

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2025

No. 24-3086-cr

UNITED STATES OF AMERICA,
Appellant,

v.

MANUEL ZUMBA MEJIA,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of New York

ARGUED: FEBRUARY 10, 2026

DECIDED: APRIL 9, 2026

Before: CABRANES, SULLIVAN, *Circuit Judges*, and GONZALEZ, *District Judge*.*

* Judge Hector Gonzalez, of the United States District Court for the Eastern District of New York, sitting by designation.

1

2 The United States of America appeals from an October 29, 2024
3 order of the United States District Court for the Southern District of
4 New York (Vincent L. Briccetti, *Judge*) granting Defendant-Appellee
5 Manuel Zumba Mejia’s motion to dismiss a criminal information. The
6 Government filed a timely notice of appeal on November 25, 2024,
7 invoking this Court’s jurisdiction pursuant to 18 U.S.C. § 3731.

8 The Government charged Mejia by complaint with aggravated
9 illegal reentry, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). Section
10 1326(d), in turn, provides that a defendant charged with illegal reentry
11 “may not challenge the validity of” his prior deportation order
12 “unless” that defendant satisfies three statutory requirements. Relying
13 on the law of the Circuit established in *United States v. Sosa*, 387 F.3d
14 131 (2d. Cir. 2004), the District Court first held that Mejia’s original
15 deportation proceeding was fundamentally unfair under § 1326(d)(3)
16 because the immigration judge misled him in violation of due process
17 by incorrectly stating he was ineligible for voluntary departure. The
18 District Court then concluded that Mejia had effectively satisfied
19 §§ 1326(d)(1) and (2) because his failure to appeal resulted from the
20 immigration judge’s misleading statements, rendering his waiver of
21 appeal not knowing and intelligent.

22 The Supreme Court has settled this matter otherwise, holding
23 unanimously in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021),
24 that § 1326(d)’s requirements are “mandatory,” and that “a court may
25 not excuse a failure to exhaust,” *id.* at 326, 329. This holding squarely
26 abrogates our prior rule under *Sosa* and its progeny, which had

1 permitted defendants to bypass § 1326(d)'s exhaustion and
2 deprivation-of-judicial-review requirements. Bound as we are by the
3 judgments of the Supreme Court, we hold that Mejia was barred from
4 collaterally challenging his underlying removal order because he
5 failed to satisfy those requirements, and the statute does not permit a
6 court to excuse that failure.

7 Accordingly, we **REVERSE** the district court's order granting
8 Mejia's motion to dismiss and **REMAND** for further proceedings
9 consistent with this opinion.

10 _____
11 MICHAEL D. MAIMIN (Jorja N.
12 Knauer, *on the brief*), Assistant
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14 CLAYTON, United States
15 Attorney for the Southern
16 District of New York, *Appellant*.

17 SARAH BAUMGARTEL, Federal
18 Defenders of New York, Inc.
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20 *Appellee*.

21 _____
22 JOSÉ A. CABRANES, *Circuit Judge*:

23 The Reentry of Removed Aliens Act, codified at 8 U.S.C. § 1326,
24 makes it a felony for a noncitizen who has been previously deported

1 to reenter the United States without authorization. To secure a
2 conviction, the Government must prove a defendant was previously
3 removed from the country—a fact usually conclusively established by
4 an order of removal from a prior administrative proceeding before an
5 Immigration Judge (“IJ”). A defendant can, however, collaterally
6 attack the validity of the original removal order to rebut the
7 satisfaction of that element. Finally, because the prior removal order
8 serves as an element of the criminal offense, subsection (d) of the
9 statute provides the sole mechanism by which a defendant may
10 collaterally attack its validity in the context of a reentry prosecution.²

11 We recognized in *United States v. Sosa*, 387 F.3d 131 (2d. Cir.
12 2004), a limited exception that excuses a defendant from these
13 requirements when a defendant’s waiver of administrative review was
14 not “knowing and intelligent.”³ Since that decision, the Supreme Court
15 held in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021), that all
16 three requirements set forth in § 1326(d) are mandatory for a
17 defendant to meet before he may collaterally challenge his underlying

² Section 1326(d) provides, in relevant part, that these requirements are:
“(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.”

³ 387 F.3d at 136, 139.

1 removal order, and that no court may excuse a defendant's failure to
2 satisfy any one of them.⁴

3 Today we consider whether the Supreme Court's decision in
4 *Palomar-Santiago* abrogates our prior interpretation of § 1326(d) in *Sosa*.
5 We hold that it does. The conflict between *Sosa* and *Palomar-Santiago* is
6 irreconcilable: *Sosa* held that courts may excuse a failure to exhaust;
7 *Palomar-Santiago* holds that they may not. Our prior rule is therefore
8 abrogated.⁵

9 BACKGROUND

10 In this case, the Government appeals from an October 29, 2024
11 order of the United States District Court for the Southern District of
12 New York (Vincent L. Briccetti, *Judge*) applying *Sosa* and granting
13 Defendant-Appellee Manuel Zumba Mejia's motion to dismiss.

14 Mejia, a native and citizen of Ecuador, entered the United States
15 without lawful authority around 1999. In 2009, he was arrested for
16 shaking his infant daughter and pleaded guilty to reckless assault of a
17 child under N.Y. Penal Law § 120.02, for which he was sentenced to
18 three years imprisonment.

⁴ 593 U.S. at 328–29.

⁵ The Ninth Circuit reached the same conclusion on nearly identical facts in *United States v. Portillo-Gonzalez*, holding that *Palomar-Santiago* foreclosed a defendant's collateral challenge where the IJ had misinformed him about his eligibility for voluntary departure, and that the analogous line of Ninth Circuit precedent did not survive *Palomar-Santiago*. 80 F.4th 910, 918 (9th Cir. 2023).

1 On September 7, 2010, Mejia appeared before an IJ who advised
2 him of his right to counsel at no government expense and asked
3 whether he wanted time to find a lawyer. Mejia declined. Mejia
4 indicated he wanted “voluntary departure,”⁶ but the IJ told him he
5 was ineligible “because of [his] crime” and, because he was
6 imprisoned, he could not “actually leave whenever [he] would want.”⁷

7 The IJ instead offered Mejia deportation. Mejia responded
8 “[T]hat is what I want, to be deported back to my country. I don’t want
9 to be here.” *Id.* The IJ granted this request. During the proceeding,
10 Mejia confirmed that he understood his right to counsel and to appeal;
11 he also acknowledged that he had received a list of free attorneys, as
12 well as the requisite immigration forms. When asked specifically
13 whether he accepted the decision to be deported or wished to appeal,
14 Mejia responded by accepting the decision and expressly waived his

⁶ “Voluntary departure” is a form of discretionary relief that allows a noncitizen to leave the country voluntarily, without a formal order of deportation. *See Thapa v. Gonzalez*, 460 F.3d 323, 327 (2d Cir. 2006).

⁷ App’x, Dkt. No. 37.1, at A.317 (“A.317”). At the time of Mejia’s 2010 deportation hearing, the IJ correctly advised him that he was ineligible for voluntary departure because his prior conviction for reckless assault of a child constituted a “crime of violence” and therefore an aggravated felony under then-governing law. *See Blake v. Gonzales*, 481 F.3d 152, 162 (2d Cir. 2007); 8 U.S.C. §§ 1101(a)(43)(F), 1229c(a)(1), 1227(a)(2)(A)(iii). That changed when the Supreme Court held in *Borden v. United States*, 593 U.S. 420 (2021), that offenses requiring a *mens rea* of recklessness no longer qualify as crimes of violence under 18 U.S.C. § 924(e)(2)(B)(i), which contains a statutory definition of “violent felonies” that was “relevantly identical” to 18 U.S.C. § 16(a), the applicable definitional statute here, *see* 593 U.S. at 427, 445.

1 right to appeal.⁸ He was removed to Ecuador on September 23, 2011,
2 more than a year after his removal proceeding.

3 About ten years later, Mejia returned to the United States from
4 Ecuador without obtaining the “express[] consent[]” of the Attorney
5 General or the DHS Secretary to reapply for admission.⁹ On October
6 3, 2021, Mejia was arrested in Westchester County, New York for
7 driving while intoxicated. Then, on December 15, 2022, the
8 Government charged Mejia by complaint with aggravated illegal
9 reentry, in violation of 8 U.S.C. § 1326(a) & (b)(2).¹⁰ Based on that
10 complaint, Mejia was arrested on January 5, 2023, and on May 2, 2024,

⁸ The IJ asked Mejia: “Do you accept that decision, or do you wish to appeal it,” after which Mejia responded that he accepted the decision. The IJ then asked again, “You are waiving your right to appeal, correct?” Mejia answered, “Yes.” A.318.

⁹ See n.11, *post*.

¹⁰ Section 1326(a) and (b) provides in relevant part:

(a) ...any alien who— (1) has been . . . removed or has departed the United States while an order of . . . deportation[] or removal is outstanding, and thereafter (2) enters . . . the United States, unless (A) prior to his reembarkation . . . the Attorney General has expressly consented to such alien’s reapplying for admission . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens . . . (2) [any alien] whose removal was subsequent to a conviction for commission of an aggravated felony . . . shall be fined under such title, imprisoned not more than 20 years, or both.

1 he waived indictment and was charged by Information with one
2 count of aggravated illegal reentry. He pleaded not guilty.

3 Mejia moved to dismiss the Information, collaterally
4 challenging his removal order from September 2010.¹¹ He argued that
5 due to an intervening Supreme Court decision of 2021, *Borden v. United*
6 *States*, his 2009 conviction for shaking his infant daughter—to which
7 he had pleaded guilty in 2010—did not qualify as a “crime of
8 violence.”¹² Because that conviction was not a crime of violence, Mejia
9 contended, he actually had been eligible for voluntary departure at the
10 time of his September 2010 removal proceedings, making the IJ’s
11 failure to properly advise him of that eligibility a due process
12 violation.

13 It is undisputed that Mejia failed to exhaust one of the
14 administrative remedies available to him in 2010, namely, an appeal to
15 the Board of Immigration Appeals (“BIA”). *See* 8 U.S.C. § 1326(d)(1).
16 Following his 2010 removal proceeding, Mejia sought no type of

¹¹ In U.S. immigration law, “deportation” historically referred to the expulsion of a noncitizen already present within the United States, while “exclusion” referred to the denial of entry at a port of entry—each governed by distinct legal proceedings. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which consolidated both processes into a single unified framework known as “removal proceedings,” effective April 1, 1997. Accordingly, “removal” is now the controlling legal term encompassing all forms of expulsion, and “deportation” survives primarily as a colloquial reference to one subset of that broader process. *See* Exec. Off. for Immigr. Rev., U.S. Dep’t of Just., Immigr. Ct. Prac. Manual §§ 4.1, 7.2 (2025).

¹² *See Borden*, 593 U.S. at 427, 445; *see also* n.7, *ante*.

1 review, either administrative or judicial, and was removed about one
2 year later, in September 2011.¹³ He argued that his failure to exhaust
3 should be excused because in 2010 the IJ failed to advise him of his
4 eligibility for voluntary departure, rendering his appeal waiver not
5 knowing and intelligent.

6 The Government, in its Opposition to the Defendant's Motion to
7 Dismiss, contended that Mejia's collateral challenge was barred
8 because he clearly failed to satisfy all three mandatory requirements
9 of § 1326(d), and that *Palomar-Santiago* did not allow a court to excuse
10 that failure.¹⁴

11 Relying on the law of the Circuit established in *Sosa*, the District
12 Court granted Mejia's motion due to a fundamental procedural error
13 and accompanying prejudice under § 1326(d)(3). The Court found it
14 undisputed that Mejia had the right to appeal his removal order to the
15 BIA; that the IJ repeatedly advised him of this right; and that Mejia had

¹³ As relevant here, under 8 C.F.R. § 1003.38(b), a Notice of Appeal (Form EOIR-26) must be filed with the BIA within 30 calendar days after the IJ renders an oral decision or mails a written decision. *See also* Exec. Off. for Immigr. Rev., U.S. Dep't of Justice, Bd. of Immigr. Appeals Prac. Manual, ch. 4.5 (Appeal Deadlines). If no appeal is filed within this period, the IJ's decision becomes final. 8 C.F.R. § 1003.39 ("Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken[,] whichever occurs first."). Mejia was not deported until approximately one year after his removal hearing, having remained in state custody with ample opportunity to file a timely appeal within the 30-day window. He chose not to do so.

¹⁴ A.323–25 (citing 593 U.S. 321 (2021)).

1 expressly declined each time. The Court also determined that,
2 following the original removal hearing, nothing had prevented Mejia
3 from pursuing that remedy. Nevertheless, relying on this Circuit's
4 precedent and the exception established in *Sosa*,¹⁵ the Court excused
5 Mejia's failure to appeal because the IJ's advice, based on the IJ's
6 understanding of the law in 2010, rendered Mejia's waiver not
7 "knowing and voluntary," such that Mejia "did not fully comprehend
8 the nature of the proceeding."¹⁶

9 In reaching this conclusion, the District Court rejected the
10 Government's primary argument that *Palomar-Santiago* abrogated *Sosa*
11 and its progeny. The Court instead reasoned that *Palomar-Santiago* was
12 "a purely statutory decision" that declined to reach constitutional
13 arguments.¹⁷ According to the District Court, nothing in *Palomar-*
14 *Santiago* vitiated the requirement "for an exception to [§ 1326(d)'s]
15 exhaustion requirement if a prior proceeding violated due process
16 guarantees."¹⁸

17 The Government timely appealed.

¹⁵ 387 F.3d at 136 ("[T]he exhaustion requirement must be excused where an alien's failure to exhaust results from an invalid waiver of the right to an administrative appeal.").

¹⁶ See *United States v. Mejia*, 2024 WL 4604644, at *8 (S.D.N.Y. Oct. 29, 2024) (citing *Sosa*, 387 F.3d at 136–37; *United States v. Calderon*, 391 F.3d 370, 375 (2d Cir. 2004)).

¹⁷ *Mejia*, 2024 WL 4604644, at *8.

¹⁸ *Id.*

DISCUSSION

1
2 Titled “Reentry of Removed Aliens,” 8 U.S.C. § 1326 was
3 initially enacted as part of the Immigration and Nationality Act of
4 1952,¹⁹ which consolidated and codified federal immigration law. In
5 its original form, the statute made it a felony for a deported alien to
6 reenter the United States without authorization, carrying a maximum
7 penalty of two years’ imprisonment. These administrative
8 proceedings under the immigration law naturally offer fewer
9 procedural protections than criminal trials, although their outcomes
10 can serve as the basis for criminal liability. This tension raised due
11 process concerns that the Supreme Court addressed in 1987 in *United*
12 *States v. Mendoza-Lopez*.²⁰ There, the Court held “that where a
13 determination made in an administrative proceeding is to play a
14 critical role in the subsequent imposition of a criminal sanction, there
15 must be some meaningful review of the administrative proceeding.”²¹
16 It further concluded that the statute would not comport with due
17 process if it allowed a criminal conviction for illegal reentry to rest on
18 a deportation order obtained through fundamentally unfair

¹⁹ Pub. L. No. 82-414, 66 Stat. 163.

²⁰ 481 U.S. 828, 829 (1987) (“Due 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.”).

²¹ *Id.* at 837–38.

1 proceedings.²² Where defects in the proceeding foreclose such review,
2 a collateral challenge must be permitted in the criminal case itself.

3 Critically, however, *Mendoza-Lopez* mandated only that some
4 alternative means of review must exist. The decision did not detail the
5 minimum due process requirements of such alternative means, nor
6 did it specify a course of action. The basic holding of *Mendoza-Lopez*
7 was merely that a constitutional violation would be found where an IJ
8 permitted waivers of the right to appeal that were not “considered or
9 intelligent” and failed to advise aliens of their eligibility for
10 discretionary relief.²³

11 In 1996, Congress enacted § 1326(d) to codify the Supreme
12 Court’s holding. The statute establishes specific requirements that a
13 defendant must satisfy to mount a collateral attack on a prior
14 deportation order when that order serves as a predicate element of an
15 illegal reentry charge under which the defendant is currently being
16 prosecuted.²⁴ Thus, § 1326(d) permits a collateral challenge to a prior
17 removal order only where the defendant establishes that (1) he had
18 exhausted available administrative remedies; (2) he was deprived of
19 the opportunity for judicial review; and (3) the underlying removal

²² *Id.* at 838.

²³ *Id.* at 838–40.

²⁴ These prerequisites were established to codify the holding in *Mendoza-Lopez*, “while preventing wholesale, time consuming attacks on underlying deportation orders.” 139 Cong. Rec. 18,695 (1993) (statement of Sen. Robert Dole); 140 Cong. Rec. 28,440–41 (1994) (statement of Sen. John Smith).

1 order was fundamentally unfair.²⁵ In enacting this statutory scheme,
2 Congress sought to balance the due process concerns recognized in
3 *Mendoza-Lopez* against the need to prevent defendants from reflexively
4 challenging their deportation orders as a matter of course. Put simply,
5 Congress sought to guarantee each defendant *one* full and fair
6 opportunity to challenge a removal order. But neither *Mendoza-Lopez*
7 nor § 1326 entitles a defendant who neglected the remedies available
8 to him a second opportunity to challenge that order collaterally in a
9 later criminal proceeding.

10 Following the 1996 amendments to § 1326, our Circuit, and
11 others, grappled with what the statute meant in practice. Our response
12 came in *Sosa*, which held that for § 1326(d) to be “consistent” with
13 *Mendoza-Lopez*, “[§ 1326’s] exhaustion requirement must be excused
14 where an alien’s failure to exhaust results from” a
15 “misunderstanding” or “lack of understanding” about the availability
16 of relief.²⁶ Thus, under *Sosa*, an IJ’s failure to advise an alien of
17 available relief excused § 1326(d)(1)’s exhaustion requirement.²⁷ We
18 also recognized that “an invalid waiver of the right to administrative
19 exhaustion will often result from the same lack of understanding that
20 renders a waiver of judicial review invalid.”²⁸ But *Sosa* can be best
21 understood as a statutory interpretation case. We read § 1326(d) to be

²⁵ 8 U.S.C. § 1326(d)(1)–(3).

²⁶ 387 F.3d at 136–37.

²⁷ *Id.* at 137.

²⁸ *Id.* at 136; *see* 8 U.S.C. § 1326(d)(2).

1 consistent with Congress’s purpose in enacting it—namely, to codify
2 *Mendoza-Lopez*.²⁹ That is an exercise in statutory interpretation, not
3 constitutional analysis. And it would not make sense to read *Sosa* as
4 incorporating a constitutional requirement from *Mendoza-Lopez* that
5 *Mendoza-Lopez* itself never articulated.³⁰

6 The same year we decided *Sosa*, we considered two additional
7 cases, *United States v. Copeland*³¹ and *United States v. Calderon*,³² that
8 further explained what was essentially a specific exception to
9 § 1326(d)’s mandatory requirements. Together, *Sosa*, *Copeland*, and
10 *Calderon* concluded that where an IJ failed to advise an alien of a
11 potential basis for discretionary relief from removal, or affirmatively

²⁹ See *United States v. Johnson*, 391 F.3d 67, 73 (2d Cir. 2004) (“Far from being inconsistent with *Mendoza Lopez*, [8 U.S.C. § 1326(d)] is designed to carry out the Supreme Court’s mandate for ensuring due process in any collateral attack on a deportation order.”)

³⁰ To the extent *Sosa* rested on constitutional avoidance, the Supreme Court made clear in *Palomar-Santiago* that the canon of constitutional avoidance has no application where, as here, the statutory text is unambiguous. *Palomar-Santiago*, 593 U.S. at 328–29.

³¹ In *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004), we held that an IJ’s failure to inform an alien of eligibility for § 212(c) relief could constitute a fundamental procedural error, that habeas review must be realistic to satisfy § 1326(d)(2), and that exhaustion could be met through a motion to reopen, *id.* at 75.

³² In *Calderon*, we applied and strengthened *Sosa*’s knowing-and-intelligent-waiver rule, holding that a defendant’s failure to exhaust under § 1326(d)(1) would be excused where the IJ affirmatively misled him about his eligibility for discretionary relief. 391 F.3d at 376.

1 misinformed him, we would excuse compliance with all of § 1326(d)'s
2 requirements.

3 That was the state of the law in this Circuit until 2021, when the
4 Supreme Court rejected an analogous approach by the Ninth Circuit
5 in *Palomar-Santiago*.³³ There, the Court considered whether defendants
6 were excused from satisfying the first two requirements of § 1326(d)
7 where the underlying removal was based on a conviction that did not
8 actually render him removable. Writing for a unanimous Court,
9 Justice Sotomayor explained that they were not, and that “[t]he Ninth
10 Circuit’s interpretation is incompatible with the text of § 1326(d).”³⁴
11 The Court reasoned, in no uncertain terms, that “[w]hen Congress uses
12 mandatory language in an administrative exhaustion provision, a
13 court may not excuse a failure to exhaust.”³⁵ The Court further
14 underscored that § 1326(d)’s requirements are connected by the
15 conjunctive “and,” meaning defendants must meet all three statutory
16 requirements.³⁶ Rejecting any distinction between procedural and
17 substantive errors on the part of the IJ, the Court emphasized that
18 “[a]dministrative review of removal orders exists precisely so

³³ See 593 U.S. at 326–27.

³⁴ *Id.*

³⁵ *Id.* at 326 (internal quotation marks omitted).

³⁶ *Id.*; see also *Portillo-Gonzalez*, 80 F.4th at 917 (“Even assuming *arguendo* that the IJ’s incorrect statement about Portillo-Gonzalez’s eligibility for voluntary departure violated due process and rendered his removal proceedings ‘fundamentally unfair,’ that would not automatically or ‘effectively’ satisfy § 1326(d)’s other two requirements.”).

1 noncitizens can challenge the *substance* of immigration judges’
2 decisions.”³⁷ Accordingly, an “immigration judge’s error on the merits
3 does not excuse the noncitizen’s failure to comply with a mandatory
4 exhaustion requirement if further administrative review, and then
5 judicial review if necessary, could fix that very error.”³⁸ In short, the
6 Court clearly held that “[e]ach of the statutory requirements of
7 § 1326(d) is mandatory”—a conclusion that several of our sister
8 circuits have taken seriously.³⁹

9 Here, it is undisputed that Mejia never appealed his initial
10 removal order to the BIA, notwithstanding the fact that an
11 administrative appeal was “available” to him. He therefore failed to
12 exhaust his administrative remedies as required by § 1326(d)(1). And
13 because the IJ correctly informed Mejia of his right to appeal—which

³⁷ 593 U.S. at 328 (emphasis added).

³⁸ *Id.*; accord *United States v. Flores-Perez*, 1 F.4th 454, 458 (6th Cir. 2021) (explaining that “even if [defendant’s] removal was flawed, that error does not excuse [his] failure to comply with a mandatory exhaustion requirement because administrative review, and then judicial review if necessary, could fix [the] error, if any” (internal quotation marks omitted)).

³⁹ 593 U.S. at 329; see also, e.g., *Portillo-Gonzalez*, 80 F.4th at 917–20; *United States v. Castillo-Martinez*, 16 F.4th 906, 916 (1st Cir. 2021) (“Castillo-Martinez nevertheless argues that if he can show that his counsel was ineffective, we should excuse his failure even where he failed to exhaust his ineffective assistance claim before the BIA. We do not accept his proposition.”); *United States v. Calan-Montiel*, 4 F.4th 496, 498 (7th Cir. 2021) (dicta) (“Effectively, [the defendant] wants us to treat § 1326(d)(3) as the only requirement for a collateral attack on a removal order. But [*Palomar-Santiago*] holds that a[] [defendant] must satisfy all three conditions. Federal courts cannot create equitable exceptions to statutes.”).

1 Mejia expressly waived—he was not “deprived . . . of the opportunity
2 for judicial review” under § 1326(d)(2). Even assuming that the IJ’s
3 erroneous statement about voluntary departure rendered Mejia’s
4 removal proceedings “fundamentally unfair” under § 1326(d)(3), that
5 error did not excuse Mejia’s independent failure to satisfy
6 §§ 1326(d)(1) and (2)—requirements that the statute does not permit a
7 court to excuse.⁴⁰ Put differently, Mejia was required to satisfy all three
8 statutory requirements to qualify for § 1326(d)’s exception; because
9 Mejia failed to do so, “he remains subject to § 1326(d)’s general rule
10 that he ‘may not challenge the validity’ of his predicate removal
11 order.”⁴¹

⁴⁰ *Palomar-Santiago*, 593 U.S. at 325–26; accord *United States v. Nunez*, 140 F.4th 1157, 1165 (9th Cir. 2025) (“[E]ven if [the defendant’s] waiver were not ‘considered and intelligent,’ that alone would not excuse [the defendant’s] failure to exhaust administrative remedies pursuant to § 1326(d)(1).”).

⁴¹ *Portillo-Gonzalez*, 80 F.4th at 917 (quoting 8 U.S.C. § 1326(d)). Mejia contends in the alternative that he should be excused from the administrative-exhaustion requirement because procedural defects in his deportation proceeding meant that “[n]o further administrative review was ‘available’ to [him]” under § 1326(d)(1). Mejia Br. at 42 (emphasis added). But Section 1326(d)(1)’s exhaustion requirement turns on the functional “availab[ility]” of the relevant “administrative remedies” — not a defendant’s subjective understanding of his rights. See *Ross v. Blake*, 578 U.S. 632, 642 (2016) (“[T]he ordinary meaning of the word ‘available’ is ‘capable of use for the accomplishment of a purpose,’ and that which ‘is accessible or may be obtained.’” (internal quotation marks omitted)). Where, as here, a defendant recognizes that an administrative remedy exists—here, the right to appeal—but elects not to pursue that remedy based on a misunderstanding, the remedy is nonetheless “accessible” and “capable of use” to provide relief. See *Mejia*, 2024 WL 4604644, at *7 (noting that the IJ told Mejia about his right to appeal and did not

