No. A._____

In the Supreme Court of the United States

NOE FLORES-PEREZ,

***Petitioner*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

PETITION FOR WRIT OF CERTIORARI

FEDERAL COMMUNITY DEFENDER

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QUESTION PRESENTED

After a non-citizen is removed, 8 U.S.C. § 1326(a) criminalizes his return without authorization. A non-citizen charged with illegally re-entering the United States can challenge the validity of the removal order, but must "demonstrate[] that" he "exhausted any administrative remedies that may have been available to seek relief against the order" and that "the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review." 8 U.S.C. § 1326(d)(1)–(2).

Once a removal order is entered *in absentia*, a non-citizen cannot appeal to the Bureau of Immigration Appeals. *See* 8 U.S.C. § 1229a(b)(5)(C); *In re Guzman*, 22 I. & N. Dec. 722, 723 (BIA 1999). The only mechanism available to non-citizens to revisit that order is to file a motion to reopen. 8 U.S.C. § 1229a(b)(5)(C). A motion to reopen an *in absentia* removal proceeding is available "at any time" only if the non-citizen can demonstrate either that he "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)," or that he "was in Federal or State custody and the failure to appear was through no fault of" his own. 8 U.S.C. § 1229a(b)(5)(C).

This case presents two questions:

(1) Whether a motion to reopen is an administrative remedy that "may have been available to seek relief against" an *in absentia* removal order, which a non-citizen must have pursued before challenging the validity of the order under 8 U.S.C. § 1326(d)?

(2) Whether a motion to reopen is an "available" remedy when the non-citizen was never provided actual notice of the hearing, never received information about how to administratively challenge the *in absentia* removal order, did not have the information necessary to file a motion to reopen, and would have been barred from filing a motion to reopen after his removal.

RELATED PROCEEDINGS

United States v. Flores-Perez, No. 19-20004 (E.D. Mich.)

United States v. Flores-Perez, No. 20-1077 (6th Cir.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

PETITION FOR A WRIT OF CERTIORARI

Petitioner Noe Flores-Perez respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Part III of the Rules of the Supreme Court of the United States. The Sixth Circuit Court of Appeals affirmed the district court's opinion denying the motion to dismiss on June 16, 2021. Mr. Flores-Perez sought, and this Court granted, an extension of time to file a petition for a writ of certiorari until January 6, 2022. This petition is therefore timely.

OPINIONS BELOW

The Sixth Circuit's published opinion affirming the district court's opinion and order denying Mr. Flores-Perez's motion to dismiss is included at A-1 and is available at *United States v. Flores-Perez*, 1 F.4th 454 (6th Cir. 2021). The order denying the petition for rehearing en banc is included at A-2. The district court's opinion and order denying the motion to dismiss is included at A-3 and is available at *United States v. Flores-Perez*, No. 19-20004, 2019 WL 2929187 (E.D. Mich. July 8, 2019).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1326(d):

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien 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.A. § 1229(a)(1)–(2)

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

8 U.S.C. § 1229a(b)(5):

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

8 C.F.R. § 1003.2(c)–(d):

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be

filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding;

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter;

(v) For which a three-member panel of the Board agrees that reopening is warranted when the following circumstances are present, provided that a respondent may file only one motion to reopen pursuant to this paragraph (c)(3):

(A) A material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien; and

(B) The movant exercised diligence in pursuing the motion to reopen;

(vi) Filed based on specific allegations, supported by evidence, that the respondent is a United States citizen or national; or

(vii) Filed by DHS in removal proceedings pursuant to section 240 of the Act or in proceedings initiated pursuant to § 1208.2(c) of this chapter.

(d) Departure, deportation, or removal. 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. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

INTRODUCTION

Section 1326(a) of Title 8 makes it a crime for a non-citizen to enter to United States after being removed without permission. "[W]here a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987). To satisfy this requirement, Congress enacted 8 U.S.C. § 1326(d). That provision "establishes three prerequisites that defendants facing unlawful-reentry charges must satisfy before they can challenge their original removal orders." *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1619 (2021). The first requirement is that the non-citizen "exhausted any administrative remedies that may have been available to seek relief against the order." 8 U.S.C. § 1326(d)(1).

Since 1987, this Court has heard only two cases involving challenges to removal orders in the context of a prosecution for illegal re-entry under 8 U.S.C. § 1326(d): *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), which prompted Congress to add § 1326(d), and *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021). In both cases, the non-citizens challenging the removal orders received actual notice of the hearing, actually appeared for the hearing, and affirmatively waived their right to appeal to the BIA. *See Mendoza-Lopez*, 481 U.S. at 831–32; *Palomar-Santiago*, 141 S. Ct. at 1620. This Court has never addressed when a non-citizen who has been ordered removed *in absentia* can challenge the validity of the removal order.

Noe Flores-Perez was ordered removed *in absentia* because of three errors outside of his control. First, the Notice to Appear (NTA) did not include the date and time of the hearing, as required by 8 U.S.C. § 1229(a). Second, the immigration agent mis-transcribed Flores-Perez's address, and the notice of the date and time of the hearing, as well as the form to correct or update an address, were returned undelivered. Third, the *in absentia* removal order and explanation of how to file a motion to reopen the removal proceedings were also returned to sender because of the transcription error. Flores-Perez did not learn why he missed the hearing until this prosecution for illegal reentry.

When non-citizens are ordered removed *in absentia*, the only avenue for administrative relief from that order is a motion to reopen. Motions to reopen are strongly disfavored and rarely granted. *See INS v. Doherty*, 503 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."). A motion to reopen an *in absentia* removal proceeding is available "at any time" only if the non-citizen can demonstrate either that he "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)," or that he "was in Federal or State custody and the failure to appear was through no fault of" his own. 8 U.S.C. § 1229a(b)(5)(C).

In 2018, when the government chose to prosecute Flores-Perez for illegally re-entering the United States, he learned for the first time why he never received notice of the date and time of his hearing. He hired an immigration attorney to file a motion

to reopen and collaterally attacked the *in absentia* removal order under 8 U.S.C. § 1326(d). The Sixth Circuit held that Flores-Perez failed to exhaust administrative remedies, as required by 8 U.S.C. § 1326(d)(1), because he did not move to reopen removal proceedings. *United States v. Flores-Perez*, 1 F.4th 454, 458 (6th Cir. 2021).

Without this Court's guidance about whether and when a motion to reopen is an "available" administrative remedy non-citizen must pursue before challenging the validity of the *in absentia* removal order under 8 U.S.C. § 1326(d), the circuit courts have reached different conclusions. The Sixth Circuit has imposed a formidable barrier in the way of challenges to in absentia removal orders even for those who have been deprived the most fundamental requirements of due process: notice of the proceedings and the opportunity to present objections. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). In order to challenge an *in absentia* removal order under § 1326(d), the Sixth Circuit requires non-citizens—most of whom do not speak English—to learn on their own about administrative remedies and to uncover why they may not have received actual notice of the hearing. Had Flores-Perez appealed in the Third, Fourth, Fifth, or Ninth Circuits, the outcome likely would have been different.

The opinion below conflicts with the statutory text of 8 U.S.C. § 1326(d), and this Court's holdings in *Ross v. Blake*, 578 U.S. 632 (2016), and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). Granting the petition will not only resolve an intractable circuit split, but also will provide greater clarity to the courts below about how to determine whether an administrative remedy is "unavailable."

STATEMENT OF THE CASE

A. Flores-Perez never received actual notice of the removal hearing

In 2001, Flores-Perez appeared twice in state court to answer for a ticket. As he was leaving, two immigration officers approached and took him to the immigration office. Although the officers spoke some Spanish, Flores-Perez was not provided an interpreter. Flores-Perez provided the officers his driver's licenses, which included his address at Colony Lane, #311.

Before releasing Flores-Perez, an officer gave him a document labeled "Notice to Appear," but it did not include a date and time. Both were "to be set." This NTA did not satisfy the requirements of 8 U.S.C. § 1229(a)(1), which requires that the NTA include the date and time of the hearing in a single document. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021); *see also id.* at 1483 (using the text of 8 U.S.C. § 1229a(b)(7), which governs *in absentia* removal to confirm that an NTA must be a single document with all pertinent information).

After being released from custody, Flores-Perez continued living at the Colony Lane address, but he never received notice of the date and time of his hearing. The immigration agent had recorded Flores-Perez's address incorrectly, so a Notice of Hearing, which included the date and time of the hearing, was sent to **#1**11 at the Colony Lane address—*not* #**3**11 as written on the license. The envelope and its contents were returned to sender.

B. An immigration judge orders Flores-Perez removed *in absentia*

In January 2003, an immigration judge (IJ) held a removal hearing. Flores-Perez did not appear at the hearing because he never received actual notice of the date and time of the hearing. Because he was not there, and he could not apply for pre-hearing voluntary departure or other forms of discretionary relief. Had he received notice of the date and time of the hearing, he would have requested voluntary departure and likely would have received it.

There are three conditions that must be satisfied before an immigration judge can order a non-citizen's removal *in absentia*: (1) service of "written notice required under paragraph (1) or (2) of section 1229(a) of this title" to the non-citizen or his counsel of record; (2) clear and convincing evidence that the written notice was provided to the non-citizen; and (3) clear and convincing evidence that the non-citizen is removable. 8 U.S.C. § 1229a(b)(5). The IJ found all three requirements were satisfied and ordered Flores-Perez removed *in absentia*.

Later that month, the Department of Justice mailed the IJ's decision to the same wrong address. The envelope in which the order was sent also included information about how to move to reopen the hearing. Both documents were returned to sender undelivered.

C. Flores-Perez is unable to file a motion to reopen the removal proceedings

In the early 2000s, Flores-Perez met his wife, a U.S. citizen. They married and had a child. In 2009, immigration agents separated the family when they arrested Flores-Perez for the 2003 immigration warrant. The family tried to find an

immigration lawyer, but Flores-Perez was deported four days after the arrest. They did not have enough time to hire a lawyer or figure out what to do.

Once a removal order is entered *in absentia*, a non-citizen cannot appeal to the Bureau of Immigration Appeals. *See* 8 U.S.C. § 1229a(b)(5)(C); *In re Guzman*, 22 I. & N. Dec. 722, 723 (BIA 1999). The only mechanism to rescind the *in absentia* removal order was to file a motion to reopen. Regulations created additional obstacles to Flores-Perez's ability to file a motion to reopen. Non-citizens may file only one motion to reopen removal proceedings. 8 C.F.R. § 1003.23(b)(4)(ii). Without any information or documents showing why the notice of the hearing was not delivered, Flores-Perez did not have enough evidence to file a motion to reopen.

In addition, the "departure bar" provides that nobody can move to reopen removal proceedings of a person "subsequent to his or her departure from the United States." 8 C.F.R. § 1003.23(b)(1). Most courts have now held that the "departure bar" is invalid. *See, e.g.*, *Santana v. Holder*, 731 F.3d 50, 55 (1st Cir. 2013) (collecting cases and noting that "the rule in every circuit . . . is that the post-departure bar either conflicts with the motion to reopen statute, or cannot be justified as a jurisdictional limitation"); *Garcia-Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012) ("Section 1229a(c)(7) unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States."). In 2009, however, when Flores-Perez was removed, the departure bar was in effect because the Sixth circuit had not yet held that it was an improper limitation on the immigration court's jurisdiction to

resolve motions to reopen.[1] *See Pruidze v. Holder*, 632 F.3d 234, 237–40 (6th Cir. 2011). The departure bar would have prevented Flores-Perez from getting relief by filing a motion to reopen; an immigration judge would have dismissed the motion for lack of jurisdiction.

D. The government chooses to prosecute Flores-Perez under 8 U.S.C. § 1326(a), and he discovered why he never received actual notice of the hearing

Flores-Perez eventually returned to the United States when he learned that his wife was pregnant and at a high-risk for complications. Since then, he has worked to support his family and raises his children. He is the only member of the family who is not a U.S. citizen.

ICE agents arrested Flores Perez in 2018, alleging that he had re-entered the United States illegally. The government provided discovery, including the NTA and a copy of the record from the Executive Office for Immigration Review, which proved that Flores-Perez never received actual notice.

Having learned for the first time why he never received notice of the date and time of the hearing, Flores-Perez moved twice to dismiss the indictment and hired an

[1] Although the Sixth Circuit held that the departure bar was not a proper jurisdictional limitation, it suggested, that the departure may instead be "a mandatory rule." *Pruidze*, 632 F.3d at 239–40. The government has never conceded this is correct and defends the departure bar to this day. *See Reyes-Vargas v. Barr*, 958 F.3d 1295, 1298 (10th Cir. 2020) (noting application of the bar). Even in the post-argument briefing in *Palomar-Santiago*, the government did not agree that the departure bar was inconsistent with the statute. *United States v. Palomar-Santiago*, No. 20-437, Mot. for Supp. Br., at 2 (Apr. 29, 2021); *United States v. Palomar-Santiago*, No. 20-437, Supp. Br. in Resp., at 3–4 (May 2021).

immigration attorney to move to reopen the removal proceedings. In the first motion to dismiss, he argued that the immigration judge lacked subject-matter jurisdiction to enter the order of removal because the NTA did not include the date and time of the hearing, and therefore was not a NTA under 8 U.S.C. § 1229(a). The second motion advanced two interrelated arguments about the validity of the removal order: (1) that the lack of *actual* notice of the proceeding deprived him of Due Process, and (2) the IJ lacked authority to enter an *in absentia* removal order because INS never provided a "written notice required under paragraph (1) or (2) of section 1229(a) of this title." 8 U.S.C. § 1229b(a)(7).

Flores-Perez explained that administrative remedies and judicial review were unavailable to him because (1) he did not have documents or know the facts necessary to file a motion; (2) the departure bar, 8 C.F.R. § 1003.23(b)(1), prevented him from filing a motion to reopen after he was deported in 2009; (3) *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which confirmed that a proper NTA must include the date and time of the hearing, had only recently been decided; (4) he was never informed how to move to reopen; (5) he could not avail himself of the remedies because he did not speak or understand English; and (6) he did not have sufficient time to move to reopen before being deported. In addition, he argued that the motion to reopen he filed in 2019—after discovering the factual basis for it—satisfied § 1326(d)(1)'s requirements.

The district court denied both motions, finding both that Flores-Perez failed to exhaust administrative remedies or seek judicial review and that the *in absentia* proceeding was not fundamentally unfair. Appendix, A-3, APP016–22. The district

court faulted Flores-Perez for not filing a motion to reopen or correcting the address the agent had written incorrectly.

E. The Sixth Circuit issues an opinion relying on *United States v. Palomar-Santiago*

Flores-Perez entered a conditional plea, reserving his right to challenge the district court's denial of the motions to dismiss. On appeal, he presented many issues, including whether any administrative remedies "may have been available" to him "to seek relief against the order." 8 U.S.C. §1326(d)(1).

After this case was submitted in the Sixth Circuit on the briefs, this Court issued an opinion in *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021). This Court resolved a narrow question, holding that "§ 1326(d)'s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable." *Id.* at 1621 (abrogating *United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017)). Palomar-Santiago affirmatively waived his right to appeal to the BIA, and therefore he did not exhaust available administrative remedies. *Id.* at 1621–22. The only argument Palomar-Santiago made for why the administrative reviews was "unavailable" was that the immigration judge told him that his prior conviction rendered him removable (something that was not true). *Id.* at 1621. This Court rejected that contention because "the substantive complexity of an affirmative defense can[not] *alone* render further review of an adverse decision 'unavailable.'" *Id.* at 1621 (emphasis added).

In *Palomar-Santiago*, this Court did not address whether a non-citizen must file a motion to reopen before collaterally attacking an *in absentia* removal order

under 8 U.S.C. § 1326(d). That question was not resolved for good reason: the issue was not raised below, briefed, or necessary to the holding because Palomar-Santiago was not removed *in absentia*. He received actual notice of the date and time of the proceeding and was provided notice of the administrative remedies he could pursue.

In fact, in response to the Solicitor General's suggestion at oral argument that a motion to reopen was an available remedy, Palomar-Santiago filed supplemental briefing addressing why a motion to reopen was not "available." *United States v. Palomar-Santiago*, No. 20-437, Mot. for Supp. Br. (Apr. 29, 2021).[2] He argued that this process was not "available" because the "departure bar," 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1), prevented it. *Id.*, Supp. Br. at 2–3. In response, the Solicitor General reiterated that it was not taking a position on whether a motion to reopen was necessary to exhaust administrative remedies and that "this case does not turn on the availability of a motion to reopen." *United States v. Palomar-Santiago*, No. 20-437, Supp. Br. in Resp., at 1–2 (May 2021).[3] This Court therefore never resolved any question about whether and when a motion to reopen is an "available" remedy a non-citizen must pursue in order to attack a removal order under § 1326(d).

Nonetheless, without providing the parties an opportunity to address how the decision impacts this appeal, the Sixth Circuit held that "*Palomar-Santiago* forecloses relief for Flores-Perez" because he should have filed a motion to reopen his removal proceedings. *Flores-Perez*, 1 F.4th at 458; Appendix, A-1, APP004–5. The

[2] Available at https://perma.cc/N79Z-E5U6.
[3] Available at https://perma.cc/TL76-HPE4.

Sixth Circuit concluded that the procedural flaws in Flores-Perez's removal proceedings were "almost identical to the [flaw] in *Palomar-Santiago*." *Id.* (citing 141 S. Ct. at 1621); Appendix, A1 at APP005. The Sixth Circuit brushed aside a significant factual difference between the two cases: Palomar-Santiago received actual notice and appeared for his hearing, and Flores-Perez did not. Still, the Sixth Circuit did not address any of the arguments for why the facts here rendered administrative remedies unavailable to Flores-Perez.

Flores-Perez filed a timely petition for rehearing en banc. The Sixth Circuit denied the petition.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve disagreement between the circuit courts of appeals about whether and when a motion to reopen is an "available administrative remedy" a non-citizen must exhaust to challenge an *in absentia* removal order under 8 U.S.C. § 1326(d).

This case meets this Court's criteria for granting certiorari. First, there is an intractable split amongst the circuit courts that only this Court can resolve. Second, the Sixth Circuit's conclusion that a motion to reopen was an "available" administrative remedy that 8 U.S.C. § 1326(d)(1) requires non-citizens to exhaust in these circumstances is incorrect. The holding conflicts with the text of the statute and this Court's explanation of when a remedy is unavailable. Third, the questions presented are important and recurring, as many non-citizens face criminal liability

based on an *in absentia* removal order of which they were unaware. Fourth, this case is an ideal vehicle.

A. The Courts of Appeals Are Divided on the Question Presented

1. The Third, Fourth, Fifth, and Ninth Circuits have all held that, in circumstances similar to those here, a motion to reopen is unavailable after a person has been removed *in absentia*. In these circuits, administrative remedies are not considered "available" if the non-citizen is never provided information about how to pursue administrative remedies. Administrative remedies are also not available until the non-citizen becomes aware of the facts necessary to file a motion to reopen. The Fifth Circuit has also held that the departure bar makes a motion to reopen unavailable.

In *United States v. El Shami*, 434 F.3d 659, 663–64 (4th Cir. 2005), as here, the record established that the non-citizen never received notice of the date and time of the removal hearing. The Fourth Circuit held that administrative and judicial review were unavailable because immigration authorities "fail[ed] to provide notice[, which] precluded [the non-citizen] from attending his deportation hearing in the first instance, he was never apprised of his right to seek [discretionary] relief and administrative and judicial review." *Id.* at 664.

Similarly, in the Ninth Circuit, a motion to reopen is an "available" administrative remedy for *in absentia* orders only if the non-citizen received actual written notice that his remedies for such an order included a motion to reopen. *Compare United States v. Hinojosa-Perez*, 206 F.3d 832, 836 (9th Cir. 2000) (the

Order to Show Cause advised that the non-citizen could file a motion to reopen if he did not receive notice of the hearing), *with United States v. Arias-Ordonez*, 597 F.3d 972, 977 (9th Cir. 2010) (distinguishing *Hinojosa-Perez* where ICE's letter misadvised that no administrative remedies were available).

In *United States v. Villanueva-Diaz*, 634 F.3d 844, 849 (5th Cir. 2011), the Fifth Circuit rejected the government's contention that the non-citizen had to file a motion to reopen to satisfy § 1326(d)(1)'s requirement. Emphasizing the text's focus on remedies that "may have been available," the Fifth Circuit found the administrative remedies were unavailable because the non-citizen "only became aware of the facts giving rise to his collateral challenge while being physically removed from the United States; once removed, the BIA would have refused to take jurisdiction of his motion to reopen." *Id.* (citing 8 C.F.R. § 1003.2 (the departure bar)).

In *Sewak v. INS*, 900 F.2d 667, 670 (3d Cir. 1990), a case involving administrative exhaustion in a different context, the Third Circuit held that a motion to reopen was not an available administrative remedy. The non-citizen had not received actual notice of the date and time of his hearing and was found deportable *in absentia*. *Id.* at 669. And he did not learn of the circumstances necessary to make his claim until after he appealed the order to the BIA. *Id.* at 671. The Third Circuit held that the "failure to move for reopening in the immigration court before appealing to the BIA did not constitute a failure to exhaust his administrative remedies that would strip us of jurisdiction" because "[t]o hold otherwise would deprive [the non-

citizen] of a remedy he did not pursue because the due process violation he asserts left him unaware of the circumstances that made it available." *Id.*

2. The Sixth and Seventh Circuits take a different view. Both courts hold that a non-citizen is responsible for learning about how to file a motion to reopen on their own and filing that motion before challenging an *in absentia* removal order under § 1326(d).

In the opinion below, the Sixth Circuit effectively imposed an extratextual duty of due diligence on non-citizens removed *in absentia*. Given the facts of this case and the Sixth Circuit's holding, in order to exhaust "available" administrative remedies, a non-citizen ordered removed *in absentia* must file a motion to reopen within a four-day time period even when: (1) he did not have documents or know the facts necessary to file a motion; (2) the departure bar, 8 C.F.R. § 1003.23(b)(1), prevented him from filing a motion to reopen after removal; (3) the case establishing a legal basis to challenge the validity of the order had yet been issued (or even filed); (4) he was never informed that a motion reopen was the administrative remedy available to challenge the *in absentia* order; and (5) he did not speak or understand English. *See Flores-Perez*, 1 F.4th at 458 (holding that being removed alone provided notice of the need to figure out how to file a motion to reopen).

The Seventh Circuit has taken a similarly severe approach. It held that non-citizens removed *in absentia* must file a motion to reopen to exhaust "available" administrative remedies under § 1326(d)(1) even when no evidence showed that the non-citizens were not informed of the right to file a motion to reopen an *in absentia*

removal proceeding. *See United States v. Hernandez-Perdomo*, 948 F.3d 807, 812 (7th Cir. 2020).

Since *Hernandez-Perdomo*, the Seventh Circuit reaffirmed its harsh position. It held that even if non-citizens are not to blame for the non-delivery of the notice of hearing, to exhaust administrative remedies under § 1326(d)(1), they must file a motion to reopen if they know of the removal order. *United States v. Calan-Montiel*, 4 F.4th 496, 498 (7th Cir. 2021). According to the Seventh Circuit, returning to the United States "by stealth . . . makes it impossible to satisfy § 1326(d), even if the agency erred in failing to send a proper notice of the hearing's date." *Id.* In effect, the Seventh Circuit's approach renders § 1326(d) a nullity because, by definition, a person charged under § 1326(a) returned to the United States "by stealth."

B. The Decision Below is Incorrect

1. The opinion below is inconsistent with the text of § 1326(d), *Ross*, and *Mendoza-Lopez*. Section 1326(d)(1)'s instructs that non-citizens must exhaust "any administrative remedies that *may have been available* to seek relief against the order." 8 U.S.C. § 1326(d)(1) (emphasis added). The phrase "may have been" is in the past perfect progressive, which describes a continuous action that ended at some period of time. The neighboring provision, § 1326(d)(2), offers a clue that the operative period of time is the time of the removal proceedings. It asks courts to decide whether "*the deportation proceedings at which the order was issued* improperly deprived the alien of the opportunity for judicial review." 8 U.S.C. § 1326(d)(2)

(emphasis added). The focus is what happened at the removal proceedings, not the time period afterwards.

Motions to reopen are not part of the underlying removal proceedings. Like a motion to vacate a conviction or sentence under 28 U.S.C. § 2255, a motion to reopen is filed after the removal proceedings have become final.

2. The opinion below also conflicts with *Mendoza-Lopez*. In *Palomar-Santiago*, this Court reaffirmed its prior holding that, "'at a minimum, a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the [noncitizen] to obtain judicial review.'" 141 S. Ct. at 1619 (quoting *Mendoza-Lopez*, 481 U.S. at 837). Section 1326(d)(1) must be interpreted in light of *Mendoza-Lopez*'s constitutional holding.

In *Mendoza-Lopez*, this Court explained that "at the very least . . . where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." 481 U.S. at 838. Thus, to comply with due process, there must be an inquiry into whether an administrative procedure was "made available," and courts must focus on whether "defects *in the administrative proceeding* foreclose judicial review." *Id.* (emphasis added). This Court further held that the IJ's failure to advise the defendants of their right to a discretionary form of relief resulted in that deprivation. "Because the waivers of their rights to appeal were not considered or intelligent,

respondents were deprived of judicial review of their deportation proceeding." *Id.* at 839.

Like the defendants in *Mendoza-Lopez*, Flores-Perez was never advised of what administrative remedies he could pursue. The defect in the underlying proceeding was significant; he never received actual notice of the date and time of his hearing as a result of an immigration agent's error. Then, after he was ordered removed *in absentia*, the order was sent to the incorrect address with information about the administrative procedure available to him (a motion to reopen), which was also returned undelivered. Because Flores-Perez never received any information about what administrative remedies were available to him, and those remedies were not, in fact available, the Sixth Circuit's opinion is inconsistent with *Mendoza-Lopez*.

3. The opinion below is inconsistent with *Ross v. Blake*, 578 U.S. 632 (2016), where this Court defined an "available" administrative remedy under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). According to this Court, "available" means "capable of use for the accomplishment of a purpose, and that which is accessible or may be obtained." *Ross*, 578 U.S. at 642 (cleaned up). This Court explained that the availability of an administrative remedy "turns on 'the real-world workings of prison grievance systems,' and . . . acknowledged that there are 'circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief.'" *Palomar Santiago*, 141 S. Ct. at 1621 (quoting *Ross*, 578 U.S. at 643).

This Court described three circumstances when administrative remedies are unavailable even if they are on the books: (1) where "an administrative procedure . . . operates as a simple dead end"; (2) "an administrative scheme [is] so opaque that it becomes, practically speaking, incapable of use"; and (3) when officials "thwart" a person from taking advantage of the process. *Ross*, 578 U.S. at 642–44. This Court has never claimed this is an exhaustive list.[4] *See id.* at 646.

There is nothing in the text of § 1326(d)(1) to suggest that the word "available" means something different in 42 U.S.C. § 1997e(a) than it does in 8 U.S.C. § 1326(d)(1). Indeed, at oral argument in *Palomar-Santiago*, the government agreed that *Ross* controls when a remedy is "available." *See United States v. Palomar-Santiago*, No. 20-437, Arg. Tr., 2021 WL 1628120, at *6 (2021) (agreeing that a non-citizen could show that administrative remedies were unavailable), *10 ("[W]e think availability turns on whether the procedure is capable of use."). And this Court did not hold or suggest otherwise. Instead, this Court rejected Palomar-Santiago's contention that "the substantive complexity of an affirmative defense can *alone* render further review of an adverse decision 'unavailable.'" 141 S. Ct. at 1621

[4] Since *Ross*, courts have found that administrative procedures in prison were "unavailable" when other barriers prevent a person from using the administrative process. *See, e.g.*, *Rucker v. Giffen*, 997 F.3d 88, 93–94 (2d Cir. 2021) (holding hospitalization rendered grievance process unavailable); *Does 8-10 v. Snyder*, 945 F.3d 951, 962–66 (6th Cir. 2019) (finding officials prevented administrative exhaustion by failing to provide people with appeal forms); *Rinaldi v. United States*, 904 F.3d 257, 267 (3d Cir. 2018) (recognizing "substantial retaliation" can render remedies unavailable); *Williams v. Corr. Officer Priatno*, 829 F.3d 118, 124 (2d Cir. 2016) (holding incarcerated person's unique circumstances made it "practically impossible for him to ascertain whether and how he could pursue his grievance").

(emphasis added). It left open the possibility that the substantive complexity may—in combination with other factors—make an administrative procedure effectively unavailable.

Flores-Perez offered numerous reasons why a motion to reopen was not an "available administrative remedy." Indeed, he never argued that a motion to reopen was unavailable because of substantive complexity. Instead, Flores-Perez explained that remedies were unavailable because (1) he did not have documents or know the facts necessary to file a motion; (2) the departure bar, 8 C.F.R. § 1003.23(b)(1), prevented him from filing a motion to reopen after he was deported in 2009; (3) *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which confirmed that a proper NTA must include the date and time of the hearing, had only recently been decided; (4) he was never informed how to move to reopen; (5) he could not avail himself of the remedies because he did not speak or understand English; and (6) he did not have sufficient time to move to reopen before being deported. In addition, he argued that the motion to reopen he filed in 2019—after discovering the factual basis for it—satisfied § 1326(d)(1)'s requirements.

The Sixth Circuit did not address any of these arguments. Instead, the Sixth Circuit treated *Palomar-Santiago* as decisive authority and seemingly limited the Supreme Court's discussion of what an "available" administrative remedy is to the "prison litigation context." *See Flores-Perez*, 1 F.4th at 458; Appendix, A-1 at APP005. The Sixth Circuit said that Flores-Perez could not show that administrative remedies were unavailable to him simply because "the substantive complexity of an affirmative

defense cannot alone render further review of an adverse decision 'unavailable.'" *Id.* (quoting *Palomar-Santiago*, 141 S. Ct. at 1621); Appendix, A-1 at APP005. The court below did not even address the other circumstances that may render an administrative remedy unavailable.

Applying *Ross*'s definition of "available" to the circumstances here, no administrative remedies were available to Flores-Perez. The defective NTA and agent's transcription error "thwarted" his ability to attend his removal hearing or receive information about administrative remedies. Because Flores-Perez did not attend the removal hearing, appeals to the BIA and the courts were unavailable to him. Also, his inability to speak English and the limited Spanish instruction provided frustrated his ability to appear or seek relief.

Further, Flores-Perez did not have the evidence of the faulty notice or returned mail until he received discovery in this case. After the 2009 arrest, he was removed "as luggage" and never appeared before an IJ. There is no evidence that he received information about how to move to reopen. Regardless, any motion to reopen was a functional dead end. After Flores-Perez was deported, he could not move to reopen because of the "departure bar" prevented non-citizens from moving to reopen removal proceedings "subsequent to his or her departure from the United States." 8 C.F.R. § 1003.23(b)(1).

In addition, until spring of 2018, when *Pereira* was decided, IJs considered NTAs without the date and time of the proceedings compliant with 8 U.S.C. § 1229a(b)(5). Even as Flores-Perez was litigating this motion, this Court held that

the defective NTA without the date and time of the hearing was enough to satisfy the statutory requirements for entry of a removal order *in absentia*. *See Valadez-Lara v. Barr*, 963 F.3d 560, 564 (6th Cir. 2020). And just recently, this Court clarified that written notice under 8 U.S.C. § 1229(a)(1) must include "[t]he time and place at which the proceedings will be held." *Niz-Chavez*, 141 S. Ct. at 1480. Flores-Perez's arguments about the legal adequacy of the notice would have been rejected, and so a motion to reopen would be a "simple dead end." *Ross*, 136 S. Ct. at 1859.

The Sixth Circuit's failure to engage in any of these arguments results in an opinion that is not consistent with the text of 8 U.S.C. § 1326(d), *Mendoza-Lopez*, and *Ross*.

C. The Decision Below Implicates Vitally Important Interests

Whether and when a motion to reopen is an administrative remedy a non-citizen must have pursued before challenging the validity of a removal order in a criminal prosecution under 8 U.S.C. § 1326(d) are vitally important questions. In fiscal year 2020, there were 19,753 prosecutions for illegal re-entry under 8 U.S.C. § 1326(a). U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based: Fiscal Year 2020*, at 55, available at https://perma.cc/6KX9-3SLE. The government uses removal orders to establish an element of the criminal offense. *Mendoza-Lopez*, 481 U.S. at 839.

The question is vitally important because thousands of non-citizens are ordered removed each year *in absentia*. Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. Penn. L. Rev. 817, 829–30 (2020)

(from 2009–16, the number of *in absentia* removal orders ranged from 19,449 to 38,329). These non-citizens may not even know about the removal order at all—particularly when, for decades, notices to appear have been issued without the date and time of the hearing. *See Pereira*, 138 S. Ct. at 2111 ("[T]he Department of Homeland Security (DHS), at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information.").

The Sixth Circuit's rule renders challenges to *in absentia* removal orders under 8 U.S.C. § 1326(d) impossible in nearly all circumstances. People who do not speak English are expected to pursue administrative remedies of which they are not aware based on facts they do not know. Yet, these people face criminal liability based on an administrative proceeding that does not comport with the basic tenants of due process.

D. This Case Presents an Ideal Vehicle to Address the Question Presented

This case provides a perfect vehicle to resolve the question presented. In each of the proceedings below, Flores-Perez identified various factual circumstances that made a motion to reopen the deportation hearing unavailable to him and that a motion to reopen was not necessary to exhaust administrative remedies. Although the Sixth Circuit provided minimal analysis, the issue of exhaustion was considered by the court below. Resolution of the question presented is outcome-determinative.

1. Petitioner consistently argued in each proceeding that he could satisfy the requirements of § 1326(d)(1) because the lack of notice deprived him of administrative

remedies. In the district court, the government argued that the motions to dismiss should be denied because Flores-Perez did not exhaust administrative remedies. Dkt. No. 30 at 6; Dkt. No. 50 at 6–10. Flores-Perez consistently pointed out that the defective NTA deprived him of the opportunity to prevent the entry of the removal order and the opportunity to learn about what administrative remedies are available. Dkt. No. 43 at 17–18; Dkt. No. 51 at 2–7; Dkt. No. 64 at 5–12 (explaining why a motion to reopen was unavailable to Flores-Perez); Dkt. No. 66 at 13–15, 24–25.

Denying the motions to dismiss the indictment, the district court, held that Flores-Perez could not satisfy § 1326(d)(1) because he did not file a motion to reopen the removal proceedings. *United States v. Flores-Perez*, No. 19-20004, 2019 WL 2929187, at *5 (E.D. Mich. July 8, 2019). The district court nonetheless concluded that Flores-Perez's removal hearing was not fundamentally unfair. First, it relied on *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019), which held that a defective NTA without a date and time does not divest an immigration court of jurisdiction.[5] *Flores-Perez*, 2019 WL 2929187, at *4. The district court also held that the hearing was not fundamentally unfair because Flores-Perez did not correct the INS agent's typographical error. *Id.* at *5–6.

On appeal, Flores-Perez again argued that administrative remedies were not available to him. Dkt. No. 33 at 44–49. He further explained why the district court's findings of fact were clearly erroneous and legally incorrect. *Id.* at 18–44, 52–68. The

[5] The Ninth Circuit has granted a petition for rehearing en banc to address whether a defective NTA deprives an immigration court of jurisdiction. *United States v. Bastide-Hernandez*, No. 19-30006, Dkt. No. 76.

government again argued that Flores-Perez could not collaterally attack the removal order because he failed to exhaust administrative remedies. Dkt. No. 38 at 13–18. Flores-Perez replied, again, explaining why administrative remedies were not available to him and arguing that the motion to reopen he filed in immigration court was a relevant development. Dkt. No. 39 at 7–15.

2. Resolution of the question presented is potentially outcome determinative. The only issue the Sixth Circuit addressed was whether Flores-Perez exhausted available administrative remedies. It did not engage in any fact-specific analysis. Because the court below concluded that Flores-Perez could not satisfy the exhaustion requirement of §1326(d)(1), it did not address whether § 1326(d)(2)'s judicial-review requirement was satisfied or the arguments advanced about why the removal proceedings were fundamentally unfair.[6] *See Flores-Perez*, 1 F.4th at 457–58 Appendix, A-1 at APP005–06. Resolution of the question presented will therefore entitle Flores-Perez to have the Sixth Circuit consider whether his removal hearing was fundamentally unfair under 8 U.S.C. § 1326(d)(3). At the very least, guidance from this Court on the question of when an administrative remedy is unavailable will also give the district court or the Sixth Circuit to apply the correct standard to these circumstances in the first instance. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 653–

[6] Practically, however, a finding that administrative remedies were unavailable also means Flores-Perez did "not have the 'opportunity' for judicial review under 8 U.S.C. § 1326(d)(2), because they may not seek review of a removal order in federal court without first appealing the order to the BIA." *Palomar-Santiago*, 141 S. Ct. at 1621 n.3.

54 (2010) (remanding to allow lower courts to apply the correct legal standard in the first instance); *Florida v. Bostick*, 501 U.S. 409, 437 (1991) (same).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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