICIAL REVIEW.

The district court did not address exhaustion of administrative remedies or deprivation of judicial review, and the Opening Brief shows that these requirements for a § 1326(d) challenge are satisfied. The Supreme Court's decision in *Mendoza-Lopez*, 481 U.S. 828, confirms that these requirements are satisfied where the alien has entered an appeal waiver that is not knowing and intelligent. (Op. Br. at 38-40.) Here, the stipulation to removal included an express appeal waiver (ROA.116), and the entire stipulation—including the appeal waiver—was invalid. The government's arguments on these issues fail.

First, the government repeats its argument that the removal stipulation was valid, but that is wrong for the reasons discussed above and in the Opening Brief.

Second, the government does not respond to the showing in the Opening Brief that *Mendoza-Lopez* governs these issues, as numerous subsequent decisions confirm. *See Lopez-Ortiz*, 313 F.3d at 229 ("*Mendoza-Lopez* is instructive on the issue whether Lopez-Ortiz was deprived of judicial review"); *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004) (concluding that 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"); *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."); *Gomez*, 757 F.3d at 897-98 (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").

Third, the government mischaracterizes the issue as whether *every* "legal error in finding an alien ineligible for relief in deportation proceedings excuse[s] the alien from exhaustion of administrative remedies." (Resp. Br. at 34.) The government proceeds to attack this straw man by arguing that, if this were so, "then Section 1326(d)(1) would impose no independent limitation on an unlawful-reentry prosecution." (*Id.*) On the contrary, the issue here is limited to the specific circumstances of an invalid appeal waiver. There are many ways that an alien can demonstrate that his removal was fundamentally unfair, even without an invalid appeal waiver. For example, a removal order may be fundamentally unfair if the alien is deprived of his right to counsel or of the ability to build an administrative record. *See United States v. Charleswell*, 456 F.3d 347, 360 (3d Cir. 2006). In such circumstances, where the alien has not invalidly waived his right to appeal, the alien would need another way to satisfy the requirements in § 1326(d) of exhaustion of administrative remedies and deprivation of judicial review.

Fourth, the government is wrong in arguing that Ms. Cordova-Soto could have appealed the removal order to the BIA and challenged the validity of the stipulation, including the appeal waiver. Ms. Cordova-Soto did not learn that the immigration officer's advice had been incorrect until long after her time for appeal expired and long after her deportation, which would have stripped the BIA of jurisdiction even if an appeal had been filed. *See* 8 C.F.R. §1003.2(e); *Cardenas-Tafoya v. Holder*, 424 F. App'x 721, 722 (10th Cir. 2011) (affirming BIA's dismissal of appeal because alien had been removed). Thus, contrary to the government's contention, Ms. Cordova-Soto *could not* have directly appealed to the BIA the IJ's order of removal, and the exhaustion requirement in § 1326(d)(1) is excused. Because she could not appeal the IJ's order to the BIA, she also could not seek direct review of the BIA's decision in the Court of Appeals as the government claims. (Resp. Br. at 37.)[9]

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

[9] Neither of the cases the government relies on in support of this position have anything to do with § 1326(d), exhaustion of administrative remedies before the BIA, or judicial review of the BIA's decisions. (*See* Resp. Br. at 37 (*citing Bousley v. United States*, 523 U.S. 614 (1998) and *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)).) *Bousley* addressed whether an individual could file a petition for habeas corpus challenging a firearms conviction. 523 U.S. at 618. And *Sanchez-Llamas* addressed whether individuals could maintain habeas claims based on alleged violations of the Vienna Convention where the claims were not raised in state court. 548 U.S. at 342-43.

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 6,983 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: January 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2015, 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: January 12, 2015