No. 20-437

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

REFUGIO PALOMAR-SANTIAGO

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

REPLY BRIEF FOR THE PETITIONER

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In conflict with every other court of appeals to consider the issue, the Ninth Circuit has maintained a reading of 8 U.S.C. 1326(d) that cannot be reconciled with the statutory text, history, or design. Section 1326(d) allows an unlawful-reentry defendant to collaterally attack his prior removal only if he demonstrates that he exhausted any "available" "administrative remedies"; that he was "improperly deprived" of "judicial review"; *and* that his prior removal "was fundamentally unfair." *Ibid.* Those requirements are mandatory and conjunctive, but the Ninth Circuit excuses a defendant from the two procedural prerequisites, resulting in automatic dismissal of an unlawful-reentry charge, whenever a court concludes on de novo review that the offense supporting a prior removal order was misclassified as a ground for removal. Respondent provides no sound reason to leave that approach in place. This Court should grant the petition for a writ of certiorari.

A. The Decision Below Is Incorrect

As the government has explained (Pet. 8-18), the court of appeals' approach to Section 1326(d) finds no foothold in the statute's language or in this Court's decisions. Respondent's contrary arguments lack merit.

1. a. Respondent cannot square the court of appeals' rule with the statutory text, which requires a defendant seeking to collaterally attack his removal order to "exhaust[] any administrative remedies that may have been available to seek relief against the order." 8 U.S.C. 1326(d)(1). Respondent contends that "when an [immigration judge] erroneously declares a noncitizen's crime an aggravated felony, no administrative remedies * * * are realistically 'available'" for purposes of Section 1326(d)(1). Br. in Opp. 19 (citation omitted). But as respondent elsewhere acknowledges, the governing statutes and regulations give "the noncitizen * * * a right to appeal [the removal] order to the Board of Immigration Appeals (BIA), and then to seek review in a federal court of appeals." *Id.* at 2 (citations omitted). An immigration judge's determination that an alien's prior offense renders him removable is precisely the type of issue that an alien can and should exhaust in the context of his removal proceedings—first with the BIA and then, if necessary, the court of appeals. See Pet. 11.

This Court's decision in *Ross* v. *Blake*, 136 S. Ct. 1850 (2016), does not support respondent's contention (Br. in Opp. 22-24) that administrative review should be considered to have been "unavailable" whenever a defendant claims that an immigration judge misclassified his prior offense. In *Ross*, the Court rejected a court of appeals' "unwritten * * * exception" to a provision of the Prison Litigation Reform Act of 1995, 18 U.S.C. 3601

note, mandating that an inmate exhaust "such administrative remedies as are available" before bringing suit to challenge prison conditions. *Ross*, 136 S. Ct. at 1854-1855 (citation omitted); see 42 U.S.C. 1997e(a). The Court went on to explain that "an administrative procedure" might be "unavailable"—and exhaustion not required—in "three kinds of circumstances," which the Court expected would "not often arise": (1) when the administrative procedure "operates as a simple dead end"; (2) when the administrative scheme is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross*, 136 S. Ct. at 1859-1860.

Administrative review of a removal order does not fall within any of those categories. Respondent contends (Br. in Opp. 22) that the immigration judge's determination that his prior conviction was an "aggravated felony" constituted a "'misrepresentation.'" But, as respondent concedes (*ibid.*), that determination accurately reflected the substantive law at the time of respondent's removal hearing. He was not "misled or threatened" in a way that prevented his "use of otherwise proper procedures." *Ross*, 136 S. Ct. at 1860. And the immigration judge's decision did not suggest that respondent could not appeal and argue—as others later successfully did—that then-current law was incorrect. Cf. *Bousley* v. *United States*, 523 U.S. 614, 621-622 (1998) (recognizing that a government official's mistaken advice about the law does not excuse the failure to challenge that advice on appeal).

Nor was the route for administrative review impossible for respondent to "discern." Br. in Opp. 22 (quot-

ing *Ross*, 136 S. Ct. at 1859). While the *substantive* question whether a particular offense qualifies as an "aggravated felony" sometimes raises difficult questions under the categorical approach, see *id.* at 23, such difficulties do not make the *process* for administrative review unavailable under Section 1326(d)(1).[1]

b. The Ninth Circuit's rule also finds no support in the history of Section 1326(d). As the government has explained (Pet. 13-14), when originally enacted, Section 1326 did not allow an unlawful-reentry defendant to collaterally attack the underlying removal order. In *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), this Court held that because the "determination made in [a removal] proceeding * * * play[s] a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *Id.* at 837-838. It accordingly determined that "where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review," that alien "must be permitted" to collaterally attack his removal in a later unlawful-reentry prosecution. *Id.* at 839. Section 1326(d) reflects Congress's "incorporat[ion]" of that judgment "into statutory law." *United States* v. *Adame-Orozco*, 607 F.3d 647, 654 (10th Cir.) (Gorsuch, J.) (quoting Ira J. Kurzban, *Immigration Law Sourcebook* 186 (10th ed. 2006)), cert. denied, 562 U.S. 944 (2010).

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[1] Despite respondent's citation of it (Br. in Opp. 22), the decision in *McKart* v. *United States*, 395 U.S. 185 (1969), provides no basis for excusing respondent's failure to exhaust his administrative remedies. Unlike Section 1326(d)(1), the statute at issue in *McKart* "said nothing which would require" a criminal defendant "to raise all [his] claims" in a previous administrative process. *Id.* at 197.

Respondent relies on a second passage of *Mendoza-Lopez*, which he contends "held that illegal-reentry prosecutions may not proceed where [immigration judges] erroneously failed to advise defendants" about their eligibility for "discretionary relief." Br. in Opp. 20 (citing *Mendoza-Lopez*, 481 U.S. at 839-840). For two reasons, that passage of *Mendoza-Lopez* does not support the Ninth Circuit's rule. First, in *Mendoza-Lopez*, the government had "asked this Court to assume that" the defendants' "deportation hearing was fundamentally unfair"; the Court "consequently accept[ed] the legal conclusions of the court below that the deportation hearing violated due process." 481 U.S. at 839-840; see *id.* at 839 n.17 (declining "to enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review"); see also, *e.g.*, *United States* v. *Lopez*, 445 F.3d 90, 98-99 (2d Cir. 2006) (Sotomayor, J.).[2]

Second, even if *Mendoza-Lopez* had decided whether an immigration judge's failure to advise an alien about discretionary relief violates due process, respondent acknowledges (Br. in Opp. 6-7) that this case "does not present th[e] discretionary-relief issue." As the government has explained (Pet. 12-13), courts that have nullified an appeal waiver in the absence of an advisement about the availability of discretionary relief have reasoned that the alien may have been unaware of that relief, which is distinct from the determination that he

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[2] Respondent's reliance (Br. in Opp. 21) on Chief Justice Rehnquist's dissent in *Mendoza-Lopez* is misplaced. Although the dissent observed that the defendants had not suggested that the immigration judge had "erroneously applied the law in determining that [they] were deportable," 481 U.S. at 845, it did not address the effect, if any, of such an allegation.

was removable. That reasoning does not apply here. Because respondent's aggravated-felony classification *both* rendered him removable *and* denied him eligibility for various forms of discretionary relief, he was plainly on notice of that issue and had both the incentive and the opportunity to contest it.[3]

2. Respondent does not attempt to square the Ninth Circuit's approach with the text of Section 1326(d)(2). Instead, he observes (Br. in Opp. 24) that having decided to forgo any appeal to the BIA, he could not seek judicial review. See 8 U.S.C. 1252(d)(1). But a defendant's decision not to exhaust an "available" administrative remedy, 8 U.S.C. 1326(d)(1), cannot satisfy the requirement to "demonstrate[]" that his removal "proceedings * * * improperly deprived [him] of the opportunity for judicial review," 8 U.S.C. 1326(d)(2).

B. The Question Presented Warrants This Court's Review

As the government has explained (Pet. 18-20), the Ninth Circuit's erroneous interpretation of Section 1326(d) conflicts with the decisions of every other court of appeals to have considered the question, and it affects a significant number of unlawful-reentry prosecutions. Respondent's attempts (Br. in Opp. 26-29) to minimize that division and its practical import are unavailing.

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[3] Respondent observes (Br. in Opp. 24) that the Second and Ninth Circuits have held that in certain circumstances, an attorney's failure to appeal a deportation order may constitute ineffective assistance of counsel that "satisfies Section 1326(d)'s requirements." But where an alien makes such an ineffective-assistance claim, the proper course is to exhaust administrative relief by seeking to reopen the immigration proceeding. See, *e.g.*, U.S. Br. in Opp. at 14, *Estrada* v. *United States*, 138 S. Ct. 2623 (2018) (No. 17-1233) (citing cases).

1. a. Seeking to whittle down a 7-1 circuit split, respondent suggests (Br. in Opp. 28) that the First Circuit has not actually addressed the question presented. But the alleged "error" in *United States* v. *Soto-Mateo*, 799 F.3d 117 (1st Cir. 2015), cert. denied, 136 S. Ct. 1236 (2016), was the same one at issue here: the immigration judge determined that the alien's prior convictions were for "aggravated felonies"—making him both removable and ineligible for certain forms of discretionary relief—when subsequent case law determined that such offenses were not aggravated felonies. *Id.* at 123. The First Circuit upheld the district court's refusal to dismiss the indictment for unlawful reentry on the ground that he had "fail[ed] to exhaust administrative remedies as required by section 1326(d)(1)." *Id.* at 124.

b. Respondent further suggests (Br. in Opp. 26) that the division in the courts of appeals is not "ripe" for review. While conceding (*id.* at 28) that six circuits "have resolved the question presented here differently from the Ninth Circuit," he notes that three of them did so before this Court's decision in *Ross*. But because *Ross* has no bearing on the question presented here, see pp. 2-4, *supra*, nothing suggests that it will cause those courts to reconsider their approaches.

Nor is the Ninth Circuit likely to reconsider its own approach. It has twice declined the government's requests for en banc consideration (including in this case). See Pet. 19. Respondent suggests that "the Government should bear the burden" of trying a third time, on the theory that its "concessions" in *United States* v. *Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), and *United States* v. *Ochoa*, 861 F.3d 1010 (9th Cir. 2017) (per curiam), "led the Ninth Circuit to adopt" its erroneous approach to Section 1326(d). Br. in Opp. 27; see *id.* at 6-9.

But the government has not changed its position on the proper interpretation of Section 1326(d), and it did not "induce[]" (*id.* at 1) the court of appeals' rule in *Aguilera-Rios*.

Instead, as respondent acknowledged below, see Resp. C.A. Br. 13-15—and as Judge Graber's concurring opinion in *Ochoa* explained, see 861 F.3d at 1021—the court of appeals had extended its "discretionary-relief" rule to "removability-related" cases much earlier. In *United States* v. *Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004), the defendant was removed based on a prior conviction for molesting a child, which the immigration judge determined constituted an aggravated felony that made him both removable and ineligible for discretionary relief. *Id.* at 1092-1093; see 8 U.S.C. 1229b(a)(3). When he moved to dismiss his indictment for unlawful reentry, the court of appeals held that his prior offense was not an aggravated felony, and it therefore excused him from complying with Section 1326(d)(1). 359 F.3d at 1093, 1096, 1103. In later cases, the government simply acknowledged that, "under Ninth Circuit precedent," a defendant who demonstrates that his prior conviction is not an aggravated felony is excused from exhausting his "administrative remedies" and demonstrating that he was "deprived of judicial review." Tr. at 1, *United States* v. *Camacho-Lopez*, No. 05-10455, 2006 WL 6053437 (9th Cir. Mar. 16, 2006); see U.S. Br. at 10, *Aguilera-Rios*, *supra* (No. 12-50597); U.S. Br. at 12, *Ochoa*, *supra* (No. 15-10354). But those acknowledgments were not endorsements of the Ninth Circuit's approach; nor does anything suggest that the Ninth Circuit is now any more amenable to en banc consideration than it was the first two times the government requested it.

2. a. Respondent further asserts (Br. in Opp. 7, 9-10) that the "question presented rarely arises." But the very fact that so many courts of appeals have resolved the issue belies that assertion. And while respondent contends (*id.* at 12 & n.4) that the Ninth Circuit has "applied the precedent at issue to bar prosecutions in just four cases," that tally omits cases where both a defendant's removability and his eligibility for discretionary relief turn on the classification of his prior offense. See pp. 5-6, *supra*; see also, *e.g.*, *United States* v. *Ramos-Cruz*, 406 Fed. Appx. 177, 178 (9th Cir. 2010); *United States* v. *Cervantes-Gonzales*, 238 Fed. Appx. 278, 280 (9th Cir. 2007). Respondent also misses the bigger picture: the Ninth Circuit's rule requires the dismissal of many indictments in district court, and it often causes prosecutors to avoid bringing Section 1326 charges that could have been pursued in other circuits.

b. Nor is respondent correct in contending (Br. in Opp. 10) that five "preconditions" suggest the question presented will only rarely "be outcome-determinative." As respondent acknowledges (*id.* at 10 n.2), his first precondition—an alien's prior status as a lawful permanent resident—is not actually necessary. See 8 U.S.C. 1227(a)(2)(A)(iii); see, *e.g.*, *United States* v. *Rodriguez-Gamboa*, 946 F.3d 548, 550, 552 n.1 (9th Cir. 2019); *United States* v. *Martinez-Hernandez*, 932 F.3d 1198, 1202, 1204 (9th Cir.), cert. denied, 140 S. Ct. 392 (2019); *United States* v. *Martinez-Rocha*, 337 F.3d 566, 568-570 (6th Cir. 2003). Respondent's second precondition (Br. in Opp. 10)—that the defendant is not entitled to seek discretionary relief under this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001)—does not affect aliens who were convicted of predicate offenses after 1996 and removed following *St. Cyr*. Respondent's third and

fourth preconditions—that a defendant must break the law and face criminal prosecution (Br. in Opp. 11)—are present in every unlawful-reentry case.

That leaves respondent's assertion (Br. in Opp. 11) that immigration judges "rarely make * * * errors" regarding the proper legal classification of an alien's prior offense. Of course immigration judges generally apply *current* law correctly. But the question presented arises when controlling precedents later change—which is hardly a rare occurrence.

Thus, the question presented is likely to arise (many times over) whenever this Court or a court of appeals determines that, despite previous practice, a particular state or federal offense does not constitute a generic "aggravated felony" (or a "[c]rime[] of moral turpitude," or a "[c]ontrolled substance[]" offense), 8 U.S.C. 1227(a)(2)(A)(i)-(iii) (emphasis omitted), 1227(a)(2)(B) (emphasis omitted), and 1229b(b)(1)(C); see, *e.g.*, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1567 (2017). Or when they clarify the methodology for applying the categorical approach in a manner that limits its reach. See, *e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2247-2248 (2016); *Descamps* v. *United States*, 570 U.S. 254, 260 (2013). Or when they invalidate part of the "aggravated felony" definition. See *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1210-1211, 1222 (2018). As a result, the case law reveals that defendants in Section 1326 prosecutions have already collaterally attacked previous removal orders based on a wide range of underlying offenses.[4]

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[4] See, *e.g.*, *Ochoa*, 861 F.3d at 1016 (conspiracy to commit unlicensed export of defense articles); *United States* v. *Maldonado-Melgoza*, 642 Fed. Appx. 737, 738 (9th Cir. 2016) (first-degree residential burglary); *United States* v. *Morales*, 634 Fed. Appx. 606, 607 (9th Cir. 2016) (statutory rape); *Aguilera-Rios*, 769 F.3d at 634-637

3. Finally, this case presents an appropriate vehicle for review. Respondent observes that he "signaled below" that, "if necessary," he would contend that "the particular advisements and manner in which [his] removal hearing was conducted" violated due process. Br. in Opp. 14 (emphases omitted).[5] But the lower courts did not address that argument, see Pet. App. 3a-4a, 12a-13a & n.3, and they may do so, if appropriate, on remand. By granting review and rejecting the court of appeals' erroneous construction of Section 1326(d), this Court can resolve a long-standing and lopsided circuit split, thereby providing important guidance about how the statute operates.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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(unlawful firearms possession); *Pallares-Galan*, 359 F.3d at 1098-1103 (annoying or molesting a child); see also *United States* v. *Watkins*, 880 F.3d 1221, 1223 (11th Cir. 2018) (per curiam) (grand theft); *United States* v. *Gil-Lopez*, 825 F.3d 819, 820-821 (7th Cir. 2016) (injury to a child); *United States* v. *Soto-Mateo*, 799 F.3d 117, 118, 123 (1st Cir. 2015) (aggravated identity theft), cert. denied, 136 S. Ct. 1236 (2016).

[5] Respondent notes (Br. in Opp. 3, 16) that the government has not produced a transcript of his removal hearing. But no transcript is necessary to decide the question presented, which turns on the proper interpretation of Section 1326(d).