No. 19-6588

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS JAVIER PEDROZA-ROCHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the immigration court lacked jurisdiction over petitioner's removal proceedings because the original notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing.

2. Whether the court of appeals correctly determined that petitioner did not exhaust administrative remedies and is therefore precluded from collaterally attacking his removal order under 8 U.S.C. 1326(d)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9[1]) is reported at 933 F.3d 490. The opinion of the district court is not published in the Federal Supplement but is available at 2018 WL 6629649.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2019. The petition for a writ of certiorari was filed on November

[1] Citations in this brief refer to Appendix A of the petition for a writ of certiorari as if it were consecutively paginated with the first page following the cover page of Appendix A as page 1.

6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following indictment in the United States District Court for the Western District of Texas for illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1), petitioner moved to dismiss the indictment. C.A. ROA 19-20, 101-109. The district court granted his motion. Id. at 204-214. The court of appeals reversed and remanded for further proceedings. Pet. App. A1-A9.

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., provides for a removal proceeding before an immigration judge (IJ) to determine whether an alien should be removed from the United States. 8 U.S.C. 1229a(a)(1). IJs "are attorneys whom the Attorney General appoints as administrative judges" to conduct removal proceedings. 8 C.F.R. 1003.10(a). Pursuant to authority vested in him by the INA, see 8 U.S.C. 1103(g), the Attorney General has promulgated regulations "to assist in the expeditious, fair, and proper resolution of matters coming before [IJs]," 8 C.F.R. 1003.12.

The Attorney General's regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document is filed with the Immigration Court." 8 C.F.R. 1003.14(a). Under the regulations, a "[c]harging document means the written instrument which initiates a proceeding before

an [IJ]," such as "a Notice to Appear." 8 C.F.R. 1003.13 (emphasis omitted). The regulations provide that "the Notice to Appear" shall contain "the time, place and date of the initial removal hearing, where practicable." 8 C.F.R. 1003.18(b); 8 C.F.R. 1003.15(b)-(c) (listing the information to be provided to the immigration court in a "Notice to Appear"). The regulations further provide that, "[i]f that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.18(a) ("The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.").

b. The INA independently requires that an alien placed in removal proceedings be served with "written notice" of certain information. 8 U.S.C. 1229(a)(1). Section 1229 refers to that "written notice" as a "'notice to appear.'" Ibid. Under paragraph (1) of Section 1229(a), such written notice must specify, among other things, the "time and place at which the proceedings will be held," and the "consequences under section 1229a(b)(5)" of failing to appear. 8 U.S.C. 1229(a)(1)(G)(i)-(ii). Paragraph (2) of Section 1229(a) provides that, "in the case of any change or postponement in the time and place of [the removal] proceedings," "written notice shall be given" specifying "the new time or place

of the proceedings," and the "consequences under section 1229a(b)(5)" of failing to attend such proceedings. 8 U.S.C. 1229(a)(2)(A).

Section 1229a(b)(5), in turn, provides that "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided * * * , does not attend a proceeding under this section, shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An alien may not be removed in absentia, however, unless the Department of Homeland Security (DHS) "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." Ibid. An order of removal entered in absentia may be rescinded "if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

c. Section 1326(a) of Title 8 generally makes it unlawful for an alien to reenter the United States after having been removed unless he obtains the prior consent of the Attorney General (or the Secretary of Homeland Security). 8 U.S.C. 1326(a); see 6 U.S.C. 202(3)-(4), 557. Under 8 U.S.C. 1326(d), a defendant charged with violating Section 1326 is permitted to collaterally attack the underlying removal order if he satisfies certain prerequisites. See United States v. Mendoza-Lopez, 481 U.S. 828, 837-838 (1987). In particular, the alien must show that (1) he "exhausted any administrative remedies that may have been

available," (2) the "deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," and (3) "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d).

2. Petitioner is a native and citizen of Mexico. C.A. ROA 111. In March 2003, he illegally entered the United States at or near El Paso, Texas, without inspection by an immigration officer. Ibid. Shortly thereafter, petitioner pleaded guilty in Texas state court to burglary of a habitation and was sentenced to ten years of community supervision. Id. at 289-290.

In May 2003, DHS served petitioner with a notice to appear for removal proceedings "on a date to be set at a time to be set." C.A. ROA 111; see id. at 112. The notice to appear charged that petitioner was subject to removal because he was an alien present in the United States without being admitted or paroled. Id. at 111; see 8 U.S.C. 1182(a)(6)(A)(i). DHS filed the notice to appear with the immigration court. C.A. ROA 111.

The immigration court later provided petitioner with a notice of hearing, informing him that it had scheduled his removal hearing for May 27, 2003, at 9 a.m. C.A. ROA 152. Petitioner appeared at that hearing and admitted the allegations in the notice to appear. Id. at 259-260. The IJ found petitioner removable as charged and ordered him removed to Mexico. Id. at 154, 260. The IJ then asked petitioner whether he would like to "appeal [the] decision or accept deportation." Id. at 260. Petitioner waived appeal to the

Board of Immigration Appeals (Board), stating that he "accept[ed] deportation." Ibid.; see id. at 154. DHS removed petitioner from the United States later that day. Id. at 115.

In 2009, petitioner was arrested for drunk driving in El Paso. Pet. App. A3. He was convicted of illegally reentering the United States after removal, in violation of 8 U.S.C. 1326, and sentenced to ten months of imprisonment. C.A. ROA 316-318. In addition, the state court revoked his term of community supervision from his prior burglary offense and sentenced him to two years of imprisonment. Id. at 291. Following his release from custody, DHS reinstated the 2003 removal order, id. at 116, and petitioner was removed to Mexico for a second time, id. at 117.

In 2011, petitioner was again found in the United States. Pet. App. A4. DHS again reinstated the 2003 removal order, C.A. ROA 321, and petitioner was removed to Mexico for a third time, id. at 118-119. In 2015, petitioner was again found in the United States. Pet. App. A4. He was convicted of illegally reentering the United States after removal, in violation of 8 U.S.C. 1326(a), and sentenced to eight months of imprisonment. C.A. ROA 322-323. DHS again reinstated the 2003 removal order, id. at 325, and petitioner was removed to Mexico for a fourth time, id. at 120-121.

3. In 2017, petitioner was arrested for assault in El Paso. Pet. App. A4; see C.A. ROA 326-328. A federal grand jury in the Western District of Texas indicted him on one count of illegally

reentering the United States after removal, in violation of 8 U.S.C. 1326(a) and (b)(1). C.A. ROA 19-20.

The district court granted petitioner's motion to dismiss the indictment, on the theory that "the immigration court lacked subject matter jurisdiction to issue the original and each subsequent removal order." C.A. ROA 206; see id. at 204-214. The district court stated that, under the relevant regulations, "[j]urisdiction vests" in the immigration court only "when a charging document" -- here, a notice to appear -- "is filed." Id. at 207 (quoting 8 C.F.R. 1003.14(a)) (emphasis omitted; brackets in original). The district court further stated that, under this Court's decision in Pereira v. Sessions, 138 S. Ct. 2105 (2018), a notice to appear is not a "valid charging document" unless it "inform[s] a noncitizen when and where to appear for removal proceedings." C.A. ROA 208. The district court took the view that, because petitioner was served with a notice to appear that lacked a specific date and time, jurisdiction never vested in the immigration court, id. at 210, and petitioner was never validly removed, id. at 212. And the district court concluded that petitioner satisfied the requirements for collaterally attacking a removal order under Section 1326(d). Id. at 213.

4. The court of appeals reversed and remanded for further proceedings. Pet. App. A1-A9.

The court of appeals noted that, during the pendency of the appeal, DHS had removed petitioner to Mexico. Pet. App. A4. The

court determined, however, that petitioner's removal did not moot the case. Id. at A4-A6. Relying on this Court's decision in United States v. Villamonte-Marquez, 462 U.S. 579 (1983), the court of appeals explained that "a live controversy persists" because if the court were to dismiss the appeal and petitioner were to return to the United States, the government would "be required to once again present evidence to a grand jury and procure another indictment." Pet. App. A6.

Turning to the merits, the court of appeals determined that the district court erred in dismissing the indictment. Pet. App. A7-A9. Relying on its prior decision in Pierre-Paul v. Barr, 930 F.3d 684 (5th Cir. 2019), petition for cert. pending, No. 19-779 (filed Dec. 16, 2019), the court explained that the omission of date-and-time information in the notice to appear filed with the immigration court did not deprive that court of jurisdiction over petitioner's removal proceedings, for three independent reasons. First, the notice to appear "was not defective under Pereira, despite its failure to include date-and-time information." Pet. App. A8. Second, petitioner was "served with a subsequent notice of hearing that did include a date and time" and thus "cured" any "alleged defect" in the notice to appear. Ibid. Third, the relevant regulation, 8 C.F.R. 1003.14, is "not jurisdictional," and petitioner "waived" any defect in the notice to appear by "fail[ing] to raise it in the underlying [removal] proceeding." Pet. App. A9.

The court of appeals also determined that "the district court should have denied the motion to dismiss the indictment because 8 U.S.C. § 1326(d) bars [petitioner's] collateral attack on the validity of his removal order." Pet. App. A9. The court of appeals explained that Section 1326(d)(1) requires an alien to show "that he 'exhausted any administrative remedies that may have been available to seek relief against the [removal] order.'" Ibid. (citation omitted). The court rejected petitioner's contention that Section 1326(d)(1) "poses no bar" because "the IJ who issued the [removal] order lacked jurisdiction." Ibid. And the court found that petitioner "failed to exhaust all administrative remedies" because he "did not file an appeal with the Board," "[d]espite having been advised of his right to appeal by the IJ." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-8) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court, and the outcome of this case would not be different in any other court of appeals that has addressed that issue. The Court has recently denied petitions for writs of certiorari raising the same issue, see Karingithi v. Barr, No. 19-475 (Feb. 24, 2020); Kadria v. Barr, No. 19-534 (Jan. 27,

2020); Banegas Gomez v. Barr, No. 19-510 (Jan. 27, 2020); Perez-Cazun v. Barr, No. 19-358 (Jan. 13, 2020); Deocampo v. Barr, No. 19-44 (Jan. 13, 2020), and the same result is warranted here.[2] Petitioner also contends (Pet. 12-16) that the court of appeals erred in determining that 8 U.S.C. 1326(d)(1) bars him from collaterally attacking his removal order because he did not exhaust administrative remedies. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for addressing either question presented because the court of appeals' decision is interlocutory and neither question alone is outcome-determinative. Further review is unwarranted.

1. Petitioner's contention (Pet. 5-8) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court lacked a specific date and time of his initial removal hearing does not warrant this Court's review.

a. The court of appeals correctly rejected petitioner's jurisdictional challenge, for three independent reasons. Pet.

[2] Other pending petitions for writs of certiorari raise similar issues. See, e.g., Pierre-Paul v. Barr, No. 19-779 (filed Dec. 16, 2019); Callejas Rivera v. United States, No. 19-7052 (filed Dec. 19, 2019); Araujo Buleje v. Barr, No. 19-908 (filed Jan. 17, 2020); Mora-Galindo v. United States, No. 19-7410 (filed Jan. 21, 2020); Gonzalez-De Leon v. Barr, No. 19-940 (filed Jan. 22, 2020); Nkomo v. Barr, No. 19-957 (Jan. 28, 2020); Ferreira v. Barr, No. 19-1044 (filed Feb. 18, 2020); Ramos v. Barr, No. 19-1048 (filed Feb. 20, 2020).

App. A7-A9. First, a notice to appear need not specify the date and time of the initial removal hearing in order for "[j]urisdiction" to "vest[]" under the pertinent regulations, 8 C.F.R. 1003.14(a). Pet. App. A8. The regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document is filed with the Immigration Court." 8 C.F.R. 1003.14(a). A "[c]harging document means the written instrument which initiates a proceeding before an [IJ]," such as "a Notice to Appear." 8 C.F.R. 1003.13 (emphasis omitted). And the regulations make clear that, in order to serve as a charging document that commences removal proceedings, a "Notice to Appear" need not specify the date and time of the initial removal hearing: the regulations specifically provide that "the Notice to Appear" shall contain "the time, place and date of the initial removal hearing" only "where practicable." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.15(b)-(c) (omitting date-and-time information from the list of information to be provided to the immigration court in a "Notice to Appear").

Far from depriving the immigration court of jurisdiction when a "Notice to Appear" filed by DHS in the immigration court does not contain "the time, place and date of the initial removal hearing," the regulations expressly authorize the immigration court to schedule the hearing and to provide "notice to the government and the alien of the time, place, and date of [the] hearing." 8 C.F.R. 1003.18(b). That provision for the immigration

court to schedule a hearing necessarily presupposes that the immigration court has jurisdiction and proceedings have commenced. Thus, a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ." Karingithi v. Whitaker, 913 F.3d 1158, 1160 (9th Cir. 2019), cert. denied, No. 19-475 (Feb. 24, 2020); see Matter of Bermudez-Cota, 27 I. & N. Dec. 441, 445 (B.I.A. 2018) (explaining that 8 C.F.R. 1003.14(a) "does not specify what information must be contained in a 'charging document' at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest").

Second, even if the notice to appear alone did not suffice to "vest[]" "[j]urisdiction" in the immigration court, 8 C.F.R. 1003.14(a), the notice to appear together with the subsequent notice of hearing did. Pet. App. A8. As noted, the regulations expressly authorize the immigration court to "provid[e] notice to the government and the alien of the time, place, and date of hearing" when "that information is not contained in the Notice to Appear." 8 C.F.R. 1003.18(b). That is what the immigration court did here: it provided petitioner with a notice of hearing informing him that his initial removal hearing had been scheduled for May 27, 2003, at 9 a.m. C.A. ROA 152. Thus, even if the regulations required notice of the date and time of the hearing for "[j]urisdiction" to "vest[]," 8 C.F.R. 1003.14(a), that

requirement was satisfied when petitioner was provided with a notice of hearing containing that information. See Bermudez-Cota, 27 I. & N. Dec. at 447 ("Because the [alien] received proper notice of the time and place of his proceeding when he received the notice of hearing, his notice to appear was not defective.").

Third, any requirement that the notice to appear contain the date and time of the initial removal hearing is not a "jurisdictional" requirement, but rather is simply a "claim-processing rule"; accordingly, petitioner forfeited any objection to the contents of the notice to appear by not raising that issue before the IJ. Ortiz-Santiago v. Barr, 924 F.3d 956, 963 (7th Cir. 2019); see Pet. App. A8-A9. Although 8 C.F.R. 1003.14(a) uses the word "[j]urisdiction," this Court has recognized that "[j]urisdiction" is "a word of many, too many, meanings." Fort Bend County v. Davis, 139 S. Ct. 1843, 1848 (2019) (citation omitted). And here, context makes clear that Section 1003.14(a) does not use the term in its strict sense. See Matter of Rosales Vargas & Rosales Rosales, 27 I. & N. Dec. 745, 753 (B.I.A. 2020) (explaining that Section 1003.14(a) is "an internal docketing or claim-processing rule and does not serve to limit subject matter jurisdiction"). As 8 C.F.R. 1003.12 confirms, the Attorney General promulgated Section 1003.14(a) "to assist in the expeditious, fair, and proper resolution of matters coming before [IJs]," 8 C.F.R. 1003.12 -- the very description of a claim-processing rule. See Henderson v. Shinseki, 562 U.S. 428, 435 (2011)

(explaining that "claim-processing rules" are "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times"). Thus, "as with every other claim-processing rule," failure to comply with Section 1003.14(a) may be "waived or forfeited." Ortiz-Santiago, 924 F.3d at 963. Here, petitioner appeared at his initial removal hearing before the IJ on May 27, 2003, without raising any objection to the lack of date-and-time information in the notice to appear. C.A. ROA 259-260. Given the absence of a timely objection, petitioner forfeited any contention that the notice to appear was defective. Pet. App. A9; see Ortiz-Santiago, 924 F.3d at 964-965.

b. This Court's decision in Pereira v. Sessions, 138 S. Ct. 2105 (2018), is not to the contrary. In Pereira, the Court held that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule" governing the calculation of the alien's continuous physical presence in the United States for purposes of cancellation of removal. Id. at 2110. "Pereira's narrow holding does not govern the jurisdictional question" presented here. Karingithi, 913 F.3d at 1160 n.1. That is because, unlike in Pereira, the question presented here does not depend on what qualifies as a "notice to appear under section 1229(a)." 138 S. Ct. at 2110; cf. 8 U.S.C. 1229b(d)(1)(A). The INA, including Section 1229(a), "is silent as

to the jurisdiction of the Immigration Court." Karingithi, 913 F.3d at 1160; see Ortiz-Santiago, 924 F.3d at 963 (explaining that the statute "says nothing about the agency's jurisdiction"). Indeed, the statute does not even require that the notice to appear be filed with the immigration court. Rather, it requires only that "written notice" of certain information -- "referred to as a 'notice to appear'" -- "be given * * * to the alien." 8 U.S.C. 1229(a)(1); see United States v. Cortez, 930 F.3d 350, 366 (4th Cir. 2019) (explaining that "the regulations in question and § 1229(a) speak to different issues -- filings in the immigration court to initiate proceedings, on the one hand, and notice to noncitizens of removal hearings, on the other").

To the extent the issue of what must be filed in the immigration court for proceedings there to commence (or for "[j]urisdiction" there to "vest[]") is addressed at all, it is addressed only by the Attorney General's regulations. 8 C.F.R. 1003.14(a). And in describing the various "[c]harging document[s]" that may "initiate[] a proceeding before an [IJ]," 8 C.F.R. 1003.13 (emphasis omitted), the regulations make no cross-reference to Section 1229(a) or its list of information to be given to the alien, see 8 C.F.R. 1003.15, 1003.18. Rather, the regulations specify their own lists of information to be provided to the immigration court in a "Notice to Appear," ibid., and those regulations do not require that a notice to appear specify the date and time of the initial removal hearing in order to qualify

as a "charging document" filed with the immigration court to commence proceedings, 8 C.F.R. 1003.14(a). See Nkomo v. Attorney Gen. of the U.S., 930 F.3d 129, 134 (3d Cir. 2019) (explaining that because Section 1003.14(a) "describes the relevant filing as a 'charging document,'" it "suggests § 1003.14's filing requirement serves a different purpose than the 'notice to appear under section 1229(a)' in the stop-time rule") (citations omitted), petition for cert. pending, No. 19-957 (filed Jan. 28, 2020). Petitioner's reliance (Pet. 5-7) on Pereira and Section 1229(a) therefore is misplaced.

In any event, petitioner was given the notice required under Section 1229(a) in this case. Section 1229(a) requires that an alien placed in removal proceedings be given "written notice" containing, among other information, "[t]he time * * * at which the proceedings will be held." 8 U.S.C. 1229(a)(1)(G)(i). Section 1229(a), however, does not mandate service of all the specified information in a single document. Thus, if the government serves an alien with a notice to appear that does not specify the date and time of his removal proceedings, it can complete the "written notice" required under Section 1229(a) by later serving the alien with a notice of hearing that does specify the date and time. 8 U.S.C. 1229(a)(1); see Matter of Mendoza-Hernandez & Capula-Cortes, 27 I. & N. Dec. 520, 531 (B.I.A. 2019) (en banc) (holding that the "'written notice'" required under Section 1229(a)(1) "may be provided in one or more documents"). The government did that

here. After DHS served petitioner with a notice to appear that provided all of the specified information except the date and time of his removal proceedings, the immigration court provided petitioner with a notice of hearing containing the date and time, and petitioner appeared at that hearing. Pet. App. A3, A8; C.A. ROA 152, 259-260.

c. Petitioner has not identified any court of appeals in which the outcome of this case would be different. Like the Fifth Circuit in this case, Pet. App. A8, seven other courts of appeals have rejected arguments like petitioner's on the ground that a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ," at least where the alien is later provided with a notice of hearing that provides that information. Karingithi, 913 F.3d at 1160 (9th Cir.); see Goncalves Pontes v. Barr, 938 F.3d 1, 3-7 (1st Cir. 2019); Banegas Gomez v. Barr, 922 F.3d 101, 111-112 (2d Cir. 2019), cert. denied, No. 19-510 (Jan. 27, 2020); Nkomo, 930 F.3d at 132-134 (3d Cir.); Cortez, 930 F.3d at 362-364 (4th Cir.); Santos-Santos v. Barr, 917 F.3d 486, 489-491 (6th Cir. 2019); Ali v. Barr, 924 F.3d 983, 986 (8th Cir. 2019).

Like the Fifth Circuit in this case, Pet. App. A8-A9, four other courts of appeals have recognized that any requirement that a notice to appear contain the date and time of the initial removal hearing is not a jurisdictional requirement, but is simply a claim-processing rule. See Cortez, 930 F.3d at 358-362 (4th Cir.);

Ortiz-Santiago, 924 F.3d at 962-965 (7th Cir.); Lopez-Munoz v. Barr, 941 F.3d 1013, 1015-1017 (10th Cir. 2019); Perez-Sanchez v. U.S. Attorney Gen., 935 F.3d 1148, 1154-1157 (11th Cir. 2019). Each of those courts of appeals would have rejected petitioner's challenge to his removal proceedings on the ground that he forfeited any reliance on such a claim-processing rule. See pp. 13-14, supra. Thus, in every court of appeals that has addressed the question presented, petitioner's challenge would have failed.

Petitioner's assertions of various circuit conflicts do not suggest otherwise. Petitioner contends (Pet. 11) that, whereas some circuits have recognized that any requirement that a notice to appear contain the date and time of the initial removal hearing is simply a claim-processing rule, the Second, Sixth, Eighth, and Ninth Circuits have deemed any such requirement to be "jurisdictional" in the strict sense of the term. That contention is incorrect. Those four circuits have repeated 8 C.F.R. 1003.14(a)'s use of the word "jurisdiction" in the course of determining that a "notice to appear need not include time and date information" for the applicable "regulatory requirements" to be satisfied. Karingithi, 913 F.3d at 1160 (9th Cir.); see Banegas Gomez, 922 F.3d at 111-112 (2d Cir.); Santos-Santos, 917 F.3d at 490-491 (6th Cir.); Hernandez-Perez v. Whitaker, 911 F.3d 305, 313-315 (6th Cir. 2018); Ali, 924 F.3d at 986 (8th Cir.). But because each of those circuits found those requirements satisfied,

none had occasion to address whether the regulations set forth a strictly jurisdictional, as opposed to a claim-processing, rule. Cf., e.g., Goncalves Pontes, 938 F.3d at 7 n.3 (1st Cir.) (declining to address whether the regulations "must be understood as claim-processing rules" after determining that the notice to appear "was not defective under the regulations").

Petitioner also contends (Pet. 9-10) that the Seventh and Eleventh Circuits disagree with other circuits on whether a notice to appear that does not specify the date and time of the removal proceedings satisfies the requirements of Section 1229(a). In Perez-Sanchez, however, the Eleventh Circuit stated only that such a notice to appear, in the absence of any additional notifications, would be deficient under Section 1229(a), while leaving open the possibility that "a notice of hearing sent later might be relevant to a harmlessness inquiry." 935 F.3d at 1154. And the court declined to decide whether such a notice to appear, by itself, would be "deficient under the regulations," as opposed to the statute. Id. at 1156; see id. at 1156 n.5 (reserving judgment on whether a notice to appear under the regulations is "the same" as a notice to appear under Section 1229(a)). The court also went on to explain that neither Section 1229(a) nor the regulations set forth a strictly "jurisdictional" rule. Id. at 1154-1155. Rather, the court recognized that "8 C.F.R. § 1003.14, like 8 U.S.C. § 1229(a), sets forth only a claim-processing rule." Id. at 1155. Thus, petitioner's failure to timely raise his notice objection in

the immigration court means that his challenge to his removal proceedings would have also failed in the Eleventh Circuit. See Pet. App. A8-A9; pp. 13-14, supra (explaining that petitioner forfeited any violation of a claim-processing rule here).

Petitioner's challenge would have likewise failed in the Seventh Circuit. In Ortiz-Santiago, the Seventh Circuit stated that a notice to appear that does not specify the date and time of the initial removal hearing is "defective" under both the statute and the regulations, 924 F.3d at 961, and that it was "not so sure" that the government could complete the required notice by later serving a notice of hearing, id. at 962. But because the Seventh Circuit held that any defect in the notice to appear was not "an error of jurisdictional significance," ibid., but rather an error that could be "waived or forfeited," id. at 963, it would have reached the same outcome as the Fifth Circuit did here. See Pet. App. A8-A9; pp. 13-14, supra (explaining that petitioner forfeited any error here).

Finally, petitioner asserts (Pet. 10) the existence of a circuit conflict on whether the Board of Immigration Appeals' interpretation of the applicable regulations in Matter of Bermudez-Cota, supra, is entitled to deference under Auer v. Robbins, 519 U.S. 452 (1997). Petitioner argues (Pet. 10) that the Seventh Circuit has rejected the Board's reasoning in Bermudez-Cota, which held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an

[IJ] with jurisdiction over the removal proceedings * * * , so long as a notice of hearing specifying this information is later sent to the alien." 27 I. & N. Dec. at 447. As explained above, however, the Seventh Circuit in Ortiz-Santiago stated only that it was "not so sure" about the "two-step process" adopted by the Board in Bermudez-Cota. 924 F.3d at 962. The Seventh Circuit then recognized that the lack of date-and-time information in the notice to appear was a defect that could be forfeited, id. at 963 -- as it was here, see Pet. App. A8-A9; pp. 13-14, supra. Thus, the outcome of this case would be the same in every court of appeals that has addressed the question presented.

2. Petitioner also contends (Pet. 12-16) that the court of appeals erred in determining that 8 U.S.C. 1326(d)(1) bars him from collaterally attacking his removal order because he failed to exhaust administrative remedies. That contention likewise does not warrant this Court's review.

a. The court of appeals correctly determined that petitioner "failed to exhaust all administrative remedies," as required by Section 1326(d)(1). Pet. App. A9. After DHS served petitioner with a notice to appear that lacked the date and time of his removal proceedings, C.A. ROA 111, the immigration court provided him with a notice of hearing that specified the date and time, id. at 152. Petitioner appeared at that hearing, and he raised no objection before the IJ to the notice he had received. Id. at 259-260. Nor did he raise any such objection before the

Board. Indeed, "[d]espite having been advised of his right to appeal by the IJ, [petitioner] did not file an appeal with the Board" at all. Pet. App. A9; see C.A. ROA 254. Thus, the court of appeals correctly determined that petitioner did not exhaust administrative remedies on his claim that the notice to appear was defective.

b. The court of appeals' determination that petitioner did not satisfy Section 1326(d)(1)'s exhaustion requirement does not conflict with any decision of this Court or another court of appeals. Relying on Estep v. United States, 327 U.S. 114 (1946), petitioner contends that "[d]ue process requires [that] a defendant be allowed to challenge the jurisdictional basis of the administrative order being used to prosecute him." Pet. 12 (emphasis omitted). As explained above, however, the alleged defect in the notice to appear is not jurisdictional in nature. See pp. 13-14, supra; Pet. App. A8-A9.

In any event, petitioner's reliance on Estep is misplaced. In Estep, the Court held that a defendant who had been criminally charged for refusing to submit to induction into the armed forces could challenge the jurisdiction of the local board that classified him as available for military service. 327 U.S. at 121-122. The Court made clear, however, that its holding did not excuse registrants from having to "exhaust[] [their] administrative remedies" before pursuing such a challenge in court. Id. at 123; see Sunal v. Large, 332 U.S. 174, 176 (1947) (describing Estep as

holding that "a registrant, who had exhausted his administrative remedies and thus obviated the rule of Falbo v. United States, [320 U.S. 549 (1944),] was entitled * * * to defend on the ground that his local board exceeded its jurisdiction in making the classification").

Petitioner also contends that the court of appeals erred in "rul[ing] that an appeal waiver" in the immigration court "automatically forecloses a collateral attack." Pet. 14 (emphasis omitted). The court, however, announced no such categorical rule. Rather, the court determined, based on the circumstances of this case, that petitioner "failed to exhaust all administrative remedies" when he "did not file an appeal with the Board." Pet. App. A9. And contrary to petitioner's contention (Pet. 15-16), the circumstances here are different from those of United States v. Mendoza-Lopez, 481 U.S. 828 (1987). In that case, it was assumed arguendo that the aliens' deportation hearing was "fundamentally unfair" because of "the failure of the [IJ] to explain adequately their right to suspension of deportation or their right to appeal." Id. at 839. That circumstance is not present here. In addition, while the Court in Mendoza-Lopez stated that the IJ "permitted waivers of the right to appeal that were not the result of considered judgments" by the aliens, id. at 840; see id. at 831 n.4 (describing the district court's findings about the confusion engendered by the IJ's explanations), here the court of appeals found that petitioner "ha[d] been advised of his right

to appeal by the IJ," Pet. App. A9; see C.A. ROA 254, and nothing in the record indicates that his waiver of his right to appeal to the Board was not knowing and intelligent. Petitioner's reliance on Mendoza-Lopez is thus misplaced.

Petitioner likewise errs in contending (Pet. 13) that Section 1326(d) is unconstitutional if it precludes him from collaterally attacking his removal order. In Mendoza-Lopez, this Court addressed the circumstances under which the Constitution requires that a defendant criminally charged with illegal reentry be permitted to challenge the validity of the underlying removal order. 481 U.S. at 837-839. Congress "effectively codified" those circumstances when it added subsection (d) to Section 1326 in response to the Court's decision. United States v. Fernandez-Antonia, 278 F.3d 150, 157 (2d Cir. 2002). Because Section 1326(d) tracks the constitutional requirements recognized in Mendoza-Lopez, petitioner's contention that Section 1326(d) itself is unconstitutional lacks merit.

c. In any event, this case would be an unsuitable vehicle for addressing the question presented because even assuming the court of appeals erred in determining that petitioner failed to exhaust administrative remedies, petitioner cannot meet Section 1326(d)'s other requirements for collateral attack. Petitioner cannot show that the "deportation proceedings at which the [removal] order was issued improperly deprived [him] of the opportunity for judicial review," 8 U.S.C. 1326(d)(2), because he

waived the right to appeal and "accept[ed] deportation," C.A. ROA 260. And he cannot show that "the entry of the order was fundamentally unfair," 8 U.S.C. 1326(d)(3), because he cannot show that the lack of date-and-time information in the notice to appear caused him any prejudice -- particularly given that he received a notice of hearing that contained that information and then appeared at the hearing. C.A. ROA 152, 259-260; see United States v. Ramirez-Cortinas, 945 F.3d 286, 291 (5th Cir. 2019) (requiring a showing of "actual prejudice" to succeed on a collateral attack under Section 1326(d)) (citation omitted). Thus, even if petitioner had exhausted administrative remedies, Section 1326(d) would still bar his collateral attack. And petitioner cites no authority for the proposition that due process requires permitting a collateral attack in such circumstances.

3. In all events, this case would be a poor vehicle to address the questions presented for two additional reasons.

First, because the court of appeals reversed the district court's dismissal of the indictment and remanded the case for further proceedings, the court of appeals' decision is interlocutory. Pet. App. A1-A9. That posture "alone furnishe[s] sufficient ground for the denial of" the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). If petitioner returns to the United States, and if,

on remand, he is convicted on the illegal-reentry charge and that conviction is affirmed on appeal, petitioner would then have the opportunity to raise his current claims, together with any other claims that may arise, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

Second, this case is a poor vehicle for further review of either question presented because neither question alone is outcome-determinative. Petitioner would have to prevail on both questions presented in order to be entitled to dismissal of the indictment. This case therefore does not present either question cleanly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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