NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ALEXANDER CALLEJAS RIVERA,
WILFREDO FUNEZ GARSILLA, and
MIGUEL ANGEL IBARRA-RAMOS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the immigration court issuing orders of removal against each petitioner lacked jurisdiction to issue such orders, so that use of such orders in a prosecution for illegal reentry violated the separation of powers and due process.

PARTIES TO THE PROCEEDINGS

Petitioners were convicted in separate proceedings before the district court, and the United States Court of Appeals for the Fifth Circuit entered separate judgments in each of their cases. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. *See* Sup. Ct. R. 12.4.

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Jose Alexander Callejas Rivera, No. 4:19-CR-94 (March 25, 2019)

United States v. Wilfredo Funez Garsilla, No. 4:19-CR-5 (May 1, 2019)

United States v. Miguel Angel Ibarra-Ramos, No. 4:18-CR-618 (July 8, 2019)

United States v. Tzul, 4:18-CR-521 (Dec. 4, 2018)

United States Court of Appeals (5th Cir.):

United States v. Jose Alexander Callejas Rivera, No. 19-20274 (Oct. 30, 2019)

United States v. Wilfredo Funez Garsilla, No. 19-20339 (Oct. 17, 2019)

United States v. Miguel Angel Ibarra-Ramos, No. 19-20466 (Nov. 25, 2019)

United States Supreme Court

Pedroza-Rocha v. United States, No. 19-6588

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MISCELLANEOUS

PRAYER

Petitioners Jose Alexander Callejas Rivera, Wilfredo Funez Garsilla, and Miguel Angel Ibarra-Ramos respectfully pray that a writ of certiorari be granted to review the judgments entered by the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in petitioners' cases are attached to this petition as Appendices A through C. The opinions of the United States District Court for the Southern District of Texas are attached as Appendices D through F.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinions on the following dates: on October 30, 2019, for Mr. Callejas Rivera; on October 17, 2019, for Mr. Funez Garsilla; and on November 25, 2019, for Mr. Ibarra-Ramos. *See* Appendices A-C. This petition is filed within 90 days after entry of judgment in each case. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The texts of the following constitutional, statutory and regulatory provisions involved are attached as Appendix G.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

These cases were originally brought as federal criminal prosecutions under 8 U.S.C. 1326. The district court therefore had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

STATEMENT OF THE CASE

In separate district court proceedings in the Southern District of Texas, petitioners were charged by indictment with the offense of illegal reentry of a previously deported alien, in violation of 8 U.S.C. § 1326. Each petitioner filed a motion to dismiss the indictment in his respective case, arguing that, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the prior order of removal and any reinstatement thereof was void because the Immigration judge issuing the order did not have jurisdiction to issue such an order and that the use of such a void order violated due process. Specifically, each petitioner argued that the "Notice to Appear" provided by immigration authorities alleging the grounds of removal prior to issuance of the first order of removal did not state the time and place at which removal proceedings were to be held and, in light of *Pereira*, such a document lacking that information was not a valid "Notice to Appear" under 8 U.S.C. § 1229(a)(1)(G)(i). Consequently, petitioners argued, the document did not vest jurisdiction with the Immigration court in light of regulations which provide that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when" the Department of Homeland Security files a notice to appear with the immigration court. 8 C.F.R. § 1103.14(a); *see also* 8 C.F.R. 1003.13.

The district court granted the motion to dismiss as filed by petitioners Callejas Rivera and Funez Garsilla. *See* Appendices D and E. The district court supported its order in each case by reference to its previous decision in *United States v. Tzul*, 345 F. Supp. 3d 785 (S.D. Tex. 2018), in which the district court agreed with a similarly-situated defendant

that this Court's decision in *Pereira* required that a valid Notice to Appear state the time and place for proceedings, *id.* at 789-92, that such a valid Notice to Appear was a jurisdictional pre-requisite for exercise of an Immigration judge's authority to order removal, *id.* at 788-89, and that the absence of jurisdiction rendered the order of removal void and subject to collateral attack without regard to the more stringent rules for collateral attack of prior orders of removal under 8 U.S.C. § 1326(d). *Id.* at 787-88. The district court ordered dismissal of the indictment in each case, and Immigration authorities subsequently deported both Mr. Callejas Rivera and Mr. Funez Garsilla.

The Government appealed the district court's order of dismissal in the case of each of Mr. Callejas Rivera and Mr. Funez Garsilla. In each case, on the Government's motion, the Fifth Circuit placed the cases in abeyance pending its decision in *United States v. Pedroza-Rocha*, No. 18-50828, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed*, (No. 19-6588) (U.S. Nov. 12, 2019).

The district court in effect denied Mr. Ibarra-Ramos's motion to dismiss the indictment. Contrary to the district court ruling in the cases of petitioners Calleja Rivera and Funez Garsilla, the district court in Mr. Ibarra-Ramos' case opined that the absence of the date and time in the Notice to Appear did not deprive the Immigration judge of subject matter jurisdiction and that any collateral attack must be preceded under 8 U.S.C. § 1326(d)(1) by exhaustion of administrative remedies, which Mr. Ibarra-Ramos had not undertaken. *See* Appendix F. The district court abated the case to give Mr. Ibarra-Ramos an opportunity to exhaust such remedies, but he acknowledged that no such remedies were

available and, pursuant to a written stipulation in which he preserved his right to appeal the denial of his motion to dismiss, entered a plea of guilty to the indictment. The district court ultimately sentenced him to a term of imprisonment of 45 months followed by two years of supervised release.

Mr. Ibarra-Ramos appealed the district court's judgment of conviction and sentence to the Fifth Circuit. Mr. Ibarra-Ramos argued in his brief, as he had before the district court, that the Notice to Appear vested jurisdiction in the Immigration court, that *Pereira* meant that the Notice to Appear in this case was not valid, depriving the Immigration court of jurisdiction, that the order of removal was void, and that the district court erred in refusing to dismiss the indictment. By the time of the filing of briefs in Mr. Ibarra-Ramos's case, however, the Fifth Circuit had issued its opinion in *Pedroza-Rocha*, and Mr. Ibarra-Ramos recognized that relief was foreclosed in the Fifth Circuit.

In all of Petitioners' cases, the Government filed a Motion for Summary Disposition, which the Fifth Circuit granted, relying on its decision in *Pedroza-Rocha*. In *Pedroza-Rocha*, the Fifth Circuit held that the omission of the hearing time did not make the notice to appear defective because the regulatory definition of the notice to appear (which does not require a hearing time), not the statutory definition (which does), controls. *Pedroza-Rocha*, 933 F.3d at 497 (citing *Pierre-Paul v. Barr*, 930 F.3d 684, 689-90 (5th Cir. 2019)). Even if the notice to appear was defective, the later notice of hearing cured it. *Pedroza-Rocha*, 933 F.3d at 497. And the regulation requiring a notice to appear to be filed with the immigration court was not jurisdictional. *Id.* at 497-98. Consequently, the Fifth

Circuit reversed the judgment of the district court in the cases of Mr. Callejas Rivera and Mr. Funez Garsilla, and affirmed the judgment of the district court in the case of Mr. Ibarra-Ramos.

Because the Fifth Circuit relied on its decision in *Pedroza-Rocha* to grant summary disposition in each of petitioners' cases, each Petitioner asks this Court to grant a petition for a writ of certiorari on the basis of arguments that are substantially the same as those presented in by the petitioner in *Pedroza-Rocha v. United States*, No. 19-6588 (filed Nov. 12, 2019).

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to address the important issue whether, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the immigration court issuing orders of removal against each petitioner lacked jurisdiction to issue such orders, so that use of such orders in a prosecution for illegal reentry violated the separation of powers and due process

A. The decisions below in each case are incorrect and violate the separation of powers.

An agency's power to act comes from Congress. *City of Arlington v. F.C.C.*, 569 U.S. 290, 298 (2013). Courts must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority." *Id.* at 307.

The notice to appear is such a limit. Congress specified that the notice to appear must be served on every noncitizen in removal proceedings. § 1229(a)(1). It also required that a notice to appear must have a hearing time. § 1229(a)(1)(G)(i). The omission of a hearing time cannot be cured; without it, the document is not a notice to appear. *Pereira*, 138 S. Ct. at 2116.

Without a notice to appear, the immigration court lacks authority to remove a noncitizen. § 1229(a)(1). That is because service of the notice to appear is necessary for subject matter jurisdiction – the immigration judge's authority to preside over cases. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (describing subject matter jurisdiction as "the court's statutory or constitutional authority to hear the case" (cleaned up)).

Immigration judges only have authority to decide cases in which the Department of Homeland Security chooses to serve a notice to appear. § 1229(a)(1). In contrast, immigration officials – not judges – can rule on a noncitizen's deportability and inadmis-

sibility through certain expedited procedures when no notice to appear is filed. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1), 1228(b). The notice to appear confers subject matter jurisdiction by defining the cases over which immigration judges preside. *See Bowles v. Russell,* 551 U.S. 205, 213 (2007) ("the notion of subject-matter jurisdiction obviously extends to classes of cases ... falling within a court's adjudicatory authority" (cleaned up)).

The government has sought to avoid this straightforward application of § 1229(a)(1) and *Pereira* by arguing that the regulatory definition of a notice to appear, not the statutory one, applies to the notice to appear required to start the removal proceeding. The regulations do not require a hearing time. 8 C.F.R. §§ 1003.15(b), 1003.18(b).

In *Pierre-Paul* and *Pedroza-Rocha*, the Fifth Circuit agreed. By ignoring the jurisdictional import of § 1229(a)(1) and finding "no glue" between the regulations and § 1229(a)(1), the Fifth Circuit distinguished *Pereira* and approved a two-step procedure: first a notice to appear with no hearing time, and then a notice of hearing. *Pierre-Paul*, 930 F.3d at 691.

But there is glue binding the statute to the regulations. Congress's transitional instructions recognize the jurisdictional significance of the notice to appear. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, § 309(c)(2), Pub. L. No. 104-208, 110 Stat 3009 (1996) (making certain documents "valid as if provided under [§ 1229] (as amended by this subtitle) to confer jurisdiction on the immigration judge"). And the regulations incorporate the statutory jurisdictional limit by providing that

a charging document such as a notice to appear vests jurisdiction with the immigration court. §§ 1003.13, 1003.14(a); *see* 8 C.F.R. § 1239.1.

The agency even acknowledged the need to "implement[ ] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear" and committed to providing a hearing time in the notices to appear "as fully as pos-sible by April 1, 1997[.]" Immigration and Naturalization Service and EOIR, Proposed Rules, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444-01, 1997 WL 1514 (Jan. 3, 1997). But the agency created an exception that hearing times could be omitted if providing them was not practicable, such as when "automated scheduling [is] not possible ... (e.g., power outages, computer crashes/downtime)." *Id.* at 449; *see* 8 C.F.R. §§ 1003.15(b), (c); 1003.18.

Two decades later, "almost 100 percent of notices to appear omit the time and date of proceeding[.]" *Pereira*, 138 S. Ct. at 2111 (cleaned up). The "where practicable" regulatory exception swallowed the statutory rule of including the hearing time in the notice to appear. And the Fifth Circuit sanctioned the agency's attempt to rewrite the statute. This violates the separation of powers. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) (agencies cannot "revise clear statutory terms that turn out not to work in practice").

B. This Court should resolve a circuit split over whether, in light of *Pereira*, the statutory definition of "notice to appear" defines the jurisdiction of the immigration courts.

Eleven circuits, as well as the Board of Immigration Appeals (BIA), have weighed in on the proper definition of a "notice to appear" and the effect of a putative notice missing a hearing time. The circuits are split on whether the statutory or regulatory definition of a notice to appear governs, and whether a notice to appear is a jurisdictional requirement or a claims-processing rule.

Two circuits hold that the statutory definition of a notice to appear applies to starting a removal proceeding, but eight circuits and the BIA hold that the regulatory definition does.

The Seventh and Eleventh Circuits, applying this Court's reasoning in *Pereira*, interpret § 1229(a)(1) as requiring the notice to appear used to begin removal proceedings to have a hearing time. The Seventh Circuit rejects as "absurd" the government's argument that the notice to appear referenced in the regulations is not the same notice to appear defined in the statute. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961–62 (7th Cir. 2019). The Eleventh Circuit explains that, per § 1229(a)(1), Congress intended for service of the notice to appear to "operate as the point of commencement for removal proceedings[,]" and "the agency was not free to redefine the point of commencement[.]" *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019).

The First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits find that the regulatory definition of a notice to appear, which does not require a hearing time,

applies for beginning removal proceedings.[1] Several circuits also hold that a later notice of hearing cures any statutory defect. *See Pierre-Paul*, 930 F.3d at 690; *but see Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019) (a defective § 1229(a)(1) notice to appear cannot be cured by a notice of hearing for the stop-time rule).

In finding that the regulatory definition controls, the First, Sixth, and Ninth Circuits specifically defer to the BIA's reasoning. *Goncalves Pontes*, 938 F.3d at 7; *Karingithi*, 913 F.3d at 1161; *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018). The BIA interpreted *Pereira* narrowly, limiting it to the stop-time rule, and approved the two-step process of notice to appear without a hearing time followed by a notice of hearing. *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443–47 (BIA 2018). The Seventh Circuit, however, sharply criticized reliance on the BIA's decision, which it found "brushed too quickly over the Supreme Court's rationale in *Pereira*" and failed to consider significant legislative history. *Ortiz-Santiago*, 924 F.3d at 962.

Four circuits and the BIA believe that a notice to appear is a jurisdictional requirement, but five circuits disagree.

The Second and Eighth Circuits hold that a notice to appear, as defined by the regulations, confers "jurisdiction" on the immigration court. *Ali*, 924 F.3d at 986; *Banegas Gomez*, 922 F.3d at 112. The Sixth and Ninth Circuits adopt similar reasoning after

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[1] *See Goncalves Pontes v. Barr*, 938 F.3d 1, 6–7 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110–12 (2d Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133–34 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 363 (4th Cir. 2019); *Pierre-Paul*, 930 F.3d at 690; *Santos-Santos v. Barr*, 917 F.3d 486, 490–91 (6th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161–62 (9th Cir. 2019).

deferring to the BIA. *Hernandez-Perez*, 911 F.3d at 314–15; *Karingithi*, 913 F.3d at 1161; *see Bermudez-Cota*, 27 I. & N. Dec. at 447.

The Fourth and Fifth Circuits disagree and find the regulations provide a claims-processing, not jurisdictional, rule. *Cortez*, 930 F.3d at 362; *Pierre-Paul*, 930 F.3d at 692. The Seventh and Eleventh Circuits also hold that the statutory time requirement is a claims-processing, not a jurisdictional rule. *Perez-Sanchez*, 935 F.3d at 1154; *Ortiz-Santiago*, 924 F.3d at 963. Similarly, the Tenth Circuit holds that neither the statute nor the regulations provide a jurisdictional rule. *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-18 (10th Cir. 2019).

The First and Third Circuits reject that § 1229(a)(1) has jurisdictional significance but do not decide whether the regulations do. *Goncalves Pontes*, 938 F.3d at 7 n.3; *Nkomo*, 930 F.3d at 134. In light of the fractured reasoning of the circuits' decisions on the jurisdictional significance of the statutory and regulatory definitions of "Notice to Appear," certiorari should be granted.

C. The Fifth Circuit's restrictions on collaterally attacking removal orders in illegal reentry prosecutions conflict with this Court's precedent and violate due process

The offense of illegal reentry depends on a determination made in an administrative proceeding. § 1326(a); *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987). The government must prove the defendant is a noncitizen who "has been ... removed" from the United States and later reenters the United States without permission. § 1326(a). Section 1326(d) provides that a defend-ant "may not challenge the validity of the deportation order ... unless" the defendant shows exhaustion of administrative remedies, deprivation of

judicial review, and fundamental unfairness. Due process, however, requires a defendant be allowed to challenge the jurisdictional basis of the administrative order being used to prosecute him.

This Court considered the use of an administrative order to impose criminal sanctions when selective service registrants, whose military inductions were ordered by local boards, were prosecuted for refusing to be inducted into the military. *Estep v. United States*, 327 U.S. 114 (1946). Even though the statute did not specify that defendants could collaterally attack those induction orders, the Court could not "believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Id.* at 121. The Court refused to resolve any statutory ambiguity against the accused, noting that "[w]e are dealing here with a question of personal liberty." *Id.* at 122.

Here, too, we are dealing with a question of personal liberty and an administrative agency that acted outside the authority defining its jurisdiction. Congress limits any challenge to the "validity of the deportation order" in § 1326(d), but that cannot be read to remove the government's burden to prove that a defendant has been removed. § 1326(a). Just as a notice to appear without a hearing time is not a notice to appear, *Pereira*, 138 S. Ct. at 2116, a removal order entered without jurisdiction is not removal order.

Alternatively, § 1326(d) is unconstitutional if it prevents a defendant from challenging the jurisdictional validity of the removal order. To comport with due process, petitioners must be able to challenge whether the immigration court lacked jurisdiction

even if he cannot satisfy the § 1326(d) criteria. The Fifth Circuit's decision in *Pedroza-Rocha* to the contrary, as applied to petitioners' cases, conflicts with this Court's precedent in *Estep*.

D. The Court should grant certiorari.

For decades, immigration authorities ignored the statutory requirement to include a hearing time in the notice to appear. In the past two decades, well over 200,000 notices to appear were filed on average per year.[2] Most of those notices lacked hearing times. *Pereira*, 138 S. Ct. at 2111. As a result, millions of people have been deported by an agency without authority to do so.

Many of those removed came back unlawfully. Illegal reentry continues to be the most prosecuted federal felony.[3] In fiscal year 2018, over 18,000 people were sentenced for illegal reentry.[4] These prosecutions not only cost defendants their liberty, taxpayers

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[2] *See* U.S. Dep't of Justice, Executive Office for Immigration Review (EOIR), Statistics Yearbook FY 2018, at 7, https://www.justice.gov/eoir/file/1198896/download; U.S. Dep't of Justice, EOIR, FY 2013 Statistics Yearbook, at A7 (Apr. 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf; U.S. Dep't of Justice, EOIR, FY 2008 Statistical Year Book, at B1 (Mar. 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/03/27/fy08syb.pdf; U.S. Dep't of Justice, EOIR, FY 2003 Statistical Year Book, at B2 (Apr. 2004), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy03syb.pdf.

[3] TRAC-Immigration, Immigration Prosecutions for 2019 (Oct. 31, 2019), https://tracfed.syr.edu/results/9x705dbb47e5a0.html.

[4] U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses (Fiscal Year 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf.

pay approximately $27,000 to detain a defendant for the average 10-month sentence.[5] The number affected militates against leaving the agency's deliberate decades-long violation of a congressional directive unchecked. Otherwise agencies will continue to ignore Congress and upend the separation and balance of powers.

Petitioners acknowledge that the petitioner in *Pedroza-Rocha* has raised in his petition the same arguments presented in this consolidated petition. Because the Fifth Circuit has applied the holdings in *Pedroza-Rocha* to the cases of all three Petitioners in this case, all Petitioners request that the Court grant the petition for certiorari in Sup. Ct. Case. No. 19-6588, and hold this consolidated petition pending this Court's decision in *Pedroza-Rocha*.

[5] U.S. Dep't of Justice, U.S. Marshals Service, FY 2020 Performance Budget: Federal Prisoner Detention Appropriation 19 (Mar. 2019), https://www.justice.gov/jmd/page/file/1144161/download (daily non-federal facility cost in fiscal year 2018 was $90.17).

CONCLUSION

For the foregoing reasons, Petitioners Jose Alexander Callejas Rivera, Wilfredo Funez Garsilla, and Miguel Angel Ibarra-Ramos respectfully pray that this Court grant the petition for certiorari in *Pedroza-Rocha v. United States*, Sup. Ct. Case No. 19-6588, and then grant this consolidated petition to review the judgments of the Fifth Circuit in these cases in light of this Court's resolution of the case in *Pedroza-Rocha*.

Date: December 19, 2019

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20274

UNITED STATES OF AMERICA,

Plaintiff - Appellant

v.

JOSE ALEXANDER CALLEJAS RIVERA,

Defendant - Appellee

Certified as a true copy and issued as the mandate on Oct 30, 2019

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court
for the Southern District of Texas

Before OWEN, Chief Judge, WILLETT and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's unopposed motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that appellant's unopposed motion to extend time for thirty (30) days to file their brief after the denial of the unopposed motion for summary judgment is DENIED as unnecessary.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 17, 2019
Lyle W. Cayce
Clerk

No. 19-20339

UNITED STATES OF AMERICA,

Plaintiff–Appellant,

versus

WILFREDO FUNEZ GARSILLA,

Defendant–Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-5-1

Before SMITH, COSTA, and HO, Circuit Judges.

PER CURIAM:*

IT IS ORDERED that appellant's unopposed motion for summary disposition is GRANTED. The order of May 1, 2019, granting the motion to dismiss filed by defendant Wilfredo Garsilla, is REVERSED, and the matter is re-

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

turned to the district court for proceedings as appropriate. IT IS FURTHER ORDERED that appellant's unopposed alternative motion for an extension to file its brief is DENIED as unnecessary.

REVISED November 26, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 25, 2019
Lyle W. Cayce
Clerk

No. 19-20466
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MIGUEL ANGEL IBARRA-RAMOS, also known as Miguel Angel Ibarra Ramos,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-618-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Miguel Angel Ibarra-Ramos appeals his conviction for illegal reentry into the United States. He challenges the district court's denial of his motion to dismiss the indictment, arguing that the indictment was invalid because the notice to appear in his removal proceedings was defective because it failed to

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

specify a time and date for his removal hearing, and that the removal order was thus void. He concedes that the issue is foreclosed by *Pierre-Paul v. Barr*, 930 F.3d 684, 689-93 (5th Cir. 2019), and *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed*, (No. 19-6588) (Nov. 12, 2019), but he wishes to preserve it for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed under *Pierre-Paul* and *Pedroza-Rocha*. Alternately, the Government requests an extension of time to file its brief.

In *Pedroza-Rocha*, this court applied *Pierre-Paul* to conclude that the notice to appear was not rendered deficient because it did not specify a date for the hearing, that any such alleged deficiency had not deprived the immigration court of jurisdiction, and that Pedroza-Rocha could not collaterally attack his notice to appear without first exhausting his administrative remedies. 933 F.3d at 496-98. Ibarra-Ramos's arguments are, as he concedes, foreclosed by this case. *See id.* Because the Government's position "is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	**CRIMINAL ACTION NO. 4:19-CR-0094**
	§	
JOSE ALEXANDER CALLEJAS RIVERA	§	

ORDER

Pending before the Court is Defendant Callejas Rivera's Motion to Dismiss the Indictment. (Doc. No. 16.) The Court recently considered the same argument in *United States v. Tzul*, No. 4:18-CR-0521-1, 345 F. Supp. 3d 785 (S.D. Tex. Dec. 4, 2018). For the reasons stated in the Memorandum and Order issued by the Court in *Tzul* (Doc. No. 35), Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 25th of March, 2019.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	**CRIMINAL ACTION NO. 4:19-CR-005**
	§	
WILFREDO FUNEZ GARSILLA	§	

ORDER

Pending before the Court is Defendant Garsilla's Motion to Dismiss the Indictment. (Doc. No. 15.) The Court recently considered the same argument in *United States v. Santiago-Tzul*, No. 4:18-CR-0521-1, 345 F. Supp. 3d 785 (S.D. Tex. Dec. 4, 2018). For the reasons stated in the Memorandum and Order issued by the Court in *Santiago-Tzul* (Doc. No. 35), Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 1st of May, 2019.

HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
v.	§	**CASE NO. 4:18-CR-0618**
	§	
MIGUEL ANGEL IBARRA-RAMOS,	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is Defendant's Motion to Dismiss the Indictment. **(Instrument No. 8)**.

Defendant's Motion to Dismiss, which identifies defects in his Notice to Appear, is a collateral attack on the immigration court's removal order. To collaterally attack the validity of the removal order, Defendant must first show that he exhausted any administrative remedies. 8 U.S.C. § 1326(d)(1); *see also United States v. Benitez-Villafuerte*, 186 F.3d 651, 658 n.8 (5th Cir. 1999).

Defendant does not deny that he did not exhaust administrative remedies in his case. Instead, he contends that he does not need to show exhaustion of administrative remedies because the immigration court never had subject matter jurisdiction. (Instrument No. 8 at 10-11).

Title 8 U.S.C. § 1229a directs immigration judges to conduct proceedings for deciding the inadmissibility or deportability of an alien in the United States. *See* 8 U.S.C. § 1229a(a)-(c) (directing that "immigration judge[s] shall conduct proceedings for deciding the inadmissibility or deportability of an alien" and stating that unless otherwise specified "a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United

States."). Section 1229a does not provide, however, when and how subject matter jurisdiction over a removal proceeding vests in an immigration court. Rather, separate federal regulations promulgated by the Attorney General dictate when and how an immigration court gains subject matter jurisdiction. Those regulations specify that "[j]ursidction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). While federal regulations provide that a "charging document" may include a Notice to Appear, the regulatory provisions that govern notices to appear do not require the time and place provisions Defendant contends make his removal order defective. *See* 8 C.F.R. §1003.15 (listing the contents of the Notice to Appear and noting that "[f]ailure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights."). Omission of the date and time of the removal hearing on Defendant's Notice to Appear did not extinguish the immigration court's subject matter jurisdiction. Defendant is therefore required to first exhaust his administrative remedies before collaterally attacking the removal order.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss is **DENIED without prejudice. (Instrument No. 8).**

IT IS FURTHER ORDERED that this case is **ABATED** to allow Defendant an opportunity to exhaust his administrative remedies in the immigration court.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 16th day of November, 2018, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.13

§ 1003.13 Definitions.

Currentness

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in § 1003.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

Credits
[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (13)

Current through November 28, 2019; 84 FR 65606.

End of Document

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.14

§ 1003.14 Jurisdiction and commencement of proceedings.

Currentness

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997; 68 FR 9832, Feb. 28, 2003; 68 FR 10350, March 5, 2003]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (38)

Current through November 28, 2019; 84 FR 65606.

End of Document

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.15

§ 1003.15 Contents of the order to show cause and notice to appear and notification of change of address.

Currentness

<For statute(s) affecting validity, see: 8 USCA § 1229.>

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with § 1003.26.

(c) Contents of the Notice to Appear for removal proceedings. In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) Address and telephone number.

(1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR–33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR–33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997; 68 FR 10350, March 5, 2003]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (22)

Current through November 28, 2019; 84 FR 65606.

End of Document

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.18

§ 1003.18 Scheduling of cases.

Currentness

<For statute(s) affecting validity, see: 8 USCA § 1229, 1229a.>

(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) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If 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. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (7)

Current through November 28, 2019; 84 FR 65606.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

8 U.S.C.A. § 1229

§ 1229. Initiation of removal proceedings

Effective: August 12, 2006
Currentness

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying--

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

CREDIT(S)

(June 27, 1952, c. 477, Title II, § 239, as added Pub.L. 104-208, Div. C, Title III, § 304(a)(3), Sept. 30, 1996, 110 Stat. 3009-587; amended Pub.L. 109-162, Title VIII, § 825(c)(1), Jan. 5, 2006, 119 Stat. 3065; Pub.L. 109-271, § 6(d), Aug. 12, 2006, 120 Stat. 763.)

Notes of Decisions (107)

8 U.S.C.A. § 1229, 8 USCA § 1229
Current through P.L. 116-72.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to

do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

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.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Notes of Decisions (1389)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 116-72.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 116-72.

End of Document