No. _____

In the Supreme Court of the United States

PEDRO RODRIGUEZ-GARCIA, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

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QUESTIONS PRESENTED FOR REVIEW

Pedro Rodriguez-Garcia was ordered removed by an immigration judge after being served a document titled "Notice to Appear" that did not tell Mr. Rodriguez-Garcia when to appear for his removal proceedings. Federal law requires that noncitizens facing removal proceedings be served a Notice to Appear with a hearing time. 8 U.S.C. § 1229(a)(1)(G)(i). Mr. Rodriguez-Garcia was convicted of illegal reentry based on that putative removal order.

The question presented is:

1. Did the immigration court lack authority to remove Mr. Rodriguez-Garcia because he was served a Notice to Appear that did not comply with federal law because it lacked a hearing time?
2. In an illegal reentry prosecution, can the defendant attack the jurisdictional basis for a removal order outside the 8 U.S.C. § 1326(d) requirements for a collateral attack? If not, is § 1326(d) unconstitutional?

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Pedro Rodriguez-Garcia*, No. 5:18-cr-00624-FB (W.D. Tex. April 17, 2019) (denying motion to dismiss)
- *United States v. Pedro Rodriguez-Garcia*, No. 19-50575 (5th Cir. April 9, 2020) (affirming judgment of the district court)
- *United States v. Pedro Rodriguez-Garcia*, No. 19-50575 (5th Cir. August 13, 2020) (denying petition for rehearing en banc)

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OPINION BELOW

A copy of the panel opinion of the court of appeals, *Pedro Rodriguez-Garcia,* No. 19-50575 (5th Cir. April 9, 2020) and the order denying rehearing en banc are attached to this petition as Appendixes A and B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 9, 2020. The order denying rehearing en banc was entered on August 13, 2020. This petition is filed within 150 days after the order denying rehearing en banc. *See* Sup. Ct. R. 13.1; Miscellaneous Order, 589 U.S. __ (Mar. 19, 2020). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The texts of the following constitutional, statutory, and regulatory provisions involved are reproduced in Appendix C:

- U.S. Const. amend. V (Due Process Clause)
- 8 U.S.C. §§ 1229, 1326
- 8 C.F.R. §§ 1003.13, 1003.14, 1003.15, 1003.18

STATEMENT

Putative removal proceedings. Mr. Rodriguez-Garcia is a citizen of Mexico who was granted lawful permanent resident status on February 8, 1996. In March 2006, he was returning from a brief trip abroad when immigration authorities stopped him at a Laredo, Texas port-of-

entry and served him with documents titled "Notice to Appear." Immigration authorities alleged that Mr. Rodriguez-Garcia was inadmissible and removable from the United States as an arriving alien because of his conviction for a controlled substance violation.

The statute requires that noncitizens in removal proceedings be served with a notice to appear specifying the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). The regulations further provide that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when" the Department of Homeland Security files a Notice to Appear with the immigration court. 8 C.F.R. § 1003.14(a); *see also* 8 C.F.R. § 1003.13.

But the document given to Mr. Rodriguez-Garcia and filed in immigration court lacked a hearing time. It stated he must appear before an immigration judge "on a date to be set at a time to be set[.]"

In April 2006, an immigration judge ordered Mr. Rodriguez-Garcia removed to Mexico. The order indicates Mr. Rodriguez-Garcia submitted a stipulated request for an order of removal wherein he admitted the factual allegations in the Notice to Appear, conceded removability, made not application for relief from removal, and waived his right to appeal. Immigration officials subsequently took him out of the United States.

Illegal reentry proceedings. In July 2018, immigration authorities found Mr. Rodriguez-Garcia in San Antonio, Texas, and he was indicted for illegal reentry.

In June 2018, this Court issued *Pereira v. Sessions*, holding that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." 138 S. Ct. 2105, 2113–14 (2018). Noncitizens across the country began litigating whether the lack of a hearing time has consequences outside the context of the rule for cancellation of removal that the period of physical presence ends when the noncitizen is served a notice to appear under § 1229(a). *See* 8 U.S.C. § 1229b(d)(1).

Mr. Rodriguez-Garcia moved to dismiss the illegal reentry indictment, arguing the removal proceedings were flawed because no notices to appear started the proceedings. He argued, based on *Pereira*, that the putative notices to appear issued in his case failed to vest jurisdiction with the immigration judge. *See* § 1229(a)(1); 8 C.F.R. § 1003.14(a). Thus, he was not "removed" as a matter of law and could meet the requirements to collaterally attack the putative removal order. The district court denied the motion.

The Fifth Circuit affirmed. App. A. The court held that Mr. Rodriguez Garcia's arguments were foreclosed by *Pierre-Paul v. Barr*, 930

F.3d 684, 689–90 (5th Cir. 2019), *cert. denied*, No. 19-779 (U.S. Apr. 27, 2020), and *United States v. Pedroza-Rocha*, 933 F.3d 490, 497 (5th Cir. 2019), *cert. denied*, No. 19-6588 (U.S. May 18, 2020). App. A. Specifically, *Pedroza-Rocha* held the omission of the hearing time did not make the notice to appear defective and deprive the immigration court of jurisdiction. App. at 2-3 (citing *Pedroza-Rocha*, 933 F.3d at 492–98).

REASONS FOR GRANTING THE WRIT

I. The decision below is incorrect and sanctions an ultra vires action by an agency in violation of separation of powers.

An agency's power to act comes from Congress. *City of Arlington v. F.C.C.*, 569 U.S. 290, 298 (2013). Courts must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority." *Id.* at 307.

The notice to appear is such a limit. Congress specified that the notice to appear must be served on every noncitizen in removal proceedings. § 1229(a)(1). It also required that a notice to appear must have a hearing time. § 1229(a)(1)(G)(i). The omission of a hearing time cannot be cured; without it, the document is not a notice to appear. *Pereira*, 138 S. Ct. at 2116.

Without a notice to appear, the immigration court lacks authority to remove a noncitizen. § 1229(a)(1). That is because service of the notice to appear is necessary for subject matter jurisdiction—the immigration judge's authority to preside over cases. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (describing subject matter jurisdiction as "the court's statutory or constitutional authority to hear the case" (cleaned up)).

Immigration judges only have authority to decide cases in which the Department of Homeland Security chooses to serve a notice to appear. § 1229(a)(1). In contrast, immigration officials—not judges—can rule on a

noncitizen's deportability and inadmissibility through certain expedited procedures when no notice to appear is filed. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1), 1228(b). The notice to appear confers subject matter jurisdiction by defining the cases over which immigration judges preside. *See Bowles v. Russell*, 551 U.S. 205, 213 (2007) ("the notion of subject-matter jurisdiction obviously extends to classes of cases ... falling within a court's adjudicatory authority" (cleaned up)).

The government sought to avoid this straightforward application of § 1229(a)(1) and *Pereira* by arguing that the regulatory definition of a notice to appear, not the statutory one, applies to the notice to appear required to start the removal proceeding. The regulations do not require a hearing time. 8 C.F.R. §§ 1003.15(b), 1003.18(b).

The Fifth Circuit agreed. By ignoring the jurisdictional import of § 1229(a)(1) and finding "no glue" between the regulations and § 1229(a)(1), the Fifth Circuit distinguished *Pereira* and approved a two-step procedure: first a notice to appear with no hearing time, and then a notice of hearing. *Pierre-Paul*, 930 F.3d at 691.

But there is glue binding the statute to the regulations. Congress's transitional instructions recognize the jurisdictional significance of the notice to appear. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, § 309(c)(2), Pub. L. No. 104-208, 110 Stat 3009 (1996) (making certain documents "valid as if provided under [§

1229] (as amended by this subtitle) to confer jurisdiction on the immigration judge"). And the regulations incorporate the statutory jurisdictional limit by providing that a charging document such as a notice to appear vests jurisdiction with the immigration court. §§ 1003.13, 1003.14(a); *see* 8 C.F.R. § 1239.1.

The agency even acknowledged the need to "implement[ ] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear" and committed to providing a hearing time in the notices to appear "as fully as possible by April 1, 1997[.]" Immigration and Naturalization Service and EOIR, Proposed Rules, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444-01, 1997 WL 1514 (Jan. 3, 1997). But the agency, on its own, created an exception that hearing times could be omitted if providing them was not practicable, such as when "automated scheduling [is] not possible … (e.g., power outages, computer crashes/downtime)." *Id.* at 449; *see* 8 C.F.R. §§ 1003.15(b), (c); 1003.18.

Two decades later, "almost 100 percent of notices to appear omit the time and date of proceeding[.]" *Pereira*, 138 S. Ct. at 2111 (cleaned up). The "where practicable" regulatory exception swallowed the statutory rule of including the hearing time in the notice to appear. And the Fifth Circuit sanctioned the agency's attempt to rewrite the statute. This is ultra vires and violates the separation of powers. *Utility Air Regulatory*

Group v. EPA, 573 U.S. 302, 327 (2014) (agencies cannot "revise clear statutory terms that turn out not to work in practice").[1]

II. The circuit split over the hearing time requirement for the notice to appear has revealed deep confusion about agency authority.

Eleven circuits, as well as the Board of Immigration Appeals (BIA), have weighed in on the proper definition of a "notice to appear" and the effect of a putative notice missing a hearing time. The circuits are split on whether the statutory or regulatory definition of a notice to appear governs, whether the statutory requirements for a notice to appear can be satisfied in two documents or just one, whether Board of Immigration Appeals' decisions on this topic deserve deference, and whether a notice to appear is a jurisdictional requirement or a claims-processing rule.

A. Two circuits hold that the statutory definition of a notice to appear applies to starting a removal proceeding, but eight circuits and the BIA hold that the regulatory definition does.

The Seventh and Eleventh Circuits, applying this Court's reasoning in *Pereira*, interpret § 1229(a)(1) as requiring the notice to appear used to begin removal proceedings to have a hearing time. The Seventh Circuit rejects as "absurd" the government's argument that the notice to

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[1] Pending before the Court is *Niz-Chavez v. Barr*, 780 Fed. Appx. 523 (6th Cir. 2019), *cert. granted*, 141 S.Ct. 84 (2020) (No. 19-863), which may be dispositive of this case.

appear referenced in the regulations is not the same notice to appear defined in the statute. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961–62 (7th Cir. 2019). The Eleventh Circuit explains that, per § 1229(a)(1), Congress intended for service of the notice to appear to "operate as the point of commencement for removal proceedings[,]" and "the agency was not free to redefine the point of commencement[.]" *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019).

The First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits find that the regulatory definition of a notice to appear, which does not require a hearing time, applies for beginning removal proceedings.[2]

Several circuits also hold that a later notice of hearing cures any statutory defect. *See Pierre-Paul*, 930 F.3d at 690; *but see Banuelos v.*

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[2] *See Goncalves Pontes v. Barr*, 938 F.3d 1, 6–7 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110–12 (2d Cir. 2019), *cert. denied* No. 19-510 (U.S. Jan. 27, 2020); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133–34 (3d Cir. 2019), *cert. denied*, No. 19-957 (U.S. May 4, 2020); *United States v. Cortez*, 930 F.3d 350, 363 (4th Cir. 2019); *Pierre-Paul*, 930 F.3d at 690; *Santos-Santos v. Barr*, 917 F.3d 486, 490–91 (6th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161–62 (9th Cir. 2019), *cert. denied*, No. 19-475 (U.S. Feb. 24, 2020).

Barr, 953 F.3d 1176, 1180–84 (10th Cir. 2020); *Guadalupe v. Attorney Gen. United States*, 951 F.3d 161, 164–66 (3d Cir. 2020).[3]

In finding that the regulatory definition controls, the First, Sixth, and Ninth Circuits specifically defer to the BIA's reasoning. *Goncalves Pontes*, 938 F.3d at 7; *Karingithi*, 913 F.3d at 1161; *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018). The BIA interpreted *Pereira* narrowly, limiting it to the stop-time rule, and approved the two-step process of notice to appear without a hearing time followed by a notice of hearing. *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443–47 (BIA 2018). The Seventh Circuit, however, sharply criticized reliance on the BIA's decision, which it found "brushed too quickly over the Supreme Court's rationale in *Pereira*" and failed to consider significant legislative history. *Ortiz-Santiago*, 924 F.3d at 962.

B. Four circuits and the BIA believe that a notice to appear is a jurisdictional requirement, but five circuits disagree.

The Second and Eighth Circuits hold that a notice to appear, as defined by the regulations, confers "jurisdiction" on the immigration court. *Ali*, 924 F.3d at 986; *Banegas Gomez*, 922 F.3d at 112. The Sixth and

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[3] The Ninth Circuit initially held the notice of hearing could not complete or cure a notice to appear lacking a hearing time, but the court granted rehearing en banc. *See Lopez v. Barr*, 925 F.3d 396, 399 (9th Cir. 2019), *reh'g en banc granted,* 948 F.3d 989 (9th Cir. 2020).

Ninth Circuits adopt similar reasoning after deferring to the BIA. *Hernandez-Perez*, 911 F.3d at 314–15; *Karingithi*, 913 F.3d at 1161; *see Bermudez-Cota*, 27 I. & N. Dec. at 447.

The Fourth and Fifth Circuits disagree and find the regulations provide a claims-processing, not jurisdictional, rule. *Cortez*, 930 F.3d at 362; *Pierre-Paul*, 930 F.3d at 692. The Seventh and Eleventh Circuits also hold that the statutory time requirement is a claims-processing, not a jurisdictional rule. *Perez-Sanchez*, 935 F.3d at 1154; *Ortiz-Santiago*, 924 F.3d at 963. Similarly, the Tenth Circuit holds that neither the statute nor the regulations provide a jurisdictional rule. *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015–18 (10th Cir. 2019).

The First and Third Circuits reject that § 1229(a)(1) has jurisdictional significance but do not decide whether the regulations do. *Goncalves Pontes*, 938 F.3d at 7 n.3; *Nkomo*, 930 F.3d at 134.

In light of the fractured reasoning of the circuits' decisions on the jurisdictional significance of the statutory and regulatory definitions of "Notice to Appear," certiorari should be granted.

III. Due process requires a defendant be allowed to challenge the jurisdictional basis of the removal order being used to prosecute him, even if he has not exhausted administrative remedies.

The Government may argue that Mr. Rodriguez-Garcia cannot challenge his removal order because he did not exhaust administrative remedies. The Fifth Circuit did not address this issue. The Government's

argument, however, conflicts with this Court's rulings in *Estep v. United States*, 327 U.S. 114 (1946), and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

The offense of illegal reentry depends on a determination made in an administrative proceeding. § 1326(a); *Mendoza-Lopez*, 481 U.S. at 837–38. The government must prove the defendant is a noncitizen who "has been … removed" from the United States and later reenters the United States without permission. § 1326(a).

Congress limited any challenge to the "validity of the deportation order" in § 1326(d), but that cannot be read to remove the government's burden to prove that a defendant has been removed. § 1326(a). Just as a notice to appear without a hearing time is not a notice to appear, *Pereira*, 138 S. Ct. at 2116, a removal order entered without jurisdiction is not removal order. The government cannot prove Mr. Rodriguez-Garcia was removed by relying on putative removal orders issued without authority.

This construction of § 1326 comports with *Estep*. There, this Court considered the use of an administrative order to impose criminal sanctions when selective service registrants, whose military inductions were ordered by local boards, were prosecuted for refusing to be inducted into the military. Even though the statute did not specify that defendants

could collaterally attack those induction orders, the Court could not "believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Id.* at 121. The Court refused to resolve any statutory ambiguity against the accused, noting that "[w]e are dealing here with a question of personal liberty." *Id.* at 122.

Here, too, we are dealing with a question of personal liberty and an administrative agency that acted outside the authority defining its jurisdiction. Mr. Rodriguez-Garcia must be allowed to bring his challenge to the immigration courts' jurisdiction notwithstanding any congressionally-made limitations to collateral attack.

Mendoza-Lopez also supports Mr. Rodriguez-Garcia's ability to challenge the removal orders; otherwise § 1326 is constitutionally suspect. In *Mendoza-Lopez*, this Court addressed a former version of § 1326 that lacked a provision for collateral attack of the removal order. 481 U.S. at 835–36. The Court held that, "at a minimum," "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review[.]" *Id.* at 839. Otherwise, the statute offends due process. *Id.* at 838–39. The Court also noted that some "procedural errors are so fundamental that they may

functionally deprive the alien of judicial review, requiring that the result of the hearing in which they took place not be used to support a criminal conviction." *Id.* at 839 n.17. Entering a removal order without authority is such a procedural error. *United States v. Lopez-Urgel*, 351 F. Supp. 3d 978, 988–89 (W.D. Tex. 2018).

Congress tried to codify *Mendoza-Lopez* in § 1326(d). *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004). Section 1326(d) provides that a defendant "may not challenge the validity of the deportation order … unless" the defendant shows exhaustion of administrative remedies, deprivation of judicial review, and fundamental unfairness. But "[t]here was almost certainly no administrative exhaustion in *Mendoza-Lopez* itself[.]" *Sosa*, 387 F.3d at 136. Still, "the Court held that collateral review of the underlying deportation order was constitutionally required." *Id.*

Thus, § 1326(d) is unconstitutional if it prevents a defendant from challenging the jurisdictional validity of the removal order simply because he did not exhaust administrative remedies. The Fifth Circuit's decision to the contrary conflicts with this Court's precedent in *Estep* and *Mendoza-Lopez*.

IV. These issues recur and are exceptionally important.

For decades, immigration authorities ignored the statutory requirement to include a hearing time in the notice to appear. In the past two decades, well over 200,000 notices to appear were filed on average per

year.[4] Most of those notices lacked hearing times. *Pereira*, 138 S. Ct. at 2111. As a result, millions of people have been deported by an agency without authority to do so.

Many of those removed came back unlawfully. Illegal reentry continues to be the most prosecuted federal felony.[5] In fiscal year 2019, over 22,000 people were sentenced for illegal reentry.[6] In the Western District of Texas alone, at least 136 defendants challenged their illegal reentry prosecutions between September 2018 and August 2019 because the underlying putative notice to appear lacked a hearing time. Many others chose to forgo motions to dismiss and plead guilty. These prose-

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[4] *See* U.S. Dep't of Justice, Executive Office for Immigration Review (EOIR), Statistics Yearbook FY 2018, at 7, https://www.justice.gov/eoir/file/1198896/download; U.S. Dep't of Justice, EOIR, FY 2013 Statistics Yearbook, at A7 (Apr. 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf; U.S. Dep't of Justice, EOIR, FY 2008 Statistical Year Book, at B1 (Mar. 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/03/27/fy08syb.pdf; U.S. Dep't of Justice, EOIR, FY 2003 Statistical Year Book, at B2 (Apr. 2004), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy03syb.pdf.

[5] TRAC-Immigration, Immigration Prosecutions for 2019 (Oct. 31, 2019), https://tracfed.syr.edu/results/9x705dbb47e5a0.html.

[6] U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses (Fiscal Year 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf.

cutions not only cost defendants their liberty, taxpayers pay approximately $27,000 to detain a defendant for the average 10-month sentence.[7]

The number affected militates against leaving the agency's deliberate decades-long violation of a congressional directive unchecked. Otherwise agencies will continue to ignore Congress and upend the separation and balance of powers.

V. Mr. Rodriguez-Garcia's case is an ideal vehicle to decide these issues.

Mr. Rodriguez-Garcia challenged his prior removal order from the beginning of this criminal case, and the district court and the Fifth Circuit addressed the questions presented. His case presents an ideal opportunity to review these issues that affect the liberty of countless defendants.

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[7] *Id.*; Dep't of Justice, U.S. Marshals Service, FY 2020 Performance Budget: Federal Prisoner Detention Appropriation 19 (Mar. 2019), https://www.justice.gov/jmd/page/file/1144161/download (daily non-federal facility cost in fiscal year 2018 was $90.17).

CONCLUSION

FOR THESE REASONS, Mr. Rodriguez-Garcia requests that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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DATED: January 11, 2021

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50575

Summary Calendar

FILED April 9, 2020

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PEDRO RODRIGUEZ-GARCIA, also known as Pedro Garcia-Rodriguez,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CR-624-1

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:*

Pedro Rodriguez-Garcia appeals his conviction for illegal reentry into the United States following deportation, a violation of 8 U.S.C. § 1326. In his guilty plea,

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Rodriguez-Garcia reserved the right to appeal the district court's denial of his motion to dismiss the indictment. See FED. R. CRIM. P. 11(a)(2). Relying on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), Rodriguez-Garcia argues that his prior removal order was invalid because the notice to appear was defective for failing to include the date and time of his removal hearing. According to Rodriguez-Garcia, his prior removal therefore could not support a conviction for illegal reentry under § 1326. Additionally, Rodriguez-Garcia asserts that he is excused from satisfying the § 1326(d) requirements for collaterally attacking his removal order.

The Government has filed a motion for summary affirmance, arguing that Rodriguez-Garcia's challenge is foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), and *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779). Rodriguez-Garcia contends that *Pedroza-Rocha* and *Pierre-Paul* do not foreclose review because this court in those cases did not address the issue he raises here. Specifically, he argues that the requirements for a notice to appear are statutory and, therefore, the rules of statutory construction require that the statutory notice requirements at issue in *Pereira* apply to the notice to appear in his immigration proceedings as well.

Summary affirmance is appropriate if "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). The Government's position is right as a matter of law under *Pedroza-*

Rocha and *Pierre-Paul* which specifically held that a defective notice to appear does not deprive the immigration court of jurisdiction. *See Pedroza-Rocha*, 933 F.3d at 492-98; *Pierre-Paul*, 930 F.3d at 689. Accordingly, the Government's motion for summary affirmance is GRANTED, its alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19-50575

FILED ON 08/13/2020

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PEDRO RODRIGUEZ-GARCIA, also known as Pedro Garcia-Rodriguez,

Defendant-Appellant

Appeal from the United States District Court

for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 04/09/2020, 5 Cir., _____, _____ F.3d _____)

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:

(✓)Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on

Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE

APPENDIX C

U.S. Const. amend. V (Due Process Clause

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1229

(a) Notice to appear

(1) In general

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

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

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

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

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

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

(F)

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

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

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

(G)

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

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

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

(A) In general

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

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

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

(B) Exception

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

(3) Central address files

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

(b) Securing of counsel

(1) In general

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

(2) Current lists of counsel

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

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if

the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

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

(d) Prompt initiation of removal

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

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

(e) Certification of compliance with restrictions on disclosure

(1) In general

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

(2) Locations

The locations specified in this paragraph are as follows:

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

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

8 U.S.C. § 1326

(a) In general

Subject to subsection (b), any alien who—

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

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

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

(b) Criminal penalties for reentry of certain removed aliens

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

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

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

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

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

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

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

Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for

the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

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

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

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

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

8 C.F.R. § 1003.13

Definitions.

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in § 1003.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. 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.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

8 C.F.R. § 1003.14

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

8 C.F.R. § 1003.15

Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 1003.26.

(c) ***Contents of the Notice to Appear for removal proceedings.*** In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) ***Address and telephone number.***

(1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written

notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR-33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

8 C.F.R. § 1003.18

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.