No. 12-

IN THE

Supreme Court of the United States

GABRIELA CORDOVA-SOTO,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 LaSalle St.
Suite 1818
Chicago, IL 60604

DAVID K. LINK
GRAGERT HIEBERT & LINK
245 N. Waco, Suite 200
Wichita, KS 67202

BRIAN J. MURRAY
Counsel of Record
NATHANIEL P. GARRETT
JONES DAY
77 West Wacker
Chicago, IL 60601-1692
(312) 782- 3939
bjmurray@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

If the Government believes that a noncitizen previously removed from the United States has reentered the country illegally, the Attorney General may order reinstatement of the prior order of removal pursuant to 8 U.S.C. § 1231(a)(5). A noncitizen may challenge a removal order by filing a petition for review "not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1). The circuits unanimously treat reinstatement orders as removal orders for purposes of § 1252(b)(1).

The question presented in this case is whether federal courts have jurisdiction to review a legal challenge to a reinstatement of removal order, including questions turning on the lawfulness of the underlying removal order to the extent they bear on the validity of the reinstatement order, if the noncitizen did not seek judicial review within 30 days of the earlier order's issuance.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Tenth Circuit were Petitioner Gabriela Cordova-Soto and Respondent Eric H. Holder, Jr.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gabriela Cordova-Soto respectfully asks the Court to resolve a split in the circuits over the reviewability of orders reinstating a prior order of removal. In this case, the Tenth Circuit held that federal courts lack jurisdiction to consider the legality of a reinstatement of removal order if the petitioner did not challenge the underlying removal order within 30 days of that order's original issuance. That holding is directly contrary to the rule in the Sixth Circuit, which holds that the thirty-day deadline imposed by 8 U.S.C. § 1252(b)(1) requires only that the petitioner file her petition within thirty days of receiving the reinstatement order, as opposed to the underlying order of removal.

The disagreement between the Tenth and Sixth Circuits implicates a broader disagreement in the circuits regarding whether and when a noncitizen facing reinstatement of a removal order may challenge the underlying removal order for legal or constitutional error. Three circuits – the Sixth, Third, and Ninth – permit an individual like Ms. Cordova-Soto to collaterally challenge an underlying removal order. The Tenth Circuit, as noted, bars such challenges on timeliness grounds, which that court deems jurisdictional. The Fifth Circuit does not view the issue as jurisdictional, but reaches the same result prudentially, on the ground that a noncitizen who did not earlier challenge the removal order has failed to exhaust administrative remedies. This split of authority is mature and well-developed, and this case presents an excellent vehicle for the Court to resolve the split in the circuits, and to clarify the

breadth of federal jurisdiction over legal challenges to reinstatement of removal orders.

OPINIONS BELOW

An unpublished administrative order was issued by the Immigration and Customs Enforcement Bureau of the United States Department of Homeland Security on September 23, 2010, reinstating a prior order of removal dated November 8, 2005. Pet. App. 17a.

The opinion of the United States Court of Appeals for the Tenth Circuit denying Petition's petition for review is reported at *Cordova-Soto v. Holder*, 659 F.3d 1029 (10th Cir. 2012). Pet. App. 1a. The order denying the petition for rehearing and petition for rehearing en banc is unpublished. *Id.* at 15a.

JURISDICTION

The Tenth Circuit's order denying Petitioner's petition for review was entered on October 17, 2011. The Tenth Circuit's order denying rehearing en banc was entered on March 23, 2012. On June 12, 2012, this Court extended the time to file a petition for a writ of certiorari until July 23, 2012. This Petition is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved include two subparts of 8 U.S.C. §1252. The first, § 1252(b)(1) provides: "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal."

The second, § 1252(a)(2)(D) states: "[n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or

eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."

Also relevant is 8 U.S.C. § 1231(b)(5), which provides that "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry."

STATEMENT

Petitioner Gabriella Cordova-Soto is a 33-year old wife and mother. Her husband and four children are United States citizens. AR 69-73. She was brought to the United States as a young child, and she lived here in undocumented status until she obtained permanent residence in 1991 at the age of 13, through the legalization program enacted as part of the 1986 Immigration Reform and Control Act. AR 78.

In October 2005, Petitioner was convicted in Ford County, Kansas of possession of a controlled substance, in violation of K.S.A. §65-4160. She was sentenced to a suspended term of 20 months and 18 months of probation. On October 28, 2005, ICE took her into custody and charged her as being deportable for, *inter alia*, having been convicted of an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii), illicit trafficking in a controlled substance. Pet. App. 2a.

As a lawful permanent resident for more than 14 years, Petitioner was eligible to seek cancellation of removal in accordance with 8 U.S.C. § 1229b(a)(3), as long as she "ha[d] not been convicted of any aggravated felony." However, the government charged that Petitioner's conviction – a felony under state law – constituted an aggravated felony which barred her from any form of relief. AR 80-81; 116-117.

Petitioner, proceeding *pro se*, signed a document entitled Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing (AR 9-12), which was counter-signed by an attorney for the U.S. government. In that document, Petitioner waived her right to be represented by counsel in the removal proceedings; admitted all factual allegations; and attested that she had executed the Stipulation voluntarily, knowingly, and intelligently. Pet. App. 2a-3a.

An Immigration Judge ("IJ") found that the stipulation "constitute[d] a conclusive determination of removability," and entered a removal order against her on that basis. AR 38. Although federal regulations require that, before entering a stipulated removal order against a *pro se* individual, the IJ must "determine that the alien's waiver is voluntary, knowing, and intelligent," 8 C.F.R. § 1003.25(b), the IJ's removal order did not determine whether the stipulation was voluntary, knowing, and intelligent. The IJ conducted no hearing, did not speak with Petitioner, and took no steps to ensure that her waiver of rights was knowing and intelligent.

Neither the IJ nor the government attorney informed Petitioner that, when she signed the

stipulation, the law on whether felony drug possession crimes are aggravated felonies was in flux. Indeed, the Agency's rule on that issue already had been rejected in three federal circuits. *Compare Matter of Yanez-Garcia*, 23 I. & N. Dec. 390, 2002 WL 993589 (2002); *with Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004). Nor was Petitioner told that the Agency's rule had recently been rejected in *Gonzales-Gomez v. Achim*, 372 F. Supp. 2d 1062 (N.D. Ill. 2005); nor that the government's appeal of that decision was then pending in the Court of Appeals whose rule governed her case.[1]

Petitioner also was not informed that she would be permanently inadmissible to the United States, without possibility of waiver, if she accepted removal. 8 U.S.C. § 1182(a)(2)(A)(i)(II). Yet, pursuant to the stipulation improperly accepted by the Immigration Judge, Petitioner waived her appeal rights and her ability to seek federal judicial review.

Petitioner was then physically removed to Mexico on November 10, 2005. Less than five months after her removal, the United States Court of Appeals for the Seventh Circuit held that drug possession offenses are *not* aggravated felonies. *Gonzales-Gomez v. Achim*, 441 F.3d 532, 533 (7th Cir. 2006). Later that year, this Court agreed, ruling that a state-court felony conviction for possession of a controlled substance is not a "drug trafficking"

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[1] The Immigration Judge who found Petitioner to be removable was sitting in Chicago, Illinois. AR 38. Accordingly, case law from the Seventh Circuit governed Petitioner's case. *See Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th Cir. 2004).

offense and, therefore, is not an aggravated felony that bars eligibility for cancellation of removal under 8 U.S.C. §1229b(a). *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006). Thus, had the IJ not improperly accepted Petitioner's waiver of rights, the aggravated felony charge of removability against her would not have been sustained.

Petitioner later reentered the United States in a procedurally regular manner, after inspection by an immigration officer, but she did not secure advance consent to reapply for admission before reentering the United States. *See* 8 U.S.C. § 1182(a)(9)(A)(iii). Petitioner was found in Wichita, Kansas, on March 18, 2010, and identified as a noncitizen who had been previously removed. The Department of Homeland Security then issued a Notice of Intent/Decision to Reinstate Prior Order, advising Petitioner that she was subject to removal under 8 U.S.C. § 1231(a)(5). After a DHS official reinstated her prior removal order, Petitioner filed a timely petition for review, arguing that the 2005 removal order is contrary to law.

The Tenth Circuit denied the petition. The court held that "because Ms. Cordova-Soto failed to file her petition for review within thirty days of her 2005 removal order, we lack jurisdiction to review that order, including constitutional claims or questions of law." Pet. App. 6a. The court reasoned that, although § 1252(a)(2)(D) authorizes federal courts to review "constitutional claims or questions of law," that provision does not apply to § 1252(b)(1), which requires that "[t]he petition for review … be filed not later than 30 days after the date of the final order of removal." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S INTERPRETATION OF THE 30-DAY DEADLINE IMPOSED BY § 1252(B)(1) CONFLICTS WITH SIXTH CIRCUIT PRECEDENT.

The Tenth Circuit's interpretation of the thirty-day deadline imposed by 8 U.S.C. § 1252(b)(1) creates a direct conflict with the Sixth Circuit's construction of the same statute.

In this case, the Tenth Circuit held that federal courts lack jurisdiction to consider a legal challenge to a reinstatement of removal order if the petitioner failed to challenge the underlying removal order within thirty days. The Tenth Circuit reasoned that § 1252(b)(1), which requires that a petition for review be filed "not later than 30 days after the date of the final order of removal," strips federal courts of jurisdiction to consider legal challenges to a reinstatement of removal order if the petitioner did not challenge the underlying removal order within 30 days. Pet. App. 6a. So, the court held, because Petitioner did not challenge the underlying removal order within 30 days, she could not collaterally attack it pursuant to § 1252(a)(2)(D) even though the removal order had been reinstated. *Id.*

In diametric opposition to the Tenth Circuit's holding in this case, the Sixth Circuit has reasoned that the thirty-day deadline imposed by § 1252(b)(1) requires only that the petitioner file her petition within thirty days of receiving the reinstatement order, as opposed to the underlying order of removal. *Villegas de la Paz v. Holder*, 640 F.3d 650, 653-54, 657 (6th Cir. 2010). In *Villegas de la Paz*, that court held that an individual who conceded removability

could challenge the lawfulness of a reinstatement order, so long as she petitioned for review within thirty days of receiving the reinstatement order. *Id.* at 653. The court concluded "that § 1252(a)(2)(D) re-vests the circuit courts with jurisdiction over constitutional claims or questions of law raised in the context of reinstatement proceedings." *Id.* at 656. Thus, notwithstanding that the petitioner never challenged the underlying removal order, the Sixth Circuit ruled her petition to be timely because she challenged the reinstatement order within thirty days of receiving it. *Id.* at 654-55. The court nonetheless denied the petition because the petitioner could not establish that she was prejudiced by the legal error that infected the underlying removal. *Id.*

II. OTHER COURTS OF APPEALS ARE HOPELESSLY DIVIDED AS TO WHETHER § 1252(A)(2)(D) RE-VESTS THE COURT WITH JURISDICTION TO REVIEW LEGAL ERRORS IN A REMOVAL ORDER THAT HAS BEEN REINSTATED.

The square split between the Tenth Circuit and the Sixth Circuit is symptomatic of broader discord among the circuits on the question of whether § 1252(a)(2)(D) permits collateral attack on an underlying removal order that is reinstated. Under one view, shared by the Tenth and Fifth Circuits, federal courts lack jurisdiction to consider a legal challenge to a reinstatement of removal order if the petitioner failed to challenge the underlying removal. The Third, Sixth, and Ninth Circuits all have reached a contrary conclusion, holding that § 1252(a)(2)(D) re-vests the federal courts with jurisdiction to consider

the lawfulness of a removal order when it is reinstated, even when the petitioner did not challenge the underlying order of removal.

a. The Tenth Circuit stands alone in taking the view that § 1252(b)(1) strips federal courts of jurisdiction to consider legal challenges to a reinstatement of removal order if the petitioner did not challenge the underlying removal order within 30 days. Pet. App. 6a.

b. The Fifth Circuit reached the same result, but with different reasoning, in *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006). The Fifth Circuit held that federal courts have jurisdiction to consider collateral attacks to a reinstated removal order under some circumstances, but not where the petitioner failed to challenge the underlying order of removal. The Fifth Circuit reasoned that "[n]othing in the REAL ID Act precludes our jurisdiction over" a challenge to the removal order underlying a reinstatement of removal order. *Id.* at 513. However, applying prior circuit case law, the Fifth Circuit limited its review in such matters to cases involving a "gross miscarriage of justice." *Id.* at 514. And the court held that a petitioner who voluntarily conceded removability, and did not seek judicial review which he erroneously believed to be unavailable to him, could not prove that his removal constitutes such a miscarriage of justice. *Id.* at 514-15. On those facts, the Fifth Circuit ruled that it lacked jurisdiction to entertain a collateral attack. *Id.* at 515.

Thus, although the two circuits disagree as to whether federal courts lack jurisdiction as a matter of statutory interpretation (Tenth Circuit) or as a matter of prudence (Fifth Circuit), the result in both

is the same: individuals like Petitioner who do not challenge an underlying removal order within thirty days cannot challenge the lawfulness of a reinstatement order.

c. The Third, Sixth, and Ninth Circuits, in contrast, have concluded that federal courts do have jurisdiction to consider legal challenges to reinstated removal orders, even if the petitioner did not file a timely challenge to the underlying order of removal. In all three cases discussing the issue, the petitioner failed to petition for review of the underlying removal order or, in pre-REAL ID Act cases, failed to file the equivalent: a habeas petition. And in all three, the court upheld jurisdiction.

The Third Circuit in *Debeato v. Attorney General*, 505 F.3d 231, 234 (3d Cir. 2007), agreed with the Fifth Circuit that § 1252(a)(2)(D) supplies federal courts with jurisdiction to review removal orders reinstated under § 1231(a)(5). But it did not agree that there is a prudential jurisdictional bar to relief merely because a petitioner failed to challenge the underlying removal order in federal court.

The petitioner in *Debeato* was removed and deemed ineligible for cancellation of removal because of her conviction for an aggravated felony. *Debeato*, 505 F.3d at 233. Falsely assuming that federal court review of her removal order was unavailable, the petitioner never filed a habeas petition in federal court – the pre-REAL ID Act equivalent to a petition for review. *See* Br. of Respondent, *Debeato v. Gonzales*, No. 05-3235, 2005 WL 6267101, at *20-22 (3d Cir. Oct. 6, 2006). After the petitioner returned to the United States and was arrested, the government reinstated the underlying removal order.

The petitioner challenged the removal order as unlawful, claiming that the immigration court erred when it deemed her ineligible for cancellation. *Debeato*, 505 F.3d at 233. The Third Circuit rejected the government's argument that it lacked jurisdiction to consider the petitioner's collateral attack when she had failed to challenge the removal order in federal court. The court explained that, because "an order reinstating a prior removal order is the functional equivalent of a final order of removal," the petitioner could challenge the legality of the underlying removal order on legal grounds. *Id.* at 234-35. For example, the court held that where the individual should not have been deported based on the law as it existed at the time of the original removal, an individual can challenge the legal merits of the underlying removal order. *Id.* at 236.

Likewise, as explained above, the Sixth Circuit held in *Villegas De La Paz*, 640 F.3d at 656, that federal courts have jurisdiction to consider legal challenges to reinstated removal orders, even if the petitioner did not file a timely challenge to the underlying order of removal.

Finally, in *Rincon v. Department of Homeland Security*, 539 F.3d 1133 (9th Cir. 2008), the Ninth Circuit held that § 1252(a)(2)(D) generally permits a collateral attack on an underlying removal order during review of a reinstatement order. *Id.* at 1138. Distinguishing earlier case law which would have precluded collateral attacks, the Ninth Circuit held that § 1252(a)(2)(D) permits a petitioner who can demonstrate a gross miscarriage of justice in the prior proceedings to collaterally attack the underlying removal order, unless a federal court

would have lacked jurisdiction in the earlier matter. *Id.* at 1138.

Thus, in the Third, Sixth, and Ninth Circuits, a federal court would have jurisdiction over Petitioner's argument that the order reinstating her removal is defective because the underlying removal order is legally invalid. But in the Fifth and Tenth Circuits, it would not. Surely, a uniform national rule should govern a federal court's jurisdiction over a legally defective order reinstating removal. The result should not turn on the vagaries of whether a noncitizen is arrested and removal is reinstated in Los Angeles, Philadelphia, or Cleveland, on the one hand, or, Wichita or Houston, on the other. This Court's guidance is urgently needed.

III. THE TENTH CIRCUIT'S HOLDING THAT FEDERAL COURTS LACK JURISDICTION TO REVIEW A LEGAL CHALLENGE TO A REINSTATEMENT OF A PRIOR REMOVAL ORDER BECAUSE THE PETITIONER DID NOT CHALLENGE THE UNDERLYING REMOVAL ORDER IS ERRONEOUS.

The Tenth Circuit's holding that it lacks jurisdiction to review Petitioner's legal challenge to her 2010 reinstatement order because no appeal was filed as to the underlying 2005 removal order not only exacerbates the entrenched split of authority on the issue, it is deeply flawed for a number of reasons.

First, the court's jurisdictional analysis conflates Petitioner's challenge to the 2010 reinstatement order with a direct appeal of her 2005 removal order. Other than the Tenth Circuit, all circuit courts to consider the matter have concluded that the plain text of the REAL ID Act allows an individual to

challenge the lawfulness of an underlying removal order if it is reinstated.

As the court explained in *Ramirez-Molina*, 436 F.3d at 513-14, § 1231(a)(5) specifies that when the Attorney General reinstates an order of removal after a noncitizen re-enters the United States in violation of that order, "the prior order of removal … is not subject to being reopened or reviewed." 8 U.S.C. § 1231(a)(5). Yet, § 1252(a)(2)(D) states that "[no] other provision of this chapter … which limits or eliminates judicial review, shall be construed as precluding constitutional claims or claims of law." Because § 1231 limits judicial review and is in the same chapter as § 1252, it follows that the prior order of removal *is* subject to being reviewed when it is reinstated and challenged on legal grounds. *Ramirez-Molina*, 436 F.3d at 513-14; *Debeato*, 505 F.3d at 234; *Molina Jerez v. Holder*, 625 F.3d 1058, 1068 (8th Cir. 2010) (holding that § 1252(a)(2)(D) provides jurisdiction to review questions of law regarding reinstatement of removal orders).

Because Petitioner filed a timely petition challenging the reinstatement order on legal grounds, the Tenth Circuit had jurisdiction to consider that appeal, including questions regarding the lawfulness of the underlying removal order to the extent they bear on the validity of the reinstatement order.

Second, the Tenth Circuit's interpretation leads to the absurd result that an individual in Petitioner's circumstances is *better off* if criminally charged with illegal reentry under 8 U.S.C. § 1326 instead of just being charged with removability pursuant to a reinstatement order. Admittedly, "[n]o criminal charges for illegal reentry were lodged against"

Petitioner. Pet. App. 4a. But if they had been, Petitioner clearly would have been able to challenge the lawfulness of her underlying removal order in that context.

In a prosecution under § 1326, a defendant would be permitted to collaterally attack the underlying removal order's legal validity, and if she succeeded, would have no criminal liability. 8 U.S.C. § 1326(d). This provision was enacted to codify *United States v. Mendoza-Lopez*, 481 U.S. 828, 833-37 (1987), and is now part of the text of the statute. To the extent that a defendant can meet the criteria for collateral attack, there is no criminal violation under § 1326.

In the court below, Petitioner argued that her removal proceedings suffered from "fundamental procedural defects [that] … rendered direct review of the Immigration Judge's determination unavailable." *Mendoza-Lopez*, 481 U.S. at 841. Specifically, the IJ violated federal regulations by accepting Petitioner's concession of removability from a country that has been her home since childhood without ascertaining whether her waiver of rights was knowing and intelligent. According to *Mendoza-Lopez*, 481 U.S. at 838, the constitution requires "that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense." There is no rational reason why Congress would want individuals charged with criminal illegal reentry under § 1326 to have *greater* rights of review of unlawful removal orders than individuals who are threatened with removal pursuant to a non-criminal reinstatement order.

Third, the Tenth Circuit's interpretation implicates the Suspension Clause. In *INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001), this Court held, in response to statutes appearing to strip federal court jurisdiction over legal and constitutional claims such as those raised by Petitioner, that "pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus." Interpreting the immigration statute to avoid the Suspension Clause problem, this Court found that habeas corpus jurisdiction remained available to address legal and constitutional claims. *Id.* Congress enacted 8 U.S.C. § 1252(a)(2)(D) precisely to respond to the Suspension Clause concerns raised in *St. Cyr*. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310. If the safety-valve of § 1252(a)(2)(D) were held to be trumped by the timely appeal requirement at 8 U.S.C. § 1252(b)(1), noncitizens would be unfairly prevented from exercising the appeal rights given in that provision, creating a Suspension Clause problem similar to that in *St. Cyr*.[2] Constitutional avoidance principles counsel an alternative interpretation if "fairly possible." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). And the rule of the Third, Sixth, and Ninth

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[2] Most federal cases considering collateral attacks on underlying removal orders arise in the habeas context. *See e.g.*, *United States ex rel. Steffner v. Carmichael*, 183 F.2d 19, 20 (5th Cir. 1950); *McLeod v. Peterson*, 283 F.2d 180, 184 (3d Cir. 1960). From 1891 to 1952, federal court review over deportation orders existed only "insofar as it was required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234-235 (1953).

Circuits is not only "fairly possible." It is the better reading of the statute.

Fourth, the Tenth Circuit's interpretation is particularly troublesome in cases where, as here, the underlying removal order was entered by means of a program which prevents or inhibits appeal. Petitioner was initially removed under a legally problematic scheme known as stipulated removal. The stipulated removal order process requires that the noncitizen not only waive a hearing, but waive all appeal rights. Once a *pro se* noncitizen like Petitioner has waived her appeal rights, exhaustion of remedies becomes impossible, as does federal appeal.

An IJ may enter a stipulated removal order "based on a review of the charging document, the written stipulation, and supporting documents, if any." 8 C.F.R. § 1003.25(b). In theory (the law requires it), if a noncitizen is not represented by counsel, the IJ "must determine that the waiver is voluntary, knowing, and intelligent." *Id.* Indeed, it is black-letter law that an IJ's "failure to explore waiver adequately with the petitioner preclude[s] a purported waiver from being considered knowing and intelligent." *United States v. Isaac Ramos*, 623 F.3d 672, 681 (9th Cir. 2010).

Experience, however, frequently is messier. Here, Petitioner was charged with deportability as an aggravated felon for drug possession, a charge which this Court ultimately found legally incorrect as to simple drug possession offenses such as that involving Petitioner. *Lopez*, 549 U. S. at 56. With no idea that she had any legal grounds on which to challenge removal, Petitioner gave up all of her legal rights, receiving in exchange only a faster end to her

legal status in this country. The IJ shirked her statutory duties to ensure that waiver was "knowing, voluntary, and intelligent." And, given the circumstances, it surely could not have been. Yet under the Tenth Circuit's decision, because Petitioner did not appeal from her own stipulation in 2005, she would be barred from subsequently challenging the legality of other removal orders. The effect of the Tenth Circuit's decision is to insulate the stipulated removal order from any kind of judicial review. This circular path to nowhere is not, and cannot be, the law.

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING AN ISSUE OF GREAT AND GROWING IMPORTANCE TO THE FEDERAL IMMIGRATION SYSTEM.

Finally, the Tenth Circuit's opinion not only adds to the wrong side of an entrenched circuit split, the issues at the heart of that split are recurring and are of compelling national importance. Since 2005, when Congress enacted the REAL ID Act, the courts of appeals have consistently and repeatedly been asked to construe the interplay between § 1252(a)(2)(D) and orders reinstating removal orders. By Petitioner's count, almost two dozen appellate decisions since 2007 alone have involved petitions by a noncitizen challenging the legal validity of a reinstatement order.[3]

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[3] *See Romero v. Holder*, No. 07-74937, 2012 WL 843033 (9th Cir. Mar. 14, 2012); *Gomez-Olvera v. Napolitano*, 451 Fed. Appx. 611 (8th Cir. 2012); *Arreola-Arreola v. Holder*, 463 Fed. Appx. 675 (9th Cir. 2011); *Cordova-Soto*, 659 F.3d at 1029; *Villegas de la Paz*, 640 F.3d at 650; *Molina Jerez v. Holder*, 625 F.3d 1058 (8th Cir. 2010); *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010); *Zamora-Vallejo v. Holder*, 378 Fed. Appx. 386 (5th

This should not be surprising. In 2010, the most recent year for which statistics are available, the U.S. government deported a historically unprecedented 387,000 people. Dep't of Homeland Security, Office of Immigration Statistics, 2010 Annual Report 1 (June 2011), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf. To reach those kind of numbers, the Government relies heavily on mechanisms like stipulated removal and reinstatement of removal.[4] These mechanisms,

(continued…)

Cir. 2010); *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076 (9th Cir. 2010); *Lema v. Holder*, 363 Fed. Appx. 88 (2d Cir. 2010); *Lopez-Velasquez v. Mukasey*, 308 Fed. Appx. 236 (9th Cir. 2009); *Rincon*, 539 F.3d at 1133; *Martinez-Merino v. Mukasey*, 525 F.3d 801 (9th Cir. 2008); *Lorenzo v. Mukasey*, 508 F.3d 1278 (10th Cir. 2007); *Grewal v. Attorney Gen. of U.S.*, 251 Fed. Appx. 114 (3d Cir. 2007); *Shtyllaku v. Gonzales*, 252 Fed. Appx. 16 (6th Cir. 2007); *Debeato*, 505 F.3d at 231; *Hurtado-Martinez v. Gonzales*, 247 Fed. Appx. 55 (9th Cir. 2007).

[4] In 2010, reinstatements of final orders accounted for 131,000, or 34%, of all removals. Dep't of Homeland Sec., Office of Immigration Statistics, 2010 Annual Report 4 (June 2011), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf. Other administrative removal processes such as expedited removal, 8 U.S.C. § 1225(b), and administrative removal, 8 U.S.C. § 1228(b), account for more than 100,000 more removals. *Id.*

Over the past decade, the Government has deported over 160,000 non-U.S. citizens via stipulated removal orders. Jennifer Lee Koh, *Deportation Without Due Process* 1 (November 2011), available at www.nilc.org/document.html?id=6. According to government statistics, almost one-third of all removal orders obtained by

lacking almost all procedural protections, predictably lead to tragic errors in individual cases, particularly where, as here, expedited procedure is layered upon expedited procedure, such that no judge ever actually considers the person's case. These tragic errors are not just hypothetical. They happened in this case, with personally devastating results for Petitioner and her family.

The law, and basic notions of human dignity, require more. The cases implicated by this petition involve claims of constitutional or legal error, often fundamental questions about the legality of an individual's removal. They should be heard by judges. So correct resolution of the threshold jurisdictional issue presented here is thus crucially important to the administration of the justice system for individuals seeking relief in immigration courts in this country. And this case is an excellent vehicle to address these issues. Indeed, it presents squarely the equitable considerations put at risk by an erroneous jurisdictional bar to legal challenges to removal reinstatement orders. Given the fractious and deepening divide in the circuits, and its longstanding intractability, no purpose would be served by waiting any longer.

CONCLUSION

For the foregoing reasons, the petition should be granted.

(continued…)

ICE attorneys in fiscal year 2008 were stipulated removal orders. *Id.* at n.2.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 LaSalle St.
Suite 1818
Chicago, IL 60604

DAVID K. LINK
GRAGERT HIEBERT &
LINK
245 N. Waco, Suite 200
Wichita, KS 67202

BRIAN J. MURRAY
Counsel of Record
NATHANIEL P. GARRETT
JONES DAY
77 West Wacker
Chicago, IL 60601.1692
(312) 782-3939
bjmurray@jonesday.com

Counsel for Petitioner

July 23, 2012