No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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FELIPE AMBRIZ-VALDOVINOS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

_____
_____

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____
_____

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should the Court resolve the circuit split on whether a notice to appear in immigration proceedings must comply with the statutory definition of a notice to appear under 8 U.S.C. § 1229 in order to vest jurisdiction in an immigration court under 8 C.F.R. § 1003.14?

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner Felipe Ambriz-Valdovinos respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on December 9, 2020.

JURISDICTION

A district judge found Petitioner guilty of being a removed alien found in the United States, 8 U.S.C. § 1326, in the United States District Court for the Southern District of California. Reviewing the judgment under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's conviction in an unpublished disposition. *See United States v. Ambriz-Valdovinos*, 830 F. App'x 906 (9th Cir. 2020) (attached to this petition as Appendix A). Petitioner filed a petition for panel rehearing and rehearing en banc, which the court denied on January 19, 2021. *See* Order Denying Petition for Rehearing (attached to this petition as Appendix B). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The Appendix to this Petition contains verbatim copies of the following statute and regulations:

- 8 U.S.C. § 1229(a)(1)
- 8 U.S.C. § 1326(d)
- 8 C.F.R. § 1003.13
- 8 C.F.R. § 1003.14
- 8 C.F.R. § 1003.15
- 8 C.F.R. § 1003.18

DIRECTLY RELATED PROCEEDINGS

There are no directly related proceedings under Rule 14(b)(iii).

STATEMENT OF THE CASE

A. District Court Proceedings.

Petitioner was born in Zihuatanejo, Mexico, in 1980. He moved to California with his family when he was nine years old. Five of his six siblings reside in the United States to this day. Petitioner has one son who resides in the United States and another that lives in Tijuana, Mexico.

Despite his extensive and long-standing ties to the United States, the government has removed Petitioner to Mexico on three occasions. Relevant here, the government initiated removal proceedings against Petitioner in 2005, alleging that he was an alien present in the United States who had not been admitted or paroled. The government filed a "Notice to Appear" in removal proceedings on April 27, 2005. Although the notice to appear stated the alleged grounds for removal, the government left most of the form unfilled.

For example, where the notice to appear asked the government to specify the "Complete Address of Immigration Court, Including Room Number, If any," the form was blank. Where the notice called for 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."

Petitioner later appeared before an immigration judge, who removed him from the United States based on his admissions that he was not a U.S. citizen, was a Mexican citizen, and was not lawfully admitted to the United States when he arrived in 1990. The government reinstated the 2005 removal in 2015.

In 2017, a U.S. Border Patrol agent encountered Petitioner approximately one mile north of the U.S.-Mexico border. Petitioner admitted he was a citizen and national of Mexico. The government filed an information against Petitioner for being a removed alien found in the United States under 8 U.S.C. § 1326(a) & (b). The Southern District of California had jurisdiction under 18 U.S.C. § 3231.

Before trial, Petitioner moved to dismiss the information under § 1326(d). He argued the immigration judge did not have the authority to issue the removal order because he had never received an actual 'notice to appear.' Petitioner 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. Petitioner argued that, under *Pereira*, the notice to appear in his removal proceedings was invalid because it also lacked the date and time of the hearing. Because there was no valid notice to appear, he claimed, jurisdiction over his

immigration case never vested with the immigration judge, rendering his removal order invalid. The district court initially granted Petitioner's motion, but ultimately denied it upon the government's motion to reconsider.

B. Appeal to the Ninth Circuit.

On appeal, Petitioner argued *inter alia* that the district court had erred in denying his motion to dismiss the information due to his invalid removal. Two Ninth Circuit decisions frustrated his appeal. First, *Karingithi v. Whitaker* ruled that *Pereira*'s analysis of § 1229(a) did not control the jurisdictional question; instead, federal regulation at 8 C.F.R. §§ 1003.14–18 controlled the jurisdiction of the immigration court. 913 F.3d 1158, 1158–59 (9th Cir. 2019). Deferring to the Board of Immigration Appeals ("B.I.A."), *Karingithi* ruled that the regulations did not contain the same date and time requirements as § 1229(a), so the lack of time and date did not deprive the immigration court of jurisdiction. *Id.* at 1159 (citing *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (B.I.A. 2018)). Second, again deferring to the B.I.A., *Aguilar Fermin v. Barr* ruled that a notice to appear also need not contain the address of the immigration court and that any defect in a notice to appear could be cured by including it in a subsequent document. 958 F.3d 887, 894–95 (9th Cir. 2020) (citing *Matter of Rosales Vargas*, 27 I. & N. Dec. 745 (B.I.A. 2020)).

The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 & 1294(1). Citing *Karingithi* and *Aguilar Fermin*, a panel of the Ninth Circuit ruled in an unpublished memorandum disposition that Petitioner's jurisdictional argument was "foreclosed by binding precedent." *United States v. Ambriz-Valdovinos*, 830 F. App'x

906, 907 (9th Cir. 2020) (unpublished). The panel went on to rule that "[b]ecause [Petitioner's] jurisdictional argument fails, we need not decide whether he needed to exhaust it under § 1326(d)(1)." *Id.*

Petitioner requested en banc rehearing to reconsider *Karingithi* and *Aguilar Fermin*. The Ninth Circuit denied the petition without ordering a response from the government nor providing any explanation for its decision.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a circuit split and clarify that the federal regulations at 8 C.F.R. §§ 1003.13–18 may not redefine a "notice to appear" in removal proceedings inconsistently with 8 U.S.C. § 1229(a). Most courts of appeal to address the issue, save the Seventh, have ruled that these jurisdictional and procedural regulations do not require notice of the time and date of a removal hearing and that such information may be later provided in a second document. The Seventh Circuit has called this conclusion "absurd," ruling that § 1229(a)'s definition of a notice to appear controls in all applications, including the regulations at §§ 1003.13–18.

If it wasn't clear after *Pereira*, this Court's decision in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), further supports the Seventh Circuit's interpretation. Drawing from multiple sources in the Immigration and Nationality Act ("INA"), *Niz-Chavez* made clear that § 1229(a)'s definition of "notice to appear" is not limited to the "stop-time" rule for cancellation of removal. Rather, only a notice to appear compliant with § 1229(a)—that is, a single document containing both the time and date of the removal hearing—may initiate removal proceedings in any context.

"[P]leas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.' " *Id.*, at 1485.

This Court should grant certiorari and rule that only a § 1229(a)-compliant notice to appear operates to vest jurisdiction in the immigration court under 8 C.F.R. § 1003.14(a).

A. The Circuits Are Intractably Split on Whether a Notice to Appear Under 8 C.F.R. § 1003.14 Must Comply with 8 U.S.C. § 1229(a).

Federal regulation prescribes "[j]urisdiction 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). "Charging document means the written instrument which initiates a proceeding before an Immigration Judge." 8 C.F.R. § 1003.13. "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." *Id.* In short, under regulation, jurisdiction vests with an immigration court when the government files a notice to appear.

The regulatory definition of "notice to appear," however, materially differs from the statutory definition under 8 U.S.C. § 1229(a). On one hand, § 1229(a)(1)(G) expressly requires that the notice contain the "time and place at which the proceedings will be held." The jurisdictional regulation, on the other hand, states only that the charging document must include a certificate of service indicating the court in which the document is filed. 8 C.F.R. § 1003.14(a). The following regulation at § 1003.15 requires that the notice include the address of the immigration court

where the notice will be filed, but not the time and place of the removal hearing. And while § 1229(a) speaks of "a" singular notice to appear containing all the required information, 8 C.F.R. § 1003.18 states that the government need only provide the time, place, and date of the removal hearing "where practicable" and that subsequent notification of that information is permissible.

In *Pereira*, this Court resolved the "narrow" question of whether a notice to appear that lacked time and place information was a "notice to appear" under § 1229(a). 138 S. Ct. at 2113. Consulting the "statutory text alone," this Court answered, "No." *Id.* at 2114. This Court explained, "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.*

Coupling the regulations' jurisdictional language with the holding in *Pereira*, petitioners challenging their removal orders on direct appeal and defendants collaterally attacking removal orders under 8 U.S.C. § 1326(d) have argued that jurisdiction cannot vest in the immigration court unless the government files a notice to appear that contains the time and date of the removal hearing, consistent with 8 U.S.C. § 1229(a). Most courts of appeal have dismissed these arguments, holding that "the regulations do not concern the written notice contemplated in section 1229(a)." *Goncalves Pontes v. Barr*, 938 F.3d 1, 6 (1st Cir. 2019). *See Banegas Gomez v. Barr*, 922 F.3d 101, 110–11 (2d Cir. 2019); *Nkomo v. Atty. Gen. of the U.S.*, 930 F.3d 129, 133 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 358–59 (4th Cir. 2019); *United States v. Pedroza-Rocha*, 933 F.3d 490, 496 (5th Cir.

2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi*, 913 F.3d at 1158–59; *Martinez-Perez v. Barr*, 947 F.3d 1273, 1278 (10th Cir. 2020). These courts relied on *Pereira*'s purported limitation only to the "stop-time" rule for cancellation of removal under § 1229b(b)(1). Unlike § 1229b(b)(1), they reason, § 1003.14 has nothing to do with cancellation of removal and doesn't explicitly cross-reference § 1229(a)(1). Many courts have also held that, to the extent time and date information is required, 8 C.F.R. § 1003.18's "where practical" language permits later notification. *See, e.g.*, *Aguilar Fermin*, 958 F.3d at 889.

The Seventh Circuit, however, calls this regulatory/statutory distinction "absurd." *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019). In *Ortiz-Santiago*, the Seventh Circuit "start[ed] with the uncontroversial proposition that an agency has no power to rewrite the text of a statute." *Id.* at 961. "If Congress has defined a term, then an implementing regulation cannot re-define that term in a conflicting way." *Id.* Confronting a petitioner's challenge to the jurisdiction of an immigration court because of a deficient notice to appear, the court quickly dismissed the government's argument that regulations at 8 C.F.R. §§ 1239.1, 1003.15, and 1003.18 were "not talking about the same 'Notice to Appear' that is defined in the statute." *Id.* The court also dismissed the government's suggestion that 8 C.F.R. § 1103.18 permitted a two-step notification process inconsistent with § 1229(a)'s requirement of a single document containing all requisite information. *Id.* at 963. In short, the Seventh Circuit ruled that only a notice to appear compliant with § 1229(a)(1) is a valid charging document under § 1003.14(a).

In sum, the courts of appeal are intractably split on the question of whether a notice to appear lacking date and time information is a "charging document" sufficient to "vest jurisdiction" under 8 C.F.R. § 1003.14.

B. The issue is ripe for review.

All but one of the courts of appeal have decided this issue. It is ripe for review. This Court has twice discussed the statutory requirements for a notice to appear under § 1229(a)(1) in *Pereira* and *Niz-Chavez*, but the courts of appeal remain split on whether this statutory definition applies to 8 C.F.R. § 1003.14. This Court should clarify that the definition of "notice to appear" under § 1229(a)(1) applies in all contexts, not just the stop-time rule for cancellation of removal.

Resolving the split in circuit precedent will have enormous implications in both immigration and criminal proceedings. Because the regulation states "jurisdiction vests" upon the filing of a notice to appear, 8 C.F.R. § 1003.14(a), the jurisdiction of the immigration court rises and falls on whether § 1229(a)(1)'s definition of "notice to appear" controls. The answer informs immigration courts' exercise of jurisdiction, decides motions to dismiss or reopen in removal proceedings, and provides grounds for collateral attack of removal orders under 8 U.S.C. § 1326(d). This Court need not decide here what "jurisdiction" means under § 1003.14 or what effect a deficient notice to appear has on the validity of a removal order on direct appeal or collateral attack.[1] But this Court should ensure that the

[1] The courts of appeals have so far taken different positions on whether § 1003.14 deals with the subject matter jurisdiction of the immigration court or is merely a claims-processing rule. *Compare Nkomo*, 930 F.3d at 133 (holding that the regulation is "jurisdiction vesting"); *Banegas Gomez*, 922 F.3d at 111 (same);

courts of appeals wrestle with those complicated and consequential issues from the correct premise: that a notice to appear under § 1003.14 must comply with § 1229(a)(1).

C. This Case Is an Ideal Vehicle to Decide this Issue.

Petitioner's case is the perfect vehicle to decide this question. He preserved the issue before the district court, and there are no factual complications to muddy this Court's analysis. Rather, this Court's decision in Petitioner's case would cleanly resolve a circuit split and force the Ninth Circuit and its sister circuits to confront jurisdictional arguments like Petitioners' without improper deference to regulation.

D. The Ninth Circuit Was Wrong to Conclude that a Notice to Appear Need Not Satisfy § 1229(a)(1)'s Requirements to "Vest Jurisdiction" Under 8 C.F.R. § 1003.14(a).

The Ninth Circuit affirmed Petitioner's conviction after concluding that Ninth Circuit precedent foreclosed his argument. *See Ambriz-Valdovinos*, 830 F. App'x at 907. The court cited it's prior conclusion that " '[a]n initial NTA need not contain time, date, and place information to vest an immigration court with jurisdiction if such information is provided before the hearing.' " *Id.* (quoting *Aguilar Fermin*, 958 F.3d at 889). It also cited it's previous holding that " '[a] notice to appear need not include time and date information to satisfy [the regulatory jurisdictional requirements].' " *Id.* (quoting *Karingithi,* 913 F.3d at 1160). These holdings are plainly incorrect under *Niz-Chavez*.

Karingithi, 913 F.3d at 1160 (same); *with Perez-Sanchez v. U.S. Atty. Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019) (ruling that regulation is a claims-processing rule and noting circuit split); *Ortiz-Santiago*, 924 F.3d at 962–64 (same).

The Court made clear in *Niz-Chavez* that Congress must be taken at its word, and a notice to appear must contain the elements required by 8 U.S.C. § 1229, including the time of the hearing. The Court began by noting that "IIRIRA defines a notice to appear as 'written notice . . . specifying' several things," including the time of the hearing. *Niz-Chavez*, 141 S. Ct. at 1479 (citing 8 U.S.C. § 1229(a)(1)). This Court ruled that the plain language and structure of the statute require a single notice containing all the requisite information, rather than "notice by installment" where the information is provided piecemeal over several documents. *Id.* at 1480-85.

This Court then turned to the government's "pleas for deference" to "its own (current) regulations" which "authorize its practice" of providing the time and place of a hearing by a subsequent notice. *Id.* at 1485. The Court bluntly rejected any deference to those regulations: "[A]s this Court has long made plain, pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'" *Id.* (citing *Pereira*, 138 S. Ct. at 2118. In other words, the Court rejected any deference to the regulations stating that the date and time of the hearing need only be provided "when practicable," 8 C.F.R. § 1003.18, and need not be included in a notice to appear. 8 C.F.R. § 1003.15 (omitting the date and time of the hearing from the required information).

This determination forecloses the existence of a separate regulatory notice to appear, distinct from the requirements of § 1229(a). The government advanced a version of this argument in *Niz-Chavez*, contending that the "Notice to Appear" described in a separate subsection of the statute, 8 U.S.C. § 1229(e)(1), was intended to prescribe what must be in the regulatory "Notice to Appear" form,

rather than to refer to a notice to appear under section 1229(a). *Niz-Chavez*, 141 S. Ct. at 1483. This Court rejected that argument, noting that it made little sense for Congress to go to the trouble of insisting that the regulatory "Notice to Appear" contain certain information, if, under the government's construction, it could provide that information pursuant to the regulations whenever and however it chose. *Id.* at 1483 n.3.

As the Court also noted, the existence of a distinct regulatory notice to appear makes even less sense considering the preamble to the proposed rulemaking enacting the regulations, where "the government expressly acknowledged that 'the language of the amended Act indicat[es] that *the time and place of the hearing must be on the Notice to Appear*.'" *Id.* at 1484 (citing 62 Fed. Reg. 449 (1997)) (emphasis in original). This Court thus recognized that the regulations were meant to contain the same requirements as the statute, and "[i]t makes no difference either that the Executive Branch tempered its candor by promising later in its proposed rule to provide a single notice only 'where practicable.' That the government let slip (at least once) that it understood the plain import of IIRIRA's revisions remains telling." *Id.* at 1484 n.5.

In sum, this Court made plain that the regulatory definition of a notice to appear, which allows the agency to omit the time and date of the hearing from the notice, is entitled to no deference, given the plain language of § 1229(a). *Id.* at 1485. This conclusion abrogates the Ninth Circuit's holdings in *Karingithi* and *Aguilar Fermin* that the regulatory charging document referenced in 8 C.F.R. § 1003.14 is distinct from a statutory notice to appear under § 1229(a). Only the latter

commences removal proceedings. This Court should grant the petition and reverse the Ninth Circuit's contrary holding.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Dated: June 17, 2021

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