No. 21-7762

IN THE SUPREME COURT OF THE UNITED STATES

JESUS LEONARDO CASTILLO-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner satisfied all of the prerequisites in 8 U.S.C. 1326(d) for mounting a collateral attack on a prior removal order in a criminal prosecution for unlawfully reentering the United States.

2. Whether the immigration court lacked jurisdiction over petitioner's removal proceedings because the original notice to appear filed with the immigration court did not specify the date and time of his removal hearing.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Mass.):

United States v. Castillo-Martinez, No. 18-cr-10247 (Sept. 20, 2019)

United States Court of Appeals (1st Cir.):

United States v. Castillo-Martinez, No. 19-1971 (Oct. 27, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 16 F.4th 906. The memorandum and order of the district court (Pet. App. 62-68) is reported at 378 F. Supp. 3d 46.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2021. A petition for rehearing was denied on January 24, 2022 (Pet. App. 79-80). The petition for a writ of certiorari was filed on April 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of unlawful reentry into the United States following removal, in violation of 8 U.S.C. 1326(a). Judgment 1. He was sentenced to time served, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-61.

1. Section 1326(a) of Title 8 generally makes it unlawful for a noncitizen to reenter the United States after having been removed unless he obtains the prior consent of the Attorney General (or the Secretary of Homeland Security). 8 U.S.C. 1326(a); see 6 U.S.C. 202(3)-(4), 557. Under 8 U.S.C. 1326(d), a defendant charged with violating Section 1326 may collaterally attack his prior removal order if he satisfies three statutory prerequisites. The noncitizen must show (1) that he "exhausted any administrative remedies that may have been available," (2) that the "deportation proceedings at which the order was issued improperly deprived [him of] the opportunity for judicial review," and (3) that "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). Because those "requirements are connected by the conjunctive 'and,' * * * defendants must meet all three" of them. United States v. Palomar-Santiago, 141 S. Ct. 1615, 1620-1621 (2021).

2. Petitioner was born in the Dominican Republic and was admitted to the United States as a lawful permanent resident in

1981. Pet. App. 3. In 1996, petitioner was convicted in Massachusetts state court of "'knowingly or intentionally manufactur[ing], distribut[ing], dispens[ing], or cultivat[ing]' marijuana." Id. at 3-4 (quoting and adding brackets to Mass. Gen. Laws ch. 94c, § 32C (2018)).

In February 2011, a New Hampshire grand jury indicted petitioner for conspiring to sell roughly 15,000 tablets of OxyContin for approximately $272,000, in violation of N.H. Rev. Stat. Ann. § 318-B:2(I) (2010). Pet. App. 4. While petitioner awaited his state-court trial, U.S. Immigration and Customs Enforcement (ICE) lodged a detainer against him. Ibid. Petitioner was convicted on the state charge and received a suspended sentence and probation. Ibid.; see id. at 64.

Petitioner was then "transferred into ICE custody and removal proceedings were initiated against him." Pet. App. 64. The Department of Homeland Security served petitioner with a notice to appear alleging that he was removable from the United States under 8 U.S.C. 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony. Pet. App. 4. The notice to appear cited petitioner's Massachusetts marijuana-distribution conviction and stated that the date and time of petitioner's hearing were "to be set." Ibid.; C.A. App. 22-23.

Petitioner was represented by counsel in his removal proceedings. Pet. App. 4-5. Petitioner conceded removability but applied for discretionary relief in the form of deferral of removal under

the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, which the immigration judge denied. Pet. App. 4-5. Petitioner appealed to the Board of Immigration Appeals (Board), raising only his claim for relief under the Convention Against Torture. Id. at 5, 64. The Board denied the petition, and petitioner was removed to the Dominican Republic in 2013. Id. at 5, 64-65.

Petitioner returned to the United States. Pet. App. 5. In April 2016, he was arrested in Florida on another controlled-substance charge. Ibid. Petitioner's removal order was reinstated, and in November 2016, he was again removed to the Dominican Republic. Ibid.

3. Petitioner returned to the United States once again. Pet. App. 6. In 2018, he was arrested in Massachusetts and charged with trafficking heroin. Ibid. A federal grand jury in the District of Massachusetts then indicted petitioner for unlawfully reentering the United States following removal, in violation of 8 U.S.C. 1326(a) and (b)(2). Indictment 1.

a. Petitioner moved to dismiss the unlawful-reentry charge, seeking to collaterally attack his prior removal order on two bases. Pet. App. 6. First, petitioner contended that the immigration court that entered his removal order lacked jurisdiction because the notice to appear did not include a specific date and

time for his hearing. Ibid. The government responded that the failure to include date and time information in the initial notice to appear did not defeat the immigration court's jurisdiction, because the notice satisfied the regulation that addresses the immigration court's jurisdiction and because petitioner later received notice of the initial hearing's date and time and, after requesting and receiving continuances of the hearing, personally appeared in the immigration court. D. Ct. Doc. 37, at 4-5, 8 n.11, 12-17 (Mar. 5, 2019). Second, petitioner contended that his marijuana conviction did not constitute an aggravated felony in light of Moncrieffe v. Holder, 569 U.S. 184 (2013), which this Court decided after his removal, and that his immigration counsel had therefore rendered ineffective assistance by failing to challenge whether the conviction so qualified. Pet. App. 6. In response, the government contended, among other things, that petitioner had not satisfied any of the three prerequisites in Section 1326(d) for mounting a collateral challenge to a removal order in a prosecution for unlawful reentry. Pet. App. 6-7; see D. Ct. Doc. 37, at 17-25.

b. The district court denied petitioner's motion to dismiss the indictment. Pet. App. 62-78. The court first held that the immigration judge had jurisdiction to enter the removal order because petitioner "was served with a [notice to appear] containing all of the" information that was "required" under the "regulatory definition of [a] [notice to appear] for purposes of vesting ju-

risdiction" in the immigration court, and petitioner was "presumably served a separate Notice of Hearing informing him of the time and place of his removal hearing (given that he actually appeared at that hearing)." Id. at 73.

The district court further held that petitioner had not satisfied Section 1326(d)'s requirements for a collateral challenge to his previous removal order because he "concede[d] that he failed to exhaust his administrative remedies and was not denied an opportunity for judicial review." Pet. App. 75. The court stated that even if ineffective assistance of counsel could excuse noncompliance with Section 1326(d), petitioner had not shown that his counsel's performance was deficient or that he suffered prejudice. Id. at 76. The court explained that counsel's determination that petitioner had been convicted of an aggravated felony "was based on the controlling law in the First Circuit at that time." Ibid. In addition, even if petitioner's marijuana conviction had not been considered an aggravated felony, he "would not have been allowed automatically to remain in the United States." Id. at 77. Rather, petitioner's marijuana conviction still would have qualified as a controlled-substance conviction, so petitioner "would have had to apply for and be granted discretionary relief from removal." Ibid. (citing 8 U.S.C. 1227(a)(2)(B)(i)). Petitioner, however, did not "argue that he would likely have been granted such relief." Ibid. For the same reasons, petitioner could not

show that the entry of his prior removal order was fundamentally unfair, as required by Section 1326(d)(3). Id. at 76-77.

Petitioner entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss the indictment. Pet. App. 8. The district court sentenced petitioner to time served, to be followed by three years of supervised release. Ibid.

4. The court of appeals affirmed. Pet. App. 1-61.

a. The court of appeals first observed that it had already "considered and rejected" the argument that the omission of a hearing date and time from a notice to appear deprives the immigration court of jurisdiction over removal proceedings. Pet. App. 9 (citing United States v. Mendoza, 963 F.3d 158, 161 (1st Cir.), cert. denied, 141 S. Ct. 834 (2020)). The court further determined that this Court's recent decision in Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), which addressed the stop-time rule of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, "did not suggest that a single-document [notice to appear] is also required to establish [the immigration court's] jurisdiction." Pet. App. 9 n.3.

b. The court of appeals also rejected petitioner's argument that his removal was invalid because his prior marijuana conviction did not qualify as an aggravated felony under Moncrieffe. Pet. App. 10-33. The court explained that petitioner "has not met any of the three statutory requirements" for collaterally attacking a prior removal order under Section 1326(d). Id. at 11.

The court of appeals explained that petitioner "fails to satisfy the first two statutory requirements of § 1326(d)" because he "neither exhausted his administrative remedies nor was he deprived of an opportunity for judicial review." Pet. App. 11. In fact, petitioner "conceded that he ha[d] not met the first two § 1326(d) requirements in the traditional sense." Id. at 12. But he argued that his failure should be excused because his immigration counsel was ineffective. Id. at 13. The court disagreed, explaining that "[t]he text of § 1326(d) and the Supreme Court's decision in Palomar-Santiago do not support excusing [petitioner's] failure to satisfy the statutory requirements." Ibid. The court observed that Palomar-Santiago held that "when Congress uses mandatory language in an administrative exhaustion provision, a court may not excuse a failure to exhaust." Id. at 14 (quoting 141 S. Ct. at 1621) (brackets, emphasis, and internal quotation marks omitted). And Palomar-Santiago reasoned that administrative and judicial review were not "unavailable" simply because the immigration judge's determination that the noncitizen was removable turned out to be erroneous in light of subsequent judicial decisions. Ibid. (quoting Palomar-Santiago, 141 S. Ct. at 1621). "Administrative review of removal orders exists precisely so noncitizens can challenge the substance of immigration judges' decisions." Ibid. (quoting Palomar-Santiago, 141 S. Ct. at 1621). The court stated that Palomar-Santiago's reasoning "applies equally to [petitioner]" because the Board "'provides a process for adjudicating ineffective

assistance of counsel claims through a motion to reopen,'" yet petitioner did "not explain why he never moved to reopen his removal proceedings after Moncrieffe." Id. at 15 (quoting Gicharu v. Carr, 983 F.3d 13, 17 (1st Cir. 2020)).

Next, the court of appeals held that "[e]ven assuming" petitioner could "satisfy § 1326(d)'s first two requirements," he had "not shown that 'the entry of the order was fundamentally unfair'" for purposes of Section 1326(d)(3). Pet. App. 18 (quoting 8 U.S.C. 1326(d)(3)). Petitioner contended that he could "satisfy this third requirement" by "demonstrating ineffective assistance of counsel," but the court determined that he had "not met his burden of showing that his immigration counsel was ineffective on the record before us." Ibid. Immigration counsel's concession that petitioner was removable "was based on longstanding and controlling First Circuit precedent." Id. at 20 (citing Julce v. Mukasey, 530 F.3d 30, 35 (1st Cir. 2008)). And even if counsel might have "predict[ed] the Supreme Court would overturn" that precedent in Moncrieffe, counsel "had strategic reasons for conceding removability." Id. at 20-21. Counsel reasonably could have determined that any objection to the classification of petitioner's marijuana conviction "would be futile" given petitioner's conviction for conspiracy to sell OxyContin, which "qualifie[d] as an aggravated felony and would have provided a standalone basis for mandatory removal." Ibid.; see id. at 22 n.7 (noting that the government could have amended the notice to appear to include this convic-

tion). And this was "not a case where counsel gave up 'the only defense available'"; rather, counsel assisted petitioner in applying for deferral of removal under the Convention Against Torture. Id. at 22 (citation omitted).

The court of appeals further determined that petitioner could not "show prejudice resulting from his immigration counsel's actions." Pet. App. 23. First, "[e]ven if [petitioner's] marijuana conviction had not been classified as an aggravated felony," it would have been a controlled-substance offense under Section 1227(a)(2)(B)(i), and petitioner "would have had to apply for and receive discretionary relief to avoid deportation." Ibid. Because petitioner "made no argument that he would have applied for" and received discretionary relief, he had not shown "a reasonable probability he would not have been removed." Ibid. Second, petitioner failed to show "that he would not have been subject to mandatory removal because of his separate OxyContin conviction." Id. at 24. "Even if he had successfully challenged the earlier aggravated felony classification for his Massachusetts offense, the government could have freely amended the [notice to appear] to include other grounds for removal." Ibid.

Finally, the court of appeals held that petitioner "fail[ed] to satisfy the distinct statutory prejudice requirement under § 1326(d)." Pet. App. 24. The court stated that it had to "assess [petitioner's] chances of relief from removal as a key part of the due process fundamental fairness inquiry embodied in the statutory

bar to such collateral attacks." Id. at 26. The court determined that petitioner's "chances of relief from removal were nonexistent" because it was "inconceivable that the government would not have amended his removal order to add the more serious OxyContin conviction if the marijuana conviction could not serve as a basis for removal." Ibid.

c. Judge Barron dissented. Pet. App. 35-61. He agreed with the majority that there was "no merit" to petitioner's claim that the immigration judge lacked jurisdiction to enter the removal order. Id. at 37 n.12. But, in his view, the district court erred in determining that immigration counsel's performance was adequate, and the court of appeals majority erred in analyzing prejudice. Id. at 49, 51-57. Thus, Judge Barron would have "vacate[d] the District Court's ruling, insofar as it is dependent on [the] finding of no 'deficient performance,'" and remanded for the district court to "determine in the first instance if there is some other basis" for finding that petitioner failed to show "deficient performance" by counsel. Id. at 49-50; see id. at 61.

5. The court of appeals denied a petition for rehearing. Judge Barron dissented from the denial of panel and en banc rehearing and Judge Thompson dissented from the denial of en banc rehearing. Pet. App. 79.

ARGUMENT

Petitioner first contends (Pet. 10-18) that the court of appeals erred in determining that he failed to satisfy the statutory

requirements of 8 U.S.C. 1326(d). Petitioner's argument lacks merit, and this case would be a poor vehicle for review of the first question presented.

Petitioner further contends (Pet. 19-29) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear lacked date and time information. The court of appeals decision is correct, and petitioner has not identified any court of appeals in which the outcome of his case would be different. The Court has recently and repeatedly denied petitions for writs of certiorari raising the same issue, and the same result is warranted here.[1]

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[1] See, e.g., Garcia v. Garland, 142 S. Ct. 1130 (2022) (No. 21-5928); Roman-Vega v. Garland, 142 S. Ct. 745 (2022) (No. 21-310); Ambriz-Valdovinos v. United States, 142 S. Ct. 210 (2021) (No. 20-8465); Uceda-Alvares v. Garland, 142 S. Ct. 105 (2021) (No. 20-1740); Pineda-Sabillon v. Garland, 141 S. Ct. 2852 (2021) (No. 20-1173); Calleja v. Garland, 141 S. Ct. 2791 (2021) (No. 20-842); Agustin-Pineda v. United States, 141 S. Ct. 2744 (2021) (No. 20-7969); Aguilar-Molina v. Garland, 141 S. Ct. 2723 (2021) (No. 20-1433); Herrera-Fuentes v. United States, 141 S. Ct. 1447 (2021) (No. 20-6962); Rodriguez-Garcia v. United States, 141 S. Ct. 1393 (2021) (No. 20-967); Castruita-Escobedo v. United States, 141 S. Ct. 1249 (2021) (No. 20-6462); Moreno-Rodriguez v. United States, 141 S. Ct. 1122 (2021) (No. 20-6464); Avalos-Rivera v. United States, 141 S. Ct. 1114 (2021) (No. 20-6362); Zuniga v. United States, 141 S. Ct. 934 (2020) (No. 20-6195); Gomez v. United States, 141 S. Ct. 838 (2020) (No. 20-5995); Mendoza-Sanchez v. United States, 141 S. Ct. 834 (2020) (No. 20-5925); Lira-Ramirez v. United States, 141 S. Ct. 830 (2020) (No. 20-5881); Vana v. Barr, 141 S. Ct. 819 (2020) (No. 20-369); Fermin v. Barr, 141 S. Ct. 664 (2020) (No. 20-53); Bhai v. Barr, 141 S. Ct. 620 (2020) (No. 20-22); Milla-Perez v. Barr, 141 S. Ct. 275 (2020) (No. 19-8296); Castro-Chavez v. Barr, 141 S. Ct. 237 (2020) (No. 19-1242); Mayorga v. United States, 141 S. Ct. 167 (2020) (No. 19-7996); Cantu-Siguero v. United States, 141 S. Ct. 166 (2020) (No. 19-7821); Pineda-Fernandez v. United States, 141 S. Ct. 166 (2020) (No. 19-7753); Ferreira v. Barr, 140 S. Ct. 2827 (2020) (No. 19-1044); Ramos v.

1. The court of appeals correctly held that petitioner failed to satisfy the requirements in Section 1326(d) for collaterally attacking a removal order.

a. As the court of appeals observed, petitioner "conceded that he has not met the first two § 1326(d) requirements in the traditional sense." Pet. App. 12; see id. at 74. Petitioner failed to exhaust his administrative remedies because he never presented to the immigration judge or the Board the claim that his Massachusetts marijuana conviction was not an aggravated felony. Id. at 5, 64-65. Nor was petitioner "improperly deprived * * * of the opportunity for judicial review." 8 U.S.C. 1326(d)(2). Rather, with the assistance of counsel, petitioner chose not to challenge the basis for his removability, focusing instead on his request for discretionary relief. Pet. App. 5.

Petitioner contends (Pet. 12-15) that ineffective assistance of immigration counsel "satisfies" or "establishes" Section 1326(d)'s first two requirements. Pet. 12 (capitalization and emphasis omitted). As an initial matter, however, noncitizens

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Barr, 140 S. Ct. 2803 (2020) (No. 19-1048); Pedroza-Rocha v. United States, 140 S. Ct. 2769 (2020) (No. 19-6588); Nkomo v. Barr, 140 S. Ct. 2740 (2020) (No. 19-957); Gonzalez-De Leon v. Barr, 140 S. Ct. 2739 (2020) (No. 19-940); Mora-Galindo v. United States, 140 S. Ct. 2722 (2020) (No. 19-7410); Callejas Rivera v. United States, 140 S. Ct. 2721 (2020) (No. 19-7052); Araujo Buleje v. Barr, 140 S. Ct. 2720 (2020 (No. 19-908); Pierre-Paul v. Barr, 140 S. Ct. 2718 (2020) (No. 19-779); Karingithi v. Barr, 140 S. Ct. 1106 (2020) (No. 19-475); Kadria v. Barr, 140 S. Ct. 955 (2020) (No. 19-534); Banegas Gomez v. Barr, 140 S. Ct. 954 (2020) (No. 19-510); Perez-Cazun v. Barr, 140 S. Ct. 908 (2020) (No. 19-358); Deocampo v. Barr, 140 S. Ct. 858 (2020) (No. 19-44).

have no right to appointed counsel in immigration proceedings. See, e.g., Romero v. United States INS, 399 F.3d 109, 112 (2d Cir. 2005); Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004). Congress has instead provided by statute that noncitizens shall have the "privilege" of being represented by the counsel of their choice "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (providing that a party may appear through counsel in any court of the United States). Accordingly, when a noncitizen invokes that privilege and retains a lawyer to represent him in removal proceedings, counsel's actions are attributed to the client, who must "bear the risk of attorney error." Coleman v. Thompson, 501 U.S. 722, 752-753 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)); see Wainwright v. Torna, 455 U.S. 586, 587-588 (1982) (per curiam).

Even assuming, as the First Circuit has previously held, that "ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case," Pet. App. 19 (quoting Fustaguio Do Nascimento v. Mukasey, 549 F.3d 12, 17 (1st Cir. 2008)) (brackets omitted), petitioner's allegations of ineffectiveness would provide no basis for excusing his failure to comply with Section 1326(d)(1) and (2). As the court of appeals observed, the Board "provides a process for adjudicating ineffective assistance of counsel claims through a motion to reopen." Id. at 15 (quoting

Gicharu v. Carr, 983 F.3d 13, 17 (1st Cir. 2020)); see 8 C.F.R. 1003.2(c)(1). Some courts have treated motions to reopen as satisfying the exhaustion requirement of Section 1326(d)(1). See, e.g., United States v. Copeland, 376 F.3d 61, 67 (2d Cir. 2004); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003). In doing so, they have noted that a noncitizen's claims generally should "be first presented to the [Board] because * * * the [Board] can reopen the proceedings" and develop an evidentiary record to assist in evaluating the noncitizen's claims. Perez, 330 F.3d at 101 (citation and internal quotation marks omitted). Because that administrative remedy was available for an ineffective-assistance claim, petitioner is incorrect in contending that an allegation of ineffective assistance necessarily satisfies the administrative-exhaustion and deprivation-of-judicial-review requirements in Section 1326(d)(1) and (d)(2).

Petitioner also errs in asserting that this Court's intervention is required to "resolve a circuit split" as to whether allegations of ineffective assistance satisfy Section 1326(d)(1) and (2). Pet. 12 (capitalization and emphasis omitted). Petitioner points out that the Second and Ninth Circuits have held that in certain circumstances, an attorney's failure to appeal a deportation order may constitute ineffective assistance of counsel that satisfies or excuses compliance with Section 1326(d)'s first two requirements. Pet. 13; see United States v. Lopez-Chavez, 757 F.3d 1033, 1044 (9th Cir. 2014); United States v. Cerna, 603 F.3d

32, 40-42 (2d Cir. 2010). But as petitioner acknowledges (Pet. 13), the Ninth Circuit has already recognized that this Court's decision in United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021), "has called at least some aspects of this framework into question." United States v. Castellanos-Avalos, 22 F.4th 1142, 1146 (9th Cir. 2022). And neither court of appeals has reaffirmed those decisions since Palomar-Santiago. Cf. United States v. Ruiz-Solis, No. 20-50265, 2022 WL 118644, at *1 (9th Cir. 2022) (assuming, "for the sake of argument, that ineffective assistance of counsel can excuse compliance with § 1326(d)(1)-(2) following Palomar-Santiago"). Review of any tension among the courts of appeals is therefore not warranted.

b. Moreover, even if noncitizens had a right to effective assistance of counsel in removal proceedings, and even if ineffective assistance could satisfy or excuse the requirements in Section 1326(d)(1) and (2), petitioner could not show that his immigration counsel's performance was deficient.

As the court of appeals explained, counsel's "strategic concession" that petitioner was removable based on his marijuana-distribution conviction was consistent with then-governing circuit precedent. Pet. App. 20. And counsel reasonably could have concluded that any attempt to challenge removal based on this Court's pending decision in Moncrieffe would have been futile because petitioner had another conviction for conspiracy to sell OxyContin that was indisputably an aggravated felony. See id. at 20-22. In

addition, counsel did not simply fail to contest removability, but instead made a "strategic choice," "elect[ing] to focus on one defense to removal rather than another": deferral of removal in light of a Convention Against Torture claim that was pursued before the immigration judge and the Board. Id. at 22.

Petitioner nonetheless contends that "conceding an issue pending before the Supreme Court" automatically "constitutes ineffective assistance of counsel" in the immigration context. Pet. 10 (capitalization altered; emphasis omitted). Although petitioner asks this Court to adopt such a bright-line rule (Pet. 10-12), he cites no authority to support one. Indeed, it would be inappropriate to hold that counsel is always ineffective for failing to contest removal where an issue potentially affecting that removal is pending before this Court. In the Sixth Amendment context, the Court has emphasized that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland v. Washington, 466 U.S. 668, 688 (1984). Establishing a "particular set of detailed rules for counsel's conduct" would interfere with the "independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-689; see Roe v. Flores-Ortega, 528 U.S. 470, 781 (2000) (observing that the Court has "consistently declined to impose mechanical rules on counsel").

To be sure, counsel may perform deficiently by failing to raise and preserve an issue that is pending before this Court.

Cf. Hinton v. Alabama, 571 U.S. 263, 274 (2014) (per curiam) (noting, in the Sixth Amendment context, that counsel has a duty to "perform basic research" where counsel is "ignoran[t] of a point of law that is fundamental to his case"). But the inquiry necessarily must be made on a case-by-case basis, evaluated "from counsel's perspective at the time." Strickland, 466 U.S. at 689. And in the immigration context, there may be any number of reasons why competent counsel would advise against contesting removability even in the face of a potentially favorable decision from this Court, such as counsel's knowledge that the noncitizen is removable on another ground and that contesting removal will only protract the proceedings to the noncitizen's detriment. See Pet. App. 22 n.7.

Aside from urging this Court to adopt an inflexible rule, petitioner does not otherwise challenge the court of appeals' determination that his immigration counsel rendered adequate performance. See Pet. 10-12. And any such fact-specific argument would not warrant this Court's review in any event. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.").

c. Finally, the court of appeals correctly held that petitioner failed to show prejudice either as part of the ineffective-assistance inquiry, or as required to demonstrate that the entry

of his removal order was "fundamentally unfair" for purposes of Section 1326(d)(3).[2]

Petitioner's removal order was based on his prior conviction for a marijuana offense that, at the time, was an "aggravated felony" under governing circuit law. Although that circuit law was later abrogated by Moncrieffe, petitioner's marijuana conviction still would have qualified as a controlled-substance offense under Section 1227(a)(2)(B)(i), such that he would have had to apply for and receive discretionary relief to avoid removal. Pet. App. 23; see Moncrieffe, 569 U.S. at 204 ("Escaping aggravated felony treatment" means "only avoiding mandatory removal"; "[a]ny marijuana distribution offense, even a misdemeanor, will still render a noncitizen deportable as a controlled substance offender"). Yet petitioner "made no argument [below] that he would have applied for such discretionary relief"; nor did "he offer[] any affirmative reasons why that relief would have been warranted." Pet. App. 23. Moreover, at the time of petitioner's removal, he also had a conviction for conspiracy to sell OxyContin that "would have provided a standalone basis for mandatory removal" -- and the government could have added that charge at any time during the proceedings. Id. at 20. The court of appeals thus correctly determined that petitioner could not show a reasonable probability

[2] Petitioner appears to contest the court of appeals' prejudice analysis only under Section 1326(d)(3). See Pet. 16-18.

that he would have avoided removal if his marijuana conviction had not been classified as an aggravated felony.

Petitioner contends (Pet. 16) that courts conducting a prejudice inquiry are limited to "the four corners of the [notice to appear]" and may not consider "a basis for removability" that is "located elsewhere in the record." That argument fails.

In the Sixth Amendment context, the prejudice inquiry focuses on whether "the result of the proceedings would have been different." Strickland, 466 U.S. at 694. That inquiry necessarily encompasses everything that could affect the ultimate result and is not restricted to isolated aspects of the proceedings. Similarly, to show fundamental unfairness under Section 1326(d)(3), it is not enough to identify a legal error in the removal order, such as the erroneous conclusion that a prior conviction qualifies as an aggravated felony. If that were sufficient, then "fundamentally unfair" would mean little more than "erroneous." Instead, "[t]o demonstrate that a removal order used in a § 1326 criminal prosecution is 'fundamentally unfair,' the defendant must show, first, a violation of his due process rights and, second, prejudice caused by the violation." United States v. Villarreal Silva, 931 F.3d 330, 337 (4th Cir.), cert. denied, 140 S. Ct. 571 (2019); see, e.g., United States v. Hernandez-Perdomo, 948 F.3d 807, 813 (7th Cir. 2020); United States v. Martinez-Hernandez, 932 F.3d 1198, 1203 (9th Cir.), cert. denied, 140 S. Ct. 392 (2019). "And, to establish prejudice, the defendant must show that, but for the

errors complained of, there was a reasonable probability that he would not have been deported." Villarreal Silva, 931 F.3d at 337 (citation and internal quotation marks omitted).

In determining whether a reasonable probability exists that the defendant would not have been removed, a court must consider the entire record. In this case, the court of appeals was not required to ignore the strong possibility that, if petitioner had successfully challenged the basis for removability alleged in the notice to appear, he still would have been removed based on the same marijuana offense, as a controlled-substance offender. Nor was the court required to ignore the likelihood that "if the marijuana conviction could not serve as a basis for removal," immigration authorities would have "amended [petitioner's] removal order to add the more serious OxyContin conviction" as a basis for mandatory removal. Pet. App. 26.

Petitioner contends (Pet. 16-17) that the court of appeals' consideration of his OxyContin conviction conflicts with decisions of the Ninth Circuit, but he overstates the extent of any disagreement. In two of the cases he cites, the court of appeals did not note any other convictions that could have been used to support removability. See United States v. Lopez-Chavez, 757 F.3d 1033, 1043 (9th Cir. 2014); United States v. Camacho-Lopez, 450 F.3d 928, 930 (9th Cir. 2006). In a third case that he cites, the court declined, without discussion, to consider whether a defendant's prior conviction was an aggravated felony under a different stat-

utory provision than the one cited in the notice to appear. United States v. Martinez, 786 F.3d 1227, 1232-1233 & n.2 (9th Cir. 2015). But the Ninth Circuit later held that a defendant is not prejudiced where the "same convictions" cited as a basis for removal "require removal under a different section of the same statute previously invoked." Martinez-Hernandez, 932 F.3d at 1205.

In the fourth case that petitioner cites, the court of appeals held that an unlawful-reentry defendant's initial removal was fundamentally unfair where he had been removed in absentia based on a conviction that circuit precedent at the time established was "not a categorical crime of violence." United States v. Ochoa-Oregel, 904 F.3d 682, 684 (9th Cir. 2018). The court also concluded that the error "infect[ed]" subsequent expedited removal proceedings against the defendant because the in absentia removal had caused him to lose his status as a legal permanent resident, which would have foreclosed expedited removal. Id. at 685. The court rejected the government's contention that the defendant was not prejudiced because, by the time of his expedited removal, he had been convicted of an aggravated felony and therefore "could have been removed anyway." Ibid. The court stated that "even 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." Id. at 685-686 (citing Comacho-Lopez, 450 F.3d at 930).

Ochoa-Oregel does not create a conflict warranting this Court's review. The Ninth Circuit there "emphasize[d]" that its holding was "limited to the case where an alien is erroneously removed in absentia and did not have a meaningful opportunity to contest the order that ostensibly stripped him or her of lawful permanent resident status." 904 F.3d at 685 n.1; see id. at 686 ("At a minimum, persons do not lose permanent lawful resident status through legally erroneous decisions in hearings where they are not able to defend themselves because they were not present."). The court "express[ed] no view about the effect of an order of removal that while legally erroneous was entered after an alien had a meaningful opportunity to contest removal." Id. at 685 n.1. Because petitioner was removed after a hearing at which he could (and did) contest removal, the decision below does not conflict with the Ninth Circuit's decision in Ochoa-Oregel.

d. In any event, this case presents an inadequate vehicle for reviewing the first question presented for several reasons.

First, to prevail in his challenge to the unlawful-reentry charge against him, petitioner must satisfy the three separate requirements in Section 1326(d). See Palomar-Santiago, 141 S. Ct. at 1620-1621. As petitioner apparently recognizes, he must convince this Court of at least three distinct propositions: (1) that "conceding an issue pending before the Supreme Court constitutes ineffective assistance of counsel"; (2) that "ineffective assistance of [immigration] counsel satisfies the administration

exhaustion requirement of § 1326(d)(1) and establishes the deprivation of the opportunity for judicial review required by § 1326(d)(2)"; and (3) that courts are "confined to the four corners of the [notice to appear] in assessing prejudice" under Section 1326(d)(3). Pet. 10, 12, 16 (capitalization altered; emphasis omitted). In addition, as explained above, petitioner would further have to demonstrate that the due process protections that apply to removal proceedings, see Reno v. Flores, 507 U.S. 292, 305 (1993), include a right to effective assistance of counsel, even though the government is not constitutionally required to furnish counsel in those proceedings, and counsel's errors are therefore not imputed to the government. See pp. 13-14, supra; Coleman, 501 U.S. at 752-754. The unlikelihood that petitioner would prevail on all of those arguments renders this a poor vehicle for further review.

Second, petitioner does not address the court of appeals' alternative holding that, "[e]ven if [petitioner's] marijuana conviction had not been classified as an aggravated felony," he failed to show a reasonable probability that he would have applied for and received discretionary relief from removal as a "controlled substance offender under 8 U.S.C. § 1227(a)(2)(B)(i)." Pet. App. 23. Even if petitioner were correct that the fundamental-unfairness inquiry should not "presume that the government would have amended the [notice to appear] to include a new ground for [mandatory] deportation," Pet. 16, he fails to explain why either

his marijuana or his OxyContin conviction would not have prevented him from obtaining discretionary relief from removal. See United States v. Gonzalez-Valerio, 342 F.3d 1051, 1055 (9th Cir. 2003) (holding that an offense that "was not the basis of a removal order" can nevertheless "serve as a bar to discretionary relief" under former 8 U.S.C. 212(c) (1994)). Because petitioner fails to address that alternative basis for the court of appeals' decision, he would not necessarily be entitled to relief even if he were to prevail on all subparts of the first question presented.

Third, the question presented is of limited practical significance to petitioner. Although convictions ordinarily have "collateral consequences adequate to meet Article III's injury-in-fact requirement," Spencer v. Kemna, 523 U.S. 1, 14 (1998), any collateral consequences are highly attenuated in this case. Petitioner received a sentence of time served, his three-year period of supervised release will end in September 2022, and he was removed from the United States in October 2020. See Letter from Nathaniel R. Mendell, Acting U.S. Att'y & Karen Eisenstadt, Assistant U.S. Att'y, to Maria R. Hamilton, Clerk of the Court (Apr. 28, 2021). Moreover, because petitioner was removed from the United States in 2013, 2016, and 2020, he is subject to a bar on reentry for removed noncitizens without regard to his current conviction. See 8 U.S.C. 1182(a)(9)(A)(ii).

2. With respect to the second question presented, petitioner contends (Pet. 25-29) that the immigration court lacked

jurisdiction over his removal proceedings because the notice to appear filed with the court did not specify the date and time of his removal hearing. That contention lacks merit and does not warrant this Court's review.

a. For the three independent reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Roman-Vega v. Garland, 142 S. Ct. 745 (2022) (No. 21-310), the court of appeals correctly rejected petitioner's jurisdictional challenge. See Br. in Opp. at 8-13, Roman-Vega, supra (No. 21-310).[3] First, a notice to appear that is filed with the immigration court need not specify the date and time of the initial removal hearing in order for "[j]urisdiction" to "vest[]" in the immigration court under the pertinent regulation, 8 C.F.R. 1003.14(a). Far from depriving the immigration court of jurisdiction when a notice to appear filed with the immigration court does not contain "the time, place and date of the initial removal hearing," the regulations expressly authorize the immigration court to schedule the hearing and to provide "notice to the government and the alien of the time, place, and date of [the] hearing." 8 C.F.R. 1003.18(b). Second, even if the regulations required notice of the date and time of the hearing for "[j]urisdiction" to "vest[]," 8 C.F.R. 1003.14(a), that requirement was satisfied in this case by a subsequent notice of hearing containing the infor-

[3] We have served petitioner with a copy of the government's brief in opposition in Roman-Vega.

mation, and petitioner actually attended his hearing. See pp. 5-6, supra; Pet. App. 7, 73 (district court's presumption that petitioner received the additional notice, which petitioner has not contested). Third, any requirement that the notice to appear filed with the immigration court contain the date and time of the initial removal hearing is not a strictly jurisdictional requirement, but rather is simply a claim-processing rule. Petitioner "concede[d] proper service of the Notice to Appear," D. Ct. Doc. 37-4, at 1, and did not object to its contents. Accordingly, petitioner failed to preserve any contention that the notice to appear violated such a claim-processing rule by not raising the issue before the immigration judge or the Board.

b. This Court's decisions in Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), and Pereira v. Sessions, 138 S. Ct. 2105 (2018), do not suggest any error in the decision below. Both of those decisions concerned the meaning of the phrase "a notice to appear" in the stop-time rule, which is triggered when "when the alien is served a notice to appear under [8 U.S.C.] 1229(a)." 8 U.S.C. 1229b(d)(1). Thus, they "did not address the effect of a defective [notice to appear] on an [immigration judge's] jurisdiction." Chery v. Garland, 16 F.4th 980, 987 (2d Cir. 2021); see Maniar v. Garland, 998 F.3d 235, 242 n.2 (5th Cir. 2021); Ramos Rafael v. Garland, 15 F.4th 797, 800-801 (6th Cir. 2021). Indeed, petitioner acknowledges (Pet. 21) that "neither Pereira nor Niz-Chavez considered the question posed here: whether the service of an undated

[notice to appear] confers jurisdiction on the immigration court." That question does not depend on what qualifies as a "notice to appear under section 1229(a)," 8 U.S.C. 1229b(d)(1), and is addressed only by the Attorney General's regulations, which do not require that a notice to appear filed with the immigration court specify the date and time of the initial removal hearing in order to qualify as a "charging document" for the purpose of initiating a proceeding before an immigration judge, 8 C.F.R. 1003.14(a). See Br. in Opp. at 12-13, Roman-Vega, supra (No. 21-310).

c. Nor has petitioner identified any court of appeals adopting his contention that "an immigration judge does not have jurisdiction to remove a noncitizen until that person has been served with a single [notice to appear] that includes the hearing date." Pet. 21; see ibid. (acknowledging that "no Circuit has" adopted petitioner's preferred rule).

Like the First Circuit, see Pet. App. 9 & n.3, the Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits have reasoned that a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the [immigration judge]," at least where the noncitizen is later provided with a notice of hearing that contains that information. Karingithi v. Whitaker, 913 F.3d 1158, 1160 (9th Cir. 2019), cert. denied, 140 S. Ct. 1106 (2020); see Chery, 16 F.4th at 986-987 (2d Cir.); Nkomo v. Attorney Gen., 930 F.3d 129, 132-134 (3d Cir. 2019), cert. denied, 140 S. Ct. 2470 (2020);

Perez Vasquez v. Garland, 4 F.4th 213, 220 (4th Cir. 2021); Maniar, 998 F.3d at 242 (5th Cir.); Santos-Santos v. Barr, 917 F.3d 486, 489-491 (6th Cir. 2019); Ali v. Barr, 924 F.3d 983, 986 (8th Cir. 2019). Petitioner cites no decision from any of those circuits granting relief to a noncitizen in circumstances similar to his.

Additionally, the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have recognized that any requirement that a notice to appear contain the date and time of the initial removal hearing is not a jurisdictional requirement but rather a claim-processing rule. See United States v. Cortez, 930 F.3d 350, 358-362 (4th Cir. 2019); Pierre-Paul v. Barr, 930 F.3d 684, 691-693 (5th Cir. 2019), cert. denied, 140 S. Ct. 2718 (2020); Ortiz-Santiago v. Barr, 924 F.3d 956, 962-965 (7th Cir. 2019); Martinez-Perez v. Barr, 947 F.3d 1273, 1278-1279 (10th Cir. 2020); Perez-Sanchez v. U.S. Attorney Gen., 935 F.3d 1148, 1154-1157 (11th Cir. 2019). Each of those courts of appeals would have rejected petitioner's challenge to his removal proceedings on the ground that he forfeited any reliance on such a claim-processing rule. Thus, petitioner cannot show that the result in his case would have been different in any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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