No. _____

IN THE

Supreme Court of the United States

JOSE VINCENTE LIRA-RAMIREZ, JOSE FERNANDEZ-CASAS, JOSE MARTINEZ, IGNACIO HERNANDEZ-MENDEZ, AND SIMON ROCHEL-CERVANTES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is a follow-up to *Pereira v. Sessions*, 138 S.Ct. 2105 (2018). The question is:

Does the Due Process Clause permit a noncitizen to be convicted under 8 U.S.C. § 1326 for unlawful reentry into the United States if the noncitizen was removed from the United States by an immigration court that did not have jurisdiction to do so because of a defective notice that did not include the time and place of the removal proceedings?

RELATED PROCEEDINGS

United States v. Lira-Ramirez, Case No. 6:18-cr-10102-JWB-1 (D. Kan. Mar. 5, 2019)

United States v. Lira-Ramirez Case No. 19-3057 (10th Cir. Mar. 6, 2020)

United States v. Fernandez-Casas, No. 6:18-cr-10126-EFM-1 (D. Kan. June 18, 2019)

United States v. Fernandez-Casas, No. 19-3128 (10th Cir. May 26, 2020)

United States v. Martinez, No. 6:19-cr-10057-JWB-1 (D. Kan. Sept. 17, 2019)

United States v. Martinez, No. 19-3218 (10th Cir. May 13, 2020)

United States v. Hernandez-Mendez, No. 2:18-cr-20055-DDC-1 (D. Kan. Oct. 29, 2019)

United States v. Hernandez-Mendez, No. 19-3247 (10th Cir. May 26, 2020)

United States v. Rochel-Cervantes, No. 6:19-cr-10056-JWB-1 (D. Kan. Nov. 19, 2019)

United States v. Rochel-Cervantes, No. 19-3263 (10th Cir. May 26, 2020)

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JOINT PETITION FOR WRIT OF CERTIORARI

Jose Vincente Lira-Ramirez, Jose Fernandez-Casas, Jose Martinez, Ignacio Hernandez-Mendez, and Simon Rochel-Cervantes respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published decision in Mr. Lira-Ramirez's appeal is available at 951 F.3d 1258, and is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc in Mr. Lira-Ramirez's appeal is included as Appendix K. The district court's unpublished order denying Mr. Lira-Ramirez's motion to dismiss is available at 2018 WL 5013523, and is included as Appendix B.

The Tenth Circuit's unpublished order in Mr. Fernandez-Casas' appeal is available at 806 Fed. Appx. 673, and is included as Appendix C. The district court's unpublished order denying Mr. Fernandez-Casas' motion to dismiss is available at 2019 WL 1058198, and is included as Appendix D.

The Tenth Circuit's unpublished order in Mr. Martinez's appeal is available at 804 Fed. Appx. 1010, as is included as Appendix E. The district court's unpublished order denying Mr. Martinez's motion to dismiss is available at 2019 WL 2268965, and is included as Appendix F.

The Tenth Circuit's unpublished order in Mr. Hernandez-Mendez's appeal is available at 806 Fed. Appx. 674, as is included as Appendix G. The district court's published order denying Mr. Hernandez-Mendez's motion to dismiss is available at 387 F.Supp.3d 1264, and is included as Appendix H.

The Tenth Circuit's unpublished order in Mr. Rochel-Cervantes' appeal is available at 806 Fed. Appx. 674, as is included as Appendix I. The district court's unpublished order denying Mr. Rochel-Cervantes' motion to dismiss is available at 2019 WL 2268970, and is included as Appendix K.

JURISDICTION

The district courts had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed Mr. Lira-Ramirez's conviction on March 6, 2020, and denied his petition for rehearing en banc on May 1, 2020. The Tenth Circuit affirmed Mr. Martinez's conviction on May 13, 2020. The Tenth Circuit affirmed Fernandez-Casas' conviction, Mr. Hernandez-Mendez's conviction, and Mr. Rochel-Cervantes' conviction on May 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

8 U.S.C. § 1326 (full text included as Appendix L)

8 U.S.C. § 1229 (full text included as Appendix M)

8 U.S.C. § 1229a (full text included as Appendix N)

Tit. III, § 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-626, provides:

> Sec. 309. EFFECTIVE DATES; TRANSITION
>
> (c) TRANSITION FOR ALIENS IN PROCEEDINGS.—
> (1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III–A effective date—
> (A) the amendments made by this subtitle shall not apply, and
> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) ATTORNEY GENERAL OPTION TO ELECT TO APPLY NEW PROCEDURES.—In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III–A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) ATTORNEY GENERAL OPTION TO TERMINATE AND REINITIATE PROCEEDINGS.—In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under chapter 4 of title II the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien

pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

(6) TRANSITION FOR CERTAIN FAMILY UNITY ALIENS.—The Attorney General may waive the application of section 212(a)(9) of the Immigration and Nationality Act, as inserted by section 301(b)(1) of this division, in the case of an alien who is provided benefits under the provisions of section 301 of the Immigration Act of 1990 (relating to family unity).

(7) LIMITATION ON SUSPENSION OF DEPORTATION.—The Attorney General may not suspend the deportation and adjust the status under section 244 of the Immigration and Nationality Act of more than 4,000 aliens in any fiscal year (beginning after the date of the enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.

STATEMENT OF THE CASE

Pereira v. Sessions holds that an immigration document that lacks the time and place of the noncitizen's removal proceedings is not a "notice to appear" under 8 U.S.C. § 1229(a)(1). 138 S.Ct. 2105, 2110 (2018). This Court should grant this petition to answer a follow-up question to *Pereira*: whether a noncitizen who was removed based on a defective notice may be convicted for unlawful reentry into the United States under 8 U.S.C. § 1326. Contrary to the Tenth Circuit's decision below, an

immigration court lacks jurisdiction to remove a noncitizen via a defective notice. Because Congress has plainly stated that a notice to appear confers jurisdiction on the immigration court, an immigration court acts ultra vires when it removes a noncitizen via a defective notice. And because the noncitizen's removal is unauthorized, the government cannot then convict that noncitizen for reentering the United States under § 1326(a), where a necessary element of that conviction is rooted in the underlying removal order.

The answer to this question is of paramount importance. The government has sent countless defective notices over the years. *See Pereira*, 138 S.Ct. at 2111. Those defective notices have resulted in defective removal proceedings, and those proceedings should not be the basis for criminal convictions under § 1326. The question is also significant because it involves the severe consequences of an executive agency's ultra vires actions. Before the government imprisons an individual, it should first ensure that the proceedings that form the basis of that imprisonment comport with due process.

A. Legal Background

Congress has authorized the Attorney General to remove certain noncitizens from the United States. *See Arizona v. United States*, 567 U.S. 387, 396 (2012). The initiation of removal proceedings is governed by 8 U.S.C. § 1229. To initiate removal proceedings, the noncitizen must be served with a notice to appear. 8 U.S.C. § 1229(a)(1). This notice to appear must "specify" a number of things, including:

> (A) The nature of the proceedings against the alien.
> (B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of the law.
(D) The charges against the alien and the statutory provisions alleged to have been violated. . . . .
(G)(i) The time and place at which the proceedings will be held.

8 U.S.C. § 1229(a)(1)(A)-(G).

Section 1229 also provides that a noncitizen "may be represented by counsel," 8 U.S.C. § 1229(a)(1)(E), and the noncitizen must "be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a," 8 U.S.C. § 1229(b)(1). But a noncitizen's failure to secure counsel does not "prevent the Attorney General from proceeding against an alien pursuant to section 1229a." 8 U.S.C. § 1229(b)(3).

While § 1229 governs the initiation of removal proceedings, Congress specified the procedures for removal proceedings in 8 U.S.C. § 1229a. 8 U.S.C. § 1229a(a)(3) (this section is "the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States"). It is § 1229a that governs the "*proceedings* for deciding the admissibility or deportability of" a noncitizen by an immigration court. 8 U.S.C. § 1229a(a)(1) (emphasis added).

Congress transitioned to this current framework with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Tit. III, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-626. Prior to IIRIRA, removal proceedings were initiated via an order to show cause and a notice of hearing. 8 U.S.C. § 1252b (1995)). In IIRIRA, Congress "replaced the two documents with a single notice to appear." *Peralta v. Gonzales*, 441 F.3d 23, 27 (1st Cir. 2006) ("before

enactment of IIRIRA, notices to appear did not exist; aliens at that time instead were served with 'orders to show cause.'").

But IIRIRA's changes did not go into effect until six months after the date of its enactment. § 309(a). So Congress included a transitional provision within IIRIRA. § 309(c). The general rule provided that IIRIRA's amendments "shall not apply" to any noncitizen "in exclusion or deportation proceedings as of [IIRIRA's] effective date." § 309(c)(1). But for those removal proceedings in which the immigration judge had not yet held an evidentiary hearing, the Attorney General could elect to proceed under IIRIRA's amended provisions. § 309(c)(2). Of course, a noncitizen in this position was served with an order to show cause and a notice of hearing, and not a notice to appear. And so, importantly, § 309(c)(2) further provided: "If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) **to confer jurisdiction on the immigration judge**." § 309(c)(2) (emphasis added). Section 239 of IIRIRA is codified at 8 U.S.C. § 1229. In other words, Congress expressly stated that the pre-IIRIRA notice of hearing could "**confer jurisdiction on the immigration judge**" in the same manner as the new notice to appear under § 1229(a).

Similar to this transitional provision, an executive-agency regulation provides that "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). But inconsistent with § 1229, a different regulation provides that a notice to appear must include the date and time of the removal hearing only "where

practicable." 8 C.F.R. § 1003.18(b). "If 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." *Id.*

In 2018, this Court held that an immigration document that lacks the time and place of the noncitizen's removal proceedings is not a "notice to appear" under 8 U.S.C. § 1229(a)(1). *Pereira*, 138 S.Ct. at 2110. *Pereira* involved a noncitizen in removal proceedings who moved for cancellation of removal under § 1229b. *Id.* at 2112. The Attorney General may cancel removal if the noncitizen, *inter alia*, has been physically present in the country for ten years. 8 U.S.C. § 1229b(b)(1)(A). But this 10-year period ends "when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1).

The noncitizen in *Pereira* was served a defective notice to appear during this 10-year period. 138 S.Ct. at 2112. Because this document did not include the time and place of the removal proceedings, this Court held that this document was "not a 'notice to appear under section 1229(a).'" *Id.* at 2110. The practical effect was that the noncitizen in *Pereira* was eligible for cancellation of removal, even though he had received a defective notice during this 10-year period. *Id.* at 2109-2110.

This petition involves a deprivation more serious than removal from this country: criminal prosecution and imprisonment. *See*, *e.g.*, *United States v. Perez*, 330 F.3d 97, 103 (2d Cir. 2003) ("there is more concern about the validity of a deportation order when it is used as the basis for a criminal conviction than when it is used as the basis for deportation, a civil matter"). Under § 1326(a), a noncitizen who is removed from

the United States is subject to criminal prosecution if he returns without permission. In *United States v. Mendoza-Lopez*, this Court, relying on the Due Process Clause, held that a noncitizen charged with a § 1326(a) offense may challenge (or collaterally attack) the validity of the underlying removal order. 481 U.S. 828, 838-839 (1987). "[W]here a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." *Id.* at 838.

Mendoza-Lopez expressed concern (calling it "troubling") with "the use of the result of an administrative proceeding to establish an element of a criminal offense." *Id.* at 838 n.15. But *Mendoza-Lopez* left this broader question open, instead more narrowly holding that, "at a minimum, the result of an administrative proceeding may not be used as a conclusive element of a criminal offense where the judicial review that legitimated such a practice in the first instance has effectively been denied." *Id.* Because the defendants in *Mendoza-Lopez* did not knowingly waive their right to appeal the administrative removal ruling, the defendants "were deprived of judicial review of their deportation proceeding," and the prior removal order could not be used to prosecute them under § 1326(a). *Id.* at 840, 842. This Court declined "to enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review, requiring that the result of the hearing in which they took place not be used to support a criminal conviction." *Id.* at 839 n.17.

Following *Mendoza-Lopez*, Congress amended § 1326 to include subsection (d):

> **(d) Limitation on collateral attack on underlying deportation order**
> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d). By its plain terms, this subsection seeks to "limit[]" collateral attacks authorized by *Mendoza-Lopez* in two material ways: (1) by limiting relief only to the denial of "the opportunity for judicial review," § 1326(d)(2); and (2) by including two additional requirements not found in *Mendoza-Lopez*: exhaustion and a showing of fundamental unfairness, § 1326(d)(1), (3). This Court has not yet addressed the interplay between *Mendoza-Lopez* and § 1326(d).

B. Proceedings Below

1. In 1994, Jose Lira-Ramirez entered the United States legally as a noncitizen married to a United States citizen. Ten years later, he was convicted of a state drug offense in Kansas and sentenced to probation. Pet. App. 13a-14a. Shortly thereafter, federal immigration authorities detained him pending removal proceedings. Pet. App. 13a. He was served with a document referred to as a notice to appear but that did not include the date and time of the removal hearing. Pet. App. 3a, 13a. Despite the omission, Mr. Lira-Ramirez was removed to Mexico. Pet. App. 3a. The removal order expressly referenced the defective notice as the basis for Mr. Lira-Ramirez's removal. Pet. App. 14a-15a.

In 2018, a federal grand jury in Kansas charged Mr. Lira-Ramirez with illegal reentry under § 1326(a). Pet. App. 3a. He moved to dismiss the indictment because the underlying removal order was invalid. Pet. App. 3a. Specifically, because the notice omitted the time and place of the hearing, it was not, in fact, a notice to appear, and, thus, the immigration court had no authority (or "jurisdiction") to remove him in the first instance. Pet. App. 3a. And because the immigration court had no authority to remove him, the underlying removal order could not be used to convict him under § 1326(a). To allow the conviction would be to violate the Due Process Clause. The district court did not address this due process claim, but instead denied the motion under § 1326(d) because Mr. Lira-Ramirez did not satisfy § 1326(d)'s three requirements to attack the prior removal order. Pet. App. 3a, 16a-24a.

Mr. Lira-Ramirez entered into a conditional guilty plea, and the district sentenced him to a three-year term of imprisonment.

Mr. Lira-Ramirez appealed. While his appeal was pending, the Tenth Circuit published two decisions holding that an immigration court does not lack authority (or "jurisdiction") to remove a noncitizen based on a defective notice. Pet. App. 4a-5a (discussing *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019) & *Martinez-Perez v. Barr*, 947 F.3d 1273 (10th Cir. 2020)). But neither of those decisions discussed IIRIRA's transitional provision, discussed above, and its express statement that a notice to appear "confer[s] jurisdiction on the immigration judge." § 309(c)(2), 110 Stat. 3009-546, 3009-626. These immigration decisions also did not involve a criminal prosecution under § 1326(a). So Mr. Lira-Ramirez argued that neither of those decisions bound a future Tenth Circuit panel from holding that, under the Due

Process Clause, a defective notice could not provide the basis to convict him under § 1326(a). Pet. App 5a.

The Tenth Circuit affirmed. Unlike the district court, the Tenth Circuit did not rely on § 1326(d). Pet. App. 3a-4a n.2. Instead, the Tenth Circuit found itself bound by *Lopez-Munoz* and *Martinez-Perez*. Pet. App. 4a.-5a. Those decisions held that an immigration court's "jurisdiction" comes from § 1229a(a)(1), and not from § 1229(a)(1). In other words, § 1229(a)(1), and its notice-to-appear requirements, was not a "jurisdictional" provision, but rather a "non-jurisdictional, claim-processing rule[]." *Martinez-Perez*, 947 F.3d at 1278.

For two reasons, the Tenth Circuit held that IIRIRA's transitional provision did not cast doubt on those precedents. Pet. App. 7a. First, even if the transitional provision provided an immigration court with "jurisdiction" to remove a noncitizen, it did not follow that § 1229 provided an immigration court with "jurisdiction" to remove a noncitizen. Pet. App. 8a. "We can consider § 1229 jurisdictional only if Congress clearly stated that it intended to restrict immigration judges' jurisdiction. Congress did not clearly make such a statement in § 1229, which says nothing about jurisdiction or an immigration judge's power to act." Pet. App. 8a. And the transitional provision discusses a "notice of hearing," not a "notice to appear." Pet. App. 9a. "[W]e cannot read between the lines to infer jurisdictional limits; the jurisdictional language must be apparent from the face of the statute itself." Pet. App. 9a.

Second, the Tenth Circuit labeled Congress's use of the word "jurisdiction" in the transitional provision "colloquial." Pet. App. 10a. Because the word "jurisdiction" is

"often used colloquially," "its inclusion in the transitional provision does not mean that Congress meant to limit an immigration judge's power to act." Pet. App. 10a.

Mr. Lira-Ramirez petitioned for rehearing en banc, but the petition was denied without comment. Pet. App. 78a.

2. In 2008, federal immigration authorities served Mr. Fernandez-Casas with a notice to appear that did not include the date and time of the removal hearing. Pet. App. 27a-28a. In 2010, an immigration court granted Mr. Fernandez-Casas' motion for voluntary departure. Pet. App. 29a. Mr. Fernandez-Casas did not voluntarily depart, however, and, in 2013, he was removed to Mexico. Pet. App. 29a-30a. In 2018, Mr. Fernandez-Cases was convicted of a weapons offense in Kansas state court. Pet. App. 30a. He then surrendered to federal immigration authorities. Pet. App. 30a.

The government charged Mr. Fernandez-Casas with illegal reentry under § 1326(a). Pet. App. 30a. Like Mr. Lira-Ramirez, Mr. Fernandez-Casas moved to dismiss the indictment because the underlying removal order was invalid. Pet. App. 30a. Specifically, because the notice omitted the time and place of the hearing, it was not, in fact, a notice to appear, and, thus, the immigration court had no authority (or "jurisdiction") to remove him in the first instance. And because the immigration court had no authority to remove him, the underlying removal order could not be used to convict him under § 1326(a). To permit the conviction would be to violate the Due Process Clause. Pet. App. 31a.

The district court rejected the argument. Pet. App. 34a-46a. It gave deference to a Board of Immigration Appeals decision – *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018) – which holds that a notice to appear that does not include the date

and time of the removal hearing vests the immigration court with jurisdiction and meets § 1229(a)'s requirements so long as a notice of hearing specifying this information is later sent to the noncitizen. Pet. App. 36a-44a. Alternatively, the district court found that Mr. Fernandez-Casas could not collaterally attack the removal order because he failed to meet § 1326(d)'s requirements. Pet. App. 44a-46a. Mr. Fernandez-Casas entered into a conditional guilty plea, and the district sentenced him to a 13-month term of imprisonment.

Mr. Fernandez-Casas appealed. Because Mr. Lira-Ramirez had already filed his brief, raising the identical issue, the Tenth Circuit suspended briefing pending its decision in *Lira-Ramirez*. After the Tenth Circuit affirmed in *Lira-Ramirez*, it summarily affirmed Mr. Fernandez-Casas' conviction, but noted Mr. Fernandez-. Casas' right to petition this Court for further review. Pet. App 25a-26a.

3. In 2007, federal immigration authorities served Mr. Martinez with a notice to appear that did not include the date and time of the removal hearing. Pet. App. 50a. He was removed in 2008, after his release from federal prison for a prior drug conviction. Pet. App. 50a.

In 2019, the government charged Mr. Martinez with illegal reentry under § 1326(a). Pet. App. 49a. Like Mr. Lira-Ramirez and Mr. Fernandez-Casas, he moved to dismiss the indictment because the underlying removal order was invalid. Pet. App. 49a-50a. Specifically, because the notice omitted the time and place of the hearing, it was not, in fact, a notice to appear, and, thus, the immigration court had no authority (or "jurisdiction") to remove him in the first instance. And because the immigration court had no authority to remove him, the underlying removal order

could not be used to convict him under § 1326(a). To permit the conviction would be to violate the Due Process Clause. Pet. App. 50a-51a.

The district court rejected the argument, relying on extra-Circuit authority. Pet. App. 51a-53a. Alternatively, the district court found that Mr. Martinez could not collaterally attack the removal order because he failed to meet § 1326(d)'s requirements. Pet. App. 53a-54a. Mr. Martinez entered into a conditional guilty plea, and the district sentenced him to a 21-month term of imprisonment.

Mr. Martinez appealed. Because Mr. Lira-Ramirez had already filed his brief, raising the identical issue, the Tenth Circuit suspended briefing pending its decision in *Lira-Ramirez*. After the Tenth Circuit affirmed in *Lira-Ramirez*, it summarily affirmed Mr. Martinez's conviction, but noted Mr. Martinez's right to petition this Court for further review. Pet. App 47a-48a.

4. In 2017, federal immigration authorities served Mr. Hernandez-Mendez with a notice to appear that did not include the date and time of the removal hearing. Pet. App. 57a. He was removed in 2018. Pet. App. 58a. He reentered again and was promptly removed a third time via a reinstatement of the prior removal order. Pet. App. 58a-59a.

In August 2018, the government charged Mr. Hernandez-Mendez with illegal reentry under § 1326(a). Pet. App. 57a. Like Mr. Lira-Ramirez, Mr. Fernandez-Casas, and Mr. Martinez, he moved to dismiss the indictment because the underlying removal order was invalid. Specifically, because the notice omitted the time and place of the hearing, it was not, in fact, a notice to appear, and, thus, the immigration court had no authority (or "jurisdiction") to remove him in the first instance. And because

the immigration court had no authority to remove him, the underlying removal order could not be used to convict him under § 1326(a). Pet. App. 60-62a.

The district court rejected the argument, relying on extra-Circuit authority. Pet. App. 62a-65a. Alternatively, the district court found that Mr. Hernandez-Mendez could not collaterally attack the removal order because he failed to meet § 1326(d)'s requirements. Pet. App. 65a-66a. Mr. Hernandez-Mendez entered into a conditional guilty plea, and the district sentenced him to a 21-month term of imprisonment.

Mr. Hernandez-Mendez appealed. Because Mr. Lira-Ramirez had already filed his brief, raising the identical issue, the Tenth Circuit suspended briefing pending its decision in *Lira-Ramirez*. After the Tenth Circuit affirmed in *Lira-Ramirez*, it summarily affirmed Mr. Hernandez-Mendez's conviction, but noted Mr. Hernandez-Mendez's right to petition this Court for further review. Pet. App 55a-56a.

5. In 2000, federal immigration authorities served Mr. Rochel-Cervantes with a notice to appear that did not include the date and time of the removal hearing. Pet. App. 70a-71a. He was removed that same year. Pet. App. 71a.

In August 2018, the government charged Mr. Rochel-Cervantes with illegal reentry under § 1326(a). Pet. App. 70a. Like Mr. Lira-Ramirez, Mr. Fernandez-Casas, Mr. Martinez, and Mr. Hernandez-Mendez, he moved to dismiss the indictment because the underlying removal order was invalid. Specifically, because the notice omitted the time and place of the hearing, it was not, in fact, a notice to appear, and, thus, the immigration court had no authority (or "jurisdiction") to remove him in the first instance. And because the immigration court had no authority to remove him,

the underlying removal order could not be used to convict him under § 1326(a). To permit the conviction would be to violate the Due Process Clause. Pet. App. 72a.

The district court rejected the argument. Pet. App. 72a-76a. The district court also found that Mr. Rochel-Cervantes could not collaterally attack the removal order because he failed to meet § 1326(d)'s requirements. Pet. App. 75a-76a. Mr. Rochel-Cervantes entered into a conditional guilty plea, and the district sentenced him to a 21-month term of imprisonment.

Mr. Rochel-Cervantes appealed. Because Mr. Lira-Ramirez had already filed his brief, raising the identical issue, the Tenth Circuit suspended briefing pending its decision in *Lira-Ramirez*. After the Tenth Circuit affirmed in *Lira-Ramirez*, it summarily affirmed Mr. Rochel-Cervantes' conviction, but noted his right to petition this Court for further review. Pet. App 68a-69a.

This timely joint petition follows.

REASONS FOR GRANTING THE WRIT

At present, the courts of appeals have uniformly held that a defective notice does not preclude the government from prosecuting a noncitizen for illegal reentry under § 1326. But they have done so for different reasons. This Court should grant this petition to resolve the lower courts' inconsistencies. Moreover, the reasoning employed by the Tenth Circuit below (as well as by the other courts of appeals) conflicts with precedent from this Court. And because the reasoning is incorrect, so too the conclusion. As Congress has plainly stated, an immigration court does not have jurisdiction to remove a noncitizen via a defective notice to appear. Because the lower courts have held otherwise, review is necessary for that reason as well.

This Court should also grant this petition because the question presented is critically important. "[T]he use of the result of an administrative proceeding to establish an element of a criminal offense is troubling." *Mendoza-Lopez*, 481 U.S. at 839 n.15. It is even more troubling when that administrative proceeding was jurisdictionally defective. The government should not be permitted to prove an element of a criminal offense – and imprison individuals – via an agency's ultra vires actions. Because that is what happened below, review is necessary.

I. The Circuits are split over the source of an immigration court's authority to remove a noncitizen.

The Tenth Circuit held below[1] that a noncitizen may be convicted under § 1326 for illegal reentry even if the noncitizen was removed via a defective notice that did not include the time and place of the removal proceedings. Pet. App. 1a-10a. Five courts of appeals agree with this holding in published decisions. *United States v. Mendoza-Sanchez*, 963 F.3d 158, 161-162 (1st Cir. 2020); *United States v. Cortez*, 930 F.3d 350, 353 (4th Cir. 2019); *United States v. Pedroza-Rocha*, 933 F.3d 490, 497-498 (5th Cir. 2019); *United States v. Manriquez-Alvarado*, 953 F.3d 511, 512-513 (7th Cir. 2020); *United States v. Escobar*, 970 F.3d 1022, 1026-1027 (8th Cir. 2020). Two others have done so in unpublished decisions. *United States v. Veloz-Alonzo*, 765 Fed. Appx. 116 (6th Cir. 2019) (unpublished); *United States v. Hernandez-Ruiz*, 780 Fed. Appx. 864, 865 (11th Cir. 2019) (unpublished). Three others have similar rules, but in the immigration context. *Banegas Gomez v. Barr*, 922 F.3d 101, 110-112 (2d Cir. 2019);

[1] We only discuss the published decision in *Lira-Ramirez*. The other decisions rely solely on *Lira-Ramirez*.

Nkomo v. Att'y Gen., 930 F.3d 129, 133-134 (3d. Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019).

While the holdings are consistent, the reasoning employed by these courts of appeals is not. The **Tenth Circuit** precludes a collateral attack on the underlying removal order because, in its view, the defective notice does not deprive the immigration court of "jurisdiction" to remove the noncitizen. Pet. App. 4a-5a (citing *Lopez-Munoz*, 941 F.3d 1013 & *Martinez-Perez*, 947 F.3d 1273). According to the Tenth Circuit, it is 8 U.S.C. § 1229a(a)(1) (granting immigration courts the authority to decide issues of "inadmissibility or deportability") that provides an immigration court with "jurisdiction" to remove a noncitizen. *Lopez-Munoz*, 941 F.3d at 1015; *Martinez-Perez*, 947 F.3d at 1279. "[T]he requirements relating to notices to appear [found in § 1229(a) and § 1003.14] are non-jurisdictional, claim-processing rules." *Martinez-Perez*, 947 F.3d at 1278.

The **Fourth**, **Fifth**, and **Eleventh** Circuits generally agree with the Tenth Circuit. *Pedroza-Rocha*, 933 F.3d at 497-498 (relying on *Pierre-Paul v. Barr*, 930 F.3d 684, 689-690 (5th Cir. 2019)); *Cortez*, 930 F.3d at 359-363; *Hernandez-Ruiz*, 780 Fed. Appx. at 865 (relying on *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1157 (11th Cir. 2019)). But the Fourth and Fifth Circuits further hold that, even if a defective notice could provide relief from a § 1326 prosecution, the defective notice can be cured by a subsequent notice that includes the place and time of the removal hearing. *Pedroza-Rocha*, 933 F.3d at 497-498; *Cortez*, 930 F.3d at 359-363. At least in the immigration context, the Tenth and Eleventh Circuits have held the opposite. *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1178 (10th Cir. 2020); *Perez-Sanchez*, 935

F.3d at 1153-1154; *see also Niv-Chavez v. Barr*, __ S.Ct. __, 2020 WL 3038288 (June 8, 2020) (granting certiorari to resolve this conflict in the § 1229b context).

The **First** and **Eighth** Circuits have also held that the underlying removal order is not subject to collateral attack because the defective notice does not deprive the immigration court of "jurisdiction" over the proceeding. *Mendoza-Sanchez*, 963 F.3d at 161; *Escobar*, 970 F.3d at 1026-1027. In contrast to the Fourth, Fifth, Tenth, and Eleventh Circuits, however, the First and Eighth Circuits hold that "the jurisdiction of an immigration court is governed by agency regulation." *Mendoza-Sanchez*, 963 F.3d at 161-162 (citing 8 C.F.R. § 1003.14(a)); *Escobar*, 970 F.3d at 1026 (same). "And the regulations do not require that the time and place of the initial hearing be included in the notice to appear in order to commence removal proceedings." *Mendoza-Sanchez*, 963 F.3d at 162; *Escobar*, 970 F.3d at 1026 (same). Thus, a notice that does not include the time and place of the removal proceeding "is effective to confer jurisdiction upon the immigration court." *Mendoza-Sanchez*, 963 F.3d at 162; *Escobar*, 970 F.3d at 1026 (same).

The **Ninth Circuit** has not addressed this issue in the § 1326 context, but it has addressed the issue in the immigration removal context. *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). The Ninth Circuit agrees with the First and Eighth Circuits that the regulations confer jurisdiction on an immigration court in removal proceedings. *Id.* at 1158-1159.

Like the Fourth, Fifth, Tenth, and Eleventh Circuits, the First, Eighth, and Ninth Circuits have expressly rejected the argument that an immigration court's jurisdiction is governed by § 1229(a)(1). *Mendoza-Sanchez*, 963 F.3d at 161-162;

Escobar, 970 F.3d at 1026 (same); *Karingithi*, 913 F.3d at 1160 (same). But these Circuits have not addressed § 1229a(a)(1) (the provision considered "jurisdictional" by the Fourth, Fifth, Tenth, and Eleventh Circuits), and whether that statute confers jurisdiction as well.

The Sixth Circuit's unpublished decision in *Veloz-Alonzo* relies on its prior immigration decision in *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019). Like the First, Eighth, and Ninth Circuits, the Sixth Circuit in *Santos-Santos* held that an immigration court's jurisdiction derives from the regulations, not from statute. *Santos-Santos*, 917 F.3d at 490-491. Like the other Circuits, the Sixth Circuit has also held that § 1229(a)(1)'s notice-to-appear requirements do not "explain when or how jurisdiction vests with the immigration judge." *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 313 (6th Cir. 2018). But the Sixth Circuit has also held, in conflict with the Fourth, Fifth, Tenth, and Eleventh Circuits, that § 1229a(a)(1) does not confer jurisdiction on immigration courts to remove noncitizens. *Santos-Santos*, 917 F.3d at 490.

While the **Seventh** Circuit has held that § 1229(a)(1) is a non-jurisdictional claims-processing rule, unlike the other courts of appeals, it has resolved this issue via § 1326(d). *Manriquez-Alvarado*, 953 F.3d at 512. According to the Seventh Circuit, § 1326(d) is the only way in which a defendant can collaterally attack a prior removal order. And because that provision does not carve out a "jurisdictional defect" exception, none exists. *Id.* at 512-513.

The **Third Circuit** has not addressed this issue in the § 1326 context, but it has addressed it in the immigration removal context. *Nkomo v. Att'y Gen.*, 930 F.3d 129

(3d. Cir. 2019). Consistent with the First, Sixth, Eighth, and Ninth Circuits, the Third Circuit has held that § 1003.14 is a "jurisdiction-vesting regulation." *Nkomo*, 930 F.3d at 133. But consistent with the Fourth, Fifth, Tenth, and Eleventh Circuits, and in conflict with the Sixth Circuit, the Third Circuit has also held that § 1229a establishes "the IJ's subject matter jurisdiction." *Id.* at 133. Because § 1229(a)(1) is not a jurisdictional provision, however, the Third Circuit has held that a deficient notice does not divest an immigration court of the authority to remove a noncitizen. *Id.* at 134.

Finally, the **Second Circuit** has also addressed this issue in the removal context. *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019). Consistent with the First, Third, Sixth, Eighth, and Ninth Circuits, the Second Circuit has held that § 1003.14 (and not § 1229(a)) vests jurisdiction in the immigration court. *Id.* at 110-111. But the Second Circuit has conditioned this holding on a subsequent notice that specifies the place and time of the removal hearing. *Id.* at 112. In other words, jurisdiction vests under the regulations only when the noncitizen receives all of the information required by those regulations. *Id.*. The Third, Sixth, and Ninth Circuits appear to have adopted the same rule. *Hernandez-Perez*, 911 F.3d at 315; *Vana v. Att'y Gen.*, 794 Fed. Appx. 156, 157 (3d Cir. 2020) (unpublished) (subsequent notice cured any jurisdictional defect); *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020) (same). Other courts of appeals disagree on this point. *See*, *e.g.*, *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019) (agreeing that the two-step process is insufficient, but concluding that it does not affect an immigration court's jurisdiction over removal proceedings).

The differences in reasoning among the Circuits is extensive and entrenched. There is essentially no consensus over where an immigration court derives its authority to remove a noncitizen. But there should be. An immigration court should know what permits it to act. At present, the answer to that question differs by jurisdiction.

The different approaches also could end in different results. In those Circuits that have held that jurisdiction derives from the regulations, most require a subsequent notice to cure an initial defective notice. *Banegas Gomez v. Barr*, 922 F.3d at 112; *Hernandez-Perez*, 911 F.3d at 315; *Vana v. Att'y Gen.*, 794 Fed. Appx. at 157; *Aguilar Fermin*, 958 F.3d at 895. Here, Mr. Lira-Ramirez (for instance) was removed without receiving a subsequent notice that included the date and time of the removal hearing. In these Circuits, then, it is likely that the government could not have prosecuted Mr. Lira-Ramirez for illegal reentry under § 1326. But because the Tenth Circuit finds "jurisdiction" within § 1229a – a provision that has nothing to do with the requirements of the notice to appear – Mr. Lira-Ramirez could not successfully challenge the prior removal order. And, unlike the other Circuits, the Seventh Circuit only allows collateral attacks under § 1326(d), precluding relief for any other due-process violations in the underlying removal proceedings.

There is no possibility that the Circuits could sort out this confusion on their own. The approaches are too varied and too many to expect a consensus to form without this Court's intervention. Review is necessary.

II. The Tenth Circuit's decision conflicts with precedent from this Court.

Review is also necessary because the Tenth Circuit's analysis conflicts with this

Court's precedent on identifying "jurisdictional" requirements. Specifically, the Tenth Circuit conducted a too-narrow jurisdictional analysis that focuses solely on one specific provision, § 1229(a). In conducting this too-narrow analysis, the Tenth Circuit ignored the relevant text, context, and history of the IIRIRA. Section 1229(a) is a jurisdictional provision not only because Congress has said it is, IIRIRA, § 309(c)(2), but because the provision governs an immigration judge's adjudicatory capacity. It is § 1229(a) that gives immigration judges jurisdiction over removal proceedings against noncitizens served with notices to appear. Section 1229(a) delineates "the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within [the immigration judge's] adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). No other provision within IIRIRA does those things.

Although Congress must provide a clear jurisdictional statement, the Tenth Circuit was wrong to hold that this jurisdictional statement must be "apparent from the face of the statute itself." Pet. App. 9a. Rather, courts must consider all the "traditional tools of statutory construction." *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015). This includes the "textual, contextual, and historical backdrop of the statute." *Gonzalez v. Thaler*, 565 U.S. 134, 148 n.8 (2012). Under this holistic review, § 1229(a) clearly states that an immigration judge has jurisdiction over removal proceedings initiated by a valid notice to appear.

Start with the text of § 1229. This provision does not use the magic word "jurisdiction." But that is beside the point. *Patchak v. Zinke*, 138 S.Ct. 897, 905 (2018). The Tenth Circuit went too far in holding that Congress's failure to use the word "jurisdiction" "heavily weighs against" a jurisdictional finding. *Martinez-Perez*, 947

F.3d at 1279.

The question is whether § 1229(a) addresses an immigration judge's "competence to adjudicate a particular category of cases." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006). This is precisely what § 1229(a) does with respect to removal proceedings. This statute is entitled, "Initiation of removal proceedings." It is the statute that confers jurisdiction on immigration judges to initiate removal proceedings. *See*, *e.g.*, *Merit Mgmt. Grp. v. FTI Consulting*, 138 S.Ct. 883, 893 (2018) (section headings "supply cues as to what Congress intended"). After all, a "court of original jurisdiction" is defined as a "court where an action is initiated and first heard." Black's Law Dictionary (11th ed. 2019).

Section 1229(a)(1) also uses mandatory language. It requires that a notice to appear "shall be given" to a noncitizen in order to initiate "removal proceedings under section 1229a." This is not a "'claim-processing rule,' like a filing deadline or an exhaustion requirement, that requires the parties to 'take certain procedural steps at certain specified times." *Patchak*, 138 S.Ct. at 906. It does not identity an "element" that the government must prove to remove a noncitizen or otherwise define the "substantive adequacy" of the government's case. *Id.* This provision instructs an immigration court to conduct removal proceedings over any noncitizen served with a valid notice to appear. Section 1229(a) delineates the classes of cases – removal proceedings – and the persons – noncitizens served with notices to appear – that fall within the immigration judge's adjudicatory authority. This is clear jurisdictional language. *Kontrick*, 540 U.S. at 455. "[I]t cannot plausibly be read as anything else." *Patchak*, 138 S.Ct. at 906.

The statutory context supports the point. Although § 1229(a)(1)(E) requires the immigration judge to give a noncitizen time to secure counsel, the statute also makes clear that "[n]othing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a" if the alien fails to secure counsel." 8 U.S.C. § 1229(b)(3). If § 1229(a) does not confer jurisdiction, then § 1229(b)(3) would be superfluous. There would be no need to signal out § 1229(a)(1)(E) as discretionary if the other subsections of § 1229(a) were discretionary as well.

Section 1229 also operates as an umbrella provision, with three additional provisions -- §§ 1229a, 1229b, and 1229c – underneath it. This statutory structure further confirms the jurisdictional nature of § 1229(a). *See*, *e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 530 (2019) ("Congress designed the Act in a specific way, and it is not our proper role to redesign the statute"). This structure also cannot support the Tenth Circuit's placement of the jurisdictional provision solely within § 1229a(a)(1). *See Martinez-Perez*, 947 F.3d at 1279. Section 1229a governs "Removal *proceedings*," and § 1229a(a)(1) generally provides that "[a]n immigration judge *shall conduct proceedings for deciding* the inadmissibility or deportability of an alien." (emphasis added). The Tenth Circuit has consistently quoted this provision out of context (by ignoring the italicized language). *Martinez-Perez*, 947 F.3d at 1279; *Lopez-Munoz*, 941 F.3d at 1015. An immigration court is not authorized to conduct proceedings under § 1229a unless a noncitizen is served a valid notice to appear. 8 U.S.C. § 1229(a)(1). The immigration court's jurisdiction over removal proceedings vests before those proceedings begin.

The statutory history confirms all of this. When transitioning from an order to show cause/notice of hearing to a notice to appear, Congress made this point explicit. In some cases commenced before IIRIRA's enactment, the Attorney General could elect to proceed under IIRIRA. § 309(c)(2). Congress provided: "If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) **to confer jurisdiction on the immigration judge**." IIRIRA, § 309(c)(2) (emphasis added). Section 239 of IIRIRA is codified at 8 U.S.C. § 1229. In other words, the pre-IIRIRA notice of hearing could "**confer jurisdiction on the immigration judge**" in the same manner as the new notice to appear under § 1229(a).

The Tenth Circuit dismissed this transitional provision because it is not within the text of § 1229. Pet. App. 8a. That was wrong. It is blackletter law that, in determining whether a provision is jurisdictional, courts should look to the statute's history. *Kwai Fun Wong*, 575 U.S. at 410. "[W]hen a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the precursor in fathoming the new law." *Johnson v. United States*, 529 U.S. 694, 710 (2000). Indeed, this Court just looked to pre-IIRIRA text to interpret another immigration provision. *Jennings v. Rodriguez*, 138 S.Ct. 830, 845 (2018) ("Nor does respondents' interpretation of the word "for' align with the way Congress has historically used that word in § 1225. Consider that section's text prior to the enactment of [IIRIRA].").

To the extent that the Tenth Circuit considered the transitional provision, Pet. App. 9a, its interpretation misses the mark. According to the Tenth Circuit,

§ 309(c)(2) merely provided that a notice of hearing conferred jurisdiction on an immigration judge, not that a notice to appear confers jurisdiction on an immigration judge. Pet. App. 10a. But that ignores the whole of the statutory text, which provides that a notice of hearing "shall be valid *as if* provided under" § 1229(a) "to confer jurisdiction on the immigration judge." (emphasis added). The phrase "as if" does not mean that a notice to appear cannot also be jurisdictional. Rather, the phrase "as if" in § 309(c)(2) clearly delineates equivalency: a notice to appear under IIRIRA is jurisdictional; so too a notice of hearing during the transition to IIRIRA. The American Heritage Dictionary (5th ed. 2020) (defining "as if" as "In the same way that it would be if").

There was also no basis for the Tenth Circuit to hold that Congress did not really mean "jurisdiction" when it used that word in § 309(c)(2). Pet. App. 10a. It is well established that courts "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (quotations omitted). In the jurisdictional context, courts must "resist speculating whether Congress acted inadvertently." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S.Ct. 13, 20 (2017). A court "cannot replace the actual text with speculation as to Congress' intent." *Magwood v. Peterson*, 561 U.S. 320, 324 (2010). Yet that is precisely what the Tenth Circuit did below. Pet. App. 10a.

In support of its judicial amendment to § 309(c)(2), the Tenth Circuit cited *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998). According to the Tenth Circuit, *Steel Co.* held "that a statute referring to 'jurisdiction' was not jurisdictional because the word 'jurisdiction' bears numerous meanings." Pet. App. 10a. That

misreads *Steel Co.* The issue in *Steel Co.* was whether the elements of a private action under 18 U.S.C. § 11046(a) were jurisdictional. 523 U.S. at 89-90. The Court held that they were not under "firmly established" precedent holding that elements of a cause of action are not jurisdictional requirements. *Id.*

This was so despite a subsection within the statute that provided district courts with "jurisdiction" "to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.* at 90 (emphasis added). That provision had nothing to do with "the elements of the cause of action," but merely specified "the remedial powers of the court." *Id.* In other words, the Court did not hold that this statute was not a jurisdictional statute. It held that this type of remedial statute did not "render[] the existence of a violation necessary for subject-matter jurisdiction." *Id.* at 91-92. And that conclusion has nothing to do with this case.

The Tenth Circuit also unfairly relegated *Pereira* to the facts of that case. *Lopez-Munoz*, 841 F.3d at 1018; *Martinez-Perez*, 947 F.3d at 1278. While it is true that *Pereira* did not address jurisdiction, it is not true that the decision's silence on jurisdiction somehow means that § 1229(a) is not a jurisdictional statute. This Court has emphatically rejected such logic. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) (citing cases). "The Court would risk error if it relied on assumptions that have gone unstated and unexamined." *Id.*

Pereira also involved § 1229**b**, one of three provisions, including § 1229**a**, that falls under § 1229. 138 S.Ct. at 2110. The question in *Pereira* involved cancellation of

removal, and the answer turned squarely on the prior removal order's failure to comply with the initiation of the prior removal proceedings under § 1229(a)(1), not the procedures employed during the prior removal proceedings under § 1229**a**. *Id.* Indeed, this Court rejected the government's claims premised on § 1229**a**, instead holding that "each of the three" provisions within § 1229**a** cited by the government "refer[] to notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1)." *Id.* at 2118. If an immigration court's authority to remove a noncitizen derived from § 1229**a**, as most of the lower courts have held, and not § 1229, surely this Court in *Pereira* would have looked to § 1229**a**, and not § 1229, to resolve the question presented there. But this Court did not. The lower courts have erred in limiting *Pereira*'s application to § 1229**b**. The decision plainly applies to § 1229 (the umbrella provision). It is that provision that provides an immigration court with authority to remove an alien in the first instance.

The other courts of appeals that have found an immigration court's jurisdiction within § 1229**a** have made the same mistakes as the Tenth Circuit. *Pedroza-Rocha*, 933 F.3d at 497-498; *Pierre-Paul*, 930 F.3d at 689-690; *Cortez*, 930 F.3d at 359-363; *Hernandez-Ruiz*, 780 Fed. Appx. at 865; *Perez-Sanchez*, 935 F.3d at 1157. None of those Circuits conducted any sort of holistic statutory analysis. And those Circuits also ignored IIRIRA's transitional provision. Indeed, no other Circuit but the Tenth has considered § 309(c)(2) and its express jurisdictional language. That is reason enough for this Court to grant certiorari in this case.

Those courts of appeals that have held that the regulations grant an immigration court jurisdiction to remove noncitizens have also contradicted blackletter law from

this Court. The power of an administrative agency (like an immigration court) is prescribed entirely by statute, not by agency regulation. *City of Arlington v. FCC*, 569 U.S. 290, 297-300 (2013). An agency's "power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." *Id.* at 297. As the Seventh Circuit put it, "[w]hile an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases." *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019). But remarkably, six courts of appeals – the First, Second, Third, Sixth, Eighth, and Ninth – have held that the government can do just that in this context. *Escobar*, 970 F.3d at 1026; *Mendoza-Sanchez*, 963 F.3d at 161-162; *Nkomo*, 930 F.3d at 133; *Banegas Gomez v. Barr*, 922 F.3d at 110-111; *Santos-Santos*, 917 F.3d at 490-491; *Karingithi*, 913 F.3d at 1158-1159. Review is necessary.

III. The resolution of this issue is critically important in both the criminal and immigration context.

Review is also necessary because of the importance of this issue. Start with the criminal context. Section 1326 includes as an element of the offense that the noncitizen was previously "denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding." 8 U.S.C. § 1326(a)(1). In other words, the result of a prior administrative proceeding is an element of a § 1326 offense.

As this Court has already noted, "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling." *Mendoza-Lopez*,

481 U.S. at 839 n.15. "[T]he propriety of using an administrative ruling in such a way remains open to question" in this Court. *Id.* Here, we know that the petitioners were removed from the United States via defective notices to appear. *See* Pet. App. 3a-4a, 27a-28a, 50a-51a, 60a-62a, 71a. Yet, the petitioners have since been prosecuted and imprisoned (not just removed from the United States) because of removal orders premised on these defective notices. The question presented here is much more important than the question presented in *Pereira*. The noncitizen in *Pereira* did not want to be removed from the United States. 138 S.Ct. at 2112-2113. That is a far cry from being imprisoned in a federal penitentiary, like the petitioners here. If the question in *Pereira* was sufficiently important for this Court's review, then, *a fortiori*, this question is as well. Indeed, the "open question" in *Mendoza-Lopez* could be answered (or at least more fully explored) with a grant of certiorari here.

Additionally, following *Mendoza-Lopez*, Congress enacted § 1326(d) to "limit[]" collateral attacks authorized by *Mendoza-Lopez* in two material ways: (1) by limiting relief only to the denial of "the opportunity for judicial review," § 1326(d)(2); and (2) by including two additional requirements not found in *Mendoza-Lopez*: exhaustion and a showing of fundamental unfairness, § 1326(d)(1), (3). At least one court of appeals (the Seventh) has held that due-process challenges to underlying removal orders are limited via § 1326(d). *Manriquez-Alvarado*, 953 F.3d at 512-513.

This Court has not yet addressed the interplay between *Mendoza-Lopez* and § 1326(d). But it is the Constitution that sets the baseline for due process protections, not Congress. *Mendoza-Lopez* did not limit collateral attacks under the Due Process Clause to any specific type of due process violation. It also did not require either

exhaustion or fundamental fairness when holding that a prior administrative proceeding that forecloses judicial review violates due process. *See* 481 U.S. at 837-842. Congress cannot rewrite due-process protections in a statute. But that is what Congress has purported to do here. And one court of appeals has affirmed that constitutional rewrite. *Manriquez-Alvarado*, 953 F.3d at 512-513. This is yet another reason to grant certiorari here. This Court should make clear that Congress cannot enact a less-protective statute to undermine our Constitutional rights.

This question is also critically important because of the number of individuals affected by it. The government has sent countless defective notices over the years. *See Pereira*, 138 S.Ct. at 2111. Those defective notices have resulted in defective removal proceedings, and those proceedings should not then be the basis for criminal convictions under § 1326. *See Mendoza-Lopez*, 481 U.S. at 839 n.15.

The question is also significant because it involves the severe consequences of an executive agency's ultra vires actions. Before the government imprisons an individual, it should first ensure that the agency had the authority to act. The scope of an executive agency's "regulatory jurisdiction" is a familiar one in this Court. *City of Arlington*, 133 S.Ct. at 300. The number of decisions from this Court interpreting an agency's authority to act are too numerous to list. *See*, *e.g.*, *id.* Especially considering that the question here involves imprisonment (not just removal, monetary fines, or other civil penalties), this Court should answer it.

Finally, resolution of this issue would clarify immigration law as well. If this Court were to resolve the question presented here, an immigration court would definitively know the source of its authority (and the scope of that authority) to act in removal

proceedings. This Court recently granted certiorari to resolve a different follow-up question to *Pereira* in the immigration context. *Niv-Chavez v. Barr*, __ S.Ct. __, 2020 WL 3038288 (June 8, 2020) (granting certiorari to resolve this conflict in the stop-time rule immigration context). This question, of which the answer will determine the liberty of countless individuals, is just as important as the question presented in *Niv-Chavez*. This Court should grant this petition to answer it.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE VINCENTE LIRA-RAMIREZ, a/k/a Vicente Lira-Ramirez,

Defendant - Appellant.

No. 19-3057

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 6:18-CR-10102-JWB-1)

Melody Brannon, Federal Public Defender, Topeka, Kansas, for Defendant-Appellant.

Jared S. Maag, Assistant United States Attorney, Topeka, Kansas (Stephen R. McAllister, United States Attorney, and James A. Brown, Assistant United States Attorney, Chief, Appellate Division, with him on the briefs), for Plaintiff-Appellee.

Before **HOLMES**, **MATHESON**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal is brought by Mr. Jose Vincente Lira-Ramirez, who was indicted on a charge of illegally reentering the United States. *See* 8 U.S.C. § 1326(a). An element of illegal reentry is the existence of a prior removal order. *United States v. Adame-Orozco*, 607 F.3d 647, 650–51 (10th Cir. 2010).[1] Though Mr. Lira-Ramirez had been removed in earlier proceedings, he moved to dismiss the indictment, arguing that the immigration judge lacked jurisdiction over the earlier proceedings because the notice to appear was defective under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The district court denied the motion to dismiss the indictment, and Mr. Lira-Ramirez appeals.

We affirm, concluding that our precedents foreclose Mr. Lira-Ramirez's jurisdictional challenge. Though Mr. Lira-Ramirez raises a new argument, it does not cast doubt on our precedents. We thus affirm the denial of Mr. Lira-Ramirez's motion to dismiss the indictment.

1. Mr. Lira-Ramirez challenged the immigration judge's jurisdiction over the prior removal proceedings.

[1] According to Mr. Lira-Ramirez, the government must prove not only the existence but also the validity of a prior removal order. *See United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1064 (9th Cir. 2018) ("A valid removal order is a predicate element of a conviction for illegal reentry under § 1326."); *United States v. Rea-Beltran*, 457 F.3d 695, 702 (7th Cir. 2006) (stating that an element of illegal reentry under § 1326(a) is the existence of "a valid deportation order"). We need not decide whether the validity of the prior removal order is an element of the offense.

Mr. Lira-Ramirez's removal proceedings began with service of a document entitled "Notice to Appear." Under federal law, a notice to appear must state the date and time of the removal hearing. 8 U.S.C. § 1229(a)(1)(G)(i). But this information was missing from the document sent to Mr. Lira-Ramirez. Despite the omission, Mr. Lira-Ramirez appeared at the removal hearing and was deported.

Mr. Lira-Ramirez was later charged with illegally reentering the United States. He challenged the validity of his prior removal order, arguing that the immigration judge had lacked jurisdiction because of the omission of the date and time in the notice to appear. The district court acknowledged that the notice to appear had been defective, but did not conclude that immigration judge had lacked jurisdiction. The district court instead rejected Mr. Lira-Ramirez's argument on procedural grounds.[2]

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[2] Under federal law, a noncitizen can challenge a prior removal order only when three conditions have been met:

1. Administrative remedies have been exhausted.

2. Judicial review has been denied.

3. Entry of the removal order had been fundamentally unfair.

8 U.S.C. § 1326(d). The district court ruled that Mr. Lira-Ramirez had failed to satisfy these requirements.

Mr. Lira-Ramirez argues that he need not satisfy these requirements because he is collaterally challenging the immigration judge's jurisdiction. Our circuit has rejected this argument in unpublished opinions. *United*

2. Our review is de novo.

Because this appeal presents a question of law, we engage in de novo review. *United States v. Pauler*, 857 F.3d 1073, 1075 (10th Cir. 2017).

3. Mr. Lira-Ramirez's argument is foreclosed by our precedents.

Mr. Lira-Ramirez argues that the immigration judge lacked jurisdiction because of an omission of the date and time in his notice to appear. But we have held in two precedential opinions that this omission does not create a jurisdictional defect.[3]

The first precedential opinion was *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019). Challenging the validity of a removal order, the petitioner in *Lopez-Munoz* argued that the omission of the date and time had rendered the notice to appear defective, precluding jurisdiction over the removal proceedings. 941 F.3d at 1015. We assumed that the petitioner's notice to appear was defective and held that an omission of the date and time in the notice to appear would not affect jurisdiction. *Id.* at 1015–18.

We reaffirmed *Lopez-Munoz* in *Martinez-Perez v. Barr*, No. 18-9573, __ F.3d __, 2020 WL 253553 (10th Cir. Jan. 17, 2020). Again considering

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States v. Zuniga-Guerrero, 772 F. App'x 736, 737 (10th Cir. 2019); *United States v. Garcia-Galvan*, 777 F. App'x 921, 924 (10th Cir. 2019). But we need not address this argument here.

[3] We assume for the sake of argument that the notice to appear was defective. But we conclude that the alleged defect would not have been jurisdictional. *See* pp. 7–10, below.

an omission of the date and time in a notice to appear, we held that the omission did not preclude jurisdiction. 2020 WL 253553 at *3.

Lopez-Munoz and *Martinez-Perez* foreclose Mr. Lira-Ramirez's argument. We must generally follow our precedents absent en banc consideration. *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014). An exception exists for intervening changes in our precedents, *id.*, but Mr. Lira-Ramirez does not identify any. We are thus bound to follow our two precedential opinions. *See United States v. Fagatele*, 944 F.3d 1230, 1235–36 (10th Cir. 2019).

Mr. Lira-Ramirez suggests that *Lopez-Munoz* is not binding because the panel did not analyze a new argument regarding a transitional provision in the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 2009 (1996). *See* Part 4, below.[4] We disagree.

At oral argument, Mr. Lira-Ramirez contended that in *Yousuf v. Cohlmia*, 741 F.3d 31 (10th Cir. 2014), doubts about a precedent led a panel of our court to buck precedent. But reliance on *Yousuf* is misplaced. The panel in *Yousuf* did overrule a point of law established by a previous panel, but did so with approval from the en banc court. 741 F.3d at 47 n.6.

[4] In his reply brief, Mr. Lira-Ramirez also argued that we should reconsider *Lopez-Munoz* because the deadline for a petition for rehearing in that case had not yet passed. But the petitioner in *Lopez-Munoz* did not seek rehearing, and the deadline has now expired.

In his briefs, Mr. Lira-Ramirez points to out-of-circuit opinions in which panels have sidestepped precedents. These opinions do not allow us to abandon our precedents.

For example, Mr. Lira-Ramirez refers to a First Circuit opinion stating that a panel can overturn another panel's decision when "newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course." *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10, 12 (1st Cir. 1991), *rev'd on other grounds*, 506 U.S. 139 (1993). But our circuit has never endorsed abandonment of a precedent on these grounds.

Mr. Lira-Ramirez also cites a Fifth Circuit opinion, which allowed one panel to overrule another panel that had unknowingly contradicted an earlier Supreme Court decision. *Wilson v. Taylor*, 658 F.2d 1021, 1034–35 (5th Cir. 1981). But the Fifth Circuit opinion does not apply. There the Fifth Circuit overruled its precedent because it conflicted with a prior Supreme Court opinion, which also bound the Fifth Circuit. Mr. Lira-Ramirez's new argument does not involve a Supreme Court opinion, so the Fifth Circuit opinion cannot justify deviation from our precedent.

Because Mr. Lira-Ramirez identifies no intervening change in our precedents, we are bound by *Lopez-Munoz* and *Martinez-Perez*. Under

these opinions, the alleged defect in the notice to appear would not be jurisdictional.

4. Mr. Lira-Ramirez's new argument does not cast doubt on our precedents holding that the alleged defect would not be jurisdictional.

Mr. Lira-Ramirez's argument treats the statutory requirements for a notice to appear as jurisdictional based on a transitional provision that had applied between the adoption and effective date of 8 U.S.C. § 1229. We would reject this argument even if we were not bound by *Lopez-Munoz* and *Martinez-Perez*.

Before the adoption of § 1229, removal proceedings could begin with two documents: (1) an order to show cause and (2) a notice of hearing. 8 U.S.C. § 1252b (1995).[5] In 1996, however, Congress replaced the two documents with a single notice to appear. 8 U.S.C. § 1229(a); *see* Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. 104-469(I) (1996), 1996 WL 168955 at *159 (discussing the statutory change).

But the 1996 law did not immediately go into effect. So Congress provided a transitional provision to govern removal proceedings that had begun before the new law took effect. Illegal Immigration Reform and

[5] The Attorney General could also start proceedings with only an Order to Show Cause if it listed the date and time of the removal hearing. 8 U.S.C. § 1252b(a)(2)(A) (1995). But using a single document was not required.

Immigrant Responsibility Act, § 309(c)(4), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-626.

This provision temporarily allowed the Attorney General to start removal proceedings under either the old procedure (with an order to show cause and a notice of hearing) or the new procedure (with a single notice to appear). The transitional provision stated that if the Attorney General started removal proceedings under the old procedure, "*the notice of hearing* provided to the alien under [§ 1252b] *shall be valid* as if provided under [§ 1229(a)](as amended by this subtitle) *to confer jurisdiction on the immigration judge*." *Id*. (emphasis added). Relying on this sentence, Mr. Lira-Ramirez argues that the transitional provision shows that § 1229(a) is jurisdictional. We disagree for two reasons.

First, we must decide whether § 1229 is jurisdictional, not whether the transitional provision would have been jurisdictional. We can consider § 1229 jurisdictional only if Congress clearly stated that it intended to restrict immigration judges' jurisdiction. *United States v. McGaughy*, 670 F.3d 1149, 1156 (10th Cir. 2012). Congress did not clearly make such a statement in § 1229, which says nothing about jurisdiction or an immigration judge's power to act. *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1017 (10th Cir. 2019). And the language of a separate transitional provision couldn't provide the clear statement necessary to render § 1229 jurisdictional. *See United States v. Green*, 886 F.3d 1300, 1305–06 (10th

Cir. 2018) (explaining that classification of one provision as jurisdictional bears little relevance to whether a nearby provision is jurisdictional).

But let's assume for the sake of argument that the transitional provision could show that another provision (§ 1229) is jurisdictional. Even then, we'd conclude that the transitional provision does not clearly show that a notice to appear is jurisdictional. Mr. Lira-Ramirez relies on a sentence in the transitional provision stating that a *notice of hearing* shall be valid to confer jurisdiction. As Mr. Lira-Ramirez concedes, however, the transitional provision addresses the impact of a "notice of hearing" rather than a "notice to appear." Oral Arg. at 5:04–:11; *see also* Appellant's Reply Br. at 2 (stating that "[t]he statutory notice of the hearing," rather than the notice to appear, is what "'confers jurisdiction on the immigration[] judge'" (citation omitted)). So the sentence does not say that a *notice to appear* confers jurisdiction on an immigration judge.

Recognizing that the transitional provision applies only to a "notice of hearing," Mr. Lira-Ramirez argues that a notice to appear must implicitly be jurisdictional. But we cannot read between the lines to infer jurisdictional limits; the jurisdictional language must be apparent from the face of the statute itself. *See United States v. Green*, 886 F.3d 1300, 1305–06 (10th Cir. 2018) (rejecting an argument that the jurisdictional nature of a statute could be inferred).

Mr. Lira-Ramirez also emphasizes the use of the word "jurisdiction" in the transitional provision. But this word is often used colloquially, so its inclusion in the transitional provision does not mean that Congress meant to limit an immigration judge's power to act. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (holding that a statute referring to "jurisdiction" was not jurisdictional because the word "jurisdiction" bears numerous meanings). Given the frequency of this colloquial usage, Congress's reference to "jurisdiction" in the transitional provision does not mean that a defect in the notice to appear is jurisdictional.[6]

5. Conclusion

Mr. Lira-Ramirez argues that a defect in the notice to appear prevented the immigration judge from obtaining jurisdiction. But our precedents foreclose this argument. Even absent these precedents, the transitional provision does not clearly show that § 1229 is jurisdictional. We thus affirm Mr. Lira-Ramirez's conviction.

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[6] Only two district courts (and no circuit courts) have addressed the transitional provision. Both district courts held that the transitional provision does not restrict an immigration judge's jurisdiction. *See United States v. Torres Zuniga*, 390 F. Supp. 3d 653, 663–64 (E.D. Va. 2019) (concluding that the transitional provision's use of the term "jurisdiction" does not show that Congress intended the statutory requirements for notices to appear to be jurisdictional); *United States v. Hernandez-Mendez,* 387 F. Supp. 3d 1264, 1270 (D. Kan. 2019) (stating that the defendant "hasn't persuaded the court that the transitional [provision's] reference to the immigration court's 'jurisdiction' suffices to confer subject matter jurisdiction on immigration courts through notices to appear").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 18-10102-JWB

JOSE VINCENTE LIRA-RAMIREZ,

Defendant.

MEMORANDUM AND ORDER

This matter is before the court on Defendant's motion to dismiss the indictment. (Doc. 11.) The motion is fully briefed and is ripe for decision. (Docs. 12, 14.) For the reasons stated herein, the motion is DENIED.

I. Background

The indictment charges in substance that on July 1, 2018, Defendant was a citizen of Mexico who is not a citizen or national of the United States, that he had previously been removed or deported, and that he was found in the United States after having re-entered without obtaining the consent of the proper authorities, in violation of 8 U.S.C. § 1326 (a) and (b). (Doc. 1.)

Defendant moves to dismiss the indictment based on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and cases interpreting that decision. He contends his removal proceeding was initiated by a defective notice to appear of the type discussed in *Pereira* – which did not specify the date and time of his removal hearing – and as a result the immigration court lacked jurisdiction to order his removal. (Doc. 11 at 9.) He argues the immigration court lacked subject-matter jurisdiction such that its order is "null and void;" consequently, he argues that he was not required to exhaust administrative remedies or seek judicial review before challenging the order in this action. He

further argues that pursuing administrative remedies would have been futile and that confusion in the law at the time of his deportation made it futile to pursue judicial review as well. (*Id*. at 10.)

The government contends that *Pereira* "does not apply here" because, unlike the alien in *Pereira,* Defendant "successfully appeared at his removal hearing and there was no need for a notice to appear." (Doc. 12 at 3.) It argues Defendant did not need to be notified of the date and time of the removal hearing because he was in custody at the time and he requested an immediate hearing before an immigration judge. (*Id*. at 4.)

Defendant cites *United States v. Virgen-Ponce,* 320 F. Supp.3d 1164, 2018 WL 3655166 (E.D. Wash. July 26, 2018), in support of his argument that the removal order is null and void and cannot be used in a § 1326 prosecution. To date, two other decisions have followed the reasoning of *Virgen-Ponce. See United States v. Pedroza-Rocha*, No. 18-CR-1286 (W.D. Tex. Sep. 21, 2018) *and United States v. Zapata-Cortinas*, No. 18-CR-00343-OLG, 2018 WL 4770868 (W.D. Tex. Oct. 2, 2018). Three recent decisions have distinguished *Pereira* and have denied motions to dismiss a § 1326(a) indictment where the defendant received actual notice of the removal hearing and/or was present at that hearing. *United States v. Morales-Hernandez*, No. 18-00365-TUC, 2018 WL 4492377, *1 (D. Az. Sept. 18, 2018); *United States v. Ibarra-Rodriguez*, No. CR-18-190-M, 2018 WL 4608503, at *2–3 (W.D. Okla. Sept. 25, 2018); *United States v. Munoz-Alvarado*, No. CR-18-171-C, 2018 WL 4762134, *1 (W.D. Okla. Oct. 2, 2018).

II. Facts

Neither party has requested a hearing on the motion to dismiss. Both parties have attached exhibits from Defendant's removal proceeding to their briefs. Because neither side challenges the authenticity of these documents, the court accepts as uncontested the facts shown by the parties' exhibits for purposes of the instant motion.

Defendant was arrested on or about April 21, 2004, on a warrant issued by the Immigration and Naturalization Service (INS). (Doc. 12-1.) On the same date, Defendant was personally served with a Notice to Appear for a removal proceeding under the Immigration and Nationality Act (INA). (Doc. 12-5 at 1.) The notice from INS alleged that Defendant was admitted to the United States but was deportable because he was not a United States citizen; he was a citizen of Mexico who had been admitted as an immigrant at El Paso, Texas, on September 20, 1994; and he was convicted of the felony offense of possession with intent to sell cocaine on February 9, 2004, in the Sedgwick County District Court. (*Id.* at 3.) It charged that the conviction made Defendant deportable under § 237 of the INA because the offense was an aggravated felony and a violation of a law relating to controlled substances.[1] The notice stated that Defendant was ordered to appear before an immigration judge in Kansas City, Missouri, "on a date to be set at a time to be set" to show cause why he should not be removed from the United States based on the charges set forth. (*Id.* at 1.)

The notice included a statement advising Defendant of various rights, including the right to be represented by counsel at the removal proceeding and, unless requested otherwise, to not have the hearing earlier than ten days from the date of the notice to allow sufficient time to secure counsel. (*Id.* at 2.) It also informed Defendant that at the hearing, he would have the opportunity to admit or deny the allegations, to present evidence, to object to government evidence and cross-examine government witnesses, and to appeal an adverse decision by the immigration judge. It stated that the immigration judge would advise him of any relief from removal for which Defendant may appear eligible. (*Id.*) Defendant signed a section in the notice on April 21, 2004,

[1] *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (alien convicted of aggravated felony is deportable) and 8 U.S.C. § 1227(a)(2)(B)(i) (alien convicted of controlled substance offense is deportable).

requesting "an immediate hearing" and waiving his right to have a ten-day period before appearing before an immigration judge. (*Id*. at 2.)

Documents from Defendant's INS file include copies of Defendant's 2004 felony conviction in Sedgwick County District Court for possession of cocaine with intent to sell in violation of K.S.A. § 65-4161(a). (Doc. 12-4.)

The government cites evidence that on April 21, 2004, Defendant signed a waiver form requesting that his removal hearing be conducted on written record without a hearing; admitting the allegations in the notice to appear; conceding he was subject to deportation; waiving the right to apply for relief from removal; acknowledging that he will no longer be a lawful permanent resident and will not be able to live in the United States; acknowledging he will need to reapply for admission to the United States in the future and may not be eligible for admission to the United States in the future; agreeing to accept a written order for removal to Mexico as a final disposition of the proceedings and waiving "my rights to appeal this removal order or to challenge it in any other proceedings"; and representing that he executed the request for removal voluntarily and knowingly, with a full understanding of its consequences. (Doc. 12-6.) The attachment provided by the government apparently includes only a portion of the waiver form (*see* Doc. 12-6 at 4-7), but an immigration officer certified that he read, explained, and provided a complete copy of the document to Defendant. (*Id.* at 7.) The INS also certified that it would accept a written order of removal as a final disposition and waived its right to appeal. (*Id.)*

On April 26, 2004, an immigration judge in Chicago, Illinois, entered a written order directing that Defendant be removed from the United States to Mexico. (Doc. 12-6 at 2.) The order noted the charges against Defendant in the April 21, 2004, Notice to Appear; found Defendant had submitted a statement waiving a hearing and admitting the charges; found Defendant admitted the

allegations and conceded he was ineligible or would not apply for relief, and had requested removal to Mexico; and found that an appeal had been waived by the parties. (*Id.*)

III. Summary of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The background to *Pereira* is as follows. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), aliens who are subject to removal proceedings may be eligible for cancellation of removal if, among other things, they have been physically present in the United States for a continuous period of ten years or more. 8 U.S.C. § 1229b(b)(1)(A). But under this so-called "stop-time rule," the period of continuous presence is deemed to end when the alien "is served a notice to appear under section 1229(a)." *Id.* § 1229b(d)(1).

Section 1229(a) provides that the government will serve the alien a written "notice to appear" specifying, among other things, the time and place at which removal proceedings will be held. *Id.* § 1229(a)(1)(G)(i). In recent years, the Department of Homeland Security has issued notices that do not specify a time or date, but state that the initial removal proceeding will take place on a date and time "to be set." Pereira, a citizen of Brazil who overstayed his visa, was served such a notice. *Pereira*, 138 S. Ct. at 2112. About a year later, the immigration court mailed Pereira a more specific notice setting the date and time of the initial hearing, but the notice was sent to the wrong address.[2] As a result, Pereira failed to appear and the immigration court ordered him removed in absentia. Several years later, Pereira was arrested and the immigration court reopened the removal proceeding. When Pereira applied for cancellation of removal and argued he had been continuously present in the United States for more than ten years, the immigration

[2] The Department adopted a regulation stating that in removal proceedings, the Immigration Service shall provide the date, place, and time of the removal proceeding in the notice to appear "where practicable." If that information is not contained in the notice to appear, the immigration court shall be responsible for scheduling the initial removal hearing and for providing notice to the government and to the alien of the date, place, and time. 8 C.F.R. § 1003.18(b).

court denied his application on the grounds that the notice to appear had interrupted the ten-year period under the stop-time rule. *Id*.

The Supreme 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 § 1229(a)' and therefore does not trigger the stop-time rule." *Pereira*, 138 S. Ct. at 2110. The Court relied on the definitional nature of § 1229(a), which makes clear the notice to appear contemplated in that provision is one that contains specific information, including the date and time of the removal proceeding. The Court observed that § 1229(a)(2), which addresses *changes* in the time and place of removal proceedings, allows the government to give notice specifying a new time or place of the proceedings, which presupposes that the government has already specified an initial time and place. The Court further pointed out that § 1229(b)(1):

> gives a noncitizen "the opportunity to secure counsel before the first [removal] hearing date" by mandating that such "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear." For § 1229(b)(1) to have any meaning, the "notice to appear" must specify the time and place that the noncitizen, and his counsel, must appear at the removal hearing.

Id. at 2114-15. Otherwise, the government could give an initial notice of a hearing "to be set" and then, one day before the hearing, specify the date and time, and thereby deprive the noncitizen of a meaningful opportunity to obtain and have prepared counsel. *Id.* at 2115.

IV. Discussion

The starting point for analyzing a challenge to a deportation order in a § 1326 prosecution must be § 1326(d). As the Tenth Circuit noted, Congress has imposed specific limitations on an alien's right to collaterally attack an underlying deportation order on a charge of illegal reentry:

> To collaterally attack a deportation order, an alien must demonstrate that: "(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3)

> the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d). The defendant bears the burden of proof.

United States v. Chavez-Alonso, 431 F.3d 726, 728 (10th Cir. 2005) (citations omitted.) Because the requirements of § 1326(d) are in the conjunctive, a defendant must satisfy all three to prevail. *See United States v. Lopez-Collazo*, 824 F.3d 453, 458 (5th Cir. 2016).

Section 1326(d) was Congress's response to *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). In *Mendoza-Lopez*, the Supreme Court examined the prior version of § 1326 and acknowledged that Congress did not intend to permit *any* challenge to the validity of an underlying deportation order in a § 1326 prosecution. *Id*. at 837. But where an administrative determination plays a critical role in a criminal sanction, the court said, due process requires that there must be *some* meaningful review of the administrative proceeding. *Id.* at 837-38 (emphasis in original) (citations omitted). This means "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to conclusively establish an element of a criminal offense." *Id*. at 838. "Depriving the alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense." *Id*. at 839. After setting forth that principle, the Supreme Court turned to whether a deprivation of judicial review had occurred, and concluded that it did:

> If the violation of respondents' rights that took place in this case amounted to a complete deprivation of judicial review of the determination, that determination may not be used to enhance the penalty for an unlawful entry under § 1326. We think that it did. The Immigration Judge permitted waivers of the right to appeal that were not the result of considered judgments by respondents, and failed to advise respondents properly of their eligibility to apply for suspension of deportation. Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation

> proceeding. The Government may not, therefore, rely on those orders as reliable proof of an element of a criminal offense.

Id. at 840.

Defendant's notice to appear was clearly defective under *Pereira*, as it did not include a specific date and time to appear. *Pereira*, 138 S. Ct. at 2110 ("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" of § 1229b(d)(1)(A)). But that fact alone does not satisfy § 1326(d). The first prerequisite for collateral review of a removal order requires Defendant to show that he exhausted any available administrative remedies "that may have been available to seek relief against the order." 8 U.S.C. § 1326(d)(1). Federal regulations provide that the removal order of an immigration judge may be appealed to the Board of Immigration Appeals. 8 C.F.R. § 1003.3(b). The undisputed facts before the court are that Defendant waived his right to appeal the immigration judge's 2004 order. "An alien who knowingly waives the right to appeal an immigration judge's order of deportation fails to exhaust administrative remedies under § 1326(d)(1)." *United States v. Chavez-Alonso*, 431 F.3d 726, 728 (10th Cir. 2005). Defendant does not allege that his waiver was not knowingly entered; he therefore fails to show an essential element of collateral review under § 1326(d).

The second prerequisite for collateral review in § 1326 requires Defendant to show that the deportation proceedings "improperly deprived [him] of the opportunity for judicial review." § 1326(d)(2). In *Mendoza-Lopez*, the alien was deprived of the chance for judicial review by faulty advice from the immigration judge, because the advice led the alien to make an unknowing waiver of his right to appeal. In this case, Defendant does not argue he was deprived of the opportunity for judicial review; he contends the immigration court's lack of jurisdiction excuses him from showing such a deprivation (as well as excusing the obligation to exhaust administrative remedies.)

Such reasoning, however, is contrary to the express limitations adopted by Congress in § 1326(d) and contrary to the Supreme Court's explanation in *Mendoza-Lopez* of when due process requires allowing collateral review in a § 1326 prosecution. The standard is not whether the deportation order was valid, but whether Defendant was deprived of the opportunity to have it reviewed by an Article III court.

A review of relevant statutes shows that Defendant was provided with the opportunity for judicial review of his removal order. Congress has specified that general removal orders (with exceptions not applicable here) are subject to judicial review under Title 28, Chapter 158, with a petition for review filed with the appropriate court of appeals being the exclusive means for judicial review of an order of removal. 8 U.S.C. § 1252(a)(1). Upon the filing of a petition for review, the court of appeals has exclusive jurisdiction to enter a judgment "determining the validity of, and enjoining, setting aside, or suspending … the order of the agency." 28 U.S.C. § 2349(a). The scope of judicial review may have been circumscribed in Defendant's case because the removal order was based on an aggravated felony and controlled substance offense. Section 1252(a)(2)(C) provides in part that no court shall have jurisdiction "to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section … 1227(a)(2)(A)(iii) [or] (B)…."[3] But nothing in that provision "shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *Id*., § 1227(a)(2)(D). Judicial review "of all questions of law and fact, including interpretation of constitutional and statutory provisions, arising from any … proceeding brought to remove an alien from the United States … shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). And

[3] See footnote 1, supra.

except as otherwise provided in the same section, "no court shall have jurisdiction … by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact." *Id*. Finally, Congress mandated that a court may review a final order of removal only if the alien "has exhausted all administrative remedies available to the alien as of right…." *Id.* § 1252(d)(1). The governing statutes thus provided Defendant with the opportunity for obtaining judicial review of his removal order.

Some courts have held a defendant can establish the first two prongs of § 1326(d) by showing "that he was denied judicial review of his removal proceeding in violation of due process" or that "immigration officials in the underlying removal proceeding violated a regulation designed to protect an alien's right to judicial review." *United States v. Gomez*, 757 F.3d 885, 892 (9th Cir. 2014) (citations omitted.) Defendant makes no such showing here. Administrative remedies and judicial review were available to Defendant at the time of his removal, but he chose to waive the opportunity to challenge the removal order or to appeal from it. That is true, moreover, notwithstanding that the legal issue he now asserts was uncertain at the time of his removal. *See United States v. Rivera-Nevarez*, 418 F.3d 1104, 1109 (10th Cir. 2005) (judicial review barred in § 1326 prosecution where defendant could have, but did not, appeal unsettled question of law in immigration proceeding to the circuit court of appeals). Again, Defendant does not argue his waiver was not knowingly made. Under the circumstances, Defendant has made no showing that the 2004 deportation proceeding "improperly deprived [him] of the opportunity for judicial review" as required by § 1326(d)(2).

The third prerequisite of § 1326(d) requires Defendant to show that entry of his 2004 removal order was fundamentally unfair. "An underlying order is 'fundamentally unfair' if (1) a defendant's due process rights were violated by defects in his underlying deportation proceeding,

and (2) he suffered prejudice as a result of the defects." *United States v. Vargas-Ortiz*, 667 F. App'x 699, 700 (10th Cir. 2016) (quoting *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1201 (9th Cir. 2014)); *United States v. Guardado-Diaz*, ___F. App'x ___, 2018 WL 2688260 (4th Cir. 2018) (same). Due process requires that an alien who faces removal be provided notice of the charges against him, a hearing before an executive or administrative tribunal, and a fair opportunity to be heard. *See United States v. El Shami*, 434 F.3d 659, 665 (4th Cir. 2005) (citing *United States v. Torres*, 383 F.3d 92, 104 (3rd Cir. 2004)). In other words, due process guarantees "an opportunity to be heard at a meaningful time in a meaningful manner." *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1271 (10th Cir. 2013) (citation omitted). To demonstrate prejudice, Defendant must demonstrate "a reasonable likelihood that, but for the errors complained of, he would not have been deported." *Aguirre-Tello*, 353 F.3d at 1208 (citation omitted).

As the Supreme Court indicated in *Pereira*, the failure of a notice to specify the date and time of a removal hearing could prejudice an alien by causing him to miss a hearing, by depriving him of the time or incentive to find counsel, or by depriving the alien (or counsel) of time to prepare for the hearing. *Pereira*, 138 S. Ct. at 2115 (without informing alien of the time of the hearing "the Government cannot reasonably expect the noncitizen to appear for his removal proceeding.") Defendant does not dispute that, unlike the alien in *Pereira*, he waived the right to be present at the removal hearing. He does not allege that the lack of notice caused him to miss the hearing or deprived him of the time needed to find counsel or prepare for the hearing. He does not argue that he did not knowingly waive his right to appear or to have counsel present at the hearing. Nor does he claim that he was not subject to deportation under the standards of the INA or that he would have obtained relief from deportation were it not for the defective notice. Absent from the motion is any suggestion that he suffered prejudice from the lack of notice, which means Defendant's

collateral challenge to the 2004 removal order is also barred by § 1326(d)(3). *See Aguirre-Tello*, 353 F.3d at 1207 ("to enable us to reach the ultimate conclusion that the deportation proceeding was fundamentally unfair, [defendant] would still have to demonstrate that any errors that occurred prejudiced him.") In sum, there was no prejudice from the notice's failure to specify the date and time of the removal hearing because Defendant waived the opportunity to attend or participate in the hearing. *Cf. Guamanrrigra v. Holder*, 670 F.3d 404, 409 (2d Cir. 2012) (service of a notice that does not specify date and time of a hearing, followed by service of a separate notice specifying those matters, satisfies the notice requirements of 8 U.S.C. § 1229(a)(1)); *United States v. Nicki*, 427 F.3d 1286, 1296 (10th Cir. 2005) (citing *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1158 (10th Cir. 1997) ("To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice.")).

Defendant relies on *Virgen-Ponce*, and presumably similar cases such as *Pedroza-Rocha*, and their rationale that the lack of a proper notice to appear deprives the immigration court of "subject-matter jurisdiction," a defect that "cannot be waived" and which results in prejudice because deportation "would not have happened but for the immigration court's error in ordering [the alien] deported when the court lacked the authority to do so." *Pedroza-Rocha*, slip op. at 10. *See also Zapata-Cortinas,* 2018 WL 4770868, *4-5. The court finds these rulings unpersuasive. Even assuming the immigration court lacked "subject-matter jurisdiction"[4] or acted beyond its

[4] The *Virgen-Ponce* line of cases relies on 8 C.F.R. § 1003.14(a) as showing that an immigration court is without subject-matter jurisdiction in the absence of a notice to appear that meets the requirements of 8 U.S.C. § 1229(a). The foregoing regulation states that "jurisdiction vests" and removal proceedings commence when a charging document is filed with the immigration court by the INS. Like the subject-matter jurisdiction of the federal courts, however, the immigration court's authority over a given subject matter is determined by federal statute - not by acts taken by INS or other Executive Branch agents - and Congress has specifically authorized immigration judges to conduct removal proceedings and to decide whether an alien is removable under the immigration laws. *Id.*, § 1229a(a) & (c). *Cf. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982) (subject-matter jurisdiction is a constitutional and statutory requirement; no action of the parties can confer subject-matter jurisdiction.) The regulation cited above goes on to state that the charging document must include a certificate showing service on the opposing party. 8 C.F.R. § 1003.14(a). That requirement is analogous to service of process in federal court, and is an

statutory authority by ordering Defendant's removal in 2008, that still would not exempt the removal order from the requirements of § 1326(d). Section 1326(d) prohibits an alien from "challeng[ing] the validity of the deportation order" unless, among other things, the alien demonstrates that the deportation proceedings "improperly deprived [him] of the opportunity for judicial review."[5] In the instant case, Defendant could have appealed the removal order and could have asked an immigration court or the circuit court of appeals to declare the order void. He waived that opportunity. *Virgen-Ponce* and *Pedroza-Rocha* do not explain what authorizes a district court in such circumstances to set aside statutory limitations on the district court's authority to collaterally review a removal order.[6] To be sure, due process requires allowing judicial review in a § 1326 prosecution where a deportation proceeding "effectively eliminate[d] the right of the alien to obtain judicial review." *Mendoza-Lopez,* 481 U.S. at 839. But Defendant's right to obtain

indication that the regulation is addressing the immigration court's acquisition of personal jurisdiction over the person for purposes of a removal proceeding. *See Compagnie des Bauxites,* 456 U.S. at 703 (personal jurisdiction protects an individual liberty interest; it requires that maintenance of the suit not offend traditional notions of fair play and substantial justice); *Oklahoma Radio Assocs. v. F.D.I.C.*, 969 F.2d 940, 943 (10th Cir. 1992) ("service of process provides the mechanism by which a court having venue and jurisdiction over the subject matter of an action asserts jurisdiction over the person of the party served").

[5] In contrast to *Mendoza-Lopez*, in *Lewis v. United States*, 445 U.S. 55 (1980), the Supreme Court said Congress could prohibit a collateral challenge to a state court conviction used as a predicate felony for a charge of unlawful possession of a firearm by a convicted felon. The Court so held despite the state conviction having been "uncounseled and therefore obtained in violation of the Sixth and Fourteenth Amendment rights of the defendant." *See Mendoza-Lopez*, 481 U.S. at 840 (citing *Lewis*, 445 U.S. at 67.) The difference between these two cases turned on the *availability* of judicial review prior to the federal criminal proceeding. Whereas the defendant in *Lewis* had the opportunity to challenge his predicate conviction in a judicial forum before he obtained a firearm, the "fundamental procedural defects of the deportation hearing … rendered direct review of the Immigration Judge's determination unavailable" to the alien in *Mendoza-Lopez*. *Id.* at 841.

[6] These two decisions held that a defendant did not have to show exhaustion or a deprivation of judicial review because the removal order was "void," whereas *Zapata-Cortinas* found the § 1326(d) requirements were "satisfied" and the defendant "was deprived of an opportunity for meaningful judicial review." *Zapata-Cortinas,*2018 WL 4770868, *5. The latter court did not explain how the defendant was deprived of judicial review. None of these decisions drew any distinction between judicially-created exhaustion requirements and those imposed by Congress. But the case cited by *Virgen-Ponce* as supporting excusal of the exhaustion requirement, *United Farm Workers of Am., AFL-CIO v. Arizona Agr. Employ. Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982), noted that application of the exhaustion doctrine was within the court's discretion "[u]nless it is specifically required by statute." *Cf. McKart v. United States*, 395 U.S. 185, 206 (1969) (White, J. concurring) ("Undoubtedly, Congress could require such exhaustion as a prerequisite to judicial review … but Congress has not chosen to do so" in the Selective Service Act).

judicial review was not "eliminated" by defects in his removal proceeding; under the facts before the court he knowingly waived his right to obtain judicial review.

Congress made clear by adopting § 1326(d) that knowingly giving up the opportunity for judicial review in a removal proceeding precludes an alien from challenging the validity of the removal order in a § 1326 prosecution. The *Virgen-Ponce* line of cases nullifies this statutory limitation by declaring the removal order void for lack of subject-matter jurisdiction, and in doing so they effectively ignore the limitations Congress imposed on their own jurisdiction. *See United States v. Adams-Orozco,* 607 F.3d 647, 652 (10th Cir. 2010) ("Where, as here, the statute's language is plain and plainly satisfied, 'the sole function of the courts' can only be 'to enforce it according to its terms.'") *Cf. Kern v. Securities & Exchange Comm.*, 724 F. App'x 687, 688 (10th Cir. 2018) ("a challenge to the agency's lack of jurisdiction does not extend our *appellate* jurisdiction to entertain an untimely petition for review.") Defendant has not shown that defects in his removal proceeding improperly deprived him of the opportunity for judicial review of his removal order. That failure precludes a collateral challenge to the order in this proceeding.

IT IS THEREFORE ORDERED this 15th day of October, 2018, that Defendant's motion to dismiss the indictment (Doc. 11) is DENIED.

s/ John W. Broomes
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

May 26, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE FERNANDEZ-CASAS,

Defendant - Appellant.

No. 19-3128
(D.C. No. 6:18-CR-10126-EFM-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before us on the United States' *Motion for Summary Disposition/Affirmance*. The United States moves for summary affirmance based on this court's recent published decision in *United States v. Lira-Ramirez*, 951 F.3d 1258 (10th Cir. 2020), *en banc rev. denied* May 1, 2020. While Appellant does not dispute that *Lira-Ramirez* controls the outcome of this appeal and does not contest summary affirmance of

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* Upon consideration of the United States' motion and Appellant's May 7, 2020 status report, this panel unanimously agrees that this matter can be submitted on these materials and without oral argument. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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the district court's judgment, he reserves the right to petition the United States Supreme Court for further review.

In light of the foregoing, the motion for summary affirmance is granted. The judgment of the district court is affirmed.

Entered for the Court

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE FERNANDEZ-CASAS,

Defendant.

Case No. 18-10126-EFM-1

MEMORANDUM AND ORDER

The Indictment in this case charges Defendant Jose Fernandez-Casas with unlawful reentry in violation of 8 U.S.C. § 1326(a) and (b). Defendant seeks dismissal of the Indictment on the basis that his prior removal from the United States was invalid because the immigration court lacked subject matter jurisdiction to enter the underlying removal order. Because the Court concludes that Defendant's prior removal was valid, the Court denies Defendant's motion.

I. Factual and Procedural Background[1]

Defendant was arrested on December 28, 2007, by the Syracuse, Kansas, Police Department during a traffic stop. Eventually the police department released him to Immigration and Customs Enforcement ("ICE") on January 17, 2008, for the initiation of deportation

[1] Neither party has requested a hearing in connection with the motion to dismiss. Both have attached exhibits to their briefs, the authenticity of which does not appear in dispute. For the purposes of the motion, the Court accepts as uncontested the facts shown by the parties' exhibits.

proceedings. The next day, an immigration official approved a warrant for his arrest and served it on him at 1:01 p.m. The Notice of Custody Determination, indicates that the immigration judge released him on a $5,000 bond. Defendant signed a provision in that document acknowledging that he received this notification and that he did not request a redetermination of this custody decision.

On that same date, Department of Homeland Security ("DHS") issued a Notice to Appear to Defendant (the "Notice"), which was prepared using Form I-862 (Rev. 08/01/07). The Notice alleged that Defendant was not a United States citizen; that he was a citizen of Mexico; that he arrived in the United States at or near Laredo, Texas, on July 1, 1990; and that he was not then admitted or paroled after inspection by an Immigration Officer. The Notice charged that Defendant was subject to removal from the United States pursuant to § 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA").

The Notice ordered Defendant to appear before an immigration judge in Kansas City, Missouri, "on a date to be set at a time to be set" to show why he should not be removed from the United States. In addition, the Notice contained a certificate of service that was signed by Defendant and the immigration enforcement agent. The certificate of service stated that that the Notice was personally served on Defendant on January 18, 2008, and that Defendant was given a list of organizations and attorneys that provide free legal services.

On January 24, 2008, ICE[2] sent a letter to the Office of the Immigration Judge advising that the defendant was released on bond. At the bottom of this document, the signing party

[2] The Immigration and Naturalization Service ("INS"), which was the precursor to ICE, sent this document. For purposes of this Order, the Court will refer to INS as ICE.

certified that Defendant was provided a specific form and notified that he must inform the court of any change of address.

A Notice of Hearing was issued on April 20, 2009, informing Defendant that a master hearing was scheduled before the immigration court in Kansas City, Missouri, on May 26, 2009, at 1:00 p.m. The certificate of service states that the Notice of Hearing was served on Defendant and DHA. Subsequent documents indicate that this hearing was continued numerous times.

On October 27, 2009, Defendant filed a document titled "Respondent's Written Pleading," in which he and his attorney represented the following: (1) the Notice to Appear dated January 18, 2008, was properly served on Defendant; (2) Defendant entered the United States in 1990 from his country of origin, Mexico, without proper inspection or admittance; and (3) Defendant was subject to removal. Defendant further asserted that he sought relief pursuant to cancellation of removal under INA § 240A(b) and "voluntary departure – alternative." As a result, the immigration judge ordered Defendant to file an application for relief by January 25, 2010.

On June 10, 2010, the immigration court granted Defendant's application for voluntary departure until October 8, 2010. The filed order indicates that Defendant was orally advised of the limitation on discretionary relief and consequences for a failing to depart as ordered. Both Defendant and DHS waived the right to appeal. A Warrant of Removal/Deportation was prepared on December 8, 2010, stating that Defendant was subject to removal from the United States based on a final order by an immigration judge.

On February 5, 2013, a Notice of Intent/Decision to Reinstate Prior Order was entered finding that Defendant was removed from the United States on January 4, 2013, and reentered the United States on February 2, 2013. Defendant signed this document indicating that he did not

wish to contest this determination. The Warrant of Removal/Deportation was issued, and Defendant was deported.

On February 14, Defendant entered the United States again without proper authorization. The prior deportation order was reinstated without Defendant's objection. Defendant was deported on March 29, 2013.

On August 13, 2018, Defendant was arrested in Pratt, Kansas, and on November 5, he was convicted of being an alien in possession of a weapon in violation of K.S.A. 21-6301(a)(16). He was surrendered to federal authorities pursuant to an immigration detainer.

Defendant is now charged with reentry of a removed alien in violation of 8 U.S.C. § 1326(a) and (b). Specifically, the Indictment charges that Defendant is a citizen of Mexico and not a citizen and national of the United States, that he was previously deported, and that he was found in the United States after having voluntarily re-entered without the appropriate permission. Defendant subsequently filed a Motion to Dismiss Indictment (Doc. 8) which is presently before the Court.

II. Analysis

To convict Defendant on the charge of reentry of a removed alien in violation of 8 U.S.C. § 1326(a) and (b), the Government must prove that (1) the defendant was removed from the United States while an order of removal is outstanding; and (2) the defendant subsequently "entered, attempted to enter, or is at any time found in, the United States."[3] Generally, the Government establishes the first element by producing evidence that the defendant was deported while a

[3] *United States v. Adame-Orozco*, 607 F.3d 647, 651 (10th Cir. 2010) (alterations omitted) (quoting 8 U.S.C. § 1326(a)).

deportation order was outstanding against him.[4] In response, a defendant may argue that the deportation order itself was unlawful.[5] This defense is specifically recognized in subsection (d) of § 1326, which allows a defendant to collaterally attack an underlying deportation order. Under this subsection, an alien may not challenge the validity of a prior deportation order unless the alien demonstrates that: "(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."[6]

Here, Defendant challenges the validity of the September 2008 removal order as a defense to the § 1326(a) and (b) charge in the Indictment. In short, Defendant argues that the immigration court was never vested with subject matter jurisdiction because the Notice lacked a specific date and time for the initial removal hearing as required by the Supreme Court's recent decision in *Pereira v. Sessions*.[7] Accordingly, Defendant argues that his due process rights were violated when he was deported from the United States. In response, the Government argues that *Pereira* does not apply, because unlike the alien in *Pereira*, Defendant received adequate information to appear and actually did appear with his counsel in 2010 and while in custody in 2013.

[4] *Id.*

[5] *Id.*

[6] 8 U.S.C. § 1326(d).

[7] 138 S. Ct. 2105 (2018).

A. Summary of *Pereira v. Sessions*

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, nonpermanent residents who are subject to removal proceedings may be eligible for cancellation of removal if, among other things, they have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application" for cancellation.[8] But, under the "stop-time rule," the period of continuous presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)."[9] Section 1229(a), in turn, states that the Government must serve the alien with a written notice to appear specifying, among other things, "[t]he time and place at which the [removal] proceedings will be held."[10] In recent years, DHS typically issued notices to appear that failed to specify the time, place, or date of initial removal hearings whenever the agency deemed it impracticable to include this information.[11] This is the case with the notice to appear received by the defendant in *Pereira*.[12]

Pereira is a citizen of Brazil who arrived in the United States in 2000 and stayed after his visa expired.[13] After he was arrested in 2006 for operating a vehicle under the influence of alcohol, DHS served him with a notice to appear that did not specify the time or date of his initial removal proceeding.[14] A year later, the immigration court mailed him a more specific notice setting forth

[8] 8 U.S.C. § 1229b(b)(1)(A).

[9] *Id.* § 1229b(d)(1)(A).

[10] *Id.* § 1229(a)(1)(G)(i).

[11] *Pereira*, 138 S. Ct. at 2111.

[12] *Id.* at 2112.

[13] *Id.*

[14] *Id.*

the time and date of the hearing, but the notice was sent to the wrong address.[15] As a result, Pereira failed to appear and the immigration court ordered him removed "in absentia."[16] In 2013, Pereira was arrested again and the immigration court reopened the removal proceedings.[17] Pereira applied for cancellation of removal, arguing that the stop-time rule was not triggered by DHS's initial 2006 notice because it failed to specify the time and date of his removal hearing.[18] The immigration court denied Pereira's application and the Board of Immigration Appeals ("BIA") agreed, finding that the 2006 notice triggered the stop-time rule even though it failed to specify the time and date of the removal hearing.[19] The First Circuit denied Pereira's petition for review of the BIA's order.[20]

The Supreme Court held 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 so does not trigger the stop-time rule."[21] The Supreme Court relied on the statutory language of the stop-time rule, which states that the alien's physical presence ends "when the alien is served a notice to appear under section 1229(a)."[22] Because § 1229(a) specifies that the notice to appear is a "[w]ritten notice" that specifies "the time and place at which the [removal]

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[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*. at 2112-13.

[20] *Id*.

[21] *Id*. at 2113-14.

[22] *Id*. at 2114 (quoting 8 U.S.C. § 1229b(d)(1)).

proceedings will be held," the Government must serve a notice that specifies the time and place of the removal proceedings.[23] The Supreme Court also observed that § 1229(a)(2), which allows for a change or postponement of the proceedings to a new time and place, presumes that the Government has already served a notice that specifies the time and place as required by § 1229(a).[24] Otherwise, there would be no time or place to change or postpone.[25] The Supreme Court also focused on the alien's need for a meaningful opportunity to obtain counsel and to prepare and participate in the hearing.[26] Pereira never received notice of the hearing and therefore he did not have this opportunity.[27] The Supreme Court reversed the denial of Pereira's appeal and remanded the case for further proceedings consistent with its opinion.[28]

B. Validity of the 2010 Removal Order

It is undisputed that Defendant's Notice was deficient under *Pereira* because it did not state the date and time of Defendant's initial removal proceeding. Defendant argues that this deficiency divested the immigration of subject matter jurisdiction thereby rendering his removal proceedings null and void. In support of this argument, Defendant relies on the regulations promulgated by the Attorney General interpreting the INA. Specifically, 8 C.F.R. § 1003.14(a) states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the [i]mmigration [c]ourt by the Service." The regulations define a

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 2114-15.

[27] *Id.*

[28] *Id.* at 2120.

"charging document" as "the written instrument which initiates a proceeding before an [i]mmigration [j]udge. . . . these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearings by Alien."[29] Accordingly, Defendant argues that because his Notice was defective under *Pereira*, a valid charging document was never filed in the immigration court and thus it did not have subject matter jurisdiction.[30]

The Court disagrees with Defendant that *Pereira* is applicable to this matter. Defendant seeks to expand *Pereira*'s holding to encompass all notices to appear in all types of removal proceedings, not just those concerning the stop-time rule. He also seeks to extend its holding to circumstances where the alien later receives the missing information and actually attends the hearing. This expansive application conflicts with the plain language of the Supreme Court's decision, which explicitly stated that the question before it was a "narrow" one.[31] Indeed, when discussing the limitations of the notice to appear under § 1229(a), the Supreme Court limited its discussion to the context of the stop-time rule.[32] The word "jurisdiction" does not appear anywhere in the opinion. The Court presumes that if the Supreme Court intended for its holding to address

[29] 8 C.F.R. § 1003.13.

[30] Defendant relies on several district court decisions that have addressed this issue post-*Pereira*. These courts have concluded that an immigration judge lacks subject matter jurisdiction if the Notice to Appear does not contain the date and time of the removal hearing—thereby rendering the removal proceeding null and void. *See, e.g.*, *United States v. Pedroza-Rocha*, 2018 WL 6629649, at *5 (W.D. Tex. 2018); *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164, 1166 (E.D. Wash. 2018). The Court declines to follow these decisions, as explained more fully in this Order.

[31] *See* 138 S. Ct. at 2113 ("[T]he dispositive question in this case is much narrower, but no less vital: Does a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by § 1229(a)(1)(G)(i), trigger the stop-time rule?").

[32] *See United States v. Chavez*, 2018 WL 6079513, at *7 (D. Kan. 2018) (citing *Pereira*, 138 S. Ct. at 2112, 2114, 2117).

the subject matter jurisdiction of the immigration courts as Defendant suggests, it would not have described the dispositive issue as a "narrow" one.

This Court's conclusion is supported by the BIA's precedential decision in the *Matter of Bermudez-Cota* and recent decisions from the Sixth and Ninth Circuits.[33] The respondent in *Bermudez-Cota* was a native and citizen of Mexico, who was personally served a notice to appear that did not state the date and time of the removal hearing.[34] The immigration court later mailed him a notice of hearing indicating when and where the hearing was to take place. The respondent appeared at this hearing and others.[35] After *Pereira*, the respondent filed a motion to terminate arguing that his proceedings should be terminated because the notice to appear did not comply with § 1229(a)(1) and thus jurisdiction never vested with the immigration judge under 8 C.F.R. § 1003.14.[36] The BIA denied the respondent's motion, holding that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an [i]mmigration [j]udge with jurisdiction over the removal proceedings and meets the requirements of [§ 1229(a) of the INA], so long as a notice of hearing specifying this information is later sent to the alien."[37]

First, the BIA found that *Pereira* did not affect when or how jurisdiction was conferred on the immigration court, distinguishing *Pereira* on the basis that it involved a cancellation of removal where the stop-time rule was at issue.[38] The BIA noted that in *Pereira* the Supreme Court

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[33] *See In the Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (B.I.A. 2018); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019).

[34] *Bermudez-Cota*, 27 I. & N. at 441.

[35] *Id*.

[36] *Id*. at 443.

[37] *Id*. at 447.

[38] *Id*. at 443.

described the issue before it as "narrow" and reasoned that the Court would not have described the issue as such if it intended for its holding to affect the immigration court's jurisdiction.[39] Lastly, the BIA emphasized that the Supreme Court did not invalidate the alien's underlying removal proceedings or even suggest that they should be terminated as a result of the deficient notice.[40] Instead, the Supreme Court remanded the matter for "further proceedings."[41]

Second, the BIA addressed the regulations, finding that it was not required to terminate proceedings pursuant to 8 C.F.R. § 1003.14. As noted above, 8 C.F.R. § 1003.14 states that "[j]urisdiction vests, and proceedings before an [i]mmigration [j]udge commence, when a charging document is filed with the [i]mmigration [c]ourt."[42] According to the BIA, this regulation does not specify what information must be contained in a "charging document" at the time it is filed with an immigration court.[43] Nor does it require that the charging document specify the time and date of the initial removal hearing before jurisdiction vests.[44] The BIA further noted that 8 C.F.R. § 1003.15—the regulation setting forth the required information for a notice to appear—does not specify that the time and date of the initial hearing must be included in the document.[45] In fact, 8 C.F.R. § 1003.18 states that the notice need only contain the time, place, and date of the initial removal hearing "where practicable," and if that information is not contained in the notice, the

[39] *Id.*

[40] *Id.* at 443-44.

[41] *Id.* at 443 (quoting *Pereira*, 138 S. Ct. at 2120).

[42] 8 C.F.R. § 1003.14(a).

[43] *Bermudez-Cota*, 27 I. & N. at 445.

[44] *Id.*

[45] *Id.*

immigration court is responsible for scheduling the initial removal hearing and providing this information to the government and the alien.[46] The BIA reasoned that terminating proceedings where service was proper under this regulation would require it to disregard a regulation that it is compelled to follow.[47]

Finally, the BIA noted that before *Pereira*, the Fifth, Seventh, Eighth, and Ninth Circuits held that a notice to appear that failed to state the time and place of the initial removal hearing was not defective if a notice of hearing that contains this information is later sent to the alien.[48] The BIA therefore concluded that a two-step notice process is sufficient to meet the statutory notice requirements of § 1229(a)(1) of the INA. Because the respondent received proper notice of the time and place of his hearing when he received the notice of hearing, his notice to appear was not defective.[49]

The Sixth and Ninth Circuits have also rejected the argument that a deficient notice to appear under *Pereira* divests the immigration court of subject matter jurisdiction.[50] In reaching its decision, the Sixth Circuit looked to the BIA's decision in *Matter of Bermudez-Cota*.[51] The Sixth Circuit analyzed the BIA's interpretation of its own regulations under the *Auer* standard, which

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[46] 8 C.F.R. § 1003.18(b).

[47] *Bermudez-Cota*, 27 I. & N. at 444 (citing *Matter of L-M-P-,* 27 I. & N. Dec. 265, 267 (BIA 2018) (affirming that neither the immigration judge nor the BIA may "disregard the regulations, which have the force and effect of law").

[48] *Id*. at 445-46 (citations omitted).

[49] *Id*. at 447.

[50] *Hernandez-Perez*, 911 F.3d 305; *Karingithi*, 913 F.3d 1158; b*ut see Duran-Ortega v. U.S. Atty. General*, No. 18-14563 (11th Cir. 2018) (granting an emergency motion for stay of removal and declining to follow the BIA's decision in *Bermudez-Cota* because it was based on an unreasonable interpretation of the statutes and regulations involved).

[51] *Hernandez-Perez*, 911 F.3d at 312.

provides that agency interpretations of their own regulations are controlling unless they are plainly erroneous or inconsistent with the regulation.[52] The Sixth Circuit determined that the INA did not specify when or how jurisdiction vests with the immigration judge or which notice to appear requirements are jurisdictional.[53] Thus, the agency had some discretion in constructing its determination of it.[54] The Sixth Circuit concluded that the BIA's finding that a two-step notice process was sufficient to meet the statutory notice requirements under § 1229(a) and was not inconsistent with the INA.[55]

The Sixth Circuit also analyzed the regulations, agreeing with the BIA that the regulations were ambiguous because they did not specify what information must be contained in a charging document at the time it is filed with the district court.[56] The circuit also noted that the definition of "charging document" does not only include a notice to appear but also a "Notices of Referral to Immigration Judge" and a "Notice of Intention to Rescind and Request for Hearing by Alien."[57] And finally, the Sixth Circuit noted that the *Pereira* Court did not invalidate the petitioner's underlying removal proceedings, stating that "[i]f *Pereira*'s holding applied to jurisdiction, there also would not have been jurisdiction in *Pereira* itself. But the Court took up, decided, and remanded *Pereira* without even hinting at the possibility of a jurisdictional flaw."[58] Ultimately,

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[52] *Id*. (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

[53] *Id*. at 313 (citing 8 U.S.C. § 1229a(a)(1) and § 1229(a)).

[54] *Id*.

[55] *Id*.

[56] *Id*. at 313-14.

[57] *Id*. at 313.

[58] *Id*. at 314.

the Sixth Circuit concluded "that jurisdiction vests with the immigration court where . . . the mandatory information about the time of the hearing, see 8 U.S.C. § 1229(a), is provided in a Notice of Hearing issued after the [notice to appear]."[59]

The Ninth Circuit subsequently ruled on the same issue. It also found *Pereira*'s holding to be limited, stating that the Supreme Court "was not in any way concerned with the [i]mmigration [c]ourt's jurisdiction" in that case.[60] Furthermore, in it is analysis of § 1229(a) and the regulations, the Ninth Circuit noted that unlike § 1229(a)(1), the regulations do not require a notice to appear to include the time and date information.[61] Instead, they only require the inclusion of this information "where practicable," and when that information is not contained in the notice to appear, the immigration court is required to later provide this information to the alien.[62] Significantly, the Ninth Circuit noted that § 1229(a) is silent regarding the immigration court's jurisdiction, and the regulations are silent as to § 1229(a)'s requirements for a notice to appear.[63] Because of the differences in the notice to appear requirements set forth in § 1229(a) and the regulations, and § 1229(a)'s silence as to jurisdiction, the Ninth Circuit concluded that the general presumption that the same word should be given the same meaning throughout a statute is inapplicable because the jurisdictional regulations not only do "not include the time of the hearing, reading such a requirement into the regulations would render meaningless their command that such

[59] *Id*. at 315.

[60] *Karingithi*, 913 F.3d at 1159.

[61] *Id*. (citing 8 C.F.R. § 1003.15(b)).

[62] *Id*. at 160 (citing 8 C.F.R. § 1003.18(b)).

[63] *Id*.

information need only be included 'where practicable.' "[64] The court then held that "[t]he regulatory definition, not the one set forth in § 1229(a), governs the [i]mmigration [c]ourt's jurisdiction. A notice to appear need not include the time and date information to satisfy this standard."[65] The Ninth Circuit also found the BIA's opinion in *Bermudez-Cota* "easily meets" the deferential standard given to agencies in interpreting their own regulations.[66]

This Court follows the Sixth and Ninth Circuits and gives the BIA's decision in *Bermudez-Cota* deference. The Supreme Court has held that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication."[67] When the BIA construes the INA, a reviewing court first asks "whether 'the statute is silent or ambiguous with respect to the specific issue' before it."[68] If the answer is yes, the court must then ask, "whether the agency's answer is based on a permissible construction of the statute."[69] An agency's construction of a statute is permissible unless it is "arbitrary, capricious, or manifestly contrary to the statute."[70] Furthermore, the Court is also required to give deference to the BIA's interpretation of its regulations. Under *Auer*, an agency's interpretation of

[64] *Id*. (quoting 8 C.F.R. § 1003.18(b)).

[65] *Id*.

[66] *Id*. at 1161.

[67] *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citation and internal quotation marks omitted).

[68] *Id*. at 424 (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984)).

[69] *Id*.

[70] *Chevron*, 467 U.S. at 844.

its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.' "[71]

The INA provides under 8 U.S.C. § 1229a(a)(1) that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deport ability of an alien." But neither this statute nor § 1229(a) state when or how jurisdiction vests with the immigration judge. And although the regulations specify when jurisdiction vests with the immigration court, they do not specify what information a charging document must contain for that jurisdiction to vest. The Court therefore looks at whether the BIA's construction of § 1229(a) and the regulations as set forth in *Bermudez-Cota* is permissible.

As discussed above, the Court agrees with the BIA that *Pereira* is not applicable to the jurisdictional question at hand. The Court is also persuaded by the Ninth Circuit's analysis of the statute and regulations. Section 1229(a) is silent regarding jurisdiction, and the regulations are silent regarding § 1229(a)(1)'s notice to appear requirements. The regulations, not the statutory definition of a notice to appear, control when jurisdiction vests with the immigration court.[72] The Court therefore gives deference to the BIA's position in *Bermudez-Cota*.

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[71] *Auer*, 519 U.S. at 461(citing *Roberston v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); *Wei v. Mukasey*, 545 F.3d 1248, 1256 (10th Cir. 2008) (citations omitted) (stating that if the INA and regulations are ambiguous, the court must defer to the BIA's interpretation of its own laws).

[72] The statutory text of § 1229(a) also proves that *Pereira*'s holding does not affect the jurisdiction of the immigration courts. Section 1229(a)(1)(G) states that "written notice (*in this section* referred to as a 'notice to appear') shall be given . . . specifying, . . . [t]he time and place at which the proceedings will be held." (emphasis added). Thus, the statutory text appears to define "notice to appear" only for purposes of the statute, such as the stop-time rule in § 1229b(d)(1)(A). The statute does not address when jurisdiction is conferred on the immigration court. Thus, the Supreme Court's interpretation of § 1229(a) and the requirement for a "notice to appear" cannot be extended to modify the regulations governing the immigration court's jurisdiction. *See United States v. Romero-Caceres*, 2018 WL 6059381, at *7 (E.D. Va. 2018).

The Court notes that although both the Sixth and Ninth Circuit gave the BIA's decision in *Bermudez-Cota* deference, there is a slight difference in their conclusions. The Sixth Circuit concluded that jurisdiction vests with the immigration court when the time and date information required by § 1229(a)(1) is provided in a notice of hearing issued after the notice to appear.[73] The Ninth Circuit, on the other hand, does not require the time and date information to be issued in a notice of hearing for jurisdiction to vest. It held that jurisdiction vests when a notice to appear that meets the regulatory requirements of 8 C.F.R. § 1003.15 is filed with the immigration court.[74] This difference most likely stems from the BIA's language in *Matter of Bermudez-Cota*, where the BIA held that "a notice to appear that does not specify the time and place of an alien's removal hearing vests an [i]mmigration [j]udge with jurisdiction over the removal proceedings and meets the requirements of [§ 1229(a) of the INA], so long as a notice of hearing specifying this information is later sent to the alien."[75] After reviewing the BIA's decision, this Court is not convinced that the BIA intended for jurisdiction to turn on whether there is a later-issued notice informing the alien of the time and date of the hearing.[76] Rather, the BIA's reference to the later notice of hearing ensures that the requirements of 8 C.F.R. § 1003.18(b) and § 1229(a)(1) are met. Indeed, as a district court in the Northern District of California who also looked at this issue explained, if a notice of hearing was the document that vested the immigration court with jurisdiction and this document is typically served after the notice to appear, how would an immigration court that had

[73] *Hernandez-Perez*, 911 F.3d at 315.

[74] *Karingithi*, 913 F.3d at 1161.

[75] *Bermudez-Cota*, 27 I. & N. at 447.

[76] *See United States v. Arteaga-Centeno*, 2019 WL 428779, at *4 (N.D. Cal. 2019) (finding that neither *Bermudez-Cota* nor *Karingithi* held that the vesting of jurisdiction of the immigration judge turns on whether there is a later issued notice informing the alien of the time and date of the hearing).

only issued a notice to appear know if it had jurisdiction?[77] The Court therefore concludes that jurisdiction vests when a notice to appear that complies with 8 C.F.R. § 1003.15 is filed with the immigration court.[78]

In sum, the immigration court had jurisdiction to order Defendant's removal. The 2008 Notice filed with the immigration court complied with the requirements set forth in the regulations. Defendant subsequently received a notice of hearing informing him of the date and time of his hearing in accordance with 8 C.F.R. § 1003.15 and § 1229(a)(1). Accordingly, Defendant's argument that the 2010 removal order was void fails.[79]

C. Defendant's Collateral Attack of the 2010 Removal Order

Intertwined with his jurisdictional argument is Defendant's collateral attack under § 1326(d). As the Tenth Circuit has recognized, Congress has imposed specific limitations on an alien's right to collaterally attack an underlying deportation order on a charge of illegal reentry:

> To collaterally attack a deportation order, an alien must demonstrate that: "(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."[80]

These requirements are in the conjunctive, and a defendant must satisfy all three to prevail.[81]

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[77] *Id*. at *4 n.2.

[78] Other courts within this district have held that a notice to appear that is deficient under *Pereira* does not divest the immigration court of subject matter jurisdiction, albeit for different reasons. *See Chavez*, 2018 WL 6079513, at *6; *United States v. Larios-Ajualat*, 2018 WL 5013522, at *6 n.4 (D. Kan. 2018); *United States v. Lira-Ramirez*, 2018 WL 5013523, at *6 n.4 (D. Kan. 2018).

[79] A number of other federal district courts have concluded that the regulations, such as 8 C.F.R. §§ 1003.14, 1003.15, and 1003.18, not *Pereira* and § 1229(a)(1) govern when jurisdiction is conferred on the immigration court. *See United States v. Garcia*, 2019 WL 399612, at *4 (M.D. Fla. 2019) (compiling cases).

[80] *United States v. Chavez-Alonso*, 431 F.3d 726, 728 (10th Cir. 2005) (citing 8 U.S.C. § 1326(d)).

[81] *See United States v. Lopez-Collazo*, 824 F.3d 453, 458 (4th Cir. 2016).

Following *Pereira*, federal district courts are split regarding whether a defendant is required to comply with § 1326(d)'s requirements to collaterally attack a removal order when the notice to appear is defective. This split primarily turns on the issue of whether the deficient notice divested the court of subject matter jurisdiction. For example, courts that have applied *Pereira* broadly have held that that a defective notice divests the court of subject matter jurisdiction, is null and void, and cannot support a § 1326(a) prosecution for illegal reentry—relieving the defendant of the burden of meeting § 1326(d)'s requirements for a collateral attack of a removal order.[82] Other district courts—including those within this district—have concluded that a defective notice does not satisfy or eliminate the need to satisfy § 1326(d)'s requirements.[83] The Tenth Circuit has not addressed the issue. Given that this Court has held that a defective notice to appear does not divest the immigration court of subject matter jurisdiction, the Court will address whether Defendant has satisfied the requirements to collaterally attack the prior removal order under § 1326(d).

Defendant argues that he was not required to exhaust his administrative remedies because "exhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile, . . . or *where the administrative proceedings themselves are void*." But the Court has already rejected Defendant's argument that the underlying removal proceedings were void, and Defendant does not otherwise argue that he exhausted his administrative remedies. Indeed, "[a]n alien who knowingly waives the right to appeal an immigration judge's order of

[82] *See United States v. Ortiz*, 2018 WL 6012390, at *2-4 (D.N.D. 2018); *Pedroza-Rocha*, 2018 WL 6629649, at *5; *Virgen-Ponce*, 320 F. Supp. 3d at 1165-66.

[83] *See United States v. Hernandez-Aguilar*, 2019 WL 456172, at *1 (E.D.N.C. 2019); *Chavez*, 2018 WL 6079513, at *6; *Larios-Ajualat*, 2018 WL 5013522, at *4; *Lira-Ramirez*, 2018 WL 5013523, at *4.

deportation fails to exhaust administrative remedies under § 1326(d)(1)."[84] Defendant does not allege that his waiver of appeal was not knowingly or voluntarily entered. He therefore fails to show an essential element of collateral review under § 1326(d). This failure precludes a collateral challenge to the 2010 removal order.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Indictment (Doc. 8) is **DENIED**.

IT IS SO ORDERED.

Dated this 6th day of March, 2019.

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

[84] *Chavez-Alonso*, 431 F.3d at 728.

FILED
United States Court of Appeals
Tenth Circuit

May 13, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE MARTINEZ, a/k/a Jose Lucas Martinez-Almaraz,

Defendant - Appellant.

No. 19-3218
(D.C. No. 6:19-CR-10057-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before us on the Motion for Summary Disposition/Affirmance. The United States moves for summary affirmance based on this court's recent published decision in *United States v. Lira-Ramirez*, 951 F.3d 1258 (10th Cir. 2020), *en banc rev. denied* May 1, 2020. While the appellant does not dispute that *Lira-Ramirez* controls the outcome of this appeal and does not contest summary

* Upon consideration of the United States' motion and the appellant's status report filed May 7, 2020, this panel unanimously agrees that this matter can be submitted on these materials and without oral argument. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

affirmance of the district court's judgment, he reserves the right to petition the United States Supreme Court for further review.

In light of the foregoing, the abatement of proceedings in this appeal is lifted, and the appellee's motion for summary affirmance is granted. The judgment of the district court is affirmed.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 19-10057-JWB

JOSE MARTINEZ,

Defendant.

MEMORANDUM AND ORDER

This matter is before the court on Defendant's amended motion to dismiss the indictment. (Doc. 15.)[1] The government has filed its response. (Doc. 13.) For the reasons stated herein, Defendant's amended motion to dismiss (Doc. 15) is DENIED.

I. Background

Defendant is charged with one count of being unlawfully found in the United States in violation of 8 U.S.C. § 1326(a) and (b)(2). (Doc. 9.) The indictment alleges that Defendant is a citizen of Mexico, that he was previously removed or deported, and that he was found on February 26, 2019, in the District of Kansas, having voluntarily re-entered without obtaining consent to reapply for admission to the United States. (*Id.*)

Defendant's motion argues that "no predicate removal order that comports with due process exists" and therefore the government "is incapable of proving its case as a matter of

[1] Defendant had originally filed a motion to dismiss on April 25, 2019. (Doc. 12.) Defendant then notified the court by e-mail that Defendant would file an amended motion to dismiss in order to withdraw an argument regarding the Appointments Clause. Defendant has now filed an amended motion to dismiss with that argument excised from the motion. Therefore, the government does not need to file an amended response and the court may proceed on ruling on the motion.

law…." (Doc. 13 at 19.) The motion alleges that on December 26, 2007, Defendant was in prison at FCI-Fort Dix, New Jersey, when he was personally served with a notice to appear ("NTA"). (*Id.* at 2.) The NTA alleged that Defendant was subject to removal because he was in the United States in violation of section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA")[2] and section 212(a)(2)(A)(i)(II) of the INA for being convicted of a crime under the Controlled Substances Act. The NTA directed Defendant to appear before an immigration judge at a location in Newark, New Jersey, "on a date to be set" and at "a time to be set" to show cause why he should not be removed from the United States. (Doc. 15-1 at 1.) The form contained a notice of rights, including an explanation of the right to be represented by an attorney and a statement that the hearing would not be set earlier than ten days from the date of the notice to allow Defendant sufficient time to secure counsel. (*Id.* at 4.) Defendant did not execute a portion of the form that permitted a waiver of the ten-day period. A certificate of service by the ICE agent indicates Defendant was personally served with the NTA on December 26, 2007, and was given a list of attorneys providing free legal services. (*Id.*)

A hearing was held on January 9, 2008. At the conclusion of the hearing, Defendant was ordered to be removed from the United States and returned to Mexico. Defendant waived his right to appeal. (Doc. 13, Exh. 1.)

Defendant argues the NTA was defective for failing to specify a date and time for the hearing, as explained in *Pereira v. United States,* 138 S. Ct. 2105 (2018). Because *Pereira* holds that a document lacking such information does not constitute a "notice to appear" within the meaning of 8 U.S.C. § 1229(a), Defendant argues the immigration court lacked subject matter jurisdiction to order his removal. This is so because the regulations provide that "[j]urisdiction

[2] "An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." 8 U.S.C. § 1182(a)(6)(A)(i).

vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service," and Defendant argues that an NTA under § 1229(a) constitutes the charging document for these purposes. (Doc. 15 at 6) (citing 8 C.F.R. § 1003.14(a)). Absent an NTA satisfying § 1229(a), he contends, his removal proceedings were void and in violation of due process. (Doc. 15 at 11-12.) Defendant contends the indictment must be dismissed as a result.

Defendant acknowledges there is conflicting case law on this issue after *Pereira*, and that two circuit courts have taken a position inconsistent with his argument. (*Id.* at 12-13.) But he points out the Tenth Circuit has not ruled on the issue, and he maintains that cases such as *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wa. 2018), which dismissed a § 1326 indictment based upon *Pereira*, are more persuasive.

II. Discussion

Neither party has requested an evidentiary hearing or challenged the facts alleged in the briefs. The court accordingly accepts as uncontested the non-conclusory facts set forth in the briefs and those shown in the documents attached to the briefs. Defendant's argument essentially asserts that the immigration court lacked jurisdiction when entering the deportation order due to the defective NTA, the order is therefore void, and, as a result, this matter must be dismissed as the government cannot establish Defendant's guilt beyond a reasonable doubt.

The undersigned has ruled previously that the immigration court is not deprived of subject matter jurisdiction due to the service of an NTA that failed to meet the standards of *Pereira*. *See United States v. Larios-Ajualat,* No. 18-10076-JWB, 2018 WL 5013522 (D. Kan. Oct. 15, 2018), *United States v. Lira-Ramirez,* No. 18-10102-JWB, 2018 WL 5013523 (D. Kan. Oct. 15, 2018). Other judges in this district have reached a similar conclusion. *See e.g., United States v.*

Hernandez-Mendez, No. 18-20055-01-DDC, 2019 WL 2120882 (D. Kan. May 15, 2019); *United States v. Garcia-Valadez,* No. 18-10144-EFM, 2019 WL 1058200 (D. Kan. Mar. 6, 2019); *United States v. Chavez,* No. 17-40106-HLT, 2018 WL 6079513 (D. Kan. Nov. 21, 2018).

As Defendant concedes, at least two circuit courts have found the immigration court has jurisdiction to order removal notwithstanding the use of an NTA that failed to specify the time and date of the hearing. *Karingithi v. Whitaker,* 913 F.3d 1158 (9th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018). *Cf. United States v. Contreras-Cabrera*, ___F. App'x ___, 2019 WL 1422627 (10th Cir. Mar. 29, 2019) (concluding immigration court had jurisdiction but noting removal was conducted under a 1992 statute that did not require an NTA to contain the time and date of the hearing).

The courts in this district have applied *Pereira* narrowly and denied motions to dismiss based on the arguments raised by Defendant. *See Hernandez-Mendez*, 2019 WL 2120882, at *3 (citing cases). The Tenth Circuit has yet to rule on this issue. After examining the relevant case law,[3] the court finds the immigration court did not lack subject matter jurisdiction despite the NTA's failure to specify the time and date of the removal hearing. Moreover, the court finds the prerequisites for collateral review under 8 U.S.C. § 1326(d) have not been established or excused here. Without fully restating its prior legal analysis, the court incorporates by reference its discussion of these issues in *United States v. Serrano-Ramirez*, No. 19-10024-JWB, 2019 WL 2070309 (May 9, 2019) and *Larios-Ajualat*, 2018 WL 5013522.

This case has somewhat different facts than the other cases decided by the undersigned. The difference in this matter is that the record does not show that Defendant received a notice of hearing with a specific time and date after receiving the NTA. This fact, however, does not affect

[3] A survey of the case law on this issue was set forth by Judge Hanen in *United States v. Porras-Avila,* No. 19-cr-010, 2019 WL 1641191 (S.D. Tex. Apr. 16, 2019).

this court's analysis that subject matter jurisdiction is conferred under 8 U.S.C. § 1229a and is not affected by filing of an NTA. *See Garcia-Valadez*, 2019 WL 1058200, *7-8; *Hernandez-Mendez*, 2019 WL 2120882, at *3.

In summary, the court finds the subject matter jurisdiction of the immigration courts was conferred by Congress in 8 U.S.C. § 1229a and is not affected by filing of an NTA; that 8 C.F.R. § 1003.14 refers to acquisition of personal jurisdiction over a person for purposes of ordering his removal; that the regulations do not require an NTA to include the date and time of the removal hearing to constitute a "charging document" that vests the immigration court with jurisdiction (*see* 8 C.F.R. § 1003.15); and that notwithstanding the defective nature of this NTA under *Pereira*, Defendant must still meet the requirements for collateral review in § 1326(d) by showing exhaustion of administrative remedies, that he was deprived of an opportunity for judicial review, and that the removal proceeding was fundamentally unfair.

Defendant does not argue the prerequisites for collateral review under § 1326(d) are satisfied. He does not claim to have exhausted administrative remedies or to have been deprived of the opportunity for judicial review. The record of the removal proceeding indicates Defendant waived an appeal of his removal order, and Defendant does not argue the waiver was unknowingly made. Rather, Defendant argues he was "excused from the administrative and judicial review requirements because the removal order never had legal force to begin with." (Doc. 15 at 18.) For the reasons indicated above, the court concludes the immigration court had subject matter jurisdiction to order Defendant's removal. But even if the court were to find otherwise, Defendant's argument fails because Congress has limited the ability of a person charged under § 1326 to collaterally attack a deportation order. Defendant's failure to satisfy those prerequisites bars his collateral challenge. *See United States v. Almanza-Vigil*, 912 F.3d 1310, 1316 (10th Cir.

2019) (Congress codified the Fifth Amendment right to due process in § 1326(d); a non-citizen seeking to collaterally attack a previous removal order must meet the three conditions in that provision). Nothing in § 1326(d) excuses or exempts a failure to exhaust remedies or to seek judicial review where the claimed error was jurisdictional in nature. 8 U.S.C. § 1326(d) ("an alien *may not challenge the validity of the deportation order … unless*" the alien meets three conditions) (emphasis added); *United States v. Olguin-Ibarra,* No. 18-191, 2019 WL 1029960, *5 (W.D. Tex. Jan. 7, 2019) ("there is no indication that Congress or the *Mendoza-Lopez* Court intended to treat jurisdictional defects any different than any other type of invalid or unlawful removal order."); *United States v. Gonzalez-Ferretiz*, No. 3:18-CR-117, 2019 WL 943388, at *4 (E.D. Va. Feb. 26, 2019) ("Allowing collateral challenges in Section 1326 prosecutions outside of Section 1326(d) flies in the face of the clear statutory text and Congress' intent.")

III. Conclusion

IT IS THEREFORE ORDERED this 28th day of May, 2019, that Defendant's amended motion to dismiss the indictment (Doc. 15) is DENIED. Defendant's initial motion to dismiss (Doc. 12) is DENIED AS MOOT.

s/ John W. Broomes
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

May 26, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IGNACIO HERNANDEZ-MENDEZ,

Defendant - Appellant.

No. 19-3247
(D.C. No. 2:18-CR-20055-DDC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before us on the United States' *Motion for Summary Disposition/Affirmance*. The United States moves for summary affirmance based on this court's recent published decision in *United States v. Lira-Ramirez*, 951 F.3d 1258 (10th Cir. 2020), *en banc rev. denied* May 1, 2020. While Appellant does not dispute that *Lira-Ramirez* controls the outcome of this appeal and does not contest summary affirmance of the district court's judgment, he reserves the right to petition the United States Supreme Court for further review.

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* Upon consideration of the United States' motion and Appellant's May 7, 2020 status report, this panel unanimously agrees that this matter can be submitted on these materials and without oral argument. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

In light of the foregoing, the motion for summary affirmance is granted. The judgment of the district court is affirmed.

Entered for the Court

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

IGNACIO HERNANDEZ-MENDEZ (01),

Defendant.

Case No. 18-20055-01-DDC

MEMORANDUM AND ORDER

This matter comes before the court on defendant Ignacio Hernandez-Mendez's Motion to Dismiss his Indictment (Doc. 18). For reasons explained below, the court denies Mr. Hernandez-Mendez's motion.

I. Background

The government has charged Mr. Hernandez-Mendez, a Mexican citizen, with one count of illegal reentry under 8 U.S.C. § 1326. Doc. 1. He has entered the country illegally four times, and he describes each entry in his motion. Specifically, his arguments focus on two of those illegal entries.

First, Mr. Hernandez-Mendez illegally entered the country for the second time on November 15, 2017. Law enforcement officers arrested him in Kansas City, Kansas, and detained him. Doc. 18 at 2–3. That day, he received a Form I-862 (*see* Doc. 18-1)—a Notice to Appear—that ordered him to appear before a United States Department of Justice immigration judge on a date and at a time "[t]o be set." Doc. 18-1 at 1.[1] Mr. Hernandez-Mendez also

[1] The parties do not appear to dispute the authenticity of the Notice to Appear (Doc. 18-1) that defendant has attached to his Motion to Dismiss (Doc. 18).

received a Spanish version of a Notice of Rights and Request for Disposition form, on which he indicated his request for a hearing before an immigration judge. Doc. 18 at 3. The Notice to Appear that Mr. Hernandez-Mendez conceded he received (*see id.*) also contained a Certificate of Service noting that the law enforcement officer who had served the Notice to Appear orally informed Mr. Hernandez-Mendez of "the time and place of his . . . hearing and of the consequences of failure to appear." Doc. 18-1 at 2; *see also* Doc. 18 at 3–4 n.3; Doc. 21 at 3. Mr. Hernandez-Mendez apparently signed both the Notice to Appear and the Certificate of Service. Doc. 18-1 at 2.

The government asserts that Mr. Hernandez-Mendez retained multiple attorneys to represent him and, through counsel and while detained, asked for a continuance. He was sent a "Notice of Hearing in Removal Proceedings" at the Versailles, Missouri, county jail where he was detained. Doc. 21 at 3–4; Doc. 23-1. The immigration court set his new hearing for January 9, 2018. At this hearing, Mr. Hernandez-Mendez conceded that he had "re-entered [the country] without permission." Doc. 18 at 3. Because Mr. Hernandez-Mendez already had departed the country once voluntarily, the presiding immigration judge informed him of his two options: (1) a removal order; or (2) additional time to find and consult counsel. Mr. Hernandez-Mendez chose the removal order. He was deported on January 19, 2018.

Second, Mr. Hernandez-Mendez illegally entered the country for the third time on February 6, 2018, when Border Patrol agents arrested him near Santa Teresa, New Mexico. This time, the Department of Homeland Security served him with a Notice of Intent/Decision to Reinstate Prior Order, or a Form I-871.[2] Essentially, this Notice asserted that the government

[2] Mr. Hernandez-Mendez's motion notes that a Form I-871 "is used when a non-citizen is subject to reinstatement of removal, *i.e.*, when 'the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal.'" Doc. 18 at 5 (quoting 8 U.S.C. § 1231(a)(5)).

could reinstate the January 9, 2018, immigration court order to remove Mr. Hernandez-Mendez again. But, this time, the government didn't deport Mr. Hernandez-Mendez immediately. Instead, the United States Attorney's Office for the District of New Mexico prosecuted him. Mr. Hernandez-Mendez pleaded guilty to illegal reentry. The court sentenced him, and, on March 6, 2018, he was deported again.

Finally, Mr. Hernandez-Mendez entered the country illegally for the fourth time. On June 27, 2018, Immigration and Customs Enforcement ("ICE") officers arrested him in Kansas City, Kansas. Mr. Hernandez-Mendez told officers that he had entered the country illegally in April 2018. The Indictment in this case arises from this June 27 arrest.

The court held a hearing on Mr. Hernandez-Mendez's motion on April 25, 2019. *See* Doc. 22. In the sections below, the court discusses the statutory and case authorities governing the motion and addresses Mr. Hernandez-Mendez's arguments.

II. Legal Standard

Several statutes and regulations govern the issues underlying Mr. Hernandez-Mendez's motion. First, 8 U.S.C. § 1229 controls the "[i]nitiation of removal proceedings." That section specifically requires that "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying" several items. *Id.* at § 1229(a)(2). One of the items the Notice must include is "[t]he time and place at which the proceedings will be held." *Id.* at § 1229(a)(1)(G)(i). Second, 8 C.F.R. § 1003.14 explains the immigration court's jurisdiction. "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration court . . . ." *Id.* at

§ 1003.14(a). And, 8 C.F.R. § 1003.18 specifies that the notice to appear "shall provide . . . the time, place and date of the initial removal hearing, where practicable."

A separate statute governs any attacks on "the validity of [a] deportation order." 8 U.S.C. § 1326(d)(1)–(3). This statute prohibits collateral attacks unless the alien can satisfy three requirements:

> (1) [T]he alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d)(1)–(3).

Mr. Hernandez-Mendez's motion relies in large part on a 2018 Supreme Court case, *Pereira v. Sessions*, __ U.S. __, 138 S. Ct. 2105 (2018), which interpreted statutory provisions governing removal. In that case, the Court considered a notice to appear that didn't contain a date and time for defendant Wescley Fonseca Pereira's initial removal hearing. "More than a year" after the government had sent the defendant the notice to appear, "the Immigration Court mailed Pereira a more specific notice setting the date and time for his initial hearing, but the notice was sent to the wrong address and was returned as undeliverable. As a result, Pereira failed to appear, and the Immigration Court ordered him removed in absentia." *Pereira*, 138 S. Ct. at 2107. Pereira remained unaware of the proceedings and the removal order, and he stayed in the United States.

Pereira evaluated 8 U.S.C. § 1229b, which provides that the Attorney General "may cancel removal of . . . an alien who is inadmissible or deportable from the United States if the alien . . . has been physically present in the United States for a continuous period of not less than

10 years immediately preceding the date of such application[.]" *Id.* at § 1229b(b)(1)(A). But, the same section ends this 10-year period "when [an] alien is served a notice to appear under section 1229(a)." *Id.* at § 1229b(d)(1). The Court referred to § 1229b(d)(1) as the "stop-time rule." *Pereira*, 138 S. Ct. at 2108. Because § 1229b specifically references § 1229(a), the Court concluded that Congress had answered the "narrow[]" question whether "a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by § 1229(a)(1)(G)(i), trigger[s] the stop-time rule[.]" *Id.* at 2113. Since Congress had supplied a clear answer to this question, the Court concluded that it didn't need to "resort to *Chevron* deference" to agency interpretations and decisions. *Id.* The Court also employed several canons of statutory construction and evaluated practical considerations, but ultimately held that §§ 1229b(d)(1) and 1229(a) contained clear, unambiguous language. This language, the court held, meant that such a notice isn't sufficient to invoke the stop-time rule.

III. Analysis

Mr. Hernandez-Mendez's motion here asserts two main arguments: one challenges the January 9, 2018, removal order, and the other challenges the March 6, 2018, removal based on the January 9 order. The court addresses these arguments, in turn, in the two sections, below.

A. Deficient Notice to Appear

1. Does *Pereira* require a notice to appear to contain the time and place of the removal hearing to establish the immigration court's subject matter jurisdiction?

Mr. Hernandez-Mendez primarily asserts that notices to appear must contain time and place information for removal hearings under *Pereira*. Without that crucial information, Mr. Hernandez-Mendez argues, a notice to appear is void, and it divests the immigration court of subject matter jurisdiction over those removal proceedings. Mr. Hernandez-Mendez recognizes

that our court has rejected this argument several times. But, he asserts, the Supreme Court in *Pereira* categorized 8 U.S.C. § 1229(a)—which includes the "time and place" requirement—as "definitional." Doc. 18 at 14 (quoting *Pereira*, 138 S. Ct. at 2116). He also argues that, under established statutory construction rules, "'identical words . . . used in different parts of the same act . . . are intended to have the same meaning.'" *Id.* (quoting *Pereira*, 138 S. Ct. at 2115). Mr. Hernandez-Mendez rejects BIA decisions and regulations such as 8 C.F.R. §§ 1003.14, 1003.15, and 1003.18, which don't require notices to appear to contain time, date, or place information. These decisions and regulations, he contends, directly contravene Congress's explicit requirement in 8 U.S.C. § 1229(a) that notices to appear must indeed contain the "time and place" of removal hearings.

But, recent cases from our court show that Mr. Hernandez-Mendez is not the first to invoke *Pereira* for these arguments. *See generally United States v. Cardenas-Rodriguez*, No. 18-10104-EFM-1, 2019 WL 1058197 (D. Kan. Mar. 6, 2019); *United States v. Fernandez-Casas*, No. 18-10126-EFM-1, 2019 WL 1058198 (D. Kan. Mar. 6, 2019); *United States v. Garcia-Valadez*, No. 18-10144-EFM-1, 2019 WL 1058200 (D. Kan. Mar. 6, 2019); *United States v. Chavez*, No. 2:17-CR-40106-01-HLT, 2018 WL 6079513 (D. Kan. Nov. 21, 2018); *United States v. Larios-Ajualat*, No. 18-10076-JWB, 2018 WL 5013522 (D. Kan. Oct. 15, 2018); *United States v. Lira-Ramirez*, No. 18-10102-JWB, 2018 WL 5013523 (D. Kan. Oct. 15, 2018). In all these cases, our court has interpreted *Pereira* narrowly and denied several defendants' motions to dismiss their indictments. Specifically, the court has concluded that a notice to appear omitting the time, date, or place for a defendant's removal hearing does not violate 8 U.S.C. § 1229(a) and thus does not divest the immigration court of subject matter jurisdiction over removal proceedings. This outcome aligns with decisions from the Sixth and Ninth Circuits. Both courts

have held that an initial notice to appear lacking time, date, or place information did not, alone, deprive an immigration court of subject matter jurisdiction.[3] *Cardenas-Rodriguez*, 2019 WL 1058197, at *5–6; *Fernandez-Casas*, 2019 WL 1058198, at *5–6; *Garcia-Valadez*, 2019 WL 1058200, at *5–6. Also, this court has analogized service of a notice to appear under 8 C.F.R. § 1003.14 to service of process in civil cases. That is, defects in these notices that may trigger personal jurisdiction issues, but not subject matter jurisdiction issues. *See Chavez*, 2018 WL 6079513, at *5–7.

The court adopts and applies this same reasoning here. Mr. Hernandez-Mendez only advances arguments this court has rejected over the last few months. The court explicitly has declined to adopt his subject matter jurisdiction argument that tries to extend *Pereira* beyond its "narrow" holding. *Pereira*, 138 S. Ct. at 2110, 2113. And, Mr. Hernandez-Mendez's case is distinguishable from the facts of *Pereira*: Here, Mr. Hernandez-Mendez appeared for his hearing. He signed a Certificate of Service attesting that the law enforcement officer who served him had provided him with oral notice of the time and place of his removal hearing. The government also asserts that Mr. Hernandez-Mendez received notice about the continued date for his removal hearing while detained. These notices satisfy the standards provided in 8 C.F.R.

[3] Judge Melgren has cited *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 315 (6th Cir. 2018), which "concluded 'that jurisdiction vests with the immigration court where . . . the mandatory information about the time of the hearing, see 8 U.S.C. § 1229(a), is provided in a Notice of Hearing issued after the [notice to appear].'" *Cardenas-Rodriguez*, 2019 WL 1058197, at *6 (quoting *Hernandez-Perez*, 911 F.3d at 315). He also has cited *Karingithi v. Whitaker*, 913 F.3d 1158, 1159–61 (9th Cir. 2019), which determined that the *Pereira* Court "'was not in any way concerned with the [i]mmigration [c]ourt's jurisdiction.'" *Cardenas-Rodriguez*, 2019 WL 1058197, at *6 (quoting *Karingithi*, 913 F.3d at 1159). Because 8 U.S.C. § 1229(a) doesn't discuss the immigration court's jurisdiction, the Ninth Circuit concluded that "'[t]he regulatory definition, not the one set forth in § 1229(a), governs the [i]mmigration [c]ourt's jurisdiction. A notice to appear need not include the time and date information to satisfy this standard.'" *Id.* (quoting *Karingithi*, 913 F.3d at 1159).

§§ 1003.15 and 1003.18, which our court and the Ninth Circuit have recognized as controlling law on the subject matter jurisdiction issue. The court thus denies Mr. Hernandez-Mendez's motion based on his *Pereira*-based arguments.

2. Do other statutory provisions categorize 8 U.S.C. § 1229(a) as a jurisdictional statute?

Mr. Hernandez-Mendez also argues that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") classifies 8 U.S.C. § 1229(a) as a jurisdictional statute. In other words, Mr. Hernandez-Mendez argues, "Congress provided explicit guidance on how to utilize the hearing notice . . . to confer jurisdiction on the immigration court." Doc. 18 at 23. The IIRIRA includes transitional rules to apply to "aliens who were in the administrative process when [the] IIRIRA took effect." *Ram v. I.N.S.*, 243 F.3d 510, 512–13 (9th Cir. 2001). The transitional rules give the United States Attorney General the "option to elect to apply new procedures" in some instances. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 309(c)(2), 110 Stat. 3009 (1997). Specifically, the transitional rule applicable to notices to appear provides that these notices "confer jurisdiction on the immigration judge." *Id.*

At least one court has considered and explicitly rejected this argument. *See United States v. Avila Flores*, No. 3:18-CR-152-JAG, 2019 WL 1756532, at *3 n.5 (E.D. Va. Apr. 19, 2019). In a footnote, Judge Gibney of the Eastern District of Virginia explained that "the use of the term 'jurisdiction' in the IIRIRA's transitional rules does not change the Court's conclusion [that 8 U.S.C. § 1229(a)] . . . 'says nothing about the Immigration Court's jurisdiction.'" *Id.* (quoting *Karingithi*, 913 F.3d at 1160). Our court also has explained that "an immigration court's subject-matter jurisdiction is determined by statute, not by acts taken by immigration authorities." *Chavez*, 2018 WL 6079513, at *6 (first citing *Larios-Ajualat*, 2018 WL 5013522, at *6 n.4; then citing *Lira-Ramirez*, 2018 WL 5013523, at *6 n.4). Judge Teeter construed § 1229(a)—and the

service requirements in that section—as analogous to service of process requirements under rules such as Federal Rule of Civil Procedure 4. Failure to comply with these types of requirements can affect personal jurisdiction—not subject matter jurisdiction, which derives from the statute itself.

The court reaches the same conclusion here. Mr. Hernandez-Mendez hasn't persuaded the court that the transitional statute's reference to the immigration court's "jurisdiction" suffices to confer subject matter jurisdiction on immigration courts through notices to appear. "Congress has specifically authorized immigration judges to conduct removal proceedings and to decide whether an alien is removable under immigration laws." *Id.* (first citing 8 U.S.C. §§ 1229(a) and (c); then citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)). The court thus concludes that 8 U.S.C. §§ 1229(a) and (c) confer subject matter jurisdiction on immigration courts. And, as discussed above, because § 1229(a) contains no language about jurisdiction, the relevant regulations—*i.e.*, 8 C.F.R. §§ 1003.14 and 1003.18—control. Thus, Mr. Hernandez-Mendez's arguments based on IIRIRA's transitional provisions do not persuade the court that 8 U.S.C. § 1229(a) is a jurisdictional statute.

B. Collateral Attack on Deportation Order

Mr. Hernandez-Mendez's motion also argues that because the first removal order—issued on January 9, 2017—was void because it failed to trigger the immigration court's subject matter jurisdiction, the second removal order that reinstated the January 9 order also was void.

Our court generally has concluded that, since the Tenth Circuit hasn't yet addressed *Pereira*'s effect—if any—on 8 U.S.C. § 1326(d)'s collateral attack requirements, a defendant challenging a removal order must satisfy its three requirements. *See Cardenas-Rodriguez*, 2019 WL 1058197, at *8; *Fernandez-Casas*, 2019 WL 1058198, at *8; *Garcia-Valadez*, 2019 WL

1058200, at *8; *Chavez*, 2018 WL 6079513, at *4–7; *Larios-Ajualat*, 2018 WL 5013522, at *4–7; *Lira-Ramirez*, 2018 WL 5013523, at *4–7.

But, Mr. Hernandez-Mendez's motion doesn't specify how he satisfies the three requirements under 8 U.S.C. §§ 1326(d)(1)–(3) permitting him to attack his removal order collaterally. Instead, he asserts merely that his first removal order, based on a deficient Notice to Appear that divested the immigration court of subject matter jurisdiction, nullified his second removal order. And, he contends, his second removal order cannot "independently support an illegal reentry charge" because it extends only as far as the purportedly void first removal order. Doc. 18 at 28. This court consistently has held that the requirements in §§ 1326(d)(1)–(3) control (and the Tenth Circuit hasn't reached a different conclusion). Mr. Hernandez-Mendez hasn't satisfied his burden to demonstrate that he may collaterally attack his removal order. The court thus denies his motion based on his collateral attack arguments.

IV. Conclusion

For the reasons explained, above, the court is unpersuaded that *Pereira* requires notices to appear to contain time and place information for removal hearings to trigger the subject matter jurisdiction of immigration courts. And, the court doesn't find that this purported lack of subject matter jurisdiction allows defendants to collaterally attack removal orders without complying with 8 U.S.C. §§ 1326(d)(1)–(3). The court thus denies Mr. Hernandez-Mendez's motion.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Ignacio Hernandez-Mendez's Motion to Dismiss his Indictment (Doc. 18) is denied.

IT IS SO ORDERED.

Dated this 15th day of May, 2019, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

May 26, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SIMON ROCHEL-CERVANTES,

Defendant - Appellant.

No. 19-3263
(D.C. No. 6:19-CR-10056-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter is before us on the United States' *Motion for Summary Disposition/Affirmance*. The United States moves for summary affirmance based on this court's recent published decision in *United States v. Lira-Ramirez*, 951 F.3d 1258 (10th Cir. 2020), *en banc rev. denied* May 1, 2020. While Appellant does not dispute that *Lira-Ramirez* controls the outcome of this appeal and does not contest summary affirmance of

* Upon consideration of the United States' motion and Appellant's May 7, 2020 status report, this panel unanimously agrees that this matter can be submitted on these materials and without oral argument. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the district court's judgment, he reserves the right to petition the United States Supreme Court for further review.

In light of the foregoing, the motion for summary affirmance is granted. The judgment of the district court is affirmed.

Entered for the Court

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 19-10056-JWB

SIMON ROCHEL-CERVANTES,

Defendant.

MEMORANDUM AND ORDER

This matter is before the court on Defendant's motion to dismiss the indictment. (Doc. 14.) The government has filed its response. (Doc. 15.) For the reasons stated herein, Defendant's motion to dismiss (Doc. 14) is DENIED.

I. Background

Defendant is charged with one count of being unlawfully found in the United States in violation of 8 U.S.C. § 1326(a) and (b)(2). (Doc. 11.) The indictment alleges that Defendant is a citizen of Mexico, that he was previously removed or deported, and that he was found on March 5, 2019,[1] in the District of Kansas, having voluntarily re-entered without obtaining consent to reapply for admission to the United States. (*Id.*)

Defendant's motion argues that "no predicate removal order that comports with due process exists" and therefore the government "is incapable of proving its case as a matter of law…." (Doc. 14 at 20-21.) The motion alleges that Defendant's deportation occurred in 2000,

[1] Defendant's motion alleges that he was actually found in Kansas Department of Corrections (KDOC) custody on February 29, 2007, while serving a 184-month sentence, and he was interviewed at that time by Immigration and Customs Enforcement (ICE) officers. Defendant was allegedly transferred to federal custody in 2019 pursuant to an ICE detainer filed with the KDOC. (Doc. 14 at 2.)

and that the proceedings began with service of a notice to appear ("NTA") that alleged Defendant was subject to removal under section 212(a)(6)(A)(i) of the Immigration and Nationality Act. The NTA directed Defendant to appear before an immigration judge to show cause why he should not be removed from the United States, but it did not provide a date, time, or location where removal proceedings were to occur. Rather, the NTA stated the date was "To Be Calendared" at a time "To Be Set." As to the location of the proceedings, the NTA referenced "Attachment A," which stated in relevant part: "Your Notice to Appear is not being filed with the Office of the Immigration Judge at this time. At the time the Notice to Appear is filed, you will be notified of the street address, city, state, and zip code of the Office of the Immigration Judge having jurisdiction over your case." (Doc. 14-2.) The form contained a notice of rights, including an explanation of the right to be represented by an attorney and a statement that the hearing would not be set earlier than ten days from the date of the notice to allow Defendant sufficient time to secure counsel. (*Id.* at 3.) Defendant executed a portion of the form permitting a waiver of the ten-day period and requesting an immediate hearing. (*Id.*) A certificate of service by the ICE agent indicates Defendant was personally served with the NTA on January 6, 2000, and was given a list of attorneys providing free legal services. (*Id.*)

On February 9, 2000, an immigration judge entered a stipulated order directing that Defendant be removed to Mexico on the charges contained in the NTA.[2] (Doc. 14-1.) The order stated that it was based on Defendant's admissions and a "Stipulated Request" for a final order of

[2] Defense counsel states that the discovery provided by the government did not include any NTA other than the one referenced above with Attachment A, which stated that the NTA was not then being filed. (Doc. 14 at 2-3.) The government does not mention this issue in its response. The stipulated order of the immigration judge, however, indicates that the NTA was filed, as the judge's order states that the charges in the NTA provide the basis for Defendant's removal. (Doc. 14-1.)

removal dated January 31, 2000.[3] The immigration judge's order indicated that Defendant waived his right to appeal. (*Id.*)

Defendant argues the NTA was defective for failing to specify a date and time for the hearing, as explained in *Pereira v. United States,* 138 S. Ct. 2105 (2018). Because *Pereira* holds that a document lacking such information does not constitute a "notice to appear" within the meaning of 8 U.S.C. § 1229(a), Defendant argues the immigration court lacked subject matter jurisdiction to order his removal. This is so because the regulations provide that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service," and Defendant argues that an NTA under § 1229(a) constitutes the charging document for these purposes. (Doc. 14 at 7) (citing 8 C.F.R. § 1003.14(a)). Absent an NTA satisfying § 1229(a), he contends, his removal proceedings were void and in violation of due process. (Doc. 14 at 12-13.) Defendant contends the indictment must be dismissed as a result. Defendant acknowledges there is conflicting case law on this issue after *Pereira*, and that two circuit courts have taken a position inconsistent with his argument. (*Id.* at 13-14.) But he points out the Tenth Circuit has not ruled on the issue, and he maintains that cases such as *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wa. 2018), which dismissed a § 1326 indictment based upon *Pereira*, are more persuasive.

Defendant also argues the immigration judge who ordered his removal was not appointed to his position in a manner consistent with the Appointments Clause of the Constitution. (Doc. 14 at 21-24) (citing U.S. Const., art. II, § 2, cl. 2.) Defendant argues this failure makes the removal order invalid and prevents the government from meeting its burden of proof on the present charge. (*Id.* at 24.)

[3] The Stipulated Request is not included in the materials now before the court.

II. Discussion

A. *Pereira jurisdictional challenge*. Neither party has requested an evidentiary hearing or challenged the facts alleged in the briefs. The court accordingly accepts as uncontested the non-conclusory facts set forth in the briefs and those shown in the documents attached to the briefs. Defendant's argument essentially asserts that the immigration court lacked jurisdiction when entering the deportation order due to the defective NTA; that the order is therefore void; and that, as a result, this matter must be dismissed because the government cannot establish Defendant's guilt beyond a reasonable doubt.

The undersigned has ruled previously that the immigration court is not deprived of subject matter jurisdiction due to the service of an NTA that failed to meet the standards of *Pereira*. *See United States v. Larios-Ajualat,* No. 18-10076-JWB, 2018 WL 5013522 (D. Kan. Oct. 15, 2018), *United States v. Lira-Ramirez,* No. 18-10102-JWB, 2018 WL 5013523 (D. Kan. Oct. 15, 2018). Other judges in this district have reached a similar conclusion. *See e.g., United States v. Hernandez-Mendez*, No. 18-20055-01-DDC, 2019 WL 2120882 (D. Kan. May 15, 2019); *United States v. Garcia-Valadez,* No. 18-10144-EFM, 2019 WL 1058200 (D. Kan. Mar. 6, 2019); *United States v. Chavez,* No. 17-40106-HLT, 2018 WL 6079513 (D. Kan. Nov. 21, 2018).

As Defendant concedes, other circuit courts have found the immigration court has jurisdiction to order removal notwithstanding the use of an NTA that failed to specify the time and date of the hearing. *Karingithi v. Whitaker,* 913 F.3d 1158 (9th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018). *Cf. United States v. Contreras-Cabrera*, ___F. App'x ___, 2019 WL 1422627 (10th Cir. Mar. 29, 2019) (concluding immigration court had jurisdiction but noting removal was conducted under a 1992 statute that did not require an NTA to contain the time and date of the hearing). *See also Szabo v. United States Attorney General,* ___ F. App'x

___, 2019 WL 2191115, *1 (11th Cir. May 21, 2019) (dismissing *Pereira*-based challenge to Board of Immigration Appeals' ruling for failure to exhaust administrative remedies and consequent lack of appellate jurisdiction); *Banegas Gomez v. Barr,* 922 F.3d 101, 110 (2d Cir. 2019) (*Pereira* "is not properly read to void *jurisdiction* in cases in which an NTA omits a hearing time or place.") (emphasis in original); *Ortiz-Santiago v. Barr*, ___F.3d ___, 2019 2171368, *1 (7th Cir. May 20, 2019) ("We thus hold, as have the Second, Sixth, and Ninth Circuits, that an Immigration Court's jurisdiction is secure despite the omission in a Notice of time-and-place information.").

The courts in this district have applied *Pereira* narrowly and denied motions to dismiss based on the arguments raised by Defendant. *See Hernandez-Mendez*, 2019 WL 2120882, at *3 (citing cases). The Tenth Circuit has yet to rule on this issue. After examining the relevant case law,[4] the court finds the immigration court did not lack subject matter jurisdiction despite the NTA's failure to specify the time and date of the removal hearing. Moreover, the court finds the prerequisites for collateral review under 8 U.S.C. § 1326(d) have not been established or excused here. Without fully restating its prior legal analysis, the court incorporates by reference its discussion of these issues in *United States v. Serrano-Ramirez*, No. 19-10024-JWB, 2019 WL 2070309 (May 9, 2019) and *Larios-Ajualat*, 2018 WL 5013522.

This case has somewhat different facts than some of the other cases decided by the undersigned, in that the record does not show that Defendant received a notice of hearing with a specific time and date after receiving the NTA. This fact, however, does not affect this court's analysis that subject matter jurisdiction is conferred under 8 U.S.C. § 1229a and is not affected by

[4] A survey of the case law on this issue was set forth by Judge Hanen in *United States v. Porras-Avila,* No. 19-cr-010, 2019 WL 1641191 (S.D. Tex. Apr. 16, 2019).

filing of an NTA. *See Garcia-Valadez*, 2019 WL 1058200, *7-8; *Hernandez-Mendez*, 2019 WL 2120882, at *3.

In summary, the court finds the subject matter jurisdiction of the immigration courts was conferred by Congress in 8 U.S.C. § 1229a and is not affected by filing of an NTA; that 8 C.F.R. § 1003.14 refers to acquisition of personal jurisdiction over a person for purposes of ordering his removal; that the regulations do not require an NTA to include the date and time of the removal hearing to constitute a "charging document" that vests the immigration court with jurisdiction (*see* 8 C.F.R. § 1003.15); and that notwithstanding the defective nature of this NTA under *Pereira*, Defendant must still meet the requirements for collateral review in § 1326(d) by showing exhaustion of administrative remedies, that he was deprived of an opportunity for judicial review, and that the removal proceeding was fundamentally unfair.

Defendant does not argue the prerequisites for collateral review under § 1326(d) are satisfied. He does not claim to have exhausted administrative remedies or to have been deprived of the opportunity for judicial review. The record of the removal proceeding indicates Defendant waived an appeal of his removal order, and Defendant does not argue the waiver was unknowingly made. Rather, Defendant argues he was "excused from the administrative and judicial review requirements because the removal order never had legal force to begin with." (Doc. 14 at 19.) For the reasons indicated above, the court concludes the immigration court had subject matter jurisdiction to order Defendant's removal. But even if the court were to find otherwise, Defendant's argument fails because Congress has limited the ability of a person charged under § 1326 to collaterally attack a deportation order. Defendant's failure to satisfy those prerequisites bars his collateral challenge. *See United States v. Almanza-Vigil*, 912 F.3d 1310, 1316 (10th Cir. 2019) (Congress codified the Fifth Amendment right to due process in § 1326(d); a non-citizen

seeking to collaterally attack a previous removal order must meet the three conditions in that provision). Nothing in § 1326(d) excuses or exempts a failure to exhaust remedies or to seek judicial review where the claimed error was jurisdictional in nature. 8 U.S.C. § 1326(d) ("an alien *may not challenge the validity of the deportation order … unless*" the alien meets three conditions) (emphasis added); *United States v. Olguin-Ibarra,* No. 18-191, 2019 WL 1029960, *5 (W.D. Tex. Jan. 7, 2019) ("there is no indication that Congress or the *Mendoza-Lopez* Court intended to treat jurisdictional defects any different than any other type of invalid or unlawful removal order."); *United States v. Gonzalez-Ferretiz*, No. 3:18-CR-117, 2019 WL 943388, at *4 (E.D. Va. Feb. 26, 2019) ("Allowing collateral challenges in Section 1326 prosecutions outside of Section 1326(d) flies in the face of the clear statutory text and Congress' intent.")

B. *Appointments Clause*. Defendant also contends that the removal order violates the Appointments Clause to the Constitution because Defendant believes that the immigration judge who issued the order may not have been appointed by the Attorney General. Defendant contends that there was a change in law on October 22, 2007, which required immigration judges to be appointed by the Attorney General. (Doc. 14 at 23, citing 8 CFR § 1003.10.) As the government points out, however, both a statute and a different regulation, which were in effect prior to 2007, required the appointment of immigration judges by the Attorney General. (Doc. 15 at 7-9.) *See* 8 U.S.C. § 1101(b)(4); 8 C.F.R. 100.1; 62 FR 10312-01, 10330, 1997 WL 931131. Neither party has provided the court with any facts regarding the appointment of the immigration judge who issued the order for Defendant.

Nevertheless, a challenge to the appointment of an administrative law judge must be made before the agency or it is waived. *See Turner Bros., Inc. v. Conley*, 757 F. App'x 697, 700 (10th Cir. 2018) (holding that "Appointments Clause challenges are nonjurisdictional and may be

waived or forfeited.") Defendant does not assert that he raised this argument in his immigration proceedings. Therefore, it has been waived.

III. Conclusion

IT IS THEREFORE ORDERED this 28th day of May, 2019, that Defendant's motion to dismiss the indictment (Doc. 14) is DENIED.

s/ John W. Broomes
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

May 1, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE VINCENTE LIRA-RAMIREZ, also known as Jose Vicente Lira-Ramirez,

Defendant - Appellant.

No. 19-3057
(D.C. No. 6:18-CR-10102-JWB-1)
(D. Kan.)

ORDER

Before **HOLMES**, **MATHESON**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by United States v. Gonzalez-Fierro, 10th Cir.(N.M.), Feb. 04, 2020

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Notes of Decisions (1428)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 116-158.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

8 U.S.C.A. § 1229

§ 1229. Initiation of removal proceedings

Effective: August 12, 2006
Currentness

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying--

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

CREDIT(S)

(June 27, 1952, c. 477, Title II, c. 4, § 239, as added Pub.L. 104-208, Div. C, Title III, § 304(a)(3), Sept. 30, 1996, 110 Stat. 3009-587; amended Pub.L. 109-162, Title VIII, § 825(c)(1), Jan. 5, 2006, 119 Stat. 3065; Pub.L. 109-271, § 6(d), Aug. 12, 2006, 120 Stat. 763.)

Notes of Decisions (130)

8 U.S.C.A. § 1229, 8 USCA § 1229
Current through P.L. 116-158.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

8 U.S.C.A. § 1229a

§ 1229a. Removal proceedings

Effective: January 5, 2006
Currentness

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place--

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General--

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only--

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation--

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing--

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is--

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien--

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections [1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply--

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,, [2] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title [3] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means--

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

CREDIT(S)

(June 27, 1952, c. 477, Title II, c. 4, § 240, as added Pub.L. 104-208, Div. C, Title III, § 304(a)(3), Sept. 30, 1996, 110 Stat. 3009-589; amended Pub.L. 106-386, Div. B, Title V, § 1506(c)(1)(A), Oct. 28, 2000, 114 Stat. 1528; Pub.L. 109-13, Div. B, Title I, § 101(d), May 11, 2005, 119 Stat. 304; Pub.L. 109-162, Title VIII, §§ 813(a)(1), 825(a), Jan. 5, 2006, 119 Stat. 3057, 3063.)

Notes of Decisions (2428)

Footnotes

1 So in original. Probably should be "section".
2 So in original. The second comma probably should not appear.
3 So in original. A closing parenthesis probably should appear.

8 U.S.C.A. § 1229a, 8 USCA § 1229a
Current through P.L. 116-158.