No. 19-6588

In the Supreme Court of the United States

October Term, 2019

CARLOS JAVIER PEDROZA-ROCHA, *PETITIONER*,

V.

UNITED STATES OF AMERICA

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Petitioner Carlos Javier Pedroza-Rocha asks this Court to consider important questions regarding lower courts' adherence to this Court's precedents in matters that affect the separation of powers and the lives of countless noncitizen defendants charged with illegally reentering the United States. Mr. Pedroza was removed years ago based on a notice to appear that failed to comply with the statutory requirement to have a hearing time. He collaterally attacked that prior removal order in his criminal proceeding. The district court dismissed the indictment, and the court of appeals reversed.

Mr. Pedroza argues that, given the statutory framework and *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the notice to appear—complete with hearing time—is a jurisdictional requirement for removal proceedings. The putative notice to appear issued to him lacked the required hearing time and rendered his removal proceeding void. He further argues that prohibiting him from challenging the immigration court's jurisdiction unless he can meet the collateral attack requirements of 8 U.S.C. § 1326(d) is inconsistent with this Court's decision in *Estep v. United States*, 327 U.S. 114 (1946). And the court of appeals' determination that Mr. Pedroza could not collaterally attack his removal order, even though he

waived appeal without knowing he could challenge the immigration court's jurisdiction, is inconsistent with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). Ultimately, restricting the collateral attack of removal orders in this way renders § 1326 unconstitutional.

The government opposes certiorari because it believes the regulatory definition of a notice to appear trumps the statutory one, the statutory requirements can be met by service of multiple documents, and the notice to appear has no jurisdictional import. The government also claims Mr. Pedroza cannot collaterally attack his removal order because he was told he could appeal and did not do so, without addressing whether that waiver was considered and intelligent when the immigration judge did not tell him he could challenge the immigration court's jurisdiction. Finally, the government argues Mr. Pedroza's case is a poor vehicle because he would not satisfy § 1326(d)'s other requirements, the decision is interlocutory, and no individual question is outcome-determinative.

Mr. Pedroza replies.

ARGUMENTS AND AUTHORITIES

I. The immigration court lacked authority to remove Mr. Pedroza because an agency cannot ignore a statutory jurisdictional requirement.

The government argues that Pedroza's removal was proper because the notice to appear complied with the regulatory requirements, he received the information required by the statute through the notice to appear and later notice of hearing, and neither the notice to appear nor its contents has jurisdictional significance. BIO 11–14. It avoids the separation of powers and *Pereira* problems by focusing on the regulations instead of 8 U.S.C. § 1229. BIO 11–17.

But the statute, not regulations, controls the definition of a notice to appear. Congress was clear that the notice to appear must include a hearing time. 8 U.S.C. § 1229(a)(1)(G)(i). Even the agency initially understood this requirement. Immigration and Naturalization Service and EOIR, Proposed Rules, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444-01, 449, 1997 WL 1514 (Jan. 3, 1997). But the agency overstepped by creating an exception—that the hearing time need be included only "where practicable"—and then using that exception for nearly every notice to appear filed thereafter. 8 C.F.R. § 1003.18(b); *see Pereira*, 138 S. Ct. at 2110. This Court should address such agency defiance of

Congress, particularly when the circuits' decisions and reasoning are so fractured. *See* Pet. 7–12.

The government alternatively argues that Pedroza received the statutorily-required notice to appear through two documents: the notice to appear and the notice of hearing. BIO 12–13. Two circuit courts have rejected this argument in the stop-time rule context. *Banuelos v. Barr*, 953 F.3d 1176, 1180–84 (10th Cir. 2020); *Guadalupe v. Attorney Gen. United States*, 951 F.3d 161, 164–66 (3d Cir. 2020).[1] As the Third Circuit explained, *Pereira* "establishes a bright-line rule": a notice to appear "shall contain all the information set out in section 1229(a)(1)." *Guadalupe*, 951 F.3d at 164. The two-step process conflicts with the statutory language, congressional intent, and *Pereira*. *Banuelos*, 953 F.3d at 1180–84. Two other circuits and the Board of Immigration Appeals side with the government. *Yanez-Pena v. Barr*, 952 F.3d 239, 246 (5th Cir. 2020), *petition for certiorari pending*, No. 19-1208; *Garcia-Romo v. Barr*, 940 F.3d 192, 204 (6th Cir. 2019); *Matters of Mendoza-Hernandez & Capula-Cortes*, 27 I. & N. Dec. 520, 535 (BIA 2019). The courts need guidance.

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[1] The Ninth Circuit initially held the notice of hearing could not complete or cure a notice to appear lacking a hearing time, but the court granted rehearing en banc. *See Lopez v. Barr*, 925 F.3d 396, 399 (9th Cir. 2019), *reh'g en banc granted,* 948 F.3d 989 (9th Cir. 2020).

The government does not squarely address whether § 1229(a)(1) imposes a jurisdictional requirement, instead arguing the regulation requiring a notice to appear be filed with the immigration court is a claim-processing rule. BIO 13–14 (citing 8 C.F.R. § 1003.14(a)). But the issue here is the jurisdictional import of § 1229(a)(1), which requires service of the notice to appear. That service defines the class of cases over which immigration judges can preside. *See* Pet. 5–6. By defining the class subject to the immigration judge's authority, § 1229(a)(1) is a jurisdictional requirement. *See Bowles v. Russell*, 551 U.S. 205, 213 (2007); *United States v. Cotton*, 535 U.S. 625, 630 (2002). Immigration judges cannot remove noncitizens not served a § 1229(a)(1) notice to appear. Those noncitizens can be removed through other procedures[2] or are not removed. Thus, the notice to appear is an important limit on immigration judges' authority. Courts must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington v. F.C.C.*, 569 U.S. 290, 307 (2013).

Given the important role of § 1229(a)(1), and this Court's determination in *Pereira* that a notice to appear must have the hearing time or it is not a notice to appear, a defective notice to appear

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[2] *See, e.g.*, 8 U.S.C. §§ 1225(b)(1), 1228(b).

does not give an immigration judge authority to remove a noncitizen.

II. An unconsidered waiver of appeal in a removal proceeding does not prevent a noncitizen from collaterally attacking a removal order used to deprive him of liberty in a criminal proceeding.

The government argues Mr. Pedroza cannot challenge his jurisdictionally-deficient putative removal order because he was told he could appeal and did not do so. BIO 21–24. This misinterprets *Mendoza-Lopez*.

In *Mendoza-Lopez*, the contested issue was whether petitioners could collaterally attack their illegal reentry proceedings, assuming the underlying removal orders were fundamentally unfair. 481 U.S. at 839–40. The Court held they must be able to collaterally attack if they were deprived of judicial review. *Id.* at 840. The Court said nothing about requiring administrative exhaustion. *Id.* at 830–42. The petitioners, like Mr. Pedroza, were told they had the right to appeal and did not do so. *Id.* at 845 (Rehnquist, C.J., dissenting); *id.* at 849 (Scalia, J., dissenting). But the Court found they were deprived of judicial review because the appeal waivers were not "considered or intelligent" since they were not advised they were giving up the opportunity to seek suspension of deportation. *Id.* at 840. Similarly, Mr. Pedroza was not advised he was giv-

ing up the opportunity to challenge the immigration court's authority over the case. Pet. 2–3. His appeal waiver was not considered or intelligent.

Mr. Pedroza, thus, satisfies the § 1326(d) requirement of showing deprivation of judicial review. *See Mendoza-Lopez*, 481 U.S. at 839–40 (unconsidered appeal waiver is deprivation of judicial review). And he is excused from the requirement to exhaust administrative remedies. *See United States v. Sosa*, 387 F.3d 131, 137 (2d Cir. 2004) (unconsidered appeal waiver excuses exhaustion).

Contrary to the government's assertion, BIO 24–25, he meets the remaining § 1326(d) requirements. The proceeding was fundamentally unfair because the immigration court had no authority to conduct it, depriving him of a meaningful opportunity to be heard. *See United States v. Lopez-Urgel*, 351 F. Supp. 3d 978, 988–89 (W.D. Tex. 2018). And he was prejudiced because, had he prevailed on the issue, he would not have been removed in that proceeding. *See United States v. Ochoa-Oregel*, 904 F.3d 682, 685–86 (9th Cir. 2018).

But even if Mr. Pedroza cannot meet the § 1326(d) requirements, he must be able to challenge the use of that putative removal order in his criminal proceeding for § 1326 to be constitu-

tional. *See* Pet. 12–13. This Court recognizes the importance of reviewing the jurisdictional basis for administrative decisions before using them to impose criminal penalties. *Estep*, 327 U.S. at 121 (doubting Congress intended criminal sanctions to apply to administrative orders "no matter how flagrantly [the agencies] violated the rules and regulations which define their jurisdiction"). That Estep had administratively exhausted *his* claim does not import exhaustion as a requirement for challenging the immigration court's jurisdiction here, particularly given that Mr. Pedroza's pro se waiver after being detained was not considered or intelligent. Prohibiting such review does not comport with due process. *See id.* at 122 (rejecting that jail should result "for not obeying an unlawful order of an administrative agency").

III. These issues merit consideration, and Mr. Pedroza's case is a suitable vehicle.

Mr. Pedroza's case is a suitable vehicle to consider these important issues. If the Court addressed the notice-to-appear issue in a non-criminal context and reverse the circuit courts, it would likely need to address the implication of its ruling in the illegal reentry context. Mr. Pedroza's case allows the Court to do both simultaneously.

The interlocutory nature of the court of appeals decision is not a reason to deny review. *See* BIO 25–26. The result of any future

motion to dismiss, if Mr. Pedroza returns to the United States, is settled in the Fifth Circuit, given its conclusion that the immigration court had jurisdiction despite the defective notice to appear. The facts and law related to the validity of his removal order, and his ability to challenge it, will not change without this Court's intervention. *Compare with Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., explaining denial of certiorari for interlocutory appeal because the lower court was instructed to address remedies on remand).

It is true no circuit has ruled for Mr. Pedroza's notice-to-appear argument. *See* BIO 18. But that has not stopped this Court from granting certiorari and correcting the lower courts before. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (requiring the government to prove the defendant "knew he had the relevant status when he possessed" the firearm for a 18 U.S.C. § 922(g) conviction).[3] And Mr. Pedroza's collateral-attack arguments present a circuit split. *Compare* Pet. App. A at 498 (failure to exhaust even though not informed about argument to avoid removal order) *with*

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[3] Before this Court stepped in, "no court of appeals ha[d] required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g)." *United States v. Rehaif*, 888 F.3d 1138, 1145 (11th Cir. 2018), *rev'd and remanded*, 139 S. Ct. 2191 (2019).

Sosa, 387 F.3d at 137 (excusing exhaustion requirement when not informed about right to apply for relief from removal).

CONCLUSION

FOR THESE REASONS, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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