No. _____

In the Supreme Court of the United States

RUBEN VAZQUEZ-OVALLE, *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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QUESTION PRESENTED FOR REVIEW

Ruben Vazquez-Ovalle was ordered removed by an immigration judge after being served a document titled "Notice to Appear" that did not tell him when to appear for removal proceedings, contrary to a statute that requires this information. *See* 8 U.S.C. § 1229(a)(1)(G)(i). Here, the Government relied on that removal to prosecute Vazquez for illegal reentry based on that putative removal order. The district court denied Vazquez's motion to dismiss the indictment and found him guilty, and the court of appeals affirmed the conviction.

The question presented is: Did the immigration court lack authority to remove Vazquez because he was not served a notice to appear that had a hearing time?

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RUBEN VAZQUEZ-OVALLE, Petitioner,

V.

UNITED STATES OF AMERICA

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

Petitioner, Ruben Vazquez-Ovalle asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 28, 2021.

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.

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Vazquez-Ovalle*, Nos. 20-50924 & 20-50934 (5th Cir. June 28, 2021) (per curiam) (unpublished), is attached to this petition as Pet. App. 1a–3a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

On March 19, 2020, the Court extended the deadline for filing a petition for writ of certiorari due after that date to 150 days from the date of the lower court's judgment. *See also* Sup. Ct. R. 13.1, 13.5. On July 19, 2021, the Court rescinded the March 19, 2020 Order, but kept the extension in place for judgments entered in between the dates of two orders: "[I]n any case in which the relevant lower court judgment… was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment or order." This petition is filed within that time, as the opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 28, 2021. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The following are reproduced at Pet. App. 4a–20a:

- 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

1. Vazquez appealed the district court's denial of his motion to dismiss his illegal reentry indictment, in which he argued that his original removal order was void because the immigration court lacked jurisdiction to issue it due to a defective notice to appear for the removal proceedings. His arguments were foreclosed by the Fifth Circuit's decision in *United States v. Pedroza-Rocha*, 933 F.3d 490 (2019) (per curiam), *cert. denied*, 140 S. Ct. 2769 (2020); and *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2718 (2020). He asks this Court to grant a writ of certiorari to resolve a circuit split over that issue.

2. Vazquez is a citizen of Mexico. In January 2014, he was served with a "Notice to Appear" alleging that he was removable from the United States as an alien who had not been admitted or paroled into the country. The notice ordered him "to appear before an immigration judge of the United States Department of Justice … on a date to be set at a time to be set[.]" The certificate of service says that Vazquez was given oral notice, in Spanish, "of the time and place of his … hearing[.]" At Vazquez's hearing, on February

19, 2014, the immigration judge ordered his removal to Mexico. According to the removal order, Vazquez waived appeal. He was removed two weeks later, on March 4, 2014. The order was reinstated twice, and Vazquez was last removed in September 2019.

In January 2020, Border Patrol agents found Vazquez in the Western District of Texas. He had not received permission from the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States. Vazquez was indicted for illegal reentry, in violation of 8 U.S.C. § 1326.[1]

Vazquez moved to dismiss the indictment. Relying on this Court's decision in *Pereira v. Sessions*, he argued that the notice to appear did not vest the immigration court with jurisdiction because it did not include the date and time of the removal proceedings, as required by statute. 138 S. Ct. 2105, 2113–14 (2018) (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 [8 U.S.C. §] 1229(a)"); 8 C.F.R.

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[1] Also, the probation office filed a motion to revoke Vazquez's supervised release from a 2017 conviction for drug offenses and illegal reentry, based on this new offense.

§ 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court[.]"). For that reason, Vazquez argued, his removal proceedings were void *ab initio,* and he was not "removed" as a matter of law. Thus, neither the original removal order nor the reinstatements of that order could be used to establish the removal element of illegal reentry.

The district court denied Vazquez's motion to dismiss. Applying Fifth Circuit precedent, *see United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 2769 (2020); and *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2718 (2020), the court rejected Vazquez's argument that the notice to appear was defective for lacking a hearing date and time.

Vazquez pleaded guilty conditionally, reserving his right to appeal the denial of his motion to dismiss. *See* Fed. R. Crim. P.

11(a)(2). The district court sentenced him to 63 months' imprisonment and three years' supervised release.[2]

Vazquez appealed.[3] The Fifth Circuit summarily affirmed Vazquez's conviction, based on its decisions in *Pedroza-Rocha* and *Pierre-Paul*. Pet. App. 2a–3a. In *Pedroza-Rocha*, the Fifth Circuit held that that the notice to appear was not rendered deficient because it did not specify a date for the hearing and that any such alleged deficiency had not deprived the immigration court of jurisdiction.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's holding that a notice to appear is not jurisdictional is incorrect.

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.

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[2] The court also revoked Vazquez's supervised release from his last conviction and sentenced him to 12 months' imprisonment, to run consecutively to the 63-month sentence in the new case. His projected release date from prison is May 29, 2025. *See* https://www.bop.gov/inmateloc/ (register # 25791-408).

[3] He also appealed his revocation. He did not raise any separate challenge to the revocation on appeal. *See* Pet. App. 2a n.1.

The notice to appear for removal proceedings is such a limit. Congress specified that the notice to appear must be served on every noncitizen in removal proceedings. 8 U.S.C. § 1229(a)(1). The statute also requires a notice to appear to include have a hearing time. 8 U.S.C. § 1229(a)(1)(G)(i). The omission of a hearing time cannot be cured; without it, the document is not a notice to appear and does not trigger the stop-time rule for purposes of seeking cancellation of removal. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480–85 (2021); *Pereira v. Sessions*, 138 S. Ct. 2105, 2116 (2018).

The Fifth Circuit holds that this Court's decisions concerning the statutory requirement of a notice to appear do not apply outside the stop-time context. That is, according to the Fifth Circuit, the omission of a date and time of hearing from a notice to appear does not deprive the immigration court of jurisdiction over the proceedings. *See Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2718 (2020); *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2769 (2020). The Fifth Circuit has reasoned that, although the *statute* requires notification of the date and time of the hearing, § 1229(a)(1)(G)(i), the *regulatory definition* of a notice to appear does not, 8 C.F.R. §§ 1003.15(b), 1003.18(b). In 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.

This Court abrogated the two-step part of *Pierre-Paul* in *Niz-Chavez v. United States*, which held the statute requires "a single document containing all the information an individual needs to know about his removal hearing"—including the date and time—to trigger the stop-time rule. 141 S. Ct. 1474, 1479 (2021). Still, the Fifth Circuit maintains that, although *Niz-Chavez* "undermines one of the rationales of our decision in *Pierre-Paul*[,]" it "does [not] alter our conclusion that '*Pereira* does not extend outside the stop-time rule context.'" *Maniar v. Garland*, 998 F.3d 235, 242 n.2 (2021) (quoting *Pierre-Paul*, 930 F.3d at 689).

Although *Niz-Chavez* did not address the jurisdictional question, the Fifth Circuit remains wrong about the lack of glue binding the statute to the regulations. Without a notice to appear, the immigration court lacks authority to remove a noncitizen. 8 U.S.C. § 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. 8 U.S.C. § 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)).

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. 8 C.F.R. §§ 1003.13,

1003.14(a); *see* 8 C.F.R. § 1239.1. Thus, the Fifth Circuit's rule that a defective notice to appear is not a jurisdictional defect is wrong.

II. The circuits are split over the jurisdictional nature of a notice to appear in removal proceedings.

The Second and Eighth Circuits hold that a notice to appear, as defined by the regulations, confers "jurisdiction" on the immigration court. *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110–12 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 954 (2020). The Sixth and Ninth Circuits adopted similar reasoning after deferring to the BIA. *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314–15 (6th Cir. 2018); *Karingithi v. Barr*, 913 F.3d 1158, 1162 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020); *see Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (BIA 2018).

The Fourth and Fifth Circuits disagree and find the regulations provide a claims-processing, not jurisdictional, rule. *United States v. Cortez*, 930 F.3d 350, 362 (4th Cir. 2019); *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. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019). Similarly, the Tenth Circuit holds that neither the statute nor the regulations provide a jurisdictional rule. *Lopez-Munoz*

v. Barr, 941 F.3d 1013, 1016–17 (10th Cir. 2019). The First and Third Circuits also agree that § 1229(a)(1) is not jurisdictional but have not decided whether the regulations are. *See Goncalves Pontes v. Barr*, 938 F.3d 1, 7 n.3 (1st Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133–34 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2740 (2020).

Given 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. The issue recurs and is 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 2018, over 18,000 people were sentenced for illegal reentry.[6] These prosecutions not only cost defendants their liberty; taxpayers pay

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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 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf.

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.

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[7] *Id.*; U.S. 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, Vazquez asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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