No. 19-7753

In the Supreme Court of the United States

October Term, 2019

JUAN RAMON PINEDA-FERNANDEZ, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

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INTRODUCTION

Petitioner Juan Ramon Pineda-Fernandez asks this Court to consider important questions regarding lower courts' adherence to this Court's precedents in matters that affect the separation of powers and the lives of countless noncitizen defendants charged with illegally reentering the United States. Pineda was removed years ago based on a notice to appear that failed to comply with the statutory requirement to have a hearing time. He collaterally attacked that prior removal order in his criminal proceeding. The district court denied that motion to dismiss and sentenced him to seven months' imprisonment. The Fifth Circuit affirmed.

Pineda argues that, given the statutory framework and *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the notice to appear—complete with hearing time—is a jurisdictional requirement for removal proceedings. The putative notice to appear issued to him lacked the required hearing time and rendered his removal proceeding void. He further argues that prohibiting him from challenging the immigration court's jurisdiction unless he can meet the collateral attack requirements of 8 U.S.C. § 1326(d) is inconsistent with this Court's decision in *Estep v. United States*, 327 U.S. 114 (1946). Ultimately, restricting the collateral attack of removal orders in this way renders § 1326 unconstitutional.

The government opposes certiorari because it believes the regulatory definition of a notice to appear trumps the statutory one, the statutory requirements can be met by service of multiple documents, and the notice to appear has no jurisdictional import.[1] The government also claims Pineda cannot collaterally attack his removal order because he fails to meet the requirements of § 1326(d). Finally, the government argues Pineda's case is a poor vehicle because the court below did not address the constitutionality of § 1326(d). he would not satisfy § 1326(d)'s other requirements and no individual question is outcome-determinative.

Pineda replies.

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[1] The government refers to and incorporates arguments made in its brief in opposition to the petition for certiorari in *Mora-Galindo v. United States*, No. 19-7410 (referred to hereinafter as "*Mora-Galindo* BIO").

ARGUMENTS AND AUTHORITIES

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

The government argues that Pineda's removal was proper because the notice to appear complied with the regulatory requirements, he received the information required by the statute through the notice to appear and later notice of hearing, and neither the notice to appear nor its contents has jurisdictional significance. BIO 2–3. It avoids the separation of powers and *Pereira* problems by focusing on the regulations instead of 8 U.S.C. § 1229. BIO 2–3; *Mora-Galindo* BIO 11–14.

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

particularly when the circuits' decisions and reasoning are so fractured. *See* Pet. 8–11.

The government alternatively argues that Pineda received the statutorily-required notice to appear through two documents: the notice to appear and the notice of hearing. BIO 2; *Mora-Galindo* BIO 12–13. Two circuit courts have rejected this argument in the stop-time rule context. *Banuelos v. Barr*, 953 F.3d 1176, 1180–84 (10th Cir. 2020); *Guadalupe v. Att'y Gen. United States*, 951 F.3d 161, 164–66 (3d Cir. 2020).[2] As the Third Circuit explained, *Pereira* "establishes a bright-line rule": a notice to appear "shall contain all the information set out in section 1229(a)(1)." *Guadalupe*, 951 F.3d at 164. The two-step process conflicts with the statutory language, congressional intent, and *Pereira*. *Banuelos*, 953 F.3d at 1180–84. Two other circuits and the Board of Immigration Appeals side with the government. *Yanez-Pena v. Barr*, 952 F.3d 239, 246 (5th Cir. 2020), *petition for certiorari pending*, No. 19-1208; *Garcia-Romo v. Barr*, 940 F.3d 192, 204 (6th Cir. 2019); *Matters of*

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[2] The Ninth Circuit initially held the notice of hearing could not complete or cure a notice to appear lacking a hearing time, but the court granted rehearing en banc and is deciding the issue on the briefs. *See Lopez v. Barr*, 925 F.3d 396, 399 (9th Cir. 2019), *reh'g en banc granted,* 948 F.3d 989 (9th Cir. 2020); *Lopez v. Barr*, No. 15-72406 (9th Cir.) (docket).

Mendoza-Hernandez & Capula-Cortes, 27 I. & N. Dec. 520, 535 (BIA 2019). The courts need guidance.

The government does not squarely address whether § 1229(a)(1) imposes a jurisdictional requirement, instead arguing the regulation requiring a notice to appear be filed with the immigration court is a claim-processing rule. BIO 2–3; *Mora-Galindo* BIO 13–14 (citing 8 C.F.R. § 1003.14(a)). But the issue here is the jurisdictional import of § 1229(a)(1), which requires service of the notice to appear. That service defines the class of cases over which immigration judges can preside. *See* Pet. 5–6. By defining the class subject to the immigration judge's authority, § 1229(a)(1) is a jurisdictional requirement. *See Bowles v. Russell*, 551 U.S. 205, 213 (2007); *United States v. Cotton*, 535 U.S. 625, 630 (2002). Immigration judges cannot remove noncitizens not served a § 1229(a)(1) notice to appear. Those noncitizens can be removed through other procedures[3] or are not removed. Thus, the notice to appear is an important limit on immigration judges' authority. Courts must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington v. F.C.C.*, 569 U.S. 290, 307 (2013).

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

Given the important role of § 1229(a)(1), and this Court's determination in *Pereira* that a notice to appear must have the hearing time or it is not a notice to appear, a defective notice to appear does not give an immigration judge authority to remove a noncitizen.

II. This Court's precedents teach that § 1326(d) cannot prevent a noncitizen from collaterally attacking a jurisdictionally-void removal order used to deprive him of liberty in a criminal proceeding.

The government argues Pineda cannot challenge his jurisdictionally-deficient putative removal order because he did not satisfy the § 1326(d) criteria for collateral attack. BIO 4; *Mora-Galindo* BIO 21–24. Contrary to the government's assertion, § 1326(d) does not track the constitutional requirements recognized in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). *See Mora-Galindo* BIO 23. In *Mendoza-Lopez*, the Court held the noncitizen petitioners must be able to collaterally attack if they were deprived of judicial review. 481 U.S. at 840. The Court said nothing about requiring administrative exhaustion. *Id.* at 830–42.

But the Court recognized in *Estep v. United States* the importance of reviewing the jurisdictional basis for administrative decisions before using them to impose criminal penalties. 327 U.S. 114, 121 (1946) (doubting Congress intended criminal sanctions to

apply to administrative orders "no matter how flagrantly [the agencies] violated the rules and regulations which define their jurisdiction"). That Estep had administratively exhausted *his* claim does not import exhaustion as a requirement for challenging the immigration court's jurisdiction here. Prohibiting such review does not comport with due process. *See id.* at 122 (rejecting that jail should result "for not obeying an unlawful order of an administrative agency").

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

Pineda's case is a suitable vehicle to consider these important issues. It is true no circuit has ruled for Pineda's notice-to-appear argument. *See* BIO 3. But that has not stopped this Court from granting certiorari and correcting the lower courts before. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (requiring the government to prove the defendant "knew he had the relevant status when he possessed" the firearm for a 18 U.S.C. § 922(g) conviction).[4] And if the Court addressed the notice-to-appear issue in a non-criminal context and reversed the circuit courts, it would

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

likely need to address the implication of its ruling in the illegal reentry context. Pineda's case allows the Court to do both simultaneously.

CONCLUSION

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

Respectfully submitted.

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