No. 20-437

IN THE
SUPREME COURT OF THE UNITED STATES

United States,

Petitioner,

v.

Refugio Palomar-Santiago,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a former lawful permanent resident charged with illegal reentry satisfies the requirements of 8 U.S.C. § 1326(d) for dismissal where an immigration judge previously ordered his removal from the United States by misclassifying a prior conviction as a removable offense.

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INTRODUCTION

There is no dispute that respondent Refugio Palomar-Santiago never should have been removed from the United States. His removal occurred solely because of an immigration judge's (IJ) mistaken belief that his conviction for driving-under-the-influence (DUI) constituted an aggravated felony and thereby rendered him deportable and ineligible for any form of discretionary relief. Nonetheless, the Government seeks to criminally prosecute Palomar-Santiago under 8 U.S.C. § 1326 for unlawfully reentering the country—basing that prosecution on the very removal order that the Government itself (via the IJ) wrongly induced. The Ninth Circuit held that the Government's prosecution cannot move forward because Palomar-Santiago has satisfied the requirements of subsection (d) of the illegal-reentry statute for challenging "the validity of the deportation order" underlying his prosecution. 8 U.S.C. § 1326(d).

The Government now petitions for this Court's review. Its argument, however, rests on a misleading caricature of the circuit precedent the Ninth Circuit applied here. The Government also ignores that it invited the Ninth Circuit to adopt the very precedent it now attacks. An accurate understanding of Ninth Circuit case law and this litigation history—along with broader appreciation of how Section 1326(d) has been interpreted and applied across the lower courts—makes clear that the Government's petition should be denied.

STATEMENT OF THE CASE

I. Statutory background

Under the Immigration and Nationality Act (INA), lawful permanent residents (LPRs) who are convicted of an "aggravated felony" are subject to removal from the United States. *See* 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43) (listing qualifying crimes). If the Government initiates removal proceedings against a noncitizen, the noncitizen may generally appear before an IJ for a hearing. *See* 8 C.F.R. § 238.1. If an IJ orders a noncitizen's removal, the noncitizen has a right to appeal that order to the Board of Immigration Appeals (BIA), *see* 8 C.F.R. §§ 1003.1(b), (d)(3), and then to seek review in a federal court of appeals, *see* 8 U.S.C. §§ 1101(a)(47)(B), 1252(d).

A noncitizen who is removed and then later unlawfully reenters the country is subject to criminal prosecution under 8 U.S.C. § 1326. An earlier version of Section 1326 left no room for defendants to challenge the validity of their underlying removal orders during their unlawful-reentry prosecutions. But in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), the Court concluded that such challenges must be allowed where the IJ "failed to advise [the noncitizen defendants] properly of their eligibility to apply for suspension of deportation," rendering their "waivers of their right to appeal . . . not considered or intelligent." *Id.* at 840. More generally, the Court held that a noncitizen cannot be prosecuted under Section 1326 "where the deportation proceeding effectively eliminate[d] the right of the [noncitizen] to obtain judicial review." *Id.* at 839.

In 1996, Congress amended Section 1326 "to codify the holding of *Mendoza-Lopez*." Pet. 4 (quoting *United States v. Hernandez-Perdomo*, 948 F.3d 807, 810 (7th Cir. 2020)). Section 1326(d) now expressly permits a noncitizen facing an unlawful-reentry prosecution to "challenge the validity of [his] deportation order" if three conditions are met. 8 U.S.C. § 1326(d). First, the noncitizen must have "exhausted any administrative remedies that may have been available to seek relief against the order." *Id.* § 1326(d)(1). Second, "the deportation proceedings at which the order was issued" must have "improperly deprived the [noncitizen] of the opportunity for judicial review." *Id.* § 1326(d)(2). Third, "the entry of the order" must have been "fundamentally unfair." *Id.* § 1326(d)(3).

II. Factual and procedural background

1. Respondent Refugio Palomar-Santiago is a 62-year-old Mexican national who obtained LPR status in 1990. Pet. App. 2a. In 1991, he was convicted in California of felony DUI. *Id.* Seven years later, Palomar-Santiago—who was gainfully employed and married with two children, *see* Court of Appeals Supplemental Excerpts of Record (C.A. Supp. ER) 46—received a Notice to Appear stating that he was subject to removal. Pet. App. 30a-31a. The Notice asserted a single basis for removal: that his DUI offense qualified as an aggravated felony. Pet. App. 9a, 13a, 31a.

In 1998, an IJ held a removal hearing. Pet. App. 9a. Palomar-Santiago attended the hearing. But because the Government has not produced a transcript or audio recording of the hearing, it is unclear exactly what transpired. At the conclusion of the hearing, however, the IJ issued an order directing Palomar-Santiago's removal

based on the aggravated-felony charge in the Notice to Appear. Pet. App. 17a. At the time, the BIA also treated DUI as an aggravated felony. *See In re Magallanes-Garcia*, 1998 WL 133301 (BIA 1998). Perhaps for this reason, Palomar-Santiago waived his right to appeal. Pet. App. 18a. The day after his hearing, Palomar-Santiago was removed to Mexico. Pet. App. 9a.

Three years later, the Ninth Circuit concluded that DUI is in fact *not* an aggravated felony under the INA. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146-47 (9th Cir. 2001). And three years after that, this Court confirmed the Ninth Circuit's conclusion. *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). Because "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1994), those decisions unequivocally demonstrate that Palomar-Santiago was not convicted of an aggravated felony. As a result, the Government had no valid basis to remove Palomar-Santiago from the United States.

2. In 2017, Palomar-Santiago was found to be living again in the United States. Pet. App. 2a. A grand jury indicted him for unlawful reentry after removal. *Id.*; Pet. App. 15a. Palomar-Santiago moved to dismiss the indictment, challenging—in the words of under Section 1326(d)—the "validity" of his prior deportation order. He cited the Ninth Circuit's decisions in *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), and *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), in which the court of appeals held—accepting the Government's concessions—that Section 1326(d)'s requirements are "satisfied" where the IJ ordered the noncitizen removed by

misclassifying a prior conviction as a removable offense. *Ochoa*, 861 F.3d at 1015; *see also Aguilera-Rios*, 769 F.3d at 630. Stressing that Palomar-Santiago was "removed when he should not have been," the district court granted Palomar-Santiago's motion, holding that he had "satisfied each of the three § 1326(d) requirements." Pet. App. 13a.

3. On appeal, the Government asked the Ninth Circuit to grant initial hearing en banc. The court of appeals denied this motion. Pet. App. 7a.

A Ninth Circuit panel then issued an unpublished decision affirming the district court. Pet. App. 1a. The Ninth Circuit confirmed that Palomar-Santiago had "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." Pet. App. 3a. Applying "Ninth Circuit precedent as established in *Ochoa* and *Aguilera-Rios*," the court agreed with the district court that the prosecution must be dismissed pursuant to Section 1326(d). *Id.*

The Government did not seek rehearing en banc before the Ninth Circuit. Instead, this petition for certiorari followed.

REASONS FOR DENYING THE WRIT

8 U.S.C. § 1326(d) sets forth three requirements to challenge "the validity of the deportation order" that serves as the basis for an illegal-reentry prosecution. Contrary to the Government's contention, the Ninth Circuit has not "read[] Sections 1326(1) and (2) out of the statute." Pet. 10. Instead, the Ninth Circuit has held—accepting concessions from the Government in two cases in 2014 and 2017—that a defendant *satisfies* the first two prongs of Section 1326(d) where he demonstrates that

"the crime underlying the original removal was improperly characterized" by the Government and immigration judge as a removable offense. Pet. App. 2a (citing *United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017), and *United States v. Aguilera-Rios*, 769 F.3d 626, 633 (9th Cir. 2014)). The Ninth Circuit's application of those prior holdings in this case does not warrant review. The specific question presented arises infrequently. This case would be a subpar vehicle for addressing how Section 1326 applies in this general situation. The Ninth Circuit's precedent is correct. And insofar as other courts of appeals have disagreed with the Ninth Circuit's position on the question presented, further percolation may resolve that conflict.

I. The question presented is not sufficiently important to warrant this Court's attention.

A. The question presented rarely arises.

The Government maintains that the question presented is important because "[u]nlawful reentry is one of the most commonly charged offenses in the federal system," and many unlawful-reentry prosecutions occur in the Ninth Circuit. Pet. 19-20. But the mere fact that unlawful-reentry prosecutions are common does not establish that the narrow question here is frequently recurring or otherwise important. In fact, it is not.

1. It is useful to begin with a point of clarification. As the Government observes, the Ninth Circuit has long held that an unlawful-reentry prosecution is invalid if a defendant "was eligible for discretionary relief" from removal, but the IJ "fail[ed] to advise the alien of this possibility." Pet. 11 (quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001)); *see United States v. Pallares-Gallan*, 359 F.3d

1088, 1104 (9th Cir. 2004); *United States v. Leon-Paz*, 340 F.3d 1003, 1006-07 (9th Cir. 2003); *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000). While the Second Circuit has agreed with this rule, *see United States v. Sosa*, 387 F.3d 131, 137-38 (2d Cir. 2004), other circuits have not.[1] But the Ninth Circuit's decision below does not rest on this rule, and the record here lacks any transcript of Palomar-Santiago's removal hearing. As this case comes to this Court, therefore, it does not present that discretionary-relief issue, and the Government does not ask this Court to resolve that issue.

The Government's petition instead asks this Court to decide a distinct question: whether Section 1326(d)'s first two prongs are met when the crime for which the defendant was removed was not "a removable offense" at all. Pet. (I).

2. Unlike the discretionary-relief issue, that removability-related question presented rarely arises, and the Ninth Circuit's approach to it is of quite recent vintage.

The Ninth Circuit first applied the rule at issue in this case in 2014 in *Aguilera-Rios*, 769 F.3d 626. There, the defendant was removed based on a conviction that the IJ misclassified as a removable offense. *Id.* at 637. When the defendant was later prosecuted for unlawful reentry, the Government conceded on that basis that "the

[1] *See United States v. Santiago-Ochoa,* 447 F.3d 1015, 1020 (7th Cir. 2006); *Bonhometre v. Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005); *United States v. Aguirre-Tello,* 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *United States v. Lopez-Ortiz,* 313 F.3d 225, 231 (5th Cir. 2002); *Smith v. Ashcroft,* 295 F.3d 425, 430 (4th Cir. 2002); *Escudero-Corona v. INS,* 244 F.3d 608, 615 (8th Cir. 2001); *Ashki v. INS,* 233 F.3d 913, 921 (6th Cir. 2000).

first two elements of § 1326(d) have been met." *Id.* at 630. The court went on to conclude that the third prong was met as well, resulting in a holding that where the defendant was previously "removed as a result of a legal error" in misclassifying his offense as removable, he satisfies the requirements of Section 1326(d). *Id.* at 633.

The Ninth Circuit applied this holding again in 2017 in *Ochoa*, 861 F.3d 1010. But there, too, the Government "conceded" that Section 1326(d)'s first two prongs were met, *id.* at 1015, and the court found the third prong satisfied because the defendant's underlying conviction "could not serve as a proper predicate for removal," *id.* at 1018. Judge Graber issued a concurrence—upon which the Government's petition heavily relies, *see* Pet. 16-19—questioning the soundness of the Ninth Circuit's precedent, *see Ochoa*, 861 F.3d at 1018-24 (Graber, J., concurring). Judge Graber recognized (correctly) that the Ninth Circuit first enunciated its relevant understanding of Section 1326(d) in *Aguilera-Rios*. *Id.* at 1022-23. But Judge Graber overlooked that the Ninth Circuit had done so at the Government's own request.

Reversing course from its concessions in *Aguilera-Rios* and *Ochoa*, the Government now argues that demonstrating that the defendant was removed based on an erroneous aggravated-felony determination does *not* necessarily satisfy Section 1326(d)'s first two prongs. The Government, of course, is permitted to change its position on the proper interpretation of a federal statute. But it is odd that the Government's petition fails even to acknowledge that it is doing so here.

Perhaps seeking to paper over its past admissions, the Government suggests that the Ninth Circuit precedent at issue here dates back further than *Aguilera-Rios*—in particular, to two cases decided in 2003 and 2006. Pet. 12 (citing *Leon-Paz*,

340 F.3d 1003, and *United States v. Camacho-Lopez*, 450 F.3d 928 (9th Cir. 2006)). But those cases were different. They involved the distinct scenario mentioned above: IJs' failures to advise noncitizens regarding discretionary relief. *See Leon-Paz*, 340 F.3d at 1007 (observing that the defendant "was entitled to the continued protection of § 212(c) [a discretionary-relief provision] and the IJ erred when he told [defendant] that no relief was available"); *Camacho-Lopez*, 450 F.3d at 930 (observing, based on the government's concession, that the first two prongs of § 1326(d) were satisfied because "the IJ erroneously advised [defendant] that he was ineligible for discretionary relief").

The Government also characterizes the Ninth Circuit's position at issue here as an "exten[sion]" of its position regarding failures to advise of the availability of discretionary relief. Pet. 12. But that characterization, too, is wrong. Whatever the merits of the Ninth Circuit's discretionary-relief rule, its position on the removability-related issue here is distinct. *Aguilera-Rios* itself made that clear, reasoning that "[f]ailing to obtain … discretionary relief is quite different than the situation here, where [defendant] would have had the *right* to be in the United States, as a lawful permanent resident, but for the IJ's determination that he was removable—a determination we now know to be legally erroneous." 769 F.3d at 633. In short, the Ninth Circuit's removability precedent is not necessarily based on its discretionary-relief rule, or vice versa. The removability precedent stands on its own two feet.

3. With the focus properly and exclusively on the Ninth Circuit's removability precedent, it becomes clear that the question presented is exceedingly narrow. For

the question presented to arise and to be outcome-determinative, five preconditions will generally have to be present. All five boxes are seldom checked at once.

First, the noncitizen generally must have had LPR status when removed. Only about 10% of removals each year involve LPRs.[2]

Second, the former LPR must have been removed based on an IJ's legal determination that a crime he was convicted of was "classifie[d] . . . as an aggravated felony," rendering discretionary relief entirely unavailable. Pet. 12-13. Some LPRs convicted of aggravated felonies—particularly those, like Palomar-Santiago, who pleaded guilty to their crimes before Congress stripped them of certain remedies in 1996—were eligible at the time of their removal hearings for at least one form of discretionary relief. *See INS v. St. Cyr*, 533 U.S. 289, 326 (2001). Such LPRs who were ordered removed before this Court decided *St. Cyr* usually satisfy Section 1326(d)—if they are later prosecuted for unlawful reentry—for the distinct reason that the IJ failed properly to advise them about the availability of discretionary relief. *See Leon-Paz*, 340 F.3d at 1006 (dismissing Section 1326 prosecution on this ground); *Camacho-Lopez*, 450 F.3d at 930 (same); *Sosa*, 387 F.3d at 137 (same). And when

[2] *See, e.g.*, *A Price Too High, US Families Torn Apart by Deportations for Drug Offenses*, Human Rights Watch (June 16, 2015), https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses. Cases raising the issue here have almost exclusively involved LPRs because LPRs may typically be removed only after a criminal conviction. *See, e.g.*, *United States v. Gil-Lopez*, 825 F.3d 819, 820 (7th Cir. 2016); *Aguilera-Rios*, 769 F.3d at 629; *United States v. Rodriguez*, 420 F.3d 831, 832 (8th Cir. 2005). The issue could theoretically arise with non-LPRs, but it rarely has in practice.

defendants satisfy Section 1326(d) on that basis, the question presented here becomes irrelevant.

Third, after being removed, the former LPR must reenter the country unlawfully (and be apprehended by authorities). Many people who are removed do not attempt such reentries—or at least do not end up again in federal custody.

Fourth, the Government must decide to criminally prosecute the former LPR for unlawful reentry under 8 U.S.C. § 1326. In many cases involving illegal border crossings, the Government simply places those it apprehends directly into removal proceedings, without filing any criminal charges. And even where the Government charges individuals with violating Section 1326, such cases "often" result in plea bargains to lesser offenses—most notably, "improper entry" under 8 U.S.C. § 1325, which does not contain a prior removal element. *See* American Immigration Council, *Prosecuting People for Coming to the United States* 2 & n.14 (Jan. 2020).[3]

Fifth, the former LPR prosecuted under Section 1326 must demonstrate that the IJ conducting his removal proceeding mistakenly classified the crime for which he was removed as an aggravated felony. But IJs rarely make such errors. That is evident from the fact that five of the eight cases in the Government's alleged circuit conflict (including this case) all stem from a single legal error committed by IJs for a short period of time roughly twenty years ago—namely, the misclassification of DUI as an aggravated felony. *See* Pet. App. 2a (1998 removal proceedings); *United States v. Parrales-Guzman*, 922 F.3d 706 (5th Cir. 2019) (2001 removal proceedings); *United*

[3] https://www.americanimmigrationcouncil.org/research/immigration-prosecutions.

States v. Martinez-Rocha, 337 F.3d 566 (6th Cir. 2003) (2000 removal proceedings); *United States v. Rodriguez*, 420 F.3d 831 (8th Cir. 2005) (1999 removal proceedings); *United States v. Rivera-Nevarez*, 418 F.3d 1104 (10th Cir. 2005) (1999 removal proceedings). This Court corrected that error in its 2004 *Leocal* decision.

In light of these collective realities, it is unsurprising that the Ninth Circuit has hardly ever had occasion to apply the circuit precedent at issue here. The current version of Section 1326(d) has been on the books for 24 years. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441, 110 Stat. 1214, 1279. In that time, the Ninth Circuit appears to have applied the precedent at issue to bar prosecutions in just four cases, including this one. *See* Pet. App. 2a-3a; *Ochoa*, 861 F.3d at 1015; *United States v. Morales*, 634 F. App'x 606, 607 (9th Cir. 2016); *Aguilera-Rios*, 769 F.3d at 630.[4]

[4] A fifth case, *United States v. Martinez*, 786 F.3d 1227 (9th Cir. 2015), involved facts similar to those here, but the Ninth Circuit did not apply the circuit precedent at issue. In any event, the Government there did not dispute that Section 1326(d)'s first two prongs were satisfied, Govt. Br. at 6, *Martinez*, No. 12-30185 (9th Cir. Sept. 20, 2012), and the panel cited only *Camacho-Lopez*—a case turning on the availability of discretionary relief, 450 F.3d at 930—as a basis for finding them met, *Martinez*, 786 F.3d at 1230.

There are a few other cases in which terse, unpublished decisions from the Ninth Circuit might make it seem like the court applied legal reasoning like the panel below. But inspecting the briefs in such cases makes clear that the defendants argued that Section 1326(d)'s first two prongs were satisfied because IJs at their removal hearings improperly failed to advise them of the availability of discretionary relief. *Compare, e.g.*, *United States v. Pulido-Estrada*, 624 F. App'x 526, 527 (9th Cir. 2015), *with* Appellant's Opening Br., *Pulido-Estrada*, No. 13-50290, 2014 WL 205334, at *21 (9th Cir. Jan. 13, 2014).

B. The Government itself has signaled that the question presented lacks pressing importance.

In two related ways, the Government's own prior actions have revealed that the question presented is not particularly important.

1. Despite prior opportunities to do so, the Government has never before seen fit to ask this Court to review the Ninth Circuit's position on the question presented. Most notably, the Government did not file a certiorari petition after the Ninth Circuit's decision in *Ochoa*—despite Judge Graber's concurrence criticizing Ninth Circuit precedent. 861 F.3d at 1018-24 (Graber, J., concurring). Nor did the Government file a petition the previous year in *Morales* after the defendant prevailed. 634 F. App'x at 607.

2. Even as to the more common discretionary-relief issue discussed above, the Government has never suggested a need for this Court's review. Even though the circuits have long taken different views on the issue, with the Second and Ninth Circuits applying a more defendant-friendly rule, the Government has never sought this Court's intervention. *See supra* at 7. And when defendants outside the Second and Ninth Circuits have sought certiorari on that issue, the Government has always urged the Court to deny review. The Court has consistently obliged, including as recently as 2018. *See Estrada v. United States*, 138 S. Ct. 2623 (2018) (mem.).[5]

[5] For the Government's briefs in these cases, see Govt. Br. in Opp., *Estrada v. United States*, 2018 WL 2095668 (U.S. May 4, 2018); Govt. Br. in Opp., *Cordova-Soto v. United States,* 136 S. Ct. 2507 (2016) (No. 15-945); Govt. Br. in Opp., *Garrido v. United States,* 134 S. Ct. 513 (2013) (No. 13-5415); Govt. Br. in Opp., *Avendano v. United States,* 562 U.S. 842 (2010) (No. 09-9617); Govt. Br. in Opp., *Madrid v. United States,* 560 U.S. 928 (2010) (No. 09-8643); Govt. Br. in Opp., *Acosta-Larios v. United States,* 559 U.S. 1009 (2010) (No. 09-7519); Govt. Br. in Opp., *Barrios-Beltran v.*

If the discretionary-relief issue does not warrant this Court's attention, then the issue here certainly does not. The issue here arises less frequently; fewer courts have addressed it; and the alleged circuit split is less developed. There is simply no need for this Court to expend its limited resources reviewing the question presented here.

II. This case is a poor vehicle for addressing Section 1326(d)'s requirements.

Even if there were good reason for this Court to address how Section 1326(d) applies where the IJ who ordered the defendant removed misclassified his prior offense as an aggravated felony, this case would be an inappropriate vehicle for addressing that general scenario.

1. The Government asks this Court to hold that a defendant does not satisfy Section 1326(d)'s first two prongs "solely" by showing that his removal resulted from the IJ's misclassification of his conviction as an aggravated felony. Pet. (I). But defendants prosecuted under Section 1326 who challenge the validity of their prior removal orders rarely press narrow legal challenges based strictly on the IJ's misclassifications and nothing more. Rather, they typically also argue (as Palomar-Santiago himself signaled below he would do in this case if necessary, *see* Pet. App. 13a n.3) that the *particular advisements* and *manner* in which their removal hearing was conducted—either alone or in conjunction with an IJ's legal error—deprived them of their right to appeal their removal order.

United States, 558 U.S. 1051 (2009) (No. 09-5480).

Recall that *Mendoza-Lopez*, the decision that prompted Congress to pass Section 1326(d), held that an unlawful-reentry prosecution violates due process when the defendant's waiver of his right to appeal his removal order was "not considered or intelligent." 481 U.S. at 840. This rule allows a defendant to argue that his appeal waiver was not considered or intelligent because of specific facts in the record of his removal proceeding—for instance, the IJ's failure adequately to advise the noncitizen of his appeal rights, or the IJ's failure to ensure the noncitizen actually understood those rights.

Numerous Ninth Circuit decisions have conducted such record-intensive inquiries, sometimes granting relief on this basis. *See, e.g.*, *United States v. Valdivia-Flores*, 876 F.3d 1201, 1206 (9th Cir. 2017) (concluding that defendant's "waiver of the right to seek judicial review was not considered and intelligent" because "[t]he government provides no evidence that an immigration officer ever met with [defendant] to explain [the appeal waiver]"); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004) ("[defendant's] waiver of his right to appeal his removal order was not sufficiently 'considered and intelligent' because the IJ presiding over the removal proceeding failed to inform him that he had the right to appeal his removal order to the BIA").

Decisions from other circuits—including some in the Government's alleged circuit split—have engaged in similar fact-specific analyses. *See, e.g.*, *Rodriguez,* 420 F.3d at 834 (finding underlying removal order valid under Section 1326 in part because "[t]he record demonstrates that [defendant] was aware of and understood his right to appeal"); *Martinez-Rocha,* 337 F.3d at 569 (finding underlying removal order

valid where the defendant "had expressed a desire to return to Mexico" and demonstrated a "command of English"). Indeed, a dissenting judge in the Eighth Circuit's *Rodriguez* decision (part of the Government's alleged conflict) would have held that "[t]he failure of the IJ to inform [defendant] of his right to appeal to the federal courts before accepting his waiver of his right to appeal was sufficient" to preclude the defendant's prosecution under Section 1326(d). 420 F.3d at 835 (Heaney, J., dissenting).

2. Here, there can be no record-intensive inquiry because the Government has never produced an audiotape or transcript of Palomar-Santiago's removal hearing. The only relevant material the Government has produced is the IJ's removal order, which includes the word "waived" circled next to the word "appeal." Pet. App. 18a; C.A. Supp. ER 13. But without the transcript of the removal hearing, there is no way to discern whether the IJ advised Palomar-Santiago of his right to appeal to the BIA and then to a federal court of appeals—much less whether Palomar-Santiago understood any such advisements.[6]

The lack of a transcript of the removal hearing makes this case an inappropriate vehicle for addressing Section 1326(d)'s meaning and application. Opposing certiorari in a case raising the discretionary-relief issue discussed above, the Government explained that any consideration by this Court of how Section

[6] Even if the IJ did advise Palomar-Santiago in English, Palomar-Santiago would not have understood that advisement without a Spanish translator. *See* C.A. ER 21. Given that other procedural notices were "provided to [him] in English," C.A. Supp. ER 44, it seems quite possible that no translator was present at the removal hearing.

1326(d) applies to a challenge to an underlying removal order should include a record showing "the content of the advice provided to petitioner about his right to appeal, if any." Govt. Br. in Opposition, *Acosta-Larios*, No. 09-7519, at 14-15 (U.S. Feb. 19, 2010). "[B]ecause the record [in that case was] inadequate," the Government contended, the case "would not be an appropriate vehicle to address the circumstances in which an alien may be exempted from Section 1326(d)(1)'s exhaustion requirement." *Id.*; *see* Govt. Br. in Opposition, *Avendano*, No. 09-9617, at 14-15 (same) (U.S. June 14, 2010).

The same logic applies here. If the Court ever wishes to consider how Section 1326(d) applies where an IJ misclassified the offense that triggered the original removal as an aggravated felony, it should review a case with a removal hearing transcript in the record. Only in that circumstance could the Court be assured of its ability to provide comprehensive guidance about how Section 1326(d) operates in this setting. If the Court were to do nothing more than reject the Ninth Circuit's narrow holding here, lower courts would still have to confront the recurring question whether and when appeal waivers are considered and intelligent based on the actual events in a removal hearing. And this Court would have to grant certiorari in another case to establish the full contours of *Mendoza-Lopez*'s considered-and-intelligent requirement and Section 1326(d)'s first two prongs. Better to be efficient and to address these two closely related, and potentially interconnected, questions at the same time.

III. The Ninth Circuit's ruling is correct.

The Government does not dispute that the entry of the prior removal order was "fundamentally unfair." 8 U.S.C. § 1326(d)(3). But the Government insists that it can still prosecute Palomar-Santiago because he cannot show—as Section 1326(d) also requires—that he (1) "exhausted any administrative remedies that may have been available" when he was wrongfully deported and (2) was "improperly deprived" at that time of "the opportunity for judicial review." *Id.* §§ 1326(d)(1) & (2). The Ninth Circuit correctly rejected these arguments.

A. The Ninth Circuit does not "excuse" compliance with Section 1326(d)'s first two prongs.

The Government's primary argument on the merits attacks a straw man. The Government maintains that, in cases like the one here, the Ninth Circuit holds that the defendant "is *excused* from proving [Section 1326(d)'s] first two procedural requirements." Pet. 8 (quoting *Ochoa*, 861 F.3d at 1015) (emphasis added). According to the Government, this interpretation of Section 1326(d) "effectively reads Sections 1326(d)(1) and (2) out of the statute." Pet. 10.

The premise of the Government's argument is wrong. While the Ninth Circuit said in *Ochoa* (and has repeated a couple of other times) that defendants under the circumstances here are "excused" from meeting Section 1326(d)'s first two prongs, it has elsewhere made clear—including on the very page of the very opinion the Government quotes—that in this situation those two prongs are "satisfied." *See Ochoa*, 861 F.3d at 1015 (using two words interchangeably). And the origins of the Ninth Circuit's rule make clear that the latter formulation is plainly the more

accurate one: In *Aguilera-Rios*, when describing the Government's concession, the court explained that "[t]he government recognizes that the first two elements of § 1326(d) have been *met*." 769 F.3d at 630 (emphasis added).

Having established how the Ninth Circuit actually construes Section 1326(d), we now explain why that construction (derived from the Government's own previous interpretation of the statute) is sound.

B. Section 1326(d)'s administrative exhaustion prong is satisfied here.

Section 1326(d)'s first prong requires that a defendant have "exhausted any administrative remedies that may have been available to seek relief against the [removal] order." 8 U.S.C. § 1326(d)(1). That prong is satisfied here.

1. As the Government observes (Pet. 15), Congress enacted Section 1326(d) to "codif[y]" *Mendoza-Lopez*. The statute's terms must therefore be construed in harmony with that decision. And *Mendoza-Lopez* dictates that when an IJ erroneously declares a noncitizen's crime an aggravated felony, no administrative remedies (to use the language of Section 1326(d)(1)) are realistically "available" to the noncitizen. *See Mendoza-Lopez*, 481 U.S. at 837.

In *Mendoza-Lopez*, the Court observed that "the use of the result of an administrative proceeding to establish an element of a criminal offense" is always "troubling." *Id.* at 838 n.15 (citing *United States v. Spector*, 343 U.S. 169, 179 (1952) (Jackson, J., dissenting)). And if Section 1326 allowed a court to "impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation may have been," it would violate the Due Process Clause.

Id. at 837. "[A]t the very least," the Court explained, due process requires "*some* meaningful review of the administrative proceeding" before a deportation order can be used for "the subsequent imposition of a criminal sanction." *Id.* at 837-38.

Accordingly, the *Mendoza-Lopez* Court held that illegal-reentry prosecutions may not proceed where IJs erroneously failed to advise defendants when ordering them deported about "their eligibility to apply for suspension of deportation," a form of discretionary relief available to certain noncitizens under the pre-1996 statutory scheme. *Id.* at 839-40. Because the IJ's error led the defendants in that case to waive their right to challenge their deportation, the defendants' waiver was "not the result of [a] considered judgment[]." *Id.* at 840. And in turn, the IJ's error effectively deprived the defendants—in the Court's words and the words of the later-enacted Section 1326(d)—of the "[]availab[ility]" of any administrative remedies. *Id.* at 841.

The deficiencies that the *Mendoza-Lopez* Court identified are also present here. Just as the IJ's failure to properly advise the defendants in *Mendoza-Lopez* rendered administrative remedies unavailable, the IJ's misrepresentation to Palomar-Santiago that his DUI conviction was an aggravated felony effectively thwarted any meaningful opportunity for administrative relief.

The Government argues that *Mendoza-Lopez* is distinguishable because the defendants there lacked "a fair procedural opportunity to challenge [their] removal order." Pet. 13. If anything, the Government has it backwards. Allowing the Government to prosecute Palomar-Santiago based on his erroneous deportation order would be even more problematic than the situation in *Mendoza-Lopez*. In that case, there was no suggestion that the IJ "erroneously applied the law in determining that

respondents were deportable," *Mendoza-Lopez*, 481 U.S. at 845 (Rehnquist, C.J., dissenting), and yet the Court still precluded the illegal-reentry prosecutions. Here, it is undisputed that the IJ erroneously applied the law and that Palomar-Santiago would not have been deported absent that erroneous application.

Indeed, while Chief Justice Rehnquist believed that challenges to underlying removal orders were inappropriate in cases like *Mendoza-Lopez*—that is, cases involving an error of *omission* concerning discretionary relief—he acknowledged that due process might require courts to allow them where (as here) the IJ made an error of *commission* concerning removability. 481 U.S. at 845 (Rehnquist, C.J., dissenting); *see also United States v. Hernandez-Perdomo*, 948 F.3d 807, 813 (7th Cir. 2020) (explaining that in the Section 1326(d) context, "affirmative misstatements are more problematic than omissions because they function as a deterrent to seeking relief" (alterations and quotation marks omitted)); *United States v. Charleswell*, 456 F.3d 347, 357 (3d Cir. 2006) (same); *United States v. Lopez*, 445 F.3d 90, 99 (2d Cir. 2006) (Sotomayor, J.) (same). Where an IJ "erroneously applied the law in determining that [a defendant was] deportable," *Mendoza-Lopez*, 481 U.S. at 845 (Rehnquist, C.J., dissenting), due process forbids subsequent reliance on the deportation order to impose criminal punishment. The statute here must be construed to avoid that constitutional infirmity (or, if necessary, found unconstitutional as applied to this situation).

The Government may sometimes remove a defendant in Palomar-Santiago's situation through new immigration proceedings. Or perhaps the Government might take some other adverse action. But the Government cannot *criminally punish* such

an individual based in part on "the government's [own] legal mistake." *Aguilera-Rios*, 769 F.3d at 633; *see also McKart v. United States*, 395 U.S. 185, 197 (1969) (refusing to allow criminal punishment based on erroneous administrative classification, even though defendant failed to exhaust administrative remedies).

2. This Court's recent decision in *Ross v. Blake*, 136 S. Ct. 1850 (2016), further bolsters the Ninth Circuit's rule. There, the Court construed language in the Prison Litigation Reform Act's administrative-exhaustion provision that is similar to Section 1326(d). The Court concluded that an administrative remedy is "available" only if it is "capable of use to obtain some relief" for the action complained of. *Id.* at 1859. Even if a remedy is "officially on the books," the Court unanimously held it *unavailable* when it is precluded by an official's "misrepresentation," or "so opaque that . . . no ordinary prisoner can discern or navigate it." *Id.* at 1859-60; *see also Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (recognizing exhaustion requirements are "intensely practical" in nature) (internal quotation marks omitted).

Under *Ross*'s rationale, no administrative remedy was "available" to Palomar-Santiago in his administrative proceedings. The IJ told Palomar-Santiago—backed by the BIA's holding in *In re Magallanes-Garcia*, 1998 WL 133301 (BIA 1998)—that his DUI conviction was an aggravated felony, but that was a "misrepresentation." And when an IJ tells an "ordinary" noncitizen that he is an aggravated felon according to binding BIA authority, the person cannot "discern"—much less "navigate"—any opportunity to obtain administrative relief. *Ross*, 136 S. Ct. at 1859. More than 60% of noncitizens—and approximately 86% of detained noncitizens—appear *pro se* in their removal proceedings. Ingrid V. Eagly & Steven Shafer, *A*

National Study of Access To Counsel In Immigration Court, 164 U. Pa. L. Rev. 1, 7-8 (Dec. 2015). In part for that reason, "our removal system relies on IJs to explain the law accurately to *pro se* aliens." *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004). Without an accurate explanation of the law from the IJ, noncitizens "have no way of knowing what information was relevant to their cases and [are] practically foreclosed from making a case against removal." *Id.* Indeed, this scenario is tailor-made to "trip up all but the most skillful" noncitizens. *Ross*, 136 S. Ct. at 1860 (alterations omitted).

That is especially true given the nature of an IJ's error in misclassifying a noncitizen's prior conviction as an aggravated felony, and the nature of the argument a noncitizen would have to make on appeal. This Court has established that these inquiries are governed by the "categorical" and "modified categorical" approaches. The categorical approach involves "an endless gauntlet of abstract legal questions," requiring highly technical parsing of the elements of "generic" offenses and the offense of which the noncitizen was convicted. *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring); *see, e.g.*, *Descamps v. United States*, 570 U.S. 254 (2013). This legal maze is difficult even for represented parties and expert judges to navigate. Even if (usually uncounseled) noncitizens are sometimes well-positioned to take appeals to the BIA based on their factual circumstances or to otherwise challenge an IJ's weighing of evidence, noncitizens will not realistically be able to spot an error in an IJ's application of the categorical approach and develop the necessary arguments to appeal.

Indeed, where a noncitizen *was* represented by counsel in immigration proceedings and his lawyer declined to appeal an erroneous aggravated-felon designation, that ineffective assistance of counsel satisfies Section 1326(d)'s requirements. *See, e.g.*, *United States v. Lopez-Chavez*, 757 F.3d 1033, 1038-44 (9th Cir. 2014); *United States v. Cerna*, 603 F.3d 32, 42-43 (2d Cir. 2010). It would make no sense for defendants whose attorneys failed to seek administrative review to be better off than those who were not even represented at their removal hearings and similarly failed to seek administrative review.[7]

C. Section 1326(d)'s judicial review prong is satisfied here.

Section 1326(d)'s second prong requires the defendant to show that his removal proceedings "improperly deprived [him] of the opportunity for judicial review." 8 U.S.C. § 1326(d)(2). Such an improper deprivation occurred here.

As explained, the IJ misrepresented to Palomar-Santiago that he had committed an aggravated felony. That misrepresentation, coupled with the BIA's adverse position at the time, caused him to forego any administrative appeal. A noncitizen who does not appeal his deportation order to the BIA is statutorily precluded from seeking judicial review. *See* 8 U.S.C. § 1252(d)(1); *see, e.g.*, *Barron v. Ashcroft*, 358 F.3d 674, 677-78 (9th Cir. 2004). So when an IJ's misrepresentation of

[7] Palomar-Santiago was represented by counsel at some point in his removal proceedings. But, as the Government conceded in the district court in its response to his motion to dismiss, it is "unclear . . . whether [his] attorney was present at [his removal] hearing." C.A. Supp. ER 20; *see also* C.A. Supp. ER 44 (noting that order of removal was served on Palomar-Santiago's "c/o custodial officer," *not* on an attorney). In light of the ineffective-assistance case law just discussed, the district court properly dismissed the indictment whether or not Palomar-Santiago was represented at his removal hearing.

law, combined with erroneous BIA precedent, precludes a noncitizen from seeking BIA review, it follows that these errors improperly deprive the noncitizen of judicial review as well.

Mendoza-Lopez again confirms this result. There, the Court first found that the IJ "failed to advise [defendants] properly of their eligibility to apply for" the administrative remedy of "suspension of deportation." 481 U.S. at 840. And as a result of that administrative deprivation, the Court concluded, those defendants also "were deprived of judicial review of their deportation proceeding." *Id.*; s*ee also, e.g.*, *Lopez*, 445 F.3d at 98 (where the defendant "receive[s] erroneous information from the IJ," that "is a powerful deterrent from seeking judicial relief" and may satisfy § 1326(d)(2)). The same analysis applies here.

D. The Government's policy arguments lack merit.

1. The Government argues that purported "finality interests" counsel against the Ninth Circuit's approach, comparing this case to cases in which an inmate collaterally challenges the criminal conviction or sentence pursuant to which he is incarcerated. Pet. 16. That comparison is inapt. No "finality" interests are even implicated here. Palomar-Santiago is not seeking to undo his prior wrongful deportation. That would be impossible. Rather, he simply is arguing that the Government may not rely on the concededly invalid deportation order to take the new and distinct step of prosecuting him for unlawful reentry. Just as the Government's purported finality interests could not justify the prosecution in *Mendoza-Lopez*, they cannot justify the prosecution here.

2. Nor is there any basis for the Government's speculation that, if Section 1326(d)'s requirements are satisfied here, then "a less diligent alien could find himself in a *better* position than a more diligent one." Pet. 16-17. The Government acknowledges that the Ninth Circuit has never held that to be so, and it does not identify any case in any jurisdiction presenting the facts it hypothesizes. Pet. 18. That should not be surprising: The foundation of the Ninth Circuit's precedent at issue here is that if the defendant had obtained judicial review of his original removal order, he would never have been removed in the first place (for he was not convicted of a removable offense). *See Aguilera-Rios*, 769 F.3d at 633 (explaining that the defendant "would have had the *right* to be in the United States, as a lawful permanent resident, but for the IJ's determination that he was removable—a determination we now know to be legally erroneous"). Certainly that is true in Palomar-Santiago's case. To say that an LPR who was wrongfully removed from this country and years later is able to defend against an illegal-reentry charge is somehow in a "better" position than someone never removed in the first place—and therefore not subject to an illegal-reentry prosecution at all—is to blink reality.

IV. There is no ripe circuit conflict over the question presented.

The Government alleges a 7-1 split over whether a defendant satisfies Section 1326(d) when "the crime that led to his removal should not have qualified as an aggravated felony." Pet. 19. But it is not even clear that the Ninth Circuit itself has come to rest on this issue. And even if it has, the Government's allegation of a conflict is premature.

1. The Government's suggestion (Pet. 19) that the Ninth Circuit will not revisit this issue is not well founded. The Government asserts that it has twice sought "rehearing en banc on this issue" and been rebuffed. *Id.* In fact, the Government has sought rehearing en banc in the Ninth Circuit only once, in the 2017 *Ochoa* case where it had conceded this very issue before the panel. *See Ochoa*, 861 F.3d at 1015. Possibly because of that concession, not even the three concurring judges who questioned the result in *Ochoa* called for a vote on the Government's en banc petition.

The "second" effort the Government points to is its request in this case for *initial* hearing en banc. *Id.* Initial hearing en banc is an extraordinary procedure, which the Ninth Circuit presumably decided was inappropriate at least in part because Palomar-Santiago advanced multiple arguments in support of the district court's judgment. *See* Pet. App. 4a. After the Ninth Circuit upheld that judgment based on the rule the Government challenges here, the Government could have sought rehearing en banc. *See, e.g.*, *Hawaii v. Trump*, 864 F.3d 994 (Mem.) (9th Cir. 2017) ("The denial of the request for initial hearing en banc does not preclude any party from filing a petition for rehearing en banc pursuant to the applicable rules following issuance of the panel opinion."). But the Government filed a certiorari petition instead.

Because the Government's own concessions in *Aguilera-Rios* and *Ochoa* led the Ninth Circuit to adopt a rule that the Government now asserts is erroneous, the Government should bear the burden—before seeking this Court's intervention—of properly seeking correction of that rule in the Ninth Circuit. To date, however, the

Government has not asked the Ninth Circuit in a case where the issue was properly preserved to rehear this issue en banc.[8]

2. Case law in other circuits does not support this Court's intervention either.

As an initial matter, the Government asserts that the Ninth Circuit's position on the question presented is inconsistent with the First Circuit's decision in *United States v. Soto-Mateo*, 799 F.3d 117 (1st Cir. 2015). Not so. In that case, the IJ's legal error deprived the noncitizen only of the "chance of obtaining discretionary relief from removal"—not the right to remain in the country at all. *Id.* at 123.

It is true that six other courts of appeals, at one time or another, have resolved the question presented here differently from the Ninth Circuit. *See Parrales-Guzman*, 922 F.3d at 707; *United States v. Watkins*, 880 F.3d 1221, 1226 (11th Cir. 2018); *Gil-Lopez*, 825 F.3d at 823 (7th Cir. 2016); *Rodriguez*, 420 F.3d at 834; *Rivera-Nevarez*, 418 F.3d at 1110-11; *Martinez-Rocha*, 337 F.3d at 568-70. But those decisions do not counsel in favor of review here either. Three of those six decisions pre-date this Court's intervening decision in *Ross*. *See Rodriguez*, 420 F.3d 831; *Rivera-Nevarez*, 418 F.3d 1104; *Martinez-Rocha*, 337 F.3d 566. And none of the decisions issued after

[8] In *Morales*, the Government argued in its brief to the panel that while the defendant could satisfy Section 1326(d)'s third "fundamental fairness" prong, he could not "satisfy the *first two* requirements for dismissal under § 1326(d)." Br. for the Govt. at 3, *Morales*, No. 13-50477 (9th Cir. Jan. 12, 2015). The Government acknowledged that it had "not contested" the first two requirements in *Aguilera-Rios*. *Id.* at 31. But it did not explain *why* it did not contest those requirements there but yet chose to do so in *Morales*. Nor did the Government request rehearing en banc in *Morales*. The next year, in *Ochoa*, the Government reverted back to conceding the issue. Br. for the Govt. at 12, *Ochoa*, No. 15-10354 (9th Cir. Jan. 20, 2016); *see also United States v. Verduzco-Rangel*, 884 F.3d 918, 920 (9th Cir. 2018) (Government "concede[d] the first two prongs," but defendant did not satisfy the third prong).

Ross consider how this Court's analysis in that case of the statutory term "available" bears on the question presented here. If nothing else, before determining whether any genuine circuit conflict exists, this Court should allow the courts of appeals to absorb and expressly consider *Ross*'s guidance with respect to the administrative-exhaustion requirement in Section 1326(d). Allowing such further percolation might be particularly valuable if, in coming months, the Government were to reconsider its position on the question presented and return to the understanding of Section 1326(d) it espoused in *Aguilera-Rios* and *Ochoa.*[9]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[9] Any such reconsideration of the Government's position could also result in a dismissal of this very case.