No. 21-6815

IN THE SUPREME COURT OF THE UNITED STATES

NOE FLORES-PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

A defendant charged with unlawful reentry into the United States following removal may assert the invalidity of his removal order as an affirmative defense only if he "demonstrates that" he "exhausted any administrative remedies that may have been available to seek relief against the order," 8 U.S.C. 1326(d)(1), the removal proceedings "deprived [him] of the opportunity for judicial review," 8 U.S.C. 1326(d)(2), and "the entry of the order was fundamentally unfair," 8 U.S.C. 1326(d)(3).

The Immigration and Nationality Act, 8 U.S.C. 1101 et seq., authorizes a noncitizen who was ordered removed in absentia to seek rescission of the removal order through "a motion to reopen filed at any time" that demonstrates that the movant "did not receive notice" of removal proceedings in accordance with certain statutory requirements. 8 U.S.C. 1229a(b)(5)(C)(ii); see 8 C.F.R. 1003.23(b)(4)(iii)(A)(2). The question presented is:

Whether, in a prosecution for unlawful reentry, a noncitizen who did not challenge an in absentia removal order through a motion to reopen exhausted "available" administrative remedies, as required by 8 U.S.C. 1326(d)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 1 F.4th 454. The order of the district court (Pet. App. 9-23) is unreported but is available at 2019 WL 2929187.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2021. A petition for rehearing was denied on August 9, 2021 (Pet. App. 7). On November 8, 2021, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including January 6, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of unlawful reentry into the United States following removal, in violation of 8 U.S.C. 1326(a). Judgment 1. He was sentenced to time served, with no term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. a. The Immigration and Nationality Act, 8 U.S.C. 1101 et seq., requires that a noncitizen placed in removal proceedings be served with "written notice" of certain information. 8 U.S.C. 1229(a)(1).[1] Section 1229 refers to that "written notice" as a "'notice to appear'" (NTA). Ibid. The NTA must specify, among other things, the "charges against the alien" and their statutory basis; the "requirement that the alien must immediately provide" to the Attorney General "a written record of an address * * * at which the alien may be contacted" and "of any change of the alien's address," and the consequences under Section 1229a(b)(5) of failing to do so; and the "time and place at which the proceedings will be held," and the consequences under Section 1229a(b)(5) of failing to appear. 8 U.S.C. 1229(a)(1)(D)-(G); see 8 U.S.C. 1229(a)(2) (requiring notice of a change in the time or place of removal proceedings).

[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

Section 1229a(b)(5), in turn, states that a noncitizen who fails to appear at his removal hearing "shall be ordered removed in absentia" if the government "establishes by clear, unequivocal, and convincing evidence that the" required written notice "was * * * provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). The provision further states that the "written notice * * * shall be considered sufficient * * * if provided at the most recent address provided [by the noncitizen] under section 1229(a)(1)(F)." Ibid.; see 8 U.S.C. 1229(c). "[I]f the alien has failed to provide the address required under section 1229(a)(1)(F)," then "[n]o written notice shall be required" before the alien is ordered removed in absentia. 8 U.S.C. 1229a(b)(5)(B).

A removal order entered in absentia "may be rescinded * * * 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)." 8 U.S.C. 1229a(b)(5)(C)(ii). The filing of such a motion "stay[s] the removal of the alien pending disposition of the motion by the immigration judge." Ibid.

b. Section 1326(a) of Title 8 generally makes it unlawful for a noncitizen to reenter the United States after having been removed unless he obtains the prior consent of the Attorney General (or the Secretary of Homeland Security). 8 U.S.C. 1326(a)(2); see 6 U.S.C. 202(3)-(4), 557. Under 8 U.S.C. 1326(d), a defendant charged with violating Section 1326 may collaterally attack the

underlying removal order if he satisfies three statutory requirements. See United States v. Palomar-Santiago, 141 S. Ct. 1615, 1619-1620 (2021). Specifically, the defendant must show that (1) he "exhausted any administrative remedies that may have been available," (2) the "deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," and (3) "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d).

2. Petitioner is a Mexican citizen who entered the United States without authorization at some point before 2001. Pet. App. 10. In December 2001, federal immigration officers detained petitioner outside a Michigan courthouse and transported him to a nearby immigration office. Id. at 2, 10. Petitioner provided the officers with two forms of state-issued identification that listed his address as Apartment 311 at a street number on Colony Lane. D. Ct. Doc. 43-2, at 3-4, 6-7 (Apr. 10, 2019). The officers then served petitioner with an NTA charging that he was removable from the United States and ordering him to appear for a hearing at the immigration court in Detroit, Michigan, at a date and time to be set. Pet App. 2; D. Ct. Doc. 45 (Apr. 18, 2019).

In the space for petitioner's address on the NTA, the immigration officers wrote the correct street address on Colony Lane but an incorrect apartment number (Apartment 132). Pet App. 2; D. Ct. Doc. 45, at 2. Petitioner nevertheless signed the back of the form, below the advisements informing him (inter alia) that he

was required to provide immigration officials with his "full mailing address and telephone number" and to "notify the Immigration Court" of any change of address. D. Ct. Doc. 45, at 3. No interpreter assisted petitioner during service of the NTA, but as he left the immigration office, a Spanish-speaking employee handed petitioner a copy of the NTA he had signed and explained in Spanish that petitioner would receive another document in the mail from immigration officials. Pet. App. 2.

In April 2002, the immigration court mailed to the address listed on the NTA a Notice of Hearing stating that petitioner's removal hearing would be held on January 22, 2003. Pet. App. 2. That notice was returned as undeliverable. Ibid. When petitioner failed to appear at the hearing, the immigration judge ordered him removed in absentia. Ibid. The removal order was mailed to the same address listed on the NTA, and it too was returned to sender. Ibid.

Petitioner remained in the United States until 2009 but never attempted to contact, or seek relief from, the immigration court. In March of that year, immigration officials arrested him in Michigan. Pet. App. 2, 10. He was removed to Mexico, pursuant to the 2003 removal order, a few days later. Id. at 2.

3. Petitioner returned to the United States without authorization later in 2009. Pet. App. 2. In December 2018, he was arrested for attempting to break into an apartment in suburban Detroit. Id. at 2-3. A grand jury charged him with unlawful

reentry following removal, in violation of 8 U.S.C. 1326(a). Pet. App. 3.

Petitioner moved to dismiss the indictment under 8 U.S.C. 1326(d). As relevant here, petitioner argued that because he did not receive notice of the removal hearing, he satisfied all three requirements in Section 1326(d): No administrative remedies were available to him, he was deprived of the opportunity for judicial review, and his removal proceedings were fundamentally unfair. Pet App. 17; D. Ct. Doc. 43, at 11-23 (Apr. 10, 2019).

The district court denied the motion to dismiss, "mainly" because petitioner could not meet the exhaustion and fundamental-unfairness requirements of Section 1326(d)(1) and (3). Pet. App. 10, 17-23. As to exhaustion, the court observed that petitioner had "concede[d] that he never pursued any available administrative remedies to challenge the removal order, and that he never has made any attempt within the [previous] 18 years to reopen the removal proceedings." Id. at 17.[2] The court acknowledged petitioner's contention that administrative remedies were not "'available' to him" because he had not been advised of avenues for challenging the removal order. Id. at 17; see id. at 18. But the

[2] Petitioner states (Pet. 2-3) that following the indictment in this case, he "hired an immigration attorney to file a motion to reopen" his prior removal order. See Pet. 8, 19. In the district court hearing on petitioner's motion to dismiss the indictment, petitioner's counsel was asked whether there had been a motion to reopen. She responded that petitioner's "immigration attorney is preparing one, but there has not been a motion to reopen." D. Ct. Doc. 64, at 6 (Feb. 21, 2020).

court stated that noncitizens "'are presumed capable of researching generally available remedies,'" and that petitioner had done nothing "at all" to contest the 2003 order, "even though he plainly admits that he was informed that a removal hearing would be held" and "he certainly was aware of the 2003 removal order when the government relied upon it to remove him again in 2009." Id. at 18 (quoting United States v. Alegria-Saldana, 750 F.3d 638, 641 (7th Cir. 2014)). The court also determined that petitioner could not establish that entry of the removal order was fundamentally unfair, as required by 8 U.S.C. 1326(d)(3). Id. at 20-22.

4. The court of appeals affirmed. Pet. App. 1-6. The court explained that this Court's decision in United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021), had recently "confirm[ed] the mandatory nature" of Section 1326(d)'s requirements for collaterally attacking a prior removal order, including the requirement in Section 1326(d)(1) that a defendant have exhausted any available administrative remedies for seeking relief from the order. Pet. App. 3. The court of appeals determined that petitioner "failed to satisfy" that exhaustion requirement because he "failed to challenge his removal order in any respect until" moving to dismiss his Section 1326(d) indictment, "nearly twenty years after the [removal] order was issued, and after [petitioner] was deported due to the order." Id. at 4; see id. at 6 (observing that petitioner "failed to exhaust his administrative remedies -- even with

plain notice of the removal order as reflected by his 2009 deportation").

The court of appeals rejected petitioner's argument that a motion to reopen was not an "available" remedy for purposes of Section 1326(d)(1). Pet. App. 5-6. The court acknowledged that "there can be circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." Id. at 5 (citation and internal quotation marks omitted). But the court explained that the INA "expressly contemplates how a noncitizen" ordered removed in absentia "can proceed in the event of insufficient notice": The noncitizen may move to reopen the order "'at any time' based on a demonstrated lack of proper notice." Ibid. (quoting 8 U.S.C. 1229a(b)(5)(C)(ii)). Because petitioner "failed to avail himself of administrative remedies available to him," the court determined that "allowing him to invalidate his removal order" in a collateral challenge "would be 'incompatible with the text of [Section] 1326(d).'" Id. at 6 (quoting Palomar-Santiago, 141 S. Ct. at 1620).

5. The court of appeals denied petitioner's petition for rehearing en banc, with no judge requesting a vote. Pet. App. 8.

ARGUMENT

Petitioner renews his contention (Pet. 11-25) that a statutory motion to reopen specific to in absentia removal proceedings was not an available administrative remedy that petitioner was required to exhaust under 8 U.S.C. 1326(d)(1). The court of

appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of another court of appeals. In any event, further consideration of the exhaustion question by the courts of appeals would be appropriate in light of this Court's recent decision in United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021). The petition for a writ of certiorari should therefore be denied.

1. The court of appeals correctly determined (Pet. App. 3-6) that, in the circumstances of this case, a motion to reopen an in absentia removal order was an available administrative remedy that petitioner was required to exhaust under 8 U.S.C. 1326(d)(1).

a. Under Section 1326(d), "defendants charged with unlawful reentry" following a prior removal from the United States "'may not' challenge their underlying removal orders 'unless' they 'demonstrat[e]' that three conditions are met." Palomar-Santiago, 141 S. Ct. at 1620 (quoting 8 U.S.C. 1326(d)) (brackets in original). Most relevant here, the defendant must have "exhausted any administrative remedies that may have been available to seek relief against the [removal] order." 8 U.S.C. 1326(d)(1); see Palomar-Santiago, 141 S. Ct. at 1620-1621. The Court in Palomar-Santiago did not comprehensively determine what makes a remedy "available" under Section 1326(d)(1). But in analogous exhaustion contexts, the Court has stated that a remedy is "available" if it "is capable of use for the accomplishment of a purpose" or "is accessible or may be obtained." Ross v. Blake, 578 U.S. 632, 642 (2016)

(citation and internal quotation marks omitted); see Palomar-Santiago, 141 S. Ct. at 1621.

The court of appeals correctly determined that petitioner failed to exhaust an administrative remedy that was "available" to a noncitizen who asserts that he never received notice of the immigration hearing that resulted in the entry of an in absentia removal order. Pet. App. 5. As the court explained, "the relevant statutory scheme expressly contemplates how a noncitizen can proceed in the event of insufficient notice." Ibid. Section 1229a(b)(5)(C)(ii) authorizes immigration courts to "rescind[]" the removal order "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance" with certain statutory requirements. 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added); see 8 C.F.R. 1003.23(b)(4)(iii)(A)(2). That procedure -- which is specifically directed to situations in which a noncitizen claims a lack of notice and which is exempt from the time limits applicable to other motions to reopen, see 8 U.S.C. 1229a(c)(7)(A) -- was "capable of [petitioner's] use" and "accessible" to him. Ross, 578 U.S. at 642 (citation and internal quotation marks omitted).

Indeed, petitioner had personal knowledge of the core facts needed to file a motion to reopen years before he was indicted for violating Section 1326(a). At least by the time of his removal in 2009, petitioner knew that he never received a notice from the immigration court scheduling a removal hearing; that the hearing resulted in entry of a removal order despite his absence; and that

he was being removed pursuant to that order. See Pet. App. 4, 18; D. Ct. Doc. 43-2, at 4-5. A motion to reopen the in absentia removal order was therefore "available," and petitioner was required to exhaust it before collaterally attacking the order under Section 1326(d)(1). Pet. App. A5-A6; accord United States v. Hernandez-Perdomo, 948 F.3d 807, 811-812 (7th Cir. 2020); United States v. Zelaya, 293 F.3d 1294, 1297 (11th Cir. 2002).

b. Petitioner contends (Pet. 15-16) that motions to reopen may never qualify as "available" remedies for purposes of Section 1326(d)(1). According to petitioner, Section 1326(d) focuses on "what happened at the removal proceedings," but "[m]otions to reopen are not part of the underlying removal proceedings"; rather, they are "filed after the removal proceedings have become final." Ibid.

Petitioner's argument fails under the plain language of the statute. Even if, as petitioner suggests (Pet. 16), the separate condition in Section 1326(d)(2) focuses solely on "what happened at the [initial] removal proceedings," Section 1326(d)(1)'s exhaustion provision does not. Rather, Section 1326(d)(1) requires unlawful-reentry defendants to demonstrate that they "exhausted any administrative remedies that may have been available to seek relief against the [removal] order." 8 U.S.C. 1326(d)(1) (emphasis added). Nothing in that language limits "available" remedies to those that could have been invoked at the time of the initial removal proceedings or excludes from "available" remedies the

statutory reopening procedure specific to in absentia removal orders allegedly entered without adequate notice.[3]

c. Petitioner also errs in contending (Pet. 16-17) that the court of appeals' decision is inconsistent with this Court's decision in United States v. Mendoza-Lopez, 481 U.S. 828 (1987). At the time of Mendoza-Lopez, Section 1326 did not expressly permit defendants charged with unlawful reentry to collaterally attack their underlying removal orders. See id. at 834-835. The Court, however, stated that "where 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." Id. at 837-838. Applying that principle, the Court held that "where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review," a defendant "must be permitted" to collaterally attack his removal in a later unlawful-reentry prosecution. Id. at 839; see id. at 838-840.

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[3] Petitioner contends (Pet. 15) that the phrase "may have been available" in Section 1326(d)(1) is "in the past perfect progressive" tense and therefore refers to "a continuous action that ended at some period of time." But "may" is instead an example of a modal auxiliary verb, a construction that addresses the "possibility" that remedies have been available. See, e.g., Bryan A. Garner, The Chicago Guide to Grammar, Usage, and Punctuation 121-122 (2016) (discussion of "[m]odal auxiliaries" and "'[m]ay' and 'might'"). And "have been" is in the present-perfect tense, which "denotes an act, state, or condition that is now completed or continues up to the present." Id. at 97. The verb phrase is therefore not limited to the duration of the removal proceeding or to any other particular period in the past.

Because the version of Section 1326 at issue in Mendoza-Lopez did not contain a provision for collaterally attacking a prior removal order -- much less an exhaustion requirement analogous to Section 1326(d)(1) -- this Court had no occasion to consider what specific "means of obtaining judicial review must be made available" before an administrative determination can be used in a criminal case. Mendoza-Lopez, 481 U.S. at 838; see id. at 839 n.17 (declining to "enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review"). And because the deprivation of judicial review in Mendoza-Lopez arose from invalid "waivers of the right to appeal," id. at 840, the Court did not address whether "meaningful review," id. at 838, could follow a motion to reopen in absentia removal proceedings, or the effect of a defendant's failure to avail himself of such a procedure. In short, nothing in Mendoza-Lopez is inconsistent with the court of appeals' determination that a motion to reopen under Section 1229a(b)(5)(C)(ii) was an available remedy for purposes of Section 1326(d)(1). Pet. App. 4-5.

d. Petitioner's reliance (Pet. 18-20) on Ross v. Blake, supra, is also misplaced. The Court in Ross "note[d] as relevant * * * three kinds of circumstances in which an administrative remedy, although officially on the books," would not be considered "available" for purposes of the Prison Litigation Reform Act. 578 U.S. at 643; see Pet. 18. First, "an administrative procedure is unavailable when (despite what regulations or guidance materials

may promise) it operates as a simple dead end," because, for example, the "particular administrative office" to which prison grievances are directed "disclaims the capacity to consider those petitions." Ibid. Second, "an administrative scheme" is "unavailable" when it is "so opaque that it becomes, practically speaking, incapable of use." Ross, 578 U.S. at 643. Third, "the same is true when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." Id. at 644.

None of those circumstances -- which the Court did not expect to arise "often," Ross, 578 U.S. at 643 -- applies in this case. Petitioner suggests (Pet. 19-20) that filing a motion to reopen at the time of his removal would have been a "functional dead end" in light of legal barriers such as the regulatory "departure bar." See 8 C.F.R. 103.23(b)(1). But less than four months after petitioner's 2009 removal, the Board of Immigration Appeals (BIA) held that a noncitizen's "departure from the United States while under an outstanding order of deportation or removal issued in absentia does not deprive the Immigration Judge of jurisdiction to entertain a motion to reopen to rescind the order if the motion is premised on lack of notice." Matter of Bulnes-Nolasco, 25 I. & N. Dec. 57, 60 (B.I.A. 2009); see also Matter of Armendarez-Mendez, 24 I. & N. Dec. 646, 654 n.6 (B.I.A. 2008) (reserving that question). Had petitioner moved to reopen based on lack of notice after his 2009 removal, the immigration courts may well have entertained his

motion -- and judicial review of any adverse ruling would have been available in the court of appeals. See Pruidze v. Holder, 632 F.3d 234, 237-240 (6th Cir. 2011) (holding, in partial reliance on Bulnes-Nolasco, supra, that the departure bar applicable to the BIA was not a restriction on the BIA's subject-matter jurisdiction); see also United States v. Calan-Montiel, 4 F.4th 496, 498 (7th Cir. 2021) (explaining that a noncitizen removed in absentia "could have asked the agency to reopen the proceedings" under Section 1229a(b)(5)(C)(ii), and "could have made that request even after being returned to Mexico").

Petitioner suggests (Pet. 20-21) that a motion to reopen would have been a "dead end" for the additional reason that his arguments about the NTA's legal adequacy would have failed under Sixth Circuit precedent. But the decision petitioner cites recognizes that, apart from challenging the legal sufficiency of certain forms of notice, noncitizens seeking rescission of in absentia removal orders may argue -- as petitioner does here -- "that they did not actually 'receive' the notice that was mailed to them." Valadez-Lara v. Barr, 963 F.3d 560, 566 (6th Cir. 2020) (citation omitted). And more fundamentally, the fact that petitioner's arguments might not have succeeded provides no basis for adding an unwritten "futility" exception to Section 1326(d)(1)'s mandatory exhaustion requirement. See, e.g., Booth v. Churner, 532 U.S. 731, 741 n.6 (2001); cf. Palomar-Santiago, 141 S. Ct. at 1621 ("When Congress uses 'mandatory language' in an administrative exhaustion

provision, 'a court may not excuse a failure to exhaust'") (quoting Ross, 578 U.S. at 639); id. at 1622 ("The Court holds that each of the statutory requirements of § 1326(d) is mandatory.").

Petitioner further contends (Pet. 20) that the lack of notice of his removal hearing and his "inability to speak English" "thwarted his ability" to avail himself of administrative remedies such as a motion to reopen. But the description in Ross of "thwart[ed]" opportunities concerned "instances in which officials misled or threatened individual inmates so as to prevent their use of otherwise proper procedures." 578 U.S. at 644. Petitioner's unfamiliarity with the possibility of a motion to reopen does not resemble the kind of "machination, misrepresentation, or intimidation" by government officials that might render a statutory remedy unavailable. See ibid.; cf. Pet. App. 18 (district court's observation that "individuals subject to removal proceedings 'are presumed capable of researching generally available remedies'") (quoting United States v. Alegria-Saldana, 750 F.3d 638, 641 (7th Cir. 2014)).

2. Petitioner contends (Pet. 12-15) that this Court's review is needed to resolve disagreement among the courts of appeals "about whether and when a motion to reopen is an 'available' administrative remedy [that a] non-citizen must pursue before challenging the validity of [an] in absentia removal order under 8 U.S.C. 1326(d)." Pet. 11. But there is no such division in the courts of appeals. The decision below accords with the decisions

of the only other courts of appeals that have expressly addressed the question, and it does not squarely conflict with the decision of any other court of appeals.

a. Every court of appeals that has expressly addressed the question has held that the motion to reopen that is specifically tied to in absentia removals is an available remedy that must be exhausted under Section 1326(d)(1). The Sixth, Seventh, and Eleventh Circuits have all determined that the motion to reopen provided in Section 1229a(b)(5)(C)(ii) and applicable regulations is an available remedy in that scenario. Pet. App. 4-6 (6th Cir.); Calan-Montiel, 4 F.4th at 498 (7th Cir.); Hernandez-Perdomo, 948 F.3d at 812 (7th Cir.); Zelaya, 293 F.3d at 1297 (11th Cir.).

b. The decisions that petitioner invokes do not establish that any other court of appeals would reach a contrary determination on similar facts.

Petitioner first relies (Pet. 12) on the Fourth Circuit's decision in United States v. El Shami, 434 F.3d 659 (2005). But El Shami did not address whether the statutory reopening procedure in Section 1229a(b)(5)(C)(ii) is an available remedy that a defendant is required to exhaust. Rather, the court there rejected the government's argument that Section 1326(d)(1) required the defendant to appeal "the immigration judge's order of deportation to the BIA." Id. at 664. The court explained that the defendant did not receive "a copy of the deportation order" until "well after the time for seeking [appellate] review had expired." Ibid.

Because the government's exhaustion argument rested solely on the possibility of an appeal to the BIA, the Fourth Circuit had no occasion to consider whether the statutory reopening procedure specific to in absentia orders -- which is available "at any time," 8 U.S.C. 1229a(b)(5)(C)(ii) -- was an available remedy that the defendant had to pursue under Section 1326(d)(1).

Nor is petitioner correct in asserting (Pet. 12) that "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." Petitioner observes (Pet. 12-13) that in 2000, the Ninth Circuit held that a motion to reopen under the predecessor to Section 1229a(b)(5)(C)(ii) was an available remedy that a noncitizen was required to exhaust, where the immigration charging document advised him that "a failure to receive written notice [w]as a basis to file such a motion." United States v. Hinojosa-Perez, 206 F.3d 832, 836. But petitioner errs in suggesting (Pet. 13) that the court's subsequent decision in United States v. Arias-Ordonez, 597 F.3d 972 (9th Cir. 2010), demonstrates that it would recognize a motion to reopen under Section 1229a(b)(5)(C)(ii) as an available remedy only where the government expressly informs the noncitizen of the ability to file such a motion. Rather, as petitioner acknowledges (Pet. 13), in holding that the defendant had "satisfied" Section 1326(d)(1)'s exhaustion requirement, 597 F.3d at 977, Arias-Ordonez did not rely on a mere

failure to inform the noncitizen of the possibility of reopening. The court instead emphasized that the order sent to the noncitizen in Arias-Ordonez "was affirmatively misleading because it told him that he had no administrative remedies." Id. at 976. Petitioner alleges no similar affirmative misrepresentation here.

Petitioner likewise errs in relying on the Third Circuit's decision in Sewak v. INS, 900 F.2d 667 (1990). As petitioner acknowledges (Pet. 13), that decision arose in a "different context": The court held that a noncitizen ordered removed in absentia had satisfied the exhaustion criterion in a predecessor to 8 U.S.C. 1252(d)(1) despite failing to file a motion to reopen. See Sewak, 900 F.2d at 670-671. Sewak, however, not only involved a different exhaustion statute; the events in that case preceded the enactment of the statutory remedy of a motion to reopen an in absentia removal order for lack of notice (the remedy now codified in Section 1229a(b)(5)(C)(ii)). See Matter of Gonzalez-Lopez, 20 I. & N. Dec. 644, 646 (B.I.A. 1993). Sewak is therefore inapposite.

Indeed, Sewak does not rule out the possibility that a statutory reopening procedure may be an administrative remedy that must be exhausted. The noncitizen in Sewak had immediately appealed to the BIA upon learning of the in absentia removal order against him -- a step that, under governing regulations, would have precluded him from pursuing "[a] motion to reopen in the immigration court." 900 F.2d at 671; see id. at 669 n.2 (citing

8 C.F.R. 242.22 (1989)). The Third Circuit determined that, in those circumstances, the "failure to move for reopening in the immigration court before appealing to the BIA did not constitute a failure to exhaust * * * administrative remedies." Id. at 671. But the court did not hold that motions to reopen could never qualify as available administrative remedies, much less that an unlawful-reentry defendant such as petitioner -- who pursued no such remedy at all -- could satisfy the exhaustion requirement in Section 1326(d)(1).

Finally, contrary to petitioner's assertion (Pet. 13), the decision below is consistent with the law of the Fifth Circuit. In United States v. Parrales-Guzman, 922 F.3d 706 (5th Cir. 2019), the court stated that a noncitizen "exhausts administrative remedies" for purposes of Section 1326(d)(1) "by raising an issue either on direct appeal or in a motion to reopen before the BIA." Id. at 707 (citation and quotation marks omitted). The court then relied on the absence of evidence that the defendant had "sought to re-open his case with the [immigration judge] or the BIA" in rejecting his collateral attack for failure to exhaust available administrative remedies. Ibid.

The decision in United States v. Villanueva-Diaz, 634 F.3d 844 (5th Cir.), cert. denied, 565 U.S. 823 (2011) (cited at Pet. 13), is not to the contrary. That case did not involve an in absentia removal order at all. Instead, the defendant in Villanueva-Diaz was present at his removal hearing and represented

by retained counsel, who unsuccessfully appealed the removal order to the BIA. Id. at 846-847. Following his indictment for unlawful reentry, the defendant claimed that counsel did not inform him of the BIA's ruling and that, had he known about it, he would have filed a petition for judicial review in time to benefit from intervening case law. Id. at 847. The Fifth Circuit rejected the government's argument that, "on the facts of th[at] case," the defendant also had to file "a motion to reopen with the BIA" in order to exhaust available remedies. Id. at 849. The court explained that the defendant had learned of the facts giving rise to his challenge "while being physically removed from the United States" and that, under the regulatory departure bar, "the BIA would have refused to take jurisdiction of his motion to reopen" after his removal. Ibid. Especially in light of the more recent decision in Parrales-Guzman, nothing in Villanueva-Diaz suggests that the Fifth Circuit would view as unavailable the statutory motion to reopen that noncitizens who claim lack of notice of an in absentia removal order may file "at any time," 8 U.S.C. 1229a(b)(5)(C)(ii).

3. Even if the question presented might otherwise warrant this Court's review, such review would be premature.

The decision below was the first court of appeals decision to address whether a motion to reopen under Section 1229a(b)(5)(C)(ii) is an available administrative remedy since this Court's decision in Palomar-Santiago, which was itself the

first decision of this Court to construe the exhaustion requirement in Section 1326(d)(1). Since the decision below was issued, only one other court of appeals has addressed the issue in a precedential opinion, reaffirming its prior precedent in accord with the Sixth Circuit's decision here. See Calan-Montiel, 4 F.4th at 498 (7th Cir.). Given the recency of the Court's decision in Palomar-Santiago and its focus on the "mandatory" nature of the exhaustion requirement in Section 1326(d)(1), 141 S. Ct. at 1622, this Court's consideration of the question presented, if ultimately warranted, would likely benefit from further consideration by the courts of appeals of the circumstances in which motions to reopen may constitute available remedies that must be exhausted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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