No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

REFUGIO PALOMAR-SANTIAGO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 8 U.S.C. 1326(d), a defendant charged with unlawful reentry into the United States following removal may assert the invalidity of the original removal order as an affirmative defense only if he "demonstrates that" he "exhausted any administrative remedies that may have been available to seek relief against the order," 8 U.S.C. 1326(d)(1), the removal proceedings "deprived [him] of the opportunity for judicial review," 8 U.S.C. 1326(d)(2), and "the entry of the order was fundamentally unfair," 8 U.S.C. 1326(d)(3).

The question presented is whether a defendant automatically satisfies all three of those prerequisites solely by showing that he was removed for a crime that would not be considered a removable offense under current circuit law, even if he cannot independently demonstrate administrative exhaustion or deprivation of the opportunity for judicial review.

RELATED PROCEEDINGS

United States District Court (D. Nev.):

United States v. *Palomar-Santiago*, No. 17-cr-116 (Dec. 18, 2018)

United States Court of Appeals (9th Cir.):

United States v. *Palomar-Santiago*, No. 19-10011 (Nov. 20, 2019) (order denying initial hearing en banc)

United States v. *Palomar-Santiago*, No. 19-10011 (May 14, 2020) (memorandum opinion affirming dismissal of indictment)

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The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not published in the Federal Reporter but is reprinted at 813 Fed. Appx. 282. The order of the district court (App., *infra*, 8a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. 1326(d).

Other pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 36a-39a.

STATEMENT

Respondent was indicted in the United States District Court for the District of Nevada on one count of unlawful reentry into the United States following removal, in violation of 8 U.S.C. 1326(a). App., *infra*, 15a-16a. The district court dismissed the indictment, *id.* at 8a-14a, and the court of appeals affirmed, *id.* at 1a-6a.

1. a. Under the Immigration and Nationality Act of 1952 (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), aliens may be removed from the United States for a variety of reasons, including a conviction for committing a criminal offense that qualifies as an "aggravated felony," "crime involving moral turpitude," or "controlled substance" offense. 8 U.S.C. 1227(a)(2)(A)(i)-(iii) and

(B). An alien who has been convicted of an aggravated felony is not only removable, but also "ineligible for several forms of discretionary relief" from removal. *Torres* v. *Lynch*, 136 S. Ct. 1619, 1623 (2016).

In general, an alien who is alleged to be removable by reason of a criminal conviction appears before an immigration judge for a hearing. 8 U.S.C. 1229a; see 8 U.S.C. 1228(b) (providing for expedited removal of certain aliens convicted of aggravated felonies); 8 C.F.R. 238.1 (setting forth procedures). The alien can challenge his removability, including (as relevant) the classification of a crime for which he was convicted as an aggravated felony or other type of removable offense. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 5-6 (2004). If the immigration judge finds the alien removable, the alien may appeal that determination to the Board of Immigration Appeals (BIA). See 8 C.F.R. 1003.1(b) and (d)(3). If the BIA issues a decision adverse to the alien, he may seek further review in the court of appeals. See 8 U.S.C. 1101(a)(47)(B) and 1252(d).

b. The INA makes it a crime, codified at 8 U.S.C. 1326, for aliens who have previously been removed to reenter the United States without authorization. As enacted in 1952, Section 1326 did not expressly permit defendants charged with unlawful reentry to collaterally attack their underlying removal orders. § 276, 66 Stat. 229. This Court, however, held in *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), that "where the defects in" the removal proceeding previously "foreclose[d] judicial review of that proceeding," the Due Process Clause requires that an unlawful-reentry defendant must be able to "obtain[] judicial review" of the removal order in the Section 1326 prosecution itself. *Id.* at 838.

In 1996, Congress enacted 8 U.S.C. 1326(d) "to codify the holding of *Mendoza-Lopez*." *United States* v. *Hernandez-Perdomo*, 948 F.3d 807, 810 (7th Cir. 2020); see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441, 110 Stat. 1279. Section 1326(d), which is entitled "[l]imitation on collateral attack on underlying deportation order," provides that an alien charged with unlawful reentry "may not challenge the validity of the deportation order" underlying the charge "unless the alien demonstrates" that (1) he "exhausted any administrative remedies that may have been available to seek relief against the order"; (2) "the deportation proceedings * * * improperly deprived the alien of the opportunity for judicial review"; and (3) "the entry of the [deportation] order was fundamentally unfair." 8 U.S.C. 1326(d) (emphasis omitted).

c. As the Ninth Circuit explained in *United States* v. *Ochoa*, 861 F.3d 1010 (2017) (per curiam), its case law "excuse[s]" an unlawful-reentry defendant from "proving the first two requirements" of Section 1326(d), and compels automatic dismissal of the indictment, whenever a defendant can show that he was removed for an offense that should not have "made him removable under the INA." *Id.* at 1015. In the Ninth Circuit's view, a defendant who makes such a showing has established not only that his removal was "fundamentally unfair" for purposes of Section 1326(d)(3), but also that the separate prerequisites of administrative exhaustion and denial of judicial review, codified in Sections 1326(d)(1) and (2), do not preclude relief. *Ibid.*

The Ninth Circuit additionally allows a defendant to qualify for such automatic relief even if the removal order accorded with the understanding of the law at the

time it was issued. See *Ochoa*, 861 F.3d at 1015. Because the Ninth Circuit has "adopted the view that 'statutory interpretation decisions are fully retroactive,'" it requires courts to apply current law in determining whether the alien's prior crime was a removable offense. *Ibid.* (quoting *United States* v. *Aguilera-Rios*, 769 F.3d 626, 633 (9th Cir. 2014)). As a result, under the Ninth Circuit's approach, the entire "§ 1326(d) inquiry collapses into a de novo review of [the alien's] removability." *Ibid.*

All three judges on the *Ochoa* panel joined a concurring opinion stating that the Ninth Circuit's "law with respect to the scope of collateral challenges under 8 U.S.C. § 1326(d) has strayed increasingly far from the statutory text" and is "out of step with our sister circuits' correct interpretation." 861 F.3d at 1018 (Graber, J., concurring). The concurrence urged the court to "rehear this case en banc to correct [its] course." *Ibid.* In accord with that concurrence, the United States filed a petition for rehearing en banc in *Ochoa*. See C.A. Doc. 45, *United States* v. *Ochoa*, No. 15-10354 (9th Cir. Aug. 16, 2017). The Ninth Circuit, however, denied the petition. *Ochoa*, *supra*, No. 15-10354 (Sept. 11, 2017).

2. a. Respondent "is a Mexican national who was granted permanent resident status in the United States in 1990." App., *infra*, 2a. In 1991, he was convicted in California of felony driving under the influence (DUI) causing bodily injury. *Ibid.* In 1998, the Immigration and Naturalization Service served respondent with a notice to appear stating that he was subject to removal because his DUI offense was an "'aggravated felony'" under 8 U.S.C. 1101(a)(43). *Ibid.*

At the removal hearing, the immigration judge determined that respondent was "subject to removal on

the charge[] in the Notice to Appear." App., *infra*, 17a. The immigration judge also noted that respondent had "made no application for relief from removal" and had "[w]aived" his right to appeal. *Id.* at 17a-18a. Respondent was removed to Mexico in June 1998. *Id.* at 9a.

b. In 2017, respondent was found in the United States. App., *infra*, 2a. A grand jury indicted him on one count of unlawful reentry after removal, in violation of 8 U.S.C. 1326(a). App., *infra*, 15a-16a; see *id.* at 2a.

The district court granted respondent's motion to dismiss the indictment under Section 1326(d). App., *infra*, 8a-14a. It was "uncontested" that, under circuit law at the time of the criminal prosecution, respondent's California DUI offense would not be classified as an "aggravated felony," because the Ninth Circuit had "explicitly ruled" as much three years after respondent's removal proceedings. *Id.* at 12a; see *United States* v. *Trinidad-Aquino*, 259 F.3d 1140, 1145-1146 (9th Cir. 2001). And the district court explained that, under the Ninth Circuit's approach to Section 1326(d), that alone sufficed not only to show "fundamental unfairness" under 8 U.S.C. 1326(d)(3), but also to "exempt [respondent] from demonstrating the first two §1326(d) requirements"—*i.e.*, that he had exhausted his administrative remedies and was deprived of the opportunity for judicial review. App., *infra*, 12a. The district court accordingly concluded that "under Ninth Circuit precedent," respondent had "met or satisfied each of the three § 1326(d) requirements, and * * * cannot be charged with unlawfully reentering the United States." *Id.* at 13a.

c. The government appealed and sought initial hearing en banc to challenge the binding circuit interpretation of Section 1326(d) on which the district court had relied. C.A. Doc. 6 (Apr. 15, 2019). The court of appeals

denied the petition, and a panel of the court subsequently affirmed the dismissal of the indictment. App., *infra*, 1a-7a. The panel acknowledged that the government objected—based on "the text of the statute," "evidence of contravening congressional intent," and "contrary case law" in other circuits—to the Ninth Circuit's approach to Section 1326(d). *Id.* at 3a. But it observed that "[w]hatever merits the government's argument may have," it had "no choice but to apply" Ninth Circuit precedent. *Ibid.*

Judge Clifton filed a concurrence reiterating the view of the judges on the *Ochoa* panel that the Ninth Circuit's precedent "should be revisited by an en banc panel of this court." App., *infra*, 5a. He explained that the precedent "has the effect of nullifying the procedural requirements of [8 U.S.C.] § 1326(d) . . . and creating in their place a new, substantive right to retroactive de novo review, thereby undermining the finality interests the statute was designed to protect." *Ibid.* (quoting *Ochoa*, 861 F.3d at 1024 (Graber, J., concurring)). And he urged that the precedent "merits" further consideration because it "remain[s] inconsistent with the statute and on the wrong side of a circuit split." *Id.* at 5a-6a.

REASONS FOR GRANTING THE PETITION

This Court should grant review in this case to correct the Ninth Circuit's erroneous approach to 8 U.S.C. 1326(d). That provision allows an unlawful-reentry defendant to collaterally attack the validity of his prior removal only if he can show that he exhausted his administrative remedies, that he was improperly deprived of the opportunity for judicial review, *and* that the removal was fundamentally unfair. *Ibid.* The Ninth Circuit, however, "excuse[s]" a defendant from satisfying

the procedural prerequisites, and requires automatic dismissal of an unlawful-reentry charge, if a court concludes on de novo review under current law that his removal was premised on the misclassification of a prior offense. *United States* v. *Ochoa*, 861 F.3d 1010, 1015 (2017) (per curiam). That approach cannot be reconciled with Section 1326(d)'s text, history, or design, and it conflicts with the decisions of every other court of appeals to have considered the issue. It is also highly problematic because the Ninth Circuit is host to a significant number of Section 1326 prosecutions. This Court should grant the petition for a writ of certiorari and reverse.

A. The Decision Below Is Incorrect

The court of appeals relied on circuit precedent to excuse respondent from satisfying Section 1326(d)'s procedural requirements—that he exhausted any available administrative remedies and was denied the opportunity for judicial review, 8 U.S.C. 1326(d)(1) and (2)—so long as "he [could] show the crime underlying [his] original removal was improperly characterized as an aggravated felony." App., *infra*, 2a. That approach finds no foothold in the language, history, or design of the statute, and it threatens to produce incongruous results.

1. The court of appeals' approach to Section 1326(d) is textually unsound

The Ninth Circuit's conclusion that a defendant like respondent "is excused from proving [Section 1326(d)'s] first two requirements" if he was "not convicted of an offense that made him removable," *Ochoa*, 861 F.3d at 1015, cannot be squared with the statutory text. Nothing in Section 1326(d) allows a court to judicially excise

two of the prerequisites for a collateral attack on a removal order. See, *e.g.*, *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360 (2019) ("If the words of a statute are unambiguous, th[e] first step of the interpretive inquiry is [the court's] last.").

a. Section 1326(d), entitled "Limitation on collateral attack on underlying deportation order," provides:

> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. 1326(d).

The statutory text makes plain that Section 1326(d)'s requirements are both mandatory and conjunctive; each must be met before a defendant may challenge his underlying removal order. The provision specifically states that a defendant charged with unlawful reentry "*may not* challenge the validity of the deportation order * * * unless the alien" demonstrates that he satisfies the prerequisites in subsections (1) through (3). 8 U.S.C. 1326(d) (emphasis added). And those prerequisites are connected by "and," making clear that all three must be satisfied. 8 U.S.C. 1326(d)(2); see Antonin Scalia & Bryan A. Garner, *Reading Law: The Inter-*

pretation of Legal Texts 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."); *United States* v. *Soto-Mateo*, 799 F.3d 117, 120 (1st Cir. 2015) ("The elements of section 1326(d) are conjunctive, and [a defendant] must satisfy all of those elements in order to prevail on a collateral challenge to his removal order."), cert. denied, 136 S. Ct. 1236 (2016).

The first two prerequisites in Section 1326(d) are procedural in nature. A defendant must demonstrate both that he "exhausted any administrative remedies that may have been available" and that "the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review." 8 U.S.C. 1326(d)(1)-(2). "Time and again, this Court has taken [mandatory exhaustion] statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016); see, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."). The Ninth Circuit, however, has taken a different approach, under which a defendant is "excused" from meeting the procedural requirements of Sections 1326(d)(1) and (2) whenever he can show that, in hindsight, the immigration judge substantively erred in classifying a prior crime as a removable offense. *Ochoa*, 861 F.3d at 1015.

b. That approach effectively reads Sections 1326(d)(1) and (2) out of the statute. The Ninth Circuit's after-the-fact conclusion that respondent's prior offense does not qualify as an "aggravated felony" in no way "demonstrates" that he "exhausted any [available] administrative remedies," or that he was "improperly deprived * * * of the opportunity for judicial review,"

when he was originally removed. 8 U.S.C. 1326(d)(1) and (2).

To the contrary, an immigration judge's determination that an alien is removable is generally the type of issue that an alien can and should raise on appeal to the BIA—and, if unsuccessful there, to the court of appeals—in the context of his initial removal proceedings. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 3-5 (2004). And the court of appeals has never provided any textual basis for automatically deeming the procedural requirements of Sections 1326(d)(1) and (2) to be satisfied simply because it later turns out that the immigration judge misclassified an alien's prior offense. Instead, the court reached that result through multiple steps of atextual reasoning.

First, the court of appeals has allowed aliens who conceded removability and explicitly waived their rights to further review in the removal proceedings themselves to nonetheless satisfy Sections 1326(d)(1) and (2) if the record contains "'an inference'" that the alien was eligible for discretionary relief notwithstanding his removability, but the immigration judge "fail[ed] to 'advise the alien of this possibility.'" *United States* v. *Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir.) (quoting *United States* v. *Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)), cert. denied, 534 U.S. 879 (2001); see *United States* v. *Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004). In the Ninth Circuit's view, that circumstance automatically means that the appeal waiver was not "considered and intelligent," renders the waiver constitutionally invalid, and turns it into a nullity for purposes of Sections 1326(d)(1) and (2). *Muro-Inclan*, 249 F.3d at 1182 (quoting *Arrieta*, 224 F.3d at 1079). Second, the court has extended its nullification of waivers to cases

like this one, where the potential availability of discretionary relief turns on the same question as the removal itself—whether the alien was convicted of an aggravated felony. See, *e.g.*, *United States* v. *Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006); *United States* v. *Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); see generally *Ochoa*, 861 F.3d at 1020-1023 (Graber, J., concurring) (describing the evolution of Ninth Circuit law).

Neither of those steps was sound. As a threshold matter, a "majority of circuits ha[s] rejected" the Ninth Circuit's first holding—"that there is a constitutional right to be informed of eligibility for * * * discretionary relief." *United States* v. *Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006) (collecting authority); see *Ochoa*, 861 F.3d at 1020 (Graber, J., concurring). That majority of circuits is correct in its recognition that an alien's waiver of further review is not invalidated, nor his removal proceedings rendered fundamentally unfair, by the absence of an advisement about possible discretionary relief. See, *e.g.*, U.S. Br. at 6-11, *Estrada* v. *United States*, 138 S. Ct. 2623 (2018) (No. 17-1233). In any event, whatever the merits of the Ninth Circuit's rule in discretionary-relief cases, no sound basis exists for extending it to cases, like this one, in which the availability of discretionary relief turned on the question of whether the defendant was in fact removable.

The Ninth Circuit's rationale for effectively nullifying an appeal waiver in the absence of an advisement about discretionary relief is that the alien may have been unaware of an issue distinct from his removability—the potential for discretionary relief notwithstanding his removability—that he could have raised. See *Arrieta*, 224 F.3d at 1079. But when the immigration judge clas-

sifies an alien's prior crime as an aggravated felony, eligibility for discretionary relief is *not* distinct from removability. See, *e.g.*, *Torres* v. *Lynch*, 136 S. Ct. 1619, 1623 (2016). Instead, the alien is plainly on notice about the single legal issue—the aggravated-felony classification—that both renders him removable and denies him eligibility for various forms of discretionary relief. The alien thus has both the incentive and "the opportunity to develop the issue," and his waiver of the right to appeal remains "considered and intelligent" even if it later turns out that the appeal would have had merit. *Muro-Inclan*, 249 F.3d at 1182 (quoting *Arrieta*, 224 F.3d at 1079); cf. *Brady* v. *United States*, 397 U.S. 742, 757-758 (1970) ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

2. The court of appeals' decision is inconsistent with the history of Section 1326(d)

Although the text of Section 1326(d) alone forecloses the Ninth Circuit's approach, an examination of the genesis of Section 1326(d) underscores the flaws of that approach. Section 1326(d) was designed solely to address a due-process concern, identified by this Court, that an alien not be punished for unlawful reentry if he has *never* had a fair procedural opportunity to challenge his original removal order. Granting automatic relief to an unlawful-reentry defendant who *did* have such an opportunity during his removal proceedings, based on an after-the-fact claim of substantive error, subverts that design.

a. As originally enacted, Section 1326 did not contain any provision allowing an unlawful-reentry defendant to collaterally attack his original removal order. See

8 U.S.C. 1326 (1952). In *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), this Court considered "whether a federal court" in an unlawful-reentry case "must *always* accept as conclusive the fact of the deportation order, even if the deportation proceeding was not conducted in conformity with due process." *Id.* at 834. The Court reasoned that, because the "determination made in [a removal] proceeding * * * play[s] a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *Id.* at 837-838. And it accordingly held that "where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review," a defendant "must be permitted" to collaterally attack his removal in a later unlawful-reentry prosecution. *Id.* at 839; see *id.* at 838-840.

The holding of *Mendoza-Lopez* ensures that a defendant will not be punished for unlawful reentry without *ever* having the opportunity to argue to a court that the underlying removal order is fundamentally defective. See 481 U.S. at 840 ("If the violation of respondents' rights * * * amounted to a *complete deprivation* of judicial review of the [removability] determination, that determination may not be used to enhance the penalty for an unlawful entry under § 1326.") (emphasis added). That holding does not extend to a defendant who simply failed to exhaust his administrative remedies in the original removal proceedings, or who had a clear path to seek judicial review of the removal order. See, *e.g.*, *id.* at 839 (explaining that the critical question is whether "the deportation proceeding effectively eliminate[d] the right of the alien to obtain judicial review").

b. Section 1326(d), in turn, does not extend further than *Mendoza-Lopez*, so as to preclude an unlawful-

reentry prosecution against a defendant who has already had an opportunity to seek review of his removal order. Rather, Section 1326(d) "was enacted in response to *Mendoza-Lopez* and in an effort to 'incorporate'" the Court's judgment "'into statutory law.'" *United States* v. *Adame-Orozco*, 607 F.3d 647, 654 (10th Cir.) (Gorsuch, J.) (quoting Ira J. Kurzban, *Immigration Law Sourcebook* 186 (10th ed. 2006)), cert. denied, 562 U.S. 944 (2010); see, *e.g.*, *United States* v. *Hernandez-Perdomo*, 948 F.3d 807, 810 (7th Cir. 2020) (similar).

In enacting Section 1326(d), Congress simply codified *Mendoza-Lopez*'s limited holding. See, *e.g.*, 140 Cong. Rec. 28,440-28,441 (1994) (statement of Sen. Smith) (noting that the "language" of what would become Section 1326(d) was "taken directly from the U.S. Supreme Court case of *United States v. Mendoza-Lopez*"). Section 1326(d) is entitled "*[l]imitation* on collateral attack on underlying deportation order." 8 U.S.C. 1326(d) (emphasis altered); see H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 119 (1996) (stating that the provision "limits the ability of a[] deportable alien to collaterally challenge a[] deportation order in a pending criminal case"). It accordingly imposes three distinct requirements on defendants seeking to challenge their prior removal orders. See pp. 9-10, *supra*; see also, *e.g.*, *United States* v. *Delacruz-Soto*, 414 F.3d 1158, 1166 (10th Cir. 2005) ("§ 1326(d) places strict limits on the circumstances in which * * * underlying deportation orders can be challenged"). And, tracking *Mendoza-Lopez*, Sections 1326(d)(1) and (2) are concerned with *procedure*—the alien's exhaustion of administrative remedies, and his ability "to have the disposition in a deportation hearing reviewed in a judicial forum." 481 U.S. at 839.

As two Senators explained when discussing similarly worded predecessor bills, Section 1326(d) was "intended to ensure that minimum due process was followed in the original deportation proceeding while preventing wholesale, time-consuming attacks on underlying deportation orders." 139 Cong. Rec. 18,695 (1993) (statement of Sen. Dole); see 140 Cong. Rec. at 28,440-28,441 (statement of Sen. Smith). The Ninth Circuit's approach contravenes that congressional design, "nullifying the *procedural* requirements of § 1326(d)(1) and (2) and creating in their place a new, *substantive* right to retroactive de novo review" of an alien's prior removal order. *Ochoa*, 861 F.3d at 1024 (Graber, J., concurring) (second emphasis added).

The Ninth Circuit's approach also "undermin[es] the finality interests the statute was designed to protect." *Ochoa*, 861 F.3d at 1024 (Graber, J., concurring). As this Court has recognized, administrative exhaustion requirements "promote[] judicial efficiency" by giving the agency "the opportunity to correct its own errors" and by "produc[ing] a useful record for subsequent judicial consideration." *McCarthy*, 503 U.S. at 145. And just as the interest in finality justifies limiting the availability of collateral attacks on criminal convictions, see, *e.g.*, *Bousley* v. *United States*, 523 U.S. 614, 621-622 (1998), finality interests also justify limitations on collateral attacks of removal orders.

3. The court of appeals' reasoning would produce incongruous results

Finally, the Ninth Circuit's interpretation of Section 1326(d) threatens consequences that Congress could not have intended. Under its approach, a less diligent alien could find himself in a *better* position than a more diligent one.

The Ninth Circuit allows an unlawful-reentry defendant to collaterally attack his removal even if, when he was originally removed, he "could have exhausted administrative remedies, could have appealed the removal order, knew that appeal was available, and failed to appeal." *Ochoa*, 861 F.3d at 1023 (Graber, J., concurring). But it seemingly provides no similar benefit to an alien who diligently, but unsuccessfully, pursued every avenue for administrative and judicial relief at the time that he was removed.

The court of appeals' rationales for dispensing with the requirements of Sections 1326(d)(1) and (2) for the less diligent aliens appear inapplicable to the more diligent ones. As described earlier, see pp. 11-13, *supra*, the Ninth Circuit has allowed an alien who waived further review of the aggravated-felony classification in the removal proceedings themselves to collaterally attack that classification under Section 1326(d) on the theory that the waiver was not "considered and intelligent." *Muro-Inclan*, 249 F.3d at 1182 (citation omitted). That theory does not translate to a defendant who did not waive his appellate rights at all, but instead actually exhausted his administrative and judicial remedies. Indeed, the Ninth Circuit has held that a defendant *cannot* satisfy Section 1326(d)(2) where he "*did*, in fact, seek judicial review" by filing (and then dismissing) a petition for a writ of habeas corpus. *United States* v. *Gonzalez-Villalobos*, 724 F.3d 1125, 1132 (9th Cir. 2013).

It thus appears that if the Ninth Circuit concludes that a crime for which multiple aliens have previously been removed is not, in fact, a removable offense, only aliens who did *not* exhaust their administrative and ju-

dicial remedies would be excused from satisfying Sections 1326(d)(1) and (2), while aliens who *did* seek administrative and judicial review could be out of luck. Congress could not have intended that result, and nothing in Section 1326 supports it. To the contrary, Section 1326(d)'s "[l]imitation[s]" on the class of defendants who may collaterally attack their underlying removal orders, 8 U.S.C. 1326(d) (emphasis omitted), are "designed to require that merits arguments be presented to the I[mmigration] J[udge] and argued on appeal in the first instance," rather than through a collateral attack in the context of an unlawful-reentry prosecution. *Ochoa*, 861 F.3d at 1022 (Graber, J., concurring).

To be sure, the Ninth Circuit has not directly addressed whether it would in fact apply its approach in such an anomalous fashion. When and if it were confronted with the issue, it could conceivably elect to extend its approach to all aliens who were removed based on crimes subsequently determined not to be removable offenses. But such a response would simply exacerbate the approach's underlying flaws. It would completely divorce the approach even from the rationales that the Ninth Circuit has offered, and further expose the approach for what it is—an unjustified departure from statutory text.

B. The Question Presented Warrants This Court's Review

The Ninth Circuit's erroneous approach to the question presented conflicts with the decisions of every other court of appeals to have considered the question and affects a significant number of unlawful-reentry prosecutions. It accordingly warrants review and reversal by this Court.

The Ninth Circuit stands alone in its erroneous approach to Section 1326(d). The seven other courts of

appeals to have addressed the issue heed the statute's plain text and do not excuse a defendant from satisfying the requirements of Sections 1326(d)(1) and (2) merely because the defendant argues—or binding authority holds—that the crime that led to his removal should not have qualified as an aggravated felony. See *Soto-Mateo*, 799 F.3d at 120-124 (1st Cir.); *United States* v. *Parrales-Guzman*, 922 F.3d 706, 706-708 (5th Cir. 2019); *United States* v. *Martinez-Rocha*, 337 F.3d 566, 570 (6th Cir. 2003); *United States* v. *Gil-Lopez*, 825 F.3d 819, 823 (7th Cir. 2016); *United States* v. *Rodriguez*, 420 F.3d 831, 834-835 (8th Cir. 2005); *United States* v. *Rivera-Nevarez*, 418 F.3d 1104, 1108-1109 (10th Cir. 2005), cert. denied, 547 U.S. 1114 (2006); *United States* v. *Watkins*, 880 F.3d 1221, 1223, 1224-1226 (11th Cir. 2018) (per curiam) (same with respect to argument that prior offense was not a "crime[] involving moral turpitude").

That division of authority will not resolve itself. The Ninth Circuit has twice declined the government's requests for rehearing en banc on this issue, despite several judges calling for such review. See App., *infra*, 7a; C.A. Doc. 46, *Ochoa*, *supra* (No. 15-10354); App., *infra*, 5a-6a (Clifton, J., concurring); *Ochoa*, 861 F.3d at 1018 (Graber, J., concurring); see also *United States* v. *Morales*, 634 Fed. Appx. 606, 608 (9th Cir. 2016) (Callahan, J., dissenting). No reasonable prospect exists for a change in the Ninth Circuit's outlier status without this Court's intervention. And such intervention is particularly warranted in light of the Ninth Circuit's outsized role in unlawful-reentry prosecutions. Unlawful reentry is one of the most commonly charged offenses in the federal system. United States Courts, *Criminal Federal Judicial Caseload Statistics 2019, Tbl. D3* (Mar. 31, 2019),

https://www.uscourts.gov/statistics/table/d-3/federal-judicial-caseload-statistics/2019/03/31. In the one-year period ending March 31, 2019, the government charged 24,819 defendants with unlawful reentry, accounting for approximately 27% of all federal criminal cases filed during that period. *Ibid.* Districts within the Ninth Circuit accounted for 5719 of those unlawful-reentry prosecutions, representing approximately 23% of the total. *Ibid.*; see United States Courts, *Criminal Federal Judicial Caseload Statistics 2018, Tbl. D3* (Mar. 31, 2018), https://www.uscourts.gov/statistics/table/d-3/federal-judicial-caseload-statistics/2018/03/31 (similar number for the one-year period ending March 31, 2018).

It is untenable for nearly a quarter of unlawful-reentry prosecutions to be subject to the Ninth Circuit's erroneous rule. This Court's review is necessary to correct the Ninth Circuit's course and ensure nationwide consistency in the enforcement of the unlawful-reentry statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
BRIAN C. RABBITT
Acting Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

OCTOBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-10011
D.C. No. 3:17-cr-00116-LRH-WGC-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

REFUGIO PALOMAR-SANTIAGO, AKA REFUGIO SANTIAGOPALOMAR, DEFENDANT-APPELLEE

Submitted: Apr. 15, 2020[*]
Filed: May 14, 2020
San Francisco California

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

MEMORANDUM[**]

Before: PAEZ and CLIFTON, Circuit Judges, and HARPOOL,[***] District Judge.

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

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

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

Refugio Palomar-Santiago is a Mexican national who was granted permanent resident status in the United States in 1990. In 1991, he was convicted of a felony DUI in California. In 1998, he received an Notice to Appear from the Immigration and Naturalization Service informing him that he was subject to removal because the DUI offense was classified as a crime of violence under 18 U.S.C. § 16 and thus considered an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43). After a hearing before an IJ, Palomar-Santiago was deported on that basis. Three years later, the Ninth Circuit determined that the crime Palomar-Santiago was convicted of was not a crime of violence. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146-47 (9th Cir. 2001). This determination applied retroactively. *United States v. Aguilera-Rios*, 769 F.3d 626, 633 (9th Cir. 2013).

By 2017, Palomar-Santiago was again living in the United States, this time without authorization. That year, a grand jury indicted him for illegal reentry after deportation under 8 U.S.C. § 1326. Palomar-Santiago moved to dismiss the indictment under 8 U.S.C. § 1326(d). Under § 1326(d), a district court must dismiss a § 1326 indictment if the defendant proves (1) he exhausted any administrative remedies that may have been available to seek relief against the order; (2) he was deprived of the opportunity for judicial review at the deportation hearing; and (3) that the deportation order was fundamentally unfair. 8 U.S.C. § 1326(d). However, a defendant need not prove the first two elements if he can show the crime underlying the original removal was improperly characterized as an aggravated felony and need not show the third element if he can show the removal should not have occurred. *United States v. Ochoa*, 861

F.3d 1010, 1015 (9th Cir. 2017); *United States v. Aguilera-Rios*, 769 F.3d at 630.

The district court held Palomar-Santiago met his burden in showing his crime was improperly characterized as an aggravated felony and that he was wrongfully removed from the United States in 1998. On this basis, it dismissed the indictment under § 1326(d). On appeal, the government concedes the district court faithfully applied Ninth Circuit precedent in its order. Instead of disputing the district court's application of the law, the government argues that our settled precedent is wrong and urges the panel to ignore it. *Id.* It points to evidence of contravening congressional intent, the text of the statute itself, and contrary case law from our sister circuits to support its argument. *See, e.g.*, *United States v. Soto-Mateo*, 799 F.3d 117, 120-21 (1st Cir. 2015); *United States v. Villanueva-Diaz*, 634 F.3d 844, 849-52 (5th Cir. 2011).

Whatever merits the government's argument may have, a three-judge panel "can only decline to apply prior Circuit precedent 'clearly irreconcilable' with a subsequent Supreme Court decision." *United States v. Shelby*, 939 F.3d 975, 978 (9th Cir. 2019) (internal citations omitted). The Ninth Circuit precedent as established in *Ochoa* and *Aguilera-Rios* is not clearly irreconcilable with any subsequent Supreme Court precedent, and as such this panel has no choice but to apply it. The parties do not dispute, and this panel agrees, that the district court faithfully applied Ninth Circuit precedent in dismissing the indictment under § 1326(d) after finding Palomar-Santiago was not convicted of an aggravated felony in 1991, was not eligible for removal, and was wrongfully removed from the United States.

Consequently, we affirm the district court's dismissal on this basis. Because this is an adequate independent basis for dismissal, the panel declines to reach Palomar-Santiago's alternative arguments supporting dismissal.

AFFIRMED.

No. 19-10011, *United States v. Refugio Palomar-Santiago*

CLIFTON, Circuit Judge, concurring:

I concur in the disposition, which faithfully applies our precedent. I write separately to express my view that this precedent should be revisited by an en banc panel of this court.

Three years ago, a panel of our court concluded that our precedent permitted defendants charged with illegal reentry to collaterally challenge their prior removal orders, even if they did not appeal them at the time, so long as the crime for which they were originally deported was not in fact a removable offense. *United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017) (citing *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) and *United States v. Pallares-Galan*, 359 F.3d 1088, 1096, 1103-04 (9th Cir. 2004)).

Nevertheless, in *Ochoa*, a concurrence by Judge Graber, joined by both of the other two members of the *Ochoa* panel, Judges McKeown and Chief District Judge Barbara M.G. Lynn (N.D. Tex.), described the precedents that bound that panel and bind us, as inconsistent with the relevant statutory text, out of step with other circuits and based on reasoning that was unfounded. "Our precedent has the effect of nullifying the procedural requirements of [8 U.S.C.] § 1326(d) . . . and creating in their place a new, substantive right to retroactive de novo review, thereby undermining the finality interests the statute was designed to protect." *Ochoa*, 861 F.3d at 1024 (Graber, J., concurring). We remain inconsistent with the statute and on the wrong side of a circuit split, by my count currently 9-2. I repeat the

suggestion of the *Ochoa* panel that this question merits en banc reconsideration.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-10011
D.C. No. 3:17-cr-00116-LRH-WGC-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

REFUGIO PALOMAR-SANTIAGO, AKA REFUGIO SANTIAGO PALOMAR, DEFENDANT-APPELLEE

Filed: Nov. 20, 2019

ORDER

No judge has requested a vote to hear this case initially en banc within the time allowed by GO 5.2(a). The petition for initial hearing en banc (Docket Entry No. 6) is therefore denied.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF THE COURT

By: Paul Keller
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. 3:17-CR-00116-LRH-WGC

UNITED STATES OF AMERICA, PLAINTIFF

v.

REFUGIO PALOMAR-SANTIAGO, DEFENDANT

Filed: Dec. 18, 2018

ORDER

Defendant Refugio Palomar-Santiago has filed a motion to dismiss the criminal indictment against him for violating 8 U.S.C. § 1326(a), which prohibits a previously-deported alien from reentering the United States without permission. (ECF No. 23). The United States filed a timely response on November 1, 2018, and defendant replied on November 7, 2018. For the reasons stated below, the Court will dismiss the indictment with prejudice.

I. Factual Background

On April 16, 1991, defendant, a Mexican national, was convicted in California of driving under the influence ("DUI") resulting in injury, a violation of California Vehicle Code §23153. (ECF No. 23-2 at 2). He was sentenced to sixteen months incarceration. (*Id.*) At the

time of defendant's conviction, he was a lawful permanent resident of the United States, having been granted that status several months prior to his conviction. (*Id.*) On April 14, 1998, defendant received a Notice to Appear from the Immigration and Naturalization Service ("INS") that informed him that because of his DUI conviction, he was subject to removal from the United States under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA") and would have a hearing to determine if he would be deported. (*Id.*); 8 U.S.C. § 1227. The Notice to Appear did not list a date, time, or place of defendant's hearing before the immigration judge; instead, it listed the date and time as "to be set" and the place as "to be calendared by EOIR." (ECF No. 23-2 at 2). On May 20, 1998, defendant received[1] a second Notice to Appear from the immigration court that listed the date, time, and place of his removal hearing. (ECF No. 24-2 at 2). Defendant appeared in person at his June 10, 1998 removal hearing at which the immigration judge ordered him to be removed from the United States and returned to Mexico. (ECF No. 24-3 at 2-4). According to the immigration records, defendant did not make an "application for relief from removal" at his hearing. (*Id.*) Defendant was returned to Mexico the following day on June 11, 1998. (ECF No. 1 at 1).

Defendant was subsequently found in the United States on November 24, 2017, but had not received the express permission from either the Attorney General or Secretary of Homeland Security to return, making him an illegal alien. (ECF No. 1 at 1). He was indicted on December 20, 2017, the sole charge being unlawful

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[1] The second Notice to Appear was hand-delivered to defendant's attorney.

reentry by a previously-deported alien. (*Id.*) Defendant was arrested on the charge in early July 2018 and had his initial appearance later that month. (ECF No. 8). He now seeks to dismiss the indictment against him.

II. Legal Standard

8 U.S.C. §1227(2)(A)(ii) allows for the government to remove any alien who is convicted of an aggravated felony at any time after he is admitted to the United States. An "aggravated felony" is defined as, *inter alia*, a crime of violence for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F). In turn, a "crime of violence" is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. 18 U.S.C. § 16(a).[2]

8 U.S.C. § 1326(d) allows for an alien criminally charged under the statute to challenge the validity of his previous removal order, but only if: (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. The Ninth Circuit, however, has crafted several exceptions to § 1326(d)'s strict requirements, two of which are relevant to the case at bar. First, a defendant is excused from demonstrating the first two

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[2] The Supreme Court has recently held that the residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the INA, is unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

requirements if he can show that he was wrongfully deported from the United States because a previous conviction was improperly characterized as an aggravated felony. *See, e.g., U.S. v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017) (citing *U.S. v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006)); *U.S. v. Gonzalez-Villalobos*, 724 F.3d 1125, 1131 (9th Cir. 2013). Second, a defendant can establish the third requirement when he can demonstrate that he was removed from the United States when he should not have been. *U.S. v. Aguilera-Rios*, 769 F.3d 626, 630 (9th Cir. 2013).

III. Discussion

Defendant presents two arguments as to why the Court should dismiss the indictment against him, and he argues that either argument, standing alone, is sufficient to warrant a dismissal. First, he argues that because the Ninth Circuit has previously determined that convictions for DUI causing injury under California law are not aggravated felonies, he automatically satisfies the first two requirements of § 1326(d). (ECF No. 23 at 2). And because he was a lawful permanent resident at the time of his deportation, he satisfies the third requirement because he should not have been removed from the United States. Alternatively, he argues that pursuant to a recent Supreme Court case, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Court should dismiss the indictment because the immigration judge lacked the requisite jurisdiction to order his removal. (ECF No. 23 at 2). He argues that *Pereira* is applicable in his case because the April 14, 1998 Notice to Appear did not list a specific date, time, and place for his removal hearing. (*Id.*)

The Court does not reach defendant's *Pereira* argument because it finds that he has sufficiently demonstrated that his California conviction for DUI with injury is not an aggravated felony. This fact is uncontested because the Ninth Circuit has explicitly ruled that it is not. *See U.S. v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) (holding that California Vehicle Code §23153 is not a crime of violence—and thus not an aggravated felony—because a defendant cannot commit a crime of violence if he negligently, rather than intentionally, hits someone with a physical object, such as his vehicle). The fact that the Ninth Circuit made this determination three years after defendant's removal hearing and deportation does not affect his available remedy under § 1326(d) because statutory interpretations are "fully retroactive" when determining "whether a defendant would have had the right to be in the United States, as a lawful permanent resident, but for the [immigration judge's] determination that he was removable." *U.S. v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017) (citing *U.S. v. Aguilera-Rios*, 769 F.3d 626, 633 (9th Cir. 2014)). Thus, the Court finds that defendant is exempt from demonstrating the first two §1326(d) requirements.

As to the third requirement—fundamental unfairness—an underlying removal order is fundamentally unfair if (1) an alien's due process rights were violated by defects in the underlying deportation proceeding and (2) he suffered prejudice because of the defects. *U.S. v. Aguilera-Rios*, 769 F.3d at 626, 630 (9th Cir. 2014) (citing *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004)). But when an alien is removed when he should not have been, his original removal is automatically deemed as fundamentally unfair. *Id.* (citing *U.S. v.*

Camacho-Lopez, 450 F.3d 928, 930 (9th Cir. 2006)). *See also U.S. v. Martinez*, 786 F.3d 1227, 1230 (9th Cir. 2015) ("Where a prior removal order is premised on the commission of an aggravated felony, a defendant who shows that the crime of which he was previously convicted was not, in fact, an aggravated felony, has established both that his due process rights were violated and that he suffered prejudice as a result."). There is little doubt that this is the case here. The evidence indicates that defendant's 1998 deportation appears to be based solely off the fact that the immigration judge determined that his 1991 conviction for DUI with injury qualified as an aggravated felony.[3] (ECF No. 24-3 at 2). But as the Ninth Circuit ruled in *Trinidad-Aquino*, it should not have. Therefore, under Ninth Circuit precedent, the Court finds that defendant has met or satisfied each of the three § 1326(d) requirements, and as such, he cannot be charged with unlawfully reentering the United States.

IV. Conclusion

IT IS THEREFORE ORDERED that defendant's motion to dismiss the criminal indictment against him (ECF No. 23) is GRANTED.

IT IS FURTHER ORDERED that the criminal indictment against defendant (ECF No. 1) is DISMISSED WITH PREJUDICE.

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[3] Defendant also accuses the immigration judge of having "affirmatively misled" him during his removal hearing, but he does not provide any evidence as to the contents of said hearing. (ECF No. 23 at 5). Because defendant failed to provide any evidence relating to the hearing itself, the Court makes no findings as to the immigration judge's conduct during said hearing.

IT IS SO ORDERED.

DATED this 18th day of Dec., 2018.

/s/ LARRY R. HICKS
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. 3:17-CR-00116-LRH-WGC

UNITED STATES OF AMERICA, PLAINTIFF

v.

REFUGIO PALOMAR-SANTIAGO, AKA REFUGIO SANTIAGO PALOMAR, DEFENDANT

[Filed: Dec. 20, 2017]

INDICTMENT FOR VIOLATION OF: TITLE 8, UNITED STATES CODE, SECTION 1326(a)—Deported Alien Found Unlawfully in the United States

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THE GRAND JURY CHARGES THAT:

On or about November 24, 2017, in the District of Nevada, REFUGIO PALOMAR-SANTIAGO, aka Refugio Santiago Palomar, defendant herein, an alien who had been previously deported and removed from the United States on or about June 11, 1998, was found in the United States without the express consent of the Attorney General or Secretary of Homeland Security to reapply for admission into the United States; all in violation of Title 8, United States Code, Section 1326(a).

A TRUE BILL:

_____/S/_____
FOREPERSON OF THE GRAND JURY

STEVEN W. MYHRE
Acting United States Attorney
/s/ BRIAN L. SULLIVAN
Assistant United States Attorney

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
606 SOUTH OLIVE ST. 15TH FLOOR
LOS ANGELES, CA 90014

Case No. A92-271-220
Docket: MIRA LOMA DETENTION FACILITY

IN THE MATTER OF: PALOMAR-SANTIAGO, REFUGIO,
RESPONDENT

Filed: Nov. 1, 2018

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge(s) in the Notice to Appear.

Respondent has made no Application for relief from removal.

It is HEREBY ORDERED that the respondent be removed from the United States to MEXICO on the charge(s) contained in the Notice to Appear.

If you fail to appear for removal at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control (such as serious illness of the alien or death of an immediate relative of the

alien, but not including less compelling circumstances), you will not be eligible for the following forms of relief for a period of ten (10) years after the date you were required to appear for removal:

(1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;

(2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

(3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

/s/ HOWARD VAN WINKLE
HOWARD VAN WINKLE
Immigration Judge
Date: June 10, 1998

Appeal: Waived (A/I/B)

Appeal Due By: Jul 10, 1998

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [X] ALIEN c/o Custodial Officer
[ ] Alien's ATT/REP [X] INS

DATE: [6/10/98]

BY: COURT STAFF /s/ [ILLEGIBLE]

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List
[ ] Other

LIMITATIONS ON DISCRETIONARY RELIEF
FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for a period of ten (10) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for ten (10) years from the date of the scheduled

departure or the date of unlawful reentry, respectively. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

(X) 4. An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for ten (10) years after the date you are scheduled to appear.

** the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;

2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice provided to the alien in English. Oral notice of the contents of this notice must be given to the at alien in his/her native language; or in a language he/she understands by the Immigration Judge.

Date: Jun 10, 1998

Immigration Judge /s/ [ILLEGIBLE] or Court Clerk: _____

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [X] ALIEN c/o Custodial Officer
[ ] Alien's ATT/REP [X] INS

DATE: [6/10/98]

BY: COURT STAFF /s/ [ILLEGIBLE]

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List
[ ] Other

APPENDIX F

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
606 SOUTH OLIVE ST. 15TH FLOOR
LOS ANGELES, CA 90014

RE: PALOMAR-SANTIAGO, REFUGIO

FILE: A92-271-220 DATE: May 20, 1998

TO: CARLOS MARTINEZ-COUOH, ESQ.
1505 HAWTHORNE BLVD
LENNOX, CA 90304

Please take notice that the above captioned case has been scheduled for a (Master) Individual hearing before the Immigration court [6/19/98] at [8:30 a.m.] at

45100 N. 60TH ST., WEST
LANCASTER, CA 93536

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice To Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions:

1) You may be taken into custody by the Immigration and Naturalization Service and held for further action.

2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Immigration and Naturalization Service established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT LOS ANGELES, CA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR 33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT

TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A List of Free Legal Service Providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 OR 703-305-1662 LJ.

LIMITATIONS ON DISCRETIONARY RELIEF
FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for a period of ten (10) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for ten (10)

years from the date of the scheduled departure or the date of unlawful reentry, respectively. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the united States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

( ) 4. An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for ten (10) years after the date you are scheduled to appear.

** the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240A of the Immigration and Nationality Act;

2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

3) Adjustment o status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the immigration judge.

Date: May 20, 1998

Immigration Judge: [ILLEGIBLE] or Court Clerk: _____

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [X] ALIEN c/o Custodial Officer
[ ] Alien's ATT/REP [X] INS

DATE: [5/20/98]

BY: COURT STAFF /s/ [ILLEGIBLE]

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List
[ ] Other

NOTICE OF EN..ce OF APPEARANCE AS ATTORNEY OR ....RESENTATIVE BEFORE THE OFFICE OF THE IMMIGRATION JUDGE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

TYPE OF PROCEEDING FOR WHICH I AM ENTERING AN APPEARANCE: *(check only one)*
☒ Deportation *(Including Bond Redetermination)* ☐ Exclusion ☐ Motion to Reopen/Reconsider ☐ Other

DATE 5-4-98

ALIEN NUMBER *(list lead alien number and all family member alien numbers if applicable)*
A 92-271-220
A — —
A — —

I hereby enter my appearance as attorney *(or representative)* for and at the request of the following named person(s):

NAME Palomar-Santiago, Refugio

ADDRESS *(Apt. No.)* *(Number & Street)* *(City)* *(State)* *(Zip Code)*

Check if Applicable Item(s) below:

☒ 1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia Calif. Supreme Court *(Name of Court)* and am not under a court or administrative agency order suspending, enjoining, disbarring, or otherwise restricting me in practicing law.

☐ 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:

☐ 3. I am associated with _____, the attorney of record who previously filed a notice of appearance in this case and my appearance is at his/her request. *(If you check this item, also check item 1 or 2 whichever is appropriate.)*

☐ 4. Other *(Explain fully.)*

SIGNATURE
Carlos Martinez Couch

COMPLETE ADDRESS ☐ Check here if this is a new address
10505 Hawthorne Blvd.
Lennox, CA 90304

NAME *(Type or print)*
Carlos Martinez Couch

TELEPHONE NUMBER
(310)330-7999

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO REPRESENTATION BY AND THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY EOIR SYSTEM OF RECORDS:

Carlos Martinez Couch
(Name of Attorney or Representative)

NAME OF PERSON CONSENTING	SIGNATURE OF PERSON CONSENTING	DATE
Refugio Palomar-Santiago	Refugio Palomar	5-4-98

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is or claims to be a citizen of the United States or an alien lawfully admitted for permanent residence.)

U.S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A92 271 200

In the Matter of:

Respondent: PALOMAR-Santiago Refugio

45100 N. 60th Street, West Lancaster, Ca. 93536
(Number, street, city, state and ZIP code)

805-940-3555
(Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1. You are not a citizen or national of the United States;

2. You are a native of Mexico and a citizen of Mexico;

3. On February 1, 1989, you were granted temporary status in accordance to the Legalization Provisions;

4. On December 1, 1990, you were granted Permanent Resident Status per Legalization Provisions of Section 210 of the Immigration Nationality Act, as Amended;

5. You were on April 16, 1991, convicted in the Superior Court of the California, County of Riverside for the offense of Driving under the influence causing injury, in violation of Section VC23153 of the California Vehicle Code;

6. For that offense you were sentenced to confinement for a period of 1 year and 4 months.

"Superseding NTA"

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43) of the Act.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

TO BE CALENDARED BY EOIR

(Complete Address of Immigration court, Including room Number, if any)

on TO BE SET (Date) at TO BE SET (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

/s/ [ILLEGIBLE]
DEPUTY ASSISTANT DISTRICT
DIRECTOR, DD&P
(Signature and Title of Issuing Officer)

LOS ANGELES, CALIFORNIA
(City and State)

Date: [Apr. 14, 1998]

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the

receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOJR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

/s/ [ILLEGIBLE]
(Signature of Respondent)

Before: Date: [Apr. 20, 1998]

/s/ [ILLEGIBLE]
(Signature and Title of INS Officer)

Certificate of Service

This Notice to Appear was served on the respondent by me on [Apr. 20, 1998], in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☒ in person ☐ by certified mail, return receipt requested

☐ by regular mail

☐ Attached is a list of organizations and attorneys which provide free legal services.

☐ The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

/s/ [ILLEGIBLE]
(Signature of Respondent if Personally served)

/s/ [ILLEGIBLE]
(Signature and Title of Officer)

APPENDIX G

1. 8 U.S.C. 1326 provides:

Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such

alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

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[1] So in original. The period probably should be a semicolon.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

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

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

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[2] See References in text note below.

2. 8 U.S.C. 1326 (1952) provides:

Reentry of deported alien.

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.