No. 20-437

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

REFUGIO PALOMAR-SANTIAGO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether a former lawful permanent resident of the United States can be convicted of unlawful reentry under 8 U.S.C. § 1326 based on a prior removal order that was void *ab initio*—in other words, that had no legal basis because it was issued for a conviction that was not a removable offense.

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INTRODUCTION

In 1998, the Government removed respondent Refugio Palomar-Santiago, a lawful permanent resident (LPR), for a prior driving-under-the-influence (DUI) conviction that the Immigration and Naturalization Service (INS) deemed an aggravated felony supporting removal. Yet in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court held that DUI is *not* an aggravated felony. The Government now seeks to compound its error, relying on Palomar-Santiago's prior removal to charge him with reentry after removal under 8 U.S.C. § 1326.

The Government characterizes the question here as whether it can bring a prosecution under Section 1326 based on a removal order for a prior conviction that is "no longer" an aggravated felony. *See, e.g.*, Gov't Br. 13; Gov't Br. 8 (similar). In other words, the Government suggests that Palomar-Santiago's removal was legitimate at the time because the Board of Immigration Appeals (BIA) had held that DUI was an aggravated felony. The Government also says that Palomar-Santiago's immigration judge (IJ) made no "misrepresentation" to him, and that this case merely presents a run-of-the-mill change in law that does not undermine Palomar-Santiago's waiver of rights in his immigration proceeding. Gov't Br. 24.

The Government is wrong. It is hornbook law that a statutory interpretation ruling like *Leocal* "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1994). Accordingly, the removal order against Palomar-Santiago was illegitimate from

the outset. From a legal standpoint, the situation would be no different if the INS had ordered Palomar-Santiago removed shortly *after* this Court decided *Leocal*. *See, e.g.*, *Fiore v. White*, 531 U.S. 225, 226-29 (2001) (per curiam).

Once one appreciates the true nature of the error in Palomar-Santiago's removal proceeding, it is apparent that the Government's position raises profound equitable and constitutional concerns, by seeking to treat an administrative order that is indisputably invalid as conclusive in a later criminal proceeding. Those concerns—some of which the Court flagged in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987)—should be avoided by holding that the Government cannot pursue a Section 1326 prosecution using a prior removal order that is indisputably substantively invalid.

Put another way, *Leocal* establishes that the IJ *did* misrepresent the law to Palomar-Santiago. He therefore cannot be deemed to have knowingly and intelligently waived his rights to challenge his removal order. Indeed, in analogous cases in the criminal context, this Court has repeatedly held that such substantive statutory interpretation decisions cut through prior waivers of rights based on misunderstandings of the charges. All the more so here, where even fewer procedural protections inhered in the earlier proceedings leading to the erroneous sanction.

Upon finding Palomar-Santiago in this country, the Government could have explored a lesser charge of unlawful *entry* under 8 U.S.C. § 1325, which requires no prior removal order. Or it could simply have

initiated removal proceedings. The Government instead pursued an enhanced charge under Section 1326. Whatever the propriety of less-drastic remedies, the Government has overstepped its bounds here. The Court should affirm.

STATEMENT OF THE CASE

A. Statutory Background

The Immigration and Nationality Act (INA) creates two separate criminal offenses for unlawful entry into the United States. The first is 8 U.S.C. § 1325, which addresses noncitizens who enter the United States without permission. The second is 8 U.S.C. § 1326, under which a noncitizen who has been previously removed and *reenters* the United States without permission is subject to a more severe penalty.

As originally enacted in 1952, Section 1326 provided that "[a]ny alien who … has been arrested and deported or excluded and deported," and subsequently "enters, attempts to enter, or is at any time found in, the United States," would be subject to criminal prosecution. June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229 (current version at 8 U.S.C. § 1326). And as relevant here, LPRs who are convicted of an "aggravated felony" are subject to removal from the United States. *See* 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43) (listing qualifying crimes). If the Government initiates removal proceedings against a noncitizen, and an IJ orders the noncitizen's removal, the noncitizen has a right to appeal that order to the BIA, *see* 8 C.F.R. § 1003.1(b), (d)(3), and then to seek review in a federal

court of appeals, *see* 8 U.S.C. §§ 1101(a)(47)(B), 1252(d).

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court considered whether a noncitizen prosecuted under Section 1326 could collaterally attack the underlying deportation order on the ground that it was procured in violation of procedural due process. The Court first rejected the contention that the statute itself allowed such challenges. The "language of the statute," the Court explained, "suggests no such limitation" on the government's prosecutorial power, "stating simply that '[a]ny alien who has been arrested and deported or excluded and deported'" and subsequently enters the United States will be guilty of a felony. *Id.* at 834-35 (quoting 8 U.S.C. § 1326(1) (1952)).

But the Court held that the Constitution demanded that courts allow certain procedural challenges to underlying removal orders. "[A]t the very least," *id.* at 838, the Court explained, an individual cannot be prosecuted under Section 1326 "where the deportation proceeding effectively eliminate[d] the right of the [noncitizen] to obtain judicial review," *id.* at 839. And even where the noncitizens waived their right to appeal their orders of deportation, that standard is met where the IJ made errors that rendered those waivers "not considered or intelligent." *Id.* at 840.

The *Mendoza-Lopez* Court also emphasized that basing criminal liability on the outcome of administrative proceedings could raise even larger constitutional questions. "Even with [the] safeguard" of some meaningful judicial review, the Court explained, "the

use of the result of an administrative proceeding to establish an element of a criminal offense is troubling." *Id.* at 837-38 n.15. The Court noted that it had reserved that question in *United States v. Spector*, 343 U.S. 169 (1952), and that Justice Jackson had maintained there that such use of an administrative order is in fact unconstitutional. 481 U.S. at 833 n.7. But the Court did not need to resolve that question in *Mendoza-Lopez*, so it again reserved it. *See id.*

In 1996, responding to *Mendoza-Lopez*, Congress amended Section 1326. In a new subsection, Congress made clear that defendants can challenge the validity of underlying removal orders, subject to certain requirements. The statute now provides that "an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless" three conditions are met. 8 U.S.C. § 1326(d). First, the noncitizen must have "exhausted any administrative remedies that may have been available to seek relief against the order." *Id.* § 1326(d)(1). Second, "the deportation proceedings at which the order was issued" must have "improperly deprived the [noncitizen] of the opportunity for judicial review." *Id.* § 1326(d)(2). Third, "the entry of the order" must have been "fundamentally unfair." *Id.* § 1326(d)(3). All agree that if those three requirements are satisfied—and thus the removal order is shown to be invalid—a defendant cannot be convicted of violating Section 1326. *See* Gov't Br. 13.

B. Factual And Procedural Background

1. Refugio Palomar-Santiago is a 62-year-old Mexican national who obtained LPR status in 1990. Pet. App. 2a. At the time, he was employed and married

with two children, *see* Court of Appeals Supplemental Excerpts of Record 46. The following year, he was convicted in California of felony DUI. *Id.* He complied with the terms of the conviction and continued living his life with his family in the United States.

Seven years later, Palomar-Santiago received a Notice to Appear stating that he was subject to removal. Pet. App. 30a-31a. The Notice asserted one basis for removal: that his years-old DUI offense qualified as an aggravated felony. Pet. App. 9a, 13a, 31a. At the time, the BIA treated DUI as an aggravated felony. *See In re Magallanes-Garcia*, 22 I. & N. Dec. 1 (BIA 1998).

In 1998, an IJ held a removal hearing. Palomar-Santiago attended, but the Government has not produced a transcript or audio recording of the hearing to provide any other details. Pet. App. 9a. Following the hearing, the IJ issued an order directing Palomar-Santiago's removal based on the aggravated-felony charge in the Notice to Appear. Pet. App. 17a. Palomar-Santiago waived his right to appeal, Pet. App. 18a, and the day after his hearing, he was removed to Mexico, Pet. App. 9a.

Six years later, this Court concluded that DUI is in fact not an aggravated felony. *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004).

2. In 2017, Palomar-Santiago was found living in the United States. Pet. App. 2a. A grand jury indicted him for unlawful reentry after removal. *Id.*; Pet. App. 15a. Palomar-Santiago moved to dismiss the indictment, arguing that, in light of *Leocal*, his prior removal order was invalid. In support of that

argument, Palomar-Santiago cited the Ninth Circuit's decisions in *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), and *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), in which the court of appeals held—accepting the Government's concessions—that Section 1326(d)'s requirements are "satisfied" where the IJ ordered the noncitizen removed based on misclassifying a prior conviction as a removable offense. *Ochoa*, 861 F.3d at 1015; *see also Aguilera-Rios*, 769 F.3d at 630.

The district court granted Palomar-Santiago's motion, reasoning that he had "satisfied each of the three § 1326(d) requirements." Pet. App. 13a.

3. The Ninth Circuit affirmed. Pet. App. 1a. The panel confirmed that Palomar-Santiago had "met his burden in showing his crime was improperly characterized as an aggravated felony and that he was wrongfully removed from the United States in 1998." Pet. App. 3a. Applying "Ninth Circuit precedent as established in *Ochoa* and *Aguilera-Rios*," the court of appeals thus agreed with the district court that the prosecution must be dismissed. *Id.*

SUMMARY OF ARGUMENT

I. The Government urges this Court to hold that Section 1326 authorizes criminal liability for unlawful reentry following removal where the underlying removal order was void *ab initio*—that is, where the administrative agency never had the authority to remove that noncitizen in the first instance.

That interpretation of Section 1326 would raise serious constitutional and equitable problems. This Court has repeatedly recognized that *any* scheme that

permits the results of an administrative proceeding to conclusively provide the basis for criminal liability raises serious due process and separation of powers concerns. Those concerns are dramatically magnified where, as here, a statute purportedly permits a prosecution to proceed based on an agency order that is, and always has been, substantively invalid. Traditional equitable principles against which Congress legislates likewise dictate that when a person shows he was previously sanctioned for conduct that all agree was not so sanctionable, that substantive legal defect necessarily cuts through otherwise applicable procedural barriers.

II. Especially given the concerns raised by the Government's reading of Section 1326, this Court should reject the Government's proposed construction of the statute.

A. As an initial matter, this Court should construe Section 1326 to preclude criminal liability for unlawful reentry when the prior removal order is void *ab initio*. In its amendments to Section 1326 in response to *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), Congress expressly demonstrated concern with allowing an unlawful reentry prosecution to proceed where "the validity of the deportation order" underlying the prosecution is in question. 8 U.S.C. § 1326(d). Given these amendments, the Government recognizes that defendants who can demonstrate certain procedural errors with the proceedings that led to their removal orders cannot be prosecuted under the statute. That being so, it would make no sense—either as an equitable matter or in light of the overall structure of Section 1326—to allow the imposition of

criminal liability under the statute where the removal order itself is void *ab initio*. In that situation, no "challenge" to the removal order—in the parlance of Section 1326(d)—is even necessary. All a court needs to do is recognize what is already apparent for all to see: that the agency plainly overstepped its authority because the defendant was removed for something that indisputably was not a removable offense.

B. At minimum, this Court should hold that Palomar-Santiago has satisfied Section 1326(d)'s requirements and so can collaterally "challenge" his removal order as part of this prosecution.

With respect to Section 1326(d)'s first requirement, Palomar-Santiago had no "available" administrative remedies to exhaust. Per *Mendoza-Lopez*, no appellate remedies are "available" when an IJ's error causes a noncitizen to unintelligently waive his right to appeal. And here, the IJ's misrepresentation that Palomar-Santiago's DUI conviction was an aggravated felony caused him to misunderstand the elements of that charge. That is a prototypical error invalidating a waiver of rights.

In addition, because *Leocal* demonstrates that Palomar-Santiago was not removable at all, he satisfies Section 1326(d)'s procedural requirements on the rationale of the many cases holding that "actual innocence" of a sanction cuts through otherwise applicable procedural bars.

The real world workings of removal proceedings confirm this result. Challenging the classification of a prior conviction as an aggravated felony involves a

nuanced and often exquisitely complicated legal analysis known as the "categorical approach." And noncitizens in removal proceedings typically appear pro se—often while being detained in jails. At least where, as here, binding BIA authority compels the IJ's classification of his prior offense as an aggravated felony, an ordinary noncitizen's failure to appeal that determination cannot be treated as a failure to exhaust "available" remedies.

With respect to Section 1326(d)'s second requirement, a noncitizen who—because of an IJ's errors—does not pursue administrative remedies is statutorily precluded from, and thus erroneously deprived of, judicial review.

C. To the extent there is any lingering ambiguity, the rule of lenity requires the statute to be read in Palomar-Santiago's favor. Under the Government's reading of Section 1326(d), it is difficult to imagine *any* situation in which its requirements would be satisfied. On the other hand, Palomar-Santiago seeks only to prevent the Government from using an indisputably unlawful removal order as a basis for convicting him of unlawful *re*entry—a more serious offense than mere unlawful entry. Given Section 1326's express concern with "the validity of the deportation order" underlying the Government's charge, and the fact that no literal reading of Congress's enactment can perfectly harmonize all of its language and provisions, the Court should default to the less punitive construction.

ARGUMENT

The Government challenges the Ninth Circuit's rule that a substantively invalid removal order cannot be the basis for an "illegal reentry after removal" prosecution under Section 1326. The Government suggests that the Ninth Circuit established that rule in *United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004). *See* Gov't Br. 18-19; Gov't Cert. Reply 8. But *Pallares-Galan* turned on the fact that the noncitizen "was eligible for relief from deportation," and yet was not told that he could apply for discretionary relief. 359 F.3d at 1096; *see also United States v. Camacho-Lopez*, 450 F.3d 928 (9th Cir. 2006) (similar). As the Government acknowledges elsewhere, the question whether the failure to advise a noncitizen of "possible discretionary relief" satisfies Section 1326(d) is different from the question whether someone can be prosecuted under Section 1326 where his prior removal order is substantively invalid. Gov't Br. 19. The parties agree that "this case does not present the discretionary relief issue." Gov't Br. 32 (quoting BIO 6-7); *see also* Cert. Reply 6, 11 n.5.[1]

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[1] That said, Palomar-Santiago must correct one misstatement in the Government's brief. The Government says without qualification that "when the immigration judge classifies a prior crime as an aggravated felony, eligibility for discretionary relief is *not* distinct from removability." Gov't Br. 20. That may be largely true nowadays. But LPRs, such as Palomar-Santiago, who pleaded guilty to aggravated felonies before 1996 were eligible at the time of their removal hearings for at least one form of discretionary relief. *See INS v. St. Cyr*, 533 U.S. 289, 326 (2001); *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1121 (9th Cir. 2013).

As for the Ninth Circuit rule that the Government *does* challenge, that rule originates—as the court of appeals itself noted below—from *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), and *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014). Pet. App. 2a-3a. In both cases, the Ninth Circuit held—accepting the Government's concessions—that a Section 1326 prosecution may not proceed where the IJ ordered the noncitizen removed based on misclassifying a prior conviction as a removable offense. *Ochoa*, 861 F.3d at 1015; *see also Aguilera-Rios*, 769 F.3d at 630.

Because the Government conceded the issue in both cases, the Ninth Circuit has never had to explain the basis for its rule in any detail—creating the need for Palomar-Santiago to defend that rule essentially from scratch. This brief articulates two bases on which to uphold the Ninth Circuit's conclusion. First, Section 1326 itself precludes prosecutions for unlawful reentry that are based on removal orders that are void *ab initio—viz.*, that indisputably should not have issued, thus obviating the need to apply the "collateral attack" rules laid out in Section 1326(d). Second, the three-pronged test in Section 1326(d) for challenging the validity of a removal order is necessarily satisfied here.

Palomar-Santiago understands that the Government has articulated the question presented solely in terms of whether Section 1326(d) is satisfied. But where a question of law is a "predicate to an intelligent resolution of the question on which the Court granted certiorari, it can be regarded as "fairly comprised therein." *Vance v. Terrazas*, 444 U.S. 252, 258-

59 n.5 (1980). Such is the case respecting Palomar-Santiago's first argument—particularly when the court of appeals itself has never even been required to provide a legal basis for the rule at issue.[2]

I. PREDICATING CRIMINAL LIABILITY ON A PRIOR ADMINISTRATIVE ORDER THAT IS VOID *AB INITIO* IS AT ODDS WITH OUR LEGAL TRADITIONS AND WOULD RAISE GRAVE CONSTITUTIONAL CONCERNS.

The Government argues Section 1326 permits it to prosecute noncitizens based on administrative orders from agencies that did not have the authority to remove those noncitizens in the first place. Once it brings such prosecutions, the Government contends, defendants are barred from pointing out—and courts are precluded from considering—that the removal orders are void *ab initio* unless the defendants satisfy what the Government calls the "procedural" requirements of Section 1326(d). The Government's reading of Section 1326 would flout our legal traditions and raise serious constitutional concerns—both in terms of predicating criminal liability on a plainly invalid administrative order and in terms of precluding collateral challenge to a prior sanction for conduct all agree did not qualify for that sanction.

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[2] Of course, the Court would have discretion to consider this argument in any event. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 n.2 (1995); *United States v. Leon*, 468 U.S. 897, 905 (1984); *Fry v. United States*, 421 U.S. 542, 545 (1975); *Boynton v. Virginia*, 364 U.S. 454, 457 (1960).

A. The Court Has Expressly—And Correctly—Warned Against Using An Indisputably Erroneous Removal Order As The Basis For A Section 1326 Prosecution.

Congress always legislates against traditional "weights and bounds in the scales of justice." *Morissette v. United States*, 342 U.S. 246, 262 (1952). Sometimes these principles are grounded in the common law, *see*, *e.g.*, *id.* at 262-63, and sometimes they are rooted in longstanding notions of equity, *see*, *e.g.*, *Holland v. Florida*, 560 U.S. 631, 646 (2010). Regardless, this Court does not deem Congress to have departed from such principles absent the "clearest command" to the contrary. *Miller v. French*, 530 U.S. 327, 340 (2000).

In addition, the Court "presum[es] that Congress did not intend [to enact statutes] which raise[] serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Indeed, a statute "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Applying this principle, this Court has repeatedly "read significant limitations" into immigration-related and other statutes "in order to avoid their constitutional invalidation." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *accord Martinez*, 543 U.S. at 381; *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *United States v. Witkovich*, 353 U.S. 194, 195 (1957).

The Government's interpretation of Section 1326 would contravene traditional equitable considerations and raise grave constitutional concerns. In particular, this Court has repeatedly noted the profound due process and separation of powers problems that would result from a scheme that permits the results of an administrative proceeding to conclusively establish a criminal offense. Those concerns are heightened when, as here, the agency never had the authority to issue the order in the first instance.

1. The last time this Court addressed the crime of unlawful reentry was in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). In that case, the defendants argued that they could not be convicted of the crime because their underlying removal orders suffered from *procedural* flaws. The Court ruled that although the statute did not itself envision a challenge of that type, the Constitution nonetheless precluded prosecution for unlawful reentry where the defendant has not knowingly and voluntarily waived his right to seek review of the prior removal order. *Id.* at 839-40.

The Court also noted, but did not directly confront, other constitutional issues that would arise in a statutory scheme that made substantively invalid administrative orders determinative in a later criminal prosecution. *See id.* at 837-38 n.15. Given the distinct punitive weight of criminal prosecutions, the Court explained, "the use of the result of an administrative proceeding to establish an element of a criminal offense" is always "troubling." *Id.* That is so "*even with [the] safeguard*" of providing some meaningful review of the administrative proceeding prior to the criminal prosecution. *Id.* (emphasis added). Still, the Court

reserved the question whether the Constitution permits using an administrative order to "establish an element of a criminal offense," without affording any opportunity to challenge the order's substantive validity. *Id.*

Mendoza-Lopez, in fact, was the second time this Court explicitly reserved this constitutional issue. *See id.* at 833 n.7. In *United States v. Spector,* 343 U.S. 169 (1952), the statute at issue criminalized willful failure to leave the country despite an outstanding deportation order but did "not permit the court which tries him for this crime to pass on" the validity of that order. *Id.* at 177 (Jackson, J., dissenting). Instead, "[p]roduction of an outstanding administrative order for his deportation [became] conclusive evidence of his unlawful presence … and no inquiry into the correctness or validity of the order [was] permitted." *Id.* The Court flagged the question whether a "statute must be declared unconstitutional because it affords a defendant no opportunity to have the court which tries him pass on the validity of the order of deportation." *Id.* at 172-73. The majority, however, did not resolve the issue.

Justice Jackson—joined by Justice Frankfurter—would have reached the issue and struck down the statute. Justice Jackson explained that if Congress could thus "subdivide a charge … and avoid jury trial by submitting the vital and controversial part of it to administrative decision," it would "subver[t]" the many constitutional protections provided to criminal defendants. *Id.* at 177-79.

2. As *Mendoza-Lopez* and *Spector* indicate, predicating criminal liability on an administrative order

that is substantively invalid would implicate deep-rooted concerns sounding in due process and the separation of powers.

a. The Framers believed that the criminal sanction deserved special safeguards not necessary for other governmental actions. *See, e.g.*, The Federalist No. 84, at 511-12 (Hamilton) (Clinton Rossiter ed., 1961). Serious due process concerns are thus triggered whenever an administrative proceeding, shorn of the procedural protections due criminal defendants, provides the basis for later criminal punishment. As Justice Jackson explained, because the administrative determination "is not made either by a jury trial or a court decision" under "procedures constitutional for judgment of crime," its use as a basis for later criminal liability runs counter to bedrock constitutional protections for criminal defendants. *Spector*, 343 U.S. at 177-78 (Jackson, J., dissenting).

b. Using concededly erroneous administrative orders as a basis for criminal liability would also raise serious separation of powers concerns. Under the Government's view of Section 1326, a federal court is required to impose criminal liability based on a removal order even when the court recognizes that the order should never have been issued in the first place. "To sustain such a view … would make the judicial function a rubber stamp in criminal cases for administrative or executive action"—and substantively invalid action at that. *Estep v. United States*, 327 U.S. 114, 133-34 (1946) (Rutledge, J., concurring); *cf. United States v. England*, 347 F.2d 425, 440 (7th Cir. 1965) (discussing *Spector* and noting the "obvious constitutional repugnance to the situation wherein a

criminally accused may be subject to conviction for violating an invalid administrative order"). This attempt to use the courts and "criminal sanctions to give effect to an invalid administrative order" impinges on "the unique responsibility of the judiciary to assure itself that constitutional limits on government power have been maintained." Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence"*, 25 San Diego L. Rev. 631, 698 (1988) (discussing *Mendoza-Lopez*).

Dissenting in the World War II case of *Yakus v. United States*, 321 U.S. 414 (1944), Justice Rutledge recognized this constitutional concern. The statute there precluded a court presiding over a criminal enforcement action even from considering a purely legal defect that rendered an administrative "order invalid on its face." *Id.* at 481-82, 484. Requiring a court to "shut its eyes" to such a flaw, Justice Rutledge reasoned, improperly constrained the judicial power envisioned by Article III. *Id.*

The Government suggests that Justice Rutledge's analysis does not have purchase here because the majority in *Yakus* upheld the statute at issue. Gov't Br. 34 n.4. But the majority limited its holding to the war-time exigencies that drove that case's result. *See, e.g.*, *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring) (*Yakus* "emphasiz[ed] that the price controls imposed by the Congress were a 'war emergency measure'"); *United States v. Saade*, 652 F.2d 1126, 1133 n.9 (1st Cir. 1981) (questioning "[w]hether a legislative scheme similar [to that in *Yakus*] could today withstand a constitutional challenge by a criminal defendant");

Chrysler Corp. v. EPA, 600 F.2d 904, 913 (D.C. Cir. 1979) (noting "nagging presence of a substantial due process question" in such a scheme). Had *Yakus* resolved the constitutional question here, there would have been no need for the Court to explicitly reserve the issue in its subsequent decisions in *Spector* and *Mendoza-Lopez*.

As a leading treatise currently puts it, "[i]t is doubtful, in light of current doctrines of due process, that Congress could deny a criminal defendant the right to raise the invalidity of a statute or regulation in his defense, absent extreme exigencies." Charles Alan Wright & Arthur R. Miller, 13 Fed. Prac. & Proc. Juris. § 3526 n.2 (3d ed.). This is all the more true with respect to the invalidity of an underlying administrative order issued directly against that defendant.

3. The constitutional concerns with predicating criminal liability on substantively invalid administrative orders are at their height when it is plain that the administrative order forming the basis for the subsequent criminal charge is not just invalid but void *ab initio* and therefore *never* had any basis in law. Such is the case here.

a. Where an administrative agency or other government actor purports to exercise authority it does not have, the resulting action is ultra vires and void *ab initio*. *See United States v. Krueger*, 809 F.3d 1109, 1123 (10th Cir. 2015) (Gorsuch, J., concurring) (where magistrate issued warrant in violation of statutory geographic limitation, such warrant "was treated as no warrant at all—as *ultra vires* and void *ab initio* to use some of the law's favorite Latin phrases—as null and void without regard to potential questions of

'harmlessness'"); *see also United States v. Henderson*, 906 F.3d 1109, 1117 (9th Cir. 2018); *United States v. Werdene*, 883 F.3d 204, 213 (3d Cir. 2018); *United States v. Horton*, 863 F.3d 1041, 1048 (8th Cir. 2017).

Like other non-Article III bodies, IJs derive their authority from Congress. The INA authorizes IJs to conduct removal proceedings and prescribes the statutory minimum of the form of such removal proceedings. *See* 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."). In particular, the INA dictates that a noncitizen in removal proceedings "may be charged with any … applicable ground of deportability under section 1227(a) of this title." *Id.* § 1229a(a)(2). And the statute also confirms that an order of removal is not "valid" if it is not based on evidence showing that the defendant is, in fact, removable. *See* 8 U.S.C. § 1229a(c)(3)(A) ("No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.").

Thus, for example, where the BIA enters a removal order without statutory authority to do so, its "lack of authority to enter [the noncitizen's] removal order renders that component of his proceedings 'in essence, a legal nullity.'" *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 884 (9th Cir. 2003); *see also Mejia Galindo v. Sessions*, 897 F.3d 894, 898 (7th Cir. 2018) (BIA's entry of removal order without authority "was not a final order of removal," and "was a 'legal nullity'"); *Rhodes-Bradford v. Keisler*, 507 F.3d 77, 81 (2d Cir. 2007) (BIA entry of removal order without statutory authority constituted "ultra vires behavior"); *James v. Gonzales*, 464 F.3d 505, 513 (5th Cir. 2006)

(BIA's lack of statutory authority to order noncitizen removed "render[ed] the order a legal nullity").

b. Here, Palomar-Santiago's removal order was ultra vires and void *ab initio*. All agree that Palomar-Santiago's removal occurred solely because the IJ believed that his DUI conviction constituted an aggravated felony, thereby rendering him removable. *See* Gov't Br. 7. And all agree that this was incorrect under *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004), which held that such state DUI convictions do not constitute "crime[s] of violence," 18 U.S.C. § 16, qualifying as aggravated felonies under the INA. *See* Gov't Br. 8.

Crucially, Palomar-Santiago's deportation order did not just become invalid at some later date; it was void from the time it was entered. It is well-settled that this sort of "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1994). Accordingly, courts have appropriately referred to "pre-*Leocal*" removals based on prior DUI convictions—the precise issue here—as "invalid." *Aguilera-Rios*, 769 F.3d at 632; *see United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005). Such orders were without legal authority and therefore are void *ab initio*.

c. This Court's collateral-review jurisprudence reinforces this analysis. The Court has repeatedly recognized that new interpretations of a criminal statute that show a defendant was convicted of "an act that the law does not make criminal" are necessarily retroactive. *Bousley v. United States*, 523 U.S. 614, 620 (1998) (quoting *Davis v. United States*, 417 U.S. 333,

346 (1974)). Unlike new procedural rules, which merely call the reliability of the prior proceeding into doubt, substantive interpretations of a statute leave no "possibility of a valid result" where they "eliminate[] a State's power to proscribe the defendant's conduct." *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016). Thus, "a conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Id.* at 731. Alternatively stated, "a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place" makes its "judgments or sentences ... void *ab initio*." *United States v. Johnson*, 457 U.S. 537, 550 (1982). Indeed, any punishment for an act that a subsequent court decision makes clear did not violate a criminal statute, as properly interpreted, contravenes "the Federal Due Process Clause." *Fiore v. White*, 531 U.S. 225, 228 (2001) (per curiam).

Lewis v. United States, 445 U.S. 55 (1980), cited in the Government's brief (Gov't Br. 34), is not to the contrary. *Lewis* held that a federal court may use a state-court conviction as a predicate for a felon-in-possession charge even if that conviction was obtained in violation of the defendant's right to counsel. 445 U.S. at 65. That case did not involve an underlying conviction that was substantively invalid and void *ab initio* to impose further criminal punishment. Neither did the other two cases the Government cites (Gov't Br. 34) to argue that a prior criminal conviction may not be collaterally attacked when used as the basis of a second conviction or enhanced sentence. *See Daniels*

v. United States, 532 U.S. 374, 379 (2001) (unsupported assertion—not based on any change in law—that defendant lacked "full understanding" of elements of state court conviction used to enhance subsequent sentence); *Custis v. United States*, 511 U.S. 485, 497 (1994) (challenge to predicate state convictions on ground defendant was unaware of an available defense and received ineffective assistance of counsel when pleading guilty).

A felon-in-possession case truly comparable to the situation here would be one in which the Government attempted to prosecute someone for the offense after precedent established that the predicate conviction never should have issued in the first place. The Government has not cited, and this Court has never considered, any such case. Allowing such an approach in the Section 1326 context would be all the more troubling, given that Section 1326 concerns prior *administrative* adjudications, not prior court decisions.

B. The Court Has Studiously Avoided Holding That The Substantive Invalidity Of A Prior Sanction Is Irrelevant In Litigation, Even When A Litigant Would Ordinarily Need To Satisfy Procedural Requirements To Challenge The Sanction.

The Government does not contend merely that it can rely on an order that was void from the moment it was entered to impose new criminal penalties on Palomar-Santiago. It also argues that Section 1326(d) precludes Palomar-Santiago from collaterally challenging his removal order on that basis. That interpretation of the statute is at loggerheads with traditional equitable principles, sounding in due process,

establishing that actual innocence of an underlying sanction vitiates otherwise applicable procedural bars to challenging the sanction.

1. Courts have regularly expressed concern at the idea of procedural bars foreclosing defendants who are actually innocent from challenging their convictions. *See Rivas v. Fischer*, 687 F.3d 514, 552 (2d Cir. 2012) ("were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent ... we would be faced with a thorny constitutional issue" (quoting *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997))); *Lee v. Lampert*, 653 F.3d 929, 936 (9th Cir. 2011) (denying relief to "actually innocent petitioner would be constitutionally problematic" (quotation marks omitted)); *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1218 (11th Cir. 2000); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). In fact, some courts have expressed "grave constitutional concerns" about the prospect. *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005).

In light of the equitable imperative of recognizing cases of indisputable innocence when they arise, courts have held in numerous settings that claims of innocence necessarily overcome applicable procedural bars that might otherwise preclude challenging legally baseless convictions. *Id.* at 601-02; *see also Miller*, 141 F.3d at 978. For example, a defendant may collaterally attack a federal conviction when a new statutory interpretation decision reveals his underlying conviction was substantively invalid—*viz.*, that he was convicted "for an act that the law does not make criminal." *Davis*, 417 U.S. at 346. The same is true respecting state convictions. *Fiore*, 531 U.S. at 228.

In federal habeas proceedings, the "actual innocence" exception allows a petitioner to overcome a procedural default, *Bousley*, 523 U.S. at 622-24, and applies across a range of statutory procedural bars. *See McQuiggin v. Perkins*, 569 U.S. 383, 392-93 (2013); *Georgison v. Donelli*, 588 F.3d 145, 153 (2d Cir. 2009) (28 U.S.C. § 2254(b)(1) exhaustion requirement subject to actual innocence exception).[3]

McQuiggin is illustrative. There, this Court addressed whether a showing of actual innocence could overcome the statute of limitations for first federal habeas petitions in 28 U.S.C. § 2244(d)(1). The Court concluded that collateral challenges based on such a showing could proceed because the statute "contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception." 569 U.S. at 397. In light of this reasoning, the Court did not need to ground its decision in constitutional law. But it is not hard to see the constitutional concerns that would come into play if defendants whose convictions were legally baseless were barred from even asking courts to recognize the invalidity of their convictions.

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[3] Some courts have analogized to this exception, concluding that INA exhaustion requirements necessarily incorporate "actual innocence" or "manifest injustice" exceptions. *See*, *e.g.*, *Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1210 (10th Cir. 2007) (noncitizen's "lack of exhaustion" under 8 U.S.C. § 1252(d)(1) would be excused if he could show that "his conviction was not an aggravated felony" and thus that "he is, in effect, actually innocent" of removability charge).

2. These traditional background principles apply with even greater force to the underlying administrative order here. In the examples above, the principles of substantive invalidity and actual innocence overcame significant finality interests. Here, despite the Government's suggestions to the contrary (Gov't Br. 28), there is *no* meaningful finality interest in play. Palomar-Santiago is not seeking relief from his prior removal order. He asks only that the indisputably invalid order not form the basis of a *new* criminal punishment. *Cf. Allen v. Ives*, 950 F.3d 1184, 1188 (9th Cir. 2020) (government "conceded" that prior state conviction of which defendant was "actually innocent" could not be used for sentencing enhancement).

II. THIS COURT CAN AND SHOULD READ SECTION 1326 TO FORECLOSE CRIMINAL LIABILITY HERE.

There are two alternative ways to read this statute to recognize traditional equitable principles and to avoid the constitutional concerns that would arise if the Government could impose criminal punishment based on a removal order that indisputably should not have issued. First and most directly, Section 1326 can be construed to preclude the imposition of a criminal penalty on the basis of a prior removal proceeding in these special circumstances. Second, and at the very least, Section 1326(d) can be construed such that its requirements are satisfied here.

A. A Section 1326 Prosecution Cannot Be Premised On An Indisputably Ultra Vires And Void Removal Order.

Section 1326 should be construed to preclude criminal liability for an unlawful reentry when the prior removal order indisputably never should have issued.

1. When Congress responded to *Mendoza-Lopez*, it added a new subsection (d) to the statute. That subsection authorizes defendants to "challenge the validity of the deportation order" on which the Government bases a charge of unlawful reentry. 8 U.S.C. § 1326(d). In light of Congress's demonstrated concern about the reliability of underlying removal orders, the Court should hold that where the underlying order is substantively invalid—that is, void *ab initio*—a Section 1326 prosecution is not possible. Nothing in the text of Section 1326 states otherwise. And this interpretation would avoid the serious equitable and constitutional problems the Government's interpretation raises.

To be sure, *Mendoza-Lopez* held that Section 1326—as the statute existed before Congress amended it—allowed "a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been." 481 U.S. at 837. But, for several reasons, that holding poses no barrier here.

First, as noted above, the *Mendoza-Lopez* Court did not consider the problem of substantive invalidity. It confronted a claim only of procedural invalidity. The decision, therefore, should not be read as holding

that Section 1326, even as it existed at that time, allowed the imposition of criminal liability based on a deportation order that was plainly void *ab initio*.

Second, even if *Mendoza-Lopez* could be read as broadly as the Government would like, the Court reserved the question whether the Constitution would permit imposing criminal liability based on a substantively invalid administrative order. *Id.* at 833 n.7 & 838 n.15. For the reasons we have stated, the statute can and should be read to avoid that constitutional concern here.

Common sense, too, compels this reading. The insertion of subsection (d) into the statute demonstrates beyond peradventure that Congress did not want Section 1326 prosecutions to go forward where a removal order suffers from certain procedural infirmities. Congress would not have worried about procedural problems for their own sake. The only reason why Congress would have been concerned about procedural violations in removal proceedings—indeed, the overriding reason why procedural protections exist in administrative, criminal, and other proceedings—is to protect against substantively inaccurate outcomes. That being so, it would be nonsensical to allow defendants to avoid Section 1326 liability based on procedural errors—errors where the outcome of the removal proceeding may still have been "accurate," *Montgomery*, 136 S. Ct. at 732—but to permit such a prosecution where the removal order was indisputably substantively invalid the moment it was issued.

2. Precluding Section 1326 liability when the underlying removal order is void *ab initio* also comports with Section 1326(d)'s provision that a defendant

"may not challenge" the validity of a removal order "unless" he satisfies the provision's three conditions relating to administrative exhaustion, judicial review, and fundamental fairness. Gov't Br. 15. No "challenge" to (or, in the language of Section 1326(d)'s header, "collateral attack on") the validity of the order is necessary when it was indisputably invalid from the day it issued and, as a result, is void *ab initio*. The "possibility of a valid result does not exist." *Montgomery*, 136 S. Ct. at 730.

On the other hand, where the removal order is *not* substantively invalid, Section 1326(d) provides a mechanism for defendants to defeat a Section 1326 charge by challenging the procedural validity of the order—specifically, by arguing that defects in the removal process deprived them of procedural due process.

This distinction between removal orders that are void *ab initio* and orders that are subject to challenge is equivalent to the difference between errors that render a contract or judgment "void" as opposed to "voidable." A judgment is void if it is "so defective that it is deemed never to have had legal force and effect." 46 Am. Jur. 2d Judgments § 24. A voidable judgment, by contrast, "has been entered based upon some error in procedure that allows a party to have the judgment vacated, but the judgment *has legal force and effect unless and until it is vacated*." *Id.* (emphasis added). Similarly, a void contract "binds no one and is a mere nullity," such that "no disaffirmance is required to avoid" it. 17A Am. Jur. 2d Contracts § 9; 52 Am. Jur. 2d Marriage § 82 ("As a rule, a void mar-

riage, as distinguished from one that is merely voidable, is null from its inception."). Yet "a voidable contract continues in effect until active steps are taken to disaffirm the contract." 17A Am. Jur. 2d Contracts § 9.

Implementing the void/voidable dichotomy in Section 1326 is also wholly consistent with the legislative history the Government repeatedly cites. Gov't Br. 33, 36. That history suggests Section 1326(d) was "intended to … prevent[] wholesale, time-consuming attacks on underlying deportation orders." 139 Cong. Rec. 18,695 (1993). Palomar-Santiago is not "attacking" his prior removal order. He is merely pointing out something that is already indisputable: It is substantively invalid. Recognizing that fact would take no time at all.

3. Other aspects of the text and overall structure of Section 1326 confirm that Section 1326 must preclude an unlawful reentry prosecution based on a removal order that is void *ab initio*.

a. Prohibiting Section 1326 prosecutions based on substantively erroneous removal orders harmonizes Section 1326(d) with Section 1326(b).

Section 1326(d) limits challenges not only to "the validity of the deportation order described in subsection (a)(1)," the offense-defining provision, but also to "subsection (b)," which contains enhanced penalties for certain noncitizens. Subsection (b)(2) provides that any noncitizen removed "subsequent to a conviction for commission of an aggravated felony" is subject to a maximum of *20 years*' imprisonment, instead of the 2-year maximum prescribed in subsection (a). If

courts were powerless to recognize the invalidity of a removal order absent satisfaction of subsection (d)'s requirements, then orders like the one in this case—orders that are indisputably void *ab initio*—would subject defendants to 20-year sentences. It would be absurd to treat such orders as massive sentence enhancers, subjecting individuals to prison terms ten times longer than otherwise allowed, unless they could successfully challenge the orders under Section 1326(d)'s three requirements.

b. Palomar-Santiago's reading of Section 1326 also resolves the supposed "incongruity" the Government identifies. *See* Gov't Br. 36. When a later court's decision makes clear an IJ's removability finding was incorrect when issued, the Government asserts that Congress "could not have intended" to afford relief to a defendant who waived review of his removal order yet foreclose relief to a defendant who sought review but was nevertheless removed based on then-existing, incorrect decisions. Gov't Br. 36-37. The Government may be right that this result would be incongruous. But the Government draws the wrong inference from its juxtaposition of hypotheticals.

The Government's "incongruity" argument rests on the premise that even if a noncitizen was improperly found removable *and* did everything possible to challenge that illegal action, the Government may still capitalize on its prior illegal action to seek enhanced punishment under Section 1326.

As Palomar-Santiago's reading of the statute demonstrates, it is the Government's premise that Congress could not have intended. Under the proper

reading of the statute, both defendants the Government imagines are beyond the reach of Section 1326.

c. Palomar-Santiago's reading is necessary even to give effect to Section 1326(d) itself. That provision gives defendants a mechanism to "challenge the validity of the deportation order" that underlies the Government's charge. Yet if the Government were correct that it can prosecute someone under Section 1326 even when the underlying removal order is indisputably invalid, then satisfying Section 1326(d)'s three prongs would seem to accomplish nothing. A defendant who satisfies Section 1326(d) would show he was *invalidly* deported, but he would still have been "deported" and then reentered the country, and so—in the Government's view—would still have committed the crime of reentry after removal.

When a proposed interpretation of statutory language is "simply incompatible with the existence of" another portion of the statute and would render it "superfluous," that interpretation should be rejected. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). That principle applies here. Congress plainly assumed that the validity of the underlying order was relevant when it added Section 1326(d). That being so, the Government should not be able to convict someone of violating Section 1326 when the underlying removal order is substantively invalid.[4]

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[4] These structural features of Section 1326 further distinguish this case from *Lewis*. In addressing the procedural error there, the Court explained that the text, structure, and history of the statute demonstrated that Congress did not intend for the

B. Palomar-Santiago Satisfies Section 1326(d)'s Requirements.

Even if Section 1326 authorizes convictions based on removal orders that are substantively invalid under binding precedent, the Court should still conclude that Palomar-Santiago has satisfied the requirements for challenging the order in his case under subsection (d). The Government does not dispute that Palomar-Santiago satisfies Section 1326(d)'s third prong—that the entry of the prior removal order in this case was "fundamentally unfair." 8 U.S.C. § 1326(d)(3). But the Government insists that he has not satisfied the first two prongs. The Government is incorrect.

1. *Section 1326(d)'s Administrative Exhaustion Prong Is Satisfied.*

Section 1326(d)'s first prong requires a defendant to exhaust only "administrative remedies that may have been available to seek relief against the order." 8 U.S.C. § 1326(d)(1). The statute thus contains a "textual exception to mandatory exhaustion": A noncitizen "must exhaust available remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (describing similar pro-

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conviction to depend in any way on "the validity of the predicate conviction." 445 U.S. at 63; *see id.* at 60-64. Here, Congress has done the reverse. It reacted to *Mendoza-Lopez* by adding the concept of "validity" of the prior administrative order to Section 1326. That shows beyond dispute that validity matters here, and that a Section 1326 conviction cannot be predicated on a removal order that is void *ab initio*.

vision in Prison Litigation Reform Act (PLRA)). Section 1326(d)'s language and history, as well as precedent and practical realities, demonstrate that no administrative remedies were "available" to Palomar-Santiago.

a. *Text*. "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Ross*, 136 S. Ct. at 1858-59 (quotation omitted). "To state that standard, of course, is just to begin." *Id.* at 1859. That language must be interpreted in light of the relevant context, which here includes two significant factors.

First, as the Government acknowledges, Congress enacted Section 1326(d) in response to *Mendoza-Lopez*. Gov't Br. 12, 29-30. Therefore, as then-Judge Gorsuch explained, the statute "brings the old soil with it.'" *United States v. Adame-Orozco*, 607 F.3d 647, 654 (10th Cir. 2010) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *see also Magwood v. Patterson*, 561 U.S. 320, 337-39 (2010) (construing "second or successive" in AEDPA contrary to its literal meaning because the phrase was meant to codify more nuanced prior legal holdings). That is, Section 1326(d)(1)'s term "available" must be construed in harmony with the decision that spurred its enactment.

Second, determining whether an administrative remedy is "available" is a context-specific inquiry. It requires an examination of the "facts on the ground" and the "real-world workings" of the proceedings at issue. *Ross*, 136 S. Ct. at 1859. It is not enough for a

process to be "officially on the books"; it must, "as a practical matter," be capable of use. *Valentine v. Collier*, 141 S. Ct. 57, 59 (2020) (Sotomayor, J., dissenting from denial of application of stay). That view is consistent with this Court's general recognition that administrative exhaustion is an "intensely practical" doctrine. *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (quotation omitted); *see McKart v. United States*, 395 U.S. 185, 193 (1969) ("Application of [administrative exhaustion] doctrine to specific cases requires an understanding … of the particular administrative scheme involved.").

b. *Precedent.* This Court's precedent dictates, on two independent grounds, that when an IJ erroneously determines that a noncitizen's crime is an aggravated felony, no administrative remedies are realistically "available" to the noncitizen.

i. In *Mendoza-Lopez*, the Court held that "at the very least," there must be "some meaningful review of the administrative proceeding" before a deportation order could be used for "the subsequent imposition of a criminal sanction." 481 U.S. at 837-38. The question is not whether review was technically available to the noncitizen at the time of the deportation proceedings. *See id.* at 836-37 (recognizing that noncitizen could have obtained judicial review through habeas corpus proceeding). It is whether the deportation proceedings "effectively" or "functionally" eliminated the noncitizen's ability to obtain review. *Id.* at 839 & n.17; *see United States v. Copeland*, 376 F.3d 61, 68 (2d Cir. 2004) (question under *Mendoza-Lopez* is not whether review is "technically available" but whether it is "realistically possible").

The *Mendoza-Lopez* Court recognized that the defendants there had waived their right to challenge their deportation orders. The Court held, however, that review was "effectively eliminate[d]" and thus "unavailable" because the IJ made errors that rendered those waivers "not considered or intelligent." 481 U.S. at 839-41. Specifically, the IJ had failed to adequately advise the noncitizens about their right to appeal and "their eligibility to apply for suspension of deportation." *Id.* at 839-40. The Court concluded those errors invalidated the waivers, and thus effectively rendered the opportunity for review unavailable. *See id.* at 841.

That conclusion maps directly onto the text of Section 1326(d). If an error in the proceeding causes an unintelligent waiver of appellate rights, then those rights are not "available." 8 U.S.C. § 1326(d)(1).

The Government, in fact, does not contest the proposition that *if* Palomar-Santiago's waiver was not knowing and intelligent, he satisfies Section 1326(d)(1) and (2). It simply argues that his waiver *was* knowing and intelligent. *See* Gov't Br. 20, 31. In particular, the Government maintains that the IJ did not procure Palomar-Santiago's waiver by means of a "misrepresentation" because the IJ's classification of DUI as an aggravated felony was supported at the time by BIA precedent. Gov't Br. 24.

But the Government is incorrect. As explained at the outset, this Court's decision in *Leocal* made clear that DUI is not, and never was, an aggravated felony. *Supra* at 1-2, 21. The IJ thus misled Palomar-Santiago to believe his DUI conviction rendered him categorically deportable. And that misrepresentation

rendered Palomar-Santiago's waiver of appeal unknowing and unintelligent.

Indeed, it has long been established that when a defendant is not properly advised of the elements of a charge, a waiver of a right to contest or challenge that charge is not knowing and intelligent. That principle was recognized in *Boykin v. Alabama*, 395 U.S. 238 (1969) and in *Henderson v. Morgan*, 426 U.S. 637 (1976). In *Henderson*, for example, the defendant's guilty plea was not "intelligent" where he was not informed that a particular *mens rea* was "an element of the offense." 426 U.S. at 638.

That principle was also applied in *Bousley v. United States*, 523 U.S. 614 (1998) in circumstances remarkably similar to those here. The Government charged Bousley with "using" a firearm during a drug trafficking crime under 18 U.S.C. § 924(c)(1). After the trial court told him that the "use" element of that charge encompassed possession or storage of a firearm nearby during the drug offense, Bousley pleaded guilty, thereby waiving his right to contest the Government's charge. He later brought a collateral attack against his conviction, arguing his plea was invalid because this Court had since held that the statute required "active employment of the firearm." *Bousley*, 523 U.S. at 617. The Court agreed with Bousley that a plea based on the court's and defendant's shared misunderstanding of the scope of elements of the charged offense is not "knowing and intelligent." *Id.* at 618-19.

The same logic shows Palomar-Santiago's waiver of appeal was not "knowing and voluntary." At the time of Palomar-Santiago's removal hearing, the BIA

had held that DUI was a "crime of violence" under 18 U.S.C. § 16(b) and therefore constituted an aggravated felony. The BIA reasoned that DUI "is the type of crime that involves a substantial risk of harm to persons and property" irrespective of any mens rea. *In re Magallanes-Garcia*, 22 I. & N. Dec. at 5. But this Court later held that Section 16(b)'s reference to the "use[]" of physical force requires "a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense." *Leocal*, 543 U.S. at 11. By following the BIA's erroneous but then-binding authority, the IJ left out a crucial element—more-than-negligent intent to use force—in assessing whether Palomar-Santiago had been convicted of an aggravated felony.

ii. This Court's precedent shows that Palomar-Santiago necessarily satisfies the requirements of Section 1326(d) for a second, independent reason: Procedural requirements for bringing collateral attacks cannot block defendants who are actually innocent from challenging their convictions. *Bousley* is relevant in this respect too. In the second part of that case, the Court turned to whether the defendant had had defaulted his claim by "failing to raise it on direct review." 523 U.S. at 622. The Court held that he had, but that he could nevertheless raise the challenge on collateral review because procedural bars cannot obstruct claims of unintelligent waivers where defendants are actually innocent of the underlying offense. *Id.* at 623-24. *McQuiggin* and similar cases cited above are of the same ilk. *See supra* at 24-26.

Lower courts as well have refused to enforce appeal waivers where the defendant "was not properly

informed as to the nature of each charge to which he was pleading guilty." *United States v. Balde*, 943 F.3d 73, 93-95 (2d Cir. 2019) (quotation omitted); *cf. United States v. Attar*, 38 F.3d 727, 733 n.2 (4th Cir. 1994) (waiver of appeal rights will not bar appellate review of motion to withdraw guilty plea when it "incorporates a *colorable* claim that the … waiver of appeal rights … is tainted by constitutional error").

So too here: All agree that Palomar-Santiago was not only innocent of the one charged ground of removability, but that as an LPR he would not have been removable at all but for the IJ's erroneous aggravated felony determination.

iii. None of the other cases the Government cites to support its default-for-failure-to-exhaust argument involve a comparable error showing an individual was convicted for conduct the law does not make criminal—or as here, removed for a conviction the law does not make removable.[5]

Bousley itself distinguished *Brady v. United States*, 397 U.S. 742, 748 (1970), because the defendant there challenged his guilty plea on the ground that it was induced by a death penalty provision later held unconstitutional, not that a later decision clarified that the essential elements of the crime were narrower than previously thought. 523 U.S. at 619. *United States v. Frady*, 456 U.S. 152 (1982) involved

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[5] And none of the decisions the Government cites (Gov't Br. 20) as in conflict with the Ninth Circuit's rule discusses the principle applied in *Henderson* and *Bousley* or explains how a waiver of rights can be valid when based on a shared misunderstanding of the elements of the removability charge.

an instructional error, and it was clear that the evidence there satisfied the elements of the offense. *Id.* at 170-74. And the cases the Government cites (Gov't Br. 21, 24) for the generic proposition that misjudging the strength of one's arguments is no basis to invalidate a plea did not involve clarifications of law at all, much less clarifications going to the elements of the offense. *United States v. Nguyen*, 235 F.3d 1179, 1184 (9th Cir. 2000); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

c. *Practical realities.* The "real world workings" of removal proceedings and the "facts on the ground" confirm that the IJ's misrepresentation meant Palomar-Santiago had no "available" administrative remedies. *See Ross*, 136 S. Ct. at 1859.

i. The complexity of removal proceedings is widely recognized. *See Padilla v. Kentucky,* 559 U.S. 356, 369 (2010) ("Immigration law can be complex, and it is a legal specialty of its own."). And yet more than 60% of noncitizens appear pro se. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 7-8 (Dec. 2015). That percentage is close to 90% where, as occurred here, the noncitizen is detained. *See id.* Even when detained noncitizens are able to secure counsel, the effectiveness of their representation may be undermined by the noncitizen's inability to make private phone calls and the constant possibility of a transfer. *See* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 Colum. L. Rev. 1833, 1854-56 (2011).

Based in part on these practical realities, "our removal system relies on IJs to explain the law accurately to *pro se*" noncitizens. *Copeland*, 376 F.3d at 71. If IJs misstate the law, noncitizens "have no way of knowing what information [is] relevant to their cases and [are] practically foreclosed from making a case against removal." *Id.*

That is especially true where the IJ erroneously determines that a noncitizen's prior conviction is an aggravated felony. The question whether a crime is an "aggravated felony" is governed by the "categorical" and "modified categorical approaches." *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). Detecting an error in the IJ's aggravated felony determination and challenging that error on appeal "is not an easy task." *Padilla*, 559 U.S. at 378 (Alito, J., concurring). The categorical approach involves "an endless gauntlet of abstract legal questions," requiring highly technical parsing of the elements of "generic" offenses and the offense of which the noncitizen was convicted. *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring).

Perceiving an error in an IJ's application of the categorical approach is all the more difficult and unlikely where, as was true here, the BIA has recently made the exact same determination in a binding, published decision. *See* 8 C.F.R. § 1003.1(g) (BIA decisions binding on IJs); *see also Johnson v. Ashcroft*, 378 F.3d 164, 173 (2d Cir. 2004) (BIA bound by its own precedent); *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001) (deferring to BIA's aggravated felony determination). Even if (usually uncounseled) noncitizens are sometimes well-positioned to take appeals to the

BIA based on their factual circumstances, noncitizens will not realistically be able to spot an error in the IJ and the BIA's uniform application of the categorical approach and develop the necessary arguments to appeal. In those circumstances, no administrative remedy is practically "available" to the noncitizen.

ii. According to the Government, the "difficult substantive questions" raised by the categorical approach do not make the "process for administrative review confusing or incapable of use." Gov't Br. 25 (quotation omitted). But accessing the "process for administrative review" necessarily involves understanding that the IJ erred and that there is a basis for challenging that error. A noncitizen's theoretical ability to challenge the IJ's aggravated felony determination means nothing if the noncitizen is told by the Government, the IJ, and the BIA that he is an aggravated felon. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) ("That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious."). Put another way, the knowledge that a system for appealing exists is meaningless unless the noncitizen also has some understanding of what he would argue on appeal.

That a smattering of noncitizens—out of the thousands ordered removed on this basis each year—have managed to appeal an IJ's aggravated felony determination (Gov't Br. 17 & n.2, 26), does not mean that those remedies are practically "available" to the ordinary noncitizen. In *Ross v. Blake*, the Court recognized that some prisoners successfully navigated the Maryland prison grievance system. 136 S. Ct. at 1861 (noting "several cases in which an inmate refused to

take a warden's ... 'no' for an answer, resubmitted his grievance ... and there received a ruling on the merits"). The Court nonetheless remanded the case to consider whether the inmate had "available" remedies to exhaust. *See id.* at 1862. That is because the inquiry focuses on whether "an ordinary prisoner in [the inmate's] situation," not only "the most skillful," would have been able to navigate the process at issue. *Id.* at 1860. And importantly here, the fact that *others* may have appealed in roughly analogous circumstances does not change the fact that Palomar-Santiago himself did not waive his rights in a knowing and intelligent manner. *See supra* at 36-38.

iii. The Government also contends that Palomar-Santiago's situation does not fit directly within the "three categories of unavailability" the Court identified in the PLRA context. Gov't Br. 23-25. But *Ross* held that a prison official's "misrepresentation" could render administrative remedies unavailable. 136 S. Ct. at 1860. The IJ's erroneous aggravated felony determination was plainly a "misrepresentation"—DUI is not, nor has it ever been, an aggravated felony. *See supra* at 21. And given the practical realities described above, when an IJ tells an "ordinary" noncitizen that he is an aggravated felon under binding BIA authority, that noncitizen cannot practically "discern"—much less "navigate"—any opportunity to obtain administrative relief. *Ross*, 136 S.Ct. at 1859.

At any rate, Palomar-Santiago's case does not need to fit squarely within a *Ross* exception. The three *Ross* examples—while illustrative—are not exhaustive. *See Williams v. Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016); *Andres v. Marshall*, 867 F.3d 1076,

1078 (9th Cir. 2017). Most notably, in the prison litigation context, no situation analogous to the one here—where an individual is charged with an offense but waives his rights after being misled as to the elements of that offense—can even arise.

Besides, the PLRA's exhaustion requirement was enacted to stem a perceived "tide of frivolous prisoner litigation" in the wake of "a sharp rise in prisoner litigation in the federal courts." *Woodford v. Ngo*, 548 U.S. 81, 84, 97 (2006); *Ross*, 136 S. Ct. at 1858. Congress enacted Section 1326(d) for a different purpose: to allow litigants to challenge underlying administrative adjudications. *See supra* at 5, 27-28. The provision is designed to provide a route to challenge the validity of the deportation order that serves as the basis for a subsequent criminal prosecution for reentry after removal.

Section 1326(d)'s exhaustion requirement is thus much closer to the cases where this Court has recognized exceptions to administrative exhaustion at common law. In *McKart v. United States*, 395 U.S. 185 (1969), for example, the Court held that a criminal defendant's failure to administratively appeal his classification under the Selective Service Act did not preclude him from challenging that classification as part of his subsequent prosecution for failure to report for induction. Palomar-Santiago, like McKart, is facing criminal charges and, if precluded from relying on the already-established invalidity of his underlying removal order, will "go to jail without having any judicial review" of that order. *McKart*, 395 U.S. at 197. And, as in *McKart*, there are few institutional interests favoring exhaustion, as the purely legal question

at issue (whether DUI is an aggravated felony) involves neither the agency's discretionary power nor its "particular expertise." *See id.* at 198-99; *see also Patel v. Ashcroft*, 401 F.3d 400, 407 (6th Cir. 2005); *cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151-58 (10th Cir. 2016) (Gorsuch, J., concurring).[6]

2. *Section 1326(d)'s Judicial Review Prong Is Satisfied.*

Section 1326(d)'s judicial review prong requires the defendant to show that his removal proceedings "improperly deprived [him] of the opportunity for judicial review." 8 U.S.C. § 1326(d)(2). The Government concedes that this prong rises and falls on whether the defendant had "available" administrative remedies under the first prong. *See* Gov't Br. 27. With good reason. A noncitizen who does not appeal his deportation order to the BIA is statutorily precluded from seeking judicial review. *See* 8 U.S.C. § 1252(d)(1); *Barron v. Ashcroft*, 358 F.3d 674, 677-78 (9th Cir. 2004).

Such is the case here. And even if that statutory barrier did not exist, Palomar-Santiago was deported

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[6] The majority in *Ross* did not endorse Justice Breyer's view that the word "exhaust" used in a statutory provision carries with it all "judge-made" common law exceptions. 136 S. Ct. at 1857; *see also id.* at 1863 (Breyer, J., concurring). But the Court did examine the statutory history and context of the PLRA in concluding that the statute could not include the exception at issue there. *See id.* at 1857-58. The Court should find that Section 1326(d)'s statutory history and context—and removal proceedings in general—support drawing from common-law principles.

the day after his hearing, severely limiting his practical opportunity to seek judicial review. Pet. App. 9a; 8 C.F.R. § 1003.3(e). Thus, the IJ's misrepresentation here invalidated Palomar-Santiago's waiver of rights and improperly deprived him of judicial review as well. *See Mendoza-Lopez*, 481 U.S. at 840.

C. Any Ambiguity In Section 1326 Must Be Resolved In Palomar-Santiago's Favor.

If there is any doubt that Palomar-Santiago is entitled to relief under the statute, the statute should be read in Palomar-Santiago's favor. That is true not only because of the constitutional and equitable principles discussed above, but also under the rule of lenity.

Under the rule of lenity, "criminal statutes must be strictly construed in favor of the defendant." Wayne R. LaFave, Substantive Criminal Law § 2.2(d) (3d ed. 2020). This fundamental rule of statutory interpretation is "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). It is "founded on 'the tenderness of the law for the rights of individuals' to fair notice," *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95), and "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, Benchmarks 209 (1967))); *see also Skilling v. United States*, 561 U.S. 358, 410 (2010).

Adopting the Government's reading of Section 1326 would "turn[] the rule of lenity upside down."

United States v. Santos, 553 U.S. 507, 519 (2008). The Government's reading of Section 1326 flouts the statute's history and would deprive it of any real meaning. Under those circumstances, any tinkering that must be done to make all of the pieces of the statute fit together must favor the criminal defendant.

1. According to the Government, a defendant cannot satisfy the statute's requirements whenever he had, but did not pursue, a procedural "opportunity to challenge the underlying removal order" in his removal proceedings. *See* Gov't Br. 28, 29; *see also* Gov't Br. 24-26. A noncitizen has such an "opportunity," in the Government's view, even when an IJ orders him removed based on a misunderstanding of the elements of the ground for removability, and when challenging that determination, as a practical matter, would have involved conducting a complicated legal analysis in the face of binding BIA authority. Even setting aside the equitable and constitutional concerns described above, that exceedingly constricted reading of Section 1326 cannot be right.

First, the Government's position is irreconcilable with *Mendoza-Lopez*. Those defendants too had "technically available" opportunities for review that they did not pursue. *See supra* at 35-36. And, as already noted, the Government does not dispute the basic principle of *Mendoza-Lopez*, i.e., that when a waiver of rights in an immigration proceeding is not "considered" and "intelligent," administrative remedies and judicial review are not available. 481 U.S. at 840; *supra* at 35-36.

Instead, the Government argues that *the facts* at issue in *Mendoza-Lopez* were insufficient to satisfy

that principle because *Mendoza-Lopez* merely "assum[ed]," at the Government's request, that the defendants' deportation hearing "was fundamentally unfair" and "accept[ed] the legal conclusions of the court below that the deportation hearing violated due process." Gov't Br. 31-32 (quoting *Mendoza-Lopez*, 481 U.S. at 839-40). The Court, however, proceeded to explain that in fact the waivers in that case "were not the result of considered judgments by" the noncitizens and the IJ "failed to advise respondents properly" of their rights. *Mendoza-Lopez*, 481 U.S. at 840. Even if this were not a strict holding, it would have made perfect sense for Congress to make the same assumption, when amending Section 1326, that the Government asked the Court to make. Certainly nothing in the legislative history the Government discusses contains any attempt by the Government to disabuse Congress of that view.

The Government also attempts to distinguish *Mendoza-Lopez* because the IJ failed to inform the noncitizens about discretionary relief and appellate rights of which they may not otherwise have been aware, while Palomar-Santiago "was plainly on notice of" the classification of his offense as an aggravated felony. Gov't Br. 32-33. But, as explained *supra* at 36-38, 42-43, the IJ's misunderstanding here precluded Palomar-Santiago from knowing that his offense was not truly an aggravated felony. Indeed, Chief Justice Rehnquist—despite believing that challenges to underlying removal orders were inappropriate in cases like *Mendoza-Lopez*—acknowledged that due process might require courts to allow them where

(as here) the IJ "erroneously applied the law" in analyzing removability. *Mendoza-Lopez*, 481 U.S. at 845 (Rehnquist, C.J., dissenting).

Second, the Government's interpretation of the statute leaves Section 1326(d) practically meaningless. The Government never identifies—and Palomar-Santiago cannot envision—*any* noncitizen who would be capable of satisfying Section 1326(d)'s requirements under its test. After all, as the Government itself stresses, a noncitizen's procedural right to appeal a final removal order to the BIA and, in turn, to the court of appeals, is provided for by regulation and statute. *See* Gov't Br. 4 (citing 8 C.F.R. § 1003.1(b), (d)(3) (right to appeal IJ's removal order) and 8 U.S.C. § 1252(a), (d) (final order of removal may be reviewed in federal court of appeals)). Under the Government's approach, it is not clear that even an IJ's affirmative misrepresentation that a noncitizen could not appeal would justify a failure to appeal. That misrepresentation would be incorrect, but it would certainly be *far easier* for the noncitizen to know as much than to recognize that a DUI conviction is not a categorical match for the requirements of a crime of violence when not only the IJ but the BIA has declared otherwise.

And that is even before addressing what hypothetical noncitizen, in the Government's view, could have both exhausted administrative remedies yet somehow been "improperly deprived" of the "opportunity for judicial review" by those same proceedings under Section 1326(d)(2). Congress could not have intended to draft a statute that would be impossible to satisfy.

2. On the other side of the ledger, Palomar-Santiago makes a modest request. No matter the result here, this case will not undo the harm to Palomar-Santigao and his family caused by his unlawful removal. Nor can this case itself restore his LPR status, which indisputably never should have been stripped from him. The question here is not even whether defendants like Palomar-Santiago may retain their liberty. All agree that even with this substantively invalid removal order, Palomar-Santiago could potentially have been prosecuted for the lesser offense of illegal entry under Section 1325. But that offense carries a maximum sentence of 6 months for a first-time offender. *See* 8 U.S.C. § 1325(a). A Section 1326 charge, by contrast, carries a maximum prison term of 2 years—with enhancements up to 10 or 20 years. Indeed, the entire purpose of Section 1326—titled "Reentry *of removed aliens*"—is to provide a more serious offense for noncitizens who enter the country without permission *after being deported*, thus contravening the immigration laws a second time. That rationale loses all its force where, as here, the initial deportation is void *ab initio* and never should have occurred.

Put another way, the Government here is trying to take advantage of that removal order, which should never have issued, and compound its unjust result by using it to convict Palomar-Santiago of a Section 1326 offense. Allowing the Government to "criminally punish[]" Palomar-Santiago for its own "legal mistake," *Aguilera-Rios*, 769 F.3d at 633—based on, at best, a poorly drafted and inexact statute—is a bridge too far. Congress plainly had good reason to avoid this result,

and indeed to expect that the Government would not even attempt to bring a charge based on a prior removal it knows was improper. At a bare minimum, there is no good reason to construe the statute as if Congress had the contrary intent.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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March 24, 2021