No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR AVALOS-RIVERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether an immigration court lacks jurisdiction to issue an order of removal that can later be used as a basis for an illegal reentry criminal conviction when it is based on a Notice to Appear that lacks information it is required to list under 8 U.S.C. § 1229.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Victor Avalos-Rivera respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on August 10, 2020.

OPINION BELOW

The Ninth Circuit's unpublished memorandum disposition is appended to this Petition. *See* Appendix A.

JURISDICTION

Petitioner was convicted of illegal reentry following deportation, in violation of 8 U.S.C. § 1326. Reviewing the judgment under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's sentence in an unpublished disposition. *See United States v. Avalos-Rivera*, 816 F. App'x 110 (9th Cir. 2020) (attached to this petition as Appendix A). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Avalos came to the United States as a young child. He became a lawful permanent resident and raised a family. On March 10, 2010, the government filed a "Notice to Appear" (NTA) for removal proceedings. Where the NTA form asked the government to specify the "Date" of the hearing, the government typed "a date to be set." And where the notice required the "Time," the government typed, "a time to be set." Mr. Avalos later appeared before an immigration judge, who removed him from the United States based on his prior convictions.

In late 2017, Mr. Avalos was arrested for the current offense of attempting to enter the United States. The government filed an indictment against Mr. Avalos for being a removed alien attempting entry into the United States under 8 U.S.C. § 1326(a) & (b).

Before trial, Mr. Avalos moved to dismiss the information under § 1326(d). He argued that the immigration judge did not have the authority to issue the removal order because Mr. Avalos never received a valid NTA. Because the notice in Mr. Avalos's case did not have the necessary information to qualify as a "notice to appear," the immigration judge lacked jurisdiction over his case, rendering his removal order invalid.

Mr. Avalos cited this Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), as supporting his argument. *Pereira* had held that a "notice to appear" under 8 U.S.C. § 1229(a) was invalid if it failed to designate the specific time and place of removal proceedings. Mr. Avalos argued that, under *Pereira*, the notice to appear in his removal proceedings was invalid because it lacked the date and time of the hearing. The district court denied the motion.

On appeal, the Ninth Circuit Court of Appeals relying on its prior precedent in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), rejected Mr. Avalos's arguments. In *Karingithi,* the Ninth Circuit held that an NTA filed by Department of Homeland Security (DHS) vested jurisdiction over removal proceeding in the immigration judge, even though it did not specify time and date of proceedings, where a subsequent notice of hearing provided date and time of hearing. *Id.* at 1161. The *Karingithi* Court held that regulations at 8 U.S.C. §§ 1003.13 & 1003.14 govern jurisdiction in removal proceedings, not § 1229(a). The Ninth Circuit, thus, affirmed Mr. Avalos's conviction.

REASONS FOR GRANTING THE PETITION

I. The lower court's decision conflicts with this Court's precedent.

In *Pereira*, this Court decided whether an NTA issued under 8 U.S.C. § 1229 that fails to specify the time and place of proceedings triggered the stop-time rule set forth in 8 U.S.C. § 1229b(d)(1)(A). *Pereira*, 138 S. Ct. 2105. This Court held that an NTA that fails to specify the time and place of removal proceedings "is not a notice to appear under section 1229(a)' and so does not trigger the stop-time rule." *Id*. In reaching this holding, the Court overruled the BIA's previous precedent, *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), and resolved a circuit split on the issue. This Court also overruled the regulation promulgated by the Attorney General that provided that a Notice to Appear need only provide "the time, place and date of the initial removal hearing, where practicable." *Pereira*, 138 S. Ct. at 2111-12; Conduct of Removal Proceedings, 62 Fed. Reg. 10332 (March 6, 1997) (emphasis added).

This Court used broad language in the first independent clause of the holding in *Pereira*: "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)'." *Pereira*, 138 S. Ct. at 2110. While the Court ultimately decided that the stop-time rule was not triggered in Mr. Pereira's case, the Court was only able to arrive at that conclusion by holding that an NTA must contain the time and place of the removal hearing to be considered a valid NTA under 8 U.S.C. § 1229(a). Accordingly, the lower court's ruling is not limited to the narrow issue that was before the *Pereira* Court as the holding in that case was two independent clauses.

Here, Mr. Avalos's NTA did not contain a date and time for his removal proceedings as required by *Pereira*. His NTA reads that Petitioner must appear before the Immigration Court at a date and time "to be set." The government failed to serve and file a proper charging document under 8 U.S.C. § 1229 against Mr. Avalos. His NTA was irreparably deficient, and sending a subsequent hearing notice with time and date information does not cure that defect. Therefore, as there was never a proper charging document filed to initiate removal proceedings, Mr. Avalos should have never been ordered removed and subsequently convicted of being an alien unlawfully reentering following a removal.

II. The Ninth Circuit decision creates a circuit split.

Following *Pereira*, the BIA held in *Matter of Bermudez-Cota*, 27 I&N Dec. 411 (BIA 2018) that a subsequent hearing notice containing time and date information cures a deficient NTA. This is contrary to what this Court said in *Pereira* that an NTA must contain the time and place of the removal hearing to be considered valid. The BIA re-affirmed itself in *Matter of Mendoza-Hernandez*, stating that an NTA can be perfected by a subsequent notice of hearing. *Matter of Mendoza-Hernandez*, 27 I&N Dec. 520 (BIA 2019).

Some federal circuits have disagreed. Most recently, the Tenth Circuit overruled the BIA, finding "a document omitting the time of the hearing is not considered a notice to appear." *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1178 (10th Cir. 2020). Other circuits, including the Seventh and the Eleventh, concur that the NTA without time information is defective and cannot be perfected. *Ortiz-Santiago v.*

Barr, 924 F.3d 956 (7th Cir. 2019); *Perez-Sanchez v. U.S. Attorney General*, 935 F.3d 1148 (11th Cir. 2019).

Other circuits, like the Ninth Circuit, have split from this view though, finding that serving a second document containing the information missing from the NTA is sufficient. *Karingithi*, 913 F.3d at 1161; *Banegas Gomez v. Barr*, 922 F.3d 101, 110 (2d Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018).

This circuit split regarding the variant definitions of a valid NTA and whether a deficient NTA can be cured by a subsequent hearing notice should be addressed by this Court.

* * *

In short, the court of appeals erred when it determined that Mr. Avalos was properly removed despite the invalid NTA that initiated his removal proceedings. This Court should correct the court of appeal's error and remand to that court for further proceedings.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

s/ Zandra L. Lopez

November 9, 2020

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