No. _____

In the Supreme Court of the United States

LUIS FERNANDO RAMIREZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

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

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QUESTIONS PRESENTED FOR REVIEW

Luis Fernando Ramirez was ordered removed by an immigration judge after being served a document titled "notice to appear" that did not tell him when to appear for removal proceedings, contrary to a statute that requires this information. *See* 8 U.S.C. § 1229(a)(1)(G)(i). Here, the Government relied on that removal to prosecute Ramirez for illegal reentry based on that putative removal order. The district court denied Ramirez's motion to dismiss the indictment and found him guilty, and the court of appeals affirmed the conviction.

The questions presented are:

1. Did the immigration court lack authority to remove Ramirez 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?

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UNITED STATES OF AMERICA

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

Petitioner, Luis Fernando Ramirez 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 March 6, 2020.

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.

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Ramirez*, No. 19-50525 (5th Cir. Mar. 6, 2020) (per curiam) (unpublished), is attached to this petition as Pet. App. 1a–2a.

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 March 6, 2020. On March 19, 2020, the Court extended the deadline for filing a petition for writ of certiorari due after that date to 150 days from the date of the lower court's judgment. *See also* Sup. Ct. R. 13.1, 13.5. This petition is filed within that time. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The following are reproduced at Pet. App. 3a–19a:

- 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

Ramirez is a citizen of Mexico. In January 2013, immigration authorities served him with a document titled "Notice to Appear" alleging that he was removable from the United States as an alien

who had entered the country at an unknown place and unknown date and had not been admitted or paroled into the country after inspection by an immigration officer, and that he had been convicted of possession of a controlled substance in state court. The notice ordered him "to appear before an immigration judge of the United States Department of Justice at: TEXAS DOC—HUNTSVILLE 7405 C-2 Highway 75 Huntsville TEXAS 77340 on a date to be set at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above." Ramirez was in the custody of the Texas Department of Criminal Justice when he was served with the NTA. On July 9, 2013, an immigration judge held a removal hearing by video conference. The judge found that, based on Ramirez's admissions, he was removable as charged in the NTA. For that reason, the judge ordered that Ramirez be removed to Mexico. The order reflects that Ramirez "made no application for relief from removal" and that he waived appeal. Ramirez was removed to Mexico on July 16, 2013. The removal order was reinstated in 2016, after Ramirez served a sentence for illegal reentry.

On September 26, 2018, Border Patrol agents found Ramirez in Brewster County, in the Western District of Texas. He had not received permission from the Attorney General or the Secretary of

Homeland Security to reapply for admission to the United States. Ramirez was charged in a one-count indictment with illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326.

Ramirez moved to dismiss the indictment. Relying on the Supreme Court's decision in *Pereira v. Sessions*, he argued that the notice to appear did not vest the immigration court with jurisdiction because it did not include the date and time of the removal proceedings, as required by statute. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113–14 (2018) (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 [8 U.S.C. §] 1229(a)"); 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court[.]"). For that reason, Ramirez's removal proceedings were void *ab initio* and he was not "removed" as a matter of law. He also argued he could meet the requirements to collaterally attack the putative removal order under 8 U.S.C. § 1326(d).

The district court denied Ramirez's motion to dismiss. The court assumed, without deciding, that the defect in the NTA af-

fected the immigration court's jurisdiction in the 2013 removal proceedings. But the court also concluded that, even if the NTA was jurisdictionally defective, Ramirez could not satisfy the remaining requirements for collaterally attacking a removal under 8 U.S.C. § 1326(d).

Ramirez pleaded guilty conditionally, expressly reserving his right to appeal the district court's denial of his motion to dismiss. The court sentenced him to 46 months' imprisonment and three years' supervised release.

Ramirez appealed. The Fifth Circuit summarily affirmed Ramirez's conviction, based on its decisions in *United States v. Pedroza-Rocha*, 933 F.3d 490 (2019), *cert. denied* (U.S. May 18, 2020) (No. 19-6588); and *Pierre-Paul v. Barr*, 930 F.3d 684 (2019), *cert. denied* (U.S. Apr. 27, 2020) (No. 19-779). Pet. App. 1a–2a. In *Pedroza-Rocha*, the Fifth Circuit held that that the notice to appear was not rendered deficient because it did not specify a date for the hearing, that any such alleged deficiency had not deprived the immigration court of jurisdiction, and that Pedroza-Rocha could not collaterally attack his notice to appear without first exhausting his administrative remedies. 933 F.3d at 496–98.

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 v. Sessions*, 138 S. Ct. 2105, 2116 (2018).

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 *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *cert. denied* (U.S. Apr. 27, 2020) (No. 19-779), the Fifth Circuit held 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). In finding "no glue" between the regulations and § 1229(a)(1), the Fifth Circuit 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) to require a hearing time in a notice to appear for removal proceedings. 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 in § 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 hold that the regulatory definition of a notice to appear, which does not require a hearing time, applies for beginning removal proceedings.[1] Several circuits also hold that a later notice of hearing cures any statutory defect. *See Pierre-Paul*, 930 F.3d at 690.

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[1] *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), *cert. denied*, 140 S. Ct. 954 (2020); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133–34 (3d Cir. 2019), *cert. denied* (U.S. May 4, 2020) (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. Barr*, 913 F.3d 1158, 1161–62 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020).

In finding that the regulatory definition controls, the First, Sixth, and Ninth Circuits 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 *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 also agree that § 1229(a)(1) is not jurisdictional, but have not decided whether the regulations are. *Goncalves Pontes*, 938 F.3d at 7 n.3; *Nkomo*, 930 F.3d at 134.

Given 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 defend-

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

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. *Estep v. United States*, 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 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, a defendant 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.[2] 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.[3] In fiscal year 2018, over 18,000 people were sentenced for illegal reentry.[4] These prosecutions not only cost defendants their liberty, taxpayers pay

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[2] *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.

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

[4] 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.

approximately $27,000 to detain a defendant for the average 10-month sentence.[5]

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.

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[5] *Id.*; U.S. 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, Ramirez asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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