No. 20-437

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

REFUGIO PALOMAR-SANTIAGO,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs every year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amicus and its members have decades of experience representing criminal defendants in state and federal court. Through these representations, amicus has become intimately familiar with the interaction between the administrative and the criminal processes. In particular, amicus and its members

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[1] This brief is filed with the written consent of all of the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole; no party's counsel authored, in whole or in part, this brief; and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting this brief.

have observed how the findings of an administrative agency can affect criminal proceedings and, accordingly, must advise their clients as to the consequences of prior administrative proceedings in subsequent criminal prosecutions. In light of these obligations, amicus has a strong interest in this case.

SUMMARY OF THE ARGUMENT

More than three decades ago, this Court observed that the government's "use of the results of an administrative proceeding to establish an element of a criminal offense is troubling." *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987). Unlike criminal proceedings, administrative proceedings do not guarantee participants the assistance of counsel, the privilege against self-incrimination, the right to confront and cross-examine witnesses, or various other protections. For these reasons, administrative proceedings do not typically preclude the parties from relitigating any fact decided in the agency hearing at a subsequent criminal trial.

The government's prosecution of a noncitizen for unlawful reentry under 8 U.S.C. § 1326 is a notable departure from this general rule. In a § 1326 prosecution, the government must establish that a defendant (1) has previously "been denied admission, excluded, deported, or removed," or otherwise left the United States while a removal order is pending; and (2) subsequently "enter[ed], attempt[ed] to enter, or [was] at any time found in[] the United States." 18 U.S.C. § 1326. Here, the removal order is both a necessary precondition to liability and an element of the criminal offense. In this context, a removal order is functionally equivalent to a predicate conviction in

the context of a prosecution for being a felon in possession of a firearm.

Noncitizens have limited procedural rights at a removal hearing. They also have only a limited ability to challenge the validity of their removal during a subsequent prosecution for unlawful reentry under § 1326. As a result, a noncitizen like respondent cannot challenge the validity of his removal order unless, among other things, he exhausts his administrative remedies by appealing the order. 8 U.S.C. § 1326(d). But noncitizens subject to removal orders often do not appeal because they lack counsel, do not speak or write English well, or do not comprehend the collateral consequences associated with removal. In nearly all circumstances, further appeal is unlikely to change the result of the immigration proceedings.

In this case, respondent's further appeal of his removal order in 1998 would have been fruitless because settled law foreclosed relief. *See generally United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999) (holding, for the first time, that the categorical approach applied to the determination of whether an offense was an aggravated felony); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (holding that a DUI was not a crime of violence and thus not a removable offense). It was only years later that this Court concluded that a DUI is not an aggravated felony under the Immigration and Nationality Act, *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004), and all parties agreed that respondent could not today be removed for his conduct.

Due process requires that respondent be afforded some meaningful opportunity to obtain judicial review of the administrative proceeding that is the

foundation for this criminal prosecution. *See Mendoza-Lopez*, 481 U.S. at 383, n.15. This Court should therefore allow him to challenge the validity of his removal order in his criminal proceedings. For these reasons, this Court should affirm the judgment of the Ninth Circuit.

ARGUMENT

A. The Government's Use of Removal Orders in § 1326 Prosecutions Raises Serious Due Process Concerns.

Administrative hearings are civil proceedings that rarely involve sanctions imposing the kind of "affirmative disability or restraint" that characterizes a criminal conviction. *Hudson v. United States*, 522 U.S. 93, 104 (1997). Administrative proceedings thus do not carry the same due process protections that apply in criminal trials. For these reasons, the government's "use of the result of an administrative proceeding to establish an element of a criminal offense is troubling." *Mendoza-Lopez*, 481 U.S. at 838 n.15.

This practice is particularly troubling in the context of unlawful reentry prosecutions under 8 U.S.C. § 1326. When the government elects to prosecute a noncitizen under § 1326—rather than simply place the noncitizen in removal proceedings or file other, less serious charges—it must prove that he reentered the country unlawfully after being removed, excluded, or denied admission. *See In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged."). A central part of the government's case is therefore the civil deportation order issued by an administrative body, either an Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA"). *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."). Removal orders thus occupy a unique place in the criminal justice system: they are civil judgments rendered in an administrative proceeding that the government may later rely upon in a criminal prosecution.

The use of these orders in a subsequent criminal prosecution raises serious due process concerns that favor the Ninth Circuit's approach in the decision below.[2] Noncitizens in removal proceedings are not entitled to counsel, cannot exclude wrongfully seized evidence, and do not have a right to confront adverse witnesses. In many immigration cases, including respondent's, the administrative record is incomplete or unavailable. *See N.Y. Legal Assistance Grp. v. B.I.A.*, 987 F.3d 207, 219 (2d Cir. 2021) (noting that the majority of immigration records can be accessed only through a FOIA request); *see also* United States

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[2] That unlawful-reentry defendants are noncitizens allegedly in the country illegally does not diminish these due process concerns. *Matthews v. Diaz*, 426 U.S. 67, 77–78 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."); *see also Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

Department of Justice, Executive Office of Immigration Review, "How to Submit a FOIA or Privacy Act Request," available at https://www.justice.gov/eoir/foia-submit%20a%20request.

The Ninth Circuit's approach of allowing § 1326 defendants whose prior removal orders reflect outdated, since-rejected circuit precedent to challenge the validity of the deportation order protects these due process interests.

1. Administrative Adjudications Do Not Typically Result in Preclusion.

In some circumstances, administrative findings can trigger the common law doctrines of *res judicata* and collateral estoppel in later proceedings. But those findings almost never bind litigants in subsequent criminal proceedings.

In civil actions, the preclusion doctrines serve the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 (1979) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 328–29 (1971)). When an "administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," the civil preclusion doctrines apply to "enforce repose" and "prevent relitigation of factual disputes" that were previously resolved. *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 422 (1966); *see also Univ. of Tennessee v. Elliot*, 478 U.S. 788, 798–99 (1986) (applying the civil preclusion doc-

trines to "the factfinding of state administrative tribunals"). The application of the civil preclusion doctrines to administrative proceedings in these circumstances—when an issue was actually litigated before and resolved by an agency whose function "resembles that of a trial court"—serves the twin aims of finality and judicial economy. *Amoco Prod. Co. v. Heimann*, 904 F.2d 1405, 1414–15 (10th Cir. 1990); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08 (1991) ("We have long favored application of the common law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies [whether state or federal] that have attained finality.").

The civil preclusion doctrines are not well suited to criminal proceedings, where the parties' interest in repose is guarded by the Double Jeopardy Clause. This Court "has interpreted the Double Jeopardy Clause to incorporate the principles of issue preclusion," *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)), but has also cautioned that the two doctrines are "different doctrines, with different histories, serving different purposes," *Currier v. Virginia*, 138 S. Ct. 2144, 2156 (2018). Unlike the civil preclusion doctrines, "the Double Jeopardy Clause and the common law principles it built upon . . . concern more than efficiency. They aim instead . . . to balance vital interests against abusive prosecutorial practices with consideration to the public safety." *Id.* For these reasons, this Court has "been cautious about applying the doctrine of issue preclusion in criminal proceedings." *Herrera v. Wyoming*, 139 S.

Ct. 1686, 1712 (2019) (Alito, J., dissenting); *Bravo-Fernandez*, 137 S. Ct. at 358.

Preclusion rarely applies in criminal prosecutions because finality and judicial efficiency are not the only substantial interests implicated. Civil and criminal proceedings carry fundamentally different protections because they serve fundamentally different ends. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997) (considering whether a statute implicates "either of the two primary objectives of criminal punishment: retribution or deterrence"); *id.* at 373 (Kennedy, J., concurring) (noting that these twin aims "are reserved for the criminal system alone"); *United States v. Ward*, 448 U.S. 242, 251–54 (1980) (holding that civil proceedings "[do] not trigger all the protections afforded by the Constitution to a criminal defendant," including the privilege against self incrimination).

The results of an administrative proceeding or a civil trial thus do not preclude either party from relitigating an issue in a subsequent criminal proceeding, and acquittal in a criminal trial does not bar liability in a subsequent civil hearing. *See, e.g.*, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 235 (1972) ("[T]he difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel."); *United States v. Meza-Soria*, 935 F.2d 166, 169–70 (9th Cir. 1991) ("By parity of reasoning, the difference in standards of proof must preclude the use of civil proceeding findings to establish facts in a criminal case."); *cf. United States v. Gallardo-Mendez*, 150 F.3d 1240, 1242 n.3 (10th Cir. 1998) (noting that "[t]here is a clear split among our sister circuits" on the "question of whether the government

may use the doctrine of collateral estoppel to preclude a criminal defendant from raising an issue adjudicated in a prior criminal proceeding").

Relatedly, civil and administrative proceedings do not typically trigger double jeopardy protections. It is well settled that an individual can be prosecuted even if he has already been subject to civil or administrative sanctions for the same or substantially similar conduct.[3] *See, e.g.*, *Hudson*, 522 U.S. at 103–05 (noting that administrative penalties issued by the OCC did not trigger Double Jeopardy Clause); *Sec. & Exch. Comm'n v. First Fin. Grp. of Texas, Inc.*, 659 F.2d 660, 666–67 (5th Cir. 1981) (noting that federal law permits simultaneous civil and criminal action "by different federal agencies against the same defendant involving the same transaction").

2. A Prior Administrative Adjudication Is Not Typically an Element of a Criminal Offense.

These principles highlight that the government's use of removal orders in a § 1326 prosecution, with limited opportunity to contest the validity of the underlying order, is an outlier. Even in other contexts, the results of immigration proceedings may be challenged. For example, in *United States v. Ortiz-Lopez*, a criminal defendant was permitted to litigate the question of alienage, though an IJ had previously determined that he was not a United States citizen. 24 F.3d 53, 55 (9th Cir. 1994). The court emphasized

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[3] The state courts generally apply the same rule. *See generally, e.g.*, *Ex parte Doan*, 369 S.W. 205 (Tx. Ct. Crim. App. 2012); *Robinson v. State*, 116 Md. App. 1 (Md. Ct. Special App. 1997).

the "difference in burdens of proof between criminal trials and civil proceedings," and explained that "allowing deportation orders to establish the element of alienage in a later criminal trial would eviscerate the element altogether." *Id.* at 56; *cf. Gallardo-Mendez*, 150 F.3d 1243–44 (declining to preclude a defendant from contesting alienage in an unlawful reentry prosecution because of a prior guilty plea for unlawful reentry). Similarly, in reviewing the sufficiency of evidence of a defendant's alienage, a different court focused not on a removal order but on the defendant's own signed affidavit claiming Colombian nationality. *United States v. Garcia*, 452 F.3d 36, 43–44 (1st Cir. 2006). Indeed, the court gave no weight to the IJ's findings underlying the prior removal order in determining that the evidence of alienage was sufficient to support a conviction. *Id.*

Yet the existence of a valid "removal order is a necessary element to the § 1326 charge," *see United States v. Reyes-Romero*, 959 F.3d 80, 97 (3d Cir. 2020), though a defendant's ability to challenge the validity of that order is tightly cabined. In other contexts, where the government uses evidence uncovered during an administrative proceeding in a subsequent criminal prosecution, the defendant can collaterally challenge the government's right to compel production of that evidence. *See, e.g.*, *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375–76 (D.C. Cir. 1980) (noting that a court may provide relief from civil discovery orders or exclude evidence "when the interests of justice seem [ ] to require such action") (quoting *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970)).

One of the only other circumstances in which an administrative judgment routinely serves as a pre-

condition for a criminal prosecution is in the context of tax fraud and tax evasion. *See United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001) (noting that the existence of a tax deficiency is an essential element of the crime of tax evasion). But in that context, robust procedural protections allow an individual to challenge any finding of deficiency before it becomes final. Before issuing a formal notice of deficiency, the I.R.S. issues a pre-assessment letter detailing the proposed tax deficiency and allows the taxpayer to respond. *See* United States Internal Revenue Manual §§ 4.8.9.3, 4.8.9.7.5.2, available at https://www.irs.gov/irm. Once a notice of deficiency has been issued, the taxpayer can respond with additional evidence to the I.R.S., *see id.* at § 4.8.9.23, appeal the notice, *see id.* at § 4.8.9.23.1, and seek resolution in a tax court that is independent of the I.R.S. and governed by rules of procedure that are analogous to the Federal Rules. *See* 26 U.S.C. § 7441 ("The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government."); *see generally*, United States Tax Court, *Rules of Practice and Procedure*, available at https://www.ustaxcourt.gov/rules.html#ROPPe. No such protections exist in the immigration context. In most cases, a noncitizen is served with a notice to appear and is allowed a hearing before an IJ before being ordered removed. Removal proceedings are not governed by robust procedural rules, *see* United States Department of Justice, *Immigration Court Practice Manual*, available at https://www.justice.gov/eoir/page/file/1258536/download, and neither IJs nor the BIA is independent of the Executive Branch.

Like a removal order, a final deficiency finding by the I.R.S. can open the door to criminal liability—for tax evasion or tax fraud. *See* 26 U.S.C. §§ 7201, 7202 (requiring, as an element of the offense, a tax deficiency, but not requiring a deficiency finding by the I.R.S.). But there, a tax defendant is afforded greater procedural protections than a noncitizen being prosecuted for unlawful reentry. Unlike a removal order, an I.R.S. deficiency finding "is only prima facie proof of a deficiency. The assessed deficiency may be challenged by the defendant accused of tax evasion," even if the defendant did not previously exhaust administrative remedies before the I.R.S. or the tax court. *United States v. Silkman*, 156 F.3d 833, 835–36 (8th Cir. 1998); *see also United States v. Voorhies*, 658 F.2d 710, 714–15 (9th Cir. 1981) ("Although a prior valid assessment may be used to show a tax deficiency . . . it is not required to show that deficiency.").

3. The Government's Approach Inappropriately Treats an Administrative Adjudication Like a Predicate Conviction.

Unlawful reentry prosecutions thus stand out because they both require an administrative judgment as a necessary precondition to criminal liability and also bar the defendant from challenging the validity of that judgment for failure to exhaust.

This rule treats the decision of an administrative agency like a predicate felony conviction. For example, in the context of a prosecution under 18 U.S.C. § 922(g), guilt requires a prior felony conviction. *Compare* 18 U.S.C. § 922(g) (requiring that the de-

fendant have "been convicted in any court of [ ] a crime punishable by imprisonment for a term exceeding one year"), *with* 8 U.S.C. § 1326(a)(1) (requiring the defendant be "denied admission, excluded, deported, or removed" from the United States). And, both a § 922(g) defendant and an unlawful reentry defendant are generally barred from collaterally challenging the validity of that prior removal order or felony conviction in a subsequent prosecution unless he has exhausted all other avenues for relief. *See Lewis v. United States*, 445 U.S. 55, 60–61 (1980); 8 U.S.C. § 1326(d).

But none of the significant procedural safeguards that are central to a prior criminal conviction (for a § 922(g) defendant) exist at a removal proceeding (for a § 1326 defendant). *Lopez-Mendoza*, 468 U.S. at 1038. A noncitizen is not afforded the panoply of protections that are central to the criminal process. *United States v. Aguirre-Tello*, 353 F.3d 1199, 1204 (10th Cir. 2004). He does not have a right to counsel. *Michelson v. I.N.S.*, 897 F.2d 465, 467 (10th Cir. 1990) (collecting cases). He cannot invoke the exclusionary rule, *Lopez-Mendoza*, 468 U.S. at 1042, and a noncitizen's refusal to testify or answer questions "may be the basis of an adverse inference." *Mireles v. Gonzales*, 433 F.3d 965, 968 (7th Cir. 2006) (citing *Lopez-Mendoza*, 468 U.S. at 1043–44). A noncitizen has no constitutional right to confront and cross-examine witnesses, and the rules regulating the admission of evidence are much broader than in the criminal context. *Pereida v. Wilkinson*, No. 19-438, slip op. at 17 (March 4, 2021); *see also* United States Department of Justice, *Immigration Court Practice Manual* § 4.16(d), available at

https://www.justice.gov/eoir/page/file/1258536/download.

Though due process requires that an IJ advise a noncitizen of the possibility of relief from deportation, "[t]here is no stand-alone right to notice of the availability of judicial review." *United States v. Lopez*, 445 F.3d 90, 96–97 (2d Cir. 2006) (Sotomayor, J.); *United States v. Muro-Inclan*, 249 F.3d 1180, 1183–84 (9th Cir. 2001). While any waiver of the right to judicial review by a court of appeals must be "both considered and intelligent," *Muro-Inclan*, 249 F.3d at 1182, there is no requirement that IJs explain the rights a potential deportee may waive and fully inquire on the record as to whether the waiver is "considered and intelligent." *Cf.* Fed. R. Crim. P. 11. Even if such a requirement existed, there is rarely a full public record of immigration proceedings, and often the parties themselves only have an incomplete record. *Cf. generally N.Y. Legal Assistance Grp.*, 987 F.3d at 208–09 (noting that "unpublished opinions," which "constitute the vast majority of the final decisions issued by the BIA each year, and are cited and relied upon by the BIA itself, by immigration judges, and by lawyers representing the government in immigration proceedings . . . are not readily available to lawyers representing clients in immigration proceedings").

There is also no clear avenue for a noncitizen to challenge the validity of an order of removal if the law changes. There is no analogue to post-conviction habeas proceedings through which a noncitizen can seek collateral review of the removal order. *Cf. Lewis*, 445 U.S. at 65–67 (noting that a predicate conviction may be subject to collateral attack through ordinary post-conviction proceedings). In some

circumstances, there may be no direct judicial review at all, either because a noncitizen failed to fully seek review from the BIA or because the dispute underlying the noncitizen's petition is one over which a court of appeals does not have jurisdiction. *See, e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020); *United States v. Mendez-Morales*, 384 F.3d 927, 931 (8th Cir. 2004).

Section 1326 proceedings are predicated on the results of an administrative hearing that lacks the protections afforded to criminal defendants and which may not ever be subject to meaningful judicial review. Because the results of that hearing play such an essential role in the subsequent criminal proceeding, this practice is particularly troubling.

B. In Light of these Due Process Concerns, the Court Should Excuse Respondent's Failure to Exhaust

The government's practice of relying on administrative proceedings in criminal prosecutions is "troubling," *Mendoza-Lopez*, 481 U.S. at 838 n.15, and warrants close scrutiny. In the context of this case, it is especially important that a noncitizen like respondent—who could not be removed today—be able to collaterally challenge his underlying removal order when there has been a fundamental change in governing law. *See generally*, Br. of the Appellant, *United States v. Palomar-Santiago*, 2019 WL 1779744 (9th Cir. April 15, 2019); Br. of the United States, *United States v. Palomar-Santiago*, 2021 WL 720352 (U.S. Feb. 22, 2021). As this Court has explained, "there must be some meaningful review of the administrative proceeding" before it may "play a

crucial role in the subsequent imposition of a criminal sanction."[4] *Mendoza-Lopez*, 481 U.S. at 837–38.

Respondent's removal order was entered before the court of appeals concluded that his conduct cannot form the basis for removal. He had no practical path toward appellate relief. This Court should therefore permit his collateral challenge to the validity of the underlying removal order.

1. There Is No Other Opportunity for Meaningful Judicial Review

Congress has provided noncitizens with only a limited avenue to obtain administrative or judicial review of a removal order. *See* 8 U.S.C. §§ 1229a(c)(6), (7) (detailing the requirements for motions to reopen or reconsider a removal order); 8 C.F.R. § 1003.23(b).

The primary path for further administrative review is through a motion to reopen or reconsider, but these motions are strongly disfavored and only rarely granted. *See I.N.S. v. Doherty*, 502 U.S. 314, 323 (1992) ("Motions for reopening immigration proceedings are disfavored . . . [because] every delay works to the advantage of the [ ] alien who wishes merely to remain in the United States."). And review is subject to a strict statute of limitations. 8 C.F.R. § 1003.23(b). Noncitizens must file a motion to re-

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[4] The Court has applied a similar principle in the context of the civil preclusion doctrines, stating that the civil preclusion doctrines are "premised on an underlying confidence that the result achieved in the initial litigation was substantially correct." *Bravo-Fernandez*, 137 S. Ct. 352, 358 (2018). This confidence rests, in large part, on the fact that "[i]n civil suits, inability to obtain review is exceptional." *Id*.

consider a removal order on the basis that the IJ misapplied the law "within 30 days of the date of entry of the final administrative order of removal," 8 U.S.C. § 1229a(c)(6)(B); noncitizens must file a motion to reopen removal proceedings "stat[ing] the new facts that will be proven at a hearing" "within 90 days of the entry of a final administrative order of removal," unless the motion is "based on changed country conditions arising in the country of nationality." 8 U.S.C. §§ 1229a(c)(7)(B), (C).

This avenue of relief is purely discretionary, *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (noting that the BIA has "broad discretion in such matters"), and does not give a noncitizen like respondent a meaningful opportunity to have his petitions considered by the IJ or the BIA under the correct legal standard. In respondent's case, the relevant change in the law arose several years after his removal proceedings became final and the limitations period for filing such a motion had expired. Because a motion premised on a change in the substantive law governing his removal proceedings does not rely on "changed country conditions arising in the country of nationally or the country to which removal has been ordered," 8 U.S.C. § 1229a(c)(7)(C)(ii), any motion seeking relief would have been time-barred.

Moreover, though an IJ or the BIA can *sua sponte* reopen removal proceedings or toll the limitations period for filing a motion to reopen or reconsider, the BIA has made clear that "motions to reopen are disfavored" and are limited to exceptional circumstances. *Matter of H-Y-Z-*, 28 I & N Dec. 156, 158–59 (B.I.A. 2020). A purely discretionary form of relief, based on the application of a "sparingly invoked doctrine," is hardly sufficient to protect a noncitizen's

right to meaningful administrative review of his removal order. *Jobe v. I.N.S.*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc); *see also Mata v. Lynch*, 576 U.S. 143, 148 (2015) ("In *Kucana* [*v. Holder*, 558 U.S. 233 (2010)], we declined to decide whether courts have jurisdiction to review the BIA's use of that discretionary power [to *sua sponte* reopen a removal proceeding]. . . . Courts of Appeals . . . have held that they generally lack such authority.").

This discretionary relief is particularly insufficient for a noncitizen like respondent, who has no available avenues for meaningful judicial review of his removal order. Judicial review of a denial of a motion to reopen or reconsider considers only whether the IJ or BIA abused its discretion. *See Mata*, 576 U.S. at 148; *Hernandez-Alvarez v. Barr*, 982 F.3d 1088, 1095 (7th Cir. 2020) (noting that the BIA's determination "that equitable tolling was not warranted" is reviewed only for an abuse of discretion).

A noncitizen like respondent has no other available opportunity to seek judicial review of the validity of his removal order. Because respondent has already been removed, he cannot seek relief through a writ of habeas corpus. *Cf. generally*, *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) (holding that an individual in immigration detention can seek a writ of habeas corpus). There is no basis for him to collaterally challenge the validity of his state conviction that resulted in his removal proceedings; though valid, that conviction should not have been considered a removable offense. *See Leocal*, 543 U.S. at 13; *Trinidad-Aquino*, 259 F.3d at 1146. And, he cannot now, several years after his removal, seek direct appellate review of the underlying removal order.

Consequently, respondent's only avenue to obtain judicial review of his removal order—which the government does not even defend on the merits—is to challenge its validity in his § 1326 proceedings.

2. The Failure to Exhaust Should Be Excused.

In light of the concerns raised by the use of administrative proceedings in a subsequent criminal prosecution, this Court should excuse respondent's failure to exhaust administrative and judicial remedies and allow him to challenge the validity of his removal order.

Further review of his removal order when it was entered would have been futile; at the time, the law was clear that respondent had committed "a 'crime of violence' as that term is defined in 18 U.S.C. § 16" and so was removable. *Trinidad-Aquino*, 259 F.3d at 1146. He was not told that he could apply for discretionary relief, *see United States v. Palomar Santiago*, Petition for Writ of Certiorari at Appendix E, 21a (U.S. Oct. 5, 2020), and had no basis for further appeal to either the BIA or the Court of Appeals. *See U.D.C. Chapter, American Ass'n of Univ. Professors v. Bd. of Trustees of the Univ. of D.C.*, 56 F.3d 1469, 1475 (D.C. Cir. 1995) (excusing a failure to exhaust administrative remedies when "an agency has articulated a very clear position on the issue" such that there is there is "certainty of an adverse decision or indication[] that pursuit of administrative remedies would be clearly useless") (internal quotations omitted) (citing *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986)); *cf. English v. United States*, 42 F.3d 473, 479 (9th Cir.

1994) (holding, in the context of post-conviction habeas, that a petitioner did not default a claim if it would have been foreclosed by circuit precedent at the time of his original direct appeal).

In the post-conviction context, when there has been this kind of change in the law, this Court has excused a defendant's failure to fully exhaust all remedies and allowed a collateral challenge to the validity of his underlying conviction. *See Reed v. Ross*, 468 U.S. 1, 17 (1984); *English*, 42 F.3d at 479. The same approach is called for here, and this Court should excuse a failure to exhaust administrative remedies when there has been a significant change in the law years after the noncitizen has been removed. Due process requires that the defendant have some meaningful opportunity to obtain judicial review of the removal order used against him in a criminal prosecution. Allowing respondent to mount that challenge during his prosecution—which in this case, was his first meaningful opportunity to do so—is the only approach consistent with that obligation.

The Ninth Circuit's rule provides some measure of protection for the respondent's right to due process and ensures that an individual has the "right to have the disposition in a deportation hearing reviewed in a judicial forum." *Mendoza-Lopez*, 481 U.S. at 839.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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