No. _____

In the Supreme Court of the United States

JUAN CARLOS BASTIDE-HERNANDEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari

PAUL E. SHELTON
Assistant Federal Public Defender
Federal Defenders of
Eastern Washington and Idaho
306 E Chestnut Ave
Yakima, WA 98901
(509) 248-8920
paul_shelton@fd.org

Counsel for Petitioner

Question Presented

Whether the United States' initiating removal proceedings against a noncitizen with a "Notice to Appear" that fails to include the date and time of the removal hearing, as required by 8 U.S.C. § 1229(a)(1), deprives the immigration court of subject matter jurisdiction.

Related Proceedings

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

United States v. Bastide-Hernandez, 1:18-cr-2050-SAB, order granting motion to dismiss published at 360 F. Supp. 3d 1127 (E.D. Wash. Dec. 20, 2018)

United States v. Bastide-Hernandez, 19-30006, first panel opinion and dissent published at 986 F.3d 1245 (9th Cir. Feb. 2, 2021)

United States v. Bastide-Hernandez, 19-30006, second panel opinion and concurrence published at 3 F. 4th 1193 (9th Cir. July 12, 2021)

United States v. Bastide-Hernandez, 19-30006, *en banc* panel opinion and concurrences published at 39 F. 4th 1187 (9th Cir. July 11, 2022)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case, though the question presented is common to many other civil and criminal immigration cases.

TABLE OF CONTENTS

QUESTION PRESENTED i

RELATED PROCEEDINGS ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES iv

TABLE OF AUTHORITIES v

PETITION 1

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 10

I. The statutory requirements for the contents of a Notice to Appear under 8 U.S.C. § 1229 are jurisdictional. 10

II. This Court should resolve the apparent contradiction between the Circuit Courts' rulings and this Court's rulings in *Pereira* and *Niz-Chavez*. 16

III. The question presented is important and this case is a good vehicle for this Court to consider and answer that question. 18

CONCLUSION 20

INDEX TO APPENDICES

Appendix A

United States Court of Appeals for the Ninth Circuit, En Banc Opinion entered July 11, 2022

Appendix B

United States District Court for the Eastern District of Washington, Order Granting Motion to Dismiss entered December 20, 2018

Appendix C

United States Court of Appeals for the Ninth Circuit, Order Denying Petition for Full En Banc Rehearing and Granting Motion to Stay Mandate entered August 17, 2022

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 11

Castillo-Gutierrez v. Garland, 43 F. 4th 477 (5th Cir. 2022) 17

Goncalves Pontes v. Barr, 938 F.3d 1 (1st Cir. 2019) 17

Gonzalez v. Thaler, 565 U.S. 134 (2012) 10

Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021) ..... passim

Pereira v. Sessions, 138 S. Ct. 2105 (2018) ..... passim

Perez-Sanchez v. United States Attorney General, 935 F.3d 1148 (11th Cir. 2019) 17

Rodriguez v. Garland, 15 F. 4th 351 (5th Cir. 2021) 17

Singh v. Garland, 24 F. 4th 1315 (9th Cir. 2022) 17, 18

Singh v. Garland, 51 F. 4th 371 (9th Cir. 2022) 17, 18

Singh v. United States Attorney General, 2022 WL 766950 (11th Cir. Mar. 14, 2022) 17

United States v. Bastide-Hernandez, 986 F. 3d 1245 (9th Cir. 2021) 6, 7, 18

United States v. Bastide-Hernandez, 3 F. 4th 1193 (9th Cir. 2021) 7, 18

United States v. Bastide-Hernandez, 39 F. 4th 1187 (9th Cir. 2022) ..... passim

United States v. Bastide-Hernandez,
360 F. Supp. 3d 1127 (E.D. Wash. Dec. 20, 2018) 1, 6

United States v. Castillo-Martinez, 16 F. 4th 906 (1st Cir. 2021) 17

United States v. Lira-Ramirez, 951 F.3d 1258 (10th Cir. 2020) 13

United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021) 7, 8, 18

United States v. Torres Zuniga, 807 F. App'x 260 (4th Cir. 2020) 13

Statutes

8 U.S.C. § 1229.....passim

8 U.S.C. § 1229a..... 2, 12

8 U.S.C. § 1252b 13

8 U.S.C. § 1326..... 6, 8

28 U.S.C. § 1254 1

Section 309 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).....passim

Regulations

8 C.F.R. § 3.14..... 14, 15

8 C.F.R. § 1003.13 ..... 3, 15

8 C.F.R. § 1003.14 ..... 3, 15

8 C.F.R. § 1003.15 ..... 3, 16

8 C.F.R. § 1003.18 ..... 4, 16

50 Fed. Reg. 516930-01, 1985 WL 141013 (Dec. 19, 1985)..... 14

52 Fed. Reg. 2931-01, 1987 WL 125277 (Jan. 29, 1987) 14

57 Fed. Reg. 11568-01, 1992 WL 66744 (Apr. 6, 1992) 14

62 Fed. Reg. 10312-01, 1997 WL 93131 (Mar. 6, 1997) 14, 15

68 Fed. Reg. 9824-01, 2003 WL 553495 (Feb. 28, 2003) 15

Other Authorities

United States v. Bastide-Hernandez, Appellant's Opening Brief, 2019 WL 1883533 (9th Cir. Apr. 18, 2019) 5

United States v. Bastide-Hernandez, Defendant-Appellee's Answering Brief, 2020 WL 4354481 (9th Cir. July 20, 2022) 5

United States v. Bastide-Hernandez, Defendant-Appellee's En Banc Supplemental Brief, 2022 WL 4964558 (9th Cir. Feb. 15, 2022) 8

United States v. Bastide-Hernandez, Supplemental En Banc Brief for the United States, 2022 WL 496327 (9th Cir. Feb. 15, 2022) 8

Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 11

U.S. Sentencing Commission, Interactive Data Analyzer, Federal Offenders by Type of Crime for Fiscal Years 2015-2021 19

Department of Justice, Prosecuting Immigration Crimes Reports for FY20, FY21, and FY22 19

Executive Office for Immigration Review, Statistics Yearbook FY 2018 19

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Juan Carlos Bastide-Hernandez respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS AND ORDERS BELOW

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is published at *United States v. Bastide-Hernandez*, 39 F. 4th 1187 (9th Cir. 2022), and can be found attached at Appendix A. The order of the United States District Court for the Eastern District of Washington granting Mr. Bastide-Hernandez's motion to dismiss is published at *United States v. Bastide-Hernandez*, 360 F. Supp. 3d 1127 (E.D. Wash. 2018), and can be found attached at Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely. The Ninth Circuit issued its *en banc* opinion on July 11, 2022. *See* Appendix A. Mr. Bastide-Hernandez filed a timely petition for full *en banc* rehearing, which the Ninth Circuit denied on August 17, 2022. *See* Appendix C. Mr. Bastide-Hernandez applied for an extension of time to file his petition for a writ of certiorari, which this Court (specifically Justice Kagan) granted on November 8, 2022, extending his filing deadline to November 29, 2022. *See* Application No. 22A405, letter dated November 8, 2022.

STATUTES AND REGULATIONS INVOLVED

8 U.S.C. § 1229 – Initiation of Removal Proceedings

(a) Notice to Appear

(1) In General

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

***

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

Section 309 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208 § 309(c)(2)

(c) TRANSITION FOR ALIENS IN PROCEEDINGS. –

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(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). The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date of any evidentiary hearing is commenced. 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 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

8 C.F.R. § 1003.13 – Definitions

As used in this subpart:

***

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. … For proceedings initiated after April 1, 1997, these documents include a Notice to Appear ….

8 C.F.R. § 1003.14 – Jurisdiction and Commencement of Proceedings

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed.

8 C.F.R. § 1003.15 – Contents of the Order to Show Cause and Notice to Appear and Notification of Change of Address

(b) The Order to Show Cause and Notice to Appear must also include the following information:

***

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 C.F.R. 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 1003.26.

8 C.F.R. § 1003.18 – Scheduling of Cases

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place, and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

STATEMENT OF THE CASE[1]

Immigration Proceedings

In April 2006, immigration authorities encountered Mr. Bastide-Hernandez while he was in custody in Washington. They served him with two Notices to Appear ("NTA") to initiate removal proceedings against him. Both NTAs alleged Mr. Bastide-Hernandez was subject to removal from the United States. Neither NTA specified the date or time of his initial removal hearing, and instead advised him that his hearing would occur "on a date to be set at a time to be set." Nevertheless, the certificate of service on both NTAs falsely indicated that he was contemporaneously provided oral notice of the time and place of his removal hearing.

Approximately two weeks later, the immigration court set to conduct Mr. Bastide-Hernandez's removal proceedings prepared a Notice of Hearing ("NOH") advising that his removal hearing would occur on June 14, 2006. The United States has never proven that Mr. Bastide-Hernandez personally received this NOH or was ever given any advance notice of when his removal hearing would occur.

[1] A fuller recitation of the facts appears in the parties' briefs filed in the Ninth Circuit. *See* Appellant's Opening Brief, *United States v. Bastide-Hernandez,* 19-30006, 2019 WL 1883533 at pp. 6-12 (9th Cir. Apr. 18, 2019); Defendant-Appellee's Answering Brief, *United States v. Bastide-Hernandez,* 19-30006, 2020 WL 4354481 at pp. 2-6 (9th Cir. July 20, 2020).

Mr. Bastide-Hernandez's removal hearing occurred as scheduled on June 14, 2006. The record indicates that Mr. Bastide-Hernandez appeared via video from the immigration detention facility. The immigration court found him removable and ordered him removed to Mexico. Mr. Bastide-Hernandez did not appeal this removal order and he was removed to Mexico shortly thereafter.

Criminal Proceedings

In August 2018, the United States indicted Mr. Bastide-Hernandez for illegally reentering the United States in violation of 8 U.S.C. § 1326, citing this 2006 removal order. Mr. Bastide-Hernandez moved to dismiss the indictment, arguing the immigration court was never properly vested with subject matter jurisdiction—and thus the removal order was void *ab initio*—because the NTAs did not advise him of the date and time of his removal hearing as required under 8 U.S.C. § 1229(a)(1)(G)(i). The district court granted this motion to dismiss, relying on this Court's opinion in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).[2]

The United States appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. In its first panel opinion, two judges held that the district court's ruling should be reversed, finding the district court's reliance on *Pereira* to be incorrect.[3] The panel held that "a defective NTA does not divest the immigration

[2] *See United States v. Bastide-Hernandez*, 360 F. Supp. 3d 1127 (E.D. Wash. 2018).
[3] *See United States v. Bastide-Hernandez*, 986 F.3d 1245 (9th Cir. 2021).

court of jurisdiction" and that jurisdiction vests "upon the filing of an NTA, even one that does not at that time inform the alien of the time, date, and location of the hearing."[4] A dissenting member of the panel would have affirmed the district court's dismissal of the indictment, holding that a defective NTA must be cured in order for jurisdiction to vest.[5]

Following a timely petition for rehearing and supplemental briefing regarding this Court's rulings in *Niz-Chavez v. Garland*[6] and *United States v. Palomar-Santiago*,[7] the panel withdrew its original opinions and issued new opinions.[8] The new majority opinion was substantively identical to the original majority panel opinion regarding subject matter jurisdiction. The majority opinion merely expanded to find that *Palomar-Santiago* required reversal because Mr. Bastide-Hernandez had not appealed his removal order in his underlying removal proceedings.[9] The majority made no reference to *Niz-Chavez*. Now concurring rather than dissenting, Judge Smith agreed that *Palomar-Santiago* required reversal.[10] Judge Smith otherwise continued to hold that defects in a NTA affect an immigration court's jurisdiction.[11]

---

[4] *See id.* at 1247-48.
[5] *See id.* at 1250-53 (Judge M. Smith, dissenting).
[6] 141 S. Ct. 1474 (2021).
[7] 141 S. Ct. 1615 (2021).
[8] *See United States v. Bastide-Hernandez*, 3 F. 4th 1193 (9th Cir. 2021).
[9] *See id.* at 1195-98.
[10] *See id.* at 1198 (Judge M. Smith, concurring).
[11] *See id.* at 1198-1201 (Judge M. Smith, concurring).

Mr. Bastide-Hernandez filed a second timely petition for rehearing following issuance of the amended panel opinions. The Ninth Circuit granted this petition and reheard the case *en banc*. Prior to *en banc* oral argument, the parties submitted supplemental briefing.[12] Additionally, a collective of former immigration judges and members of the Board of Immigration Appeals submitted an amicus brief.[13]

The Ninth Circuit *en banc* panel issued three opinions on July 11, 2022. The majority opinion reversed the district court's ruling, finding that defects in a NTA do not affect an immigration court's jurisdiction.[14] The majority joined held that 8 U.S.C. § 1229 has no effect on jurisdiction and that the relevant regulations are mere "claim processing rules."[15] Judge Collins concurred in the majority opinion but dissented in part regarding the scope of remand.[16] Judge Friedland concurred in the majority's judgment to reverse and remand "for the district court to decide whether Bastide-Hernandez has satisfied all three requirements of 8 U.S.C. § 1326(d)," citing *Palomar-Santiago*.[17] Judge Friedland's concurrence appears to reject the majority's conclusion that the relevant statute does not affect subject matter jurisdiction, citing "strong arguments

---

[12] *See* Defendant-Appellee's En Banc Supplemental Brief, 2022 WL 4964558 (9th Cir. Feb. 15, 2022); Supplemental En Banc Brief for the United States, 2022 WL 496327 (9th Cir. Feb. 15, 2022).
[13] This brief has not been published. Mr. Bastide-Hernandez is happy to submit a copy if the Court so desires to review it prior to ruling on the instant petition.
[14] *See United States v. Bastide-Hernandez*, 39 F. 4th 1187 (9th Cir. 2022).
[15] *See generally id.*
[16] *See id.* at 1197-1200 (Judge D. Collins, concurring in part and dissenting in part).
[17] *Id.* at 1194-1197 (Judge M. Friedland, concurring).

for the contrary position."[18] However, Judge Friedland neither expressly adopts this position nor rejects it, instead merely urging the United States "to take seriously the possibility that statutory noncompliance might have jurisdictional consequences."[19] This conclusion would flow directly from this Court's rulings in *Pereira* and *Niz-Chavez*, both of which Judge Friedland cites.[20]

Mr. Bastide-Hernandez filed a timely petition seeking rehearing by the full Ninth Circuit under Circuit Rule 35-3. The Ninth Circuit denied that petition on August 17, 2022.[21] The Ninth Circuit did grant a separate motion to stay the mandate pending an application to this Court for a writ of certiorari. This Court (specifically Justice Kagan) granted Mr. Bastide-Hernandez an extension until November 29, 2022, to file the instant petition. This petition follows.

[18] *Id.* at 1194.
[19] *Id.* at 1197.
[20] *See id.* at 1196.
[21] *See* Appendix C.

REASONS FOR GRANTING THE WRIT

I. The statutory requirements for the contents of a Notice to Appear under 8 U.S.C. § 1229 are jurisdictional.

A rule is jurisdictional when Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.[22] Congress clearly stated that the statutory requirements for a NTA set forth in 8 U.S.C. § 1229(a)(1) are jurisdictional, and it did so within Section 309(c)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the IIRIRA").[23] In sum, the IIRIRA significantly changed the rules governing exclusion, deportation, and removal proceedings. Generally, the IIRIRA's changes did not apply to persons who were already in active proceedings.[24] However, the IIRIRA authorized the Attorney General to transition persons in active proceedings from pre-IIRIRA law to post-IIRIRA law. The Attorney General merely had to provide written notice at least 30 days prior to any evidentiary hearing.[25] Congress explicitly provided that such notice "shall be valid as if provided under **section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.**"[26] Section 239 is 8 U.S.C. § 1229, which then (and now) requires a NTA to include the date, time, and place of a removal hearing.[27]

---

[22] *Gonzalez v. Thaler*, 565 U.S. 134, 141-42 (2012).
[23] Pub. L. 104-208, 110 Stat. 3009 at Division C (Sept. 30, 1996).
[24] *See id.* at Section 309(c)(1).
[25] *See id.* at Section 309(c)(2).
[26] *See id.* (emphasis added).
[27] *See id.* at Section 239; 8 U.S.C. § 1229(a)(1).

Congress thus unequivocally stated that a NTA as defined under Section 239 of the IIRIRA (8 U.S.C. § 1229) is jurisdictional. This Court has held not once but twice that a "notice to appear" that does not inform a person of the date, time, and location of their removal hearing is not a true "notice to appear" under 8 U.S.C. § 1229.[28] Consequently, service of a single document containing all the information required under 8 U.S.C. § 1229(a)(1) is a jurisdictional requirement to initiate removal proceedings.

Numerous undisputed facts support this conclusion. For instance, the heading of Section 1229 is "Initiation of Removal Proceedings." Though not dispositive, section headings are "permissible indicators of meaning."[29] The fact that Section 1229 is titled "Initiation of Removal Proceedings" and the first subsection thereof defines the required contents of a NTA—which is "like an indictment" insofar as it commences a "gravel legal proceeding"[30]—is consistent with treating § 1229 as jurisdictional. Initiating proceedings is synonymous with the vesting of jurisdiction.

---

[28] *See Pereira*, 138 S. Ct. at 2110 ("A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' ...."); *Niz-Chavez*, 141 S. Ct. at 1480 (holding that a Notice to Appear must be a "single document containing the required information, not a mishmash of pieces with some assembly required.").

[29] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 217, 221 (2012). *See also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (holding that the title of a statute and heading of a section may help resolve a statute's meaning).

[30] *Niz-Chavez*, 141 S. Ct. at 1482 (internal quotes and citations omitted).

Section 1229's other subsections and neighboring statutes similarly compel this conclusion. The next subsection of the same statute, § 1229(a)(2), requires the government to serve "a written notice" when the date, time, or place of a removal hearing is being changed.[31] Despite arguing that a "notice to appear" under § 1229(a)(1) could be contained in multiple documents, the government did not so argue with regard to § 1229(a)(2).[32] Similarly, § 1229(e) defines special rules when a noncitizen is encountered at certain locations such as domestic violence shelters.[33] Like § 1229(a), §1229(e) describes a NTA in the singular as "the Notice," suggesting a single document rather than multiple documents.[34] A neighboring statute, § 1229a(b)(7), limits discretionary relief for noncitizens ordered removed *in absentia* and refers to "the notice described in paragraph (1) or (2) of section 1229(a)."[35] There is no basis to treat NTAs differently under § 1229(a)(1) than under these other related statutes. Hence, a "notice to appear" under § 1229(a)(1) is a single document containing all required information.

The historical context of the IIRIRA's enactment also makes clear that a NTA must be a single document and that this document has jurisdictional effect over the initiation of removal proceedings. Prior to the IIRIRA's passage, the government could provide notice of the time and place of a removal hearing in the initial charging

---

[31] *See Niz-Chavez*, 141 S. Ct. at 1483; 8 U.S.C. § 1229(a)(2).
[32] *See Niz-Chavez*, 141 S. Ct. at 1483.
[33] *See Niz-Chavez*, 141 S. Ct. at 1482; 8 U.S.C. § 1229(e).
[34] *See Niz-Chavez*, 141 S. Ct. at 1482-83.
[35] *See Niz-Chavez*, 141 S. Ct. at 1483 (*quoting* 8 U.S.C. § 1229a(b)(7)).

document "'or otherwise.'"[36] In IIRIRA, Congress changed the law and specifically eliminated the "or otherwise" language; Congress directed that the time and place of the removal hearing be included in the initial charging document, now called a Notice to Appear.[37] Moreover, the IIRIRA simultaneously created the "stop time" rule that was at issue in both *Pereira* and *Niz-Chavez*, further evidencing that Congress intended a NTA to be a single document.[38]

Few courts have addressed or even referenced Section 309 of the IIRIRA when ruling on whether 8 U.S.C. § 1229 affects immigration judges' jurisdiction. The *en banc* panel majority below does not address Section 309 at all.[39] Judge Friedland discusses it extensively in her concurrence yet offers no reason to find that service of a NTA under § 1229 is not a jurisdictional requirement.[40] To counsel's knowledge, only one circuit has attempted to substantively address Section 309's apparent connection of § 1229 to jurisdiction. In *United States v. Lira-Ramirez*,[41] the Tenth Circuit held that Section 309 did not clearly show that a NTA under § 1229 was jurisdictional because it references a "notice of hearing" rather than a notice to appear.[42] In reaching this holding, the Tenth

[36] *Niz-Chavez*, 141 S. Ct. at 1484 (*quoting* 8 U.S.C. § 1252b(a)(2)(A) (1994 ed.)).
[37] *See Niz-Chavez*, 141 S. Ct. at 1484; 8 U.S.C. § 1229(a)(1).
[38] *See Niz-Chavez*, 141 S. Ct. at 1484.
[39] *See generally Bastide-Hernandez*, 39 F. 4th 1187.
[40] *See generally id.* at 1194-97 (Judge M. Friedland, concurring).
[41] 951 F.3d 1258 (10th Cir. 2020).
[42] *See id.* at 1262. The Fourth Circuit has cited *Lira-Ramirez* approvingly once, without any analysis. *See United States v. Torres Zuniga*, 807 F. App'x 260, 261 (4th Cir. 2020).

Circuit plainly focuses on the wrong part of Section 309. Yes, Section 309 references a "notice of hearing" to transition a person from pre-IIRIRA proceedings to post-IIRIRA proceedings. More importantly, though, Section 309 goes on to say that such notice "shall be valid **as if provided under [§ 1229] to confer jurisdiction on the immigration judge.**"[43] The use of "notice of hearing" makes perfect sense in this context and does not affect the direct reference to Section 239 of the IIRIRA, which is 8 U.S.C. § 1229. Congress' use of the word "jurisdiction" in this context "suggests that Congress understood the NTA to have jurisdictional significance."[44]

Reading § 1229 to have jurisdictional impact also squares with the regulatory scheme in effect both pre-IIRIRA and post-IIRIRA. The relevant regulation linking the vesting of jurisdiction to the filing of a charging document was proposed in 1985 and adopted in 1987.[45] This regulation was maintained despite significant amendments to the regulatory scheme in 1992 following enactment of the Immigration Act of 1990.[46] Finally, following the IIRIRA's enactment, the Attorney General maintained this regulation.[47] In doing so, the Attorney General specifically rejected a proposed

[43] *See* Pub. L. 104-208, 110 Stat. 3009 at Div. C, Section 309(c)(2) (emphasis added).
[44] *Bastide-Hernandez*, 39 F. 4th at 1195 (Judge M. Friedland, concurring).
[45] *See* 50 Fed. Reg. 516930-01 at 51697, 1985 WL 141013 (Dec. 19, 1985) (proposing 8 C.F.R. § 3.14 and other regulations); 52 Fed. Reg. 2931-01 at 2931, 1987 WL 125277 (Jan. 29, 1987) (adopting these regulations).
[46] *See* 57 Fed. Reg. 11568-01 at 11571, 1992 WL 66744 (Apr. 6, 1992) (maintaining §3.14 with revisions).
[47] *See* 62 Fed. Reg. 10312-01 at 10332, 1997 WL 93131 (Mar. 6, 1997).

expansion of who could file a NTA in order to confer and vest jurisdiction in the immigration court.[48] Thus, this regulation provided prior to and after the IIRIRA's enactment and to this day provides that **jurisdiction vests** when a charging document (defined under 8 C.F.R. § 1003.13 as a **Notice to Appear** after the IIRIRA's enactment) is filed with the immigration court.[49]

Congress was well aware of this regulatory scheme when it enacted the IIRIRA and implicitly adopted it. Congress titled §1229 "Initiation of Removal Proceedings" and began that statute by defining the contents of a Notice to Appear. Congress also expressly eliminated the "or otherwise" language regarding when notice of the time and place of a removal hearing had to be provided, mandating it be provided in the initial NTA. Thus, Congress clearly was creating a jurisdictional requirement in § 1229.

In sum, there is unambiguous statutory authority making clear that removal proceedings may only be initiated (and thus jurisdiction only vests) with service of a Notice to Appear as defined under 8 U.S.C. § 1229(a)(1). Per *Pereira* and *Niz-Chavez*, a Notice to Appear must be a single document containing all information required under 8 U.S.C. § 1229(a)(1), including the time and place of the removal hearing. This statutory requirement is jurisdictional.

---

[48] *See id.* at 10322-23.

[49] This regulation was recodified from 8 C.F.R. § 3.14 to 8 C.F.R. § 1003.14 in 2003. *See* 68 Fed. Reg. 9824-01 at 9830, 2003 WL 553495 (Feb. 28, 2003).

II. This Court should resolve the apparent contradiction between the Circuit Courts' rulings and this Court's rulings in *Pereira* and *Niz-Chavez*.

This Court assumed without discussion in both *Pereira* and *Niz-Chavez* that the defective NTAs in those cases conferred jurisdiction on the immigration court; that question was not presented in either case. Essentially every Circuit Court to have considered any challenge to an immigration court's jurisdiction based on *Pereira* and *Niz-Chavez* has found either that those holdings are limited to the context of the "stop-time" rule or otherwise are not applicable to the question presented herein.[50] Nowhere within either *Pereira* or *Niz-Chavez* did this Court state that its analysis of what constitutes a "Notice to Appear" was limited to the stop-time rule. To the contrary, in *Niz-Chavez*, this Court explicitly referenced multiple other statutes where the phrase "Notice to Appear" appears.[51] Unless this Court agrees that its analysis in *Pereira* and *Niz-Chavez* is as limited as the Circuit Courts have treated it, this Court needs to intervene and definitively answer the question presented.

Despite agreeing that defective NTAs do not deprive an immigration court of jurisdiction, the Circuit Courts have failed to agree why this is so. Some Circuits have effectively read into existence two different Notices to Appear: a statutory NTA (under 8 U.S.C. § 1229(a)(1), which mandates that time and place information be included) and a regulatory NTA (under 8 C.F.R. §§ 1003.15(b) and 1003.18, which make the time and

[50] *See, e.g., Bastide-Hernandez*, 39 F. 4th at 1193 (reading *Pereira* and *Niz-Chavez* as limited to the stop-time rule).
[51] *See Niz-Chavez*, 141 S. Ct. at 1482-1485.

place information optional).[52] Other Circuits, including the Ninth Circuit below, have held that the statute does not control when jurisdiction vests but also neither do the regulations, as those are mere "claim processing" rules.[53]

Compounding the problem, some Circuits have reached apparently contradictory rulings. For example, in the Fifth Circuit, a NTA must be a single document containing all information required under § 1229 when an *in absentia* removal order is being challenged[54] yet the regulations control what a NTA must contain to generally initiate removal proceedings.[55] Because *in absentia* removal orders necessarily arise from the same NTAs used in all removal proceedings, it is impossible to justify why the statute controls the contents of a NTA in one scenario but not another. Nevertheless, the Ninth Circuit has created a similar distinction regarding *in absentia* orders.[56]

---

[52] *See, e.g., Goncalves Pontes v. Barr*, 938 F.3d 1, 6-7 (1st Cir. 2019) (holding that the statute and regulations "speak to different audiences" with the statute dealing with notice to noncitizens and the regulations controlling the commencement of proceedings). The First Circuit re-affirmed this holding post-*Niz-Chavez* in *United States v. Castillo-Martinez*, 16 F. 4th 906 (1st Cir. 2021).

[53] *See, e.g., Bastide-Hernandez*, 39 F. 4th at 1192; *Perez-Sanchez v. United States Attorney General*, 935 F.3d 1148, 1154-55 (11th Cir. 2019). The Eleventh Circuit re-affirmed that holding post-*Niz-Chavez* in *Singh v. United States Attorney General*, 2022 WL 766950 (11th Cir. Mar. 14, 2022).

[54] *See Rodriguez v. Garland*, 15 F. 4th 351, 354-56 (5th Cir. 2021).

[55] *See Castillo-Gutierrez v. Garland*, 43 F. 4th 477, 480 (5th Cir. 2022).

[56] *See Singh v. Garland*, 24 F. 4th 1315, 1318-1320 (9th Cir. 2022) (granting challenge to *in absentia* removal order because NTA did not comply with § 1229). The Ninth Circuit denied a petition to rehear this case *en banc*, despite 12 judges wishing to grant *en banc* review, in *Singh v. Garland*, 51 F. 4th 371 (9th Cir. 2022).

So far as Mr. Bastide-Hernandez and his counsel are aware, *Bastide-Hernandez* is the only *en banc* Circuit Court ruling addressing the question presented. One concurring judge appears to agree with Mr. Bastide-Hernandez's argument yet concurred in the majority's judgment, presumably only due to *Palomar-Santiago*.[57] Combined with the outright dissent from an original panel member as to the question presented[58] and the difficulty reconciling this case with the result in *Singh v. Garland*, this matter is far from settled.

In sum, although the Circuit Courts are united in agreement that a defective NTA does not deprive an immigration court of jurisdiction, the scattershot and inconsistent rulings on the question presented and related questions have created much confusion. This Court should take up the question presented and provide a definitive answer.

III. The question presented is important and this case is a good vehicle for this Court to consider and answer that question.

The question presented in this case arises in thousands of civil immigration and federal criminal cases every year and has so arisen in such cases in the decades since the IIRIRA's enactment. The importance of the question presented cannot be overstated. Immigration offenses (particularly illegal re-entry, the same offense Mr. Bastide-

[57] *See Bastide-Hernandez*, 39 F. 4th at 1194-97 (Judge M. Friedland, concurring).
[58] *See Bastide-Hernandez*, 986 F.3d at 1250-53 (Judge M. Smith, dissenting) (holding that a defective NTA that is never cured would deprive the immigration court of jurisdiction); *Bastide-Hernandez*, 3 F. 4th at 1198-1201 (Judge M. Smith, concurring in result) (same holding regarding jurisdiction question).

Hernandez is charged with) are the single-most prosecuted federal crimes in the United States.[59] According to the most recent statistics from the Executive Office of Immigration Review, more than 1.25 million Notices to Appear were issued between Fiscal Years 2014 and 2018.[60] Given the United States' statements at oral argument before this Court in *Pereira*,[61] it is likely that the vast majority of NTAs used to initiate removal proceedings over the past 25 years were defective and did not comply with 8 U.S.C. § 1229.[62]

The question presented also presents a challenge to the intersection of the authority of administrative agencies (here, civil immigration authorities that carry out removal proceedings) and the rights of criminal defendants to contest an element of the crime (here, illegal re-entry, which necessarily requires proof of a prior valid removal

---

[59] *See* U.S. Sentencing Commission, Interactive Data Analyzer, Federal Offenders by Type of Crime for Fiscals Years 2015-2021, *available at:* https://ida.ussc.gov/analytics/saw.dll?Dashboard (immigration offenses constituted 33.4% of all offenders, ahead of all other crimes); Department of Justice, Prosecuting Immigration Crimes Reports for FY20, FY21, and FY 22, *available at:* https://www.justice.gov/usao/resources/PICReport (reporting that the United States prosecuted 20,100 people for illegal re-entry in FY20, 14,036 in FY21, and 13,670 in FY22).

[60] *See* Executive Office for Immigration Review, Statistics Yearbook FY 2018 at p. 7, *available at:* https://www.justice.gov/eoir/file/1198896/download.

[61] *See Pereira*, 138 S. Ct. at 2111 (noting the United States "almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings").

[62] *See also Niz-Chavez*, 141 S. Ct. at 1479 (nothing the United States "has chosen instead to continue down the same old path" and issue putative NTAs that did not contain this information even after this Court's ruling in *Pereira*).

from the United States). Many of the Circuit Courts addressing this question have held that neither the relevant statute (8 U.S.C. § 1229) nor the relevant regulations control the vesting of the jurisdiction of immigration courts. This answer naturally begs the question: what does, then? Congress cannot have granted immigration enforcement authority to the involved agencies with no limitations, yet the Circuit Courts have failed to identify any such limit on their jurisdiction. This Court should step in and resolve this question.

Mr. Bastide-Hernandez's case is a good vehicle for this Court to consider the question presented. This issue was squarely presented and resolved in the district court, before a Ninth Circuit panel, and before an *en banc* Ninth Circuit panel. This case has received as much scrutiny from the courts below as one possibly could before being presented to this Court. The question presented remains important, relevant, and ripe for consideration by this Court to definitively resolve an issue affecting literally millions of people's civil and criminal immigration proceedings. Given the Circuit Courts' collective failure to definitively resolve the question presented over the past several years, this Court should step in and answer the question.

CONCLUSION

For the reasons set forth herein, this Court should grant Mr. Bastide-Hernandez's petition for a writ of certiorari.

Dated: November 29, 2022.

Paul Shelton

Paul Shelton, 52337 Federal
Defenders of Eastern
Washington and Idaho
306 East Chestnut Avenue
Yakima, Washington 98901
(509) 248-8920
(509) 248-9118 (fax)
Paul_Shelton@fd.org
Counsel for Mr. Bastide-Hernandez,
Petitioner