No. _____

In the Supreme Court of the United States

October Term, 2019

MILTON MAYORGA, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

MAUREEN SCOTT FRANCO
Federal Public Defender

LAURA G. GREENBERG
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Milton Mayorga, like many noncitizen defendants, was ordered removed by an immigration judge after being served a document titled "notice to appear" that did not tell Mr. Mayorga when to appear for removal proceedings. The statute requires that noncitizens facing removal proceedings be served a notice to appear with a hearing time. 8 U.S.C. § 1229(a)(1)(G)(i). The government prosecuted Mr. Mayorga for illegal reentry based on that putative removal order.

The questions presented are:

1. Did the immigration court lack authority to remove Mr. Mayorga because he was not served a notice to appear that had a hearing time?
2. In an illegal reentry prosecution, can the defendant attack the jurisdictional basis for a removal order outside the 8 U.S.C. § 1326(d) requirements for a collateral attack? If not, is § 1326(d) unconstitutional?

No. _____

In the Supreme Court of the United States

October Term, 2019

MILTON MAYORGA, Petitioner,

V.

UNITED STATES OF AMERICA

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

Petitioner, Milton Mayorga asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 21, 2019.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Mayorga*, No. 1:17-CR-114-LY (W.D. Tex. January 29, 2019) (denying motion to dismiss)

- *United States v. Mayorga*, No. 19-50396 (5th Cir. December 12, 2019) (affirming judgment of the district court)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Regulations

Other Authorities

OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Mayorga*, No. 19-50396 (5th Cir. Dec. 12, 2019), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on December 12, 2019. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari 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 reproduced in Appendix B:

- U.S. Const. amend. V (Due Process Clause)
- 8 U.S.C. §§ 1229, 1326
- 8 C.F.R. §§ 1003.13, 1003.14, 1003.15, 1003.18

STATEMENT

Putative removal proceedings. In 2011, immigration authorities detained Mr. Mayorga and gave him a document titled "Notice to Appear" alleging he was inadmissible.

The statute requires that noncitizens in removal proceedings be served with a notice to appear specifying the "time and place at

which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). The regulations further 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. § 1003.14(a); *see also* 8 C.F.R. § 1003.13.

But the document given to Mr. Mayorga and filed in immigration court lacked a hearing time. It stated he must appear before an immigration judge "on a date to be set at a time to be set[.]"

In 2012, the immigration judge found Mr. Mayorga could be removed to Nicaragua. Mr. Mayorga waived the right to appeal. He was removed to Nicaragua.

Illegal reentry proceedings. In 2017, Mr. Mayorga was charged with illegal reentry.[1] The indictment alleged he was previously removed from the United States.

A few months earlier, this Court had issued *Pereira v. Sessions*, holding that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." 138 S. Ct. 2105, 2113–14 (2018).

---

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

Noncitizens across the country began litigating whether the lack of a hearing time has consequences outside the context of the rule for cancellation of removal that the period of physical presence ends when the noncitizen is served a notice to appear under § 1229(a). *See* 8 U.S.C. § 1229b(d)(1).

Mr. Mayorga moved to dismiss the illegal reentry indictment, arguing his removal proceedings were flawed because no notice to appear started the proceedings. He argued, based on *Pereira*, that the putative notice to appear issued in his case failed to vest jurisdiction with the immigration judge. *See* § 1229(a)(1); 8 C.F.R. § 1003.14(a). Thus, he was not "removed" as a matter of law and could meet the requirements to collaterally attack the putative removal order. The district court denied the motion. Mr. Mayorga entered a conditional plea of guilty, reserving his right to appeal the court's decision. The court sentenced him to 24 months' imprisonment and three years' supervised release.

Mr. Mayorga appealed. The government filed an unopposed motion for summary affirmance because the issue was foreclosed by the Fifth Circuit's ruling in *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019). The court granted the motion and affirmed. App. A. In *Pedroza-Rocha*, the court 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), *petition for certiorari pending* No. 19-779). 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. The court also held that a void removal order can be challenged only through 8 U.S.C. § 1326(d), which requires exhaustion of administrative remedies. *Id.* at 498.

REASONS FOR GRANTING THE WRIT

I. The decision below is incorrect and violates 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 inadmissibility 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)).

In *Pedroza-Rocha*, the government 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).

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 court 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 possible 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").

II. The circuit split over the hearing time requirement for the notice to appear has revealed deep confusion about agency authority.

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.

A. 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.[2] Several circuits also hold that a later notice of hearing cures any statutory defect. *See Pierre-Paul*, 930 F.3d at 690.

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

---

[2] *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), *petition for certiorari denied* No. 19-510 (Jan. 27, 2020); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133–34 (3d Cir. 2019), *petition for certiorari pending* No. 19-957; *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), *petition for certiorari denied* No. 19-475.

Pereira" and failed to consider significant legislative history. *Ortiz-Santiago*, 924 F.3d at 962.

B. 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 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, 1016–17 (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.

III. 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 defendant "may not challenge the validity of the deportation order … unless" the defendant shows exhaustion of administrative remedies, deprivation of judicial review, and fundamental unfairness.

In *Pedroza-Rocha*, the Fifth Circuit held that a noncitizen cannot challenge a prior removal order without exhausting administrative remedies. 933 F.3d at 498. The court rejected the argument

Mr. Mayorga made below that an order entered without jurisdiction is void ab initio and can be challenged outside of § 1326(d). *Id.* This ruling conflicts with due process and this Court's precedent.

In *Estep v. United States*, 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. 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 a 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, Mr. Mayorga 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 to the contrary conflicts with this Court's precedent in *Estep*.

IV. These issues recur and are exceptionally important.

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.[3] 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.[4] In fiscal year 2018, over 18,000 people were sentenced for illegal reentry.[5] In the Western District of Texas alone, at least 136 defendants challenged their illegal reentry prosecutions in the year between *Pereira* and *Pedroza-Rocha* because the underlying putative notice to appear lacked a hearing time. Many others chose to forgo motions

---

[3] *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.

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

[5] 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.

to dismiss and plead guilty. These prosecutions not only cost defendants their liberty, taxpayers pay approximately $27,000 to detain a defendant for the average 10-month illegal-reentry sentence.[6]

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.

V. Mr. Mayorga's case is an ideal vehicle to decide these issues.

Mr. Mayorga challenged his prior removal order from the beginning of this criminal case, and the district court and the Fifth Circuit addressed the questions presented. His case presents an ideal opportunity to review these issues that affect the liberty of countless defendants.

---

[6] *Id.*; 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 THESE REASONS, Mr. Mayorga requests that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Laura G. Greenberg
LAURA G. GREENBERG
Assistant Federal Public Defender

Attorney for Defendant-Appellant

DATED: March 11, 2020