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

REPLY BRIEF FOR THE UNITED STATES

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Respondent makes little attempt to defend the Ninth Circuit's erroneous excision of 18 U.S.C. 1326(d)(1) and (2) on its own terms. His only argument that he "satisfies" those explicit prerequisites for relief, Pet. I (question presented), is the untenable claim that the statutory mechanisms for seeking review of an assertedly incorrect decision by an immigration judge are not actually "available" for that very purpose. His primary argument, which seeks to avoid Section 1326(d) altogether, is outside the question presented, not appropriately preserved, and rests on the implausible premise that he is not "challeng[ing] the validity" of his removal order, 8 U.S.C. 1326(d), by asserting that it is "invalid," *e.g.*, Resp. Br. 2. Nor can he overcome the plain text of Section 1326(d) through newly minted arguments questioning its as-applied constitutionality, which is not in doubt, or analogizing to equitable doctrines in other contexts, which do not carry over to this one. At bottom,

respondent "point[s] to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative [order], by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). This Court should accordingly enforce Section 1326(d) by its terms and reverse the decision below.

A. The Text, History, And Design Of Section 1326(d) Foreclose Respondent's Arguments

The text of Section 1326(d) resolves this case. See Gov't Br. 14-27. Section 1326(d) instructs that an unlawful-reentry defendant "may not challenge the validity of the deportation order" underlying the charge "unless [he] demonstrates that" (1) he "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)(1), (2), and (3). A later judicial determination that a defendant's prior offense does not qualify as an "aggravated felony" in no way demonstrates that a defendant "exhausted any [available] administrative remedies" or was "improperly deprived" of judicial review. 8 U.S.C. 1326(d)(1) and (2).

1. An immigration judge's application of governing law does not render administrative and judicial remedies unavailable

a. Respondent's sole argument that he "satisfie[d]" Section 1326(d)(1) (Br. 36) is his assertion that administrative review of his removal order was not "available,"

on the theory that "as a practical matter" it was not "capable of use." Resp. Br. 35 (citation and internal quotation marks omitted). As the government has explained (Br. 21-27), however, the process for appealing an immigration judge's order to the Board of Immigration Appeals (BIA), and, if necessary, to the court of appeals, is well established by statute and regulation, and regularly used to challenge removal orders.

Respondent suggests (Br. 40-41) that review was not "available" because immigration proceedings are "complex[]," removal proceedings are often pro se (despite a statutory privilege to retain counsel), and removability determinations sometimes raise difficult legal questions. But none of those considerations renders administrative review "not capable of use to obtain relief." *Ross* v. *Blake*, 136 S. Ct. 1850, 1859 (2016); see Gov't Br. 24-25. Respondent identifies no decision of any court invoking such a rationale to hold that express statutory administrative remedies are not "available." And his interpretation of the word "available" would largely vitiate Section 1326(d)'s "[l]imitation on collateral attack[s]" that "challenge the validity" of underlying "deportation order[s]," 8 U.S.C. 1326(d) (emphasis omitted), by excusing a defendant's failure to exhaust in many cases—including, potentially, *any* case involving "substantive" error. Resp. Br. 42; see Gov't Br. 26-27.

Because Section 1326(d) includes a statutory exhaustion requirement, respondent's reliance on cases in which "this Court has recognized exceptions to administrative exhaustion at common law" is misplaced. Resp. Br. 44. As respondent acknowledges, *Ross* v. *Blake* rejected the argument that courts may read "'judge-made' common law exceptions" into mandatory exhaustion statutes. *Id.* at 45 n.6 (quoting *Ross*, 136 S. Ct. at

1857); see *Ross*, 136 S. Ct. at 1863 (Breyer, J., concurring in part). And while respondent likens this case (Br. 44-45) to *McKart* v. *United States*, 395 U.S. 185 (1969), the statute at issue there—unlike Section 1326(d)—"said nothing which would require" a criminal defendant "to raise all [his] claims" in a previous administrative process. *Id.* at 197.

b. Respondent errs in contending (Br. 35-36) that the immigration judge's substantive removability determination, which included applying then-governing law to classify respondent's offense of driving under the influence causing bodily injury (DUI) as an aggravated felony, *ipso facto* "misled" him into believing that the statutory procedures for further review were not "available." The circuit decision on which respondent relies (Br. 35) itself recognizes that unless "the relevant administrative procedure *lacks authority* to provide any relief or take any action whatsoever in response to a complaint," then "no futility exception * * * to statutory exhaustion requirements" exists. *United States* v. *Copeland*, 376 F.3d 61, 66-67 (2d Cir. 2004) (citation omitted).

This Court's remand in *Ross* for further exploration of whether the prison grievance system that "some" prisoners had navigated was "available" to the plaintiff, Resp. Br. 43, was necessary only because other evidence indicated that "a prisoner *cannot* obtain relief through the standard * * * process." 136 S. Ct. at 1860; see *id.* at 1861-1862. The record here contains no similar evidence. Under the plain terms of the statute, respondent could have sought relief by appealing and arguing that then-current law was incorrect—as others later did. See Gov't Br. 34-36. As respondent appears to recognize (Br. 36), the only practical obstacle to his

doing so was his own appeal waiver, which was within his control.

Respondent reads (Br. 35-36) *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), to hold that such a waiver is not knowing or intelligent when the immigration judge makes a substantive error about whether an offense is removable. But *Mendoza-Lopez* in no way supports transforming the immigration judge's substantive determination about removability into a *procedural* obstacle to invoking the very mechanisms that the statute provides for challenging such a determination. Respondent points to the Court's observation that the immigration judge in *Mendoza-Lopez* "had failed to adequately advise the noncitizens about their right to appeal and 'their eligibility to apply for suspension of deportation.'" Resp. Br. 36 (citation omitted). But as the government has explained (Br. 31-33), that passage does not bear on the Court's ultimate procedural holding, because the Court simply "assume[d]," as the government requested, that the deportation hearing was fundamentally unfair. *Mendoza-Lopez*, 481 U.S. at 839-840. And even if review might be deemed unavailable when the immigration judge failed to advise an alien of an otherwise potentially unknown route to *discretionary* relief via an appeal, here the availability of statutory procedures to challenge the *substantive* removability determination and the basis for it was obvious. That is precisely what the statutory review mechanisms are for.

Respondent might not have known "that his offense was not truly an aggravated felony," Resp. Br. 48, but he certainly had reason to know that that question was central to his case, and that he could continue to litigate it. See Gov't Br. 19-20, 31-33. His attempted analogy

(Resp. Br. 37-38) to criminal cases involving claims that a plea was not knowing and intelligent is misplaced. None of the cited decisions excused a defendant's failure to comply with a "mandatory exhaustion statute[]." *Ross*, 136 S. Ct. at 1857; see *Bousley* v. *United States*, 523 U.S. 614, 622-624 (1998) (judge-made procedural default rules); *Henderson* v. *Morgan*, 426 U.S. 637, 639 (1976) (properly exhausted claims); *Boykin* v. *Alabama*, 395 U.S. 238, 240-241, 243 (1968) (direct review). Nor is respondent's appeal waiver in the administrative proceedings analogous to a guilty plea where a defendant later contests guilt. Respondent does not dispute that he committed the DUI offense; he instead contends (Br. 37-38) that the immigration judge misstated the legal consequences of his DUI conviction. If that contention had a guilty-plea analogue, it would be a contention that a misapprehension regarding a potential *penalty* warrants relief from a guilty plea—a contention that this Court has squarely rejected. See *Brady* v. *United States*, 397 U.S. 742, 743-745, 756-758 (1970) (upholding guilty plea notwithstanding subsequent determination that penalty scheme that informed plea was unconstitutional).

c. Respondent briefly suggests that he at least satisfies Section 1326(d)(2), because once he failed to appeal his deportation order to the BIA, he was "statutorily precluded from seeking judicial review." Resp. Br. 45. But satisfying Section 1326(d)(2) alone would not entitle him to relief. Furthermore, respondent's own decision to forgo administrative review cannot in itself "demonstrate[]" that "the deportation proceedings * * * improperly deprived [him] of the opportunity for judicial review." 8 U.S.C. 1326(d)(2).

Respondent states (Br. 45-46) that his removal "severely limit[ed] his practical opportunity to seek judicial review." But had he exhausted, rather than waived, administrative review, he could not have been removed while an appeal to the BIA was pending. See *In re Alfredo Diaz-Garcia*, 25 I. & N. Dec. 794, 795-796 (B.I.A. 2012) (discussing 8 C.F.R. 1003.6(a)); see also 8 C.F.R. 1003.39; *Patel* v. *Attorney Gen.*, 394 Fed. Appx. 941, 944-945 (3d Cir. 2010); *Madrigal* v. *Holder*, 572 F.3d 239, 243-245 (6th Cir. 2009). And had he filed a petition for review of the final removal order in the Ninth Circuit, see 8 U.S.C. 1252(b)(2), he could have sought a further stay of removal (which itself would have triggered a temporary stay, see *De Leon* v. *INS*, 115 F.3d 643 (9th Cir. 1997)), or "continue[d] [his] case[] from abroad," *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003).

2. A defendant who contends that his prior offense was not removable seeks to "challenge the validity" of his removal order

Respondent separately argues (Br. 27-32) that the procedural requirements of Section 1326(d) do not apply at all, on the theory that his assertion of a "substantively invalid" (Br. 32) removal order does not in fact "challenge the validity," 8 U.S.C. 1326(d), of that order. If the Court entertains that argument, the Court should reject it.

a. As a threshold matter, respondent's argument is not properly before the Court. As respondent acknowledges (Br. 12), it falls outside the question presented, which is "articulated * * * solely in terms of whether Section 1326(d) is satisfied." And the argument is not a "predicate to an intelligent resolution" of the question presented, *ibid.* (quoting *Vance* v. *Terrazas*, 444 U.S.

252, 258-259 n.5 (1980)), which the Court "can decide * * * on its own," *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16-17 (2011), by assuming that Section 1326(d) applies. See, *e.g.*, *Upper Skagit Indian Tribe* v. *Lundgren*, 138 S. Ct. 1649, 1653-1655 (2018); *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 305-306 (2010).

Review of respondent's argument is also inappropriate because this Court is one "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). While respondent characterizes (Br. 26) his new approach as the "most direct[]"means of reading the statute in his favor, he did not raise it at any prior stage of the proceedings. Nor does he point to any case adopting it. Respondent suggests (Br. 12) that the Court should nevertheless consider his new claim, asserting that "the Government's concessions" in *United States* v. *Ochoa*, 861 F.3d 1010 (2017) (per curiam), and *United States* v. *Aguilera-Rios*, 769 F.3d 626 (2014), created the automatic-relief rule without a chance for Ninth Circuit discussion. But as the government has explained (Cert. Reply Br. 8), as respondent previously acknowledged (C.A. Br. 13-16), and as the entire *Ochoa* panel recognized, 861 F.3d at 1021-1022 (Graber, J., concurring), the court of appeals itself adopted the challenged rule much earlier. The government previously "concede[d]" only the existence of the binding circuit precedent that it contested in this case. Cf. *United States* v. *Vonn*, 535 U.S. 55, 58-59 n.1 (2002) (recognizing that repeat litigant need not repeatedly contest circuit precedent).

b. In any event, respondent's new interpretation of the statute is unsound. Respondent *does* seek to "challenge the validity of [his] deportation order," 8 U.S.C. 1326(d), because he "formally question[s] [its] legality,"

Black's Law Dictionary 287 (11th ed. 2019). Respondent has acknowledged as much at every prior stage of the proceedings. Br. in Opp. 4 ("Palomar-Santiago moved to dismiss the indictment, challenging—in the words of * * * Section 1326(d)—the 'validity' of his prior deportation order."); Resp. C.A. Br. 28 (describing respondent's argument as a "collateral challenge under 8 U.S.C. § 1326(d)"); Resp. Mot. to Dismiss 2 (contending that "[a]ll requirements of a collateral challenge under 8 U.S.C. § 1326(d) are satisfied").

Nor is respondent correct (*e.g.*, Br. 27) that Congress intended to preclude prosecution under Section 1326 in every case where a deportation order is "substantively invalid." As respondent acknowledges (*ibid.*), *Mendoza-Lopez* rejected the argument that a "lawful" prior deportation order was a necessary element of a Section 1326 offense. 481 U.S. at 834. And respondent does not suggest that the adoption of Section 1326(d) added any such "validity" element. While Congress could have responded to *Mendoza-Lopez* in that manner, it instead treated invalidity of the removal order as an affirmative defense and, tracking *Mendoza-Lopez*, "[l]imited" such a "collateral attack" on removal to cases in which the defendant "demonstrates" that three specific, mandatory, and conjunctive prerequisites are met. 8 U.S.C. 1326(d) (emphasis omitted); see, *e.g.*, *United States* v. *Adame-Orozco*, 607 F.3d 647, 651 (10th Cir.) (Gorsuch, J.) (explaining that the first "element" of Section 1326(a) is a prior removal order, which "enjoys a presumption of regularity" that the defendant may rebut by "prov[ing] each of § 1326(d)'s elements"), cert. denied, 562 U.S. 944 (2010); 9th Cir. Model Crim. Jury Instr. 9.6-9.8 (2020) (similar).

Respondent nevertheless asserts (Br. 28-29) that Section 1326(d)'s procedural prerequisites do not apply to him, on the theory that his removal order was "void *ab initio*" rather than "voidable." That theory—which would seem equally applicable to *any* substantively erroneous removal order—is unsound. Although the current understanding of the "aggravated felony" definition indicates that the immigration judge's classification of respondent's offense was erroneous at the time it was made, see *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994), a legal error regarding the proper interpretation of a nonjurisdictional statute does not render a prior order a "mere nullity," Resp. Br. 29 (citation omitted). Were respondent correct, anyone with a substantively erroneous removal order could, without ever seeking administrative or judicial confirmation or correction, *lawfully* reenter the United States. Even respondent does not embrace that untenable conclusion, instead acknowledging (Br. 2-3, 50) that his reentry into the United States was unlawful, such that he could be removed or charged with violating 8 U.S.C. 1325.

For similar reasons, respondent's argument finds no support in cases in which a government actor has been viewed to have acted outside the "statutory territorial jurisdiction * * * as prescribed by Congress." *United States* v. *Krueger*, 809 F.3d 1109, 1126 n.7 (10th Cir. 2015) (Gorsuch, J., concurring in the judgment); see *id.* at 1122-1123; Resp. Br. 20-21 (citing cases in which the BIA acted outside its statutory jurisdiction by entering a removal order). Immigration judges have statutory authority to conduct removal proceedings. See 8 U.S.C. 1229a(a)(1) and (c)(1)(A); see, *e.g.*, *United States* v. *Bastide-Hernandez*, 986 F.3d 1245, 1247-1248 (9th Cir.

2021) (jurisdiction vests upon filing of notice to appear). Respondent points to no statute suggesting, or case holding, that such authority retroactively disappears simply because an immigration judge applies then-governing law that is subsequently overturned. Cf. *United States* v. *Gonzalez-Ferretiz*, 813 Fed. Appx. 837, 842-843 (4th Cir. 2020) (rejecting attempt to avoid Section 1326(d) through claim that aggravated-felony determination was "*ultra vires*"), petition for cert. pending, No. 20-6049 (filed Oct. 13, 2020); *United States* v. *Parrales-Guzman*, 922 F.3d 706, 707-708 (5th Cir. 2019) (rejecting argument that Section 1326(d)'s "bar on collateral attacks does not attach" where a defendant's removal order was allegedly "*void ab initio*" because "it rested on an unconstitutionally vague statute").

c. Legislative history and "[c]ommon sense" (Resp. Br. 28, 30, 44) similarly refute, rather than support, respondent's interpretation. Respondent posits that this Court in *Mendoza-Lopez*, and Congress in enacting Section 1326(d), ensured that unlawful-reentry defendants have a procedural opportunity to attack their removal orders in order "to protect against substantively inaccurate outcomes." Resp. Br. 28. But what they ensured is that each defendant has *one* full and fair opportunity to challenge a removal order. See Gov't Br. 28-31. *Mendoza-Lopez* did not require, and Congress did not provide, a *second* opportunity for a defendant who failed to exhaust the remedies "available" in his removal proceedings. 8 U.S.C. 1326(d)(1).

Respondent likewise errs (Br. 30) in seeking affirmative support for his reading based on Congress's goal of "preventing wholesale, time-consuming attacks on underlying deportation orders" in Section 1326 prosecutions. 139 Cong. Rec. 18,695 (1993) (Sen. Dole). While

respondent suggests (Br. 30) that in light of intervening precedent, it would take "no time" to recognize the error in his case, his rule would logically apply to cases in which *no* court has previously determined that a prior offense is not removable. See, *e.g.*, *Ochoa*, 861 F.3d at 1015-1018 (reversing Section 1326 conviction based on determination in same decision that prior offense was not an "aggravated felony" or qualifying firearms offense); *id.* at 1023 (Graber, J., concurring). Respondent's apparent effort to limit his atextual exception to cases of "indisputabl[e] invalid[ity]," *e.g.*, Resp. Br. 2, lacks explanation, has nothing to recommend it beyond case-specific gerrymandering, and begs the question. Under the plain statutory text, a court cannot consider whether a case fits respondent's amorphous exception without considering a "challenge" to the removal order's "validity," 8 U.S.C. 1326(d).

Finally, it is respondent's interpretation, not the one followed by all but one of the courts of appeals, that would defy common sense. He does not dispute that the "incongruity" identified in the government's opening brief—wherein a defendant who *did not* appeal could obtain relief unavailable to a defendant who did, see Gov't Br. 36-37—would be nonsensical. See Resp. Br. 31-32. And the only solution that he proffers to that "incongruity" would be to further distort the statutory text by exempting *both* types of defendants from the statutory prerequisites. Nothing in the statutory text, legislative history, *Mendoza-Lopez*, or practicality supports such a wide loophole.

3. The rule of lenity does not apply

Respondent's atextual reading of Section 1326(d) cannot be redeemed by his invocation (Br. 46-51) of the rule of lenity. That rule "applies only when a criminal

statute contains a 'grievous ambiguity or uncertainty,' and 'only if, after seizing everything from which aid can be derived,' the Court 'can make no more than a guess as to what Congress intended.'" *Ocasio* v. *United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (citation omitted); see, *e.g.*, *Shular* v. *United States*, 140 S. Ct. 779, 787 (2020); *id.* at 787-789 (Kavanaugh, J., concurring). The rule "has no application" to the clear limitations on the affirmative defense in Section 1326(d). *Lewis* v. *United States*, 445 U.S. 55, 65 (1980) (citation omitted).

Respondent attempts to create ambiguity by observing that the defendants in *Mendoza-Lopez* had "'technically available' opportunities for review that they did not pursue"—specifically, habeas corpus. Resp. Br. 47; see *id.* at 35; *Mendoza-Lopez*, 481 U.S. at 836-837. But Section 1326(d), rather than *Mendoza-Lopez*'s understanding of the remedies available in that particular case, applies here. And the government's position rests not on the availability of habeas corpus, but on respondent's ability to appeal to the BIA and, if necessary, the court of appeals—precisely the procedure that *Mendoza-Lopez* assumed was unavailable there. See 481 U.S. at 839-840.

Respondent also relies (Br. 48-49) on the Court's "assum[ption]" in *Mendoza-Lopez* that the facts there constituted a deprivation of due process. 481 U.S. at 839. But the provision's text does not reflect that assumption. And the immigration judge in *Mendoza-Lopez* committed errors substantially different from the one that respondent asserts. See Gov't Br. 31-33. Contrary to respondent's claim (Br. 48), his argument finds no support in Chief Justice Rehnquist's *Mendoza-Lopez* dissent. The dissent observed that the defendants there

had not suggested that the immigration judge had "erroneously applied the law in determining that [they] were deportable," *Mendoza-Lopez*, 481 U.S. at 845, without addressing the potential effect, if any, of such an allegation.

In the end, respondent's lenity argument turns (Br. 50-51) on his view that "Congress * * * had good reason to avoid" unlawful-reentry prosecutions where legal developments subsequent to a defendant's removal demonstrate that his prior offense was not a removable one. But respondent's view that the statute, as written, has "the potential for harsh results" does not demonstrate ambiguity, and it does not make this Court "free to rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). Congress plainly required that an unlawful-reentry defendant satisfy three distinct prerequisites in order to challenge the removal order that is the basis for the charge. See Gov't Br. 14-16. The well-established avenues for administrative and judicial review of removal orders may mean that few unlawful-reentry defendants may be able to show both that they exhausted any "available" administrative remedies, as required by Section 1326(d)(1), and that their removal proceedings "improperly deprived [them] of the opportunity for judicial review," as required by Section 1326(d)(2). See Resp. Br. 49. But that is how Congress decided to write the statute. See, *e.g.*, *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of [congressional] purpose is the statutory text."). In doing so, it did not leave room for the exception that respondent seeks or create grievous ambiguity.

B. The Plain Text Of Section 1326(d) Raises No Significant Constitutional Or Equitable Concerns

Respondent attempts to justify his untenable construction of Section 1326(d) by arguing that enforcing the statute as written would "raise serious constitutional concerns" and be at "loggerheads with traditional equitable principles." Resp. Br. 13; *id.* at 23. Respondent did not make those arguments below, and to the extent that they are independent of his statutory-interpretation argument—*i.e.*, to the extent that he is arguing that the statute is unconstitutional as applied or seeking a freestanding equitable exception to the statute—this Court should not address them. See *Cutter*, 544 U.S. at 718 n.7. In any event, neither argument has merit.

1. The straightforward application of Section 1326(d) raises no significant constitutional questions

a. Respondent errs in relying (Br. 14) on the canon of constitutional avoidance, which instructs that "[w]hen a serious doubt is raised about the constitutionality of an act of Congress," a court should "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Nielsen* v. *Preap*, 139 S. Ct. 954, 971 (2019) (citation and internal quotation marks omitted). That canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Id.* at 972 (citation omitted). "The canon has no application" where, as here, the statute is unambiguous. *Ibid.* (citation and internal quotation marks omitted); see, *e.g.*, *Lewis*, 445 U.S. at 65.

Even if Section 1326(d) were unclear, respondent cannot identify any significant constitutional question arising from applying it. Respondent contends (Br. 15-

16) that the Court has "reserved the question whether the Constitution permits using an administrative order to 'establish an element of a criminal offense,' without affording any opportunity to challenge the order's substantive validity." See Resp. Br. 7-8. But that question is not implicated here, because respondent had the opportunity to challenge the removal order in his removal proceedings, by appealing to the BIA and then, if necessary, to the court of appeals. Moreover, even after those proceedings concluded, respondent could have moved to reopen them, see, *e.g.*, *Copeland*, 376 F.3d at 67, or sought the Attorney General's permission to reapply for admission, see 8 U.S.C. 1182(a)(9) and 1326(a)(2), and then demonstrated that no other bars on admission applied to him. See generally *Briones-Sanchez* v. *Heinauer*, 319 F.3d 324, 327-328 (8th Cir. 2003). Respondent's failure to do any of those things, and instead to break the law by reentering the United States despite an extant removal order, does not render his prosecution unconstitutional.

As the government has explained (Br. 34-36 & n.4), Section 1326(d) reflects the principle that administrative orders generally may not be collaterally attacked on a basis that could have been raised before they became final. In those situations, the original "opportunity to be heard and for judicial review," *Yakus*, 321 U.S. at 444, satisfies the Due Process Clause. This Court's rejection of a challenge to a prior criminal conviction in *Lewis* v. *United States*, supports adherence to that principle here. The defendant there was convicted for unlawfully possessing a firearm after a felony conviction, in violation of 18 U.S.C. App. 1202(a)(1) (1978). *Lewis*, 445 U.S. at 57. The Court assumed that the defendant's prior state felony prosecution had violated

Gideon v. *Wainwright*, 372 U.S. 335 (1963), which was "fully retroactive" and applied to the defendant's case. *Lewis*, 445 U.S. at 59. Nonetheless, the Court held that because the state conviction had "never been overturned," it could be used as the predicate for a Section 1202(a)(1) prosecution. *Id.* at 57; see *id.* at 60-65.

The Court in *Lewis* explained that as a statutory matter, Section 1202(a)(1) simply required that the defendant have been "convicted" of a prior felony. 445 U.S. at 60 (citation omitted). As to the constitutional issue, the Court emphasized that "a convicted felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm." *Id.* at 67; see *id.* at 57. That was true even though, as the dissent observed, the defendant's lack of counsel would have made such a challenge more difficult. See *id.* at 73 (Brennan, J., dissenting). Although *Lewis* involved a claim invoking the particular "concept of equal protection embodied in the Due Process Clause," *id.* at 65, this Court and the courts of appeals have understood *Lewis* to be relevant to procedural due process claims, and to turn on "the availability of alternative means to secure judicial review of the" underlying conviction. *Mendoza-Lopez*, 481 U.S. at 840-842; see, *e.g.*, *United States* v. *First*, 731 F.3d 998, 1008-1009 (9th Cir. 2013), cert. denied, 574 U.S. 828 (2014); *United States* v. *Baker*, 197 F.3d 211, 217 (6th Cir. 1999), cert. denied, 528 U.S. 1197 (2000); cf. *Daniels* v. *United States*, 532 U.S. 374, 383 (2001) (stating that due process does not generally require "another bite at the apple" where a prior conviction that the defendant failed to challenge "is later used to enhance another sentence").

The logic of *Lewis* applies here. As a statutory matter, Section 1326(d) simply requires a prior removal order. See p. 9, *supra*. And as a constitutional matter, respondent had a clear avenue for challenging the validity of that removal. See pp. 2-7, *supra*. *Lewis* also demonstrates that respondent's reliance (Br. 21-22) on "[t]his Court's collateral-review jurisprudence" involving retroactive "substantive rule[s]" is misplaced. Like substantive rules, the right to counsel—the quintessential "watershed" procedural rule—applies retroactively. *Beard* v. *Banks*, 542 U.S. 406, 417 (2004) (citation omitted); see *Lewis*, 445 U.S. at 59. Nonetheless, the defendant in *Lewis* could not assert the invalidity of his prior state conviction to undermine his federal prosecution; instead, he should have "clear[ed] his status *before* obtaining a firearm." *Id.* at 64. Respondent here should have, and plainly could have, pursued similar relief with respect to his removal order.

b. Respondent errs in attempting (Br. 14-21) to draw support for his constitutional argument from *Mendoza-Lopez* itself. Section 1326(d) precisely tracks the remedy that *Mendoza-Lopez* prescribed after considering the asserted constitutional infirmity in the prior version of the unlawful-reentry statute. See Gov't Br. 28-31. That remedy cannot *itself* be viewed as constitutionally inadequate. Indeed, respondent cites no decision in the 25 years since Section 1326(d)'s enactment suggesting, much less holding, that the statutory codification of *Mendoza-Lopez* is unconstitutional.

Respondent principally relies (Br. 15-16) on a footnote in *Mendoza-Lopez* stating that "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling." 481 U.S. at 838 n.15. The footnote went on, however, to observe that

Yakus v. *United States* had upheld such a scheme. See *ibid.* To be sure, the Court in *Mendoza-Lopez* noted that "the decision in [*Yakus*] was motivated by the exigencies of wartime, dealt with the propriety of regulations rather than the legitimacy of an adjudicative procedure, and, most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum"—and the footnote stated that "[u]nder different circumstances, the propriety of using an administrative ruling in such a way remains open to question." *Ibid.* But the remedy that *Mendoza-Lopez* prescribed for avoiding unconstitutional unlawful-reentry prosecutions addresses the second and third concerns by requiring that individualized review of the legitimacy of a defendant's own adjudicatory proceedings be available. See *id.* at 838. And respondent identifies no opinion for a majority of the Court supporting the view that such a remedy would be sufficient only in wartime. Cf. *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (noting Congress's plenary power over immigration).

This Court's earlier decision in *United States* v. *Spector*, 343 U.S. 169 (1952), likewise does not cast serious doubt on the constitutionality of Congress's codification of *Mendoza-Lopez*. The Court in *Spector* declined to address whether "the statute must be declared unconstitutional because it affords a defendant no opportunity to have the court which tries him pass on the validity of the order of deportation," because that question had not been "raised by the appellee nor briefed nor argued here." *Id.* at 172. Justice Jackson's dissent questioned the constitutionality of relying on a prior deportation order in a criminal proceeding, *id.* at 174-180,

but the opinion for the Court did not indicate such a concern, *id.* at 172-173. And the dissent noted that the Court had not yet decided whether the deportation order was subject to review under the Administrative Procedure Act, 5 U.S.C. 551, or the scope of such review. *Spector*, 343 U.S. at 178-179. In respondent's case, however, the procedures for a full and fair review of his removal order were well established and statutorily codified. If respondent had exhausted his administrative remedies and sought review in the court of appeals, the court would have considered *de novo* the argument that his DUI offense was not an "aggravated felony." See, *e.g.*, *Carlos-Blaza* v. *Holder*, 611 F.3d 583, 587 (9th Cir. 2010).

Finally, respondent suggests in passing that relying on a removal order in this context "raise[s] serious separation of powers concerns." Br. 17. But no such concerns exist where a defendant could have, but chose not to, seek administrative and judicial review of a removal order. In such a case, the court is not acting as a "rubber stamp" for the agency by declining to provide a second chance to seek judicial review. *Ibid.* (quoting *Estep* v. *United States*, 327 U.S. 114, 133-134 (1946) (Rutledge, J., concurring)). It is simply enforcing the "familiar" principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus*, 321 U.S. at 444.

2. Respondent's reliance on this Court's actual-innocence case law is misplaced

Respondent errs in contending (Br. 23) that he should be permitted to challenge his removal order under "traditional equitable principles." He asserts that

"actual innocence of an underlying sanction vitiates otherwise applicable procedural bars to challenging the sanction." Resp. Br. 24. But he does not claim that he is actually innocent of unlawful reentry; nor could he, because an immigration judge's erroneous classification of a prior offense as an aggravated felony does not negate any element of a Section 1326(a) offense. See p. 9, *supra*. Respondent's reliance (Br. 22) on *Fiore* v. *White*, 531 U.S. 225 (2001) (per curiam), which addressed "whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit," *id.* at 228, is therefore misplaced.

Although the conduct for which he was indicted would satisfy all of the elements of the crime, respondent urges (*e.g.*, Br. 24) that prosecution is nonetheless barred on the theory that he is "actually innocent" of the civil classification of removability. But his support for that assertion rests on cases in the criminal post-conviction context, involving attempts to undo the same conviction to which a claim of "actual innocence" would pertain. He identifies no decision of this Court expanding "actual innocence" from the criminal post-conviction context to one like this, and the rationales of the decisions that he cites do not support such an expansion.

As respondent recognizes (Br. 25), the Court's actual-innocence decisions are grounded "in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *McQuiggin* v. *Perkins*, 569 U.S. 383, 392 (2013) (quoting *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993)); see *id.* at 397. The Court has thus allowed actual innocence as "an exception * * * to judge-made, prudential barriers to habeas relief, or as a means of

channeling judges' statutorily conferred discretion not to apply a procedural bar." *Id.* at 402 (Scalia, J., dissenting); see *id.* at 404-405; see also *id.* at 393 (majority opinion). But the Court has never suggested that actual innocence provides a general means for courts to ignore statutorily-mandated exhaustion requirements.

Respondent observes (Br. 25) that in *McQuiggin* v. *Perkins*, this Court applied the actual-innocence "gateway" to a case in which the "impediment" to relief was the federal statute of limitations in 28 U.S.C. 2244(d)(1). *McQuiggin*, 569 U.S. at 386. But that decision likewise relied on habeas courts' traditional equitable powers, and the Court explained that it would "not construe a statute to displace" such "authority absent the clearest command." *Id.* at 397 (citation omitted); see *id.* at 397 n.2. No sound analogy can be drawn between this criminal prosecution and a habeas proceeding; the proceedings here were initiated to address respondent's commission of a crime, not to revisit prior determinations, and a court has no equitable authority to rewrite the terms of the statute of prosecution. See, *e.g.*, *Dodd*, 545 U.S. at 359. Even if such authority existed, Section 1326(d) is precisely the type of "clear" statement from Congress that *McQuiggin* recognized would displace equitable discretion to excuse defendants' procedural failures. 569 U.S. at 397; accord *Miller* v. *French*, 530 U.S. 327, 340 (2000) (holding that Congress displaced courts' equitable power because "Congress ha[d] made its intent clear").

Indeed, Congress was particularly clear that "actual innocence" of removability, standing alone, does not authorize a defendant to collaterally attack his removal order in a Section 1326 prosecution. While the determi-

nation that an unlawful-reentry defendant's prior offense should not have rendered him removable might satisfy the "fundamental[] unfair[ness]" requirement in Section 1326(d)(3), Congress did not permit a defendant to collaterally attack his removal order on that basis alone. 8 U.S.C. 1326(d)(3). Instead, Congress *also* required that the defendant "demonstrate" that he exhausted any "available" administrative remedies and was "improperly deprived" of judicial review. 8 U.S.C. 1326(d)(1) and (2). The statutory text thus refutes respondent's contention that an error regarding removability excuses a defendant from independently satisfying each of Section 1326(d)'s prerequisites. Because respondent did not satisfy even two of the three, let alone all of them, he is not entitled to the relief granted below.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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