No. 20-437

In the
Supreme Court of the United States

UNITED STATES,
Petitioner,
v.

REFUGIO PALOMAR-SANTIAGO,
Respondent.

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

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS

CHRISTOPHER J. HAJEC
Counsel of Record
GINA M. D'ANDREA
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae

MARCH 1, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years, the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") provides a limited opportunity for aliens charged with unlawful reentry after removal collaterally to attack their original removal order. Congress enacted Section 1326(d) to codify this Court's opinion in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), which permitted a collateral attack in cases where the original proceeding may have suffered from due process defects.

The court below has unlawfully expanded the scope of *Mendoza-Lopez* and Section 1326(d). The circuit precedents it relied on permit an alien to avoid proving

---

[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

two of the elements required in § 1326(d) if the alien establishes that the crime he was originally removed for would not be a removable offense under current law. This rule impermissibly turns a due process remedy into a new opportunity to challenge removal in contravention of basic rules of statutory interpretation, the clear intent of Congress to codify this Court's limited holding in *Mendoza-Lopez*, and the established principle that subsequent changes in law do not work a retroactive due process violation.

ARGUMENT

I. NINTH CIRCUIT PRECEDENTS CONFLICT WITH THE INA.

The right to collateral attack of a prior deportation order is a limited mechanism by which aliens may challenge the validity of their original removal hearing as an affirmative defense to the charge of unlawful reentry after removal. The INA provides:

> 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.

8 U.S.C. § 1326(d). The provision was enacted by Congress as a result of this Court's holding that permitted such collateral attack only as a remedy for an unfair or procedurally deficient removal proceeding. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987) (explaining 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 alien to obtain judicial review").

Despite the clear limits of this Court's holding and the plain language of § 1326, the Ninth Circuit has expanded the scope of this provision to permit collateral attacks without a showing of procedural errors. In *United States v. Camacho-Lopez*, 450 F.3d 928 (9th Cir. 2006), the Ninth Circuit held that because the defendant's underlying crime was no longer considered an aggravated felony, "he was removed when he should not have been and clearly suffered prejudice." *Id.* The court thereby waived the requirements that an alien also show exhaustion of administrative remedies and deprivation of judicial review for cases where subsequent changes in the law no longer render the underlying crime of conviction a removable offense. Thus, an alien who "was not convicted of an offense that made him removable under the INA to begin with . . . is excused from proving the first two requirements." *United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir.). With these cases, the Ninth Circuit created its own version of collateral attack that

is in direct conflict with the INA and the remaining circuit courts.

A. The plain language of § 1326(d) creates mandatory requirements that an alien must establish to assert a right to bring a collateral attack on a prior removal proceeding.

Section 1326(d) is a due process remedy that provides a limited right of collateral attack in unlawful reentry cases. An alien charged with unlawful reentry after removal under 8 U.S.C. § 1326(a) may bring a collateral attack on the underlying removal proceeding if "(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." 8 U.S.C. § 1326(d) (emphasis added). The plain meaning of the statute is that a showing of all three listed elements is required.

Settled principles of statutory construction provide that the language, design, and structure of a statute are instructive about its meaning. *See Abramski v. United States*, 573 U.S. 169, 179 (2014) (statutory analysis requires "reference to the statutory context, structure, history, and purpose"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (explaining that "the language

and design of the statute as a whole" act as an interpretive guide). Wherever possible, courts should "give effect . . . to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal citations omitted).

The language and structure of § 1326(d) are clearly conjunctive. The three listed elements that an alien must show to assert a collateral attack are connected by the word "and." This language choice and statutory structure are generally understood to mean that Congress intended that all elements must be proven. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 13 n.1 (1980) (explaining that "a natural reading of the conjunctive 'and' in § 1983 would require that the right at issue be secured by both the Constitution and by the laws."); *Adams v. Catrambone*, 359 F.3d 858, 864 (7th Cir. 2004) (finding that "the conjunctive language in the statute requires that all three prongs be met."); *Miss. Coast Marine v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981) ("The exemption criteria are conjunctive . . . and in order to qualify . . . both conditions must be met"). *See also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116 (2012) ("Under the conjunctive/disjunctive canon, and combines items while or creates alternatives."). Thus, simply because the statutory elements here are connected by the term "and," they are all mandatory for a collateral attack.

Furthermore, several other circuit courts have addressed § 1326(d) and have all come to the conclusion that because its elements are in fact conjunctive, they must all be proven to challenge the underlying

removal. *See United States v. Soto-Mateo*, 799 F.3d 117, 120 (1st Cir. 2015) ("The elements of section 1326(d) are conjunctive, and an appellant must satisfy all of those elements in order to prevail on a collateral challenge to his removal order."); *United States v. Fernandez-Antonia*, 278 F.3d 150, 157 (2d Cir. 2002) ("The requirements are conjunctive, and thus Fernandez-Antonia must establish all three in order to succeed in his challenge to his removal order."); *United States v. Wilson*, 316 F.3d 506, 509 (4th Cir. 2003) ("These requirements are listed in the conjunctive, so a defendant must satisfy all three in order to prevail."); *United States v. Martinez-Rocha*, 337 F.3d 566, 568 (6th Cir. 2003) ("But a defendant charged with unlawfully reentering the United States after having been ordered deported may not challenge the validity of the underlying deportation order unless three statutory conditions are satisfied."); *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005), cert. denied, 547 U.S. 1114 (2006) ("Because Rivera-Nevarez fails to demonstrate that the statutory requirements for a collateral attack are satisfied, this court concludes that he cannot challenge his removal in this criminal prosecution."); *United States v. Watkins*, 880 F. 3d 1221 (11th Cir. 2018) (per curiam) ("To collaterally attack or challenge the validity of her underlying deportation order, Watkins must show all three of the . . . requirements."). In these courts, because all three elements are required, failure of any single element is fatal to the attempted collateral attack and ends the court's inquiry into the underlying proceedings. *United States v. Parrales-Guzman*, 922 F.3d 706, 707 (5th Cir. 2019) ("If the alien fails to satisfy any one of these prongs, then the court need not

consider the other prongs."). Therefore, by ignoring the plain language requirements of § 1326(d), the Ninth Circuit has, in effect, established its own rules of collateral attack that conflict with the INA.

In fact, a judge of the Ninth Circuit has acknowledged as much, contending that the approach of the Ninth Circuit is incorrect and should be overturned. *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017) (Graber, C.J., concurring). Circuit Judge Graber explained that Ninth Circuit "law with respect to the scope of collateral challenges . . . has strayed increasingly far from the statutory text and [is] out of step with our sister circuits' *correct interpretation*." (emphasis added). *Id*. at 1018. Circuit Judge Graber further explained that "[I]n [s]ection 1326(d)[,] . . . by using the conjunction 'and,' Congress signified that the alien must establish that all three conditions are met." *Id*. at 1019. For this basic reason, it is evident that the Ninth Circuit's approach is in clear and direct conflict with the plain language of the INA and should be reversed.

Additionally, the restrictive language used by Congress in the provision indicates that there is no right of collateral attack in unlawful reentry cases without satisfaction of the enumerated requirements. Beginning with the use of the term "limitation" in the title, the structure and language make clear that Congress was creating mandatory elements for a narrow remedy to due process problems in removal proceedings. 8 U.S.C. § 1326(d) ("Limitation on collateral attack on underlying deportation order"). The provision continues that an alien charged with

unlawful reentry "*may not* challenge the validity of the [underlying] deportation order . . . *unless"* he can prove the three listed elements. *Id*. (emphases added). Where the language of the statute is clear, the court has no choice but to apply it as written. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (explaining that Congress "says in a statute what it means and means in a statute what it says there"); *Dodd v. United States*, 545 U.S. 353, 354 (2005) ("This Court presumes that a legislature says what it means and means what it says in a statute."); *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."). The language used reflects the clear intent of Congress to create a limited due process remedy and not a general right of collateral attack.

The Ninth Circuit has taken it upon itself to ignore these plain language requirements of § 1326(d), along with the purpose both of Congress and this Court's precedent (see below), by essentially rewriting the statute to create its own set of rules for collateral attack. Because the plain language of § 1326(d) requires a sufficient showing of all three elements, it is "the sole function of the courts . . . to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

B. Legislative history supports overturning the Ninth Circuit's approach to collateral attacks.

When Congress originally enacted § 1326, it did not provide any opportunity for collateral attack. *See* 8 U.S.C. § 1326 (1952 ed.) (as enacted June 27, 1952,

§ 276, 66 Stat. 229). *See also United States v. Adame-Orozco*, 607 F.3d 647, 654 (10th Cir. 2010) ("Prior to the enactment of § 1326(d) the *validity* of the BIA's administrative deportation order was not essential to a conviction under § 1326(a)") (emphasis in original). In 1987, this Court resolved a split among the circuit courts by holding that "[d]ue process requires that a collateral challenge to the use of a deportation proceeding as an element of a criminal offense be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review." *Mendoza-Lopez*, 481 U.S. at 830. Congress later enacted Section 1326(d) to reflect the premise that absent "a complete deprivation of judicial review," there is no right to collateral attack. *Id.* at 840. *See also* 139 Cong. Rec. 18695 (1993) (statement of Sen. Dole) ("This language . . . is intended to ensure that minimum due process was followed in the original deportation proceeding while preventing wholesale, time-consuming attacks on underlying deportation orders.").

As then-Circuit Judge Gorsuch explained, "[t]he statute's genesis was thus all about ensuring some form of judicial review of the administrative deportation proceedings—not the underlying criminal conviction for which other avenues of judicial review had already long existed." *Adame-Orozco*, 607 F.3d at 654. Where, as here, Congress is acting in response to a decision of this Court, it is safe to assume that, unless explicitly stating otherwise, the legislation enacted reflects the meaning and intent of the opinion on which it is based. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (explaining that Congress

"presumably knows and adopts the cluster of ideas that were attached . . . and the meaning its use will convey to the judicial mind unless otherwise instructed."); *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("Our conclusion rests on a long-standing interpretive principle: When a statutory term is obviously transplanted from another legal source, it brings the old soil with it.") (internal citations omitted). The Ninth Circuit ignored this principle by unilaterally expanding the use of § 1326(d).

II. NINTH CIRCUIT PRECEDENTS CONFLICT WITH THE ACCEPTED UNDERSTANDING OF FUNDAMENTAL FAIRNESS AND USURP CONGRESS'S AUTHORITY OVER IMMIGRATION.

The precedents relied on in the opinion below contain another error that this court must rectify. The Ninth Circuit has created its own definition of fundamental fairness and created a new immigration right by allowing changes in subsequent law to control the validity of the original proceeding. That court has thus exceeded the bounds of its authority and encroached on Congress's plenary power to determine immigration rules and procedures.

Fundamental unfairness is generally understood to indicate a due process violation. *See, e.g., United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 (9th Cir. 2004) ("The entry of a removal order is fundamentally unfair if the deportation proceedings violated the defendant's due process rights and that violation prejudices the defendant."); *United States v. Rodriguez*, 420 F.3d 831, 833 (8th Cir. 2005) ("We have recognized

subsection (d) as a codification of *United States v. Mendoza-Lopez*, which established due process requirements for the application of § 1326."); *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002) (explaining that fundamental fairness is a "question of procedure."). A due process violation that resulted in actual prejudice to the alien would render the underlying proceeding fundamentally unfair. *See, e.g., United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995) ("[A]n error cannot render a proceeding fundamentally unfair unless that error resulted in prejudice."). Thus, an alien must show not only that there was a procedural error in the underlying removal proceeding but also that the error was significant enough to cause actual prejudice. *See United States v. Lopez-Collazo*, 824 F.3d 453, 462 (4th Cir. 2016) (emphasis in original) ("To establish fundamental unfairness under § 1326(d), a defendant must show that he suffered actual prejudice as a result of the due process violations in the removal proceedings."). Nonetheless, the Ninth Circuit has unilaterally removed the requirement of a fundamentally unfair, prejudicial procedural error by allowing aliens such as Respondent to attack collaterally a proceeding in which no due process violations were even alleged.

Furthermore, subsequent changes in the applicable law that render the underlying crime of removal a nonremovable offense are not sufficient evidence of fundamental unfairness. *See Reynoldsville Casket v. Hyde*, 514 U.S. 749, 758 (1995) ("New legal principles, even when applied retroactively, do not apply to cases already closed."). Aliens whose removal hearings are fairly conducted according to the current law of the

time cannot be said to suffer from actual prejudice as the result of a due process violation and therefore cannot challenge the underlying deportation order. *See, e.g., Pena-Muriel v. Gonzalez*, 489 F.3d 438, 443 (1st Cir. 2007) ("Due process does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country."); *Galvan-Escobar v. Gonzalez*, 151 F. App'x 327, 329-330 (5th Cir. 2005) (explaining that there was "no reason to retroactively apply the new interpretation of the statutory language" because "by all accounts in the record [the removal proceedings] were fairly conducted under the state law at the time."); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 674-75 (5th Cir. 2003) (stating that the BIA declined an alien's motion to reopen, "reason[ing] that, at the time [the alien]'s final order of removal was issued, his DWI conviction was considered to be an aggravated felony."). This is especially true where the alien could have pursued further judicial review but failed to do so. *See Ovalles v. Holder*, 577 F.3d 288, 299 (5th Cir. 2009) ("The fact that the law changed . . . does not mean that he was denied due process . . . especially when he concededly did not request reopening within the specified allowed time even as calculated from the time the law changed."). In this way, too, the Ninth Circuit failed to understand that collateral attack is simply not available without a showing of a prejudicial due process violation that caused the underlying proceeding to be fundamentally unfair.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

CHRISTOPHER J. HAJEC
Counsel of Record
GINA M. D'ANDREA
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae

March 1, 2021