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IN THE SUPREME COURT OF THE UNITED STATES
- - - - -
UNITED STATES,)
Petitioner,)
v.) No. 20-437
REFUGIO PALOMAR-SANTIAGO,)
Respondent.)
- - - - -

Washington, D.C.

Tuesday, April 27, 2021

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 11:43 a.m.

APPEARANCES:

ERICA L. ROSS, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioner.

BRADLEY N. GARCIA, ESQUIRE, Washington, D.C.; on
behalf of the Respondent.

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1 proceeding using the well-established statutory
2 and regulatory procedures that exist for that
3 very purpose. Congress reasonably prohibited
4 non-citizens from taking the law into their own
5 hands by simply reentering the country and then
6 challenging a prior removal order only if
7 indicted for unlawful reentry.

8 At the same time, consistent with this
9 Court's decision in *Mendoza-Lopez*,
10 Section 1326(c) provides a narrow escape hatch
11 for the rare case in which no prior opportunity
12 for review was available, resulting in
13 fundamental unfairness.

14 Respondent's case does not fall within
15 that narrow class, and his arguments would
16 create a significant loophole in the statute.

17 Respondent plainly could have brought
18 to the BIA, the court of appeals, and, if
19 necessary, this Court the argument that his
20 prior offense was not an aggravated felony, just
21 as others later did. And even after this
22 Court's decision in *Leocal*, Respondent could
23 have sought to reopen his removal order or to
24 obtain the Attorney General's permission to
25 reapply for admission. What Respondent could

1 not do was simply reenter the country and then
2 claim immunity from prosecution under
3 Section 1326.

4 This Court should enforce the statute
5 as Congress wrote it and reverse.

6 I welcome the Court's questions.

7 CHIEF JUSTICE ROBERTS: Counsel, I
8 want to make sure I understand the government's
9 position correctly. Are -- are there any
10 removal orders that are subject to collateral
11 attack if the alien cannot establish the three
12 requirements of subsection (d)?

13 MS. ROSS: Mr. Chief Justice, I don't
14 think so. I mean, we haven't had to take a
15 position on that in this case because I think
16 the parties, for the most part, agree that
17 1326(d) governs. Of course, Respondent has an
18 argument about the -- the idea that he's not
19 challenging the validity at all. We think
20 that's incorrect.

21 But I think, you know, Congress meant
22 to limit the -- the collateral attack, as it
23 plainly expressed in 1326(d).

24 CHIEF JUSTICE ROBERTS: So, in a case
25 in which an alien waives or forfeits the right

1 to appeal, there's no way for him to be able to
2 show that administrative remedies were not
3 available. Is that right?

4 MS. ROSS: Well, Your Honor, I mean, I
5 think he could. It -- it would be a reading of
6 that term, "available." So I think, you know,
7 we would follow this Court's decision in Ross,
8 which I think is largely common ground here,
9 that there are situations in which remedies
10 would be unavailable. And I think the fact that
11 an individual said he was waiving them wouldn't
12 necessarily be dispositive of that
13 consideration, but, you know, he would have to
14 show that they were, in fact, unavailable under
15 the meaning of "availability" as this Court
16 interpreted it in Ross and as we think is -- is
17 the common meaning of capable of use for a
18 purpose here to obtain relief from the order.

19 CHIEF JUSTICE ROBERTS: What do you
20 understand your friend on the other side to mean
21 by a removal order being void ab initio?

22 MS. ROSS: So, Your Honor, I think
23 what my -- my friend on the other side means by
24 that is that -- one of two things: essentially,
25 either it was entered without jurisdiction, or

1 it was a legal nullity at the moment that it was
2 entered.

3 And I think both of those are
4 incorrect. As a -- a textual matter and as a
5 matter of the immigration statute, the
6 immigration judge plainly had jurisdiction here.
7 That is, to -- to enter a removal order is
8 precisely what immigration judges do.

9 And I think, in terms of the attempts
10 that Respondent makes to sort of say, well, you
11 know, he -- the immigration judge went beyond
12 his statutory authority by entering this removal
13 order, that fails. As this Court explained in
14 City of Arlington, all limits on agencies are
15 essentially provided by statute, and so this
16 jurisdictional/non-jurisdictional distinction
17 doesn't quite hold up.

18 But, you know, I also think that this
19 legal nullity idea doesn't work on Respondent's
20 argument even in the situations that Respondent
21 points to, for example, where the Board of
22 Immigration Appeals issues an order of removal
23 in the first instance and it doesn't have
24 statutory authority to do that. But for --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas.

3 JUSTICE THOMAS: Thank you, Mr. Chief
4 Justice.

5 Counsel, just so I'm clear, do you
6 agree with Respondent that the underlying
7 deportation order was wrong or substantively
8 wrong?

9 MS. ROSS: We agree, Your Honor, that
10 under this Court's decision in Leocal, of
11 course, DUI is not an aggravated felony, but, as
12 I was just answering the Chief Justice, I think
13 we disagree that that makes it a legal nullity
14 that Respondent was simply entitled to ignore.

15 We think Respondent still had to go
16 through the regular channels to challenge his
17 removal order.

18 JUSTICE THOMAS: So, in effect, you're
19 saying that if he were before the -- in -- in --
20 if he were considered now for deportation, he
21 would not be deported based upon the DUI?

22 MS. ROSS: In a fresh proceeding
23 today, you know, putting to one side that
24 Respondent here obviously has an order of
25 removal that has never been vacated, yes, an

1 individual who was convicted of DUI tomorrow
2 and, you know, served with an immigration -- or
3 a removal order the next day would not be
4 removable under current law. That's correct.

5 JUSTICE THOMAS: So, if that's true,
6 why would you be pursuing this case if you say
7 today he would not be deported?

8 MS. ROSS: So, Your Honor, I think
9 Congress reasonably determined in
10 Section 1326(d) that -- or in Section 1326 that
11 someone who unlawfully reenters the United
12 States, despite an extant removal order that he
13 never challenged, has taken the law into his own
14 hands and has shown a disrespect for the law and
15 for the legal process and is subject to
16 punishment and -- and to more -- more serious
17 punishment than simply an unlawful -- than
18 simply an unlawful entry charge under
19 Section 1325, which, of course, Respondent
20 concedes would be appropriate here.

21 JUSTICE THOMAS: On a separate matter,
22 with respect to the administrative remedies
23 being unavailable, Respondent suggests that or
24 indicates, argues that they were in effect
25 unavailable to him. What do you think of that?

1 MS. ROSS: We think that's incorrect,
2 Your Honor. As I was mentioning to the Chief
3 Justice, we think availability turns on whether
4 the procedure is capable of use. And I think it
5 plainly was here.

6 We know that both as a -- a matter of
7 law and a matter of fact. As a matter of law,
8 the statutory and regulatory procedures for
9 challenging a removal order are well
10 established. And as a matter of fact,
11 individuals regularly bring these types of
12 claims to the Board of Immigration Appeals, the
13 court of appeals, and, if necessary, this Court.

14 So, you know, for lack of a better way
15 of expressing it, I mean, Mr. Palomar-Santiago
16 could have been Mr. Leocal had he chosen to
17 exhaust his administrative remedies, which were
18 plainly available to him.

19 JUSTICE THOMAS: Do you think that
20 there are any constitutional concerns lurking in
21 this case?

22 MS. ROSS: I don't, Your Honor. I
23 think this Court was pretty clear in
24 Mendoza-Lopez that the -- the constitutional
25 issue doesn't arise if someone had a prior

1 opportunity for review. I think that's the
2 holding of Yakus, and as Mendoza-Lopez noted,
3 Yakus turns most significantly in this Court's
4 words on the prior opportunity for judicial
5 review, and we think that was plainly available
6 here for the reasons I was just stating.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer.

10 JUSTICE BREYER: Is there -- it seems
11 to me something anomalous in this situation.
12 Mr. Smith has been in prison for years,
13 exhausted every possible remedy. He's there
14 because he violated crime X, which later we say
15 that the government had no power substantively
16 to create that crime, and then he can go to
17 habeas under Teague and he gets out.

18 But, here, where it seems like the
19 same situation, the government had no power to
20 make this a crime in this way, and Mr. Jones
21 comes in, we put him in jail.

22 Now is there an anomaly in that?
23 And -- and I can't quite see how to work it out.
24 I'd like to get your response.

25 MS. ROSS: Certainly, Justice Breyer.

1 So I don't think that there is an anomaly, and
2 the reason why is because, in the context that
3 you've noted, the criminal conviction and then
4 the -- the subsequent habeas proceeding, that's
5 an actual innocence claim. The problem here for
6 Respondent, I think, is threefold.

7 The first is that he's not actually
8 innocent of a Section 1326 offense. As all nine
9 justices of this Court noted in *Mendoza-Lopez*
10 and as I think is equally true afterwards, an
11 error-free removal order is not an element of
12 Section 1326. Congress could have made it one,
13 but it did not.

14 Second, in the actual innocence
15 context, the Respondent -- or -- or the
16 defendant there is using a procedure, a habeas
17 proceeding, the point of which is potentially to
18 undo his conviction.

19 Respondent here concedes that, of
20 course, the Section 1326 proceeding can't undo
21 his prior removal order. It is aimed at a
22 different matter, which is criminal prosecution
23 for his subsequent unlawful reentry.

24 And the third issue is that even in
25 the habeas context, where this Court applies

1 actual innocence, it has made clear that it does
2 so based on habeas courts' traditional equitable
3 -- equitable power and that it wouldn't apply
4 actual innocence if Congress had spoken clearly.

5 Here, you have the inverse of both of
6 those situations. There is no traditional
7 equitable power to rewrite the terms of the
8 statute, and Congress was, in fact, extremely
9 clear in Section 1326(d) about when a challenge
10 to a prior removal order may be brought.

11 JUSTICE BREYER: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito.

13 JUSTICE ALITO: After Leocal but
14 before reentering the country, was there a
15 procedure available to Respondent to obtain
16 relief from the removal order and reacquire the
17 status he had prior to removal?

18 MS. ROSS: Certainly, Your Honor. So
19 I think that would be a motion to reopen. And
20 it's a little bit complicated, but I think
21 there's essentially three ways that Respondent,
22 at least before 2020, when there was a slight
23 change in the regulations, could have obtained
24 that type of relief.

25 The first is a motion to reopen asking

1 for equitable tolling because, presumably, at
2 that point, the 90-day statutory limit on the
3 motion to reopen would have elapsed.

4 The second is to ask the government to
5 join in a motion to reopen, which would excuse
6 the time bar and would not require the
7 government to actually agree on the merits but
8 would be a mechanism of getting the issue in
9 front of the immigration judge or the Board of
10 Immigration Appeals.

11 And the third, and this is the one
12 that changed in 2020, is to ask the immigration
13 judge to rely on his sua sponte authority, and
14 that too would make inapplicable the time bar.
15 Now, in that situation, that's where the
16 regulations changed in 2020, but they were
17 replaced with a provision that would allow an
18 individual to file one untimely motion to reopen
19 when there is a case of a change in law, as well
20 as due diligence on the part of the applicant.

21 So, for all of those reasons, I think
22 Respondent plainly could have sought that type
23 of relief. I would also note that
24 Section 1326(a)(2)(A) itself makes plain that
25 the 1326 charge doesn't lie if an individual

1 seeks and obtains the Attorney General's
2 permission to reapply for admission.

3 Now it's possible in that case,
4 depending on exactly when that happened, that
5 Respondent would have had to take some
6 additional steps to lawfully enter, but it is
7 certainly true that Respondent had other
8 mechanisms to seek relief, rather than, as I
9 noted earlier, simply taking the law into his
10 own hands and reentering despite an exigent
11 removal order that he had never challenged.

12 JUSTICE ALITO: So I assume, in those
13 circumstances, the -- the alien would be
14 considered to have exhausted administrative
15 remedies, even though there wasn't an appeal to
16 the BIA from the initial removal order?

17 MS. ROSS: So, candidly, Justice
18 Alito, we haven't taken a position on that here.
19 You know, I think what those separate procedures
20 would do, would allow him, if successful, to
21 avoid the 1326 charge altogether, and I think to
22 the extent that the motion to reopen was denied
23 for some reason, in most circumstances, though,
24 candidly, not with respect to the sua sponte
25 reopening, on the government's view, the

1 individual would have judicial review of that
2 denial of the motion to reopen.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: You answered, Ms.
7 Ross, Justice Thomas by saying that you don't
8 see a constitutional issue here. But I do.
9 You've given me a lot of potential mechanisms in
10 which a -- in which an alien might be able to
11 get a -- this order reversed, but I don't know
12 that there's a legal opportunity to do that,
13 meaning it all depends on a whole series of
14 discretion.

15 In Lewis, we found it significant that
16 a convicted felon may challenge the validity of
17 a prior conviction before obtaining a firearm.
18 That's basically your point here, that there is
19 an opportunity to do that, but I'm not clear on
20 this record before us if that's the case.

21 So should we be relying just on your
22 representation, or is this one of the issues
23 that hasn't been adequately addressed below that
24 you, for that reason, you say we should not
25 address Respondent's constitutional arguments?

1 MS. ROSS: So, Justice Sotomayor, I
2 think the primary reason not to address
3 Respondent's constitutional argument is simply
4 that it's raised in the form of a constitutional
5 avoidance argument, and the statute here is
6 clear.

7 But putting that to one side, I do
8 think it's clear on this record that there was
9 an opportunity for judicial review and for
10 administrative exhaustion at least in the sense
11 that the court of appeals has only relied on a
12 legal mistake with respect to the aggravated
13 felony determination as its basis for holding
14 that Respondent did not, in fact, have to
15 exhaust his --

16 JUSTICE SOTOMAYOR: But, counsel --

17 MS. ROSS: -- administrative remedies.

18 JUSTICE SOTOMAYOR: -- the reality is
19 that when this conviction happened, neither this
20 circuit nor any court had yet ruled in his
21 favor. And so to say that whether it's him or
22 someone who did raise this before the agency and
23 had taken it to judicial review and the circuit
24 had said no, are all those people -- if they can
25 prove that they have no chance to void this

1 administrative order because it was illegally
2 entered, wouldn't they have a separate due
3 process argument? Not a constitutional
4 avoidance argument in -- but a separate due
5 process argument?

6 MS. ROSS: So, Justice Sotomayor, as
7 a -- as a first-line response, Respondent
8 obviously hasn't made that separate freestanding
9 argument here.

10 But, second, I would point this Court
11 to its decision in *Yakus*. I think the Court was
12 very clear that no principle of law or provision
13 of the Constitution precludes Congress from
14 making criminal the violation of an
15 administrative order by someone who has failed
16 to avail himself of an adequate separate
17 procedure for the adjudication of its validity.
18 And I think that's precisely what Respondent had
19 here in the first instance.

20 Now I do think the Court can take some
21 comfort in the various methods for reopening and
22 the ability to apply for the Attorney General's
23 permission to -- to apply for -- for admission,
24 excuse me, in the statute itself, but -- but,
25 for the reasons I've -- I've said, I don't think

1 there is a separate constitutional problem with
2 effectively enforcing a forfeiture of avail --
3 or a waiver of available remedies.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

5 JUSTICE KAGAN: Ms. Ross, I'd like to
6 talk about this word "available" and give you a
7 hypothetical. Suppose that the immigration
8 judge in this case had told the alien, you know,
9 there -- there just isn't an administrative
10 procedure that you can take my ruling to, this
11 is it, this is the end of the line.

12 What would happen in that case?
13 Would -- would -- would -- would this provision
14 be satisfied?

15 MS. ROSS: So, Justice Kagan, I think
16 that would be a much more difficult question
17 than the one that we have here because, of
18 course, here, it's simply a legal error as to
19 the aggravated felony determination. I think
20 there you'd get very close to this Court's third
21 category in Ross, where the Court talked about
22 governmental actors thwarting review by
23 misrepresentations.

24 I think the key is that the
25 misrepresentation both that the Court was

1 thinking about there and in your hypothetical
2 goes to the procedure rather than to the
3 substance of what's the right rule.

4 Here, of course, the substance of --
5 of whether this is or isn't --

6 JUSTICE KAGAN: So, if -- if -- if I
7 just understood you, you said it gets close to
8 Ross. I mean, does it -- does it get in Ross?
9 Is that a third -- the -- the -- the -- the --
10 the -- Ross's third category, would that --
11 would that, in fact, be unavailable at that
12 point?

13 MS. ROSS: Your Honor, I think it's a
14 little bit unclear because, in the hypothetical
15 that you're imagining, of course, this is a
16 procedure that's plain on the face of the
17 statute and the regulations, and so I think I
18 hesitate a little bit before saying that, you
19 know, a simple misstatement, an honest mistake
20 by the immigration judge would get to the level
21 of thwarting administrative review in -- in the
22 sense that I think this Court had in mind in
23 Ross. But, of course, I don't think this Court
24 needs to decide that question here because,
25 again, there is --

1 JUSTICE KAGAN: Suppose --

2 MS. ROSS: -- no --

3 JUSTICE KAGAN: -- suppose that such a
4 misrepresentation would make it unavailable.
5 But instead -- now -- now let me switch to
6 another hypothetical and say that the
7 immigration judge doesn't say you have no place
8 to take this, but instead the immigration judge
9 says, and quite wrongly: Your crime is a crime
10 of violence, and there is no way that you will
11 receive any relief from anybody ever again.

12 MS. ROSS: So, Your Honor, again, I
13 think that would potentially fall into this
14 bucket three. I think it's probably less likely
15 there, honestly, than your prior hypothetical
16 just because, again, I think that goes to sort
17 of the substance of what you're going to get
18 rather than the procedure available for review.

19 And I think particularly in an
20 instance like this, where we know from the
21 statute and the regulations that review is, in
22 fact, available, I would hesitate before
23 assuming that it would be unavailable in that
24 case.

25 JUSTICE KAGAN: But you think that

1 that's a pretty close case?

2 MS. ROSS: I do, Your Honor.

3 JUSTICE KAGAN: So how is that
4 distinguishable from this case? Because, in
5 this case, there's just as much an error in the
6 first -- from the IJ. Now it's true that the IJ
7 thought and -- and, you know, in good faith,
8 obviously, that he was faithfully applying
9 precedent. But that precedent was overturned,
10 and -- and that meant that even when he was
11 doing what he was doing, the law was -- was --
12 was not on the IJ's side.

13 So how is that any different?

14 MS. ROSS: So I think it's different,
15 Justice Kagan, because I took your prior
16 hypothetical to suggest that the Board of
17 Immigration Appeals and a court of appeals and
18 even this Court would somehow be incapable of
19 providing relief to the individual there.

20 I don't think that's true where the
21 case law is simply not on the side of the
22 individual. Of course, individuals challenge
23 case law like that all the time. Mr. Leocal
24 himself lost at the Board of Immigration Appeals
25 and the court of appeals under binding

1 precedent.

2 And so I think the way that the law
3 handles this is to require individuals to bring
4 their claims so that the law can be pushed
5 forward and developed in exactly the way that it
6 -- it was by other individuals with respect to
7 this issue.

8 JUSTICE KAGAN: Thank you, Ms. Ross.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch.

11 JUSTICE GORSUCH: Thank you. I have
12 no questions at this point.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh.

15 JUSTICE KAVANAUGH: Thank you. I have
16 no additional questions.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett.

19 JUSTICE BARRETT: I don't have any
20 questions either.

21 CHIEF JUSTICE ROBERTS: A minute to
22 wrap up, Ms. Ross.

23 MS. ROSS: Thank you, Mr. Chief
24 Justice.

25 I'd like to end where I began this

1 morning. Section 1326(d)'s text is clear and it
2 resolves the question presented in this case.
3 The immigration judge's determination that
4 Respondent's prior offense qualified as an
5 aggravated felony does not demonstrate, as
6 Congress required Respondent to do, that he
7 exhausted any available administrative remedies
8 or that the removal proceedings improperly
9 deprived him of the opportunity for judicial
10 review.

11 Respondent's contrary interpretation
12 would create a significant loophole in the
13 statute. It would effectively remove
14 Section 1326(d)(1) and (2) any time a defendant
15 argues that his prior removal order was
16 substantively invalid.

17 Respondent's attempt to limit his rule
18 to undisputable invalidity cases is simply
19 case-specific gerrymandering. The logic of his
20 rule applies regardless of whether a court has
21 already determined that a particular offense was
22 not removable.

23 This Court should reject that argument
24 and instead apply the plain text of this
25 statute. And we therefore ask that the Court

1 reverse.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Garcia.

6 ORAL ARGUMENT OF BRADLEY N. GARCIA

7 ON BEHALF OF THE RESPONDENT

8 MR. GARCIA: Mr. Chief Justice, and
9 may it please the Court:

10 This indictment was properly dismissed
11 for two reasons. First, a Section 1326
12 prosecution cannot proceed based on an invalid
13 removal order. And this case can be resolved on
14 the narrow ground that the invalidity of the
15 order here is undisputed.

16 This invalidity point flows not just
17 from constitutional and background principles
18 but directly from the plain text of subsection
19 (d). That provision sets forth a way to
20 "challenge the validity of the deportation
21 order." That language necessarily assumes that
22 the order on which a Section 1326 charge is
23 based must be valid.

24 Otherwise, satisfying subsection (d)'s
25 three requirements would have no effect. The

1 order would be deemed invalid, but there would
2 be no consequence. The government admits as
3 much on page 9 of its reply brief, explaining
4 that invalidity of the order is a defense to the
5 charge.

6 And once it's clear that, if the order
7 is invalid, the charge cannot proceed, the
8 proper result here is also clear. This order is
9 indisputably invalid. Leocal established that
10 before this proceeding ever began, and the
11 government has never claimed otherwise.

12 The government's only response to this
13 argument is that subsection (d) requires any
14 defendant who challenges the validity of a
15 removal order to make the provision's three
16 showings. But there is no need to challenge the
17 validity of a removal -- removal order where, as
18 here, it is already undisputed the order is
19 invalid. Instead, the order's undisputed
20 invalidity requires dismissal without having to
21 go through subsection (d)'s three prongs.

22 Second, even if those three prongs
23 governed here, they are satisfied.
24 Administrative remedies were not available
25 because no ordinary non-citizen could understand

1 and formulate the complex legal arguments
2 required to challenge BIA precedent under the
3 categorical approach.

4 The government's contrary reading
5 would not even cover the facts of Mendoza-Lopez
6 or any case in the 25 years since this statute
7 was amended.

8 I welcome your questions.

9 CHIEF JUSTICE ROBERTS: Counsel, what
10 do you do with the language in Mendoza-Lopez,
11 "There is no congressional intent to sanction
12 challenges to deportation orders in proceedings
13 under 1326"?

14 MR. GARCIA: So we are not disputing
15 that rationale, Your Honor. Our argument is the
16 statute has now changed fundamentally when
17 Congress added subsection (d). And that's where
18 I started today, which is, when you look at the
19 opening clause of subsection (d), it doesn't --
20 unless you read the statute to presume that,
21 when the order is invalid, the case can't
22 proceed, then satisfying those three
23 requirements will have no effect.

24 So it's a -- Congress inserted the
25 concept of validity into this statute when it

1 amended it by adding subsection (d). And the --
2 that's what I mean when I say that the
3 government agrees that the actual defense here
4 is invalidity of the order. When you look at
5 the language of subsection (d), there's no other
6 way to describe what the defense is.

7 CHIEF JUSTICE ROBERTS: Well,
8 counsel --

9 MR. GARCIA: Now --

10 CHIEF JUSTICE ROBERTS: -- there are
11 -- there are a lot of areas where, you know, the
12 door closes and you lose the right to go back
13 and challenge prior determinations. You know,
14 the felon-in-possession rules, some recidivist
15 prosecutions. And I'm just wondering, the void
16 ab initio, you seem to be arguing that whenever
17 there is some kind of change or clarification in
18 the law, you do go back and reopen everything.

19 Now, as counsel noted in response to
20 Justice Alito's question, there are avenues in
21 -- in this case, this sort of case, to do that.
22 But your proposition seems to me to be limited
23 to, you know, we now know this was wrong, so we
24 have to go and unscramble the -- unscramble the
25 eggs.

1 MR. GARCIA: Not exactly, Your Honor.
2 I think it's important to keep in mind the
3 context here, which is that the government is
4 coming to court and -- and looking to impose a
5 new and further criminal punishment on the basis
6 of an order that it knows is invalid.

7 And in that situation -- Your Honor
8 mentioned the felon-in-possession situation.
9 The Lewis case explained that that statute was
10 extremely clear that Congress had no concern for
11 the validity of the prior order. This statute
12 is exactly the opposite. Congress added a
13 defense that puts the validity of the order at
14 issue.

15 And I would say it is extremely
16 anomalous, as Justice Breyer's question
17 suggested, to impose further punishment based on
18 an order like this. The government --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. GARCIA: -- doesn't actually cite
22 any --

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

2 Counsel, are you -- is it your
3 argument that the administrative remedies are so
4 complicated that they would always be
5 unavailable?

6 MR. GARCIA: Our argument is that
7 they're unavailable in this case, Your Honor,
8 because of the extremely confusing, as Ross puts
9 it, nature of the categorical approach and the
10 fact that there was adverse BIA precedent on the
11 books.

12 And under subsection (d), from this
13 opinion -- Court's opinion in Ross and in
14 Mendoza-Lopez, both of those opinions made clear
15 that these requirements need to be read
16 practically and -- and here flexibly. And the
17 fact is I think the most important point about
18 the government's reading of subsection (d) is
19 that it -- it doesn't even capture the facts of
20 Mendoza-Lopez.

21 And the rule needs to be one that is
22 particular to the context at issue, and the
23 government's approach here ignores all of the
24 practicalities, as our brief and the National
25 Immigration Project briefs explains, the vast

1 majority, approaching 90 percent, of individuals
2 in detention are unrepresented in these
3 proceedings. And the suggestion that they could
4 realistically formulate an argument of the type
5 required in this case is entirely impractical.

6 And just to be specific about that,
7 the specific argument that supposedly was
8 available was that, in fact, the crime of
9 violence definition in Section 16(b) should be
10 read to have an implicit mens rea requirement,
11 and, thus, the DUI conviction was not a
12 categorical match for that requirement. And --

13 JUSTICE THOMAS: How would that have
14 changed your case if Respondent had been
15 represented at his deportation proceedings and
16 had proceeded -- had taken advantage of all the
17 available appeals?

18 MR. GARCIA: So it's unclear in this
19 case if Mr. Palomar-Santiago was represented.
20 And I think, in interpreting the statute, the
21 Court should take account of the reality that
22 the vast, vast majority of individuals facing
23 charges like this are unrepresented.

24 But your question also suggests an --
25 an important point, which is that the

1 government's position is exactly the same even
2 if Mr. Palomar-Santiago had appealed and gone to
3 the Ninth Circuit and lost. And that goes back
4 to our -- our first argument, Your Honor.

5 And that argument is that it would be
6 extremely anomalous to think that Congress
7 wanted to impose this particular criminal
8 punishment when everybody agrees that the order
9 was invalid. And that's both from the plain
10 text, where I started. From the constitutional
11 concerns, I think the government confirmed today
12 that the only case they can point to is Yakus.

13 And beyond being repeatedly questioned
14 as likely limited to the wartime context, as
15 recently as two terms ago and Justice
16 Kavanaugh's concurrence in -- in the PDR Network
17 case, that opinion on its face made clear that
18 there was no argument in that case that the
19 price regulation was invalid or void on its
20 face.

21 JUSTICE THOMAS: Thank you.

22 MR. GARCIA: That is the extreme case
23 we have here, Your Honor.

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: How, in your opinion,
3 at the risk of repetition, do you get out of
4 this? The -- the -- imagine a statute which is
5 absolutely clear. It says, Mr. Jones, you're
6 about to be deported and you will be under these
7 circumstances.

8 If the judge looks at your state
9 record, he looks at that document, and if it
10 says in that document you were convicted of DUI,
11 and you can attack that conviction if it is
12 entered within the last 10 years, but earlier
13 than that it's sacrosanct.

14 I mean, can't the government deport
15 somebody? All he had to do was look at the
16 record. If it's there, we don't care if it's
17 good, bad, indifferent, or whatever it is, we
18 don't want to go back into it, you're now
19 deportable.

20 Well, that's what they've done here
21 with an exception that favors you. How do we
22 get out of that?

23 MR. GARCIA: Well, I think it's common
24 ground, Your Honor, that Mr. Palomar-Santiago
25 was unlawfully deported.

1 JUSTICE BREYER: Yeah. Yeah, that
2 would be true --

3 MR. GARCIA: And the question now --

4 JUSTICE BREYER: -- that would be true
5 if, exactly the same, he really wasn't driving
6 under the influence 35 years ago.

7 MR. GARCIA: Our -- our focus, Your
8 Honor, is on the fact that regardless of the DUI
9 conviction, everyone agrees that that is not and
10 never was a basis to remove a lawful permanent
11 resident from the United States. So this order
12 is substantively invalid --

13 JUSTICE BREYER: All right.

14 MR. GARCIA: -- in the same way that
15 --

16 JUSTICE BREYER: I see where you're
17 going. I see where you're going.

18 Now I have another question. I have
19 another question. I've got -- I'm -- I'm sorry,
20 I -- I'm adding to your answer, but I see where
21 you're going.

22 All right. If you lose, I've tried to
23 find out how many people are there likely that
24 would be subject to orders based on crimes of
25 violence or whatever that term is and in your

1 client's position, and I get under a thousand.
2 And it must be a very small percentage of those,
3 maybe one, maybe two, maybe three people like
4 your client who fall within the category of
5 later on it was determined it wasn't a crime of
6 violence, like driving under the influence.

7 So does your case affect more than a
8 handful of people? And if it does not, does the
9 Attorney General or is there a route that you
10 could get relief, administrative relief, because
11 your client has lived here such a long time?

12 MR. GARCIA: So, Your Honor, the -- it
13 is certainly not a particularly broad rule,
14 especially as to the category that we are
15 relying on today, where it's made absolutely
16 clear by a prior decision that the removal was
17 unlawful.

18 And as to whether there's some other
19 way out of this, I think that's a question for
20 the government. I do need to address the
21 representation from the government that a motion
22 to reopen was available to Mr. Palomar-Santiago
23 after Leocal, because that is incorrect.

24 A motion to reopen was barred by BIA
25 regulation, and the government would have

1 opposed a motion to reopen on that basis and the
2 basis that it was time-barred.

3 And I think that's the reason that
4 never before in this case have they actually
5 argued that a motion to reopen was an available
6 remedy. And --

7 CHIEF JUSTICE ROBERTS: Justice Alito.

8 JUSTICE ALITO: Suppose that Leocal
9 and the Ninth Circuit decision, Trinidad --
10 Trinidad Aquino, had not been decided, but
11 everything else about this case is the same.

12 Could your client have moved to
13 dismiss the indictment in this case on the
14 grounds that the prior removal order was invalid
15 for the reasons that were later -- later
16 accepted and that would later be accepted in
17 Leocal and -- and the Ninth Circuit decision?

18 MR. GARCIA: So, Your Honor, we think
19 that there are arguments that that would still
20 be permitted, and that would essentially be the
21 argument that that type of order is void -- void
22 ab initio, and so no challenge is required.

23 But I recognize that the -- that poses
24 more of an obstacle in terms of the limitation
25 on this defense, which is that to -- you can't

1 challenge the validity of the order in the
2 criminal case.

3 I think it's a far easier case when
4 you have a decision like this, where Leocal
5 establishes before the government files the
6 indictment, before the case ever starts, that
7 the removal order is invalid, and that is a
8 defense to the Section 1326 charge and --

9 JUSTICE ALITO: Well, I don't really
10 -- I don't really understand why it is different
11 under the arguments that you're making. In both
12 situations, the -- the individual would have
13 been illegally removed.

14 MR. GARCIA: That's true, Your Honor.
15 And we -- but we think it's particularly clear
16 that there's no need for a challenge to the
17 validity of this order in the criminal case when
18 the other side is not even disagreeing.

19 When everyone agrees it's already
20 invalid and Leocal establishes it, there's no
21 need for a further challenge. This is all about
22 the text of that opening clause of subsection
23 (d).

24 And that's why our -- our -- again,
25 our fundamental point about the text is that the

1 government has never explained how or why, even
2 in a case where you satisfy subsection (d)'s
3 requirements, the -- the charge is dismissed,
4 and the answer is that the necessary premise of
5 this statute, you have to read it as if
6 subsection (d) begins with the words "a charge
7 cannot be based on an invalid order." And then
8 there's a limit on that defense.

9 JUSTICE ALITO: Well, what it says is,
10 in a criminal proceeding under this section, an
11 alien may not challenge the validity of the
12 deportation order, and then it provides some
13 exceptions.

14 You are challenging the validity of
15 the deportation order. You think it's open and
16 shut, and it probably is open and shut, but,
17 nevertheless, you're challenging it, are you
18 not?

19 MR. GARCIA: No, Your Honor, I don't
20 think so. We're absolutely challenging the
21 indictment. We're even --

22 JUSTICE ALITO: Well, do you accept
23 the validity of it?

24 MR. GARCIA: -- we're challenging the
25 --

1 JUSTICE ALITO: Do you accept the
2 validity of the deportation order?

3 MR. GARCIA: Well, no, but we don't
4 need to challenge it in the criminal prosecution
5 because it's already undisputed. It's
6 established by Leocal.

7 And even in a colloquial sense, if you
8 would view that as challenging, I think it's
9 actually more accurately we're challenging the
10 government's use of the order. But we don't
11 need a further challenge to the validity when
12 it's already conceded. But the notion was --

13 JUSTICE ALITO: All right. My time is
14 up. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel, can you
18 go on -- you disputed Ms. Ross's argument about
19 a motion to reopen. And I do know that there's
20 a time limit there. But she mentioned other
21 ways of you attacking or getting this revoked.

22 I don't see that issue in the briefs
23 before us or in the briefs more adequately
24 spelled out for us to really consider that issue
25 fully. But I think the essence of Lewis and

1 other cases that rely on prior convictions, even
2 if they're void or voidable, is that there is a
3 way that a person can challenge that prior
4 conviction independent of committing the crime
5 that says don't possess a gun.

6 You -- if you were a convicted felon
7 and if you think the felony is void or voidable,
8 you should go back and get it voided. And Ms.
9 Ross's argument is don't reenter the country
10 until you get your removal order voided.

11 So please answer the first question.
12 Do you dispute that all the other mechanisms are
13 unavailable to you, and where in the record do I
14 look at that being resolved by the court below?

15 MR. GARCIA: So two answers, Your
16 Honor. First, as to all of the other
17 remedies -- avenues that Ms. Ross referenced, we
18 don't think any of those are realistic in any
19 way, but I certainly agree that that hasn't been
20 adequately ventilated in the -- in the courts
21 below. And to the extent that there is a
22 concern about the constitutional issue, we'd, of
23 -- of course, be happy to address that in more
24 detail.

25 But, second, as to Lewis, Your Honor,

1 it's extremely important to remember that that
2 is a case about using a prior judicial order, a
3 judicial conviction, not an administrative
4 order. And using an administrative order in
5 this context raises exactly the concerns that
6 Justice Jackson and Justice Frankfurter, in
7 Spector, thought were unconstitutional, which is
8 to take the result of an administrative
9 proceeding in which none of the constitutional
10 protections for criminal defendants are provided
11 and to turn around and use that to impose
12 criminal penalties.

13 And I'd just go back to the
14 government's invocation of Yakus. Not only has
15 that been repeatedly questioned as being limited
16 to wartime, but even that case says there was no
17 argument there, the order was void on its face.

18 I think the fact that the government
19 can only point to Yakus is itself maybe our best
20 proof that there is a grievous and substantial
21 constitutional question in this case. And when
22 you turn to the language of subsection (d) and
23 ask, is this language actually clear that
24 Congress intended to impose this punishment when
25 everyone agrees that the removal order is

1 invalid, without any further analysis, we think
2 the answer to that has to be no.

3 Congress cared about the validity of
4 the order, and there's just -- there's no
5 reason, given all of the other considerations,
6 to treat what we are doing here as challenging
7 the validity of the order when its invalidity is
8 already established and conceded.

9 JUSTICE SOTOMAYOR: Thank you,
10 counsel.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Mr. Garcia, assuming
13 we are in Section 1326(d) and the question is
14 one of availability, I had understood your brief
15 to be making the argument that this is
16 essentially a misrepresentation case, as
17 described in Ross, so that even if there was an
18 administrative remedy on the books, it wasn't
19 truly available.

20 But, as you talked about it today, it
21 -- it strikes me that you're not talking about
22 any kind of misrepresentation, that you're
23 instead talking about what Ross's second
24 category is, which is that the administrative
25 scheme is so opaque -- so opaque that it becomes

1 incapable of use.

2 Now am I reading you right now?

3 MR. GARCIA: Your Honor, I think it's
4 most accurate to say that we think it's a
5 combination of the two. Plainly, there was a
6 misrepresentation, willful or not, and that
7 combines with the fact that this area, the
8 categorical approach, is already so opaque, as
9 the Court put it in *Ross*, so confusing, no
10 reasonable prisoner, here, a non-citizen, can
11 use them.

12 And so we're not saying it's exactly
13 like *Ross*, but, in the circumstances here, the
14 combination of all of those factors certainly
15 renders this appeal unavailable in the
16 circumstances of this case.

17 JUSTICE KAGAN: Well, *Ross* was talking
18 about misrepresentations as to what kind of
19 procedure was available, and, similarly, in
20 terms of what's opaque and what's not, *Ross* was
21 talking about, you know, procedural schemes that
22 are opaque.

23 And you're sort of taking both of
24 those and -- and converting it into a context
25 where we're talking about substantive law, and

1 I'm wondering whether that's an appropriate
2 thing to do.

3 MR. GARCIA: Yes, Your Honor. So I
4 think, in this context, substance absolutely
5 blends with the process, and the reason is that
6 both Ross and Mendoza-Lopez talk about
7 meaningful access to the procedure at issue and
8 whether it can be used for the accomplishment of
9 a purpose. Simply being able to file a notice
10 of appeal, especially when there's BIA precedent
11 foreclosing the claim, is not meaningful access
12 to an appeal.

13 And it's also important to recognize
14 that this issue just doesn't arise under the
15 PLRA. The -- the claim in Ross, for example,
16 was an excessive force claim. Of course, any
17 ordinary prisoner can develop the facts to
18 develop that type of argument.

19 Here, it's an adversary proceeding
20 against a non-citizen in an area where everybody
21 concedes that the legal doctrines are mystifying
22 and opaque. And to suggest that the substance
23 is not relevant in any way, I think, is just
24 incorrect, especially when Mendoza-Lopez and
25 Ross both tell us to approach these questions

1 practically speaking.

2 JUSTICE KAGAN: Thank you, Mr. Garcia.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Thank you. My
6 questions have already been covered.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: I have no
10 additional questions.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Mr. Garcia, I'd like
14 to go back to the colloquy you were just having
15 with Justice Kagan. So I take you to be saying
16 that, and I think everybody, I was about to say,
17 in this room, but on this call, can sympathize
18 with your point that the categorical approach
19 can be opaque and confusing, but does that then
20 mean that availability under 1326(d) varies
21 according to the difficulty of the law that
22 underlay the initial conviction?

23 MR. GARCIA: Yes, Your Honor. I think
24 that this statute necessarily calls for a
25 case-by-case determination, but I also think

1 that it's reasonable to say that in a case where
2 you have to raise a categorical approach
3 argument to overcome BIA precedent, that an
4 appeal is not realistically available.

5 And the government has -- likes the
6 refrain of pointing out that some non-citizens
7 have appealed in similar cases. And I just --
8 it's important to point out that the --
9 administrative records are generally not public,
10 but every case they cite in their brief and in
11 Leocal, at least at the appellate level, those
12 individuals were represented.

13 As the National Immigration Project
14 points out, 88 percent of individuals before the
15 BIA are represented. That -- they're, by
16 definition, not the ordinary non-citizen. And
17 the question for availability looks to whether
18 an ordinary non-citizen could appeal in
19 circumstances like this. And we don't think
20 it's meaningfully available in the way --

21 JUSTICE BARRETT: So can you --

22 MR. GARCIA: -- that Ross --

23 JUSTICE BARRETT: -- give me an
24 example of when it would be?

25 MR. GARCIA: Absolutely, Your Honor,

1 even within the context of aggravated
2 felonies -- many of the aggravated felonies are
3 enumerated federal crimes. If the immigration
4 judge says you were convicted of a firearms
5 offense under X statute, absolutely any ordinary
6 non-citizen should be able to say yes or no to
7 that.

8 But, when you're in this opaque and
9 confusing area, and on top of that, the IJ,
10 backed by BIA precedent, is misrepresenting the
11 law to you, I don't think it is a practical and
12 reasonable approach to this statute to say that
13 an appeal was available to an ordinary
14 non-citizen.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, Mr. Garcia.

18 MR. GARCIA: Thank you, Mr. Chief
19 Justice.

20 I do want to emphasize again the
21 narrowness of the rule we are proposing, which
22 is at least in a case where it is undisputed
23 that the order is already invalid, that no
24 further challenge to the order is required in a
25 criminal case.

1 That may be a narrow rule, but this is
2 the case the government asked the Court to
3 review, and it's the most extreme possible. And
4 that affects the textual analysis for the
5 reasons I've said, there's no reason for a
6 challenge, and it affects the constitutional
7 analysis. As I said, even *Yakus*, their only
8 case, was careful to note that there was no
9 argument like this in that case.

10 And in light of all of those
11 considerations, when you turn to the text in
12 subsection (d) and ask is this statute actually
13 clear that Congress truly wanted a charge for
14 this particular crime to proceed when everyone
15 agrees the prior order is invalid, we submit the
16 answer has to be no.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Rebuttal, Ms. Ross.

21 REBUTTAL ARGUMENT OF ERICA L. ROSS

22 ON BEHALF OF THE PETITIONER

23 MS. ROSS: Thank you, Mr. Chief

24 Justice. If I could just make three points.

25 The first is that Respondent's lead

1 argument today, his invalidity argument, is
2 entirely circular. Of course, he's challenging
3 the validity of his prior removal order by
4 claiming that it is, in fact, invalid. Indeed,
5 Respondent acknowledged that at every prior
6 stage of the proceedings before the red brief,
7 and that's because, in plain English, what
8 Respondent seeks to do is challenge the validity
9 of his prior removal order.

10 His argument also puts the cart before
11 the horse. It's impossible to know whether he's
12 challenging the validity of a removal order
13 until you determine whether that removal order
14 was on his view valid.

15 As my friend's comments to Justice
16 Alito indicate, his -- his theory, I think, is
17 much broader than he suggests, because his whole
18 legal theory is that the law has always meant
19 the same thing. But, if that's true, of course,
20 you would have to engage in the analysis
21 regardless of whether a court had already
22 invalidated or -- or held that a particular
23 crime doesn't qualify as an aggravated felony.

24 On the second argument that Respondent
25 made today, the availability point, I think it's

1 key that there too the argument is nowhere as
2 narrow as Respondent suggests because his view
3 is that because the administrative scheme is
4 opaque, as he responded to Justice Kagan, the --
5 an alien or non-citizen in his position could
6 never seek review. And -- and, therefore, it
7 drives just a huge hole in Section 1326(d) where
8 I think Congress was very clear with respect to
9 when it wanted collateral challenges to proceed.

10 Third, with respect to fairness and
11 constitutionality, our only case is not Yakus.
12 I would say our primary case is Mendoza-Lopez,
13 which held, of course, that there is a
14 constitutional problem if an individual had no
15 prior opportunity for judicial review, and
16 Congress responded to that, not by creating
17 validity as an element of the offense, as
18 Respondent claims, but instead by creating a
19 narrow affirmative defense in which Respondent
20 must meet (d)(1), (2), and (3). His primary
21 argument, of course, today attempts to just
22 avoid meeting (d)(1) and (2) entirely.

23 We think the solution that this Court
24 adopted in Mendoza-Lopez and Congress then
25 codified in Section 1326(d) to the potential

1 constitutional problem itself cannot be
2 unconstitutional.

3 On top of what's constitutionally
4 required by Mendoza-Lopez and what Congress
5 provided in Section 1326(d), we've talked this
6 morning about a number of other methods for
7 obtaining relief and avoiding an unlawful
8 reentry charge.

9 I agree that those are -- are not an
10 answer or are not aimed necessarily at the due
11 process issue, but I think they provide above
12 and beyond what this Court required in
13 Mendoza-Lopez. And as I've already explained
14 this morning, I think Respondent is incorrect
15 with respect to the time bar. There are a
16 variety of ways in which that could have been
17 avoided.

18 At bottom, I think this is a case
19 about the rule of law. Respondent had a variety
20 of options both at the time of the initial
21 proceeding and subsequently to challenge his
22 removal order. Congress reasonably determined
23 that he couldn't take the law into his own
24 hands.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.
3 (Whereupon, at 12:33 p.m., the case
4 was submitted.)
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Official - Subject to Final Review

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