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PRACTICE ADVISORY[1]
Advocacy Strategies After *United States v. Palomar-Santiago*

On May 24, 2021, the U.S. Supreme Court issued *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021), a federal criminal case concerning the requirements for a successful collateral attack of an underlying administrative removal order in an illegal re-entry prosecution. In *Palomar-Santiago*, the Court held that all three requirements of 8 U.S.C. § 1326(d) – administrative exhaustion, the deprivation of judicial review, and fundamental unfairness – are mandatory. The Court's decision abrogates current Ninth Circuit practice reflected in *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), which views the administrative exhaustion and deprivation of judicial review prongs as "excused" or "satisfied" in cases where an immigration judge has ordered a noncitizen removed by erroneously determining that a prior conviction was a removable offense. It is, nevertheless, a narrow decision, which leaves open alternative pathways to collaterally attack similarly invalid removal orders through § 1326(d).

This advisory first reviews the case history and the precedent governing the legal situation Mr. Palomar-Santiago was in when he was charged with illegal re-entry. It then addresses both Mr. Palomar-Santiago's and the government's arguments before the Court and the Court's decision. Finally, the advisory turns to how the Court's decision affects advocacy strategies for future collateral attacks on removal orders under § 1326(d).

I. Summary of the Case and Decision in *United States v. Palomar-Santiago*

A. Facts, Proceedings, and Legal Developments Leading to the Supreme Court Case

In 1998, Refugio Palomar-Santiago, a lawful permanent resident, was ordered removed based on a 1991 California DUI conviction, which the immigration judge determined was an aggravated felony crime of violence, under then-binding BIA precedent. *See In re Magallanes-Garcia*, 22 I. & N. Dec. 1, 4-5 (BIA 1998), *overruled by In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002) (en banc). Mr. Palomar-Santiago was removed the next day. 141 S. Ct. at 1620.

 This practice advisory was written by Matthew S. Vogel. The author thanks Khaled Alrabe, Jeffrey Fisher, Brad Garcia, Lauren Gorman, Kara Hartzler, David Menninger, Cristina Velez, and Isaac Wheeler for their contributions. Practice advisories identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice advisories do not replace independent legal advice provided by an attorney or representative familiar with a client's case.

In *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001), the Ninth Circuit, and then, in *Leocal v. Ashcroft*, 543 U.S. 1 (2004),[2] the Supreme Court determined that, ordinarily, DUI offenses are categorically *not* crime of violence aggravated felonies. Because such legal determinations are effectively retroactive,[3] it is settled that the immigration judge had erroneously ordered Mr. Palomar-Santiago removed.

In 2017, Mr. Palomar-Santiago was found living in the United States. 141 S. Ct. at 1620. Although the law is clear that the DUI conviction that triggered his prior removal is not an aggravated felony or removable offense, the government indicted him in the District of Nevada for illegal re-entry, under 8 U.S.C. § 1326. *Id.*; *United States v. Palomar-Santiago*, 813 Fed. App'x. 282 (9th Cir. 2020).

Represented by federal public defenders, Mr. Palomar-Santiago sought dismissal of the indictment, alleging that his removal order is invalid. 141 S. Ct. at 1620. One element of the illegal reentry offense is a prior removal. 8 U.S.C. § 1326(a). Because removal is the product of administrative proceedings, which lack the due process safeguards required of criminal proceedings, § 1326(d) allows for certain collateral attacks on the underlying order of removal as a defense to the reentry charge.[4] The statute has three requirements for successful collateral challenges: 1) exhaustion of administrative remedies; 2) the removal proceedings deprived the individual of the opportunity for judicial review; and 3) the order was fundamentally unfair.[5]

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[2] *Trinidad-Aquino* concerned the California DUI statute Mr. Palomar-Santiago was convicted of violating, California Vehicle Code § 23153(a). *Leocal* addressed a Florida DUI statute, Florida Statutes § 316.193(3)(c)(2).

[3] *See Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1994) ("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.").

[4] Originally, the illegal reentry statute did not contain a provision allowing for collateral attacks. However, in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), the Supreme Court held that, "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the [noncitizen] to obtain judicial review." *Id.* at 839. The Court explained that a statute "does not comport with the constitutional requirement of due process" when it imposes criminal sanctions for reentry after *any* deportation based on the results of administrative removal proceedings "regardless of how violative of the rights of the [noncitizen] the deportation proceeding may have been." *Id.* at 837. Quite simply, "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *Id.* at 837-38. Congress responded by enacting § 1326(d). *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 441, 110 Stat. 1214, 1279 (1996).

[5] The full text of 8 U.S.C. § 1326(d) is:

> **(d) Limitation on collateral attack on underlying deportation order.** In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

The Ninth Circuit has recognized several ways that people may satisfy § 1326(d)'s requirements even when the defendant had not appealed the underlying removal order to the BIA (and thereby forfeited judicial review). First, an individual may show that their appellate waiver was not "considered and intelligent" in order to satisfy §§ 1326(d)(1) and (2). *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1043 (9th Cir. 2012). *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004); *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000). One of the most common ways this occurs is when an immigration judge fails to advise the individual that they are eligible for relief, which "can form the basis of an invalid waiver of the right to appeal." *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1131 (9th Cir. 2013). *See United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001); *United States v. Leon-Paz*, 340 F.3d 1003, 1005, 1007 (9th Cir. 2003).

Second, the Ninth Circuit had also held that former lawful permanent residents who were not actually legally deportable for the criminal convictions alleged in their Notices to Appear were "excused" from satisfying the appellate exhaustion and judicial review requirements in §§ 1326(d)(1) and (2). *See Ochoa*, 861 F.3d at 1015 (9th Cir. 2017) ("But under our circuit's law, if Defendant was not convicted of an offense that made him removable under the INA to begin with, he is excused from proving the first two requirements."); *United States v. Aguilera-Rios*, 769 F.3d 626, 630 (9th Cir. 2014).[6]

Palomar-Santiago only addresses this second line of cases. The first rule regarding invalid appellate waivers is distinct and was not addressed by the Court. Similarly, *Palomar-Santiago* also did not take up the requirements of the fundamental unfairness prong; it is concerned only with the administrative exhaustion and judicial review prongs.

Relying on the *Ochoa/Aguilera-Rios* rule regarding erroneous removability determinations, the district court judge granted Mr. Palomar-Santiago's motion to dismiss the indictment and the government appealed. In an unpublished decision, a Ninth Circuit panel affirmed the district court's dismissal of the indictment, also anchoring its decision in *Ochoa* and *Aguilera-Rios*. 813 Fed. App'x 282 (9th Cir. 2020). The Government then sought certiorari before the Supreme Court, and it was granted. 141 S. Ct. 975 (2021).

B. Arguments at the Supreme Court

Before the Court, the government broadly argued that the *Ochoa/Aguilera-Rios* rule espoused by the Ninth Circuit was untethered from the text, history, design, and purposes of the statute.

First, the Government argued that the Ninth Circuit's practice ignored the mandatory and conjunctive nature of § 1326(d)'s three requirements, particularly administrative exhaustion and deprivation of judicial review. Such statutory requirements, it argued, are not amenable to judicial exceptions. It contended that Mr. Palomar-Santiago could and should have appealed and

[6] In such cases, the Ninth Circuit deemed the resulting removal order fundamentally unfair under § 1326(d)(3). *Ochoa*, 861 F.3d at 1015 (quoting *Aguilera-Rios*, 769 F.3d at 630).

sought judicial review. Second, the government argued that § 1326(d)'s origin in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), *see* supra, footnote 4, meant that it was intended to allow only limited collateral attacks, and that nothing in *Mendoza-Lopez*'s holding or Congressional implementation of it in § 1326(d) "allows a successful collateral attack on a removal order to be based on nothing but subsequent changes in the substantive law underlying the order." Gov't Br. at 12. Finality interests, the government argued, "justify limiting collateral attacks on prior criminal convictions or administrative determinations." *Id.* Lastly, the government argued that the Ninth's Circuit's practice allows for "incongruous" outcomes. *Id.* at 36. In the government's view, the Ninth Circuit's rule excludes from relief the "diligent defendant" who actually administratively exhausted and obtained judicial review of an erroneous removal order, but lost, because such a person did not waive appeal. *Id.* at 12-13. Thus, the government contended, "a diligent defendant might be precluded from bringing a successful collateral attack, even while a less-diligent defendant would not be." *Id.* at 13.

In response, Mr. Palomar-Santiago argued that, as a constitutional matter, § 1326 does not and cannot apply to substantively invalid removal orders such as his. Mr. Palomar-Santiago argued that, as a matter of law, *Leocal* showed that his removal order was *ultra vires* and void *ab initio* because it "*never* had any basis in law." Resp't Br. at 19. Fundamentally, the government cannot "prosecute noncitizens based on administrative orders from agencies that did not have the authority to remove those noncitizens in the first place." *Id.* at 13. Mr. Palomar-Santiago argued that allowing conviction under these circumstances would raise serious due process and separation of powers constitutional concerns, so the Court should reject the government's position on constitutional avoidance grounds. Such prosecutions, Mr. Palomar-Santiago continued, also raise serious equitable and constitutional due process concerns regarding criminal liability for those who are actually innocent, and § 1326(d)'s procedural requirements cannot stand in the way of such actual innocence claims. Thus, Mr. Palomar-Santiago raised both constitutional avoidance arguments as well as direct constitutional challenges.

Mr. Palomar-Santiago also argued that he actually satisfied § 1326(d)'s requirements. First, looking to the text, structure, and purpose of § 1326(d), Mr. Palomar-Santiago argued that the provision does not authorize convictions based on substantively invalid removal orders. Mr. Palomar-Santiago explained that although *Mendoza-Lopez* had addressed the question of the validity of the underlying removal order, it nevertheless does not govern his case because it addressed *procedural*, not *substantive* invalidity of removal orders, in the context of a prior version of the statute. In *Mendoza-Lopez*, the Court had held that § 1326, as then constituted, did not include the validity of the predicate deportation order as an element, and found that this raised constitutional concerns. Mr. Palomar-Santiago argued that, in enacting § 1326(d) in order to preserve the statute's constitutionality in response to *Mendoza-Lopez*, Congress was nonetheless concerned with the "validity of the deportation order" underlying the prosecution. Even the government recognizes that certain *procedural* errors in the underlying removal proceeding may mean that a § 1326 prosecution may not proceed under *Mendoza-Lopez*, Mr. Palomar-Santiago argued, so it would be nonsensical to allow prosecution where, as in his case, the removal order was *substantively* void *ab initio*. Indeed, he argued, turning to the statutory text, in cases resting on substantively invalid orders, a "challenge" to the underlying removal order within the meaning of § 1326(d) is not even necessary because "[a]ll 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." *Id.* at 9.

Second, even if prosecutions predicated upon substantively invalid removal orders were authorized under § 1326, the immigration judge's misrepresentation that Mr. Palomar-Santiago was convicted of an aggravated felony rendered his appellate waiver invalid and robbed him of the opportunities for administrative exhaustion and judicial review. Aggravated felony determinations are highly substantively complex, relying on the categorical and modified categorical approaches and highly nuanced and technical parsing of statutory language and case law. Because of this substantive complexity, Mr. Palomar-Santiago argued, it is difficult for noncitizens (who often lack counsel) to spot the legal errors in aggravated felony determinations. This difficulty is only compounded, according to Mr. Palomar-Santiago, where the BIA has itself already made the same erroneous aggravated felony determination. The immigration judge's misrepresentation of the law thus blinded Mr. Palomar-Santiago to the legal error, rendering his appellate waiver invalid. Because the INA generally only allows for judicial review of an appellate decision from the BIA, the immigration judge's legal misrepresentation also prevented Mr. Palomar-Santiago from seeking judicial review. This is additionally true because he was deported the day after he waived his appellate rights. Finally, Mr. Palomar-Santiago argued that the Court should apply the rule of lenity to any ambiguity, and rule in his favor.

C. The Supreme Court's Decision

In just over seven pages, Justice Sotomayor, writing for a unanimous Court, reversed the Ninth Circuit's decision. The Court held that "each of the statutory requirements of §1326(d) is mandatory" and that the Ninth Circuit's judicially created exceptions are "incompatible with the text of §1326(d)." 141 S. Ct. at 1620, 1622. It narrowly held that "§1326(d)'s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable" and clarified that "the substantive validity of the removal order is quite distinct from whether the noncitizen exhausted his administrative remedies . . . or was deprived of the opportunity for judicial review." *Id.* Under *Palomar-Santiago*, the single fact of an erroneous determination of removability by itself no longer "excuse[s]" or "satisfie[s]" the administrative exhaustion and deprivation of judicial review prongs of § 1326(d).

The Court rejected Mr. Palomar-Santiago's argument that the substantive complexity of immigration law could excuse people from demonstrating administrative exhaustion and the denial of judicial review. It also rejected Mr. Palomar-Santiago's textual argument that § 1326(d) does not apply to substantively invalid removal orders because "[t]here can be no 'challenge' to or 'collateral attack' on the validity of substantively flawed orders . . . because such orders are invalid from the moment they are entered." 141 S. Ct. at 1622. Claiming that the underlying removal order is substantively invalid is indeed a "challenge" under the plain meaning of that word, the Court reasoned, and it similarly is a "collateral attack" when done in a separate proceeding. *Id.* Finally, the Court rejected Mr. Palomar-Santiago's constitutional avoidance argument because constitutional avoidance may only be employed when a statute is ambiguous, and, the Court explained, § 1326(d)'s requirements are not ambiguous. *Id.*

Importantly, in two footnotes, the Court explicitly refused to consider key arguments made by Mr. Palomar-Santiago. In footnote two, the Court specifically declined to address Mr. Palomar-Santiago's argument that the text of § 1326(d) requires a substantively valid removal order and does not authorize prosecutions absent one, including his efforts to distinguish *Mendoza-Lopez* as addressing only procedural errors. And, in footnote four, the Court also declined to address Mr. Palomar-Santiago's constitutional claims, to the extent that they were direct constitutional challenges to his prosecution (as opposed to avoidance arguments). In so doing, the Court left these questions open, allowing advocates to make similar arguments in future cases.

II. Implications post-*Palomar-Santiago*

Palomar-Santiago can fairly be characterized as a narrow decision. While it did strike down the Ninth Circuit's practice of deeming automatically satisfied all three prongs of § 1326(d) in cases where individuals had been erroneously determined to be removable, it did not venture further than that. The Court rejected arguments that the substantive legal complexities of the removability inquiry render administrative remedies unavailable. However, the Court did not address whether *other* circumstances might make administrative appeal and/or judicial review unavailable. Important too was the Court's explicit refusal to address any independent constitutional challenges to allowing the government to prove an element of a criminal offense with an administrative order that the agency never had the authority to issue in the first place.

A. *Palomar-Santiago* Leaves Open Procedural Arguments that Administrative Exhaustion and Judicial Review are Unavailable.

While it forecloses arguments that administrative exhaustion and judicial review are *per se* unavailable because of substantive errors regarding removability determinations, *Palomar-Santiago* does not also foreclose arguments based on other errors, including *procedural* errors. In fact, in rejecting arguments for unavailability based on substantive errors regarding removability, the Court repeatedly makes clear that it is addressing those *substantive* errors regarding removability and not *procedural* errors. The Court cites to *Ross v. Blake*, 578 U.S. 632 (2016), a Prison Litigation Reform Act (PLRA) case, to illustrate the difference.[7] Generally, before people who are incarcerated can sue in federal court, the PLRA, like § 1326(d), requires that they must exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a). *Ross* discussed three circumstances under which existing administrative remedies might not actually be "available" within the meaning of the statute.[8] *Ross*, 578 U.S. at 642-48. The *Palomar-Santiago* Court's treatment of *Ross* here is instructive:

> *Ross* held that whether such [administrative] remedies are 'available' turns on 'the real-world workings of prison grievance systems,' and it acknowledged that there

[7] The *Palomar-Santiago* Court first cited *Ross* for the proposition that mandatory statutory exhaustion requirements are not amenable to judicial exceptions, clearly linking the two similar statutory exhaustion requirements. 141 S. Ct. at 1620-21.

[8] The three circumstances discussed in *Ross* do not appear to be 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). Counsel should consider looking to PLRA litigation for other arguments examining when administrative remedies might not actually be "available."

> are 'circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief.' Nothing in *Ross*, however, suggests that the substantive complexity of an affirmative defense can alone render further review of an adverse decision 'unavailable.'

141 S. Ct. at 1621 (quoting *Ross*, 578 U.S. at 643) (internal citation omitted). The Court explains that under *Ross*, whether administrative exhaustion is truly "available" requires an examination of the realities of the day-to-day operation of the particular prison grievance procedures at issue and whether they actually can be used to obtain relief. Without rejecting the *Ross* framework's application to the § 1326(d) context, the Court merely states that the set of exceptions discussed in *Ross* does not encompass substantive complexity by itself. Further, the Court explains that an "immigration judge's error *on the merits* does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement." *Id.* (emphasis added). Again, the Court is clear – it is only speaking to errors "on the merits" - it does not address the type of procedural errors that could render administrative exhaustion and judicial review unavailable.

Accordingly, *procedural* arguments that administrative exhaustion and/or judicial review are unavailable are not foreclosed by *Palomar-Santiago*, and counsel should resist attempts to extend *Palomar-Santiago* to encompass them. Importantly, both of the parties and the Court employed the *Ross* framework for analyzing when administrative exhaustion is "unavailable," including under § 1326(d). Neither the government nor the Court denies that *Ross* should, as a matter of law, be applied in this context; rather, they question whether the facts of Mr. Palomar-Santiago's arguments fit within the *Ross* framework.

Note that, depending on the facts in any particular case, certain procedural arguments may only address when administrative exhaustion or judicial review, or both, are effectively unavailable. This advisory does not tackle whether or not those procedural arguments will also satisfy the fundamental unfairness prong; other arguments may have to be made to satisfy that prong.

1. Failure to Advise of Discretionary Relief

One important procedural argument concerns an immigration judge's failure to advise regarding eligibility for discretionary relief that actually existed under the law being applied at the time. Such arguments come directly from the Supreme Court's decision in *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987), which *Palomar-Santiago* did not overrule. In *Mendoza-Lopez*, the immigration judge "failed to advise respondents properly of their eligibility to apply for suspension of deportation." This meant that the "waivers of their rights to appeal were not considered or intelligent." *Id.* Because their appellate waivers were invalid, the Court held that they were "deprived of judicial review of their deportation proceeding" such that the government could not use their deportation order as "reliable proof of an element of a criminal offense." *Id*. Because *Palomar-Santiago* did not overrule *Mendoza-Lopez*, this rule having to do with appellate waivers that are "not considered or intelligent" is thus unaffected by *Palomar-Santiago*. Indeed, the Court did not address arguments concerning the failure to advise of discretionary relief or the resulting invalid appellate waivers; nowhere does *Palomar-Santiago* so much as mention such arguments, much less foreclose them.

Counsel should therefore resist efforts from the government or the courts to expand *Palomar-Santiago* beyond its narrow holding and reasoning, on the ground that the discretionary relief issue was simply not before the Court. In its petition for certiorari, the government never asked the Supreme Court to consider the discretionary relief issue at all – nor could it, since the Ninth Circuit didn't decide Mr. Palomar-Santiago's case on that basis. Pet. Cert.; *see United States v. Palomar-Santiago*, 813 Fed. App'x 282 (9th Cir. 2020). The Court could not have addressed that question, because there was no recording of the merits hearing in Mr. Palomar-Santiago's immigration case, so Mr. Palomar-Santiago's argument was necessarily limited to the fact that the immigration judge sustained the erroneous charge of removability. No one knows what the immigration judge said – or did not say – in the merits hearing, so the Court had no occasion to comment on what kind of advisals or waivers would satisfy §§ 1326(d)(1) and (2).

What's more, both the government and Mr. Palomar-Santiago, in their merits briefing, explicitly agreed that the case did not present that very issue. *See* Resp't Br. at 11; Gov't Cert. Reply 5-6; Gov't Br. 32. For example, the Government's certiorari-stage reply brief explicitly stated that "this case does not present the discretionary-relief issue," and characterized that issue—accurately—as "distinct" from the question it asked the Supreme Court to review. Cert. Reply 5 (alterations and quotation marks omitted). The government's merits brief similarly explicitly acknowledged that "this case does not present the discretionary-relief issue." Gov't Br. 32 (alterations and quotation marks omitted). The government should not be permitted to use the Supreme Court's ruling to attack a rule that it explicitly told the Supreme Court was distinct from the limited question actually before the Court. In terms of the previous discussion of Ninth Circuit case law, *Palomar-Santiago* necessarily dealt only with the *Ochoa/Aguilera-Rios* rule and line of cases (having to do with erroneous removability determinations), and not the earlier *Gonzalez-Villalobos* rule and line of cases (having to do with the circumstances of invalid appellate waivers).[9]

2. Other Procedural Arguments

Other potential arguments that procedural infirmities would make appeal and judicial review unavailable include, but are not limited to:

- the fact that all appeals and petitions for review at the circuit courts must be presented in English, limiting the ability of pro se non-English speakers to present their claims for appeal and judicial review;
- administrative removal of people convicted of aggravated felonies under 8 U.S.C. § 1228(b): the form used to challenge administrative removal proceedings (I-851, Notice of Intent) does not clearly and explicitly allow for challenges to whether a conviction was properly classified as an aggravated felony, for example[10];

[9] In addition to the Ninth Circuit, the Second Circuit has also recognized that invalid appellate waivers may satisfy the requirements of §§ 1326(d)(1) and (2), including when they concern the erroneous denial of the opportunity to apply for relief. *See, e.g.*, *United States v. Sosa*, 387 F.3d 131, 136-37 (2d Cir. 2004); *United States v. Calderon*, 391 F.3d 370, 374-75 (2d Cir. 2004); *United States v. Copeland*, 376 F.3d 61, 70 (2d Cir. 2004); and *United States v. Lopez*, 445 F.3d 90, 97-100 (2d Cir. 2006). This line of cases is similarly unaffected by *Palomar-Santiago*, for the same reasons that the *Gonzalez-Villalobos* rule and line of cases are unaffected.

- expedited removal under 8 U.S.C. § 1225(b)(1): no administrative appeal is available and the very issues subject to judicial review are highly limited,[10] *see, e.g.*, *United States v. Raya-Vaca*, 771 F.3d 1195, 1202 (9th Cir. 2014), *abrogated on other grounds* by *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020);
- an immigration judge's failure to properly advise of appellate rights, *see, e.g.*, *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044-45 (9th Cir. 2012); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048-50 (9th Cir. 2004);
- an immigration judge's acceptance of a stipulated removal agreement without verifying that the respondent knowingly waived the right to a removal hearing and the ability to apply for relief, *see, e.g.*, *United States v. Gomez*, 757 F.3d 885, 897-88 (9th Cir. 2014); *United States v. Ramos,* 623 F.3d 672, 683 (9th Cir. 2010); *United States v. Nunez*, 375 F. Supp. 3d 232, 243 (E.D.N.Y. 2018);
- ineffective assistance of immigration counsel, *see, e.g.*, *United States v. Lopez-Chavez*, 757 F.3d 1033, 1044 (9th Cir. 2014); *United States v. Cerna*, 603 F.3d 32, 42-43 (2d Cir. 2010); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003), *but see United States v. Castillo-Martinez*, 16 F.4th 906 (1st Cir. 2021); and
- other procedural infirmities in the underlying immigration proceedings.

These arguments can be used to seek the benefit of one of the "unavailability" exceptions set out in *Ross*. For example, that decision held that remedies are unavailable despite being "officially on the books" if they are "so opaque that . . . no ordinary [noncitizen] can navigate" them. *Ross*, 578 U.S. 643-44.

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[10] There is, however, some controversy concerning precisely what the administrative remedies are with respect to administrative removal under 8 U.S.C. § 1228(b). *Compare U.S. v. Valdivia-Flores*, 876 F.3d 1201, 1205-06 (9th Cir. 2017) (Notice of Intent "did not explicitly inform him that he could refute, through either an administrative or judicial procedure, the legal conclusion underlying his removability. In fact, the Notice of Intent's three check boxes suggested just the opposite—that removability could only be contested on factual grounds."); *Etienne v. Lynch*, 813 F.3d 135, 142 (4th Cir. 2015) (Form I–851 "expressly prompts aliens to raise only factual challenges to removal") *and Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013) (same) *with Malu v. U.S. Atty. Gen.*, 764 F.3d 1282, 1288-89 (11th Cir. 2014) (Form I-851 provides for both legal and factual challenges to removal).

Additionally, it is important to note that challenges under § 1326(d) to expedited removal orders issued under § 1225(b) are expressly prohibited by the statute. 8 U.S.C. § 1225(b)(1)(D). At least the Fourth, Ninth, and Tenth Circuits have held that this provision is unconstitutional under *Mendoza-Lopez*. *See United States v. Gonzalez-Fierro*, 949 F.3d 512, 518-22 (10th Cir. 2020); *United States v. Villareal Silva*, 931 F.3d 330, 334-37 (4th Cir. 2019); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1085 (9th Cir. 2011). Some circuits have not decided this matter. *See, e.g.*, *Shunaula v. Holder*, 732 F.3d 143, 147 n.7 (2d Cir. 2013). However, "no court squarely confronting the issue has held that § 1225(b)(1)(D) is constitutional." *United States v. Terrazas Siles*, 397 F. Supp. 3d 812, 819 (E.D. Va. 2019).

The nuances of administrative and expedited removal law across the circuits and of these legal arguments are beyond the scope of this advisory. These are merely suggested as examples of the kinds of arguments that *may* be possible regarding procedural errors post-*Palomar-Santiago*; it is not an exhaustive blueprint of how to make such arguments or whether they are even otherwise available in every circuit.

B. *Palomar-Santiago* Leaves Open Constitutional Arguments Against Convictions Based on Substantively Invalid Removal Orders.

While the Court was not persuaded to reject the government's textual argument because of Mr. Palomar-Santiago's constitutional avoidance arguments, it did not reject those arguments on the merits. The Court noted that the canon of constitutional avoidance only comes into play when the statute is ambiguous, citing *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001), and it determined not that the statute raised no serious constitutional concerns, but rather that it was not ambiguous, leaving Mr. Palomar-Santiago's core constitutional arguments untouched. Indeed, in footnote four, the Court explicitly refused to entertain his direct constitutional claims because they were not raised in the courts below and fell outside the "narrow question" presented in *Palomar-Santiago*. Further supporting the availability of direct constitutional challenges to § 1326(d), the Court also did not disturb the longstanding rule that statutory interpretation is retroactive, leaving intact arguments such as Mr. Palomar-Santiago's, that substantively invalid removal orders are *ultra vires* and void *ab initio*.

Accordingly, counsel should continue to raise direct constitutional claims regarding the use of substantively invalid removal orders in § 1326(d) prosecutions, including those Mr. Palomar-Santiago argued. Mr. Palomar-Santiago made two key constitutional arguments: due process and separation of powers. At the center of the due process argument is the idea that due process is implicated "whenever an administrative proceeding, shorn of the procedural protections due criminal defendants, provides the basis for later criminal punishment." Resp't Br. at 17. *See Mendoza-Lopez*, 481 U.S. at 837-38, 838 n.15; *United States v. Spector*, 343 U.S. 169, 177-79 (1952) (Jackson, J., dissenting). Such arguments may be available in any § 1326 prosecution, *see United States v. Perez-Paz*, 3 F.4th 120 (4th Cir. 2021), but take on particular force when, as in Mr. Palomar-Santiago's case, the underlying removal order is unquestionably substantively invalid. The separation of powers claim argues that requiring a federal court "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," Resp't Br. at 17, flies in the face of the judicial function and judicial power under Article III. *See Estep v. United States*, 327 U.S. 114, 133-34 (1946) (Rutledge, J., concurring); *Yakus v. United States*, 321 U.S. 414, 481-85 (1944) (Rutledge, J., dissenting). This type of argument was explicitly reserved by the Court in *Mendoza-Lopez*, *see* 481 U.S. at 837-38, 838 n.15, and although explicit support for it is drawn primarily from concurrences and dissents, neither the Supreme Court nor any court of appeals has rejected the rationale in a binding opinion.

Additionally, Mr. Palomar-Santiago made "actual innocence" claims - which, at their core, are equitable and constitutional (under due process). Mr. Palomar-Santiago argued that § 1326(d)'s procedural requirements for collaterally attacking his underlying removal order cannot constitutionally stand as an obstacle to attacking that order when, in fact, he was factually and legally innocent of the underlying immigration law violation, analogizing to arguments that claims of innocence in the criminal context cut through procedural bars that would otherwise prevent challenges to unjustified criminal convictions. *See* Resp't Br. at 24-26. The Court explicitly did not include these direct constitutional arguments in its analysis, leaving them available for future challenges. *See* 141 S. Ct. at 1622 n.4.

Finally, amici in *Palomar-Santiago* argued persuasively that § 1326 has deeply racist origins and that continued prosecution under the statute therefore violates the Constitution's equal protection guarantee. The Court did not address this argument at all. Counsel should continue to raise arguments challenging the constitutional validity of § 1326 under the Equal Protection Clause. *See United States v. Carillo-Lopez*, --- F. Supp. 3d ---, No. 3:20-cr-00026-MMD-WGC, 2021 WL 3667330 (D. Nev. Aug. 18, 2021); Brief for Professors Kelly Lytle Hernández, Mae Ngai, and Ingrid Eagly as Amici Curiae Supporting Respondent, *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021) (No. 20-437).

C. *Palomar-Santiago* Leaves Open Certain Statutory Arguments that § 1326 Does Not Authorize Convictions Based on Substantively Invalid Removal Orders.

Mr. Palomar-Santiago argued that there must be a substantively valid removal order standing as the basis for any unlawful reentry prosecution. Mr. Palomar-Santiago distinguished *Mendoza-Lopez*, arguing that Court there addressed only underlying removal orders that were invalid *procedurally* and that the distinct issues presented by *substantively* invalid removal orders such as his were neither presented to nor considered by the *Mendoza-Lopez* Court. In footnote two, the Court acknowledges Mr. Palomar-Santiago's arguments that § 1326 requires a lawful removal order and that *Mendoza-Lopez*, which addressed and rejected "a similar argument with respect to the pre-AEDPA version of §1326(a)," is distinguishable. 141 S. Ct. at 1621 n.2. The Court explicitly declined to address this argument as neither raised below nor encompassed by the question presented to the Court. Because the Court did not resolve the question of whether *Mendoza-Lopez* addresses both procedural and substantive invalidity, where appropriate, counsel may continue to argue that the text of § 1326(d) does not authorize conviction based on substantively invalid removal orders, distinguishing *Mendoza-Lopez* as solely concerning procedural invalidity.

Conclusion

While it foreclosed certain collateral attacks on underlying removal orders under § 1326(d) in the Ninth Circuit, *Palomar-Santiago* should be read as a narrow decision that also left open significant avenues for attack. Undoubtedly, the government will urge an expansive reading of *Palomar-Santiago*. The Court, however, was explicit about the grounds on which it did and did not rule, and counsel should push back against efforts to expand the decision's reach. Where possible, counsel should continue to attack removal orders under § 1326(d) by developing arguments in the procedural, constitutional, and textual areas the Court left open.

Please contact Matthew Vogel at mvogel@nipnlg.org if you have any questions or for further information.

Relevant Circuit Court Cases Discussing *Palomar-Santiago*

***United States v. Castillo-Martinez*, 16 F.4th 906 (1st Cir. 2021)**: In relevant part, Jesus Leonardo Castillo-Martinez argued that, under *Moncrieffe v. Holder*, 569 U.S. 184 (2013), his 2012 marijuana conviction (which formed the basis of his removal order) was not actually an aggravated felony, rendering his removal order invalid. Mr. Castillo-Martinez argued further that his counsel provided ineffective assistance by not objecting to the classification of his marijuana conviction as an aggravated felony. The district court denied Mr. Castillo-Martinez's challenge to the § 1326 prosecution and the First Circuit affirmed. The First Circuit rejected his argument that ineffective assistance of counsel could serve to excuse his failure to exhaust and seek judicial review. Citing *Palomar-Santiago*, the court noted both that statutorily mandatory exhaustion regimes are not susceptible to judicial exceptions, and that there were avenues for administrative exhaustion and judicial review of his ineffective assistance of counsel claim. The court faulted Mr. Castillo-Martinez for not seeking to reopen his immigration case. It explained how a motion to reopen can result in administrative exhaustion of an ineffective assistance claim, and how judicial review would subsequently be available. The court then decided that, even assuming that Mr. Castillo-Martinez had satisfied the requirements of §§ 1326(d)(1)-(2), he could not satisfy the fundamental unfairness requirement in § 1326(d)(3). As the dissent recognizes, the First Circuit majority is breaking new ground here. Not only did *Palomar-Santiago* not discuss whether or not ineffective assistance of counsel could function to render exhaustion and judicial review effectively unavailable, it also did not address the interplay of motions to reopen and the exhaustion requirement, despite supplemental briefing on the issue. *Palomar-Santiago* cannot be said to dictate the court's conclusions here.

***United States v. Herrera-Pagoada*, 14 F.th 311 (4th Cir. 2021)**: The Fourth Circuit resolved Lexy Leonel Herrera-Pagoada's § 1326(d) challenge on the fundamental unfairness prong, § 1326(d)(3), and so had no reason to address the exhaustion and judicial review prongs. 14 F.4th at 320. In doing so, it rejected the government's invitation to hold that "because the IJ accurately informed Herrera-Pagoada of his right to appeal, his appeal waiver was binding," thereby foreclosing his challenge to the prosecution. *Id.* The Fourth Circuit also brushed away the government's invocation of *Palomar-Santiago*, noting that "the [*Palomar-Santiago*] Court didn't consider the effect of an invalid appeal waiver on an alien's burden to prove the first two prongs of § 1326(d)." *Id.* at 320 n.8.

***United States v. Sanchez*, 853 Fed. App'x 201 (9th Cir. 2021)**: The district court excused Manuel Alejandro Sanchez from demonstrating compliance with § 1326(d)'s requirements because the immigration judge did not give him an opportunity to present evidence in support of his application for voluntary departure. The Ninth Circuit explicitly did not decide the question of how a deprivation of the right to appeal to the BIA interacts with both *Palomar-Santiago* and § 1326(d)'s exhaustion and judicial review requirements. Rather, it determined that denying Mr. Sanchez the ability to present evidence in support of his voluntary departure application was not an error that "affected" his "awareness of or ability to seek judicial review." 853 Fed. App'x at 202. Therefore, even if, after *Palomar-Santiago*, a court could still find that a denial of the right to appeal to the BIA could satisfy one or more of § 1326(d)'s requirements, it was improper to do so in this case, and the Ninth Circuit reversed. As far as the court was concerned, "Sanchez was aware of his right to seek voluntary departure, applied for it, and could have appealed the

denial of that relief." *Id.* The court's reversal in *Sanchez*, then, rests upon the facts of Mr. Sanchez's proceedings; the court did not anything about the proper application of *Palomar-Santiago*.

***United States v. Bastide-Hernandez*, 3 F.4th 1193 (9th Cir. 2021)**: Juan Carlos Bastide-Hernandez argued that the immigration judge in his removal case lacked jurisdiction because of a defective Notice to Appear. The court rejected that argument. With respect to *Palomar-Santiago*, the court repeated the holding that each of § 1326(d)'s three prongs are mandatory. Mr. Bastide-Hernandez argued that § 1326(d)'s requirements were inapplicable because of the lack of jurisdiction and that *Palomar-Santiago* does not apply because his case concerns jurisdiction and not a substantively erroneous removability determination. The court rejected those arguments because 1) it had determined that the immigration court did have jurisdiction, and 2) "jurisdiction notwithstanding," he would still need to satisfy all the prongs of § 1326(d) in order to collaterally attack the removal order. 3 F.4th at 1197. However, the court did not rule out the possibility that Mr. Bastide-Hernandez might nevertheless be able to show that he actually satisfied all of the § 1326(d) factors. Because Mr. Bastide-Hernandez had not addressed them at all in his briefing, the court determined that it lacked a sufficient record to address the merits of § 13236(d)'s three prongs. The court did quote *Zamorano*'s dicta that *Palomar-Santiago* "casts doubt on the continued vitality of our exhaustion excusal rule under § 1326(d)." *Id.* (quoting *Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir. 2021)) (see below), but that is dicta here as well, because "[l]ike the court in *Zamorano*," it "le[ft] for another day the effect of *Palomar-Santiago*" on the Ninth's Circuit's exhaustion excusal rule. *Id.* at 1197 n.3.

***Zamorano v. Garland*, 2 F.4th 1213 (9th Cir. 2021)**: In the course of resolving a case about an entirely different immigration statute, this Ninth Circuit panel noted in passing that *Palomar-Santiago*'s holding "casts doubt on the continued vitality" of the Ninth's Circuit's recognition that the failure to advise of discretionary relief can render an appellate waiver invalid. 2 F.4th at 1225. The panel did not discuss or give any reasons for this gloss, and, as even the opinion itself appears to acknowledge, it is dicta. *See id.* ("But we need not resolve the effect of *Palomar-Santiago* in the § 1326(d) context, because, in any event, our judge-made exception to § 1326(d)(1) does not apply to the jurisdictional exhaustion requirement of [the statute actually at issue in *Zamorano*, 8 U.S.C. § 1252(d)(1)]."). This is not and should not be considered a binding holding.

***United States v. Flores-Perez*, 1 F.4th 454 (6th Cir. 2021)**: Noe Flores-Perez was removed pursuant to an *in absentia* removal order issued when he did not attend his removal hearing after the hearing notice sent to the address on the Notice to Appear was returned to the immigration court because "no such number" existed at the apartment complex. 1 F.4th at 456. The immigration court similarly mailed the *in absentia* removal order and it too was returned to the immigration court, for the same reason. In affirming the denial of Mr. Flores-Perez's § 1326(d) challenge, the decision repeats *Palomar-Santiago*'s holding that § 1326(d)'s requirements are mandatory and conjunctive. The court noted that Mr. Flores-Perez never attempted to challenge the removal order before the § 1326 prosecution, some 20 years after the removal order was issued. The court rejected Mr. Flores-Perez's argument that the lack of sufficient notice of his removal proceeding made administrative exhaustion unavailable, thereby depriving him of the opportunity for judicial review, and making the proceedings fundamentally unfair. It argued that

the opportunity to file a motion to reopen proceedings at the immigration court was a sufficient vehicle for him to pursue administrative exhaustion, but he never did that. While motions to reopen came up during argument and supplemental briefing in the *Palomar-Santiago* case, they were not considered at all by the Court. Indeed, the specific issue of a motion to reopen a removal order entered *in absentia* was not even present in Mr. Palomar-Santiago's case. In that respect, *Flores-Perez* goes beyond *Palomar-Santiago*. *Palomar-Santiago* cannot be said to foreclose § 1326(d) challenges when motions to reopen are available; the Court simply did not opine on that issue.