No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LUIS HUERTA-CARRANZA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title 8, United States Code § 1326, requires the government to prove beyond a reasonable doubt that a noncitizen was ordered removed in immigration proceedings. The administrative process of removal begins with the service of a notice to appear. In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), this Court held that a notice to appear must contain all statutorily required information—including the time and place of the removal hearing—in one document.

The questions presented are:

1. Whether a defective notice to appear that omits the statutorily required time-and-place information fails to confer jurisdiction on the immigration court and renders a removal order void.
2. Whether it violates due process and the separation-of-powers doctrine to establish an element of a criminal § 1326 offense with a removal order based on a notice to appear that omitted the statutorily required time-and-place information.

PARTIES

Petitioner, Luis Huerta-Carranza, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

RELATED PROCEEDINGS

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

United States v. Huerta-Carranza
Appeal No. 20-12038
Judgment Date: May 24, 2022

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

United States v. Huerta-Carranza
Case No. 8:19-cr-597-RAL-AAS-1
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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Luis Huerta-Carranza, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION AND JUDGMENT BELOW

The Eleventh Circuit's opinion is neither published in the Federal Reporter nor reprinted in the Federal Appendix. It is available on Westlaw at 2022 WL 1640701 (11th Cir. May 24, 2022) and provided in Appendix A-1. The Eleventh Circuit's order denying rehearing is provided in Appendix A-5.

The district court's judgment is provided in Appendix A-2, and its endorsed order denying the motion to dismiss is provided in Appendix A-3.

The immigration court's order of removal is provided in Appendix A-4.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion May 24, 2022, *see* App. A-1, and denied rehearing on August 16, 2022. *See* App. A-5. This petition is timely filed under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

In 2001, Section 1229(a) of Title 8, United States Code, provided:

> § 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:

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

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

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

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

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

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

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

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

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

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

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

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in

person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying--

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

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

(B) Exception

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

(3) Central address files

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

In 2001, Section 1229a(a) of Title 8, United States Code, provided:

§ 1229a. Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

Section 1326 of Title 8, United States Code, provides:

(a) In general

Subject to subsection (b), any alien who--

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

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

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

(b) Criminal penalties for reentry of certain removed aliens

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

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

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

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

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

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

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

Any alien deported pursuant to section 1252(h)(2)[] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

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

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

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

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

STATEMENT

1. Mr. Huerta-Carranza is a native and citizen of Mexico.[1] On February 15, 2001, the Immigration and Naturalization Service (INS) filed a document labeled "Notice to Appear," charging that Mr. Huerta-Carranza was subject to removal from the United States under section 212(a)(6)(A)(i) of the Immigration and Nationality Act because he was "an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General." App. A-6.

The "Notice to Appear" contained the following section:

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: To be set.

(Complete Address of Immigration Court, Including Room Number, if any)

on _____ at _____ to show why you should not be removed from the United States based on the
(Date) (Time)

charge(s) set forth above.

Patrol Agent In Charge
(Signature and Title of Issuing Officer)

Date: 02/15/01 Tampa, Florida
(City and State)

See App. A-6. Thus, the "Notice to Appear" did not contain the time and place for Mr. Huerta-Carranza's hearing. In the certificate of service, a box is checked indicating that oral notice of the time and place of Mr. Huerta-Carranza's hearing was provided, but the record does not reveal any time or place. *Id.*

Approximately two months later, on April 18, 2001, the immigration court issued a "Notice of Hearing in Removal Proceedings," which provided a time (May 10,

[1] Mr. Huerta-Carranza entered the United States as a teenager in the late 1990s. His partner, since 1999, and their three children are United States citizens.

2001, at 8:30 a.m.) and place (515 11th St. West, Suite 300, Bradenton, Florida 34205-1111) for the hearing.[2] The record does not reflect whether that hearing occurred.

On May 24, 2001, the immigration judge ordered Mr. Huerta-Carranza's removal from the United States. App. A-4. According to the order, the immigration judge considered "respondent's admissions," and Mr. Huerta-Carranza "made no application for relief from removal." *Id.* The order states that an appeal was due by June 25, 2001, but the word "WAIVED" after "Appeal:" is also circled. *Id.* According to the certificate of service, Mr. Huerta-Carranza was personally served with the order on May 24, 2001. *Id.* He was removed to Mexico on June 1, 2001.[3]

2. On December 13, 2019, immigration authorities found Mr. Huerta-Carranza in the United States voluntarily, without the consent of the Attorney General or Secretary of Homeland Security to reapply for admission to the United States. The government charged him by indictment with reentry after removal in violation of 8 U.S.C. § 1326.[4] The district court had jurisdiction under 18 U.S.C. § 3231.

Mr. Huerta-Carranza moved to dismiss the indictment to challenge his 2001 removal order.[5] He argued that the immigration court lacked jurisdiction to order his removal because the putative "Notice to Appear" did not provide the date, time, or place for his removal hearing. He also argued that he need not meet the

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[2] *See* Case No. 8:19-cr-597-RAL-AAS-1, Doc. 23 at 25 (Def. Ex. 2).
[3] *See* Case No. 8:19-cr-597-RAL-AAS-1, Doc. 23 at 28-30 (Def. Ex. 4).
[4] *See* Case No. 8:19-cr-597-RAL-AAS-1, Doc. 1.
[5] *See* Case No. 8:19-cr-597-RAL-AAS-1, Doc. 23.

requirements of § 1326(d).[6] He recognized, however, that Eleventh Circuit precedent bound the district court to reject his argument that the deficient "Notice to Appear" deprived the immigration court of jurisdiction. *See Perez-Sanchez v. United States Att'y Gen.*, 935 F.3d 1148, 1153-57 (11th Cir. 2019).

Citing *Perez-Sanchez*, the district court denied Mr. Huerta-Carranza's motion by entering a two-line endorsed order directly on the docket. App. A-3. The district court did not address Mr. Huerta-Carranza's argument that he need not meet the requirements of § 1326(d).

Following the denial of his motion to dismiss, Mr. Huerta-Carranza agreed to a stipulated-facts bench trial. The district court convicted him and sentenced him to 46 months' imprisonment and three years of supervised release. App. A-2.

3. Mr. Huerta-Carranza appealed. The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Finding no error in the district court's denial of Mr. Huerta-Carranza's motion to dismiss, the Eleventh Circuit affirmed his conviction. App. A-1. Relying on its prior-panel-precedent rule, the Eleventh Circuit held that Mr. Huerta-Carranza's claim was squarely foreclosed by *Perez-Sanchez*, an immigration case in which the Eleventh Circuit rejected the argument that a defective notice to appear (NTA) deprives the immigration court of jurisdiction over removal proceedings. *Id.* The court of appeals also concluded that this Court's subsequent opinion in *Niz-Chavez v.*

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[6] Mr. Huerta-Carranza filed his motion to dismiss on February 4, 2020, before this Court's decisions in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), and *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021).

Garland, 141 S. Ct. 1474 (2021), did not undermine the holding of *Perez-Sanchez*. *Id.* And, citing another immigration decision, the Eleventh Circuit noted that it "continue[s] to rely on *Perez-Sanchez*'s holding that a defective NTA does not create a jurisdictional issue post-*Niz-Chavez*." *Id.* (citing *Farah v. U.S. Att'y Gen.*, 12 F.4th 1312, 1322 (11th Cir. 2021) (holding that "the immigration court retains jurisdiction over an alien's removal proceedings even if the alien's notice to appear does not contain the time or place of the proceedings")).

4. Mr. Huerta-Carranza sought rehearing en banc. The Eleventh Circuit denied his petition. App. A-5.

REASONS FOR GRANTING THE WRIT

Mr. Huerta-Carranza's NTA omitted the statutorily required time and place information and was deficient under *Niz-Chavez* and *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). But because the Eleventh Circuit considers the defective NTA a violation of claims-processing rules instead of a jurisdictional defect, it rejected Mr. Huerta-Carranza's collateral challenge to the removal order used to satisfy an element of his § 1326 offense and affirmed his conviction.

The Eleventh Circuit's decision below is wrong. Congress intended service of a statutorily compliant NTA under 8 U.S.C. § 1229 to be a jurisdictional requirement, as evidenced by the text, context, and history. Just like a defective NTA that lacks time-and-date information is not a NTA, a removal order based on a defective NTA is not a removal order, and cannot establish an element of a § 1326 offense.

The Eleventh Circuit is not alone in holding that defective NTA is not a jurisdictional defect. But the circuits are split on identifying the legal authority that confers jurisdiction on immigration courts—some rely on a statute, while others rely on regulations. And the circuit courts of appeals are struggling with applying the straightforward textual analysis of *Pereira* and *Niz-Chavez* to contexts other than cancellation of removal and its stop-time rule, especially in circuits that rely on the regulations to confer jurisdiction.

The embedded question of whether a NTA that lacks time and place information fails to confer jurisdiction impacts significant numbers of immigration proceedings and criminal prosecutions. But it is in criminal prosecutions under

§ 1326, like this one, where due process and separation-of-powers concerns heighten, because removal orders—results of administrative proceedings—are used to establish an element of the criminal offense. And the due process and separation-of-powers violations are acute where the administrative body—the immigration court—never had authority to issue the removal order in the first place.

Mr. Huerta-Carranza respectfully asks this Court to grant his petition.

A. The decision below is wrong.

In the decision below, the Eleventh Circuit relied on its prior-panel-precedent rule and held that Mr. Huerta-Carranza's claim was squarely foreclosed by the immigration decision in *Perez-Sanchez*. App. A-1. Both the instant decision and *Perez-Sanchez* are wrong.

In *Perez-Sanchez*, the Eleventh Circuit held that a deficient NTA that lacks time and place information does not deprive the agency of jurisdiction over removal proceedings. 935 F.3d at 1150.[7] The Eleventh Circuit reached that conclusion after holding that both § 1229(a)(1) and 8 C.F.R. § 1003.14 set forth claim-processing rules, not jurisdictional rules. *Id.* at 1150, 1153-55.[8] Instead, the Eleventh Circuit held that Congress vested immigration judges with jurisdiction by empowering them in 8 U.S.C. § 1229a(a)(1) "to conduct proceedings for deciding the inadmissibility or

[7] Other courts of appeals have also reached that conclusion. *See, e.g.*, *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1188 (9th Cir. 2022) (en banc); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 958 (7th Cir. 2019); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-18 (10th Cir. 2019); *Goncalves Pontes v. Barr*, 938 F.3d 1, 7 n.3 (1st Cir. 2019); *Nkomo v. Att'y Gen. of United States*, 930 F.3d 129, 134 (3d Cir. 2019).

[8] Notably, neither party argued that § 1229(a)'s time-and-place requirement created a jurisdictional rule. *Perez-Sanchez*, 935 F.3d at 1154.

deportability of an alien." *Id.* at 1156 (quoting 8 U.S.C. § 1229a(a)(1)). And, the Eleventh Circuit held, "[t]his broad grant of authority is not limited in any way by the filing or service of an NTA." *Id.*

But that conclusion is too cursory. And "there are strong arguments for the contrary position." *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1194 (9th Cir. 2022) (en banc) (Friedland, J., concurring in the judgment).[9]

To be sure, § 1229a(a)(1) allows immigration courts to conduct removal proceedings. But the government must invoke the immigration court's jurisdiction by filing an appropriate charging document—here, an NTA under § 1229(a). As this Court explained, "[a] notice to appear serves as the basis for commencing a grave legal proceeding" and is "like an indictment in a criminal case." *Niz-Chavez*, 141 S. Ct. at 1482.

The texts of § 1229a and § 1229 must be read together. The text of § 1229a directs the immigration judge to "conduct proceedings." 8 U.S.C. § 1229a(a)(1). And in Section 1229, Congress directed that "[i]n removal proceedings under section 1229a of [Title 8]," the government must give the noncitizen a notice to appear. 8 U.S.C. § 1229(a)(1). So it is not § 1229a alone that confers blanket jurisdiction on immigration judges, but § 1229a and § 1229(a)(1) together that confer jurisdiction to

[9] Indeed, Judge Friedland observed that this Court "may eventually disagree" with the holding that service of an NTA is not jurisdictional, "[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." *Bastide-Hernandez*, 39 F.4th at 1196 (Friedland, J., concurring in the judgment); *see id.* at 1194-95.

remove noncitizens on the immigration judges. And jurisdiction does not attach without a valid NTA. *See* 8 U.S.C. § 1229(a)(1).

Other evidence supports this conclusion and shows that Congress intended service of the NTA to be a jurisdictional requirement. *See Bastide-Hernandez*, 39 F.4th at 1194-97 (Friedland, J., concurring in the judgment). When Congress enacted § 1229, it repealed its predecessor 8 U.S.C. § 1252b. *See* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009, P.L. 104-208 (Sept. 30, 1996). Congress also included a transition statute within IIRIRA. *Id.* This transition statute gave the Attorney General the option to convert certain pre-IIRIRA cases to the new law by providing written notice to the noncitizen at least 30 days before any evidentiary hearing. *Id.* The transition statute provided that a timely notice of hearing under this section "shall be valid as if provided under section 239 of such Act . . . to confer jurisdiction on the immigration judge." *Id.* Section 239 is § 1229. Thus, a plain reading of the transition statute makes clear that Congress intended for an NTA as defined under § 1229 to confer jurisdiction on immigration judges to conduct removal proceedings. *See Bastide-Hernandez*, 39 F.4th at 1195 (Friedland, J., concurring in the judgment) ("Although § 1229 does not itself use the word 'jurisdiction,' the transition statute's use of the word in reference to the notice requirements of § 1229 suggests that Congress understood the NTA to have jurisdictional significance.").

Moreover, "Congress's reference to 'jurisdiction' is consistent with the Executive Branch's apparent understanding, both before and after IIRIRA, that a

charging document is a prerequisite to the vesting of jurisdiction in the immigration court." *Bastide-Hernandez*, 39 F.4th at 1195 (Friedland, J., concurring in the judgment). In 8 C.F.R. § 1003.14, the Attorney General twice connected "[j]urisdiction" and "commencement of proceedings" with the word "and."[10] As Judge Friedland explained, "[t]he use of 'and' in both the text and title of the regulation suggests that the Attorney General has understood the word 'jurisdiction' to do work beyond indicating when proceedings commence—that is, beyond the work of a claim-processing rule . . . ." *Bastide-Hernandez*, 39 F.4th at 1196 (Friedland, J., concurring in the judgment). And "[t]hat understanding of the regulation would be consistent with Congress's suggestion in IIRIRA that an NTA is what confers jurisdiction on the immigration court." *Id.*[11]

Also, as thirty-nine former immigration judges and members of the Board of Immigration Appeals have stated, "immigration court jurisdiction requires a properly-issued NTA." Br. for *Amici Curiae* at 2 (ECF 98-2 at 6), *United States v. Bastide-Hernandez*, No. 19-30006 (filed Feb. 22, 2022). In an *amici curiae* brief filed before the en banc Ninth Circuit, these experts argued that "[w]here the Government fails to initiate a proceeding with [an NTA that complies with *Niz-Chavez*], the immigration court lacks jurisdiction to hear the case." *Id.* at 3 (ECF 98-2 at 7).

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[10] *See* 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court.")

[11] To be clear, Mr. Huerta-Carranza cites 8 C.F.R. § 1003.14 as evidence of the Executive Branch's understanding of the NTA's role in conferring jurisdiction.

They explained:

> Subject-matter jurisdiction determines whether a matter is under the power of the immigration court (within the Department of Justice), or that of [the Department of Homeland Security (DHS)]. Some matters can only be adjudicated by IJs, others only by DHS, and still others by either agency, depending on which has jurisdiction.

Id. The issuance and filing of the NTA matter because they determine the authority of the respective agencies. As the *amici curiae* explained:

> For instance, DHS performs the initial prosecutorial function of issuing an NTA, and can unilaterally cancel the NTA until jurisdiction vests in the immigration court. 8 C.F.R. §§ 239.1(a), 239.2(a). Once jurisdiction vests in immigration court, an [immigration judge (IJ)] must approve dismissal. *Id.* § 239.2(c). Additionally, in many instances, only one agency has authority to adjudicate applications for relief. *See, e.g.,* 8 C.F.R. § 1208.2(c)(1) (IJs have exclusive jurisdiction over asylum applications following issuance of an NTA); *id.* § 1245.2(a)(1)(i) (IJs have exclusive jurisdiction to adjudicate adjustment-of-status applications for applicants in removal proceedings); *id.* § 1208.31(a) (DHS has exclusive jurisdiction to make reasonable fear determinations); *id.* § 1240.62(b) (immigration court has exclusive jurisdiction over certain applications for cancellation of removal, except in certain circumstances when applications may be filed with DHS).

Id. As such, the NTA and § 1229(a)(1) are crucial to the immigration court's jurisdiction.

Finally, the way jurisdiction is analyzed in federal criminal cases is instructive. 18 U.S.C. § 3231 grants federal district courts original jurisdiction over federal crimes. Even so, a district court still lacks jurisdiction over a case if the charging document fails to allege an "offense[ ] against the laws of the United States." 18 U.S.C. § 3231; *see United States v. St. Hubert*, 909 F.3d 335, 342-44 (11th Cir. 2018),

abrogated on other grounds by United States v. Taylor, 142 S. Ct. 2015 (2022); *United States v. Peter*, 310 F.3d 709, 713-14 (11th Cir. 2002).

Like § 3231 in federal criminal cases, § 1229a allows an immigration court to hear deportation cases. But just like a district court can lack jurisdiction over a criminal case if the government files a defective indictment, the same is true in an immigration case—especially here, where the government, through its error, effectively filed no charging document. *See Pereira*, 138 S. Ct. at 2110 ("A notice that does not inform a noncitizen when and where to appear for a removal proceeding is not a 'notice to appear under section 1229(a)' . . . .").

B. The circuits are split regarding the source of the immigration court's jurisdiction and improperly limiting *Pereira* and *Niz-Chavez* to the context of cancellation of removal and the stop-time rule.

Some circuit courts of appeals, including the Eleventh, have held that the immigration court's jurisdiction derives from the statute. *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-18 (10th Cir. 2019); *Perez-Sanchez*, 935 F.3d at 1156; *United States v. Cortez*, 930 F.3d 350, 358-62 (4th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019). But other circuits have held that the regulations—particularly 8 C.F.R. § 1003.14(a)—confer jurisdiction on the immigration court. *See Maniar v. Garland*, 998 F.3d 235 (5th Cir. 2021); *Nkomo v. Att'y Gen. of United States*, 930 F.3d 129, 133 (3d Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 310-11, 313-14 (6th Cir. 2018). This Court should grant certiorari to resolve this circuit split.

In addition, although this Court conducted a textual analysis of § 1229(a) in *Niz-Chavez* that was separate from the stop-time rule, the circuit courts of appeals are limiting *Pereira* and *Niz-Chavez* to the context of cancellation of removal and its attendant stop-time rule. *See e.g., Chevy v. Garland*, 16 F.4th 980, 986-87 (2d Cir. 2021); *United States v. Dohou*, 948 F.3d 621, 627 (3rd Cir. 2020). And although the Fifth Circuit held that *Niz-Chavez* extends to rescission of in absentia orders, *see Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021) *reh'g denied*, 31 F.4th 935 (5th Cir. 2022), its rule that the regulations govern NTAs precluded it from applying *Niz-Chavez* when determining whether the immigration court lacked jurisdiction. *Garcia v. Garland*, 28 F.4th 644, 646-48 (5th Cir. 2022). But the statute must be interpreted consistently in all contexts. *See Leocal v.* Ashcroft, 543 U.S. 1, 11 n.8 (2004). This Court should step in to clear up the confusion in the circuit courts of appeals regarding the source of the immigration court's jurisdiction and the application of *Pereira* and *Niz-Chavez* beyond the context of the stop-time rule.

C. The question impacts immigration proceedings and criminal prosecutions, implicating due process rights and the separation-of-powers doctrine.

Whether a defective NTA deprives an immigration court of jurisdiction is an important question affecting tens of thousands of immigration proceedings and criminal prosecutions. Indeed, the Sentencing Commission reported over 11,000 prosecutions involving unlawful reentry or unlawfully remaining in the United States without authority in fiscal year 2021. *See* United States Sentencing Commission, Overview of Federal Criminal Cases, Fiscal Year 2021, at 18 (April 2022); *see also*

United States Sentencing Commission, 2021 Sourcebook of Federal Sentencing Statistics, Tables I-1 through I-7.

And as this Court noted, NTAs omitting the time and date of the proceedings have been the norm, not the exception, in recent years. *Pereira*, 138 S. Ct. at 2111 (explaining that, since 1997, immigration authorities have relied extensively on a regulation stating that a NTA need only provide the time, place and date of the initial removal hearing, where practicable, and "almost always" served noncitizens with NTAs that fail to specify the time, place, or date of initial removal hearings). Indeed, the government admitted that "almost 100 percent" of NTAS omitted the time and date of the proceeding between 2015 and 2018. *Id.*

Also, "a challenge to the *existence* of a removal order is different form a claim seeking judicial review of such an order." *Romero v. Sec'y, U.S. Dep't of Homeland Security*, 20 F.4th 1374, 1379 (11th Cir. 2021) (citing *Madu v. United States Att'y Gen.,* 470 F.3d 1362, 1363 (11th Cir. 2006) (explaining that a petitioner's assertion that he is not subject to an order of removal is distinct from a petitioner's challenge to a removal order)). So in the immigration context, this distinction has implications for district and appellate court jurisdiction. *See id.* The district court may be foreclosed by 8 U.S.C. § 1252(a)(5) from exercising habeas jurisdiction over claims seeking judicial review of a removal order, but the district court may have jurisdiction under 28 U.S.C. § 2241 to hear a challenge to the existence of a removal order. *See id.*; *see also Madu*, 470 F.3d at 1363. Furthermore, the distinction has implications

for § 1326(d) in criminal cases, because a petitioner may not have administrative remedies and judicial review over a removal order that was void ab initio.

Crucially, the importance of the answer to this question compounds qualitatively in § 1326 criminal prosecutions like Mr. Huerta-Carranza's, where a removal order—the result of an administrative proceeding—is an element of a § 1326 offense. Criminal liability under § 1326 depends on whether a noncitizen has been ordered removed, which in turn, depends on whether the immigration court had jurisdiction to conduct removal proceedings and issue a removal order in the first place. When § 1326 becomes involved, the questions presented implicate constitutional matters of due process and separation of powers.

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court explained that because the "determination made in [a removal] proceeding . . . play[s] a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *Id.* at 837-88. Accordingly, "where the [removal] proceeding effectively eliminates the right of the alien to obtain judicial review," a defendant "must be permitted" to collaterally attack his removal in a later § 1326 prosecution. *Id.* at 839; *see id.* at 838-40. Still, this Court observed in *Mendoza-Lopez* that "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling," even if a collateral judicial-review "safeguard" were in place. *Id.* at 838 n.15.

The troubling due process and separation-of-powers concerns are heightened

when the agency never had the authority to issue the removal in the first place.[12] This Court should grant certiorari to address the constitutionality of § 1326 and the due process and separation-of-powers violations presented when an element of a criminal offense is based on an administrative order the immigration judge lacked authority to enter because of a statutorily deficient NTA that lacked the time and place information.

D. This case is a good vehicle.

Mr. Huerta-Carranza preserved the issues here. The court convicted Mr. Huerta-Carranza of a crime by allowing an ultra vires removal order issued by the executive branch to satisfy an element of his offense.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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[12] This Court recently declined to address freestanding constitutional claims raised by § 1326. *See Palomar-Santiago*, 141 S. Ct. at 1622 n.4.