No. __-_____

IN THE

Supreme Court of the United States

ERLIN JOSUE TORRES ZUNIGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether and under what circumstances the government may invoke collateral estoppel against a criminal defendant based on a prior administrative agency adjudication.

II. Whether IIRIRA 309(c), stating that a notice under 8 U.S.C. § 1229(a) "confer[s] jurisdiction on the immigration judge" is a "clear statement" that Congress intended the service of a Notice to Appear to be jurisdictional – that is, a condition on the exercise of an immigration judge's authority to enter orders of removal.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Torres Zuniga*, No. 19-4663, United States Court of Appeals for the Fourth Circuit. Judgment entered June 1, 2020.

(2) *United States v. Torres Zuniga*, No. 3:18CR155-REP, United States District Court for the Eastern District of Virginia. Judgment entered September 4, 2019.

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PETITION FOR WRIT OF CERTIORARI

Erlin Torres Zuniga respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 2a of the appendix to the petition and is available at 807 F. App'x. 260 (4th Cir. 2020). The district court's memorandum opinion appears at pages 3a to 13a of the appendix, and is available at 390 F. Supp. 3d 653 (E.D.Va. 2019).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on June 1, 2020. This Court's order of March 19, 2020, extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person . . . shall be deprived of life, liberty, or property, without due process of law[.]

Title 8, United State Code, Section 1326 provides in relevant part:

> (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.

. . .

(d) Limitation on collateral attack on underlying deportation orderIn 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.

Title 8 United States Code, Section 1229 provides, in relevant part:

Initiation of removal proceedings

(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:

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

Section 309(c)(2) of the Illegal Immigration Reform and Immigrant Accountability Act ("IIRIRA"), Pub. L. 104-208 § 309(c)(2), provides in relevant part:

> If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such [Immigration and Nationality] Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) [8 U.S.C. § 1229] to confer jurisdiction on the immigration judge.

STATEMENT OF THE CASE

Immigration Proceedings

Erlin Torres Zuniga entered the United States as a minor twice in Arizona. App. 5a. The first time, in 2007, he was placed before an immigration judge and granted voluntary departure to his native Honduras. *Id.* The second time, in February of 2008, he was held at Southwest Key Unaccompanied Minor Shelter in Phoenix, Arizona. *Id.* He was provided a Notice to Appear ("NTA") which did not list a date or time for his removal hearing. *Id.* A month later, on March 4, 2008, a Notice of Hearing ("NOH") was served on the officer having custody of Erlin Torres ("Alien c/o Custodial Officer") providing a date of March 17, 2008 for the hearing. *Id.* As scheduled, Erlin Torres was brought before the immigration judge, confirmed that he was 17 years old, and introduced to an attorney who handled

minors' cases. C.A.J.A. 166.[1] The attorney asked for additional time to speak to Erlin Torres; a recess was granted. C.A.J.A. 168. After the recess, the government withdrew an allegation that Erlin Torres had previously been ordered removed, and his attorney conceded removability for having entered without inspection, which Mr. Torres confirmed. *Id*. The attorney waived appeal for Mr. Torres and moved to withdraw from the case, which was granted. *Id*.

Proceedings in the District Court

Mr. Torres was encountered in Virginia in 2018, and charged in a one count indictment with being a removed alien found in the United States under 8 U.S.C. § 1326. App. 6a. He moved to dismiss the indictment. *Id*. His argument was that (1) a purported NTA that lacks a date and time is not an NTA under 8 U.S.C. § 1229(a) in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); (2) a proper NTA under § 1229(a) is required to vest jurisdiction in the immigration court; (3) the NTA served on Mr. Torres did not have a date and time; therefore, (4) the immigration court that ordered his removal did not have authority to do so, rendering the purported removal order a "legal nullity" that could not serve as the basis for the charge under § 1326. App. 7a. In support of his argument that an NTA under § 1229(a) vests jurisdiction in the immigration judge, Mr. Torres relied on Section 309(c)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, § 309(c)(2). App. 10a. Section 309(c) is a transitional provision that states

[1] **Error! Main Document Only.**"C.A.J.A." refers to the joint appendix filed in the court of appeals. *See* Joint Appendix*, United States v. Torres Zuniga,* No. 19-4663, Doc. 21 (filed Dec. 23, 2019).

that notices of hearing under the pre-IIRIRA regime "shall be valid as if provided under section 239 of such Act (as amended by this subtitle) [8 U.S.C. § 1229] to confer jurisdiction on the immigration judge."

The district court rejected the argument. First, it held that Mr. Torres could not rely solely on the argument that the removal order was void; he was required to also satisfy the gatekeeping requirements of 8 U.S.C. § 1326(d), showing exhaustion of administrative remedies, deprivation of judicial review, a due process violation and prejudice. App. 7a. Proceeding to the merits, it held that immigration regulations (which do not require a date and time), and not any statute, "govern the vesting of jurisdiction in the immigration courts." App. 8a. Regarding IIRIRA § 309(c), the district court rejected the argument for three reasons. First, "jurisdiction" is ambiguous; second, IIRIRA § 309(c) was a transitional provision of limited effect; and third, it was not codified. App. 10a.

After the district court denied the motion, Mr. Torres pled guilty under a conditional plea agreement and appealed the denial of the motion. C.A.J.A. 225-240.

Proceedings in the Court of Appeals

In the Fourth Circuit, Mr. Torres raised the same argument, and disputed the district court's reasons for denying the motion. In the meantime, the Fourth Circuit issued *United States v. Cortez*, 930 F.3d 350, 356 (4th Cir. 2019), which (1) indicated that criminal defendants had no right to challenge the use of a purported removal order on the sole basis that it was void for lack of statutory authority

(hereinafter "jurisdiction"); and (2) rejected the argument that a statutorily-compliant NTA was required to confer jurisdiction on the immigration judge. The Fourth Circuit therefore rejected Mr. Torres' argument with a citation to *Cortez* and *United States v. Lira-Ramirez*, 951 F.3d 1258 (10th Cir. 2020) (holding the same) (petition for certiorari pending, No. 20-5881). App. 2a.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented are Important Because There is No Clear Standard in This Court's Precedent for What Renders an Administrative Agency Order Void and Subject to Collateral Attack; Nor Whether a Criminal Defendant Can Be Estopped From Challenging, as Void, an Agency Order Used as an Element of the Crime; and the Issue Frequently Arises in Prosecutions for the Most Common Federal Felony

This case concerns the intersection between the authority of administrative agencies and the rights of criminal defendants to contest an element of the crime. It presents two important questions that only this Court can decide: First, whether and under what circumstances a criminal defendant may be collaterally estopped from disputing the authority of an administrative agency to enter an order that forms an element of the crime of which he is accused. The Fourth Circuit, along with the Fifth and Seventh Circuits, has adopted a categorical rule prohibiting such a defense. This Court's intervention is needed to clarify the law; some pronouncements in this Court's precedents seem to support the prohibition, albeit in the civil context, but others, in the criminal context, do not. Only this Court can resolve conflicting statements in its own precedents.

If Mr. Torres does have the right to contest the jurisdiction of the executive officials who entered the removal order later used to prosecute him, then the Court

should examine the merits. The question at that point is whether 8 U.S.C. § 1229 and IIRIRIA § 309(c)(2), a transitional statute that asserts that certain notices "confer jurisdiction on the immigration judge" are a clear statement that Congress intended such notices to be jurisdictional. The Fourth Circuit, along with most of its sister circuits in a spate of cases in the last two years, have eroded the clear statement rule in the criminal context by ignoring this Court's "readily administrable bright line" rule on how to decide such questions. This Court's intervention is needed to prevent dilution of the clear statement rule in criminal cases involving agency adjudications where it is needed most.

These issues are important because prior non-criminal adjudications form an element of over twenty thousand federal prosecutions a year, involving mostly illegal reentry, but also failure to pay child support and possession of firearms by those adjudicated mentally defective or committed. A clear rule is needed for both whether and how to evaluate the authority of those issuing such orders before depriving so many defendants of their personal liberty.

A. The Need to Consolidate and Clarify This Court's Precedents on When Administrative Agency Adjudications Can be Collaterally Attacked as Void

Illegal reentry under 8 U.S.C. § 1326 has, as an element of the crime, a prior administrative agency adjudication – the removal order. The Fourth Circuit below has imported the collateral bar rule from civil cases, and held that a criminal defendant may be estopped from arguing that the administrative agency order used in his prosecution is void. App. 2a; s*ee United States v. Cortez*, 930 F.3d 350, 357

(4th Cir. 2019) (importing rule from *Kontrick v. Ryan*, 540 U.S. 443, 355 n.9 (2004) and *Cooper v. Productive Transp. Servs., Inc.*, 147 F.3d 347 (4th Cir. 1998)). Even in a criminal case, the Fourth Circuit held, the interest in finality of agency orders is sufficiently strong that "subject matter jurisdiction . . . may not be attacked collaterally." *Id*. (quotations omitted). The Fifth and Seventh Circuits have likewise held that an alien defendant cannot defeat the removal element solely by challenging the order as void. *See United States v. Pedroza-Rocha*, 933 F.3d 490, 498 (5th Cir. 2019); *United States v. Manriquez-Alvarado*, 953 F.3d 511, 512-13 (7th Cir. 2020). The Fourth Circuit relied on a footnote in *Kontrick v. Ryan*, 540 U.S. 443, 456 n.9 (2004), which states "subject-matter jurisdiction . . . may not be attacked collaterally." *See Cortez*, 930 F.3d at 357. The Fourth Circuit and others take this as a categorical rule.

This issue deserves this Court's attention because there is a need to clarify and consolidate this Court's precedents on when administrative agency adjudications may be collaterally attacked as void. This issue is important because administrative agency adjudications are used as elements of a crime in over twenty thousand federal criminal prosecutions each year, and this Court's caselaw provides no clear, indisputable rule. Some pronouncements of this Court on the subject are made in unqualified terms; but many others recognize exceptions to the general rule, or appear to advocate a context-specific weighing of the interests in finality and validity.

1. Cases Expressing a General Rule on Collateral Attacks of Final Judgments, and Cases Recognizing Exceptions

In *Windsor v. McVeigh*, 93 U.S. 274 (1876), the government had seized the petitioner's property in the midst of the Civil War on the ground that he was then an officer in the Confederate government. *Id.* at 275. The petitioner, still in Richmond and behind rebel lines, attempted to appear by counsel, but was prohibited from participating in the case, and suffered a default judgment. *Id.* at 276. Later, he brought an ejectment action alleging that he retained title to the property and that the forfeiture judgment was void. *Id.* This Court held that it was "correct as a general proposition" that a "judgment, however erroneous, cannot be collaterally assailed[.]" *Id.* at 282. However, it cautioned, this rule is "subject to many qualifications in its application." *Id.* In particular, "a departure from established modes of procedure" can "render the judgment void[.]" *Id.* at 283. As examples, this Court gave purely procedural violations, such as conviction by a Court without jury involvement, or the decree of an equity court without written pleadings. *Id.* Such acts would be not simply erroneous but "idle" and "invalid for any purpose." *Id.* This conclusion flowed from the many limitations on the jurisdiction of courts, not only in "subject-matter" but "modes of procedure" and the "extent and character of its judgments." *Id.* at 282.

Less than a decade later, however, this Court held that a final judgment of a court could not be collaterally attacked, even where the original court lacked subject matter jurisdiction, and the issue was not actually litigated, but only assumed. *See Des Moines Nav. & R. Co. v. Iowa Homestead Co.,* 123 U.S. 552, 559 (1887) (lack of

diversity of citizenship in case removed to federal court did not render judgment "a nullity."). It did so without mentioning *Windsor v. McVeigh*, and did not mention any exceptions to the rule against collateral attack of a final judgment. As relevant here, *Des Moines* was the only precedent from this Court cited in support of the broad statement that "subject-matter jurisdiction . . . may not be attacked collaterally" in *Kontrick v. Ryan*, on which the Fourth Circuit relied for its categorical rule. *See Cortez*, 930 F.3d at 357 (4th Cir. 2019) (quoting *Kontrick*, 540 U.S. at 355 n.9 (citing *Des Moines*, 123 U.S. 552))).

Yet three years after *Des Moines*, this Court distinguished *Des Moines* as an incomplete statement of the law, and held that the decree of appellate court "void by reason of the party's not being before that court" may be collaterally attacked. *Kingsbury v. Buckner*, 134 U.S. 650, 675 (1890) (distinguishing *Des Moines Nav. Co.*, 123 U.S. 552).

The back-and-forth continued in the modern era, with some cases providing a broad general rule and others recognizing exceptions, and each providing citations for both sides of the argument. In *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), this Court invoked *res judicata* and refused to entertain a collateral attack on a judgment from a district court, even where this Court had since recognized that the statute which granted authority to the court below was unconstitutional. *Id.* at 374-75. This Court broadly stated that the judgment of a federal court that exercises jurisdiction implicitly by ruling on the merits of an action "may not be assailed collaterally." *Id.* at 376.

Weeks later, however, this Court disavowed any bright-line rule in *Chicot*. "In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared." *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940). There this Court held in a collateral action that a U.S. District Court order was void where the suit was barred by sovereign immunity, even though the government had failed to raise the issue in the underlying case. *Id.* at 514. This Court conducted a context-specific balancing test, weighing the interests in sovereign immunity against the interests in finality. *Id.* at 514-15.

In this context, this Court's statement in passing, in a footnote in *Kontrick*, that subject-matter jurisdiction may not be collaterally attacked, cannot be taken as an absolute and categorical rule as the Fourth Circuit did. *See Cortez*, 930 F.3d at 357 (4th Cir. 2019) (quoting *Kontrick*, 540 U.S. at 355 n.9). In fact since *Kontrick*, this Court has noted but reserved on the proper standard for determining when a prior judgment is entirely void, and when it is simply erroneous but enforceable. In *United Students Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), and in the context of Fed. R. Civ. P. 60(b)(4), this Court noted that courts below had drawn the line where there was not even an "arguable basis" for jurisdiction; but declined to "define the precise circumstances in which a jurisdictional error will render a judgment void[.]" *Id.* at 271. It held, without elaborating, that void judgments include those "where a judgment is premised . . . on a certain type of jurisdictional error." *Id.* at 271. Thus, even in the civil context, this Court has left open what types of errors make a judgment void on collateral review.

2. Cases Involving Administrative Agency Adjudications and/or Collateral Attacks in Criminal Cases

In the administrative agency and criminal context, the cases are nuanced. They appear both to forbid collateral attack on agency orders generally; but also to allow collateral attack on the basis of jurisdiction and even ordinary legal error when those orders are used in a criminal prosecution.

As far back as 1887, this Court held that the orders of administrative agencies acting in a quasi-judicial capacity are subject to the general rule applicable to courts at the time: "[t]heir action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack." *Stanley v. Bd. of Sup'rs of Albany Cty.*, 121 U.S. 535, 550 (1887). That appears as the rule in the civil administrative agency context through modern times. *See Callanan Road Imp. Co. v. United States*, 345 U.S. 507, 512 (1953) (forbidding collateral attack on agency authority to order modification of certificate previously issued).

Criminal cases and habeas corpus cases, however, appear to follow a different rule. Habeas corpus, this Court has noted, is intended to redress judgments that are "so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay v. Noia*, 372 U.S. 391, 423 (1963) (quotations omitted), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977), *and abrogated by Coleman v. Thompson*, 501 U.S. 722 (1991). Hence, *res judicata* does not apply in habeas proceedings, which is an expression of the "larger principle that void judgments may be collaterally impeached." *Id.*

In direct criminal cases this Court has also taken an approach less deferential to administrative agencies. In *Estep v. United States*, 327 U.S. 114 (1946), the accused attempted to defend again a charge of failure to report for induction by arguing that the draft board had exceeded its jurisdiction by classifying him as available for military service. *Id*. at 117-18. This Court held that this was a valid defense. It first noted that draft boards' jurisdiction was limited territorially, *see id*. at 120. Draft board were also limited in the classes of people subject to their orders; and the procedures used. *Id*. at 121. The statutes and regulations "limit, as well as define, their jurisdiction." *Id*. And any action in violation of the regulations "would be lawless and beyond its jurisdiction." This Court refused to believe that Congress would allow prosecution for draft dodging "no matter how flagrantly [the draft boards] violated the rules and regulations which define their jurisdiction. We are dealing here with a question of personal liberty." *Id*. at 121-22. Similarly, in *Sicurella v. United States*, 348 U.S. 385 (1955), this Court held in another prosecution for draft evasion, that a legal error in defining the standards for a conscientious objector status, found in the government's brief to the administrative agency, was enough to "vitiate the entire proceedings" and render the resulting order unavailable to the government for prosecution. *Id*. at 392.

Thus, where an administrative agency adjudication is used in a later criminal prosecution, this Court has been more solicitous of the asserted right to challenge the order based on lack of authority to enter it, and less inclined to apply *res*

judicata or a collateral bar to such arguments.[2] Still, this Court has never explicitly weighed the opposing interests, nor has it drawn any clear line on what renders an order void in the context of a collateral attack in a criminal case.

The Circuit Courts of Appeal that have ruled on this issue, however, will never determine where that line falls, or conduct the proper weighing between the interests in finality and validity, because they employ a categorical rule that the authority of the immigration court to issue the order of removal cannot be contested in the criminal case on the basis of lack of jurisdiction. *Cortez*, 930 F.3d at 357.

The Circuit Courts of Appeals' embrace of a categorical rule against collateral attack on an agency proceeding in a criminal case deserves scrutiny. First, one source of confusion is statements in this Court's opinions; therefore this Court is the only one that can clarify and unify the rule to be applied. Second, in the course of clarifying this rule, the Court will be able to weigh the interests of finality and validity, in the unique but important and frequently litigated context of administrative agency adjudications used in a criminal prosecution. As explained below, any interest in finality is reduced when the government seeks to use the agency order anew in a criminal prosecution;[3] and the defendant's and the public's

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[2] This Court has recognized at least one circumstances where even the judgment of a court can be collaterally attacked as void in a subsequent criminal prosecution. *See Burgett v. Texas*, 389 U.S. 109 (1967) (prior conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963) was "void" and could not be used for recidivist enhancement)

[3] *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (each subsequent use of void judgment means defendant "suffers anew" previous violation)

interest in restricting the use of only valid agency orders in criminal prosecutions is arguably at its height.

B. The Circuit Courts Have Eroded the Clear Statement Rule in the Criminal Context Where It Is Most Important

As an alternative holding, the Fourth Circuit asserted that a Notice to Appear that satisfies 8 U.S.C. § 1229 is not necessary to confer jurisdiction on the immigration court, such that a defective NTA does not prevent the immigration judge from obtaining authority to enter the order. App. 2a; *Cortez*, 930 F.3d at 358. The Tenth Circuit has held the same, in a case on which the Fourth Circuit below relied. App. 2a; s*ee United States v. Lira-Ramirez*, 951 F.3d 1258, 1262-63 (10th Cir. 2020). Other Circuits agree with the result for various reasons, and have held that the statutes are ambiguous, or that agency regulations asserting jurisdiction without notice of a date and time govern. *See United States v. Mendoza-Sanchez*, 963 F.3d 158, 161-62 (1st Cir. 2020); *Banegas Gomez v. Barr*, 922 F.3d 101, 110-12 (2d Cir. 2019); *Nkomo v. Att'y Gen.*, 930 F.d 129, 133-34 (3d Cir. 2019); *United States v. Pedroza-Rocha*, 933 F.3d 490, 497-98 (5th Cir. 2019); *United States v. Manriquez-Alvarado*, 953 F.3d 511, 512-13 (7th Cir. 2020); *United States v. Escobar*, 970 F.3d 1022, 1026-27 (8th Cir. 2020); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *United States v. Hernandez-Ruiz*, 780 F. App'x. 864, 865 (11th Cir. 2019) (unpublished).

In their haste to deal with the fallout from *Pereira*, these Circuits disregarded an important and clear principle this Court has adopted. When litigants have been permitted to challenge prior judgments or administrative

agency actions collaterally, the question always arises about whether the alleged defect is of the type that prevents its later use in a different proceeding. This Court has announced what it called a "readily administrable bright line" rule to determine whether the defect is "jurisdictional" (meaning that it preconditions a tribunal's "adjudicatory capacity" and is therefore open to collateral attack). *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (quoting, in part, *Arbaugh v. Y&H Corp.*, 546 U.S 500, 515-16 (2006). The Court looks to whether there is "any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Id.* This Court repudiated any categorical rules because "Congress is free to attach the conditions that go with the jurisdictional label to a rule that [the Court] would prefer to call a claim-processing rule." *Id.* In *Henderson* this Court first applied the clear statement rule in the context of an agency adjudication, as opposed to a court-issued judgment. *Id.* at 438. Under the clear statement rule, first, of course, the Court looks to the terms of the statute and asks whether the statute "speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction" of the agency. *Id.* at 438 (citations, quotations omitted). Second, the Court looks to the placement of the statue in the legislative scheme, consulting the title of the statute or section to aid in resolving any ambiguity. *Id.* at 439. Last, the Court looks to characteristics and purpose of the agency procedures under the statutory scheme. *Id.* at 440.

The problem this case and others like it raise is this: the Fourth Circuit below, and its sister circuits to consider the issue, have declined to conduct the *Arbaugh-Henderson* clear statement analysis in the context of criminal prosecutions

for illegal reentry and in immigration cases. Instead, they typically first note that the bare word "jurisdiction" is ambiguous and hold the clear statement rule unsatisfied. *See Cortez*, 930 F.3d at 359 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 957 (7th Cir. 2019) (same); *United States v. Lira-Ramirez*, 951 F.3d 1258 (10th Cir. 2020) (same). None of them look to the surrounding text in IIRIRA § 309(c)(2) ("confer jurisdiction on the immigration judge"); the placement of § 1229(a) in the statutory scheme, or the character and purpose of the agency procedure.

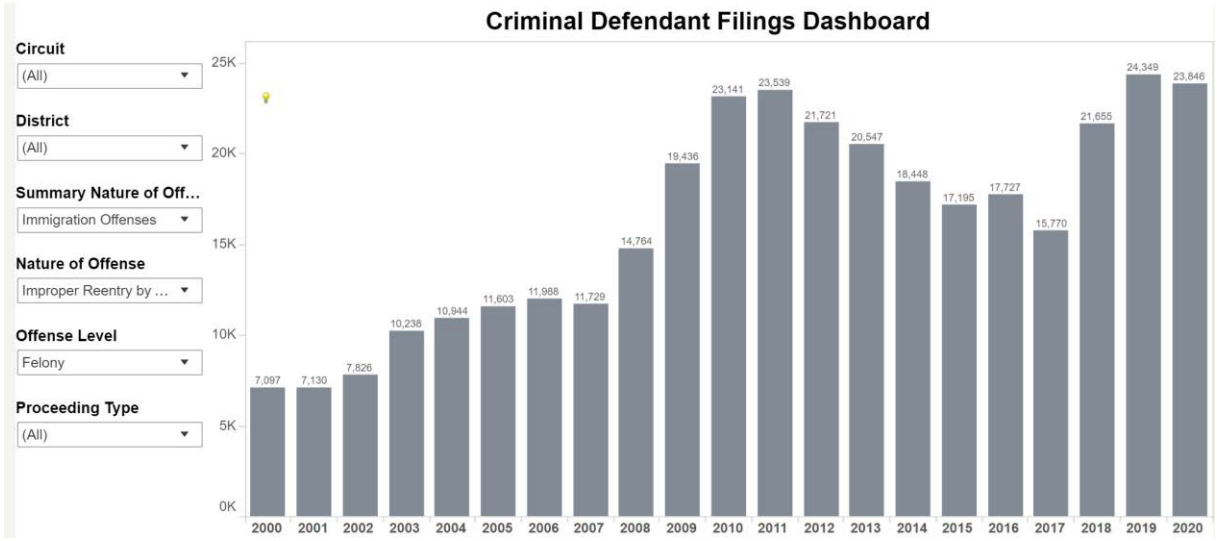
The outcome of any argument on the application of *Henderson* and the clear statement rule to these statutes is not a foregone conclusion, although the proper analysis under *Henderson* for § 1229 and IIRIRA § 309(c)(2) likely points toward a notice under § 1229 being jurisdictional. *See infra* § II.B. But it should concern the Court that these cases mark an erosion of the clear statement rule in the context of criminal prosecutions where an agency action forms an element of the crime for which millenia of man-years in prison are imposed every year.

C. Administrative Agency Actions Are Used As An Element of Over Twenty Thousand Federal Felony Prosecutions Each Year.

These issues are important because they concern "a question of personal liberty," *Estep*, 327 U.S. at 122, for the tens of thousands of people convicted each year of the felony of illegal reentry. Illegal reentry is the most commonly prosecuted federal felony. According to the U.S. Sentencing Commission, out of the 76,538 defendants sentenced in fiscal year 2019, 22,077 were sentenced under the

illegal reentry guideline, U.S.S.G § 2L1.2. That is 30.7% of all federal sentencings – more than all drug trafficking cases combined, and more than three times more than all federal firearms cases. United States Sentencing Commission, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* at 71, 128 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf). The average sentence in fiscal year 2019 was 9 months, *id*. at 137, which means that more than 16,500 man-years (16.5 man-millenia) of prison were imposed for this crime in a single year.

The continued prosecution of illegal reentry offenses is unlikely to abate. Although it varies, prosecution rates have not dipped below 15,000 per year since before 2010, and reached peaks in 2011 and 2019. *Sourcebook* at 136.



Administrative Office of the Courts, *U.S. District Caseload Explorer* (available at http://jnet.ao.dcn/resources/data-analysis/us-district-caseload-explorer) (accessed Oct. 10, 2020).

The burden of litigation extends to the courts of appeals. According to the Administrative Office of the Courts, almost 10% of federal criminal appeals, year after year, are for immigration offenses generally. And a survey of the caselaw makes clear that a collateral attack on a prior removal order under § 1326(d) is the most commonly asserted defense to an illegal reentry charge. A circuit-level case concerning collateral attack is issued on average about every 6 days over the last year (63 cases).

The questions presented are also important for other federal prosecutions where prior non-criminal adjudications form an element of a federal felony. For example, the Child Support Recovery Act ("CSRA"), 18 U.S.C. § 228, provides federal criminal enforcement for failure to pay child support ordered by a state, at

which there is no guaranteed right to an attorney. *See United States v. Johnson*, 114 F.3d 476, 483 (4th Cir. 1997) (no right to contest paternity in CSRA prosecution); *id*. at n.4 (expressing "great doubt" that support order could be collaterally attacked even for perjury or fraud). Title 18 U.S. Code § 922(g)(4) makes it a felony to possess a firearm if one has ever been adjudicated a mental defective or committed to any mental institution. At least one Circuit has held that there is no right to collaterally attack the involuntary commitment order, no matter how violative of due process the order was, or whether it was issued by a court or a county board. *See United States v. McIlwain*, 772 F.3d 688, 696-98 (11th Cir. 2014). These are just two more contexts where the use of a prior non-criminal adjudication forms an element of a crime. The scrutiny due such orders before they are used to imprison individuals should include at least a determination of whether the issuing agency had been given the authority it exercised by Congress. Thus, the questions raised by this case are important, both to avoid unnecessary litigation and clarify the applicable rule, but also to protect the personal liberty of the thousands each year who are imprisoned for violating administrative agency orders.

II. The Fourth Circuit's Decision was Wrong

A. Collateral Estoppel Should Not Bar a Criminal Defendant From Challenging an Administrative Agency Action That Forms an Element of the Crime Charged

The Fourth Circuit and others that hold that the immigration judge's authority to enter the removal order cannot be collaterally attacked are wrong. It amounts to offensive collateral estoppel by the government to prove an element of a

crime, and is contradicted by the holdings of this Court's precedent and the text of § 1326 itself.

First, the government has publicly disavowed the power to use offensive collateral estoppel to prove an element of a crime. *See United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005) (recounting government's confession of error in prior *en banc* case, informing court that government may not use collateral estoppel to establish element or rebut affirmative defense for which government bears the burden of proof). An argument that a removal order is void directly challenges the removal element of a charged § 1326 violation. Therefore, collateral estoppel can not be used to preclude the argument that the order is void consistent with due process and constitutional criminal procedural protections.

Second, this Court's precedents indicate that such attacks are especially necessary and important in the context of a criminal prosecution based on an administrative agency order where the defendant faces imprisonment for the violation. *Estep v. United States*, 327 U.S. 114 (1946); *Sicurella v. United States*, 348 U.S. 385 (1955); *Burgett v. Texas*, 389 U.S. 109 (1967).

Third, the text of § 1326(a) itself supports the argument. It requires as an element that the defendant have been "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). "Removal" as well as the other formulations are terms of art and refer to official actions of properly authorized officials. *See Zhong v. DOJ*, 480 F.3d 104, 108 n.3 (2d Cir. 2007) (discussing

terminology). Yet an order entered by immigration officials without statutory authority to act is not simply erroneous; it is void, and a legal nullity. *Puc-Ruiz v. Holder*, 629 F.3d 771, 782 (8th Cir. 2010) ("When the IJ lacks jurisdiction, his decisions are nullities."); *Noriega-Lopez v. Ashcroft*, 335 F.3d 875, 882 (9th Cir. 2003) ("Unlike a claimed due process violation, a component of which is to show prejudice, the BIA's lack of authority to enter Noriega-Lopez's removal order renders that component of his proceedings in essence a legal nullity."). Therefore it cannot fall within the statutory meaning of the terms "deported" or "removed."

Section 1326(d) does not, as the courts below held, provide the sole method of collateral attack. By its own terms, § 1326(d) applies to collateral attacks on an "order described in subsection (a)(1)" only. But a defendant like Mr. Torres is not simply asserting a prejudicial error rendering the removal order invalid, he is asserting that there is *no legally cognizable order under § 1326(a)(1) in the first place*. Therefore, § 1326(d) does not on its own terms apply to limit such challenges.

Last, when balancing the interest in finality against the interest in ensuring only valid orders are used for criminal prosecution, the government's interest is at a nadir and the defendant's at its highest. It is the government's choice to pursue criminal, as opposed to civil, enforcement of removal orders. And by initiating a criminal prosecution that relies on the prior removal order, the defendant "suffers anew" the error that led to the removal order. *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (each subsequent use of void judgment means defendant "suffers anew" previous violation). And as a matter of fundamental procedural due process, very

little if anything can trump a criminal defendant's interest in disputing an element of an offense of which he is accused where his physical liberty is at stake. "We are dealing here with a question of personal liberty." *Estep*, 327 U.S. at 122. Fundamental due process should forbid the use of an order void for lack of statutory authority in a criminal prosecution, and must allow the defendant to raise such an issue in defense.

B. The Statement That a Notice Under 8 U.S.C. § 1229(a) "Confer[s] Jurisdiction on the Immigration Judge" in IIRIRA § 309(c) is a Clear Statement That Congress Intended Such Notices to Condition the Authority of the Immigration Judge

It is difficult to imagine that Congress could speak more clearly than to say that notice "provided under" 8 U.S.C. § 1229 "confer[s] jurisdiction on the immigration judge." Pub. L. 104-208 § 309(c)(2). As Mr. Torres argued below, the bare word "jurisdiction" may be capable of many meanings, but to "confer jurisdiction" on a "judge" is not susceptible to multiple interpretations, and clearly can only reference the power of the administrative court to adjudicate and issue orders. It is difficult to imagine any object that pairs with the verb "confer" other than "authority" or "jurisdiction" or "power." And this Court has used that exact phrase when describing an adjudicatory body's authority to act. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance – it *confers jurisdiction on the court of appeals* and divests the district court of its control over those aspects of the case involved in the appeal.") (emphasis added). Any analysis under the clear

statement rule of *Henderson* and *Arbaugh* could stop at this first point, because Congress spoke unambiguously. *Henderson*, 562 U.S. at 438 (first question under clear statement rule is whether statute "speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction" of the agency).

The second clear statement factor, the context of the statute, also supports holding that a notice under § 1229(a) is jurisdictional. The title of the § 1229 is "Initiation of removal proceedings," and it describes a particular document (the NTA) with particular mandatory requirements. *See Henderson*, 562 U.S. at 439 (consulting title of statute as indication of Congressional intent). Case-initiating documents are categorically necessary, as a matter of logic and law, to the exercise of power by a tribunal whose job is to decide cases – whether a notice of appeal, order to show cause, or indictment. *See, e.g.*, *Griggs*, 459 U.S. at 58 ("The filing of a notice of appeal . . . confers jurisdiction on the court of appeals . . ."); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 449 (1911) (in civil case for injunction and money damages, court has no power to order imprisonment as a remedy); U.S. CONST. AMEND. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .")..

Although the self-contained language of IIRIRA § 309(c) is clear, it is, admittedly, easy to imagine a clearer context than a transitional provision; however, the fact that this statement comes in a transitional provision and was not codified should not affect the outcome. The first difficulty is grammatical. The proper subject of "confer[s] jurisdiction on the immigration judge" is the "notice of

hearing" under the pre-IIRIRA regime, as the Tenth Circuit noted in *Lira-Ramirez*. 951 F.3d at 1262. However, that is beside the point. The statute states that "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) [8 U.S.C. § 1229] to confer jurisdiction on the immigration judge*. Pub. L. 104-208 § 309(c)(2) (emphasis added). This statement makes no sense unless it is true that a notice under § 1229 confers jurisdiction on the immigration judge. It is *necessarily true* that Congress therefore intended notice under § 1229 to confer jurisdiction on the immigration judge. Its point is that pre-IIRIRA notices can confer jurisdiction *too*.

Nearly all of the courts to address the issue note that 8 U.S.C. § 1229 itself says nothing about jurisdiction. *See Cortez*, 930 F.3d at 364. But Congress is not required to consolidate evidence of its intent in one statute. *See Doe v. Chao*, 540 U.S. 614, 622 (2004) (relying on uncodified provision to construe codified provision); *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (courts may not "construe the meaning of statutory terms in a vacuum."). In fact, the same "glue that bond[ed]" the stop-time rule to § 1229(a)'s requirements in *Pereira*, 138 S.Ct. at 2117, is present here. Like the statute at issue in *Pereira*, IIRIRA § 309(c)(2) explicitly cross-references notice "under Section 239 [8 U.S.C. § 1229]." The Circuit Courts of Appeal have disregarded this explicit cross-reference which was key to the holding in *Pereira*.

The district court below questioned whether IIRIRA § 309(c)(2) could be given effect because it was not codified. App. 10a. But codification is immaterial. In

Chao, 540 U.S. at 622, this Court relied on "[a]n uncodified section of the Act" at issue, directing a commission to consider whether the federal government should be liable in tort, to construe a codified provision not to allow suit. Likewise here, IIRIRA § 309(c)(2), though uncodified, is an Act of Congress, signed by the President and a public law. It is completely proper to consult it to construe 8 U.S.C. § 1229, a code section that it explicitly cross-references.

The Fourth Circuit further erred in holding that 8 U.S.C. § 1229a is the sole statutory definition of an immigration judge's authority. *See Cortez*, 930 F.3d at 360. That statute provides that immigration judges "shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). But that only defines the *nature* of the immigration judge's powers, not when they begin or end. If that statute were the sole limitation on immigration judges' powers, they could conduct roving inquiries into the deportability of any alien without waiting for an NTA. Instead immigration judges, like their Article III counterparts, must wait for a case to be brought before them. Those individual cases are initiated as the title of § 1229 indicates, by service of a statutorily-compliant NTA, which is the trigger for the immigration judge to exercise the powers conferred by § 1229a.

As a parallel, no one imagines that a district court has roving jurisdiction to seek out and adjudicate crimes through the grant of jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231. Jurisdiction in a particular case depends on the filing of a criminal complaint, information or indictment alleging such an offense to initiate the case. So to here; § 1229a(a)(1)

defines the nature of immigration judges' power; § 1229 governs the prerequisites for *when* those powers may be exercised.

III. This Case is a Good Vehicle to Resolve the Issues Raised

This case presents an opportunity to answer the questions presented clearly. First, there are no factual disputes lurking in the record below; the entirety of the administrative proceeding was established using documentary evidence from Mr. Torres's immigration file and an undisputed tape of the removal proceeding itself. Second the questions presented were raised explicitly and briefed thoroughly from the district court through appeal. The district court issued a detailed and lengthy written opinion, and the Fourth Circuit opinion relied on a published case with detailed analysis. Last, the issues raised are dispositive; no remand will be required. Either Mr. Torres has the right to argue that the purported removal order is a legal nullity as a defense to a § 1326 charge, or he doesn't. And the lack of a date and time on the NTA either voids the removal order or doesn't. These two questions are the only remaining issues that govern the outcome of this case. The questions presented are in need of this Court's answer, which would provide guidance to the lower courts on the interaction between civil administrative agency orders and the criminal prosecutions based on those orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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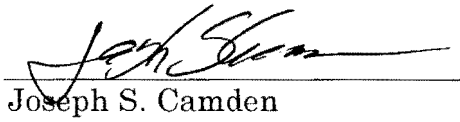

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