No. 20-437

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

REFUGIO PALOMAR-SANTIAGO,
Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, nonprofit, volunteer organization made up of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A.[1] Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court, among them thousands of individuals charged under the statute at issue here. Illegal reentry under 8 U.S.C. § 1326 is the most prosecuted federal crime. In the twelve-month period ending in June 2020, federal prosecutors brought 23,846 such cases: a staggering 36% of all federal prosecutions, which is higher than all federal drug prosecutions combined. United States Courts, Criminal Federal Judicial Caseload Statistics 2020, Tbl. D2 (June 30, 2020), https://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2020/06/30.

The members of NAFD have deep practical experience in litigating illegal-reentry cases nationwide, and a strong incentive to ensure that

[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

individuals who were wrongly deported are not subject to prosecution under § 1326.

SUMMARY OF ARGUMENT

If the immigration agencies had stayed within their congressionally delegated bounds, Mr. Palomar-Santiago would still be living in the United States as a lawful permanent resident. He was, instead, taken from his home, held in detention, ordered removed from his country, separated from his family, and stripped of his lawful employment status—all due to what the government now concedes was a legal mistake. Rather than take steps to remedy the serious harm that it caused, or at least demonstrate some measure of contrition, the government would compound its error by using the invalid order as the basis of criminal punishment.

Congress could not have intended the Executive to prosecute for "reentry of removed aliens" a group that Congress never authorized to be removed in the first place. Instead, individuals like Mr. Palomar-Santiago—people whose removal orders were issued without lawful authority and thus are "innocent-of-removal"—should be protected from prosecution under § 1326, whether or not they can satisfy § 1326(d). NAFD writes separately to highlight the narrowness, prudence, and workability of Mr. Palomar-Santiago's rule for removing such innocent-of-removal defendants from § 1326(d). This rule will apply in only a handful of cases: those individuals for whom removal was substantively unlawful and for whom no additional procedures or safeguards could have made their removal proceedings just.

That small group—necessarily limited to noncitizens granted lawful status—has always been afforded special solicitude under our law, and they represent the subset of § 1326 prosecutions that most offend our notions of justice. Moreover, the rule will not absolve a defendant of all liability related to reentry, nor will it incentivize an innocent-of-removal individual to forego administrative remedies or multiply the workload of the federal courts.

But even if Mr. Palomar-Santiago must satisfy § 1326(d), NAFD agrees that he can make that showing. This Court has long recognized that procedural requirements must bend to ensure that innocence claims are heard on their merits, and those doctrines apply with equal force in this setting. Moreover, principles of administrative law support Mr. Palomar-Santiago's position, as this Court has been willing to overlook technical adherence to exhaustion requirements where the agency exceeded its statutory authority.

Whether within § 1326(d) or without it, this Court should hold that Congress did not intend the government to prosecute defendants who are innocent-of-removal. This Court should affirm.

ARGUMENT

A. The Government Cannot Base a § 1326 Charge on a Concededly Invalid Removal Order

NAFD agrees with Mr. Palomar-Santiago that, under the best reading of 8 U.S.C. § 1326, the

government cannot prove the crime of "reentry of removed aliens" by relying on an indisputably invalid removal order. What might not be intuitive is just how narrowly that rule could be crafted, and how it would reach those cases that most offend traditional concepts of justice.

1. Innocent-of-removal defendants are a small subset of § 1326 defendants.

As an initial matter, it bears emphasis that this innocent-of-removal class is quite narrow. In practice, it would not include defendants who had no lawful status at the time of their deportation, because a person who lacks status is removable based solely on lack of status. 8 U.S.C. §§ 1182(a)(6)(A)(i); 1227(a)(1)(B). Only about 10% of all removal orders are entered against lawful permanent residents (LPRs), so this limitation alone would likely make this rule inapplicable in the vast majority of § 1326 prosecutions.[2]

Because of the lawful-status limitation, the rule would also exclude defendants who have received multiple removal orders. A removal order strips an individual of lawful status; therefore, by definition, the defendant would not have status at any subsequent removal and would be validly subject to removal on that basis. This one-removal limitation

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[2] *See* American Immigration Council, *The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harms U.S. Citizen Children* (April 26, 2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Childs_Best_Interest_Fact_Sheet_042610.pdf

would also exclude the lion's share of defendants: in fiscal year 2013, the last year that the Sentencing Commission gathered this data, 63% of illegal-reentry defendants had multiple removals. United States Sentencing Commission, *Illegal Reentry Offenses* (April 2015), at 9 & tbl. 9.

Third, a rule for innocence-of-removal would not cover individuals whose claim is premised on discretionary relief. A noncitizen has certain procedural rights in connection with request for a discretionary relief but has no right to discretionary relief itself. *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956).

Finally, even among the one-removal, former-lawful-status defendants, the rule would come into play only in cases where the defendant was *wrongly* ordered removed—that is, where the Immigration Judge mistakenly ruled that the defendant fell within the classes of individuals that Congress deemed removable. In that sense, an innocence-of-removal equivalent to *Bousley v. United States*, 523 U.S. 614 (1998), may well be warranted. *See id.* at 624 (explaining that the actual-innocence inquiry is "not limited to the existing record" but includes "any admissible evidence" bearing on the defendant's factual guilt).

For each of these reasons, the class of innocent-of-removal defendants that would be outside of the strictures of § 1326(d) under Respondent's rule is quite narrow.

2. *This class of innocent-of-removal defendants are afforded special solicitude under the law.*

As a practical matter, in narrowing the focus to § 1326 defendants who previously had lawful status, Respondent homes in on a group that receives special solicitude under the law—legal permanent residents. Indeed, a century of jurisprudence and statutory law emphasizes the rights and responsibilities accorded to a lawful permanent resident—rights and responsibilities that a wrongful deportation extinguishes without any legitimate basis. Congress, legislating against this backdrop, could not have intended for a wrongfully deported LPR to face aggravated punishment based on an unlawful order.

As early as the nineteenth century, this Court observed the special place that a longtime, lawful resident noncitizen holds in American law:

> [F]oreigners who have become domiciled in a country other than their own acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country; and no restriction on the footing upon which such person stand by reason of their domicile of choice ... is to be presumed.

Lau v. United States, 144 U.S. 47, 61-62 (1892). Having been granted permission to lawfully remain in the United States, a lawful permanent resident develops deep attachments to this country, often

deeper than to his country of birth. *Woodby v. INS*, 385 U.S. 276, 286 (1966) ("[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens."). Our nation asks much of LPRs: "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973). A lawful permanent resident male of war-going age—like his U.S. citizen peers, but unlike any other noncitizen—must register for the Selective Service. 50 U.S.C. § 3802(a). A lawful permanent resident, like a citizen, is required to pay taxes to the U.S. government on income earned anywhere in the world, whereas a temporary resident owes taxes only on U.S.-based earnings. *Compare* 26 CFR § 1.1–1(b) *with id.* § 1.871–1(a); 26 U.S.C. § 872(a).

In exchange for these greater obligations, the lawful permanent resident is afforded greater constitutional protections than other noncitizens. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."). Of course, Congress has decided that a lawful permanent resident can nonetheless be stripped of

these rights if he runs afoul of certain statutory prohibitions. *See* 8 U.S.C. § 1227(a). But as long as he does not commit an act that subjects him to removal, a lawful permanent resident is entitled to live much like a U.S. citizen.[3]

Legislating against this backdrop, it is unlikely that Congress intended to allow the Executive to multiply its own error by authorizing prosecution based on a wrongfully entered order. This is all the more reason to adopt the Respondent's construction of a class of innocent-of-removal individuals whose fate does not turn on whether their claim is procedurally perfected.

3. *The government's rule multiplies the injustice inflicted on innocent-of-removal individuals*

Moreover, real human costs lie in the balance between the government's rule and Mr. Palomar-Santiago's. Take, for example, a person protected from prosecution under the Ninth Circuit's rule and under Respondent's rule:

Jorge Escajeda-Hernandez: Mr. Escajeda-Hernandez became a lawful permanent resident as a child. *United States v. Escajeda-Hernandez*, No. CR 14-2718, ECF 25-1 at 2, (S.D. Cal. Jan. 16, 2015). He speaks unaccented English. *Id.* at 3. After graduating from a Los Angeles high school, he

[3] The only important exceptions are entitlement for certain public benefits and political rights, such as voting, jury service, and public office. *Demore v. Kim*, 538 U.S. 510, 544 (2003) (Souter, J., concurring and dissenting).

married a United States citizen and fathered three U.S. citizen daughters. *Id.* at 2-3. In 2001, he was convicted of a violation of California Penal Code 459. *Id*. at 4. Although California calls that offense "burglary," at the time of Mr. Escajeda-Hernandez's conviction it "swep[t] so widely" that it encompassed even "a shoplifter who enters a store, like any other customer, during business hours." *Descamps v. United States*, 570 U.S. 254, 259 (2013). For that reason, this Court would hold that it does not qualify as an aggravated felony. *Id.*

In 2004, however, the Department of Homeland Security (DHS) took Mr. Escajeda-Hernandez into immigration detention and commenced removal proceedings on the erroneous basis that his offense qualified as an aggravated felony. *Escajeda-Hernandez*, ECF 25-1 at 4. Joining in DHS's error, the Immigration Judge stripped Mr. Escajeda-Hernandez of his lawful permanent resident status and ordered him removed. *Id.* The agency's legal error not only wrongfully removed Mr. Escajeda-Hernandez from his lifelong home; it also wrongfully separated a U.S. citizen spouse from her husband, and three U.S. citizen children from their father.

When Mr. Escajeda-Hernandez returned to the United States, the government charged him with illegal reentry in violation of § 1326. *Escajeda-Hernandez*, ECF 1. No doubt because of Ninth Circuit precedent providing a pathway for challenges like his, the government agreed to let Mr. Escajeda-Hernandez plead to a misdemeanor charge of illegal entry instead. *Id.* ECF 32. He received a sentence of five months' imprisonment. *Id.* ECF 31.

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In contrast, jurisdictions that do allow prosecution of innocent-of-removal defendants—and would continue to do so under the rule advocated by the government—compound the human costs by imprisoning individuals based on a patently invalid deportation order:

Jose Alfredo Flores: Jose Alfredo Flores came to the United States at age 8. *United States v. Flores*, CR 18-150, ECF 69 at 3 (D. Colo. Oct. 12, 2018). He graduated from a high school in western Colorado, and completed college coursework. *Id.* His father is also a lawful permanent resident, and the rest of his family are U.S. citizens. *Id.* at 4. In 2009, he was convicted of the Colorado crime of vehicular eluding. *Id.* ECF 34 at 2. Erroneously concluding that Mr. Flores's conviction was an aggravated felony, an Immigration Judge ordered him removed and separated from his family, deporting him to a country he barely knew. *Id.* at 2-3. Even though the government later admitted that Mr. Flores's offense was not, in fact, an aggravated felony—that he should have never been deported in the first place—it nonetheless charged him with illegal reentry after deportation. *See id.* ECF 38 at 1. The wrongfulness of his removal provided no defense in the Tenth Circuit, and Mr. Flores was convicted and sentenced to 22 months' imprisonment for violating a

deportation order that the Immigration Judge had no authority to issue. *Id.* ECF 73.[4]

Ramon Varela-Cias: Mr. Varela-Cias was a lawful permanent resident with a long record of work in the agricultural sector. *United States v. Varela-Cias*, CR 10-420, ECF 22 at 2 (D.N.M. Apr. 13, 2010). He lived in Idaho with his wife and three children, who were also all lawful permanent residents. *Id.* ECF 22-1 at 9-11. In 2000, he was convicted of felony DUI under Idaho law. *Id.* ECF 22 at 2. In 2001, an Immigration Judge made the same erroneous conclusion as the Immigration Judge in Mr. Palomar-Santiago's case: that felony DUI qualifies as an aggravated felony crime of violence. *Id.* at 3. Six years after this Court held in *Leocal* that a DUI was never a crime of violence, the government nonetheless charged Mr. Varela-Cias under 8 U.S.C. § 1326. *Id.* ECF 1. He was convicted and sentenced to ten months' imprisonment. *Id.* ECF 47.

Oscar Beckford: Mr. Beckford came from Guatemala to the United States in 1970s with his family. *United States v. Beckford*, 640 F. App'x 558, 559 (7th Cir. 2016). He became a lawful permanent

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[4] The record in Mr. Flores's case—like the two following examples—does not specifically indicate what happened to him after his prison sentence, but there is no reason to believe that he was not deported upon release. *See, e.g.*, *United States v. Dominguez-Alvarado*, 695 F.3d 324, 329 (5th Cir. 2012) (accepting as fact that defendant would be deported); *United States v. Aplicano-Oyuela*, 792 F.3d 416, 424 (4th Cir. 2015) (same). And as explained below, even wrongly deported defendants who escape § 1326 conviction, like Mr. Escajeda-Hernandez, are nonetheless usually deported.

resident in 1990. *Id.* In the 1990s, he sustained three Illinois convictions for simple drug possession. *Id.* at 560. In 1997, an Immigration Judge ordered him removed, erroneously concluding that his second and third possession convictions qualified as aggravated felonies. *Id.* at 560. This Court subsequently held that a simple possession offense is never an aggravated felony. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 582 (2010).[5] Even though *Carachuri-Rosendo* made clear that Congress never wanted Mr. Beckford deported in the first place, the government charged him with illegal reentry in 2014. *Beckford*, 640 F. App'x at 560. He was convicted and sentenced to 60 months' imprisonment. *Id.*

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In each case, the government took these men from their families, locked them in immigration detention,[6] and ordered them deported from their homes. In each case, there is no dispute that the individuals were not validly removed. In each case, the government nonetheless attempted to—or successfully did—use a patently invalid removal

[5] Mr. Beckford's Illinois possession convictions also do not qualify as deportable controlled substance offenses. *Najera-Rodriguez v. Barr*, 926 F.3d 343, 348 (7th Cir. 2019) (applying *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *Mellouli v. Lynch*, 575 U.S. 798 (2015)). Thus, he was not deportable under any alternative ground of removability.

[6] The law states that DHS "shall" detain a noncitizen convicted of an aggravated felony during removal proceedings. 8 U.S.C. § 1226(c)(1)(B).

order as the basis of criminal punishment. The statute should not be read to sanction this piling of error on error.

4. *Precluding prosecution based on an invalid removal order will not absolve a defendant from all consequences for his reentry into the United States.*

Although a ruling for Mr. Palomar-Santiago would prevent § 1326 prosecution of this narrow class, it would not mean that these individuals could unlawfully return to the United States without consequence. As an initial matter, even if the invalid order will not support illegal-reentry charges under § 1326, such a defendant still may be charged with unlawful entry under 8 U.S.C. § 1325, which carries a penalty of up to six months for a first offense and up to two years for each successive offense. *Id.* As Mr. Escajeda-Hernandez's case demonstrates, those who might state a valid § 1326(d) claim under the Ninth Circuit's current rule often resolve the case with a plea to this lesser charge. *Escajeda-Hernandez*, ECF 32; *see also, e.g.*, *United States v. Zepeda-Ambriz*, No. 11-5411, ECF 21 (S.D. Cal. Jan. 26, 2012); *United States v. Hurtado-Saldivar*, No. 13-1166, ECF 22 (S.D. Cal. June 6, 2013); *United States v. Sotelo-Araujo*, No. 14-163, ECF 27 (S.D. Cal. July 18, 2014); *United States v. Garcia-Fraire*, No. 15-3048, ECF 28 (S.D. Cal. Mar. 3, 2016); *United States v. Barragan-Lopez*, No. 16-2368, ECF 27 (D. Ariz. May 30, 2017); *United States v. Osario-Rivera*, No. 19-2028, ECF 36 (E.D. Wash. Jan. 18, 2019); *United States v. Ornelas-Miranda*, No. 19-1365, ECF 27 (D. Ariz. June 26, 2020). In this sense,

dismissal of § 1326 charges on the ground of innocence-of-removal is no get-out-of-jail free card; it only concerns whether the defendant is guilty of the aggravated offense of returning in violation of a duly entered removal order.

Moreover, a rule requiring a valid removal order would not automatically restore the immigration status of individuals who are innocent-of-removal. Congress has prescribed a separate set of rules for reopening an immigration proceeding, and there are stringent procedural limitations on the ability to seek such relief. The statute allows a noncitizen only one motion to reconsider, to be filed within 30 days of the removal order, and one motion to reopen, filed within 90 days of the removal order, with minimal exceptions. 8 U.S.C. §§ 1229a(c)(6)(A), (B); 1229a(c)(7)(A), (C)(i).[7] An innocent-of-removal noncitizen's options for undoing the unlawful removal are thus strictly limited.

Considering these restrictions, an innocent-of-removal defendant might be deported again, even if he prevails and his illegal-reentry charges are dismissed. Moreover, as explained above, a wrongfully deported defendant's unlawful reentry

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[7] A noncitizen who seeks reopening or reconsideration outside these statutory limits is at the mercy of the agency's discretion. 8 C.F.R. §§ 1003.23(b)(1), 1003.2(a). And although it has been the subject of litigation, a regulation purports to bar such "sua sponte" motions after the noncitizen has departed—or been deported from—the United States. 8 C.F.R. § 1003.2(d); *see, e.g.*, *Zhang v. Holder*, 617 F.3d 650, 665 (2d Cir. 2010) (upholding the regulatory "departure bar" in this context).

could form the basis of a new removal charge. *See* 8 U.S.C. § 1182(a)(6)(A) (making removable any noncitizen who enters the United States without inspection). Thus, even when a court dismisses a § 1326 charge because the prior removal order was infirm, that dismissal does not immunize the defendant from deportation.

5. *A rule protecting innocent-of-removal defendants in federal criminal court does not threaten the administrative process.*

In light of the dire consequences that flow from a removal order for a lawful resident, this Court need not worry that Mr. Palomar-Santiago's rule would cause noncitizens to disregard Immigration Court orders and forego appeals. *Cf. Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("[E]xhaustion requirements are designed to deal with parties who do not want to exhaust."). The small group of defendants that this argument protects has every motivation to fight for their legal status from the beginning. No one would choose a loss of legal status and separation from family and country on the hope that he might have a defense to criminal charges down the road. As just described, the failure to challenge the lawfulness of deportation at the time of the removal hearing will have its own consequences that cannot be ameliorated solely by prevailing on a defense in federal criminal court. In short, no one would reserve a valid argument against removability in the hopes that they might be able to use it, later, in a federal criminal proceeding, when the other option

is fighting to remain in the country with their family.

6. *This rule will not burden the federal courts.*

One last practical point: As the above examples demonstrate, most innocent-of-removal cases come down to whether a particular offense is an aggravated felony. But deciding whether a defendant's prior offense is an aggravated felony is required in all § 1326 cases, regardless of whether the outcome of that inquiry provides a defense, because it drives the statutory range for the offense. Section 1326(b) creates a ten-year statutory maximum if the defendant returns after conviction of a felony, and a twenty-year statutory maximum if the defendant returns after conviction of an aggravated felony. 8 U.S.C. § 1326(b)(2). Because a defendant must be properly advised of the statutory maximum in connection with a guilty plea, Fed. R. Crim. P. 11(b)(1)(H), the district court must address questions around the definition of aggravated felony in every § 1326 case, whether it presents a defense to the charges or not. *See, e.g.*, *United States v. Valle-Ramirez*, 908 F.3d 981, 983 (5th Cir. 2018) ("We affirm that the relevant Georgia statute qualifies as an aggravated felony and affirm the district court's judgment reflecting Valle-Ramirez's conviction under § 1326(b)(2)."); *United States v. Payano*, 930 F.3d 186, 192 n.4 & 198 (3d Cir. 2019) (holding that defendant's prior offense was not an aggravated felony and remanding for resentencing in light of "District Court's erroneous understanding of the applicable statutory maximum"). Any suggestion

that Mr. Palomar-Santiago's proposed rule would multiply categorical-approach analyses required of the district courts would be incorrect.

For all of these practical reasons, we believe that Mr. Palomar-Santiago's rule is not only right as a matter of constitutional avoidance and textual interpretation, it is also manageable, practical, and avoids the multiplication of injustice in the most compelling cases.

B. In the Alternative, Mr. Palomar-Santiago's Claim that he was Removed but not Removable Satisfies § 1326(d)(1) and (2).

There is good reason, then, to believe that Congress must have intended innocent-of-removal individuals to be outside the requirements of § 1326(d) altogether. But even if Mr. Palomar-Santiago is subject to § 1326(d)(1) and (2), the Court should still affirm. Mr. Palomar-Santiago argues that an Immigration Judge's legal error in finding a noncitizen removable necessarily taints their waiver of the right to pursue administrative remedies. Other amici describe, as a practical matter, just how difficult it is for noncitizens to pursue administrative remedies, particularly from detention. NAFD agrees wholeheartedly with both points. We write separately to amplify Respondent's alternative point that Mr. Palomar-Santiago's plight should be recognized for what it is: removability innocence. And in this context—just as the Court has routinely recognized in analogous contexts—procedural hurdles should bend to proof that a

noncitizen has been invalidly stripped of his lawful status.

1. *The exhaustion requirement of § 1326(d) should be deemed satisfied because Mr. Palomar-Santiago was "actually innocent" of removability.*

This Court has long recognized a miscarriage-of-justice exception to procedural rules that would bar consideration of a claim of innocence on the merits. Where a habeas petitioner proves that he is actually innocent of a criminal offense, for example, he is not held to his procedural default of the claim at an earlier stage of proceedings. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). He is not barred from relief even if he fails to file his claim within the statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 387 (2013). New evidence of factual innocence provides a path to filing a second or successive habeas petition. 28 U.S.C. § 2255(h)(1); *see United States v. Williams*, 790 F.3d 1059, 1079-80 (10th Cir. 2015) (granting authorization to proceed on a second-or-successive petition based on a showing of "factual innocence"). In pre-AEDPA days, a person who established actual innocence could overcome the abuse-of-the-writ doctrine. *Herrera v. Collins*, 506 U.S. 390, 404 (1993). And neither the failure to develop facts in the state court, nor the failure to comply with state filing deadlines precludes federal courts from considering claims of innocence. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

This Court has been willing to overlook all such procedural missteps because "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 325. Thus, even granting "AEDPA's central concern that the merits of concluded criminal proceedings not be revisited," that concern, too, must yield in the face of a "strong showing of actual innocence." *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (permitting federal court to recall its mandate to revisit merits of decision, in light of innocence showing). Where a compelling case of actual innocence is presented, interests in comity and finality must bend to permit that claim to be heard.

Moreover, this Court and the lower courts have extended the miscarriage-of-justice exception beyond those who claim that they are innocent of the offense of conviction. In *Sawyer v. Whitley*, 505 U.S. 333, 341 (1992), the Court held that one can be innocent of the death penalty. Though "innocent of death" might not be a "natural usage," the Court deemed it appropriate to "strive to construct an analog" that was narrow but permitted these compelling cases to be considered on their merits. *Id.* Since then, several circuits have accepted that one can be innocent of a non-capital sentencing enhancement in at least some circumstances. *See Allen v. Ives*, 950 F.3d 1184, 1189-90 (9th Cir. 2020); *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 171 (2d Cir. 2000); *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999).

A § 1326(d) defendant who claims an invalid deportation in the context of a criminal case is differently positioned from a habeas petitioner, but the two contexts share several important features that make the analogy apt. Both challenge the validity of a final adjudication that continues to have an ongoing prejudicial impact. As this Court recognized long ago, removability, especially for permanent residents like Mr. Palomar-Santiago, has consequences akin to those in a criminal proceeding. In *Bridges v. Wixon*, the Court considered whether a longtime resident of the United States would be banished to Australia because of his affiliation with the Communist party. 326 U.S. 135, 154 (1945). The Court recognized:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Id. Mr. Palomar-Santiago was, indisputably, innocent-of-removal—he was removed yet not removable. This Court should show that claim the same solicitude it would a habeas petitioner's innocence claim and adapt the miscarriage-of-justice exception to this analogous context.

From a practical standpoint, moreover, the analogy holds. Both the actually innocent habeas petitioner and the person who is actually innocent-of-removal have plenty of incentive to raise their claims properly and in a timely fashion. Moreover, true cases of innocence-of-removal will be just as rare as proved cases of criminal innocence, for all the reasons set out above. *Schlup*, 513 U.S. at 321. In particular, as was contemplated in *Bousley*, the government might meet an actual innocence claim by showing that there was additional proof of removability—even proof outside the record—that existed at the time and that the government would have presented, had they had a proper understanding of the law. *Bousley*, 523 U.S. at 624.

Mr. Palomar-Santiago's removal was wrongful, and its wrongfulness has nothing to do with the process he received. And just like the habeas petitioner who proves his innocence, this Court should ensure that those who are actually innocent-of-removal have an avenue to prevent the multiplication of that injustice through a criminal charge.

Indeed, at least one court has already extended the miscarriage-of-justice exception to the immigration context. Drawing the analogy to factual innocence in a criminal case, the Tenth Circuit overlooked a noncitizen's failure to exhaust remedies in immigration court because his claim went to the very basis of his deportation. *Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1209-10 (10th Cir. 2007). The miscarriage-of-justice exception had a role to play, the Court held, where the noncitizen

alleges an error that would make him "actually innocent" of deportation. *Id.*

The government argues that *Ross v. Blake*, 136 S. Ct. 1850 (2016), presents an insuperable barrier to this argument. It does not. *Ross v. Blake* held, in the context of the Prison Litigation Reform Act (PLRA), that courts could not engraft a special-circumstances exception onto a statutory exhaustion requirement. *Id.* at 1858. The Court reached that conclusion in light of the history and legislative intent of the PLRA. *Id.* at 1857-58. Here, for the reasons set forth in Mr. Palomar-Santiago's brief, the text and history here point in the other direction. Br. of Resp. at 45 n.6.

More fundamentally, however, *Ross v. Blake* concerned a suit for damages sustained in a prison assault. There was no reason to discuss the trumping effect of innocence in the context of PLRA exhaustion, because there is no equivalent of innocence in a suit for monetary damages. But in the context where a statutory exhaustion requirement does collide with innocence, courts have continued to give an overriding effect to innocence. For example, a state habeas petitioner is statutorily required to exhaust all remedies available in the state court. 28 U.S.C. § 2254(b)(1)(A). And yet, as with other procedural rules, the exhaustion rule would not bar one who claims actual innocence,; *Milone v. Camp*, 22 F.3d 693, 699 (7th Cir. 1994); *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008); *Coningford v. Rhode Island*, 640 F.3d 478, 482 n.2 (1st Cir. 2011), at least so long as there was not a remaining door through which petitioner's claim of

innocence could be exhausted in the state court. *Graham v. Johnson*, 94 F.3d 958, 969 (5th Cir. 1996). Even after *Ross v. Blake*, courts have continued to apply these cases to exempt the rare person who establishes his innocence from having to return to state court to exhaust his claims. *E.g.*, *Fontenot v. Allbaugh*, 402 F. Supp. 3d 1110, 1152 (E.D. Okla. 2019).

The government's rule subjects innocent-of-removal defendants to prosecution for failure to exhaust. Consonant with its precedents, this Court should extend the miscarriage-of-justice exception to such individuals.

2. *The exhaustion requirement is also satisfied because the agency acted beyond its authority.*

A broad view of the miscarriage-of-justice exception is warranted under principles of administrative law as well. The class of innocent-of-removal LPRs discussed above, by definition, are beyond the authority of the immigration agencies to remove from the country. Under longstanding tenets of administrative law—and the separation-of-powers concerns that underlie them—exhaustion is not required where an agency has patently overstepped its authority.

An agency "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) Pursuant to such a grant of authority, DHS and the immigration courts administer our nation's immigration laws. *See I.N.S. v. Aguirre-Aguirre*, 526

U.S. 415, 424-25 (1999). But it is Congress, and not the agencies, that decides what makes a noncitizen subject to removal. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (the question of "what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay" is "for Congress exclusively to determine"); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (the principle that rules governing which acts might subject a noncitizen to removal are "entrusted exclusively to Congress" is "as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"). And Congress has strictly limited immigration agencies' authority to remove noncitizens. *See* 8 U.S.C. § 1227(a) (allowing the agency to enter a removal order against a noncitizen admitted to the United States only if he falls "within one or more of the following classes of deportable aliens"); *id.* § 1229a(c)(3)(A) (providing that "no decision on deportability shall be valid" unless the agency meets a clear-and-convincing burden of "reasonable, substantial, and probative evidence"). Where a noncitizen is deported for a reason not specified by Congress, that order is "invalid." *Bridges*, 326 U.S. at 149; *see Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1922 (2020) (Thomas, J., concurring and dissenting) (arguing that DHS action was "unlawful" because it "created a new exception to the statutory provisions governing removability").

Because agencies' "power to act and how they are to act is authoritatively prescribed by Congress, . . . when they act improperly, no less than when they

act beyond their jurisdiction, what they do is ultra vires." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013). And when an agency "has patently traveled outside the orbit of its authority" in issuing an order, "legally speaking there is no order to enforce." *N.L.R.B. v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946); *cf. Regents of the Univ. of California*, 140 S. Ct. at 1926, 1922, 1927 (2020) (Thomas, J., dissenting) (stating that DHS action that exceeded "congressionally delegated power" was "void *ab initio*").

In light of these principles, courts have long recognized that the failure to exhaust an agency's administrative process presents no barrier to relief where the administrative proceedings themselves are void, *Winterberger v. General Teamsters Auto Truck Drivers & Helpers Local Union 162*, 558 F.2d 923, 925 (9th Cir. 1977) (exhaustion not required where agency action conceded to be void); *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981), or where the agency patently strayed beyond its authority to act. *Leedom v. Kyne*, 358 U.S. 184, 189 (1958); *see also Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *First Nat'l Bank of Grayson v. Conover*, 715 F.2d 234, 236 (6th Cir. 1983); *Manges v. Camp*, 474 F.2d 97, 99 (5th Cir. 1973).

This rule makes eminent sense. Where the agency's action is void beyond dispute, or where the agency has patently strayed beyond its authority, the traditional benefits of exhaustion vanish. *Winterberger*, 558 F.2d at 925-26. There is no utility in consulting the agency's expertise, or receiving the

agency's distillation of the issues, where there is no dispute that the agency acted in excess of its authority. And where "legally speaking there is no order to enforce," *Cheney Cal. Lumber Co.*, 327 U.S. at 388, any further remedies dependent on that out-of-bounds agency cannot meaningfully be deemed "available." *See* 8 U.S.C. § 1326(d)(1).

Here, there is no dispute that the agency had no authority to remove Mr. Palomar-Santiago based on his DUI conviction, and there is not suggestion that he was removable on any other ground. He was removed, but not removable. For this narrow group of innocent-of-removal individuals, any failure to exhaust should not preclude relief.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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