No. 19-7410

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR MANUEL MORA-GALINDO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

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

2. Whether 8 U.S.C. 1326(d) violates due process if it precludes petitioner from collaterally attacking his removal order.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Mora-Galindo, No. 18-cr-217 (May 31, 2019)

United States v. Mora-Galindo, No. 18-cr-826 (May 31, 2019)

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

United States v. Mora-Galindo, No. 19-50517 (Oct. 22, 2019)

United States v. Mora-Galindo, No. 19-50527 (Oct. 22, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 781 Fed. Appx. 374.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2019. The petition for a writ of certiorari was filed on January 21, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). C.A. ROA 156. The district court sentenced him to 18 months of imprisonment, to be followed by three years of supervised release. Id. at 157-158. The court of appeals affirmed. Pet. App. A1-A2.

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. Petitioner is a native and citizen of Mexico. D. Ct. Doc. 22-4, at 2 (Jan. 16, 2019). On an unknown date, he illegally entered the United States without inspection by an immigration officer. Ibid.

In 2013, DHS served petitioner with a notice to appear for removal proceedings "on a date to be set at a time to be set." D. Ct. Doc. 22-4, at 2. The notice to appear charged that petitioner was subject to removal because he was an alien present in the United States without being admitted or paroled. Ibid.; see 8 U.S.C. 1182(a)(6)(A)(i).

The immigration court later provided petitioner with a notice of hearing, informing him that it had scheduled his removal hearing for May 7, 2013, at 1 p.m. D. Ct. Doc. 22-5, at 2 (Jan. 16, 2019). On that date, petitioner appeared in person before an IJ and executed a "Stipulated Request for Removal Order and Waiver of Hearing." D. Ct. Doc. 22-6, at 2 (Jan. 16, 2019) (capitalization altered; emphasis omitted); see id. at 3. In that stipulation, petitioner admitted the allegations in the notice to appear, acknowledged that he was removable as charged, and agreed that he was not eligible for any relief from removal. Id. at 2. He also waived any removal hearing, agreed to accept a summary order of his removal to Mexico, and waived appeal of such an order. Ibid.

The IJ therefore ordered petitioner removed to Mexico. D. Ct. Doc. 22-7, at 2 (Jan. 16, 2019). DHS removed him to Mexico a short time later. D. Ct. Doc. 22-8, at 2-3 (Jan. 16, 2019).

In 2016, petitioner was found in the United States. D. Ct. Doc. 22-2, at 7 (Jan. 16, 2019). 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 105 days of imprisonment. D. Ct. Doc. 22-2, at 2. DHS reinstated the 2013 removal order, and petitioner was removed to Mexico for a second time. D. Ct. Doc. 22-9, at 2-3 (Jan. 16, 2019).

In April 2018, petitioner was again found in the United States. Presentence Investigation Report ¶ 25. He was convicted of illegally reentering the United States after removal, in violation of 8 U.S.C. 1326, and sentenced to six months of imprisonment, to be followed by one year of supervised release. D. Ct. Doc. 22-3, at 2-4 (Jan. 16, 2019). DHS again reinstated the 2013 removal order, and petitioner was removed to Mexico for a third time. D. Ct. Doc. 22-10, at 2-3 (Jan. 16, 2019).

3. In November 2018, petitioner was again found in the United States. C.A. ROA 15. A federal grand jury in the Western District of Texas indicted him on one count of illegally reentering the United States after removal, in violation of 8 U.S.C. 1326. Ibid.

A magistrate judge recommended denying petitioner's motion to dismiss the indictment. C.A. ROA 132-144. The magistrate judge

took the view that "the notice to appear issued to [petitioner] was deficient" because "it failed to specify the date and time of the hearing." Id. at 138. The magistrate judge determined, however, that even assuming that the deficiency in the notice to appear deprived the immigration court of "jurisdiction," ibid., petitioner could not satisfy any of the prerequisites set forth in 8 U.S.C. 1326(d) for collaterally attacking his 2013 removal order, because he had admitted the allegations in the notice to appear, acknowledged that he was removable as charged, and waived appeal of the removal order, C.A. ROA 139-143.

The district court adopted the magistrate judge's recommendation and denied petitioner's motion to dismiss the indictment. C.A. ROA 151-153. The court noted that petitioner had not filed any objections to the magistrate judge's recommendation, and that petitioner's failure to do so barred him from appellate review "except upon grounds of plain error." Id. at 152.

Petitioner entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss the indictment. Plea Tr. 8, 11, 42. The district court sentenced him to 18 months of imprisonment, to be followed by three years of supervised release. C.A. ROA 157-158.

4. Petitioner appealed. C.A. ROA 162. 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 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 of Immigration Appeals (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.

5. The court of appeals in petitioner's case granted the government's unopposed motion for summary affirmance, noting petitioner's acknowledgement that the court's intervening decision in Pedroza-Rocha foreclosed his jurisdictional challenge to the underlying removal proceedings. Pet. App. A1-A2.

ARGUMENT

Petitioner contends (Pet. 5-8) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court, and the outcome of this case would not 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.[1] Petitioner also contends (Pet. 12-13) that 8 U.S.C. 1326(d) violates due process if it precludes him from collaterally attacking his removal order. That contention likewise lacks merit and does not warrant this Court's review. In any event, this case would be a poor vehicle for addressing either question presented because neither question alone is outcome-determinative. Further review is unwarranted.

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

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[1] 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); Callejas Rivera v. United States, No. 19-7052 (filed Dec. 19, 2019); Araujo Buleje v. Barr, No. 19-908 (filed Jan. 17, 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).

a. The court of appeals correctly rejected petitioner's jurisdictional challenge, for three 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, even if the notice to appear alone did not suffice to "vest[]" "[j]urisdiction" in the immigration court, 8 C.F.R. 1003.14(a), the notice to appear together with the subsequent notice of hearing did. As noted, the regulations expressly authorize the immigration court to "provid[e] notice to the government and the alien of the time, place, and date of hearing" when "that information is not contained in the Notice to Appear." 8 C.F.R. 1003.18(b). That is what the immigration court did here: it provided petitioner with a notice of hearing informing him that his initial removal hearing had been scheduled for May 7, 2013, at 1 p.m. D. Ct. Doc. 22-5, at 2. Thus, even if the regulations

required notice of the date and time of the hearing for "[j]urisdiction" to "vest[]," 8 C.F.R. 1003.14(a), that requirement was satisfied when petitioner was provided with a notice of hearing containing that information. See Bermudez-Cota, 27 I. & N. Dec. at 447 ("Because the [alien] received proper notice of the time and place of his proceeding when he received the notice of hearing, his notice to appear was not defective.").

Third, any requirement that the notice to appear contain the date and time of the initial removal hearing is not a "jurisdictional" requirement, but rather is simply a "claim-processing rule"; accordingly, petitioner forfeited any objection to the contents of the notice to appear by not raising that issue before the IJ 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, petitioner appeared in person before the IJ on the date of his initial removal hearing and waived his right to a hearing, without raising any objection to the lack of date-and-time information in the notice to appear. D. Ct. Doc. 22-6, at 2-3. Given the absence of a timely objection, 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 decision 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). Petitioner's reliance (Pet. 5-8) on Pereira and Section 1229(a) therefore is misplaced.

In any event, petitioner was given the notice required under Section 1229(a) in this case. Section 1229(a) requires that an alien placed in removal proceedings be given "written notice" containing, among other information, "[t]he time * * * at which the proceedings will be held." 8 U.S.C. 1229(a)(1)(G)(i). Section 1229(a), however, does not mandate service of all the specified information in a single document. Thus, if the government serves an alien with a notice to appear that does not specify the date and time of his removal proceedings, it can complete the "written notice" required under Section 1229(a) by later serving the alien

with a notice of hearing that does specify the date and time. 8 U.S.C. 1229(a)(1); see Matter of Mendoza-Hernandez & Capula-Cortes, 27 I. & N. Dec. 520, 531 (B.I.A. 2019) (en banc) (holding that the "'written notice'" required under Section 1229(a)(1) "may be provided in one or more documents"). The government did that here. After DHS served petitioner with a notice to appear that provided all of the specified information except the date and time of his removal proceedings, the immigration court provided petitioner with a notice of hearing containing the date and time, D. Ct. Doc. 22-5, at 2, and petitioner appeared in person before the IJ on that date and waived a hearing, D. Ct. Doc. 22-6, at 2.

c. Petitioner has not identified any court of appeals in which the outcome of his case 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 petitioner's on the ground that a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ," at least where the alien is later provided with a notice of hearing that provides that information. Karingithi, 913 F.3d at 1160 (9th Cir.); see Goncalves Pontes v. Barr, 938 F.3d 1, 3-7 (1st Cir. 2019); Banegas Gomez v. Barr, 922 F.3d 101, 111-112 (2d Cir. 2019), cert. denied, No. 19-510 (Jan. 27, 2020); Nkomo, 930 F.3d at 132-134 (3d Cir.);

Cortez, 930 F.3d at 362-364 (4th Cir.); Santos-Santos v. Barr, 917 F.3d 486, 489-491 (6th Cir. 2019); Ali v. Barr, 924 F.3d 983, 986 (8th Cir. 2019). Petitioner accordingly would not be entitled to relief in any of those circuits.

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 petitioner's challenge to his removal proceedings on the ground that he forfeited any reliance on such a claim-processing rule. See pp. 13-14, supra. Thus, in every court of appeals that has addressed the question presented, petitioner's challenge would have failed.

Petitioner's assertions of various circuit conflicts do not suggest otherwise. Petitioner contends (Pet. 10-11) that, whereas some circuits have recognized that any requirement that a notice to appear contain the date and time of the initial removal hearing is simply a claim-processing rule, the Second, Sixth, Eighth, and Ninth Circuits have deemed any such requirement to be "jurisdictional" in the strict sense of the term. That contention

is incorrect. Those four circuits have repeated 8 C.F.R. 1003.14(a)'s use of the word "jurisdiction" in the course of determining that a "notice to appear need not include time and date information" for the applicable "regulatory requirements" to be satisfied. Karingithi, 913 F.3d at 1160 (9th Cir.); see Banegas Gomez, 922 F.3d at 111-112 (2d Cir.); Santos-Santos, 917 F.3d at 490-491 (6th Cir.); Hernandez-Perez v. Whitaker, 911 F.3d 305, 313-315 (6th Cir. 2018); Ali, 924 F.3d at 986 (8th Cir.). But because each of those circuits found those requirements satisfied, none had occasion to address whether the regulations set forth a strictly jurisdictional, as opposed to a claim-processing, rule. 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").

Petitioner also contends 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." Pet. 8 (emphasis omitted). But the Eleventh Circuit decision cited by petitioner -- 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, petitioner's failure to timely raise his notice objection in the immigration court means that his challenge to his removal proceedings would have failed in the Eleventh Circuit. See pp. 13-14, supra (explaining that petitioner forfeited any violation of a claim-processing rule here).

Petitioner's challenge would have likewise failed in the Seventh Circuit. In Ortiz-Santiago 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 this case as

the Fifth Circuit did. See pp. 13-14, supra (explaining that petitioner forfeited any error here).

Finally, petitioner asserts (Pet. 10) the existence of a circuit conflict on whether the Board of Immigration Appeals' decision in Matter of Bermudez-Cota, supra, is entitled to deference under Auer v. Robbins, 519 U.S. 452 (1997). Petitioner argues (Pet. 10) that the Seventh Circuit has rejected the Board's reasoning in Bermudez-Cota, which held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an [IJ] with jurisdiction over the removal proceedings * * * , so long as a notice of hearing specifying this information is later sent to the alien." 27 I. & N. Dec. at 447. As explained above, however, the Seventh Circuit in Ortiz-Santiago stated only that it was "not so sure" about the "two-step process" adopted by the Board in Bermudez-Cota. 924 F.3d at 962. The Seventh Circuit then recognized that the lack of date-and-time information in the notice to appear was a defect that could be forfeited, id. at 963 -- as it was here, see pp. 13-14, supra. Thus, the outcome of this case would have been the same in every court of appeals that has addressed the question presented.

2. Petitioner additionally contends (Pet. 12-13) that 8 U.S.C. 1326(d) violates due process if it precludes him from collaterally attacking his removal order. That contention likewise lacks merit and does not warrant this Court's review.

a. As an initial matter, petitioner does not dispute that he failed to satisfy the prerequisites for collaterally attacking his removal order under Section 1326(d). Like the defendant in Pedroza-Rocha, 933 F.3d at 498, petitioner has not exhausted administrative remedies, 8 U.S.C. 1326(d)(1), because he raised no objection before the IJ or the Board to the notice he received, see D. Ct. Doc. 22-6, at 2. Petitioner also cannot show that the "deportation proceedings at which the [removal] order was issued improperly deprived [him] of the opportunity for judicial review," 8 U.S.C. 1326(d)(2), because he waived the right to appeal and accepted removal, see D. Ct. Doc. 22-6, at 2. And he cannot show that "the entry of the order was fundamentally unfair," 8 U.S.C. 1326(d)(3), because he cannot show that the lack of date-and-time information in the notice to appear caused him any prejudice -- particularly given that he received a notice of hearing that specified the date and time and then appeared in person before the IJ on that date. See D. Ct. Doc. 22-5, at 2; D. Ct. Doc. 22-6, at 3; 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. Petitioner errs in contending (Pet. 12-13) that Section 1326(d) violates due process if it precludes him from collaterally attacking his removal order. 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, petitioner's contention that Section 1326(d) itself is unconstitutional lacks merit.

Relying on Estep v. United States, 327 U.S. 114 (1946), petitioner contends (Pet. 13) that due process requires that a defendant "be able to challenge whether the immigration court lacked jurisdiction even if he cannot satisfy the § 1326(d) criteria." As explained above, however, the alleged defect in the notice to appear is not "jurisdictional" in nature. See pp. 13-14, supra. And even if the alleged defect were "jurisdictional," petitioner's 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, this case would be a poor vehicle 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-A2; C.A. ROA 132-144, 151-153. Nor did the court of appeals address the constitutionality of Section 1326(d) in its decision in Pedroza-Rocha, on which the decision below relied. Pet. App. A2. 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, this case would be a poor vehicle to address the questions presented because neither question presented alone is outcome-determinative. Petitioner would have to prevail on both questions presented in order to be entitled to dismissal of the indictment. This case therefore does not present either question cleanly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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