No. 20-437

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

REFUGIO PALOMAR-SANTIAGO

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaty, statutes, regulations, and guideline:

Statutes, regulations, and guideline—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 813 Fed. Appx. 282. The order of the district court (Pet. App. 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 petition for a writ of certiorari was filed on October 5, 2020, and granted on January 8, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1326 of Title 8 of the United States Code criminalizes unlawful reentry into the United States following removal and provides in subsection (d) as follows:

> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order [underlying the charge of unlawful reentry] 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 entirety of Section 1326—both in its current form and as it was first enacted in 1952—is reprinted in the appendix to this brief. App., *infra*, 1a-4a.

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). Pet. App. 15a-16a. The district court dismissed the indictment, *id.* at 8a-14a, and the court of appeals affirmed, *id.* at 1a-6a.

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a foreign national may be removed from the United States for a variety of reasons, including having been convicted after admission of

a criminal offense that qualifies as an "aggravated felony," a "crime involving moral turpitude," or a "controlled substance" offense. 8 U.S.C. 1227(a)(2)(A)(i)-(iii) and (B). An individual who has been convicted of an aggravated felony is not only removable, but also "ineligible for several forms of discretionary relief" from removal and potentially subject to expedited-removal proceedings. *Torres* v. *Lynch*, 136 S. Ct. 1619, 1623 (2016); 8 U.S.C. 1228(b).

The INA "defines the term 'aggravated felony' by way of a long list of offenses, now codified at [8 U.S.C.] 1101(a)(43)." *Torres*, 136 S. Ct. at 1623. One of those offenses is "a crime of violence (as defined in section 16 of Title 18 * * *) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted). The cross-referenced provision—18 U.S.C. 16—defines a "crime of violence" as including "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1215-1216 (2018) (holding that the definition of "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague).

In general, an individual charged with being removable by reason of a criminal conviction appears before an immigration judge for a hearing, 8 U.S.C. 1229a, though expedited-removal procedures may be used for "aliens who are not permanent residents" and who have been convicted of committing aggravated felonies, see 8 U.S.C. 1228(b); 8 C.F.R. 238.1 (setting forth proce-

dures for expedited removal). In either form of proceedings, the alien has the statutory privilege of being represented by counsel and may rebut the charges of removability. 8 U.S.C. 1228(b)(4)(B)-(C), 1229a(b)(4). As relevant here, such rebuttal may take the form of contending that a conviction identified in the charging document is not properly classified as an aggravated felony or other type of removable offense. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 5-6 (2004) (describing process culminating in this Court's holding that the petitioner's offense was not a crime of violence, and hence not an aggravated felony); 8 C.F.R. 1240.8, 1240.10(c) and (d).

If an immigration judge enters an order of removal (other than an order entered in absentia), that determination may be appealed to the Board of Immigration Appeals (BIA). See 8 U.S.C. 1229a(c)(5); 8 C.F.R. 1003.1(b) and (d)(3); 8 C.F.R. 1240.15. A final order of removal (including an adverse BIA decision) may be reviewed in a federal court of appeals. See 8 U.S.C. 1101(a)(47), 1252(a) and (d); see generally *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1690-1691 (2020).

2. a. The INA makes it a crime for "any alien who * * * has been * * * removed" from the United States to "thereafter * * * enter[], attempt[] to enter," or be "found in, the United States" without authorization. 8 U.S.C. 1326(a)(1)-(2). As enacted in 1952, Section 1326 did not expressly permit defendants charged with unlawful reentry following a removal to collaterally attack their underlying removal orders. 8 U.S.C. 1326 (1952); see App., *infra*, 4a. This Court, however, held in *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), that "where the defects in" a deportation proceeding previously "foreclose[d] judicial review of that proceeding," the Due Process Clause requires that an unlawful-

reentry defendant be able to "obtain[] judicial review" of the deportation 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 (AEDPA), 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, "[i]n a criminal proceeding under [Section 1326], an alien may not challenge the validity of the deportation order" underlying the charge of unlawful reentry "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 order was fundamentally unfair." 8 U.S.C. 1326(d) (emphasis omitted).

b. 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 the defendant can show that he was removed for an offense that should not have "made him removable under the INA," including, for example, when that offense should not have been classified as an "aggravated felony." *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 sepa-

rate prerequisites of administrative exhaustion and denial of judicial review, codified in Section 1326(d)(1) and (2), do not preclude relief. *Ibid.*[1]

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 a 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 d]efendant's removability." *Ibid.*

All three judges on the *Ochoa* panel joined Judge Graber's concurring opinion, which explained 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

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[1] With respect to Section 1326(d)(3), the Ninth Circuit has stated that "[a]n underlying removal order is 'fundamentally unfair'" when "(1) a defendant's due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States* v. *Martinez-Hernandez*, 932 F.3d 1198, 1203 (quoting *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004)), cert. denied, 140 S. Ct. 392 (2019). That definition of fundamental unfairness is consistent with the definition adopted by other circuits, see, *e.g.*, *Hernandez-Perdomo*, 948 F.3d at 813; *United States* v. *Villarreal Silva*, 931 F.3d 330, 337 (4th Cir.), cert. denied, 140 S. Ct. 571 (2019), though some variation exists in the application of Section 1326(d)(3), see, *e.g.*, U.S. Br. in Opp. at 6-9, 11, *Estrada* v. *United States*, 138 S. Ct. 2623 (2018) (No. 17-1233). The question presented in this case is limited to the proper understanding and application of the procedural requirements in Section 1326(d)(1) and (2). See Pet. I.

step with our sister circuits' correct interpretation." 861 F.3d at 1018. The concurrence urged the court to "re-hear th[e] case en banc to correct [its] course." *Ibid.* 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).

3. a. Respondent "is a Mexican national who was granted permanent resident status in the United States in 1990." Pet. App. 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). Pet. App. 2a; see *id.* at 31a (reprinting notice to appear). At the time, the BIA had recently held that a conviction for aggravated DUI under Arizona law was an aggravated felony under 18 U.S.C. 16(b)'s definition of a "crime of violence" because it was "the type of crime that involves a substantial risk of harm to persons and property." *In re Magallanes-Garcia*, 22 I. & N. Dec. 1, 4-5 (B.I.A. 1998), overruled by *In re Ramos*, 23 I. & N. Dec. 336 (B.I.A. 2002) (en banc).

At respondent's removal hearing, the immigration judge determined that respondent was "subject to removal on the charge[] in the Notice to Appear." Pet. App. 17a. The immigration judge's order states that respondent "made no application for relief from removal" and "[w]aived" his right to appeal. *Id.* at 17a-18a. Respondent was removed to Mexico in June 1998. *Id.* at 9a.

b. Three years later, the Ninth Circuit concluded—in cases involving other parties—that convictions in California state court for DUI causing bodily injury did not qualify as aggravated felonies. See *United States* v. *Trinidad-Aquino*, 259 F.3d 1140, 1143, 1146 (2001) (interpreting 18 U.S.C. 16(b) for purposes of Sentencing Guidelines § 2L1.2(b)(1)(A) (1998)); *Valencia-Valencia* v. *INS*, 22 Fed. Appx. 754, 755 (2001) (applying *Trinidad-Aquino* to removal proceedings). And three years after that, this Court reached the same conclusion with respect to a similar offense under Florida law. *Leocal*, 543 U.S. at 10-12 (holding that Section 16(b)'s definition of a "crime of violence" requires "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense").

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

The district court granted respondent's motion to dismiss the indictment under Section 1326(d). Pet. App. 8a-14a. Although precedent at the time of respondent's removal proceedings had supported the immigration judge's determination that respondent's California DUI offense was an "aggravated felony," by the time of the criminal proceeding, it was "uncontested" that the offense was no longer considered an aggravated felony, as described above. *Id.* at 12a. The district court explained that, under the Ninth Circuit's approach to Section 1326(d), that conclusion, taken alone, was sufficient 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 that

the removal proceedings had deprived him of the opportunity for judicial review. Pet. App. 12a. The district court accordingly concluded that "under Ninth Circuit precedent," respondent had "met or satisfied each of the three § 1326(d) requirements," and, in light of his successful collateral attack on his removal order, he could not "be charged with unlawfully reentering the United States." *Id.* at 13a. The court dismissed the indictment with prejudice. *Ibid.*

4. 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. Pet. App. 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). Pet. App. 3a. But the panel observed that it had "no choice but to apply" circuit precedent "[w]hatever merits the government's argument may have." *Ibid.*

Judge Clifton filed a concurrence reiterating the view of the judges on the *Ochoa* panel that the Ninth Circuit's precedents "should be revisited by an en banc panel of this court." Pet. App. 5a. He explained that those precedents have "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 question "merits" further consideration because the court "remain[s] inconsistent with the statute and on the wrong side of a circuit split." *Id.* at 5a-6a.

SUMMARY OF ARGUMENT

Under 8 U.S.C. 1326(d), an unlawful-reentry defendant may collaterally attack a prior removal order only by demonstrating three separate things: that he exhausted any available administrative remedies; that the removal proceedings improperly deprived him of the opportunity for judicial review; and that entry of the removal order was fundamentally unfair. The Ninth Circuit, however, deems all three prerequisites to be satisfied if the conviction supporting the underlying removal would not qualify as a removable offense under current law. That abbreviated approach cannot be reconciled with Section 1326's text, history, design, or purposes.

A. The court of appeals' reading of Section 1326(d) lacks any textual basis. The statute provides that an unlawful-reentry defendant "may not challenge the validity" of his prior removal order "unless [he] demonstrates that" (1) he "exhausted any administrative remedies that may have been available"; (2) the removal proceedings "improperly deprived [him] of the opportunity for judicial review"; "*and* (3) the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d) (emphasis added). Those prerequisites are both conjunctive and mandatory. A successful collateral attack requires a showing of all three. And this Court's cases confirm that where Congress imposes mandatory procedural exhaustion requirements, as it has in Section 1326(d), courts must enforce those requirements as written.

The court of appeals, however, does not require a defendant to satisfy Section 1326(d)'s procedural requirements if he can show that, as a substantive matter, his underlying offense would not qualify as a removable offense under current law. The court reached that result not based on the statute's text, but as an extension of its precedent holding that a waiver of appeal rights in removal proceedings is not considered and intelligent if the immigration judge fails to inform the individual of potential eligibility for discretionary relief. But the court of appeals' rule is incorrect in the discretionary-relief context. And in any event, its logic has no application to the class of cases at issue here. Even assuming that an individual who was not advised about the availability of discretionary relief may have been unaware of an issue distinct from removability that could have been raised on appeal, when an immigration judge classifies a prior conviction as an aggravated felony, there is plainly notice of a legal issue—the aggravated-felony classification—that supports the charge of removability, providing both the knowledge and the incentive to seek further review.

The Ninth Circuit's approach cannot be justified on the alternative basis that administrative and appellate review are not "available" when an immigration judge makes a removability determination that, while reasonable under then-governing law, is later called into question. The processes for administrative and appellate review sensibly funnel objections to removability determinations into the proceedings that culminated in removal. Contrary to respondent's arguments in opposing the petition for a writ of certiorari, this case does not involve any misrepresentation or obstacle that could render "unavailable" the well-established procedures

for seeking administrative and judicial review of a removal order.

B. The Ninth Circuit's approach also runs contrary to Section 1326(d)'s history and purposes. Congress enacted Section 1326(d) to codify the holding of *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), in which this Court held that due process requires that an unlawful-reentry defendant be permitted to collaterally attack a deportation order when the deportation proceedings "effectively eliminate[d] the right of the alien to obtain judicial review." *Id.* at 839. Consistent with that decision, Section 1326(d) permits "[l]imit[ed]" collateral attacks. 8 U.S.C. 1326(d) (emphasis omitted) (section title). Neither the holding of *Mendoza-Lopez* nor Congress's implementation of it allows a successful collateral attack on a removal order to be based on nothing but subsequent changes in the substantive law underlying the order. Indeed, in a variety of contexts, this Court has recognized that finality interests justify limiting collateral attacks on prior criminal convictions or administrative determinations. Properly construed, Section 1326(d)'s procedural requirements serve the same kinds of finality interests.

C. Finally, adoption of the court of appeals' interpretation of Section 1326(d) would threaten to produce consequences Congress could not have intended. When the substantive law regarding the proper classification of a prior offense of conviction has changed, the Ninth Circuit excuses unlawful-reentry defendants who waived their right to administrative review from complying with Section 1326(d)(1) and (2) on the theory that the waiver was not considered and intelligent. But a defendant who actually, but unsuccessfully, exhausted his administrative and judicial remedies could not rely on

that logic, because he did not waive his rights at all. As a result, a diligent defendant might be precluded from bringing a successful collateral attack, even while a less-diligent defendant would not be. This Court should not adopt an interpretation of Section 1326(d) that threatens such incongruous results.

ARGUMENT

AN UNLAWFUL-REENTRY DEFENDANT CANNOT COLLATERALLY ATTACK A REMOVAL ORDER BY SHOWING ONLY THAT HE WAS REMOVED FOR A CRIME THAT WOULD NO LONGER BE CONSIDERED A REMOVABLE OFFENSE

Congress has provided criminal defendants with a mechanism for mounting a collateral attack on the validity of a prior removal order that serves as the predicate for an unlawful-reentry charge. Under 8 U.S.C. 1326(d), a defendant must show that he exhausted any available administrative remedies, that he was improperly deprived of the opportunity for judicial review, *and* that the removal was fundamentally unfair. Despite the clear statutory text, the Ninth Circuit alone "excuse[s]" a defendant from the two procedural prerequisites upon a demonstration that the removal was based on a crime that would not be considered a removable offense under circuit law at the time of the unlawful-reentry proceeding. *United States* v. *Ochoa*, 861 F.3d 1010, 1015 (2017) (per curiam). The Ninth Circuit's approach cannot be reconciled with Section 1326(d)'s text, history, design, or purposes. Instead, an unlawful-reentry defendant must independently satisfy each of Section 1326(d)'s requirements in order to succeed in a collateral attack on the underlying removal order.

A. The Statutory Text Establishes That An Unlawful-Reentry Defendant Must Independently Satisfy The Procedural Requirements In 8 U.S.C. 1326(d)(1) and (2)

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 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 [a court's] last.").

1. After specifying the elements of unlawful-reentry offenses in 8 U.S.C. 1326(a) and (b), Congress has provided what is expressly entitled a "[l]imitation on collateral attack on underlying deportation order," 8 U.S.C. 1326(d) (emphasis omitted). Section 1326(d) provides as follows:

> 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 three 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" in that criminal proceeding "unless the alien demonstrates" the prerequisites identified in paragraphs (1) through (3). 8 U.S.C. 1326(d) (emphasis added). And those prerequisites are connected by "and," making it clear that all three of them must be satisfied. 8 U.S.C. 1326(d)(2); see, *e.g.*, *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); *United States* v. *Estrada*, 876 F.3d 885, 887 (6th Cir. 2017) (similar), cert. denied, 138 S. Ct. 2623 (2018); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (*Reading Law*) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.").

In Section 1326(d), Congress limited collateral attacks on removal orders to situations in which the defendant "exhausted any administrative remedies that may have been available" in the removal proceedings and was "deprived * * * of the opportunity for judicial review." 8 U.S.C. 1326(d)(1) and (2). Those two prerequisites are procedural in nature and are independent of the substantive question whether the defendant was actually removable or whether the entry of the removal order was otherwise "fundamentally unfair." 8 U.S.C.

1326(d)(3). Those procedural requirements serve important interests, including ensuring that criminal prosecutions under Section 1326 are not transformed into opportunities to litigate issues related to removability that could have been raised during the initial proceedings. See pp. 33-36, *infra*.

2. Congress has not authorized courts to deviate from the procedural prerequisites in Section 1326(d)(1) and (2). As this Court has explained, when Congress uses "mandatory language" in an exhaustion provision, "a court may not excuse a failure to exhaust." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). Unlike "judge-made exhaustion requirements," which "remain amenable to judge-made exceptions," statutory exhaustion requirements are not subject to "judicial discretion." *Id.* at 1857. Thus, "[t]ime and again, this Court has taken [mandatory exhaustion] statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Ibid.*; see, *e.g.*, *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."); *McNeil* v. *United States*, 508 U.S. 106, 111, 113 (1993) (where a "clear statutory command" requires exhaustion, courts "are not free to rewrite the statutory text"); *McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Coit Independence Joint Venture* v. *Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute."). Thus, courts "must honor Congress's choice" and enforce the statutory exhaustion requirement as written. *Ross*, 136 S. Ct. at 1857.

3. Despite that principle and the statutory text, the Ninth Circuit has held that defendants are "excused" from meeting the procedural requirements of Section 1326(d)(1) and (2) whenever they can show that, in hindsight, an immigration judge substantively erred in classifying a prior crime as a removable offense. *Ochoa*, 861 F.3d at 1015. That approach effectively reads Section 1326(d)(1) and (2) out of the statute. The after-the-fact conclusion that respondent's prior offense of conviction did not qualify as an "aggravated felony" in no way "demonstrates" that respondent "exhausted any [available] administrative remedies," or that the removal proceedings "improperly deprived [him] of the opportunity for judicial review." 8 U.S.C. 1326(d)(1) and (2). To the contrary, an immigration judge's legal determination about removability is the type of issue that generally can and should be raised on appeal to the BIA—and, if unsuccessful there, in a petition for review by the court of appeals—in the context of the initial removal proceedings. Thus, this Court periodically considers, on direct review from removal proceedings, whether immigration judges, the BIA, or the courts of appeals have correctly determined that certain offenses trigger removability under the INA.[2]

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[2] See, *e.g.*, *Mellouli* v. *Lynch*, 575 U.S. 798, 803-804 (2015) (whether a misdemeanor conviction for concealing pills was for a controlled-substance offense); *Moncrieffe* v. *Holder*, 569 U.S. 184, 188-189 (2013) (whether possession of marijuana with intent to distribute was an aggravated felony); *Kawashima* v. *Holder*, 565 U.S. 478, 480-482 (2012) (whether certain federal tax offenses were aggravated felonies); *Nijhawan* v. *Holder*, 557 U.S. 29, 32-33 (2009) (whether certain federal fraud offenses were aggravated felonies); *Leocal* v. *Ashcroft*, 543 U.S. 1, 5-6 (2004) (whether DUI causing bodily injury was an aggravated felony); see p. 26, *infra*.

The Ninth Circuit has never identified a textual basis for automatically deeming the procedural requirements of Section 1326(d)(1) and (2) to be satisfied simply because it later turned out that the immigration judge misclassified a prior offense. Instead, the court has reached that result through multiple steps of atextual reasoning.

First, even when aliens have conceded removability and explicitly waived their rights to further review in the removal proceedings themselves, the Ninth Circuit has nonetheless determined that they satisfy Section 1326(d)(1) and (2) if the record supports "'an inference'" that they were eligible for discretionary relief from removal and the immigration judge "fail[ed] to 'advise the[m] 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). In the Ninth Circuit's view, that circumstance automatically means that the appeal waiver was not "considered and intelligent," rendering the waiver constitutionally invalid and turning it into a nullity for purposes of Section 1326(d)(1) and (2). *Ibid.*

Second, the Ninth Circuit has extended its nullification of appeal waivers to cases like this one, where the potential availability of discretionary relief turns on the same question as removability 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. *Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004); see generally *Ochoa*, 861 F.3d at 1020-1023 (Graber, J., concurring) (describing the evolution of Ninth Circuit law). For example, in *Pallares-*

Galan, the defendant had been removed based on a previous conviction for molesting a child, which the immigration judge determined constituted an aggravated felony that made him both removable and ineligible for discretionary relief. 359 F.3d at 1092-1093; see 8 U.S.C. 1229b(a)(3). When the defendant unsuccessfully moved to dismiss his subsequent indictment for unlawful reentry, the court of appeals held that his prior offense was not an aggravated felony, and it therefore excused him from complying with Section 1326(d)(1) and (2). See *Pallares-Galan*, 359 F.3d at 1093, 1096, 1103.

Neither step in the Ninth Circuit's analytical progression is sound. As a threshold matter, a "majority of circuits ha[s] rejected" the proposition "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). Those circuits are correct in recognizing that an alien's waiver of further review is not invalidated, nor are 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 same legal question that rendered the defendant removable or not.

The Ninth Circuit's rationale for effectively nullifying an appeal waiver in the absence of an advisement about eligibility for discretionary relief is that the alien may have been unaware of an issue distinct from removability—the potential for discretionary relief—that could have been

raised. See *Arrieta*, 224 F.3d at 1079. But when the immigration judge classifies a 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 plainly has notice of the single legal issue—the aggravated-felony classification—that both renders him removable and makes him ineligible for various forms of discretionary relief. He therefore 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 subsequent case law demonstrates that an argument that could have been made on appeal has merit. *Muro-Inclan*, 249 F.3d at 1182 (quoting *Arrieta*, 224 F.3d at 1079); see, *e.g.*, *Soto-Mateo*, 799 F.3d at 123 ("A waiver of rights based on a reasonable interpretation of existing law is not rendered faulty by later jurisprudential developments."); *United States* v. *Rodriguez*, 420 F.3d 831, 834 (8th Cir. 2005) ("A subsequent change in the law does not render [an alien's] waiver of his right to appeal not considered or intelligent.") (citation and internal quotation marks omitted).

That understanding is consistent with this Court's recognition in other contexts that an individual's inability to foresee a future change in the law does not invalidate a waiver of rights. In *Brady* v. *United States*, 397 U.S. 742 (1970), the defendant pleaded guilty to kidnapping under 18 U.S.C. 1201(a), which authorized the death penalty if the defendant was tried by a jury, but not if he pleaded guilty or agreed to a bench trial. *Brady*, 397 U.S. at 743-744, 756. Nine years after the defendant's guilty plea, this Court held that the death-penalty provision in Section 1201(a) was unconstitutional because it impermissibly burdened defendants'

exercise of the right to a jury trial. *United States* v. *Jackson*, 390 U.S. 570, 583, 591 (1968); see *Brady*, 397 U.S. at 746. The defendant in *Brady* then sought relief under 28 U.S.C. 2255, contending that his guilty plea—and the accompanying waiver of his Fifth and Sixth Amendment rights—had not been "intelligently made." *Brady*, 397 U.S. at 756; see *id.* at 744, 746. This Court rejected that claim, explaining that "absent misrepresentation or other impermissible conduct by state agents, 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." *Id.* at 757 (citation omitted).

The Ninth Circuit accepts this principle in other contexts. Thus, it has rejected a criminal defendant's attempt to nullify his appellate waiver because he "did not realize the strength of his potential appellate claims at the time he entered into the plea agreement." *United States* v. *Nguyen*, 235 F.3d 1179, 1184 (2000), abrogated on other grounds by *United States* v. *Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011). As the court explained, "[t]he whole point of a waiver * * * is the relinquishment of claims *regardless* of their merit." *Ibid.* The court of appeals has provided no sound basis for applying a different rule where an unlawful-reentry defendant contends that a change in the law excuses the failure to exhaust administrative remedies or to pursue judicial review in the underlying removal proceedings.

4. Seeking to bolster the court of appeals' analysis, respondent has previously contended (Br. in Opp. 18-19) that Section 1326(d)(1) and (2)'s requirements are "satisfied" (rather than "excused") whenever an immigration judge's classification of a prior conviction as a

removable offense turns out to be wrong under subsequent judicial decisions. That is incorrect. As already discussed, Section 1326(d)(1) requires unlawful-reentry defendants to "demonstrate[]" that they exhausted all "available" administrative remedies in the prior removal proceedings, 8 U.S.C. 1326(d)(1), while Section 1326(d)(2) requires them to show that those "proceedings * * * improperly deprived" them of "the opportunity for judicial review," 8 U.S.C. 1326(d)(2). The fact that an immigration judge accurately classified a prior offense as an aggravated felony under the law that existed at the time of an alien's removal—but the law subsequently changed—does not "satisf[y]," Br. in Opp. 19, those requirements.

Respondent's theory rests on a misapplication of this Court's precedent. Respondent previously invoked (Br. in Opp. 22) this Court's decision in *Ross* v. *Blake*, which considered a provision of the Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. 3601 note, mandating that an inmate exhaust "such administrative remedies as are available" before bringing suit to challenge prison conditions. *Ross*, 136 S. Ct. at 1854-1855 (citation omitted); see 42 U.S.C. 1997e(a). The Court rejected the Fourth Circuit's adoption of an "unwritten * * * exception" to the statutory exhaustion requirement. *Ross*, 136 S. Ct. at 1855; see *id.* at 1856-1858. It explained that "mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion" to "excuse a failure to exhaust." *Id.* at 1856-1857. *Ross*'s holding thus provides no support for the Ninth Circuit's practice here, which effectively "add[s] unwritten limits onto" Section 1326(d)'s "rigorous textual requirements." *Id.* at 1857.

As respondent has emphasized (Br. in Opp. 22), the Court in *Ross* went on to address the circumstances in which a grievance procedure is not "available" for purposes of the PLRA. 136 S. Ct. at 1859. The Court stated that "an administrative procedure" is "'available'" where it is "'capable of use for the accomplishment of a purpose'" and is "'accessible or may be obtained.'" *Id.* at 1858-1859 (citations omitted). And the Court "note[d] as relevant * * * three kinds of circumstances in which an administrative remedy, although officially on the books," would *not* be considered "available." *Id.* at 1859. First, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end," because, for example, the "particular administrative office" to which grievances are directed "disclaims the capacity to consider those petitions." *Ibid.* Second, "an administrative scheme" is "unavailable" when it is "so opaque that it becomes, practically speaking, incapable of use." *Ibid.* And third, "the same is true when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1860.

Ross's three categories of unavailability have no application here. Each concerns a situation in which an individual is, as a practical matter, denied access to the *procedure* for review. See *Ross*, 136 S. Ct. at 1859-1860. But the lower courts never found that respondent's access to review by the BIA and (if necessary) the court of appeals was so hampered. Instead, they determined that because the *substantive* law regarding respondent's prior offense had changed, he was excused from satisfying Section 1326(d)'s *procedural* requirements. See Pet. App. 3a-4a, 12a-13a.

Although respondent has attempted to shoehorn this case into *Ross*'s categories, see Br. in Opp. 22-23, those efforts are unpersuasive. Respondent has primarily focused on *Ross*'s third category; but contrary to his suggestion (*id.* at 22), the immigration judge's determination that his prior conviction was an "aggravated felony" did not constitute a "misrepresentation" about the governing procedures. See *Ross*, 136 S. Ct. at 1860. Indeed, the immigration judge's determination was not a misrepresentation at all; rather, as respondent has acknowledged (Br. in Opp. 22), it was an accurate statement of the substantive law at the time of respondent's removal hearing. Respondent also was not "misled or threatened" in a way that prevented his "use of otherwise proper procedures." *Ross*, 136 S. Ct. at 1860. The immigration judge's decision did not suggest that respondent could not appeal and argue that then-current law was incorrect. Cf. *Bousley* v. *United States*, 523 U.S. 614, 621-622 (1998) (recognizing that a government official's mistaken advice about the law does not excuse the failure to challenge that advice on appeal); *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 358-360 (2006) (holding that state officials' failure to inform a foreign national detained on criminal charges of his rights to consular notification and communication under Article 36 of the Vienna Convention on Consular Relations and Optional Protocol on Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292-294, did not excuse the procedural default when the foreign national failed to raise an Article 36 claim at trial or on direct appeal).

Nor was the route for administrative review in respondent's removal proceedings so "opaque" that it was impossible for him to "discern." Br. in Opp. 22 (quoting *Ross*, 136 S. Ct. at 1859). Although the question

whether a particular offense qualifies as an "aggravated felony" may raise difficult *substantive* questions under the Court's categorical approach, see *id.* at 23, such difficulties do not make the *process* for administrative review confusing or "incapable of use." *Ross*, 136 S. Ct. at 1859. That is true even though, as respondent has pointed out (Br. in Opp. 22-23), some individuals proceed pro se in their removal proceedings. The Ninth Circuit's rule does not rest on that ground, and it applies to uncounseled and counseled unlawful-reentry defendants alike. See Pet. App. 2a-4a; *id.* at 29a. Aliens have a statutory privilege to retain counsel of their choice in removal proceedings. See 8 U.S.C. 1229a(b)(4)(A), 1362; see also 8 U.S.C. 1229(b). But the decision to represent oneself does not render unavailable the procedures for appeal—notice of which must be provided to anyone ordered to be removed by an immigration judge, see 8 U.S.C. 1229a(c)(5).

The fact that the immigration judge applied then-governing BIA precedent—and thus that the BIA might have rejected on the merits any appeal brought by respondent, see Br. in Opp. 22—also did not render review unavailable. Regardless of whether respondent's argument would have succeeded at the time, the relevant question is whether he "had the *opportunity* to obtain administrative and judicial review and thus the *opportunity* to challenge the categorization of his conviction as an aggravated felony." *Ochoa*, 861 F.3d at 1020 (Graber, J., concurring). Cf. *Bousley*, 523 U.S. at 623 (holding that a defendant's failure to attack his guilty plea on direct appeal should not be excused as "futile" "simply" because his claim "was unacceptable to [a] particular court at that particular time") (citations and internal quotation marks omitted).

Indeed, the experience of other individuals who pursued direct review of their removal orders and prevailed demonstrates conclusively that the usual procedures for further review were not rendered unavailable by the mere existence of adverse BIA precedent about the classification of DUI offenses as aggravated felonies. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 3-4 (2004) (holding that the Florida offense of DUI causing serious bodily injury was not an aggravated felony); *Martinez-Sanchez* v. *INS*, 22 Fed. Appx. 755, 756 (9th Cir. 2001) (holding that the California offense of DUI causing bodily injury to another person is not an aggravated felony); *Valencia-Valencia* v. *INS*, 22 Fed. Appx. 754 (9th Cir. 2001) (same); see also, *e.g.*, *Mellouli* v. *United States*, 575 U.S. 798, 804-810 (2015) (reversing finding of removability where alien in removal proceedings challenged then-controlling BIA precedent about the classification of drug-paraphernalia offenses).

More generally, respondent's reading of *Ross* is also implausible because it would make unavailability excusing mandatory exhaustion a de facto rule rather than—as the *Ross* Court "expect[ed]"—a narrow exception that is infrequently satisfied. 136 S. Ct. at 1858-1859. The Court in *Ross* observed that the "three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief," would "not often arise." *Id.* at 1859. Yet, on respondent's view, the administrative scheme for review of a removability determination—which is well-established by statute and regulation, see pp. 3-4, *supra*—would be deemed "unavailable" *whenever* an immigration judge reasonably applied the law at the time of an alien's removability determination, but that law subsequently changes (including in the alien's own

criminal case). That is by no means a rare occurrence in the Ninth Circuit. See, *e.g.*, *Ochoa*, 861 F.3d at 1013, 1018; *United States* v. *Morales*, 634 Fed. Appx. 606, 608 (9th Cir. 2016); *United States* v. *Aguilera-Rios*, 769 F.3d 626, 630-631, 636-637 (9th Cir. 2014); *Camacho-Lopez*, 450 F.3d at 929-930; *United States* v. *Ramos-Cruz*, 406 Fed. Appx. 177, 178 (9th Cir. 2010); *United States* v. *Cervantes-Gonzales*, 238 Fed. Appx. 278, 280 (9th Cir. 2007); *Pallares-Galan*, 359 F.3d at 1098-1103. Neither the Ninth Circuit nor respondent has provided any sound reason to construe Section 1326(d)(1) and (2)'s procedural requirements to cease to serve any practical purpose with such frequency.

5. Finally, respondent has previously observed (Br. in Opp. 24) that once he decided to forgo any appeal to the BIA, he was also unable to seek judicial review. But a defendant's decision not to exhaust an "available" administrative remedy, 8 U.S.C. 1326(d)(1), cannot satisfy his obligation to "demonstrate[]" that his removal "proceedings * * * improperly deprived [him] of the opportunity for judicial review," 8 U.S.C. 1326(d)(2). Respondent therefore cannot bootstrap his failure to exhaust administrative remedies into a determination that the proceedings themselves further deprived him of the opportunity to seek judicial review. See *United States* v. *Hernandez-Perdomo*, 948 F.3d 807, 811-812 (7th Cir. 2020).[3]

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[3] In *Hernandez-Perdomo*, the Seventh Circuit explained that the defendants had failed to exhaust available administrative remedies by failing to file motions to reopen their removal proceedings. 948 F.3d at 811-812. The court noted that filing such motions to reopen would have allowed them to "obtain[] judicial review." *Id.* at 812. It further observed that, for purposes of Section 1326(d)(2), they had not been "'improperly deprived' of judicial review, they just never

B. Section 1326(d)'s History And Purposes Confirm That Each Of Its Three Prerequisites Must Be Independently Satisfied

Although the text of Section 1326(d) alone forecloses the Ninth Circuit's approach, an examination of the provision's genesis underscores the flaws of the court of appeals' rule. 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 after a previous removal if he *never* had a fair procedural opportunity to challenge the underlying removal order. Granting automatic relief to an unlawful-reentry defendant who *did* have such an opportunity during his removal proceedings, based solely on an after-the-fact claim of substantive error, subverts that design and imperils important finality interests.

1. 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); App., *infra*, 4a. 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

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sought it." *Ibid.* (citation omitted). As a result, they had failed to satisfy Section 1326(d)(1) *and* (2). *Id.* at 811.

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 that the underlying removal order is fundamentally defective. See 481 U.S. at 840 ("If the violation of [the defendants'] 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). But that rationale provides no basis to find a due-process violation when a defendant simply failed to take advantage of administrative remedies that were available in the original removal proceedings, or who otherwise had a clear, but untrodden, path for seeking judicial review of the removal order. Thus, the need for collateral review exists only "where the defects in [the earlier] administrative proceeding foreclose[d] judicial review of that proceeding." *Id.* at 838; see *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").

Section 1326(d) itself does not extend further than *Mendoza-Lopez*, and therefore does not preclude an unlawful-reentry prosecution against a defendant who has already had an opportunity to seek review of the underlying removal order. That is to be expected, because 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 *Hernandez-Perdomo*, 948 F.3d at 810 (similar); see also 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*").

Nor is there any indication in the statute that Congress sought to sweep more broadly. To the contrary, in enacting Section 1326(d), Congress described the provision in the subsection heading as a "[*l*]*imitation* on collateral attack on underlying deportation order," 8 U.S.C. 1326(d) (emphasis altered). See AEDPA § 441, 110 Stat. 1279; *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) ("Although section headings cannot limit the plain meaning of a statutory text, they supply cues as to what Congress intended.") (citations and internal quotation marks omitted); *Reading Law* 221-222 (similar); see also 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"); *United States* v. *Delacruz-Soto*, 414 F.3d 1158, 1166 (10th Cir. 2005) ("[Section] 1326(d) places strict limits on the circumstances in which * * * underlying deportation orders can be challenged[.]").

Accordingly, Section 1326(d)(3) requires the underlying removal proceedings to have been "fundamentally unfair"—which the *Mendoza-Lopez* Court assumed had been the case in the proceedings at issue there, see 481 U.S. at 834 n.8, 839. But, as the *Mendoza-Lopez* Court had done, Congress also required something more be-

fore the outcome of the earlier proceeding could be disregarded: Section 1326(d)(1) and (2) add *procedural* requirements for defendants to demonstrate that they also suffered "a complete deprivation of judicial review of the [removability] determination," *id.* at 840.

2. Respondent has previously relied on a different passage in *Mendoza-Lopez* to contend that "illegal-reentry prosecutions may not proceed where [immigration judges] erroneously failed to advise defendants about * * * 'their eligibility to apply for' * * * discretionary relief." Br. in Opp. 20 (quoting *Mendoza-Lopez*, 481 U.S. at 840). On respondent's view (*ibid.*), "[j]ust as the [immigration judge's] failure to properly advise the defendants in *Mendoza-Lopez* rendered administrative remedies unavailable," the determination here that respondent's prior conviction was an aggravated felony "effectively thwarted any opportunity for administrative relief." That argument lacks merit for three reasons.

First, the passage on which respondent relies was not part of *Mendoza-Lopez*'s holding. After holding that an unlawful-reentry defendant must be permitted to collaterally attack his prior removal where the proceeding "effectively eliminate[d]" his right to obtain judicial review, the Court discussed the application of that rule to the case before it. *Mendoza-Lopez*, 481 U.S. at 839. The Court explained that the government "did not seek review of the Court of Appeals' holding that the deportation proceeding in th[at] case was fundamentally unfair." *Id.* at 834 n.8; see *id.* at 839. Instead, the government asked the Court "to assume that [the] deportation hearing [in that case] was fundamentally unfair in considering whether collateral attack on the hearing may be permitted." *Id.* at 839-840. The Court

"consequently accept[ed] the legal conclusions of the court below that the deportation hearing violated due process." *Id.* at 840. In fact, the Court "declin[ed] * * * to enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review." *Id.* at 839 n.17; see, *e.g.*, *United States* v. *Lopez*, 445 F.3d 90, 99 (2d Cir. 2006) (Sotomayor, J.) (observing that because "the government [in *Mendoza-Lopez*] did not challenge" the district court's findings, "th[is] Court assumed that the[] failures by the [immigration judge] violated the aliens' due process rights and concluded that the violation amounted to a complete denial of judicial review").

Second, even if *Mendoza-Lopez* had decided that an immigration judge's failure to advise an alien about eligibility for *discretionary relief* violates due process, respondent has acknowledged (Br. in Opp. 6-7) that this case "does not present th[e] discretionary-relief issue." As explained above, see pp. 18-19, *supra*, the Ninth Circuit in other cases has nullified appeal waivers on the ground that they lacked an advisement about the availability of discretionary relief from removal, and the aliens may therefore have unwittingly let slip the opportunity to press a claim that could have prevented removal. That reasoning does not apply here. Because the classification of respondent's offense as an aggravated felony *both* rendered him removable *and* denied him eligibility for various forms of discretionary relief from removal, he was plainly on notice of that issue and had both the incentive and the opportunity to contest it.

Third, the alleged error in *Mendoza-Lopez* was not only that the immigration judge erroneously concluded that the aliens were ineligible for discretionary relief, but also that the immigration judge failed to explain

"their right to appeal" to the BIA. 481 U.S. at 839; see *id.* at 839-840. But the court of appeals' rule applies even where an alien makes no allegation that the immigration judge failed to explain his right to appeal. Respondent made no such allegation below, and the court of appeals nonetheless held that the immigration judge's correct application of then-governing law excused him from complying with the procedural requirements in Section 1326(d)(1) and (2), see Pet. App. 1a-4a. The *Mendoza-Lopez* Court's grant of the government's request to assume a due-process violation in that case thus cannot justify the court of appeals' rule.

3. The Ninth Circuit's approach to Section 1326(d) also "undermin[es] the finality interests the statute was designed to protect." *Ochoa*, 861 F.3d at 1024 (Graber, J., concurring). As legislative sponsors explained in the Senate when describing identically phrased provisions in 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) (section-by-section analysis offered by Sen. Dole); see *id.* at 18,661 (reprinting relevant section of bill's text); see also 140 Cong. Rec. at 28,437 (bill text); 140 Cong. Rec. at 28,440-28,441 (section-by-section analysis offered by Sen. Smith).

Properly construed, Section 1326(d)(1) and (2) permit a collateral attack on a prior removal order when—but only when—the defendant exhausted any available administrative remedies in the removal proceedings and the prior removal proceedings deprived him of the opportunity for judicial review, in addition to the requirement under Section 1326(d)(3) to demonstrate that the proceedings were fundamentally unfair. Section

1326(d)'s procedural requirements protect important interests in finality by foreclosing challenges that could have been raised in the removal proceedings. See *Ochoa*, 861 F.3d at 1020 (Graber, J., concurring) ("Subsection (d) is designed to allow collateral attack only as a safety valve for those who *could not* seek judicial review at the time the original removal order issued.").

The statute is thus consistent with this Court's cases holding that in most circumstances, a criminal conviction may not be collaterally attacked on a basis that could have been raised before the conviction became final. See, *e.g.*, *Bousley*, 523 U.S. at 621-623; *United States* v. *Frady*, 456 U.S. 152, 164 (1982). Absent a contrary indication from Congress, that rule governs where a prior criminal conviction is a basis for a subsequent criminal conviction, or is used to enhance a subsequent criminal penalty. See, *e.g.*, *Daniels* v. *United States*, 532 U.S. 374, 382-383 (2001); *Custis* v. *United States*, 511 U.S. 485, 497 (1994); *Lewis* v. *United States*, 445 U.S. 55, 64-67 (1980). And at least where Congress requires administrative exhaustion, it also applies where, as here, a previous civil determination may provide a predicate for a criminal conviction when "there is an opportunity to be heard and for judicial review." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); cf. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293-294 (1947).[4]

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[4] Despite respondent's prior invocation (Br. in Opp. 22) of it, this Court's decision in *McKart* v. *United States*, 395 U.S. 185 (1969), is not to the contrary. Unlike Section 1326(d)(1), the statute at issue in *McKart* "said nothing which would require" criminal defendants "to raise all their claims" in previous administrative proceedings. *Id.* at 197. Thus, the question in *McKart* was whether, in the absence of a statutory exhaustion requirement, courts should apply

As in those other contexts, the legal system's strong interests in finality support Congress's imposition of limitations on collateral attacks on removal orders. Congress reasonably required aliens to exhaust their administrative and judicial remedies at the time of their removal, rather than waiting to raise their claims years later in criminal proceedings. Cf. *McCarthy*, 503 U.S. at 145 (recognizing that an administrative exhaustion requirement "promotes judicial efficiency" by giving an agency "the opportunity to correct its own errors" and by "produc[ing] a useful record for subsequent judicial consideration"). 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 in his later criminal case. *Ochoa*, 861 F.3d at 1024 (Graber, J., concurring). That new substantive right permits an unlawful-reentry proceeding to include a collateral attack based entirely on a de novo review of whether the defendant's prior offense would constitute an "aggravated felony"

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the "judicial doctrine[]" of administrative exhaustion. *Id.* at 193; see *id.* at 197 & n.14. While the Court declined to apply that doctrine to the specific challenge that the defendant had raised to his prosecution, the decision does not cast doubt on Congress's ability to foreclose collateral attacks on a prior administrative order where a defendant has failed to exhaust prior opportunities for administrative and judicial review. See, *e.g.*, *Yakus*, 321 U.S. at 444 ("[W]e are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity."); cf. *Mendoza-Lopez*, 481 U.S. at 838 n.15 (observing that the decision in *Yakus* "most significantly[] turned on the fact that adequate judicial review of the validity of the regulation was available in another forum").

under current circuit law—even where the aggravated-felony classification could have been challenged in the removal proceedings. The Ninth Circuit's approach thus permits precisely the "wholesale, time-consuming attacks on underlying deportation orders" that Section 1326(d) was designed to prevent. 139 Cong. Rec. at 18,695.

C. Adopting The Court Of Appeals' Rule Would Produce Incongruous Results

Finally, the court of appeals' interpretation of Section 1326(d) threatens consequences that Congress could not have intended. Under the court of appeals' 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 order even if 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, perversely, the court's logic would seemingly provide no similar benefit to an alien who diligently, but unsuccessfully, pursued every avenue for administrative and judicial relief in the underlying removal proceedings.

As described earlier, see pp. 18-19, *supra*, the Ninth Circuit has allowed an alien who waived further review of an aggravated-felony classification in removal proceedings 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 rationale does not apply to a defendant who did not waive his appellate rights at all, but instead exhausted his administrative and judicial remedies. A defendant who actually appealed the

immigration judge's removal determination cannot later claim to have been "improperly deprived * * * of the *opportunity* for judicial review" simply because his appeal proved unsuccessful. 8 U.S.C. 1326(d)(2) (emphasis added); cf. *United States* v. *Gonzalez-Villalobos*, 724 F.3d 1125, 1132 (9th Cir. 2013) (holding 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).

The court of appeals has not addressed this precise issue. But it appears that under the court's rule (or respondent's defense of it), the only unlawful-reentry defendants who could successfully mount collateral attacks on their underlying removal orders based solely on a change in the classification of a prior offense would be those who had *failed* to exhaust their administrative and judicial remedies (and would therefore be excused from satisfying Section 1326(d)(1) and (2)). Those who *did* seek administrative and judicial review, but whose efforts failed in light of then-governing law, 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 [immigration judge] and argued on appeal in the first instance." *Ochoa*, 861 F.3d at 1022 (Graber, J., concurring). This Court should not adopt an interpretation of the statute that would disadvantage unlawful-reentry defendants who complied with that statutory mandate as compared with those who did not.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

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APPENDIX

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) provided:

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.