No. 20-437

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

REFUGIO PALOMAR-SANTIAGO,
Respondent.

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

BRIEF FOR THE NATIONAL IMMIGRATION PROJECT, THE IMMIGRANT DEFENSE PROJECT, AND THE NATIONAL IMMIGRANT JUSTICE CENTER AS AMICI CURIAE SUPPORTING RESPONDENT

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March 31, 2021

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INTERESTS OF *AMICI*[1]

Amici are immigrant legal services organizations. For decades, they have been intimately involved in the day-to-day realities of immigration proceedings and removal practice, especially at the intersection of criminal and immigration law. *Amici* provide immigration law training and technical assistance to immigration practitioners nationwide, publish practice advisories and manuals, and often litigate immigration issues. Their members and staff investigate, prepare, brief, argue, and try cases in immigration courts nationwide. *Amici* are thus deeply familiar with removal proceedings—not just as they are formally set forth in statutes, regulations, and case law, but also as they are implemented, interpreted, and applied. *Amici* thus submit this brief to explain how that reality influences the question presented.

National Immigration Project of the National Lawyers Guild (NIPNLG) is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIPNLG provides legal training to the bar and the bench on removal defense and the immigration consequences of criminal convictions. It is also the author of *Immigration Law and Crimes* (2020) and three other treatises published by Thomson-West.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

NIPNLG has participated as *amicus* in several significant immigration related cases before this Court, the courts of appeals, and the Board of Immigration Appeals. See*, e.g.*, *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020); *Sessions* v. *Dimaya,* 138 S. Ct. 1204 (2018); *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Nijhawan* v. *Holder*, 557 U.S. 29 (2009); *Lopez* v. *Gonzales*, 549 U.S. 47 (2006); *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004); *INS* v. *St. Cyr*, 533 U.S. 289 (2001).

Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. IDP has submitted *amicus* briefs in many key cases before this Court and the courts of appeals on the interplay between criminal and immigration law and the rights of immigrants in the criminal legal and immigration systems. See*, e.g.*, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017); *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Vartelas* v. *Holder*, 566 U.S. 257 (2012); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010); *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief).

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance, is a nonprofit organization providing legal education and representation to more than 10,000 low-income immigrants annually. NIJC represents and counsels asylum seekers, refugees, detained immigrant adults, children, and families, and other noncitizens facing removal and family separation. Through its Defenders' Initiative, NIJC also advises state and federal defense counsel on the immigration consequences of criminal misconduct, including assessments of whether particular offenses would trigger removability or inadmissibility.

SUMMARY OF ARGUMENT

Amici fully agree with Mr. Palomar-Santiago's analysis of 8 U.S.C. § 1326. The Court should hold his removal order void and preclude criminal punishment in these special circumstances. *Amici* also agree that Mr. Palomar-Santiago has, in any event, met § 1326(d)'s requirements for a collateral challenge to his removal order's validity. Finally, *Amici* agree with the parties that this case "does not present th[e] discretionary-relief issue." U.S. Br. 32 (quoting Br. in Opp'n); see also Cert. Reply 5; Resp't Br. 11. *Amici* submit this brief to provide more context for Mr. Palomar-Santiago's arguments for affirmance.

Many noncitizens in immigration removal proceedings face practically insurmountable barriers to administrative appeal and judicial review—especially when an immigration judge misclassifies a prior conviction as a removable offense under then-binding precedent. These practical barriers influence whether and when those remedies are "available" and thus must be exhausted under § 1326(d). See Resp't Br. 33–45.

First, the substantive law of immigration removal, relief, and judicial review is extraordinarily complex. This is especially true for aggravated-felony determinations, which can require a complicated analysis under the categorical and modified-categorical approaches—none of which is spelled out in the governing statute, and which can vary from circuit to circuit. Against this backdrop, even experienced immigration lawyers often have trouble spotting potential and viable challenges to binding agency precedents.

Second, no right to appointed counsel exists in removal proceedings, leaving most noncitizens unrepresented—especially those who are detained. Without counsel, noncitizens face insurmountable barriers to navigating substantive immigration law. Many noncitizens do not know basic tenets of the U.S. legal system, including the scope of the right to appeal and what it entails. And most do not speak English, or do not speak it well. Thus, many noncitizens do not understand the contents of the orders issued in their cases, much less their legal significance or the implications for any appellate proceedings. And while immigration courts must provide interpretation for non-English speakers, appeals to the Board of Immigration Appeals (BIA) and judicial review in the courts of appeals are both conducted in English, without guaranteed interpretation or translation services.

Third, the fact of continued immigration detention imposes a strong disincentive to pursue further review. Developing a case while in detention is exceedingly difficult. And people in removal proceedings must either accept removal and thus forfeit appeal and judicial review, or remain detained for months or years to have a chance of vindicating their rights. In other words, the availability of due process to review

a removal order depends on continued detention, often for months or even years. A detained person, told that binding legal precedent compels their deportation, will justifiably see administrative appeal and judicial review as prolonging their detention for no reason.

For all these reasons, administrative exhaustion and judicial review are functionally unavailable if an immigration judge orders removal based on an erroneous aggravated-felony determination required by then-binding precedent. In this situation, it is often unclear that any avenue to challenge the order exists. That is true especially for noncitizens without counsel or a working command of English—and even more so for people held in detention. The Court should consider these realities in conducting the practical, functional inquiry that precedent calls for. See Resp't Br. 35.

ARGUMENT

I. Noncitizens face substantial barriers to administrative and judicial review of their removal orders.

People in removal proceedings face significant barriers to accessing the appellate process and judicial review. The substantive law that governs their cases is often complex and may require, for example, aggravated-felony analyses that challenge even experienced immigration lawyers. For many noncitizens without counsel, these barriers are insurmountable. Many noncitizens lack the English-language skills to understand the contents of their orders, let alone the governing legal principles. Continued detention during administrative and court appeals—often for months or years—makes the situation worse. And

when (as here) a noncitizen is ordered removed based on the misclassification of a prior conviction as a removable offense under then-binding precedent, appeal and judicial review may be effectively unavailable.

A. Immigration law's complexity makes administrative and judicial review difficult to obtain.

The substantive law of immigration removal and relief is exceedingly complex, and aggravated felony determinations are especially so. This complexity makes it harder for noncitizens to obtain meaningful administrative and judicial review.

This Court has long recognized immigration law's complexity. See *Padilla* v. *Kentucky*, 559 U.S. 356, 369 (2010). And aggravated-felony determinations are particularly difficult; whether a conviction is an aggravated felony is not "easily ascertained." See *id.* at 378 (Alito, J., concurring).

To assess whether a noncitizen's conviction matches an offense on the statutory list of aggravated felonies for immigration purposes, see 8 U.S.C. § 1101(a)(43), courts use the categorical approach. See *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013). This framework requires examining the statute of conviction's elements to identify whether it necessarily criminalizes conduct covered by the generic federal offense "that serves as a point of comparison." *Moncrieffe*, 569 U.S. at 190. The generic federal offense's definition and elements may be listed in the statute, *e.g.*, 8 U.S.C. § 1101(a)(43)(D), or may be found in case law, *e.g.*, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017). Courts may also need to determine whether the statute of conviction is divisi-

ble—creating multiple offenses listed in the alternative, one or more of which may be aggravated felonies—or merely states other ways to satisfy an element. See *Mathis*, 136 S. Ct. at 2256–57. If the statute is divisible, the modified categorical approach requires the court to "review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction." *Id.* at 2256.

That is not all. Some offenses are aggravated felonies only if they involve a certain "sentence," see, *e.g.*, 8 U.S.C. § 1101(a)(43)(G)—which itself is a term of art in immigration law, see *id.* § 1101(a)(48)(B). Or a court may need to determine whether the amount of a particular financial loss qualifies a conviction as an aggravated felony. See *id.* § 1101(a)(43)(M)(i) (requiring a $10,000 loss in fraud convictions). Many of the determinations above can require examining substantive state or federal criminal law construing the statute of conviction. See, *e.g.*, *Moncrieffe*, 569 U.S. at 194–95.

Each of these steps has its own corresponding body of case law, which can vary significantly from circuit to circuit. And none of this is spelled out in the statute listing aggravated felonies for immigration purposes. See 8 U.S.C. § 1101(a)(43). Determining whether a particular offense is an aggravated felony can thus be a daunting task.

Nor is the aggravated-felony inquiry the only analysis required to determine removability. Immigration judges often must assess other complex grounds of removability, like whether a particular offense is a "[c]rime[] of moral turpitude," see 8 U.S.C. § 1227(a)(2)(A)(i), (ii); a "crime of domestic violence," *id.* § 1227(a)(2)(E); or a "firearms offense," *id.*

§ 1227(a)(2)(C). Some of these tasks are "no easier" than the aggravated-felony determination. *Padilla*, 559 U.S. at 379 (Alito, J., concurring).

Spotting and then seeking review of a mistake in this thicket of legal and factual determinations can challenge even immigration law specialists. Further complicating that task are the separate procedures governing administrative appeals and judicial review. Generally, noncitizens must first navigate an appeal to the BIA. 8 U.S.C. § 1229a(c)(5). Then they must petition for review in a court of appeals. *Id.* § 1252(b)(2). Each process has its own procedures and timing requirements. See 8 C.F.R. § 1003.3; *Bd. Immigr. Appeals Practice Manual*, ch. 3, 4 (Oct. 5, 2020); 8 U.S.C. § 1252(b), (c).

And the courts of appeals' jurisdiction in this area can be both complicated and contested. See 8 U.S.C. § 1252(a). The nearly 800 words in § 1252(a) include various limitations on judicial review based on the decision at issue, the nature of the claim, and the person seeking review. Each circuit has developed its own law on each of these various review bars. And one of the statutory bars prohibits judicial review of removal orders based on convictions found to be aggravated felonies. 8 U.S.C. § 1252(a)(2)(C). While § 1252(a)(2)(D) now allows review of constitutional and legal claims, including the aggravated felony determination itself, see, *e.g.*, *Larin-Ulloa* v. *Gonzales*, 462 F.3d 456, 461 (5th Cir. 2006), that provision did not yet exist during Mr. Palomar-Santiago's removal proceedings.

Noncitizens also face the risk of abrupt removal from the United States before the appellate and judicial review processes are complete. Although removal is stayed during an appeal to the BIA, 8 C.F.R.

§ 1003.6(a), a removal order becomes final if the BIA affirms it, *id.* § 1241.1(a), and no automatic stay exists to allow judicial review. So, to seek judicial review from within the United States, a noncitizen must also secure a stay of removal from the reviewing court of appeals.

Litigating a petition for review before a court of appeals involves a detailed analysis of the facts of the case, the legal issues raised in it, the BIA or immigration judge's errors of law, and the hardships that would ensue if the person were removed while the petition is pending. A noncitizen must also navigate the separate body of law governing stays of removal. See *Nken* v. *Holder*, 556 U.S. 418 (2009). And she must do so without the administrative record, which need only be filed within forty days after service of the petition for review. See Fed. R. App. P. 17. The stakes are high, not just for the noncitizen's immediate fate but also for the outcome of any appeal. Realistically, if a noncitizen is removed before or while a petition for review is pending, she will probably have no meaningful chance to seek judicial review.

In short, to obtain administrative and judicial review of a removal order, a noncitizen must navigate not only the substantive law of removal and relief—which can be complex enough to befuddle lawyers and judges—but also the separate body of procedural law governing agency appeals, court review, and stays of removal. This would be a challenging task for any nonexpert.

B. Most people in removal proceedings do not have counsel, and many do not speak English.

These barriers are even more daunting for most noncitizens in removal proceedings, who must repre-

sent themselves in a system they do not know, in a language they may not speak well or at all. Without lawyers, they may be unable to overcome these obstacles.

People in immigration court have a right to counsel of their choosing—"at no expense to the Government." 8 U.S.C. § 1229a(b)(4)(A). Thus, if they cannot afford a lawyer, they have no right to appointed counsel. Indeed, "removal proceedings are the only legal proceedings in the United States where people are detained by the federal government and required to litigate for their liberty against trained government attorneys without any assistance of counsel." Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, Vera Inst. of Just. 7 (Nov. 2017), https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf.

As a result, most noncitizens in removal proceedings lack counsel. Lawyers are even rarer among detained people like Mr. Palomar-Santiago. One study reports that only 37% of noncitizens in removal proceedings have legal representation. Ingrid V. Eagly & Steven Shaffer, *A National Study of Access to Counsel in Immigration Court*, 164 Univ. Pa. L. Rev. 1, 16 (Dec. 2015). That rate falls to 14% for people in detention. *Id.* at 32. Another analysis similarly reports that, over the past two decades, around 46% of all immigration court cases, and just about 19% of detained noncitizens' cases, included representation. Transactional Records Access Clearinghouse, Syracuse University, *State and County Details on Deportation Proceedings in Immigration Court*, https://trac.syr.edu/phptools/immigration/nta. Only

about 34% of immigration cases started in 2020 involved representation. *Id.*

Noncitizens without counsel also see significantly different outcomes. Non-detained people with lawyers are between three-and-a-half and five-and-a-half times more likely to prevail than those without lawyers. And detained people are *ten-and-a-half times more likely* to prevail with lawyers than without. Eagly & Shafer, *supra*, at 49.[2]

On appeal, noncitizens are much more likely to have counsel—but most cases are never appealed. According to EOIR, 69% of completed appeals and 88% of pending appeals included counsel.[3] But in fiscal year 2018, for example, just 17% of immigration court cases were appealed to the BIA.[4] Using EOIR's 88% figure, that means only about 2.1% of the 182,421 noncitizens in removal cases that year took administrative appeals *without* counsel. The upshot is that many noncitizens, lacking the assistance of counsel,

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[2] The Executive Office for Immigration Review (EOIR) reports that the overall representation rate for all pending cases in immigration court is 60%. U.S. Dep't of Just., *Executive Office for Immigration Review Adjudication Statistics: Current Representation Rates* (Jan. 7, 2021), https://www.justice.gov/eoir/page/file/1062991/download. But scholars caution that EOIR figures are likely inflated because they include any case where a representative of record was noted for at least one hearing. Eagly & Shaffer, *supra*, at 15–16. This method leaves unclear *when* the noncitizen was represented, and likely includes people who were not represented at their merits proceeding. *Id.*

[3] U.S. Dep't of Just., *Executive Office for Immigration Review Adjudication Statistics: Current Representation Rates* (Jan. 7, 2021), https://www.justice.gov/eoir/page/file/1062991/download.

[4] U.S. Dep't of Just., Executive Office for Immigration Review, *Statistics Yearbook Fiscal Year 2018* at 40, fig. 32, https://www.justice.gov/eoir/file/1198896/download.

do not understand whether and how to appeal or seek judicial review—and thus do not do so.

These statistics reflect the real obstacles noncitizens face without counsel. The immigration-law doctrines discussed above can be daunting even for judges and lawyers, let alone laypeople who must represent themselves. Many unrepresented noncitizens are left alone to decipher the various complex legal and factual determinations conducted by immigration judges—and to develop arguments about why those determinations are mistaken. Some *pro se* noncitizens may not even fully grasp that appeal and review could lead to reversal, particularly when, as here, they are ordered removed under then-settled law.

Interviews with noncitizens show the challenges of proceeding *pro se*. As one person explained, she felt physically ill when she tried to defend herself in immigration court: "[W]hen you're there and you don't have a lawyer, it's like, you feel somehow . . . unprotected . . . because you don't even understand what they're telling you. You just hear them say all these court words and saying all these codes and stuff." Nina Siulc & Karen Berberich, *A Year of Feeling SAFE: Insights from the SAFE Network's First Year*, Vera Inst. of Just. 3 (Nov. 2018), https://www.vera.org/downloads/publications/a-year-of-being-safe.pdf. Another unrepresented person "observed that an immigration court interpreter was not enough to help him understand 'the law, the Constitution, or the codes' well enough to defend himself effectively." *Id.* at 4.

Indeed, many noncitizens cannot access the information they need to understand not only the procedures to appeal and seek judicial review, but also the very decision ordering them removed in the first place. Noncitizens in removal proceedings often do

not know or understand the U.S. legal system or speak English as their first language. According to Department of Justice statistics, in fiscal year 2020, 92.2% of immigration court proceedings were held in a language other than English.[5] While immigration court proceedings include interpretation, see U.S. Dep't of Just., *Immigr. Ct. Practice Manual* § 4.11 (2020), immigration judges' decisions are rendered in English. And appeals to the BIA and the courts of appeals are conducted in English, with no translation services provided. 8 C.F.R. §§ 1003.2(g)(1), 1003.3(a)(3).

Even when a noncitizen can appeal, lacking appellate counsel is a serious obstacle to securing relief. A lawyer can not only develop and present the legal and factual arguments required for appellate review, but also interpret the proceedings and arguments in language appropriate for the noncitizen. By contrast, a *pro se* person who does not speak English must investigate, develop, and present legal and factual arguments about multiple intricate bodies of law in a language they do not fully understand—alone. For instance, the BIA, like the courts of appeals, states that briefs should include, among other things, a statement of the issues presented and the applicable standard of review. *Bd. Immigr. Appeals Practice Manual, supra*, ch. 4.6(c)(iv); see Fed. R. App. P. 28(a). Even these seemingly basic requirements can be serious impediments for a non-English speaking person without a lawyer.

The record here does not reveal whether Mr. Palomar-Santiago was advised by counsel in making what

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[5] U.S. Dep't of Just., *Executive Office for Immigration Review Adjudication Statistics: Hearing Language* (Jan. 7, 2021), https://www.justice.gov/eoir/page/file/1248496/download.

the immigration judge determined was a waiver of his appeal. While he seemingly had counsel at some point in his proceedings, Pet. App. 29a, it is unclear whether counsel was present when he was ordered removed and, according to the documents in the record, waived his appeal. See *id.* at 19a (noting service of immigration judge's order on respondent via "Custodial Officer" rather than counsel).

Indeed, during Mr. Palomar-Santiago's removal proceedings in 1998, the availability of judicial review was particularly unclear. Congress had enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") just two years before. Pub. L. No. 104-208, 110 Stat. 3009. With IIRIRA, Congress abolished the prior scheme for judicial review and adopted a new one. And the new law included 8 U.S.C. § 1252(a)(2)(C), which bars review of removal orders based on certain criminal convictions including aggravated felonies. It was not until nine years later that § 1252(a)(2)(D) was enacted to explicitly preserve judicial review of constitutional and legal claims. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Thus, during Mr. Palomar-Santiago's removal proceedings, it was far from clear that his claims were judicially reviewable at all. Added to all the obstacles described above, this uncertainty underscores that administrative and judicial review were not meaningfully, practically available to him. See Resp't Br. 33–45.

C. Continued detention impedes meaningful access to appeal and judicial review.

All of these hurdles are even higher for people in detention. Most noncitizens remain in detention throughout the appeal and judicial review processes. Indeed, detention is mandatory for people convicted

of aggravated felonies. 8 U.S.C. § 1226(c). People who cannot afford bond, or arriving asylum seekers who have not been paroled into the United States, *id.* § 1225(b), also stay in detention.

And these stays are rarely short. Seeking appeal and review can mean another year or more in detention. In fiscal year 2016, the BIA adjudicated ninety-eight percent of its cases within five months. U.S. Dep't of Just. Admin. Review & Appeals, *FY 2018 Performance Budget: Congressional Budget Submission* 19 (2017), https://www.justice.gov/jmd/page/file/968566/download. But EOIR recently noted that its caseload has doubled to over 61,000 in fiscal year 2019. U.S. Dep't of Just., Executive Office for Immigration Review, *FY 2021 Congressional Budget Submission* 3–4 (2020), https://www.justice.gov/doj/page/file/1246381/download. This substantial growth in new appeals suggests a similar increase in case processing times, which is not offset by the BIA's four new members in 2018, see *Expanding the Size of the Board of Immigr. Appeals*, 83 Fed. Reg. 8,321 (Feb. 27, 2018) (BIA grew from 17 members to 21). And in 2020, the median court of appeals case took between 6.1 months in the Eighth Circuit and 12.8 months in the Second Circuit. U.S. Courts of Appeals, *Federal Court Management Statistics–Summary* (Sept. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0930.2020.pdf. Seeking appeal and review thus means spending a far longer time in detention.

This added detention follows the already-long detention during immigration court proceedings. According to one analysis, the average immigration

court case in 2020 took 459 days; so far in 2021, that number is 870 days.[6]

All the while, detained noncitizens must litigate their cases with (at least) one hand tied behind their back. It is practically impossible for someone in immigration detention to navigate the shifting sands of removability and relief, or to untangle complex questions of BIA and federal court jurisdiction. Detained noncitizens have limited access to legal materials, and even less access to those materials in languages other than English. Likewise, they "have little ability to collect evidence." *Moncrieffe*, 569 U.S. at 201. As one detained person reported: "Most of the information that [the attorney] get[s], I wouldn't have the chance to get that information to provide to the judge." Stave *et al.*, *supra*, at 23.[7]

A noncitizen's access to due process thus effectively depends on continued detention—and whether the noncitizen can bear it. As one detained person explained in an interview, "there were a lot of women . . . they had simple cases and they just decided to deport themselves because of the conditions . . . they just signed because they couldn't take the conditions and they didn't have money for a lawyer." Siulc & Berberich, *supra*, at 4. Another asylum-seeker,

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[6] Transactional Records Access Clearinghouse, Syracuse University, *Immigration Court Processing Time by Outcome*, https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

[7] *See also* Project South & Penn State Law Center for Immigrants' Rights Clinic, *Imprisoned Justice: Inside Two Georgia Immigration Detention Centers* 5 (May 2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf; Cal. Dep't of Just., *Immigration Detention in California* 95 (Feb. 2019), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf.

"[a]fter nine months in detention, separated from his family, . . . chose not to appeal the asylum denial any further. After enduring insults and hunger at the Stewart Detention Center, he was spent—physically, emotionally and psychologically. He could not imagine spending another six months in confinement fighting an appeal with little hope for success." Southern Poverty Law Center, *No End in Sight: Why Migrants Give Up on Their U.S. Immigration Cases*, 36 (2018), https://www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf.

Immigration detainees thus have a strong incentive to drop their appeals, regardless of merit—just the opposite of the criminal context. A criminal defendant serving a prison sentence need not choose between freedom and appeal; indeed, appealing may be the only path to freedom. But in the immigration context, appealing means staying in detention. And seeking judicial review just means more of the same. Mr. Palomar-Santiago's case shows the point. He was deported the day after he was ordered removed. Pet. App. 9a. An appeal would have required him to stay in detention, likely for months longer.

II. Appeal and judicial review may be practically unavailable if removal depends on erroneous binding precedent.

These barriers to appeal and judicial review are practically insurmountable when binding precedent dictates removal by misclassifying a prior conviction.

Mr. Palomar-Santiago's case again illustrates the point. According to the (sparse) record, the immigration judge mainly needed to decide whether Mr. Palomar-Santiago's DUI conviction was an aggravated felony; Mr. Palomar-Santiago apparently did not apply for relief. Pet. App. 17a. The immigration judge

thus relied on then-binding BIA case law, which mistakenly held that a DUI conviction like Mr. Palomar-Santiago's was categorically an aggravated felony. See *Matter of Magallanes-Garcia*, 22 I. & N. Dec. 1 (B.I.A. 1998), *overruled by Matter of Ramos*, 23 I. & N. Dec. 336 (B.I.A. 2002). In this kind of situation, a detained noncitizen with little knowledge of either English or the U.S. legal system, and without counsel, is unlikely to understand how to mount an effective challenge to controlling BIA precedent—or even that such a thing is possible.

Indeed, without thoroughly understanding the categorical and modified-categorical approaches, no one would even have realized that this case presented an appealable legal issue. In this context, seeking appellate review, whether at the BIA or in federal court, requires more than discerning a mistake in the convoluted aggravated-felony determination; it requires understanding that existing precedent can be challenged and developing a legal theory of why that precedent is wrong. On these facts, given all the impediments faced by people like Mr. Palomar-Santiago—including the risk of languishing even longer in detention—administrative appeal and judicial review are not meaningfully available.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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March 31, 2021