No 21-6815

IN THE
SUPREME COURT OF THE UNITED STATES

NOE FLORES-PEREZ,

***Petitioner*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

REPLY BRIEF OF PETITIONER

FEDERAL COMMUNITY DEFENDER

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"If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). For decades, the government did not turn square corners; it issued "Notices to Appear" without one of the most crucial bits of information: the date and time of the hearing. It sent people "unfamiliar with English and the habits of American bureaucracies—a series of letters . . . over the course of weeks, months, maybe years, each containing a new morsel of vital information." *Id.* at 1485. Without that information, even the slightest error to the address could and did have serious consequences, including a removal order—"a particularly severe 'penalty.'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). These orders also expose non-citizens to criminal liability.

A person ordered removed *in absentia* under these circumstances has only one avenue to judicial review: a motion to reopen. Such motions are purely discretionary and a disfavored avenue to relief. The non-citizen "has a heavy burden," and the standard of review is "highly deferential." *Mendias-Mendoza v. Sessions*, 877 F.3d 223, 226, 228 (5th Cir. 2017).

"Depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense." *United States v. Mendoza-Lopez*,

481 U.S. 828, 839 (1987). Consistent with that holding, Congress required that a non-citizen exhaust only "any administrative remedy that may have been *available* to seek relief against the order," 8 U.S.C. § 1326(d)(1) (emphasis added), before collaterally attacking a removal order in a criminal proceeding.

Whether a motion to reopen is such an administrative remedy is a question of vital importance that divides courts. This question lurked in the background in *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021), but there was no need to resolve it, because the issue presented was narrow. The Sixth and Seventh Circuits have expanded the rule of *Palomar-Santiago* far beyond its holding. The position of the government and the Sixth and Seventh Circuits is that even that removal order can be used in a criminal prosecution because an immigration court "may well have entertained" a motion to reopen filed by a non-citizen who does not speak English and does not have the evidence to do so. (Resp. at 14)

This case presents an opportunity to address this critically important issue about which the courts of appeals have reached inconsistent and incoherent results: whether and when is a motion to reopen an "available" remedy a non-citizen must pursue before collaterally attacking a removal order under 8 U.S.C. § 1326(d). The issues have been preserved, squarely presented, and are outcome-determinative. The petition should be granted.

A. The Disagreement Between Circuits is Well Established

The government minimizes the conflict amongst the circuits. In doing so, it ignores the fact that the Third, Fourth, Fifth, and Ninth Circuits hold that an

administrative remedy of any kind—including a motion to reopen—is not available when the non-citizen has not received information about how to pursue an administrative remedy and does not have the relevant information to file such a motion. That is what differentiates rules of the Sixth and Seventh Circuits from those of the Third, Fourth, Fifth, and Ninth Circuits.

While true that *United States v. El Shami*, 434 F.3d 659 (4th Cir. 2005), did not address whether a motion to reopen was an "available remedy," the Fourth Circuit found critical the fact that "INS's failure to provide notice precluded El Shami from attending his deportation hearing in the first instance, [and] he was never apprised of his right to seek section 212 relief and administrative and judicial review." *Id.* at 664. The same is true when the non-citizen was never informed of the ability to file a motion to reopen a removal order entered *in absentia*. In *Mendoza-Lopez*, this Court said that notice of how to appeal and an adequate explanation of "the only relief for which [the non-citizens] would have been eligible" rendered judicial review unavailable. 481 U.S. at 842.

Similarly, in *Sewak v. I.N.S.*, 900 F.2d 667, 671 (3d Cir. 1990), notice of the procedure and relevant facts were crucial to deciding whether a motion to reopen was an "available" administrative remedy. At the time, the Immigration and Nationality Act provided that "'[a]n order of deportation . . . shall not be reviewed by any court if the alien has not exhausted the administrative remedies *available* to him as of right under the immigration laws and regulations.'" *Id.* at 670 (quoting 8 U.S.C.A. § 1105a(c) (West 1970)) (emphasis added). It was not because the non-citizen "did not

learn of the circumstances surrounding the original hearing" until it was too late. *Id.* at 671. The Third Circuit recognized that "[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.* In subsequent cases, the Third Circuit emphasized that knowledge of the relevant facts was critical to the holding of *Sewak*. *See Marrero v. I.N.S.*, 990 F.2d 772, 779 (3d Cir. 1993) ("When he appealed to the BIA, Marrero, unlike Sewak, knew all the facts he now alleges support his claim that the immigration court improperly entered an order of deportation against him *in absentia.*").

The same is true of the Fifth Circuit. It held in *United States v. Villanueva-Diaz*, 634 F.3d 844, 849 (5th Cir. 2011), that a motion to reopen was not an "available" administrative remedy when the non-citizen "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." Thus, even though the case did not involve an *in absentia* removal order, notice of the relevant facts was critical to the analysis.

United States v. Parrales-Guzman, 922 F.3d 706 (5th Cir. 2019), did not hold to the contrary. (Resp. at 20) The Fifth Circuit suggested in passing that a motion to reopen may be an administrative remedy a non-citizen must exhaust to satisfy the requirements of § 1326(d)(1), but the defendant actually appeared at his removal hearing and waived the right to appeal. *Id.* at 708. The court held that the defendant could not satisfy § 1326(d)(1)'s requirement because he "fail[ed] to exhaust

administrative remedies that could have addressed his claims at the time of his removal." *Id.* That conclusion strengthens the conclusion that an administrative remedy is not "available" if the non-citizen did not know or have the facts necessary to pursue those remedies.

Finally, the government relies on a meaningless distinction between providing misinformation and no information. (Resp. at 18) In *United States v. Arias-Ordonez*, 597 F.3d 972 (9th Cir. 2010), the *in absentia* removal "order incorrectly stated that there was 'no administrative relief which may be extended,'" when a person had the right to move to reopen the proceedings to explain why he did not appear. *Id.* at 977. But the government offers no explanation as to why misinformation about whether and which administrative remedies are available is worse than providing no information at all. In both circumstances, non-citizens who often do not speak English are left unaware of "how to pursue administrative and judicial remedies." *Id.*

In contrast, the Sixth and Seventh Circuits have adopted a rule that does not account for whether non-citizens were provided information about how to pursue administrative remedies or the evidence necessary to do so. *See Flores-Perez*, 1 F.4th 454, 458 (6th Cir. 2021) (being removed alone provided notice of the need to figure out how to file a motion to reopen); *United States v. Calan-Montiel*, 4 F.4th 496, 498 (7th Cir. 2021) (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"). This Court should grant certiorari to address the conflict.

B. Courts Do Not Apply a Consistent Definition of "Available"

This Court should also grant certiorari to resolve inconsistent and contradictory decisions about whether a remedy is "available." As the Tenth Circuit recently observed courts have not been uniform in their approach to whether exhaustion is "excused" or an administrative remedy is unavailable. *See United States v. Ferman*, 811 F. App'x 490, 492 n.2 (10th Cir. 2020) (comparing *United States v. Lopez-Chavez*, 757 F.3d 1033, 1044 (9th Cir. 2014) (finding that ineffective assistance of counsel excuses exhaustion requirement), *and United States v. Johnson*, 391 F.3d 67, 75 (2d Cir. 2004) (noting that exhaustion may be excused if immigration judge provided misleading information regarding defendant's eligibility for discretionary relief), *with Parrales-Guzman*, 922 F.3d at 707–08 (rejecting exceptions to exhaustion requirement), *and United States v. Hernandez-Perdomo*, 948 F.3d 807, 811 (7th Cir. 2020) (concluding that even if futility exception to exhaustion exists, it would not apply where noncitizen failed to move to reopen immigration case)).

In this case, the Sixth Circuit was unbothered by the fact that the immigration court never provided Flores-Perez with information about how to seek administrative remedies or that he did not understand English. Both conclusions are inconsistent with those of other courts of appeals in the prison-litigation context. Although the types of administrative remedies available in prison and in immigration courts may differ, the meaning of the word "available" does not. There are some circumstances that make administrative remedies available in all contexts.

For example, in both the prison-litigation and immigration contexts, access to information about how to pursue administrative remedies is crucial. The Third Circuit's has held that administrative "[r]emedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes" under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). *Small v. Camden Cty.*, 728 F.3d 265, 271 (3d Cir. 2013). When policies or required forms are not made available in prison, the Ninth Circuit considers administrative remedies "unavailable," as well. *See Fordley v. Lizarraga*, 18 F.4th 344, 351–52 (9th Cir. 2021); *accord Hernandez v. Dart*, 814 F.3d 836, 842 (7th Cir. 2016) ("It is not incumbent on the prisoner to divine the availability of grievance procedures. . . . Rather, prison officials must inform the prisoner about the grievance process." (cleaned up)). That conclusion is inconsistent with the Sixth Circuit's and the government's insistence that an unexplained administrative remedy is still available if the non-citizen has knowledge of the "core facts" necessary to file a motion to reopen (*i.e.*, the existence of the removal order). (Resp. at 10)

Language barriers can also render an administrative remedy "unavailable" regardless of whether the proceeding takes place in prison or in immigration courts. "Notice may come in either oral or written form. But if every form of notice is in a language one does not speak or read, no notice at all has been conveyed." *Ramirez v. Young*, 906 F.3d 530, 537 (7th Cir. 2018). And notice "is ineffective if it is delivered in a language that is incomprehensible to the recipient." *Id.* Yet the Sixth Circuit's

rule apparently considers a person's ability to understand information irrelevant to the question of availability.

Most importantly here, there is an important distinction between knowledge of facts and possessing evidence. A motion to reopen is available "at any time if the [non-citizen] demonstrates that [he] did not *receive* notice in accordance with paragraph (1) or (2) of section 1229(a) of this title." 8 U.S.C. § 1229a(b)(5)(C)(ii); *see also Smykiene v. Holder*, 707 F.3d 785, 787 (7th Cir. 2013) (noting the important distinction between the statutory notice requirement—attempted delivery—and receipt of the notice, which is what is required to reopen removal proceedings). Flores-Perez did not have evidence of non-receipt until he received documents in discovery showing that the notice and the removal order were returned to sender. There is no evidence in the record that the government provided Flores-Perez with the removal order or the initial putative Notice to Appear before he was removed four days after his arrest. And Flores-Perez did not know until he received discovery that the reason he never received notice was because of a transcription error.

Finally, the Fifth and the Sixth Circuits do not agree about the impact of the departure bar on the availability of a motion to reopen. Although the Sixth Circuit did not discuss that barrier to administrative relief in its opinion, at the time of Flores-Perez's removal, that rule was firmly in place. The government argues that the departure bar was no barrier because "less than for months after [Flores-Perez's] removal" the Board of Immigration Review determined that immigration courts have jurisdiction to entertain a motion to reopen an *in absentia* removal proceeding. (Resp.

at 14 (citing *Matter of Bulnes-Nolasco*, 25 I. & N. Dec. 57, 60 (BIA 2009)). Yet, the government does not concede that the immigration courts would have entertained such a motion at all. (*See* Resp. at 14–15 ("[T]he immigration courts may well have entertained his motion . . . ."). The government notably does not state that it would not have tried to enforce the departure bar. Nor does it acknowledge that this conclusion is inconsistent with the Fifth Circuit's 2011 decision holding that a motion to reopen was not an "available" administrative remedy because of the departure bar. *See Villanueva-Diaz*, 634 F.3d at 849 (noting that "once removed, the BIA would have refused to take jurisdiction of his motion to reopen) (citing 8 C.F.R. § 1003; *Navarro–Miranda v. Ashcroft*, 330 F.3d 672, 675–76 (5th Cir. 2003) (affirming BIA's interpretation of predecessor regulation as jurisdictional as reasonable).

Furthermore, the Sixth Circuit has never invalidated the departure bar entirely. Indeed, the court suggested that the BIA "may wish to consider whether the departure bar is a mandatory rule." *Pruidze v. Holder*, 632 F.3d 234, 239–40 (6th Cir. 2011).

Without this Court's guidance, the courts of appeals will continue to be inconsistent about what "availability" means in the context of § 1326(d)(1). This Court should grant certiorari to prevent the unpredictability from metastasizing.

C. Textual Ambiguity Underscores the Need for Intervention

The text of 8 U.S.C. § 1326(d)(1) is not clear as the government contends (Resp. at 11) that non-citizens must exhaust any administrative remedies that may have been available at any time instead of those available at the time the removal order

was issued. Under the government's reading, the administrative-exhaustion requirement in § 1326(d)(1) is the only of the three requirements not temporally tethered to the initial removal proceedings. The plain language of 8 U.S.C. § 1326(d)(2) makes the relevant question whether "*the deportation proceedings at which the order was issued* improperly deprived the [non-citizen] of the opportunity for judicial review." *Id.* (emphasis added). The defect in the proceedings must cause the deprivation of judicial review.

Subsection (d)(3) is also backward looking at a particular moment in time: the removal proceedings. To satisfy that requirement, the non-citizen must show that "the entry of the order *was* fundamentally unfair." 8 U.S.C. § 1326(d)(3) (emphasis added). In deciding whether a non-citizen was prejudiced at the removal proceedings, at least three courts of appeals look backward to the law at the time of the proceedings. As long as the immigration judge faithfully applied existing law that was later determined to be wrong, the non-citizen cannot show prejudice in those courts. *See United States v. Lopez-Collazo*, 824 F.3d 453, 467 (4th Cir. 2016) ("Under the law as it was understood at the time of [the] removal, [the defendant] cannot have suffered prejudice because he was understood to be statutorily ineligible for relief from removal, and therefore there was no reasonable probability that he would not have been deported."); *United States v. Baptist*, 759 F.3d 690, 697–98 (7th Cir. 2014) ("Though the law has since changed and Baptist's possession offenses no longer constitute aggravated felonies under 8 U.S.C. § 1101(a)(43)(B), the law in effect at the time of Baptist's challenged removal is what matters to our analysis."); *United*

States v. Gomez, 757 F.3d 885, 899 (9th Cir. 2014) ("[W]e look to the law at the time of the deportation proceedings to determine whether an alien was eligible for relief from deportation.").

There is no sound textual or logical reason for two of the three provisions of 8 U.S.C. § 1326(d) to focus on a specific point in time, and the third to be temporally unbound. At the very least, the text of the statute is ambiguous, which provides an additional reason for this Court to clarify the issue sooner rather than later.

CONCLUSION

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

Respectfully submitted,

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March 30, 2022