No. _____

In the
Supreme Court of the United States

JESUS LEONARDO CASTILLO-MARTINEZ,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether counsel's failure to raise a controlling issue pending in this Court in immigration removal proceedings constitutes ineffective assistance of counsel satisfying the requirements of 8 U.S.C. § 1326(d) for a collateral challenge to that deportation order in a subsequent prosecution for illegal reentry?
2. Whether a removal initiated by a notice to appear (NTA) that did not include the time and date of the hearing can support an illegal reentry conviction?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The defendant-petitioner, Jesus Leonardo Castillo-Martinez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, entered on October 27, 2021, is reported at United States v. Castillo-Martinez, 16 F.4th 906 (1st Cir. 2021), and can be found at Appendix A. The court's order denying the petition for rehearing, entered on January 24, 2022, can be found at Appendix C. The order of the United States District Court for the District of Massachusetts denying Castillo-Martinez's motion to dismiss can be found at Appendix B.

JURISDICTION

The Court of Appeals issued its opinion on October 27, 2021. Castillo-Martinez filed a petition for rehearing en banc, which was denied by the Court of Appeals on January 24, 2022. This petition is filed within 90 days of the First Circuit's denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1229 - Initiation of removal proceedings

(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:

***

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

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(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.

8 U.S.C. § 1326 – Reentry of removed aliens

(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. § 1003.14 - Jurisdiction and commencement of proceedings

(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.

8 C.F.R. § 1003.15 - Contents of the order to show cause and notice to appear and notification of change of address

(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.

8 C.F.R. § 1003.18 - Scheduling of cases

(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.

STATEMENT OF THE CASE

In 2012, the government initiated removal proceedings against Jesus Castillo-Martinez, a lawful permanent resident of the United States since 1981, via a Notice to Appear (NTA) based on a 1996 marijuana conviction.[1] The offense's classification as an aggravated felony subjected Castillo-Martinez to mandatory deportation. Another drug prior (OxyContin) which qualified as an aggravated felony was not listed in the NTA. Immigration counsel conceded removability, but unsuccessfully applied for a deferral of removal pursuant to the Convention Against Torture. At the time of counsel's concession, Moncrieffe v. Holder, 569 U.S. 184 (2013), a decision that ultimately established that the misdemeanor marijuana offense did not qualify as an aggravated felony, was pending before this Court. Counsel made no Moncrieffe-based argument and Castillo-Martinez was removed one week before Moncrieffe was decided in April 2013.

Castillo-Martinez was found in the United States in 2018 and charged with illegal re-entry. He collaterally attacked the prior removal order, arguing in a motion to dismiss that his 2012 NTA did not include the date and time of his removal hearing as required by Pereria v. Sessions, 138 S.Ct. 2105 (2018). Thus his NTA was void ab initio, making the subsequent removal order invalid. He further asserted that the underlying removal order was unlawful because it was based on a misclassification of a predicate offense, and he met the statutory requirements for such a challenge—exhaustion of administrative remedies (§ 1326(d)(1)), deprivation

[1] Citations are as follows: "Pet. App." refers to the Appendices to this petition.

of opportunity for judicial review (§ 1326(d)(2)), and fundamental unfairness (§ 1326(d)(3))—due to counsel's ineffective assistance during the removal proceedings. Namely, reasonably competent counsel would have been aware of the issue pending before this Court in Moncrieffe and that a decision in Moncrieffe was forthcoming, and would have challenged the classification of Castillo-Martinez's marijuana conviction as an aggravated felony in the immigration court.

The district court denied the motion, Pet. App. B., and a divided appellate panel affirmed the ruling. Pet. App. A. As to the Pereira challenge, the panel majority relied on its precedent which held that an NTA void of date and time information did not divest an immigration court of jurisdiction over a removal proceeding. Pet. App. A at 9 (citing United States v. Mendoza-Sanchez, 963 F.3d 158 (1st Cir. 2020), and Goncalves Pontes v. Barr, 938 F.3d 1 (1st Cir. 2019)).

The majority further concluded that Castillo-Martinez failed to satisfy any of the § 1326(d) prerequisites, and that an ineffective assistance of counsel claim, not raised in administrative proceedings, could not satisfy the requirements of showing administrative exhaustion or deprivation of judicial review. The recent decision in United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021), according to the majority, supported this holding because there this Court determined that "§ 1326(d)'s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable." Id. at 1621. In so holding, the majority acknowledged that pre-Palomar-Santiago, other circuits had held that ineffective assistance of counsel can excuse a failure to

satisfy § 1326 (d)(1) and (d)(2). It also concluded that immigration counsel did not render deficient performance because he made a strategic concession based on (1) then-binding precedent in Julce v. Mukasey, 530 F.3d 30 (1st Cir. 2008), abrogated by Moncrieffe, 569 U.S. at 187,[2] and (2) Castillo-Martinez's prior OxyContin conviction which would have qualified as an aggravated felony and supported removal. Moreover, counsel chose an alternative challenge to removal by applying for relief pursuant to the Convention Against Torture, evidencing counsel's decision to proceed with the best possible defense. See Pet. App. A.

The majority also concluded that Castillo-Martinez failed to show the prejudice required to establish ineffective assistance of counsel or fundamental unfairness under § 1326(d)(3). He did not demonstrate a reasonable probability he would not have been removed for another reason, nor did he show "a substantial likelihood that the result of the removal proceeding would have been different." Pet. App. A at 24, 31. While Castillo-Martinez asserted that the prejudice analysis should focus only on the basis listed in the NTA—the marijuana conviction—the majority held that it was not restricted to the information contained in the notice; it could consider any ground potentially available to the government. As the OxyContin conviction provided another basis for removal, even though it did not appear in the NTA, Castillo-Martinez could not establish a reasonable chance of relief from removal. Id.

[2] In Julce, the First Circuit held that possession with intent to distribute marijuana qualified as an aggravated felony. 530 F.3d 30.

In dissent, Judge Barron noted that Palomar-Santiago did not resolve the issue posed here—"what would suffice to demonstrate that [§ 1326 (d)(1) and (d)(2)] had been satisfied?" Pet. App. A at 45. As to (d)(3), the dissent observed that ineffective assistance could render removal proceedings fundamentally unfair. And here, there was a basis for a deficiency claim. At the time of counsel's concession, Moncrieffe was pending before this Court, there was a circuit split on the classification of marijuana distribution offenses, and Julce had already been undermined by intervening Supreme Court precedent. Pet. App. A at 48 n.17 (citing Nijhawan v. Holder, 557 U.S. 29 (2009)). Thus, counsel could have been expected to anticipate the Moncrieffe decision. Pet. App. A at 49.

Addressing the prejudice prong, the dissent concluded that counsel's failure to argue the Moncrieffe issue prevented Castillo-Martinez from reasonably presenting his case that removal based on the single ground listed in the NTA would be unlawful. It disagreed with the majority's conclusion that there was no prejudice because another removal order supported by an alternative basis could have been entered. Instead, Judge Barron cautioned that reviewing courts should focus on the lawfulness of the order entered rather than engage in "time-consuming hypothetical inquiries" that are contrary to a "more straightforward view of prejudice." Pet. App. A at 56-57. By the same token, a § 1326(d)(3) prejudice inquiry should focus on the order that was entered instead of a "hypothetical order of removal that never was . . . ." Pet. App. A at 57-58.

After issuance of the split decision, Castillo-Martinez filed a petition for rehearing en banc, which was also treated as a petition for rehearing before the original panel. It was denied, with Judge Thompson dissenting from the denial of en banc rehearing, and Judge Barron dissenting both from the denial of panel and en banc rehearing. This petition for a writ of certiorari follows. Pet. App. C.

REASONS FOR GRANTING THE PETITION

This case concerns important issues that sit at the core of a fair judicial system: notice of government action that restricts life, liberty, or property; effective assistance of counsel; and procedural mechanisms to correct unjust judicial acts. The decisions rendered below and in other circuit courts on these issues are not harmonized and have widespread impact—illegal re-entry cases are some of the most-heavily prosecuted cases in the federal system, second only to drug offenses. United States Courts, Criminal Federal Judicial Caseload Statistics 2019, Tbl. D3 (June 30, 2021), https://www.uscourts.gov/statistics/table/d-3/statistical-tables-federal-judiciary/2021/06/30. The ramifications extend even further because at its root, decisions on the contours of the effective assistance of counsel bear upon all criminal and removal cases.

In the absence of guidance from this Court, the collective body of counsel cannot be certain of the tasks required to render effective representation, and courts cannot remain cognizant of the appropriate standard to assess the constitutionality of counsel's performance. In addition, the standard for meeting the prerequisites for mounting a collateral attack on an underlying deportation order will vary for

defendants, depending on their locale. Finally, immigration courts will continue to take judicial action without adequate notice to a noncitizen, and consequently without jurisdiction for that action. As the lower courts have generated a circuit split on some of these issues and have decided an important question of federal law that should be resolved by this Court, this petition for a writ of certiorari should be granted. See Sup. Ct. Rule 10.

I. Conceding An Issue Pending Before The Supreme Court Constitutes Ineffective Assistance Of Counsel. This Court Should Resolve The Conflict Among The Circuit Courts As To Whether Ineffective Assistance Of Counsel Satisfies The Administrative Exhaustion Requirement Of § 1326(d)(1), Establishes The Deprivation Of The Opportunity For Judicial Review Required By § 1326(d)(2), And, Where The Results Of The Proceeding Under The Charging Document Would Likely Have Been Different Had Counsel Provided Effective Assistance, Renders A Removal Proceeding Fundamentally Unfair, Satisfying § 1326(d)(3).

A. Certiorari Should Be Granted To Determine Whether Conceding An Issue Pending Before The Supreme Court Constitutes Ineffective Assistance of Counsel.

Where an individual is represented by counsel in immigration proceedings, due process requires that counsel be competent. Lozada v. I.N.S., 857 F.2d 10, 13-14 (1st Cir. 1988). Competent counsel must be aware of the current legal landscape. See Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (2021) ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice."). Armed with this survey of the legal terrain, counsel must then make decisions which are objectively reasonable at the time in which they are made. As this Court stated in Hinton v. Alabama, 571 U.S. 263, 274 (2014), "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure

to perform basic research on that point is a quintessential example of unreasonable performance under Strickland [v. Washington, 466 U.S. 668 (1984)]."[3]

Here, counsel had conceded that petitioner's marijuana conviction was an aggravated felony supporting removability. The panel majority deemed this concession appropriate based on then controlling First Circuit precedent holding a conviction for Massachusetts possession with intent to distribute marijuana to be an aggravated felony (Julce, 530 F.3d at 35-36) notwithstanding the fact that a decision from this Court on that controlling issue was imminent. Not only had certiorari been granted in Moncrieffe, but oral argument had been held. That ongoing litigation would have been disclosed after basic legal research. As the dissent below noted, there also were other indicators that the First Circuit's precedent was on uncertain ground. There was a five-circuit split on whether marijuana distribution constituted an aggravated felony, and intervening precedent from this Court undercut Julce. In sum, reasonably competent counsel would have explored whether there had been any legal developments since Julce.

Nor would it have been unduly onerous for counsel to research this Court's current docket. This Court accepts a limited number of cases each year, and considering the ubiquity of online research platforms and other digital informational gateways, pending litigation can be ascertained with relative ease. Any legal research requirement that excludes pending Supreme Court litigation

[3] Although Strickland involves a Sixth Amendment framework, the same requisites of deficient performance and prejudice apply in the immigration context. Muyubisnay-Cungachi v. Holder, 734 F.3d 66, 72 (1st Cir. 2013).

allows counsel to be oblivious of litigation that could be fruitful to an individual's defense to government charges. Effective assistance of counsel cannot be obtained if counsel is permitted to guide an accused through complicated legal proceedings via legal tunnel vision.

Nonetheless, the panel majority concluded that counsel was under no obligation to ascertain whether a case pending in this Court could abrogate binding Circuit precedent central to whether petitioner was removable as charged, stating simply that "[a]bsent 'unusual circumstances,' 'the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law.' Powell v. United States, 430 F.3d 490, 491 (1st Cir. 2005) (quoting Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995))." Pet. App. A at 20. However, this Court has never construed this general principle to mean that counsel need not address determinative issues under review by this Court. This Court should now clarify that competent counsel must consider pending Supreme Court litigation in preparing a case in order to provide effective representation.

B. This Court Should Resolve a Circuit Split and Hold That Ineffective Assistance of Counsel Satisfies the Administrative Exhaustion Requirement of § 1326(d)(1) and Establishes the Deprivation of the Opportunity for Judicial Review Required by § 1326(d)(2).

The current § 1326(d) scheme is rooted in providing defendants a mechanism to challenge the validity of a prior deportation order. Indeed, the statute as it appears in its current form evolved after this Court held "where a determination made in an administrative proceeding is to play a critical role in the subsequent

imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." United States v. Mendoza-Lopez, 481 U.S. 828, 837-38 (1987) (emphasis in the original). Thus, a successful challenge under this statute requires satisfying three factors:

> (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 U.S.C. § 1326(d).

The Second and Ninth Circuits have held that a meritorious ineffective assistance claim justifies the absence of the exhaustion of administrative remedies under (d)(1), and establishes the deprivation of the opportunity for judicial review pursuant to (d)(2). See United States v. Lopez-Chavez, 757 F.3d 1033, 1044 (9th Cir. 2014) ("[C]ounsel's ineffectiveness . . . caused Lopez-Chavez's failure to exhaust administrative remedies and deprived him of his opportunity for judicial review.") but see United States v. Castellanos-Avalos, 22 F.4th 1142 (9th Cir. 2022) (questioning, but not addressing, the viability of its § 1326(d) analysis post-Palomar-Santiago); United States v. Cerna, 603 F.3d 32, 40-42 (2d Cir. 2010) (holding that ineffective assistance of counsel can satisfy the requirement that a noncitizen was improperly deprived of the opportunity for judicial review and can serve as grounds for excusing the administrative exhaustion requirement). The panel majority below disagreed, holding that ineffective assistance of counsel cannot

excuse a defendant's failure to exhaust administrative remedies or establish deprivation of an opportunity for judicial review.

The majority distinguished the decisions from the other circuits on the basis that they were issued prior to Palomar-Santiago. Palomar-Santiago held that "§ 1326(d)'s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable" and "the immigration judge's error on the merits[4] does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error." Id. at 1621 (emphasis added). Notably, it did not address the effect of immigration counsel's failure to provide the effective representation constitutionally mandated by due process on the requirements of § 1326(d). See United States v. Palacio-Arias, 2022 WL 1172167, *2 (4th Cir. 2022) (unpub.) ("[T]he [Palomar-Santiago] Court specifically noted that it did not address whether either the Due Process Clause or other 'freestanding constitutional' concerns would preclude application of Section 1326(d)'s otherwise-mandatory requirements in certain circumstances. More generally, the Palomar-Santiago Court never considered whether the noncitizen before it had, in fact, satisfied Section 1326(d), because 'the narrow question [the] Court granted certiorari to decide" asked only whether he was

[4] The substantive error in Palomar-Santiago did not become clear until six years after the defendant's removal when this Court determined in another case that offenses like his felony DUI conviction did not render a noncitizen removable. Id. at 1620. In this case, the potential change in the law regarding predicate classifications was imminent at the time of the removal hearing.

"excused from" doing so.'") (citations omitted).[5] Accordingly, the conflict among the circuits remains and should be resolved by this Court.

This Court should affirm the approach of the Second and Ninth Circuits. Navigating the immigration legal system is known for being a particularly complex task and counsel is positioned as an expert and guide in these complicated and extremely consequential waterways. As the Ninth Circuit has noted, "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' A lawyer is often the only person who could thread the labyrinth." Castro-O'Ryan v. United States Dep't of Immigration and Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal citations and quotation marks omitted). Moreover,

> For non-citizens at risk of deportation the consequences of inadequate counsel can be devastating. Because such incompetence undermines the fair and effective administration of justice, courts must be ever vigilant. We cannot countenance the circumstance in which the failure of counsel to meet the most basic professional standards denies the alien a meaningful opportunity for judicial review.

United States v. Cerna, 603 F.3d at 35-36. Due to the split acknowledged by the First Circuit, intercession from this Court is necessary.

[5] The court remanded the case before it for the district court to decide whether "counsel's ineffectiveness satisfied the [§ 1326(d)] requirements to further exhaust any administrative remedies available and deprived him of the opportunity for judicial review." United States v. v. Palacio-Arias, 2022 WL 1172167 (4th Cir. 2022).

C. This Court Should Resolve A Circuit Split And Hold That Where The Results Of The Proceeding Under The Charging Document Would Likely Have Been Different Had Counsel Provided Effective Assistance, A Removal Hearing Is Fundamentally Unfair, Thereby Satisfying § 1326(d)(3).

A § 1326(d) challenge cannot prevail absent a finding of fundamental unfairness. A fundamental unfairness assessment entails a review of the error alleged and any prejudice—meaning a reasonable likelihood of a different result—stemming from that error. United States v. Luna, 436 F.3d 312, 319 (1st Cir. 2006); United States v. Loaisiga, 104 F.3d 484, 487 (1st Cir. 1997). Here, the error lay in the validity of the grounds of removability. The removal order hinged solely upon a prior marijuana conviction being classified as an aggravated felony. Moncrieffe tells us that designation was erroneous. Yet that was the only basis for removability listed in the NTA.

The panel majority rejected the argument that it was confined to the four corners of the NTA in assessing prejudice. Instead, it held a basis for removability could be located elsewhere in the record, and the panel could presume that the government would have amended the NTA to include a new ground for deportation.

This analysis conflicts with the Ninth Circuit's jurisprudence. In United States v. Camacho-Lopez, 450 F.3d 928 (9th Cir. 2006), the Ninth Circuit explained that the deportee was "clearly [] prejudiced" because the NTA listed only one ground for removal—status as an aggravated felon—and the predicate offense no longer fit into that class of offenses. Id. at 930. The court has continued to apply that analysis. See United States v. Martinez, 786 F.3d 1227, 1230, 1233 n.2. (9th Cir.

2015) (cabining its analysis to the sole charge listed in the NTA and holding, "[w]here a prior removal order is premised on the commission of an aggravated felony, a defendant who shows that the crime of which he was previously convicted was not, in fact, an aggravated felony, has established both that his due process rights were violated and that he suffered prejudice as a result."); United States v. Lopez-Chavez, 757 F.3d at 1043 ("[H]ad counsel presented the Seventh Circuit with the question of which rule to adopt [i.e., does a state felony punishable as a federal misdemeanor qualify as an aggravated felony], Lopez–Chavez's order of removal would have been held unlawful and would not have gone into effect. Thus, Lopez–Chavez's counsel's ineffectiveness [(conceding the prior drug offense was an aggravated felony)] . . . actually did, "affect[ ] the outcome of the proceedings."); United States v. Ochoa-Oregel, 904 F.3d 682, 685-86 (9th Cir. 2018) ("[E]ven if the government might have been able to remove him on other grounds through a formal removal proceeding, his removal on illegitimate grounds is enough to show prejudice.");[6] cf. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (in the context of examining an agency decision, holding that reviewing courts "must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the

[6] The Ninth Circuit has determined that there is no prejudice where a conviction did not qualify as an aggravated felony under the statutory provision cited in the NTA but did qualify as an aggravated felony under another statutory provision. United States v. Martinez-Hernandez, 932 F.3d 1198 (9th Cir. 2019). But the court distinguished that scenario from those where it rejected the government's argument that the entry of an order could be based on an entirely new conviction and factual allegation never referenced in the NTA. Id. at 1204-05.

administrative action by substituting what it considers to be a more adequate or proper basis.").

The Ninth Circuit's mode of analysis is correct as it evaluates prejudice based on a settled record, rather than legal speculation. This Court should approve this method, rather than the First Circuit's attempt to intuit the government's response to an invalid NTA. As stated in the dissent below, courts should reject a system where "the actual order that was entered -- though itself unreliable proof of that element due to its insulation from judicial review and the unfairness of the proceedings that produced it -- may spring back into respectability whenever the record shows that some other order could have been entered to take its place." Pet. App. A at 58. A scheme where "the tainted and unlawful order may be used in that event to prove the crime without thereby causing any fundamental unfairness, because we can be confident that a different (though never entered) order could have taken its place" should also be avoided. Id. This is because adopting these approaches serves only to undermine the due process concerns addressed by this Court in Mendoza-Lopez. Based on the conflicts engendered by the panel majority's holding, and the importance of the issues presented, this case deserves consideration by this Court.

II. The Circuit Courts' Employ Inconsistent Analyses When Faced With Incomplete Notices To Appear, But Maintain That Defective Notices Still Trigger An Immigration Court's Jurisdiction. This Court Has Not Considered Whether The Service Of An Undated NTA Vests The Immigration Court With Jurisdiction. The Circuit Courts' Scatter-Gun Approach Necessitates This Court's Intervention.

Prior to 1997, deportation proceedings began with the service of two documents: an order to show cause (that did not have to contain the time and place of the hearing), and a second document giving notice of the time and place of the hearing. See 8 U.S.C. § 1252b(a) (repealed); see also Niz-Chavez v. Garland, 141 S. Ct. 1474, 1484 (2021) (detailing this history). A review of the relevant legislative history shows that in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified in part at § 1229, Congress abandoned the two-step system where time and place information was not required in the first document. See 8 U.S.C. § 1252b (repealed 1996) (outlining that a noncitizen would first be served with an order to show cause and a second document would provide time and place of hearing). The IIRIRA now requires that a noncitizen receive "a 'notice to appear,'" specifying, inter alia, the time and place of the hearing. 8 U.S.C. §§ 1229(a)(1).

One of the regulations promulgated to implement the IIRIRA states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]." 8 C.F.R. § 1003.14; see also 62 F.R. 444-01, at 444 (Jan. 3, 1997). Charging 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.

However, the regulations and statute differ in their content requirements. Per the statute, an NTA must include the time and place of the hearing. 8 U.S.C. § 1229(a)(1); see also Niz-Chavez, 141 S. Ct. at 1480-81 (noting that statute requires "'a' written notice containing all the required information"). The regulations do not require the inclusion of time-and-place information in an NTA. 8 C.F.R. § 1003.15 (listing NTA contents); see also 8 C.F.R. § 1003.18(b) (scheduling regulation stating that NTA need only contain time-and-place information "where practicable."). In fact, for years, the Department of Homeland Security (DHS) routinely served noncitizens with NTAs that did not include the hearing date. See Niz-Chavez, 141 S. Ct. at 1479.

This Court has considered the impact of this conflict on cancellation of removal, the "discretionary relief" available to some noncitizens who "have accrued 10 years of continuous physical presence in the United States." Pereira v. Sessions, 138 S. Ct. 2105, 2109 (2018) (citing 8 U.S.C. § 1229b(b)(1)). The stop-time rule provides that this 10-year period ends "when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1)(A). Section 1229(a) states that an NTA must include, inter alia, the time and place of the removal hearing. 8 U.S.C. § 1229(a)(1)(G)(i). In Pereira, this Court held 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)' and therefore does not trigger the stop-time rule." 138 S. Ct at 2110.

After Pereira, the government took the position that the stop-time rule was triggered when it served a noncitizen with a dated hearing notice after having served an undated NTA. See Matter of German Bermudez-Cota, 27 I&N Dec. 441 (BIA 2018); see also Niz-Chavez, 141 S. Ct. at 1479, 1485. Niz-Chavez rejected this two-step approach: "[T]he statute allows the government to invoke the stop-time rule only if it furnishes the alien with a single compliant document explaining what it intends to do and when." 141 S. Ct. at 1485. It held that § 1229(a)(1) "require[s] 'a' written notice containing all the required information." Id. at 1480.

Of note, neither Pereira nor Niz-Chavez considered the question posed here: whether the service of an undated NTA confers jurisdiction on the immigration court. Pereira, 138 S. Ct. at 2110; Niz-Chavez, 141 S. Ct. at 1479. Given the DHS's practice of serving undated NTAs, litigation surrounding this issue has percolated. In the absence of this Court's guidance, the circuit courts of appeals have failed to adopt a uniform approach to reconciling the differences between the statute and relevant regulatory provisions, and no Circuit has reached the correct result: an immigration judge does not have jurisdiction to remove a noncitizen until that person has been served with a single NTA that includes the hearing date.

A. Some Circuit Courts Have Erroneously Concluded That Jurisdiction Vests When An Undated NTA Is Served Because The Regulatory NTA Is Distinct From The Statutory NTA.

Some Courts have concluded that the regulatory and statutory NTAs are different and that jurisdiction vests when an undated NTA is served because the regulatory definition, not the statute, controls jurisdiction. See, e.g., United States

v. Mendoza-Sanchez, 963 F.3d 158, 161-62 (1st Cir. 2020) (holding that jurisdiction is governed by regulation and that "regulations do not concern the written notice contemplated" by statute)); Nkomo v. Attorney General, 930 F.3d 129 (3d Cir. 2019) (noting that statute does not mention "jurisdiction" and Pereira does not "implicate[] the IJ's authority to adjudicate"); United States v. Cortez, 930 F.3d 350, 363 (4th Cir. 2019) ("It is the regulatory definition of 'notice to appear,' and not § 1229(a)'s definition, that controls in determining when a case is properly docketed with the immigration court under 8 C.F.R. § 1003.14(a)."); Pierre-Paul v. Barr, 930 F.3d 684, 689 (5th Cir. 2019) (presenting alternate holdings, including that undated NTA "was not defective"), overruled on other grounds by Niz-Chavez, 141 S. Ct. at 1474; Santos-Santos v. Barr, 917 F.3d 486 (6th Cir. 2019) (including alternate holding that regulation governs jurisdiction); Ali v. Barr, 924 F.3d 983, 986 (8th Cir. 2019) (holding statute "says nothing about how jurisdiction vests in an immigration court" and regulations require dated NTA only "'where practicable'"); Karingithi v. Whitaker, 913 F.3d 1158, 1160 (9th Cir. 2019) (concluding that undated NTA confers jurisdiction because regulatory definition controls jurisdiction).

Several of these Circuits, including the panel in this case, reaffirmed these holdings after Niz-Chavez. See, e.g., Pet. App. A at 9-10 n.3 (finding itself bound by its pre-Niz-Chavez holding that regulation, not statute, defines jurisdiction); United States v. Vasquez Flores, 2021 WL 3615366, *2 & n.3 (4th Cir. 2021) (unpub.) (finding that Niz-Chavez does not undermine Cortez's conclusion that jurisdiction is determined by regulation, not statute); Maniar v. Garland, 998 F.3d 235, 242 n.2

(5th Cir. 2021) ("Niz-Chavez does not dislodge our ultimate holding in Pierre-Paul" that regulations govern jurisdiction); Ramos Rafael v. Garland, 15 F.4th 797, 800-01 (6th Cir. 2021) ("For jurisdictional purposes, it is not necessary that the Notice to Appear contain all the required information or that all the information be included in a single document."); Tino v. Garland, 13 F.4th 708, 709 n.2 (8th Cir. 2021) ("We . . . do not interpret Niz-Chavez as disturbing our jurisdiction-related precedent."); Perez v. Garland, 853 F. App'x. 189, 190 (9th Cir. 2021) (unpub.) (holding that Niz-Chavez did not impact Karingithi's holding that jurisdiction is governed by regulation and does not require service of dated NTA).

B. Other Circuit Courts Have Erroneously Held That Jurisdiction Vests When A Dated Hearing Notice Follows An Undated NTA.

After Pereira was decided, the BIA concluded that jurisdiction vests via a two-step process. See Bermudez-Cota, 27 I&N Dec. 441. It held that an undated NTA gives the immigration court jurisdiction "so long as a notice of hearing specifying this information is later sent to the alien." 27 I&N Dec. at 447. Later, a closely divided en banc BIA affirmed this two-step process and held that the stop-time rule is triggered when a dated hearing notice follows an undated NTA. Matter of Mendoza-Hernandez, 27 I&N Dec. 520, 535 (BIA 2019), but see Matter of M-F-O, 28 I&N Dec. 408, 416 n.13 (BIA 2021) ("We also overrule Matter of Mendoza-Hernandez[] to the extent it conflicts with the Court's holding in Niz-Chavez."). Several Circuit Courts followed the BIA. See Banegas Gomez v. Barr, 922 F.3d 101, 112 (2d Cir. 2019) ("[A]n NTA that omits information regarding the time and date of the initial removal hearing is nevertheless adequate to vest jurisdiction in the

Immigration Court, at least so long as a notice of hearing specifying this information is later sent to the alien."); Pierre-Paul, 930 F.3d at 689 ("[A]ssuming arguendo that the notice to appear were defective, the immigration court cured the defect by subsequently sending a notice of hearing that included the time and date of the hearing."); Santos-Santos, 917 F.3d at 486 (concluding immigration court takes jurisdiction when hearing notice follows undated NTA).

Niz-Chavez rejected the BIA's two-step interpretation in connection with the stop-time rule. 141 S. Ct. at 1486; see also Mendoza-Hernandez, 27 I&N Dec. at 539 (Guendelsberger, dissenting) (joining five other members of en banc BIA and insisting that plain text does not permit two-step process to trigger stop-time rule). Some Circuits have nonetheless reaffirmed the jurisdictional aspect of their holdings after Niz-Chavez. See, e.g., Chery v. Garland, 16 F.4th 980, 986-87 (2d Cir. 2021) ("[T]he jurisdictional holding of Banegas Gomez remains good law."); Maniar, 998 F.3d at 242 n.2; Ramos Rafael, 15 F.4th at 800-01.

C. Other Circuits Have Incorrectly Held That The Rule That An NTA Must Include The Hearing Date Is A Non-Jurisdictional Claims-Processing Rule.

Finally, some Circuits have held that an undated NTA is deficient, but the requirement that an NTA be dated is a waivable, non-jurisdictional claims-processing rule. See Pierre-Paul, 930 F.3d at 689 ("[A]ssuming arguendo that the notice to appear were defective and the defect could not be cured, 8 C.F.R. § 1003.14 is not jurisdictional. Rather, it is a claim-processing rule…."); Ortiz-Santiago v. Barr, 924 F.3d 956, 958 (7th Cir. 2019) (concluding that NTA must be dated and

two-step process cannot substitute, but date requirement is claims-processing rule); Lopez-Munoz v. Barr, 941 F.3d 1013, 1015-16 (10th Cir. 2019) (finding regulation and statute non-jurisdictional); Perez-Sanchez v. Attorney General, 935 F.3d 1148 (11th Cir. 2019) (finding neither statute nor regulation jurisdictional and dated NTA requirement claims-processing rule); see also United States v. Calan-Montiel, 4 F.4th 496, 497 (7th Cir. 2021) (reaffirming Ortiz-Santiago's conclusion that § 1229(a)(1) is a non-jurisdictional claims-processing rule after Niz-Chavez).

D. An Immigration Court Does Not Have Jurisdiction Over Removal Proceedings Until A Dated NTA Is Properly Served. The Statute Is Unambiguous In Its Requirement That Removal Proceedings Be Initiated By Service Of A Dated NTA. The Regulations Cannot Redefine An NTA to exclude Critical Information, An Undated NTA Does Not Supply Jurisdiction, A Two-Step Process Cannot Substitute, And This Defect Cannot Be Waived.

The Circuit Court analyses described supra, while divergent in approach, all arrive at same incorrect conclusion—jurisdiction is unaffected by a defective NTA. Section 1229, again entitled "Initiation of removal proceedings," states that a noncitizen must be served with an NTA, which must contain the time and place of the hearing. 8 U.S.C. § 1229(a)(1). The regulations implementing this statute provide that the immigration court takes jurisdiction when a noncitizen is served with an NTA. 8 C.F.R. §§ 1003.13 & 1003.14. Despite the fact that the regulations require an NTA to contain time-and-place information only "where practicable," 8 C.F.R. §§ 1003.15 & 1003.18(b), it is "absurd" to view the statutory NTA and the regulatory NTA as distinct. Ortiz-Santiago v. Barr, 924 F.3d at 961-62; see also De La Rosa v. Garland, 2 F.4th 685, 687-88 (7th Cir. 2021) (noting that Niz-Chavez "ratified" this holding). Courts "normally presume that the same language in

related statutes carries a consistent meaning," United States v. Davis, 139 S. Ct. 2319, 2329 (2019); see also Pereira, 138 S. Ct. at 2115, and the regulations defining the NTA cite 8 U.S.C. § 1229 as their "authority." 8 C.F.R. §§ 1003.15 & 1003.18(b).

Section 1229 requires that a dated NTA must be served before removal proceedings are initiated, and it is indisputable that jurisdiction vests when a proceeding is properly initiated. The plain language of the statute supports the conclusion that Congress intended that a properly dated NTA would confer jurisdiction, and courts "must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A. v. National Resources Defense Council, 467 U.S. 837, 842-43 (1984); see also Niz-Chavez, 141 S. Ct. at 1485 ("[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.'" (quoting Pereira, 138 S. Ct. at 2118)). Even though the regulations mirror the pre-IIRIRA two-step system that Congress replaced, compare 8 C.F.R. §§ 1003.15 & 1003.18(b) with 8 U.S.C. § 1252b(a) (repealed) & 8 U.S.C. § 1229(a), the regulations cannot revive the rejected system or override the unambiguous legislative choice to require a dated NTA. See Utility Air Regulatory Group v. E.P.A., 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."); Niz-Chavez, 141 S. Ct. at 1486 ("[N]o amount of policy-talk can overcome a plain statutory command."); De La Rosa, 2 F.4th at 688 ("Section 1229(a) spells out what 'shall' be included in the Notice to Appear. Congress

created these requirements, and it is not for us or the Department to pick and choose when or how to alter them.").

As in Pereira, "[t]he plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion." 138 S. Ct. at 2110; see also Niz-Chavez, 141 S. Ct. at 1481-84 ("[A] long parade of textual and contextual clues persuade us of this statute's ordinary meaning."). Congress enacted IIRIRA in part because "'lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [had led] some immigration judges to decline to exercise their authority to order an alien deported in absentia.'" Pereira v. Sessions, 866 F.3d 1, 7 (1st Cir. 2017) (quoting H.R. Rep. 104-469, pt. I, at 122), overruled on other grounds by Pereira, 138 S. Ct. 2105. Congress devised the new system "to prevent 'protracted disputes concerning whether an alien has been provided proper notice of a proceeding,'" id., and allowing undated NTAs to confer jurisdiction would thwart this intent and reintroduce the specter of non-appearances due to insufficient notice. See Pereira, 138 S. Ct. at 2115 ("Conveying such time-and-place information 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.").

Moreover, allowing an undated NTA to provide jurisdiction disregards this Court's important, notice-based concerns. In Pereira, this Court wrote that "the omission of time-and-place information is not, as the dissent asserts, some trivial, ministerial defect, akin to an unsigned notice of appeal." Pereira, 138 S. Ct. at 2116

(distinguishing Becker v. Montgomery, 532 U.S. 757, 763 (2001)). "Failing to specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character.'" Id. (quoting id. at 2127, n.5 (Alito, J., dissenting)). Citing Pereira, a Ninth Circuit panel wrote:

> [T]he primary function of a Notice to Appear is to give notice, which is essential to the removal proceeding . . . . Each of those cases allowed litigants to correct trivial or ministerial errors. The requirements of a Notice to Appear, however, are "substantive." Substantive defects may not be cured by a subsequent Notice of Hearing that likewise fails to conform with the substantive requirements of Section 1229(a)(1). As nothing precludes DHS from issuing a Notice to Appear that conforms to the statutory definition, that is the appropriate course of action for the agency to follow in such situations.

Lopez v. Barr, 925 F.3d 396, 404, reh'g granted, 948 F.3d 989 (9th Cir. 2020).[7] As the Ninth Circuit notes, a subsequent Notice of Hearing is an inadequate substitute for a properly dated NTA. Like the stop-time rule in § 1229b, § 1229 describes a single document initiating removal proceedings. 8 U.S.C. § 1229(a); see also 8 C.F.R. § 1003.14 ("[j]urisdiction vests…when a charging document is filed with the Immigration Court by the Service" (emphasis added)). The NTA form requires that a government agent certify when and how it was served and that oral notice of the time and place of the hearing was provided. The notice of hearing requires no such certification or explanation. The statute requires that the NTA be issued at least 10 days before the hearing so that the notice is meaningful. 8 U.S.C. § 1229(b)(1). A notice of hearing has no such requirement. 8 C.F.R. § 1003.18. The protections

[7] Lopez was ultimately remanded to the BIA for reconsideration in light of Niz-Chavez. Lopez v. Garland, 998 F.3d 851 (9th Cir. 2021).

associated with the NTA are meant to ensure that the noncitizen knows when the hearing will be and has a meaningful opportunity to obtain representation. See Pereira, 138 S. Ct. at 2115. Serious consequences can flow from a noncitizen's failure to appear—including possible removal in absentia, 8 U.S.C. § 1229a(5), and the critical information in an NTA cannot be separated into a secondary document lacking these protections.

The same concerns arise if the requirement that an NTA include the hearing date is viewed as waivable and non-jurisdictional. Time-and-place information is not a mere formality. See Pereira, 138 S. Ct. at 2116 (describing "time and place of removal proceeding" as "integral information"); Lopez, 925 F.3d at 404 ("[T]he primary function of a Notice to Appear is to give notice, which is essential to the removal proceeding…."); Niz-Chavez, 141 S. Ct. at 1486 ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.").

A single-document encompassing time and date information meets the dual goals of comporting with Congressional intent and addressing the due process concerns that accompany the alternative two-step process. Because the current scheme employed by immigration courts runs afoul of the noncitizen's due process rights and permits removal in the absence of a court's jurisdiction, the time is now for this Court to address this issue.

CONCLUSION

For the foregoing reasons, Petitioner Castillo-Martinez respectfully requests that the Court grant the writ of certiorari.

Respectfully submitted,

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