IN THE

SUPREME COURT OF THE UNITED STATES

REFUGIO AGUSTIN-PINEDA

PETITIONER

Vs.

UNITED STATES OF AMERICA

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress has determined the "sole and exclusive procedure" for certain removal proceedings. 8 U.S.C. § 1229(a)(3). To commence these proceedings, the government must serve noncitizens with a "notice to appear" specifying the proceedings' "time and place." *Id.* § 1229(a)(1)(G)(i).

The agency's implementing regulations define "notice to appear" differently--they do not require a "notice to appear" to specify the proceedings' time and place. *See* 8 C.F.R. § 1003.15(b). The Board of Immigration Appeals applies the regulation's definition and not the statutory definition.

The questions presented are:

1. Whether the government may commence removal proceedings by serving a noncitizen with a "notice to appear" that fails to specify the hearing's time and place.

2. Whether the failure to include the time and place of an immigration hearing in the initial notice to appear results in the immigration court lacking jurisdiction such that any orders therein are not useable in a subsequent criminal proceeding under 8 U.S.C. Sect. 1326.

PARTIES TO THE PROCEEDINGS

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

RELATED PROCEEDINGS

The following proceedings are related to this case within the meaning of Rule 14.1(b)(iii):

United States vs. Refugio Agustin-Pineda, No. 2:18-CR-00174-TOR-1 District Court for the Eastern District of Washington; Honorable Thomas O. Rice- District Court Judge presiding- Judgment entered on May 15th, 2019.

United States vs. Refugio Agustin-Pineda, No. 19-30108. U. S. Court of Appeals for the Ninth Circuit; Judgment entered on December 7th, 2020.

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IN THE SUPREME COURT OF THE UNITED STATES

REFUGIO AGUSTIN-PINEDA,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent,

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

I. PETITION FOR A WRIT OF CERTIORARI

Petitioner, REFUGIO AGUSTIN-PINEDA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals is unpublished. (1App.-2app.). The *Judgment in a Criminal Case*, Sentencing Order of the District Court is unpublished. (3app.- 6app.).

III. STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on December 7th, 2020. (1app.-2app.). The Court of Appeals had jurisdiction pursuant to 28 U. S. C. Sect. 1291. This Court has jurisdiction under 28 U.S.C. Sect. 1254 (1).

IV. STATUTORY AND REGULATIONS INVOLVED

STATUTES- FEDERAL

8 U.S.C. Sect. 1229

8 U.S.C. Sect. 1229(a)

8 U.S.C. Sect. 1326

28 U.S.C. Sect. 1291

28 U.S.C. Sect. 1254(1)

REGULATIONS

8 C.F.R. § 1003.13

8 C.F.R. § 1003.14

8 C.F.R. § 1003.15

8 C.F.R. § 1003.18

(For text of the salient cited provisions, see Appendix J – STATUTES-FEDERAL and Appendix I- REGULATIONS).

V. STATEMENT OF THE CASE

Summary of Immigration Proceedings Regarding Deportation

On October 15, 2012, Mr. Augustin-Pineda was served with a Notice to Appear (NTA) on a charge of being an alien in the United States without being properly admitted. (Exhibit B-17app.-19app.). The Notice did not contain the date or time for his appearance and hearing.

The Petitioner appeared in Immigration Court on November 13, 2012, and a written Order of the Immigration Judge was entered on the same day. (Exhibit A-15app.-16app.). The written Order states it is a "summary of the oral decision entered on November 13, 2012". This Order itself is deficient in that it is a form Order with several boxes to be checked if applicable but none are checked, including the one stating that he was ordered removed from the United States. The Order is not signed by the presiding Immigration Judge Tammy Fitting.

Proceedings and Disposition in the District Court

On September 18th, 2018, the Government filed an *Indictment* (and *penalty slip*), charging the Petitioner with a violation of 8 U.S.C. Sect. 1326, *Alien in the United States after Deportation*. (65app.-67app.). The Petitioner was arraigned on September 19th, 2018, and entered a not guilty plea. (ECF 23- minutes).

On December 2nd, 2019, the Defendant filed a document entitled: "*Motion and Memorandum Re: Dismiss Indictment*". (10app.-14app.). Exhibits A and B were filed with the motion. (15app.-16app., and 17app.-19app, respectively). On January 3rd, 2019, a hearing was held with respect to the motion. ECF 37- Minute Entry; Transcript of pre trial conference/motion hearing. (20app.-34app.).

At the hearing, the Petitioner contended that since the Notice to Appear did not contain a date or time, the immigration judge did not have jurisdiction to file or sign off on the removal order. He also argued that the Government's contention that *Pereira* [*Pereira v. Sessions*, 138 S. Ct. 2105 (2018)], should be limited to the stop-time context was far too narrow of an interpretation and wasn't limited to that. In response to the Government's argument that the BIA decision in *Matter of Bermuda-Cortez*, [27 I. & N. Dec. 441 (BIA 2018)], that a subsequent notice cured the defect, the Petitioner argued that it should apply only to the agencies therein, was not precedential, and the analysis wasn't clear in that case. Counsel further argued that *Pereira* dealt with the statutory interpretation and that the statute trumps any regulation, and that since there was no jurisdiction, prejudice and/or exhaustion, need not be shown.

The Court disagreed, and on January 4th, 2019, the Court entered an *Order Denying Defendant's Motion to Dismiss and Continuing Trial Date*. (7app.-9app.).

On February 14th, 2019, the Defendant/Petitioner entered a conditional plea of guilty as charged in Count 1. ECF 43- Minute Entry. The plea was subject to a written plea agreement filed on February 14th, 2019. (56app.-64app.). As part of the *Plea Agreement*, the parties stated at page 1, in pertinent part:

> "The Defendant, REFUGIO AGUSTINE-PINEDA, agrees to enter a conditional plea of guilty to the Indictment charging the Defendant with Alien in the United States After Deportation in violation of 8 U.S.C. Sect. 1326.
>
> The Defendant and the United States acknowledge that this is a conditional Plea Agreement, pursuant to Fed. R. Crim. P. 11(a)(2), in that the Defendant reserves the right to appeal the District Court's pretrial ruling denying the Defendant's Motion to Dismiss the Indictment (ECF No. 39)."
>
> (56app.-64app.).

The Court accepted the guilty plea as knowing, intelligent, and voluntary; not induced by fear, or coercion, or ignorance; and the facts admitted to by Petitioner constituted the elements of the crime charged, and on February 14th, 2019, the Court entered an Order Accepting Guilty Plea. ECF 45.

On May 15th, 2019, the District Court Judge sentenced the Defendant to credit for time served (13 days) and one year of supervised release, among other conditions. *Judgment in a Criminal Case*, filed on May 15th, 2019 (3app.-6app.).

Proceedings and Disposition in the Ninth Circuit Court of Appeals

The Petitioner appealed to the Ninth Circuit Court of Appeals and on December 7th, 2020, the Court issued a ruling and affirmed the Petitioner's conviction. The Court held that it's ruling in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), controlled.

Statutory and regulatory scheme

Congress streamlined procedures when it enacted the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("Act"). The Act sets forth the "sole and exclusive" procedure for removal hearings. 8 U.S.C. § 1229a(a)(3). In a statutory section titled "Initiation of removal proceedings," Congress instructed that the government "shall" serve noncitizens with a single "notice to appear" specifying the proceedings' "time and place." § 1229(a)(1)(G)(i).

Section 1229 contains no exceptions to this time-and-place requirement. After section 1229 was enacted, the agency passed regulations. Two of those regulations conflict with the statute. One regulation carves out an exception that doesn't exist in the statute: the government must provide this time-and-place information only "where practicable." 8 C.F.R. § 1003.18(b). A second regulation allows a notice to appear to omit time-and-place information altogether. §

1003.15(b). Put simply, the regulations "rewr[ote] the statute." *Lopez v. Barr*, 925 F.3d 396, 401 (9th Cir. 2019).

But at some point, the government allowed the exception to swallow the rule. In recent years, the government has never found it 'practicable' to send Notices that contained time and date information. This despite the fact that "a scheduling system previously enabled DHS and the immigration court to coordinate in setting bearing dates in some cases." *Pereira*, 138 S. Ct. at 2119.

As the government conceded in *Pereira*, DHS has invoked this exception in "almost 100 percent" of immigration cases over the past few years. 138 S. Ct. at 2111.

Pereira v. Sessions . In *Pereira*, the Court held that if a document fails to include the hearing's time and place, it is not a "notice to appear" under section 1229. The question arose in the context of the "stop-time rule," which is triggered when a "notice to appear under section 1229(a)" has been filed. *See* 138 S. Ct. at 2109. To answer that "narrow" question (*id.* at 2110), the Court addressed several broader issues. The Court concluded that the phrase "notice to appear" always "carries with it the substantive time-and-place criteria required by § 1229(a)." *Id.* at 2116; *see id.* at 2115 ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (citation omitted).

Pereira recognized that this definition is uniform throughout the statute. For example, the phrase "notice to appear" appears in section 1229(b)(1), which governs noncitizens' ability to secure counsel. *Pereira* held that this version of a "notice to appear" necessarily had the same meaning. *See id.* at 2114-15. The Court also recognized that a notice to appear doubles as a charging document under the agency's regulations. *See id.* at 2115 n.7. The Court rejected the notion that this "regulatory" definition could deviate from the statutory definition depending on the purpose served by notice in a particular instance--it deemed that notion "atextual," "arbitrar[y]," and lacking any "convincing basis," *Id.*

In short, the Court has concluded that whenever the statute uses the phrase "notice to appear," the phrase carries the same meaning. *Pereira*, 138 S. Ct. at 2116 ("After all, it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (citing *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012))).

Further, since the statute is "clear and unambiguous," the Court concluded that there was no room for deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *See Pereira*, 138 S. Ct. at 2113.

The Board of Immigration Appeals interprets *Pereira* narrowly. The BIA subsequently concluded that *Pereira* was "narrow" and "distinguishable." *Matter of*

Bermudez-Cortez, 27 I. & N. Dec. 441, 443 (BIA 2018). It found that *Pereira* does not affect cases where "the 'stop-time' rule is not at issue." *Id.* The BIA therefore concluded that "a two-step notice process is sufficient" and refused to cancel removal proceedings where the notice to appear did not specify the time and place of the initial removal hearing. *Id.* at 447.

Niz-Chavez v. Garland. In *Niz-Chavez v. Garland*, 593 U. S. ____, (2021), this Court considered whether a two-step process which involved sending an initial notice to appear (NTA), without time and place of hearing information , and a later document that included this information, was sufficient under 1229(a)(1). The Court held that an NTA sufficient to trigger the IIRIARA's stop time rule was a single document containing all the information about an individual's removal hearing specified in Section 1229(a)(1). The Petitioner contends that the ruling in *Bermuda-Cortez* which exalted the BIA's regulations over the clear requirements of the statutory law has been rendered obsolete in light of the ruling in Niz-Chavez.

Applying *Niz-Chavez* to the procedure used in the instant case should result in the Court concluding that the original NTA herein was deficient and thus failed to give jurisdiction to the immigration court. Since there was no jurisdiction at the

removal hearing, it is void *ab initio* and cannot be used in a subsequent prosecution under 8 U.S.C. Sect. 1326.

VI. REASONS FOR GRANTING THE PETITION

The Petitioner was convicted by plea of being an alien in the United States after deportation in violation of 8 U.S.C. § 1326. He argued in District Court, and on appeal, that his prior deportation was invalid because he had not received a proper notice to appear in that case and he had therefore been deprived of his due process rights. The District Court stated at oral argument that *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), is distinguishable because the Supreme Court granted cert on the narrow question of whether the stop-clock rule was applicable. The Petitioner's motion to dismiss was therefore denied. The District Court, and the Ninth Circuit, erred in limiting the *Pereira* holding and relevance only to the stop-clock issue and proper analysis reveals Petitioner never received a proper notice of the deportation hearing, hence jurisdiction never attached.

The Supreme Court has held that a Notice to Appear that does not include the date, time, and place of a hearing is not a Notice at all. Accordingly, the District Court's decision must be reversed and this case must be remanded for dismissal with prejudice. As per the Plea Agreement, this issue was reserved for appeal.

A denial of a motion to dismiss is reviewed *de novo*. *United States v. Brobst*, 558 F.3d 972, 994 (9th Cir. 2009); *United States v. Reveles-Espinoza*, 522 F.3d 1044, 1047 (9th Cir. 2008) (due process). Denial of a motion to dismiss based on a due process defect in the predicate deportation proceedings presents a mixed question of law and fact and is review *de novo*. *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1042 (9th Cir. 2012).

A collateral attack on a prior proceeding may be made if the prior proceedings were improper and an Order was fundamentally unfair. *United States v. Ubaldo-Figueroa*, 364 F. 3rd 1024 (9th Cir. 2004). Failure to inform a defendant (or respondent in deportation proceedings) is a prime example of fundamental unfairness. A notice to appear without stating the date, time, and place of appearance is facially insufficient. The time and place of a hearing is a *sine qua non* of due process.

In addition to assuring the defendant or respondent appears at the proper time and place, adequate notice is required to ensure he or she is afforded time to prepare adequately for the hearing, to seek legal advice, and to prepare for the myriad other tasks required for fair proceedings.

The District Court and the Ninth Circuit erred in limiting the holdings of *Pereria* only to issues of the stop-time rule. While the effect on stop-time was a

crucial issue of that case, there were several other critical issues to be resolved before the Court could address the stop-time issue. One of these critical issues was whether omissions, including time and place, in a Notice to Appear would invalidate the Notice. The Court held that it did. "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 1229a,' and so does not trigger the stop-time rule." *Pereira*, 132 S.Ct. at 2113-14.

The Petitioner challenged the validity of the prior deportation because the notice to appear failed to include the time and date required by 8 U.S.C. Sect 1229(a), which provides, in pertinent part:

> "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 proceedings under section 1229a of this title. (ii) The requirement that the alien 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." 8 U.S.C. § 1229 (West).

This Court recently examined this statute in the context of an immigration mechanism known as the "stop time rule." The Court concluded that, "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,* at 2113-14. "If the three words 'notice to appear' mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, i.e., the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal

proceedings." *Id*. at 2115. In support of this plain reading of the statute, the Court noted that the same section addresses an alien's right to an attorney. If the alien does not know the date and time of the hearing they are effectively denied their right to counsel for the hearing.

From a practical standpoint Petitioner became aware of the time and date set for the immigration hearing because he was in custody at the time and was apparently transported to the hearing. However, he argues that this Court must rely on the statute, as well as the precedent set by this Court. The Statute plainly states that the notice of hearing must contain the date and time of the hearing. Lack of such information deprives the alien of proper notice as required by Section 1229(a). Since the notice in the instant case omitted information required by the Statute, the notice is deficient.

The Immigration Judge lacked jurisdiction because of the deficient notice. "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.

> Charging document means the written instrument which initiates a proceeding before an Immigration Judge. . . For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

8 C.F.R. 1003.13. Contrary to the Government's position, and the rulings below, the charging document required to vest jurisdiction must include a Notice to Appear. The lack of a statutorily compliant Notice to Appear in Petitioner's case means that the immigration court did not have jurisdiction and this Court should accept Certiorari and make this clear.

The Petitioner need not show that he exhausted administrative remedies because the immigration court proceedings were void. The Petitioner notes that exceptions to exhaustion exist. "Exhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile, . . . or where the administrative proceedings themselves are void." *United Farm Workers of Am., AFL-CIO v. Arizona Agr. Employment Relations Bd*., 669 F.2d 1249, 1253 (9th Cir. 1982). Administrative proceeding held where the immigration court lacked jurisdiction are void. See *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930) ([I]f the order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it.") Consequently, Petitioner's case rests on an invalid deportation and must be dismissed.

Thus, while stop-time was a crucial issue in *Pereira*, resolution of that issue was dependent on the Court's determination of the purported notice to appear. The Court held that because the purported Notice to Appear was *not a notice to appear*.

Similarly, here the purported Notice to Appear received by Petitioner was not a notice at all. Sufficiency of a notice to appear at any court proceeding is not dependent upon the type proceeding, but only on the content of the notice. Mr. Augustin-Pineda effectively received no Notice to Appear and the hearing was therefore improperly held.

Thus, the sufficiency of a Notice to Appear is determined by examination of the Notice itself, and not on the issue or issues to be resolved that trigger the need for the person's appearance.

Counsel is aware that the Ninth Circuit decided that *Pereira* did not control in the context of a regulation stating that jurisdiction vests with the filing of a charging document, including an NTA, and that an NTA issued without such information still vested jurisdiction with the immigration court. *See* 8 C.F.R. § 1003.14; *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). The Ninth Circuit ruled that the decision in *Karinthi v. Whitaker, Supra.,* mandated the ruling herein.

Even so, Mr. Agustin-Pineda should prevail. *Karingithi v. Whitaker,* deferred to the BIA's interpretation of the jurisdiction vesting regulation, giving so-called *Auer* deference where it is no longer appropriate after *Kisor v. Wilke*, 588 U.S. ___, No. 18-15, slip op. at 13-14 (Jun. 26, 2019). Using the analysis of

ambiguous regulations now required by *Kisor*, this Court should overrule *Karingithi* and re-tether the vesting of jurisdiction to the statutory requirements of a notice to appear.

VII. CONCLUSION

As set forth in the forgoing argument, this Court should grant Certiorari, vacate the judgment and remand for dismissal.

Respectfully submitted this 3rd day of May, 2021.

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