

No. 19-7996

IN THE SUPREME COURT OF THE UNITED STATES

MILTON MAYORGA, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 4-7) that the immigration court lacked jurisdiction over his removal proceedings because the initial notice to appear filed with the immigration court did not specify the date and time of his removal hearing. This Court has recently and repeatedly denied petitions for writs of certiorari raising the same issue, see Ramos v. Barr, No. 19-1048 (May 26, 2020); Pedroza-Rocha v. United States, No. 19-6588 (May 18, 2020); Nkomo v. Barr, No. 19-957 (May 4, 2020); Gonzalez-De Leon v. Barr, No. 19-940 (May 4, 2020); Mora-Galindo v. United States, No. 19-7410 (Apr. 27, 2020); Callejas Rivera v. United States, No. 19-7052 (Apr. 27, 2020); Araujo Buleje v. Barr, No. 19-908 (Apr. 27,

2020); Pierre-Paul v. Barr, No. 19-779 (Apr. 27, 2020); Karingithi v. Barr, 140 S. Ct. 1106 (2020) (No. 19-475); Kadria v. Barr, 140 S. Ct. 955 (2020) (No. 19-534); Banegas Gomez v. Barr, 140 S. Ct. 954 (2020) (No. 19-510); 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

For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Mora-Galindo v. United States, supra, the court of appeals correctly rejected petitioner's jurisdictional challenge, for three independent reasons. See Br. in Opp. at 11-17, Mora-Galindo, supra (No. 19-7410).² 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). Second, even if the regulations required notice of the date and time of the hearing for "[j]urisdiction" to "vest[]," ibid., that requirement was satisfied when petitioner was provided with a notice of hearing containing that information. See D. Ct. Doc. 28, at 18 (Jan. 29, 2019); D. Ct. Doc. 24-1, at 2-5 (Nov. 29,

¹ Other pending petitions for writs of certiorari raise similar issues. See, e.g., Milla-Perez v. Barr, No. 19-8296 (filed Feb. 15, 2020); Ferreira v. Barr, No. 19-1044 (filed Feb. 18, 2020); Pineda-Fernandez v. United States, No. 19-7753 (filed Feb. 19, 2020); Cantu-Siguero v. United States, No. 19-7821 (filed Feb. 26, 2020); Castro-Chavez v. Barr, No. 19-1242 (filed Apr. 18, 2020).

² We have served petitioner with a copy of the government's brief in opposition in Mora-Galindo.

2018). 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.” Br. in Opp. at 13, Mora-Galindo, supra (No. 19-7410) (citation omitted). Accordingly, petitioner forfeited any objection to the contents of the notice to appear by not raising that issue before the immigration judge or the Board of Immigration Appeals. See D. Ct. Doc. 28, at 2-3, 15-17.³

Petitioner has not identified any court of appeals in which the outcome of his case would have been different. As discussed in the government’s brief in opposition in Mora-Galindo, every court of appeals that has addressed the question presented would have rejected petitioner’s challenge to his removal proceedings either because the applicable regulatory requirements were satisfied or because he forfeited any contention that they were not. See Br. in Opp. at 17-18, Mora-Galindo, supra (No. 19-7410). For the reasons explained there, see id. at 18-21, petitioner errs in asserting that some circuits have deemed a requirement that a notice to appear contain the date and time of the initial removal

³ Petitioner contends (Pet. 6) that a transitional provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, supports his entitlement to relief. That transitional provision is inapposite. For the reasons stated in United States v. Lira-Ramirez, 951 F.3d 1258 (10th Cir. 2020), the provision does not suggest that 8 U.S.C. 1229(a) speaks to an immigration court’s “jurisdiction” or that the filing of a notice to appear with the immigration court is a “jurisdictional” requirement in the strict sense of the term. 951 F.3d at 1262-1263.

hearing to be “jurisdictional” in the strict sense of the term (Pet. 10-11), and that the outcome of this case would have been different in the Seventh or Eleventh Circuits (Pet. 8).

2. Petitioner additionally contends (Pet. 11-13) that 8 U.S.C. 1326(d) violates due process if it precludes him from collaterally attacking his removal order. For the reasons stated in the government’s brief in opposition in Mora-Galindo, that contention likewise lacks merit and does not warrant this Court’s review. See Br. in Opp. at 21-24, Mora-Galindo, supra (No. 19-7410). Furthermore, 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 Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is “a court of review, not of first view”). This Court has recently denied review of similar issues in other cases. See Mora-Galindo, supra (No. 19-7410); Callejas Rivera, supra (No. 19-7052).⁴ It should follow the same course here.

3. In any event, this case would be an unsuitable vehicle for addressing 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

⁴ Other pending petitions for writs of certiorari raise similar issues. See, e.g., Pineda-Fernandez, supra (No. 19-7753); Cantu-Siguero, supra (No. 19-7821).

dismissal of the indictment. This case therefore does not present either question cleanly.

The petition for a writ of certiorari should be denied.⁵

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MAY 2020

⁵ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.