No. 19-7052

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ALEXANDER CALLEJAS RIVERA, ET AL., PETITIONERS

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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the immigration court lacked jurisdiction over petitioners' removal proceedings because the original notices to appear filed with the immigration court did not specify the date and time of their initial removal hearings.

2. Whether 8 U.S.C. 1326(d) violates due process if it precludes petitioners from collaterally attacking their removal orders.

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 19-7052

JOSE ALEXANDER CALLEJAS RIVERA, ET AL., PETITIONERS

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

_____

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1 (Callejas Rivera); Pet. App. B1-B2 (Funez Garsilla); Pet. App. C1-C2 (Ibarra-Ramos)) are not published in the Federal Reporter, but two of the opinions are reprinted at 780 Fed. Appx. 191 (Funez Garsilla) and 785 Fed. Appx. 270 (Ibarra-Ramos).[1] The orders of the district court (Pet. App. D1 (Callejas Rivera); Pet. App. E1 (Funez Garsilla); Pet. App. F1-F2 (Ibarra-Ramos)) are unreported.

[1] Pursuant to this Court's Rule 12.4, petitioners are Jose Alexander Callejas Rivera, Wilfredo Funez Garsilla, and Miguel Angel Ibarra-Ramos, who received separate judgments from the same court of appeals presenting closely related questions. See Pet. ii.

JURISDICTION

The judgment of the court of appeals in petitioner Callejas Rivera's case was entered on October 30, 2019. The judgment of the court of appeals in petitioner Funez Garsilla's case was entered on October 17, 2019. The judgment of the court of appeals in petitioner Ibarra-Ramos's case was entered on November 25, 2019. The petition for a writ of certiorari was filed on December 19, 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 Southern District of Texas for illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a), petitioners Callejas Rivera and Funez Garcia moved to dismiss the indictments. 19-20274 C.A. ROA 17-18, 25-40; 19-20339 C.A. ROA 6-7, 25-36. The district court granted their motions. Pet. App. D1, E1. The court of appeals reversed and remanded for further proceedings. Id. at A1, B1-B2.

Following a conditional guilty plea in the United States District Court for the Southern District of Texas, petitioner Ibarra-Ramos was convicted of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). 19-20466 C.A. ROA 206. The district court sentenced him to 45 months of imprisonment, to be followed by two years of

supervised release. Id. at 207-208. The court of appeals affirmed. Pet. App. C1-C2.

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 separately 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. a. Petitioner Callejas Rivera is a native and citizen of El Salvador. 19-20274 C.A. ROA 43. On an unknown date, he illegally entered the United States without inspection by an immigration officer. Ibid.

In 2010, DHS served Callejas Rivera with a notice to appear for removal proceedings "on a date to be set at a time to be set." 19-20274 C.A. ROA 43. The notice to appear charged that Callejas Rivera was subject to removal because he was an alien present in the United States without being admitted or paroled. Ibid.; see 8 U.S.C. 1182(a)(6)(A)(i). DHS filed the notice to appear with the immigration court. 19-20274 C.A. ROA 43.

In 2011, an IJ held a removal hearing at which Callejas Rivera appeared. See 19-20274 C.A. ROA 45. The IJ found Callejas Rivera removable as charged and ordered him removed to El Salvador. Ibid. Callejas Rivera waived appeal to the Board of Immigration Appeals (Board). Ibid. He was subsequently removed to El Salvador. Id. at 9.

Later that same year, Callejas Rivera was found in the United States. 19-20274 C.A. ROA 9. He was convicted of entering the United States at a place other than as designated by immigration officers, in violation of 8 U.S.C. 1325(a)(1), and sentenced to time served. 19-20274 C.A. ROA 9; see 11-po-5996 D. Ct. Doc. 3, at 1 (Oct. 26, 2011). He was then removed to El Salvador for a second time. 19-20274 C.A. ROA 9.

In 2015, Callejas Rivera was again found in the United States. 19-20274 C.A. ROA 9. He was again convicted of entering the United States at a place other than as designated by immigration officers, in violation of 8 U.S.C. 1325(a)(1), and sentenced to 40 days of imprisonment. 19-20274 C.A. ROA 9; see 15-po-4274 D. Ct. Doc. 3,

at 1 (Aug. 31, 2015). He was then removed to El Salvador for a third time. 19-20274 C.A. ROA 9.

b. In 2019, Callejas Rivera was arrested for public intoxication in Montgomery County, Texas. 19-20274 C.A. ROA 10. A federal grand jury in the Southern 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). 19-20274 C.A. ROA 17-18.

The district court granted Callejas Rivera's motion to dismiss the indictment. Pet. App. D1. The court did so for the reasons stated in its prior order in United States v. Tzul, 345 F. Supp. 3d 785 (S.D. Tex. 2018), in which it had dismissed a illegal-reentry charge on the theory that the immigration court never had jurisdiction to order the defendant's removal because the defendant was served with a notice to appear that did not specify the date and time of the defendant's initial removal hearing. Id. at 786-792.

c. The government appealed. 19-20274 C.A. ROA 76. While the appeal was pending, the court of appeals issued decisions in Pierre-Paul v. Barr, 930 F.3d 684 (5th Cir. 2019), petition for cert. pending, No. 19-779 (filed Dec. 16, 2019), and United States v. Pedroza-Rocha, 933 F.3d 490 (5th Cir. 2019) (per curiam), petition for cert. pending, No. 19-6588 (filed Nov. 6, 2019). In each of those decisions, the court of appeals determined that the omission of date-and-time information in a notice to appear did

not deprive the immigration court of jurisdiction over an alien's removal proceedings, for three independent reasons. First, because "the regulations, not 8 U.S.C. § 1229(a), govern what a notice to appear must contain to constitute a valid charging document," "a notice to appear is sufficient to commence proceedings even if it does not include the time, date, or place of the initial hearing." Pierre-Paul, 930 F.3d at 693; see Pedroza-Rocha, 933 F.3d at 497. Second, because the immigration court in each case had "subsequently mail[ed] a notice of hearing that contained all pertinent information," any "defect" in the notice to appear had been "cured." Pierre-Paul, 930 F.3d at 693; see Pedroza-Rocha, 933 F.3d at 497. Third, "because 8 C.F.R. § 1003.14 is not [a] jurisdictional," but "a claim-processing," rule, the alien in each case had "forfeited" any claim that the notice to appear was "defective" by not raising the issue before the IJ or the Board. Pierre-Paul, 930 F.3d at 693; see Pedroza-Rocha, 933 F.3d at 497-498.

In Pedroza-Rocha, the court of appeals determined that the district court erred in dismissing an illegal-reentry charge for the additional reason that 8 U.S.C. 1326(d) barred the defendant's "collateral attack on the validity of his removal order." 933 F.3d at 498. The court of appeals explained that Section 1326(d)(1) requires a defendant 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 declined to create an exception to that exhaustion requirement for challenges to the immigration court's "jurisdiction." Ibid. And the court of appeals found that the defendant in that case had "failed to exhaust all administrative remedies" because he "did not file an appeal with the [Board]." Ibid.

d. The court of appeals in Callejas Rivera's case granted the government's unopposed motion for summary disposition in light of the court's intervening decisions in Pierre-Paul and Pedroza-Rocha. Pet. App. A1. The court thus reversed and remanded for further proceedings. See ibid. During the pendency of the appellate proceedings, Callejas Rivera was removed from the United States. See Pet. 4.

3. a. Petitioner Funez Garsilla is a native and citizen of Honduras. 19-20339 C.A. ROA 39. In 1998, he illegally entered the United States without inspection by an immigration officer. Ibid.

Shortly thereafter, DHS served Funez Garsilla with a notice to appear that did not specify the date and time of his initial removal hearing. 19-20339 C.A. ROA 39. The notice to appear charged that Funez Garsilla was subject to removal because he was an alien present in the United States without being admitted or paroled. Ibid.; see 8 U.S.C. 1182(a)(6)(A)(i).

About a month later, an IJ held a removal hearing at which Funez Garsilla appeared. See 19-20339 C.A. ROA 42. The IJ found

Funez Garsilla removable as charged and ordered him removed to Honduras. Id. at 41. Funez Garsilla waived appeal to the Board, ibid., and he was subsequently removed to Honduras, id. at 64.

b. In 2018, Funez Garsilla was arrested for felony assault in Texas. 19-20339 C.A. ROA 65. A federal grand jury in the Southern 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). 19-20339 C.A. ROA 6-7. The district court granted Funez Garsilla's motion to dismiss the indictment, for the reasons stated in its prior order in Tzul. Pet. App. E1.

c. The government appealed, 19-20339 C.A. ROA 96, and the court of appeals granted the government's unopposed motion for summary disposition in light of the court's intervening decisions in Pierre-Paul and Pedroza-Rocha, Pet. App. B1-B2. The court thus reversed and remanded for further proceedings. Ibid. During the pendency of the appellate proceedings, Funez Garsilla was removed from the United States. See Pet. 4.

4. a. Petitioner Ibarra-Ramos is a native and citizen of Mexico. 19-20466 C.A. ROA 90. In 2000, he illegally entered the United States without inspection by an immigration officer. Ibid. In 2002, he was convicted of possession of cocaine, in violation of Texas law. Ibid.

In 2002, DHS served Ibarra-Ramos with a notice to appear that did not specify the date and time of his initial removal hearing. 19-20466 C.A. ROA 90. The notice to appear charged that Ibarra-

Ramos was subject to removal because he was an alien present in the United States without being admitted or paroled, ibid.; see 8 U.S.C. 1182(a)(6)(A)(i), and because he had been convicted of a violation of a law relating to a controlled substance, 19-20466 C.A. ROA 90; see 8 U.S.C. 1182(a)(2)(A)(i)(II).

About a month later, an IJ held a removal hearing at which Ibarra-Ramos appeared. See 19-20466 C.A. ROA 93. The IJ ordered Ibarra-Ramos removed to Mexico. Id. at 92. Ibarra-Ramos waived appeal to the Board, ibid., and he was subsequently removed to Mexico, id. at 12, 96.

In 2009, Ibarra-Ramos was found in the United States. 19-20466 C.A. ROA 12. He was convicted of possession of a controlled substance, in violation of Texas law, and sentenced to 180 days of imprisonment. Ibid. DHS reinstated the 2002 removal order, and Ibarra-Ramos was removed to Mexico for a second time. Id. at 12, 97-99.

In 2015, Ibarra-Ramos was again found in the United States. 19-20466 C.A. ROA 12, 107. He was convicted of illegally reentering the United States after removal, in violation of 8 U.S.C. 1326(a) and (b)(1), and sentenced to time served. 19-20466 C.A. ROA 12, 103-104. DHS again reinstated the 2002 removal order, and Ibarra was removed to Mexico for a third time. Id. at 100-102.

b. In 2018, Ibarra-Ramos was arrested for driving without a valid license and for evading arrest. 19-20466 C.A. ROA 13. A

federal grand jury in the Southern 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). 19-20466 C.A. ROA 9-10.

The district court denied Ibarra-Ramos's motion to dismiss the indictment. Pet. App. F1-F2. The court rejected his contention that "[o]mission of the date and time of the removal hearing on [the] Notice to Appear * * * extinguish[ed] the immigration court's subject matter jurisdiction." Id. at F2. The court further observed that, under Section 1326(d)(1), Ibarra-Ramos was "required to first exhaust his administrative remedies before collaterally attacking the removal order," ibid.; see id. at F1, and that he did "not deny that he did not exhaust administrative remedies in his case," id. at F1.

Ibarra-Ramos entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss the indictment. 19-20466 C.A. ROA 194, 206, 231. The district court sentenced him to 45 months of imprisonment, to be followed by two years of supervised release. Id. at 207-208.

c. The court of appeals granted the government's unopposed motion for summary affirmance, noting Ibarra-Ramos's acknowledgement that the court's intervening decisions in Pierre-Paul and Pedroza-Rocha foreclosed his jurisdictional challenge to the underlying removal proceedings. Pet. App. C1-C2.

ARGUMENT

Petitioners contend (Pet. 7-9) that the immigration court lacked jurisdiction over their removal proceedings because the notices to appear filed with the immigration court did not specify the date and time of their initial removal hearings. The court of appeals correctly rejected that contention. Its decisions in these cases do not conflict with any decision of this Court, and the outcome of these cases would not have been different in any other court of appeals that has addressed that issue. This Court has recently and repeatedly 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, 140 S. Ct. 908 (2020) (No. 19-358); Deocampo v. Barr, 140 S. Ct. 858 (2020) (No. 19-44), and the same result is warranted here.[2] Petitioners also contend (Pet. 12-14) that 8 U.S.C. 1326(d) violates due process if it precludes them from collaterally attacking their removal orders. That contention likewise lacks merit and does not warrant this Court's review. In any event,

[2] Other pending petitions for writs of certiorari raise similar issues. See, e.g., Pedroza-Rocha v. United States, No. 19-6588 (filed Nov. 6, 2019); Pierre-Paul v. Barr, No. 19-779 (filed Dec. 16, 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 (filed Jan. 28, 2020); Ferreira v. Barr, No. 19-1044 (filed Feb. 18, 2020); Ramos v. Barr, No. 19-1048 (filed Feb. 20, 2020).

these cases would be poor vehicles for addressing either question presented because neither question alone is outcome-determinative. Moreover, in Callejas Rivera's and Funez Garsilla's cases, the court of appeals' decisions are interlocutory. Further review is unwarranted.

1. Petitioners' contention (Pet. 7-9) that the immigration court lacked jurisdiction over their removal proceedings, because the notices to appear filed with the immigration court did not specify the date and time of their initial removal hearings, lacks merit and does not warrant this Court's review.

a. The court of appeals correctly rejected petitioners' jurisdictional challenges, for two independent reasons. 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). The regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document is filed with the Immigration Court." Ibid. The regulations further provide that 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 instead 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 means 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, 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, petitioners forfeited any objection to the contents of the notice to appear by not raising that issue before the IJ or the Board. Ortiz-Santiago v. Barr, 924 F.3d 956, 963 (7th Cir. 2019). 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, each petitioner appeared at his initial removal hearing before the IJ and then waived appeal to the Board, without raising any objection to the lack of date-and-time information in the notice to appear. See 19-20274 C.A. ROA 45; 19-20339 C.A. ROA 41-42; 19-20466 C.A. ROA 92-93; Pet. App. F1. Given the absence of a timely objection, each petitioner forfeited any contention that the notice to appear was defective. See Pierre-Paul v. Barr, 930 F.3d 684, 693 (5th Cir. 2019), petition for cert pending, No. 19-779 (filed Dec. 16, 2019); Ortiz-Santiago, 924 F.3d at 964-965.

b. This Court's decision in Pereira v. Sessions, 138 S. Ct. 2105 (2018), does not suggest any error in the decisions below. 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 that 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 such a notice 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). Petitioners' reliance (Pet. 7-9) on Pereira and Section 1229(a) therefore is misplaced.

c. Petitioners have not identified any court of appeals in which the outcome of their cases would have been different.

Like the Fifth Circuit (see United States v. Pedroza-Rocha, 933 F.3d 490, 497 (2019) (per curiam), petition for cert. pending, No. 19-6588 (filed Nov. 6, 2019); Pierre-Paul, 930 F.3d at 693), seven other courts of appeals have rejected arguments like petitioners' 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). Petitioners cite no decision from any of those

circuits granting relief to a defendant in circumstances similar to theirs.

Like the Fifth Circuit (see Pedroza-Rocha, 933 F.3d at 497-498; Pierre-Paul, 930 F.3d at 693), 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 petitioners' challenges to their removal proceedings on the ground that they forfeited any reliance on such a claim-processing rule. See pp. 15-17, supra. Thus, no precedent in any court of appeals that has addressed the question presented recognizes a claim like petitioners'.

Petitioners' assertions of various circuit conflicts do not suggest otherwise. Petitioners contend (Pet. 11-12) 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. See Pierre-Paul, 930 F.3d at 691 n.4 (5th Cir.) (explaining that other circuits that have "concluded that the notices to appear omitting the time, date, or place are not defective" have not "needed to address whether 8 C.F.R. § 1003.14 was jurisdictional"); 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").

Petitioners also contend (Pet. 10) that the decisions below conflict with decisions of the Seventh and Eleventh Circuits on whether "the statutory definition of a notice to appear applies to starting a removal proceeding." But the Eleventh Circuit case cited by petitioners -- Perez-Sanchez v. U.S. Attorney General, supra -- did not resolve that question. See 935 F.3d at 1154 ("assum[ing] for purposes of this opinion that the statute is ambiguous"); 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)). Rather, the Eleventh Circuit determined that, even assuming that "the statute is ambiguous and the regulation should be given effect," "8 C.F.R. § 1003.14, like 8 U.S.C. § 1229(a), sets forth only a claim-processing rule." Id. at 1154-1155. Thus, petitioners' failure to timely raise their notice objections in the immigration court means that their challenges to their removal proceedings would have failed in the Eleventh Circuit. See pp. 15-17, supra (explaining that each petitioner forfeited any violation of a claim-processing rule here).

Petitioners' challenges would have likewise failed in the Seventh Circuit. In Ortiz-Santiago v. Barr, supra, 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 recognized 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 in these cases as the Fifth Circuit did. See pp. 15-17, supra (explaining that each petitioner forfeited any error here). Thus, the outcome of

these cases would have been the same in every court of appeals that has addressed the question presented.

2. Petitioners additionally contend (Pet. 12-14) that 8 U.S.C. 1326(d) violates due process if it precludes them from collaterally attacking their removal orders. That contention likewise lacks merit and does not warrant this Court's review.

a. As an initial matter, petitioners do not dispute that they failed to satisfy the prerequisites for collaterally attacking their removal orders under Section 1326(d). Like the defendant in Pedroza-Rocha, 933 F.3d at 498, petitioners have not exhausted administrative remedies, 8 U.S.C. 1326(d)(1), because they raised no objection before the IJ or the Board to the notices they received, see 19-20274 C.A. ROA 45; 19-20339 C.A. ROA 41-42; 19-20466 C.A. ROA 92-93; Pet. App. F1. Petitioners also cannot show that the "deportation proceedings at which the [removal] order[s] w[ere] issued improperly deprived [them] of the opportunity for judicial review," 8 U.S.C. 1326(d)(2), because they waived the right to appeal and accepted removal, see 19-20274 C.A. ROA 45; 19-20339 C.A. ROA 41; 19-20466 C.A. ROA 92. And they cannot show that "the entry of the order[s] was fundamentally unfair," 8 U.S.C. 1326(d)(3), because they cannot show that the lack of date-and-time information in the notices to appear caused them any prejudice -- particularly given that each petitioner appeared at his initial removal hearing and then waived appeal. See 19-20274 C.A. ROA 45; 19-20339 C.A. ROA 41-42;

19-20466 C.A. ROA 92-93; 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).

b. Petitioners err in contending (Pet. 12-14) that Section 1326(d) violates due process if it precludes them from collaterally attacking their removal orders. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), 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. Id. 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, petitioners' contention that Section 1326(d) itself is unconstitutional lacks merit.

Relying on Estep v. United States, 327 U.S. 114 (1946), petitioners contend (Pet. 13) that "[d]ue process * * * requires [that] a defendant be allowed to challenge the jurisdictional basis of the administrative order being used to prosecute him." As explained above, however, the alleged defect in the notices to appear is not "jurisdictional" in nature. See pp. 15-17, supra. And even if the alleged defect were "jurisdictional," petitioners' reliance on Estep would be 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"). Estep therefore provides no basis for concluding that Section 1326(d)'s prerequisites for a collateral attack on a removal order are unconstitutional.

c. In any event, these cases would be poor vehicles for addressing whether Section 1326(d) violates due process, because the courts below did not address the constitutionality of Section 1326(d). See Pet. App. A1, B1-B2, C1-C2, D1, E1, F1-F2. The district court's orders in Callejas Rivera's and Funez Garsilla's cases cross-referenced the court's order in United States v. Tzul, 345 F. Supp. 3d 785 (S.D. Tex. 2018). Pet. App. D1, E1. But the court in Tzul did not rely on the Constitution in determining that the defendant could pursue a "jurisdictional" challenge to his removal order; rather, it concluded simply that Section 1326(d)

did not apply to such a challenge. 345 F. Supp. 3d at 787. And while the court of appeals in each of petitioners' cases granted the government's motion for summary disposition in light of the court's prior decisions in Pierre-Paul and Pedroza-Rocha, those decisions likewise did not address the constitutionality of Section 1326(d). Because the constitutionality of Section 1326(d) was not considered below, no further review is warranted. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view").

3. In all events, these cases would be poor vehicles to address the questions presented for two additional reasons.

First, neither question presented alone is outcome-determinative. Petitioners would have to prevail on both questions presented in order to be entitled to dismissal of the indictments. These cases therefore do not present either question cleanly.

Second, in Callejas Rivera's and Funez Garsilla's cases, the court of appeals' decisions are interlocutory, because the court reversed the district court's dismissal of the indictments and remanded for further proceedings. Pet. App. A1, B1-B2. 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 Callejas Rivera and Funez Garsilla -- who have been removed from the United States -- return

to the country, and if, on remand, they are convicted on the illegal-reentry charges and those convictions are affirmed on appeal, they would then have the opportunity to raise their 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).

4. Petitioners ask (Pet. 15-16) this Court to grant the petition for a writ of certiorari in Pedroza-Rocha v. United States, No. 19-6588 (filed Nov. 6, 2019), and to hold this petition pending the Court's disposition of that case. For the reasons explained in the government's brief in opposition in Pedroza-Rocha, however, the petition for a writ of certiorari in that case should be denied. We have served petitioners with a copy of the government's brief in opposition in Pedroza-Rocha.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

PAUL T. CRANE
Attorney

MARCH 2020