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

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT, AND SUPPLEMENTAL BRIEF

Rene L. Valladares
Federal Public Defender
Cristen C. Thayer
Aarin E. Kevorkian
Ellesse Henderson
Assistant Federal
Public Defenders
OFFICE OF FEDERAL PUBLIC DEFENDER
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
(702) 388-6577

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2600

Bradley N. Garcia
Counsel of Record
Anna O. Mohan
Grace E. Leeper
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5504
bgarcia@omm.com

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Pursuant to this Court's Rules 25.6 and 25.7, respondent respectfully seeks leave to file a post-argument brief in this case addressing one specific issue. In its reply brief, the Government suggested for the first time in this litigation that respondent could have avoided prosecution under 8 U.S.C. § 1326 if, after this Court held in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that the crime for which he was deported was not a deportable offense, he had filed a "motion to reopen" his removal order. *See* Reply Br. 16. At oral argument, the Government advanced that claim in stronger terms, asserting that "Respondent plainly could have sought" a motion to reopen after *Leocal* was decided. Tr. 14:24. Such a motion, the Government maintained, "would allow him if successful to avoid the 1326 charge all together." *Id.* 15:21-23. Several Justices asked questions or otherwise suggested that these representations may be important to their analyses of the parties' respective positions, while Justice Sotomayor explicitly questioned whether the Court had sufficient briefing to evaluate or rely on the Government's representations.

Because respondent had no opportunity in the briefing process to address the subject of motions to reopen and only a very limited chance during oral argument to do so, he respectfully moves to address the issue here with a short argument and supporting citations. For the reasons explained in the attached supplemental brief, the Government's representations are incorrect. Respondent could *not* have successfully pursued a motion to reopen after this Court decided *Leocal*.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender
Cristen C. Thayer
Aarin E. Kevorkian
Ellesse Henderson
Assistant Federal
Public Defenders
OFFICE OF FEDERAL PUBLIC DEFENDER
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
(702) 388-6577

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2600

Bradley N. Garcia
Counsel of Record
Anna O. Mohan
Grace E. Leeper
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5504
bgarcia@omm.com

April 29, 2021

SUPPLEMENTAL BRIEF OF RESPONDENT

Neither the Government's petition for a writ of certiorari or its opening brief referred to a motion to reopen as a remedy available to respondent. In its reply brief, the Government mentioned the potential relevance of a motion to reopen only once, in the context of addressing the constitutional issue, *see* Reply Br. 15-16, and did not suggest a motion to reopen was an "available" remedy in the sense contemplated by Section 1326(d), *see id.* at 2-14. Yet the Government suggested at oral argument that "Respondent plainly could have sought" a motion to reopen after this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Tr. 14:24. That suggestion is incorrect and should play no role in the Court's analysis of this case.

When this Court decided *Leocal*, there was no way respondent could have successfully pursued a motion to reopen. Respondent was deported in 1998, the day after his removal order issued, and six years before *Leocal*. Resp. Br. 6. Once outside of the United States, a Board of Immigration Appeals ("BIA") regulation known as the "departure bar" prohibited him from filing a motion to reopen. That regulation provided that "[a] motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States." 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1); *see also Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008).

In 2011, seven years after *Leocal*, the Ninth Circuit held—over the Government's contrary argument—that the departure bar cannot preclude a

noncitizen from exercising a statutory right to file a motion to reopen. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 1075-77 (9th Cir. 2011) (expanding on *Coyt v. Holder*, 593 F.3d 902, 903 (9th Cir. 2010)). But the Government did not state in its briefs or at oral argument that it believes this holding is correct. At any rate, the governing statute would have deemed any motion to reopen filed in 2011 long-since time-barred. *See* 8 U.S.C. § 1229a(c)(7)(C)(i) ("[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."). The Government suggested at oral argument that perhaps respondent could have asked for equitable tolling. Tr. 14:1-4. But as this Court has explained, equitable tolling "is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs," *Wallace v. Kato*, 549 U.S. 384, 396 (2007), and we are aware of no comparable case in which the Government has ever agreed that equitable tolling should be granted. *Cf.* In Re: Samath Doung, No. AXXX-XX9-112-ELO, 2018 WL 4611461, at *1 (DCBABR Aug. 15, 2018) ("Neither the statute nor the regulations permit equitable tolling of the time limitations for filing a motion to reopen due to a change in law."). Indeed, the Government is presenting oral argument before the Fifth Circuit *today* defending a BIA decision that denied equitable tolling for a promptly filed motion to reopen following a decision of this Court. *See Gonzalez Hernandez v. Garland*, No. 19-60274 (5th Cir. April 24, 2019).

Even if it were accurate, the Government's suggestion that a successful motion to reopen would have allowed respondent to avoid prosecution under Section

1326 would still run headlong into the Government's own reading of Section 1326. According to the Government, a noncitizen must always satisfy the three prongs of Section 1326(d) to avoid a Section 1326 prosecution if he was previously removed—even where, as here, his underlying removal order is indisputably invalid. If that is so, then prevailing on a motion to reopen would be of no consequence. A noncitizen such as respondent who successfully reopens his removal proceedings has seemingly not, under the Government's reading of the statute, exhausted his administrative remedies (since he still waived his original right to judicial review), *see* 8 U.S.C. § 1326(d)(1), and he certainly has not been "improperly deprived … of the opportunity for judicial review," *id.* § 1326(d)(2).*

In short, the only way a successful motion to reopen could provide a defense to a Section 1326 prosecution is if the undisputed invalidity of a removal order—for reasons independent of the three prongs of Section 1326(d)—precludes such a prosecution. For all of the reasons respondent explained in his brief and at oral argument, such is precisely the case here, as well.

---

* The Government also suggested at oral argument that "the 1326 charge doesn't lie if an individual seeks and obtains the Attorney General's permission to reapply for admission." Tr. 15:2-4. But that avenue does not constitute an "administrative remed[y] … to seek relief against the [removal] order," and thus would not satisfy 8 U.S.C. § 1326(d)(1) either. Put differently, even if Mr. Palomar-Santiago had obtained permission to reapply for admission (a highly unlikely outcome), that process would not have had any bearing on the validity of his underlying removal order.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender
Cristen C. Thayer
Aarin E. Kevorkian
Ellesse Henderson
Assistant Federal
Public Defenders
OFFICE OF FEDERAL PUBLIC DEFENDER
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
(702) 388-6577

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2600

Bradley N. Garcia
Counsel of Record
Anna O. Mohan
Grace E. Leeper
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5504
bgarcia@omm.com

April 29, 2021