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

CONDITIONAL CROSS-MOTION OF THE UNITED STATES IN RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

In the Supreme Court of the United States

No. 20-437

UNITED STATES OF AMERICA, PETITIONER

v.

REFUGIO PALOMAR-SANTIAGO

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

CONDITIONAL CROSS-MOTION OF THE UNITED STATES IN RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

The United States does not oppose respondent's Motion for Leave to File a Supplemental Brief After Oral Argument. In the event that the Court grants that motion, the United States seeks leave to file the following supplemental brief in response.

For purposes of this Court's Rule 21.1, respondent's counsel has informed us that he does not oppose this cross-motion.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

MAY 2021

SUPPLEMENTAL BRIEF OF THE UNITED STATES IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF AFTER ARGUMENT

Respondent's supplemental brief misconstrues the government's previous statements about motions to reopen and evades the government's simple point. Even after respondent failed to "exhaust[]" any "available" administrative remedies—as required by 8 U.S.C. 1326(d)(1) before mounting a collateral challenge to a removal order in a criminal prosecution for unlawful reentry—he still failed to take any other steps that might have avoided culpability under Section 1326. Instead, respondent unlawfully reentered the United States. Neither due process nor "equitable principles" (Resp. Br. 23) require that he be permitted to contest the validity of his previous removal order in this criminal proceeding.

1. Respondent asserts that, at argument, the government relied on a motion to reopen his removal proceedings as an "'available' remedy in the sense contemplated by Section 1326(d)." Supp. Br. 1. That misconstrues the government's statements. As government counsel made clear, respondent cannot "demonstrate[]" that he "exhausted" any "available" administrative remedies because he waived the right to appeal the immigration judge's decision to the Board of Immigration Appeals (BIA). See, *e.g.*, Tr. 3-4, 10-11, 18, 22-23. That—as well as respondent's inability to show that he was improperly deprived of the opportunity for judicial review, see 8 U.S.C. 1326(d)(2)—resolves the question presented. See Gov't Br. 10-12, 17-27, 31-37; Reply Br. 2-7, 11-12, 14, 16, 20.

Indeed, when Justice Alito asked whether someone who filed a motion to reopen "would be considered to have exhausted administrative remedies, even though

there wasn't an appeal to the BIA from the initial removal order," government counsel replied: "So, candidly, Justice Alito, we haven't taken a position on that here." Tr. 15. Rather, assuming respondent had not already unlawfully reentered, "what those separate procedures would do, would allow him, if successful, to avoid the 1326 charge altogether." *Ibid.* Government counsel likewise emphasized in rebuttal that the "other methods for obtaining relief and avoiding an unlawful reentry charge"—including through a motion to reopen—were "above and beyond" and "[o]n top of what's constitutionally required * * * and what Congress provided in Section 1326(d)." Tr. 51; see Tr. 18-19 (responding to Justice Sotomayor's questions by stating that the availability of motions to reopen should provide the Court "some comfort," but Section 1326(d) does not raise significant constitutional questions because it validly "enforce[s] * * * a waiver of available remedies" in the removal proceedings). The government thus agrees that the result in this case does not turn on the availability of a motion to reopen. See Supp. Br. 1.

2. Respondent nonetheless contends (Supp. Br. 1-2) that, because he was removed in 1998 and *Leocal* v. *Ashcroft*, 543 U.S. 1, was not decided until 2004, any motion to reopen would have been untimely under 8 U.S.C. 1229a(c)(7)(C)(i). But as the government explained at argument, procedural mechanisms exist to file a motion to reopen after the "statutory limit" has "elapsed." Tr. 13-15. The time-bar would not have applied to joint or sua sponte motions to reopen. See 8 C.F.R. 1003.2(a) and (c)(3)(iii) (2004); 8 C.F.R. 1003.23(b)(1) and (b)(4)(iv) (2004); Tr. 14. And if respondent had filed a motion to reopen subject to the statutory time limitation, he could have sought equitable tolling. See Tr. 14. Although respondent suggests (Supp. Br. 2) that the government

would have opposed, and the immigration judge would have denied, equitable tolling, the court of appeals' later decision in the administrative case he cites acknowledged that a change in law may "serve as a basis for tolling" if the petitioner "show[s] due diligence." *Doung* v. *Garland*, 840 Fed. Appx. 977, 978 (9th Cir. 2021) (citing *Lona* v. *Barr*, 958 F.3d 1225, 1230-1232 (9th Cir. 2020) (addressing tolling of 30-day period for motion to reconsider)); cf. *In re Arreola-Arreola*, No. AXXX-XX4-117, 2018 WL 5921078 (B.I.A. 2018) (granting sua sponte motion to reopen based on same change in law at issue here).*

Respondent further suggests (Supp. Br. 1) that the regulatory "departure bar" would have prohibited him from filing a motion to reopen from "outside the United States." But the Ninth Circuit has held that the departure bar does not apply to individuals who were removed after removal proceedings were completed (rather than while they were ongoing). See *Reynoso-Cisneros* v. *Gonzales*, 491 F.3d 1001, 1002 (2007) (per curiam); *Lin* v. *Gonzales*, 473 F.3d 979, 982 (2007); see also, *e.g.*, *Garcia* v. *Holder*, 472 Fed. Appx. 477, 478 (9th Cir. 2012) (noting government's acknowledgment that, in light of *Lin*, BIA erred in relying on departure bar).

---

* The parties have focused on motions to reopen, but the regulations also provide for motions to reconsider based on "errors of * * * law." 8 C.F.R. 1003.2(b)(1); 8 C.F.R. 1003.23(b)(1); see 8 C.F.R. 1003.2(b) (2004); 8 C.F.R. 1003.23(b)(2) (2004). In 2004 (as today), immigration judges and the BIA had sua sponte authority to grant reopening *or* reconsideration, but no provision expressly addressed joint motions to reconsider. See 8 C.F.R. 1003.2(a) (2004); 8 C.F.R. 1003.23(b)(1) (2004). Although the regulations were revised in 2020, see Tr. 14, those changes have been enjoined, leaving the prior regulations in place, see *Centro Legal de La Raza* v. *Executive Office for Immigration Review*, No. 21-cv-463, 2021 WL 916804 (N.D. Cal. Mar. 10, 2021).

And, as respondent observes (Supp. Br. 1-2), the Ninth Circuit has held that the departure bar does not foreclose a statutory right to file a motion to reopen. Those decisions post-date *Leocal*, but respondent could have raised the same contentions earlier. See *Lin*, 473 F.3d at 982 (relying on circuit decisions from 1999 and 2005). Respondent was not guaranteed relief, but he did not even try before his unlawful reentry.

3. Respondent errs in contending (Supp. Br. 2-3) that a *successful* motion to reopen would not have "allowed [him] to avoid prosecution under Section 1326." Contrary to respondent's suggestion, if his removal proceedings had been reopened and terminated before his unlawful reentry, the government would construe Section 1326(a) not to reach his conduct. Moreover, respondent effectively ignores the other option that government counsel discussed at argument. See Tr. 4, 14-15, 18; Supp. Br. 3 n.*. If respondent had obtained the Attorney General's permission to reapply for admission before unlawfully reentering, he could not have been prosecuted under the terms of Section 1326(a)(2)(A). In either circumstance, if respondent had successfully pursued other options before unlawfully reentering the United States, he would have had no need to invoke the affirmative defense in Section 1326(d).

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

MAY 2021