

US Supreme Court**Case:** *U.S. v. Palomar-Santiago*, 593 U.S. ____ (2021)**Date:** May 24, 2021**Votes:** Unanimous**Opinion:** Sotomayor**Tags:** Immigration, removal, unlawful reentry, aggravated felony, removal order, collateral challenge, administrative remedies, judicial review**Question(s) Presented:** If a noncitizen can demonstrate that a principal removal order was fundamentally unfair when issued, is he excused from having to meet the administrative exhaustion and judicial review prongs of 8 U.S.C. § 1326(d)?**Holdings:** Reversed and remanded. No, not excused; noncitizens must meet all three prongs of 8 U.S.C. § 1326(d):

1. Administrative exhaustion;
2. Show lack of opportunity for judicial review; AND
3. Demonstrate fundamental unfairness of principal removal order.

[Note that this decision overrules *U.S. v. Ochoa*, 861 F. 3d 1010 (9th Cir. 2017)]

Rationale: Conjunctive construction indicates that Congress intended all three prongs to be met.**Facts:**

- **1998:** Mexican national Respondent removed based on felony DUI conviction.
- **2004: *Leocal v. Ashcroft* (US)** – “aggravated felony” required a higher *mens rea* than neglect or accident (as with a DUI)
- **[Reentry]**
- **2017:** Indictment for unlawful reentry after removal.

Procedural History:

- **2017: District Court**—granted motion to dismiss case based on invalid prior removal order.
- **2020: 9th Circuit**—affirmed

Appeals to Statute & Precedent:

- **8 U.S.C. § 1326(a):** unlawful reentry after removal
- **8 U.S.C. § 1326(d):** three prongs must be satisfied in collateral attack on principal removal order: (1) administrative exhaustion; (b) lack of judicial review; (c) fundamentally unfair order. [Enacted in 1996 as part of AEDPA]
- **8 U.S.C. § 1227(a)(2)(A)(iii):** removal for aggravated felony
- **8 U.S.C. § 1101(a)(43)(F):** aggravated felony includes crimes of violence for which imprisonment is at least one year.

- **18 U.S.C. § 16(a)**: crime of violence = “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”
- ***U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987)**: pre-§1326(d)—collateral challenge of principal removal order permitted where deportation proceeding effectively eliminates the right of the noncitizen to obtain judicial review.
- ***U.S. v. Ochoa*, 861 F. 3d 1010 (9th Cir. 2017)**: Precedent binding on 9th Circuit at the time: Respondents are excused from satisfying first two prongs if third is satisfied (they were not convicted of an offense that made them removable). Circuit split on this. **Now overruled.**
- ***Ross v. Blake*, 578 U.S. 632, 639 (2016)**: “When Congress uses ‘mandatory language’ in an administrative exhaustion provision, ‘a court may not excuse a failure to exhaust.’” (Slip op. at *5). Context of prisoner appeals—gives some latitude for the “real-world workings of prison grievance systems,” which may prevent administrative appeals from happening.

Respondent’s Arguments (*inter alia*):

- Includes a reference to *Ross v. Blake* and the realities affecting the practical availability of administrative appeals—here, the immigrant could not be expected to know that the IJ’s decision was wrong, so why would they appeal to the BIA?
 - Response: “The IJ’s error on the merits does not excuse the noncitizen’s failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error.” (Slip op. at *6)

Discussion:

- “The requirements are connected by the conjunctive ‘and,’ meaning defendants must meet all three.” (Slip op at *5)
- “Indeed, the substantive validity of the removal order is quite distinct from whether the noncitizen exhausted his administrative remedies (by appealing the immigration judge’s decision to the BIA) or was deprived of the opportunity for judicial review (by filing a petition for review of a BIA decision with a Federal Court of Appeals).” (Slip op. at *5)