No. _____

IN THE

Supreme Court of the United States

RAFAEL VILLAGOMEZ-TROCHE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether service of a "notice to appear" that complies with 8 U.S.C. § 1229(a)(1) is required to vest jurisdiction in an immigration court over removal proceedings.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the District of Arizona and in the United States Court of Appeals for the Ninth Circuit:

United States v. *Villagomez-Troche*, No. 2:17-cr-00836-SPL-1 (D. Ariz.); and

United States v. Villagomez-Troche, No. 17-10540 (9th Cir.).

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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The memorandum disposition of the court of appeals is unpublished. *United States v. Villagomez-Troche*, No. 17-10540, 2022 WL 2817134 (9th Cir. July 19, 2022).

JURISDICTION

The court of appeals entered judgment on July 19, 2022. (App. 1a.) This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely.

STATUTES INVOLVED

Section 1229(a)(1)(G)(i), title 8, United States Code, "Initiation of removal proceedings," provides, in relevant part:

> (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 … specifying the following:
> …
> (G)
> (i) The time and place at which the proceedings will be held.

Section 309(c)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Title III, 110 Stat. 3009 (Sept. 30, 1996), provides, in relevant part:

> (c) TRANSITION FOR ALIENS IN PROCEEDINGS.—
> …
> (2) ATTORNEY GENERAL OPTION TO ELECT TO APPLY NEW PROCEDURES.—In a case described in paragraph (1) in which an evidentiary hearing … has not commenced as of the title III–A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). … If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 [8 U.S.C. § 1229] of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

STATEMENT OF THE CASE

A complete recitation of the facts appears in the opening brief filed in the court of appeals. Appellant's Opening Brief ("Op. Br.") 3-10, *United States v. Villagomez-Troche*, No. 17-10540 (9th Cir.) (DktEntry: 52), *available at* 2021 WL 2672110.

Rafael Villagomez-Troche, a native and citizen of Mexico, became a lawful permanent resident of the United States in 1990 and was convicted of a state drug offense in 2000. (Op. Br. at 3.) In 2006, when returning to the United States from Mexico, he was detained and served with a "notice to appear," which ordered him to appear before an immigration judge for removal proceedings "on a date to be set." (*Id.* at 3, 6.) The notice to appear charged him as removable pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(II) for violating a law relating to a controlled substance. (Op. Br. at 6-7.) In removal proceedings commenced by the filing of the notice to appear, through counsel, he filed a "stipulated request for final order of removal" pursuant to 8 U.S.C. § 1229a(d) and, on July 28, 2006, without a hearing, an immigration judge sustained the charge and ordered his removal. (Op. Br. at 8.) He did not appeal. (*Id.*)

In 2017, the government found Mr. Villagomez-Troche in the United States and charged him with unlawful reentry, in violation of 8 U.S.C. § 1326. (Op. Br. at 8.) He moved to dismiss the indictment by collaterally attacking the prior order of removal pursuant to 8 U.S.C. § 1326(d) on the ground that his state drug conviction did not categorically qualify as a removable offense. (Op. Br. at 8-9.) The district court denied the motion. (*Id.* at 9.) Pursuant to a conditional plea agreement that preserved his right to appeal the denial of the motion to dismiss, he pleaded guilty. (*Id.* at 10.) On December 4, 2017, the district court imposed a sentence of time served. (*Id.*)

On appeal, Mr. Villagomez-Troche argued that his collateral attack on the prior order of removal should have been granted because the state conviction records did not establish the nature of the state conviction or that it involved a federally controlled substance. (*Id.* at 12-18.) He further preserved the argument foreclosed by Ninth Circuit precedent that, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the notice to appear did not confer adjudicatory authority upon the immigration judge because it did not advise of a hearing date. (*Id.* at 2, 11, 23-25.)

On July 19, 2022, the Ninth Circuit affirmed in an unpublished memorandum disposition. (App. 2a.) In relevant part, it relied on its opinion eight days earlier in *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1188 (9th Cir. 2022) (en banc), *reh'g denied* (Aug. 17, 2022), that defects in a notice to appear do not deprive an immigration court of subject matter jurisdiction. (App. 3a-4a.) Concurring in *Bastide-Hernandez*, however, Circuit Judge Michelle Friedland observed that, "[a]lthough our court today holds that service of an NTA is not required to confer jurisdiction on the immigration court, there are strong arguments for the contrary position." 39 F.4th at 1194. Judge Friedland further observed that, "[g]iven that the Supreme Court has on two occasions strictly enforced the statutory NTA requirements, and given that there is evidence that Congress intended an NTA to be necessary for jurisdiction over removal proceedings, the Supreme Court may eventually disagree with our court's holding today." *Id.* at 1196.

REASONS FOR GRANTING THE WRIT

I. A statutorily compliant "notice to appear" is jurisdictional.

A rule is truly jurisdictional when Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Gonzalez v. Thaler*, 565 U.S. 134, 141-42 (2012). Statutory filing deadlines, time limitations, preconditions, and threshold requirements are jurisdictional only if Congress "clearly stated" so. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-54 (2013); *accord Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435-36 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010); *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009); *Bowles v. Russell*, 551 U.S. 205, 209-13 (2007); *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Stone v. INS*, 514 U.S. 386, 405 (1995).

Congress clearly stated a precondition for vesting adjudicatory authority in an immigration court in § 309(c)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the IIRIRA"). Pub. L. 104-208, Title III, 110 Stat. 3009 (Sept. 30, 1996). Section 309 provided "transition" rules governing exclusion or deportation proceedings pending when the IIRIRA took effect on April 1, 1997. *Id.* Section 309(c)(1) provided that the IIRIRA's amendments generally did not apply to pending exclusion or deportation proceedings. Section 309(c)(2), however, authorized the Attorney General to elect to apply the IIRIRA's new removal procedures in many instances. In doing so, Congress indicated that, under the IIRIRA's new removal procedures, a notice to appear "under [§ 1229]" is required to confer jurisdiction on an immigration court:

> If the Attorney General makes such election, *the notice of hearing provided to the alien* under section 235 [8 U.S.C. § 1225 (1994), in exclusion proceedings] or 242(a) [8 U.S.C. § 1252(a) (1994), in deportation proceedings] of such Act *shall be valid as if provided under section 239 [8 U.S.C. § 1229] of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.*

IIRIRA § 309(c)(2) (emphasis added), *reproduced in* 8 U.S.C. § 1101, Note A-9 (Bender 2012). Congress thus clearly stated that a notice to appear "under [§ 1229]" is jurisdictional. And, as this Court has held, a notice to appear without a hearing date "is not a 'notice to appear under section 1229(a).'" *Pereira*, 138 S. Ct. at 2110; *accord Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (holding that a notice to appear "under § 1229(a)(1)" is a "single document").

Section 1229's heading, other subsections, and history further support that Congress intended that a notice to appear "under § 1229" is required to confer adjudicatory authority on an immigration court.

The heading of § 1229 is "Initiation of Removal Proceedings." 8 U.S.C. § 1229. Section headings are "permissible indicators of meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 217, 221 (2012); *accord Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). The heading "Initiation of Removal Proceedings," in a section that defines a "notice to appear"— which is "like an indictment" and "serves as the basis for commencing" removal proceedings, *Niz-Chavez*, 141 S. Ct. at 1482—is consistent with an intent in IIRIRA § 309(c)(2) to condition adjudicatory authority on the service of a notice to appear under § 1229.

Section 1229's other subsections also address preliminary matters at the initiation of removal proceedings. *See, e.g.*, 8 U.S.C. § 1229(b)(1) (restricting when the

immigration court may schedule the first hearing date); 8 U.S.C. § 1229(d) (mandate to expeditiously "begin any removal proceeding"). By contrast, a different statute, 8 U.S.C. § 1229a, governs the substantive conduct of removal proceedings. These surrounding subsections in § 1229 in are consistent with an intent in IIRIRA § 309(c)(2) to precondition an immigration court's adjudicatory authority on the service of a notice to appear under § 1229.

The history of § 1229 indicates that when Congress defined a "notice to appear" in the IIRIRA, it adopted almost verbatim a predecessor statute's definition of "order to show cause"—the charging document in former deportation proceedings—but *added* a requirement to advise the alien of the hearing date. *Niz-Chavez*, 141 S. Ct. at 1484 (recognizing that, although orders to show cause did not need to include a hearing date, the "IIRIRA changed all that"). This history is consistent with an intent in IIRIRA § 309(c)(2) that a notice to appear under § 1229, which requires a hearing date, is a precondition for an immigration court's authority to order removal.

The Attorney General, reading the IIRIRA in the same way, promulgated a regulation after the enactment of the IIRIRA that provides, "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court." 8 C.F.R. § 1003.14. In concluding that this regulation is nevertheless a mere "claim-processing rule" rather than a reflection of Congress's intent that a notice to appear under § 1229 is jurisdictional, the Ninth Circuit reasoned that nothing in the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., "conditions an immigration court's adjudicatory authority 'on

compliance with rules governing notices to appear, whether statutory … or regulatory….'" *Bastide-Hernandez*, 39 F.4th at 1191-92 (quoting *United States v. Cortez*, 930 F.3d 350, 360 (4th Cir. 2019)). In view of § 309(c)(2) of the IIRIRA, however, as well as § 1229's consistent title, context, and history, the Ninth Circuit's conclusion was mistaken with respect to an important question of federal law that has not been, but should be, settled by this Court.

Although this Court in *Pereira* and *Niz-Chavez* assumed without discussion that the defective "notices to appear" in those cases conferred jurisdiction on the immigration court, it has also repeatedly held that unstated assumptions on non-litigated issues are not precedential holdings binding future decisions. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952) (similar).

Properly analyzed, the agency acted beyond its statutory authority in ordering Mr. Villagomez-Troche's removal. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (when agencies act beyond their statutory authority, "no less than when they act beyond their jurisdiction, what they do is ultra vires").

II. The question presented is important and this case is a good vehicle.

The question of immigration court jurisdiction arises in thousands of agency and criminal cases every year. In Fiscal Year 2020, the Ninth Circuit alone received 3,048 petitions for review of Board of Immigration Appeals ("BIA") decisions and 4,025 criminal defendants in district courts in the Ninth Circuit were charged with illegal reentry. U.S. Courts for the Ninth Circuit, *2020 Annual Report* at 62, 65 (2020), *available at* https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/AnnualReport2020.pdf. In Fiscal Year 2018, 308,304 "notices to appear" were filed in immigration courts nationwide, the Ninth Circuit received 2,878 petitions for review of BIA decisions, and 5,934 criminal defendants in the Ninth Circuit were charged with illegal reentry. U.S. Dep't of Justice, Executive Office for Immigration Review, *Statistics Yearbook, FY 2018* at 7, fig. 2 (2019), *available at* https://www.justice.gov/eoir/file/1198896/download; U.S. Courts for the Ninth Circuit, *2018 Annual Report* at 46, 48, 49 (2018), *available at* https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/AnnualReport2018.pdf.

This case is a good vehicle for consideration of the question presented because the issue was squarely presented and resolved in the court of appeals. This Court's resolution of the issue would allow Mr. Villagomez-Troche to further demonstrate in the court of appeals that he has satisfied the remaining elements of his collateral attack. *See* 8 U.S.C. § 1326(d); *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021). Nevertheless, if the Court believes that another case should be resolved first, Mr. Villagomez-Troche asks that the Court hold his case pending resolution of the common issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 7th day of September, 2022.

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NOT FOR PUBLICATION

FILED

JUL 19 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAFAEL VILLAGOMEZ-TROCHE, AKA Robert Villagomez Troche, AKA Rafael Villagomez-Troche, Jr., Defendant-Appellant.	No. 17-10540 D.C. No. 2:17-cr-00836-SPL-1 District of Arizona, Phoenix MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, Presiding

Submitted May 9, 2022[**]
Pasadena, California

Before: WATFORD and FRIEDLAND, Circuit Judges, and ROBRENO,[***] District Judge.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Rafael Villagomez-Troche, a native and citizen of Mexico, appeals from the district court's order denying his motion to dismiss his indictment under 8 U.S.C. § 1326(d). We affirm.

1. To prevail on his motion to dismiss the indictment, Villagomez-Troche was required to prove that entry of the underlying removal order was "fundamentally unfair." *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620–21 (2021) (quoting 8 U.S.C. § 1326(d)). A removal order is fundamentally unfair if the non-citizen's due process rights were violated by defects in the removal proceeding and he suffered prejudice as a result. *United States v. Aguilera-Rios*, 769 F.3d 626, 630 (9th Cir. 2014). Villagomez-Troche argues that he was not removable as charged because the government could not prove by clear and convincing evidence that he had been convicted of "a violation of . . . any law . . . relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. § 1182(a)(2)(A)(i)(II).

Clear and convincing evidence establishes that Villagomez-Troche was in fact convicted of a violation of Illinois state law related to cannabis, a qualifying controlled substance under 21 U.S.C. § 802. Although there is some variation among different state-court documents as to the precise crime to which Villagomez-Troche ultimately pleaded guilty, nothing indicates that the substance he admitted possessing was anything other than cannabis. Villagomez-Troche

emphasizes the prosecutor's statement during his first change of plea hearing that if, after lab testing, the substance "turns out not to be cannabis we would . . . vacate the plea." Although that first plea was indeed vacated, a second guilty plea was immediately entered in its place without any comment to indicate that the substance was found not to be cannabis. Indeed, the state court docket entry indicates he pleaded guilty to "UNLAWFUL POSSESSION OF CANNABIS." Moreover, Villagomez-Troche—with the assistance of counsel—admitted all the factual allegations in the Notice to Appear, which specifically alleged that he was convicted of unlawful possession with the intent to deliver cannabis. On this record, the government carried its burden of proving by clear and convincing evidence that Villagomez-Troche was convicted of unlawful possession of cannabis.

Because Villagomez-Troche's underlying removal order was not fundamentally unfair, we need not address whether he exhausted his administrative remedies or was improperly deprived of the opportunity for judicial review. *See Palomar-Santiago*, 141 S. Ct. at 1620–21.

2. On appeal, Villagomez-Troche preserved the argument that his Notice to Appear did not confer jurisdiction on the immigration court because it did not specify the date and time of his removal hearing. As an en banc panel of this court recently held, however, such defects do not deprive the immigration court of

jurisdiction. *United States v. Bastide-Hernandez*, No. 19-30006, slip op. at 5 (9th Cir. July 11, 2022).

AFFIRMED.