No. _____

In the Supreme Court of the United States

MANUEL ALEJANDRO SANCHEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari

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Questions Presented

1. 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.

2. Whether a noncitizen's failure to file an appeal in his underlying immigration proceedings, where that failure to file an appeal is due in part to ineffective assistance of counsel, precludes a collateral attack against a removal order in a future criminal prosecution.

3. Whether a district court's finding that a noncitizen presented sufficient evidence to show they were a plausible candidate for relief from removal, the necessary element of prejudice to succeed on a motion to dismiss alleging due process violations, should be reviewed for clear error.

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. Sanchez, 4:19-CR-6052-SMJ, order denying first motion to dismiss and granting second motion to dismiss (E.D. Wash. Mar. 11, 2020)

United States v. Sanchez, 20-30084, panel memorandum opinion published at 853 Fed. App'x 201 (9th Cir. July 14, 2021)

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Manuel Alejandro Sanchez 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 memorandum opinion of the United States Court of Appeals for the Ninth Circuit is published at *United States v. Sanchez*, 853 Fed. App'x 201 (9th Cir. 2021), and can be found attached at Appendix A. The order of the United States District Court for the Eastern District of Washington granting one of Mr. Sanchez's motions to dismiss is not published but is 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 panel issued its opinion on July 14, 2021. *See* Appendix A. Mr. Sanchez filed a timely petition for *en banc* rehearing, which the Ninth Circuit denied on July 20, 2022. *See* Appendix C. Mr. Sanchez applied for an extension of time to file his petition for a writ of certiorari, which this Court (specifically Justice Kagan) granted on October 18, 2022, extending his filing deadline to December 17, 2022. *See* Application No. 22A321, letter dated October 18, 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:

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

8 U.S.C. § 1326 – Reentry of Removed Aliens

(d) Limitation on Collateral Attack on Underlying Deportation Order

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

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

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

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

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:

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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:

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(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 January 2016, Mr. Sanchez was arrested for unlawful possession of methamphetamine. While on pretrial release for this offense, he was subsequently arrested in March 2016 for attempted eluding. Following this second arrest, Mr. Sanchez pled guilty and resolved all pending charges in April 2016. After he completed his sentence in May 2016, immigration authorities initiated removal proceedings against Mr. Sanchez. They did so using a Notice to Appear ("NTA") that alleged he was removable because he arrived without inspection and because of his conviction for possession of meth. The NTA failed to specify the date or time of his removal hearing, instead advising him that his hearing would occur on a date and 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.

On July 1, 2016, Mr. Sanchez retained an immigration attorney, Vicky Currie ("Ms. Currie") to represent him. Mr. Sanchez told Ms. Currie he wanted to apply for whatever relief from deportation he might be eligible for because he wanted to stay in the United States; he specifically recalled discussing applying for asylum and

[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. Sanchez*, 20-30084, 2020 WL 5579438 at pp. 5-18 (9th Cir. Sept. 8, 2020); Defendant-Appellee's Answering Brief, *United States v. Sanchez*, 20-30084, 2020 WL 7063152 at pp. 2-4 (9th Cir. Nov. 23, 2020).

cancellation of removal.[2] During a bond hearing on July 21, 2016, Ms. Currie submitted 44 pages of evidence for the immigration judge's consideration, including letters of support from several family members, proof of residence, tax returns, employment records, and school records. Mr. Sanchez remained detained and appeared with Ms. Currie at multiple hearings over the ensuing months.

At a hearing on September 27, 2016, the immigration judge advised Mr. Sanchez that he may be eligible to apply for asylum, cancellation of removal, and voluntary departure. Mr. Sanchez submitted an asylum application the same day. The immigration judge scheduled a removal hearing for March 20, 2017, clearly giving Ms. Currie sufficient time to submit further applications for relief on Mr. Sanchez's behalf.

In November 2016, a mandatory bond hearing was scheduled for Mr. Sanchez on December 1, 2016.[3] Prior to this hearing, Ms. Currie met with Mr. Sanchez on November 28, 2016. During this meeting, Mr. Sanchez signed a document indicating he wanted to request voluntary departure and waive his rights to seek any other form of relief from removal. Mr. Sanchez did not recall Ms. Currie advising him whether his conviction for possession of meth (an aggravated felony) would preclude him or

[2] These facts are taken from Mr. Sanchez's sworn Declaration submitted in the district court below. These facts are uncontested because the only witness to testify at the evidentiary hearing was Mr. Sanchez and he testified consistent with his Declaration on this point.

[3] At the time, noncitizens were entitled to automatic bond redetermination hearings every 6 months even where they were not eligible for release, as Mr. Sanchez was. *See Rodriguez v. Robbins,* 804 F.3d 1060, 1089 (9th Cir. 2015).

otherwise negatively affect his likelihood of receiving voluntary departure prior to him signing this document or at any time prior to his December 1, 2016 hearing.

Mr. Sanchez and Ms. Currie appeared before the immigration judge on December 1, 2016. At the conclusion of his bond hearing, they immediately moved into a substantive removal hearing.[4] Ms. Currie withdrew Mr. Sanchez's applications for asylum and withholding of removal under the Convention Against Torture, and instead sought voluntary departure on his behalf. Mr. Sanchez orally confirmed that is what he wanted to do. The immigration judge heard argument from the government and Ms. Currie on voluntary departure. During her argument, Ms. Currie explicitly referenced the tax and employment records that she had submitted in July. The immigration judge stated that this information was "in the bond record" and "not in the removal record." Ms. Currie did not make any motion to make any of this evidence part of the removal record. The immigration judge ultimately rejected Mr. Sanchez's request for voluntary departure, exclusively referencing his criminal history and particularly his conviction for possession of meth, which he noted was a non-waivable ground of inadmissibility if he wanted to return to the United States in the future.

At the conclusion of the December 1, 2016 hearing, immediately after ordering Mr. Sanchez removed to Mexico, the immigration judge asked if Mr. Sanchez was

[4] There is an audio recording in the district court record of the removal hearing. The bond hearing was not recorded as those hearings are typically not recorded.

waiving his right to appeal. Ms. Currie immediately responded that he was. Mr. Sanchez affirmed this, though he does not recall Ms. Currie ever discussing his right to appeal or likelihood of success on appeal prior to or at his hearing. In the district court below, Mr. Sanchez declared and testified that he would have filed an appeal had he known that was his only option to avoid a removal order and potentially receive voluntary departure. He contended the only reason he answered "yes" when asked by the immigration judge was because he was agreeing with Ms. Currie. Mr. Sanchez was removed to Mexico approximately one week later.

Criminal Proceedings

In August 2019, the United States indicted Mr. Sanchez for illegally reentering the United States in violation of 8 U.S.C. § 1326, citing this 2016 removal order. Mr. Sanchez filed two motions to dismiss this indictment. The first motion to dismiss argued 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 second motion to dismiss argued that his removal proceedings were fundamentally unfair, citing the immigration judge's failure to consider all his positive equities when ruling on voluntary departure and arguing Ms. Currie had been ineffective, and that he was a plausible candidate for voluntary departure.

The district court denied Mr. Sanchez's first motion to dismiss, citing the Ninth Circuit's ruling in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). The district court specifically rejected Mr. Sanchez's argument that a transition statute within the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("the IIRIRA") made clear that *Karingithi* was wrongly decided because the statute (8 U.S.C. § 1229) controlled the vesting of jurisdiction in immigration courts.[5]

The district court granted Mr. Sanchez's second motion to dismiss, finding the immigration judge failed to properly consider and weigh all the positive equities, violating Mr. Sanchez's due process rights.[6] The district court further found that Mr. Sanchez was a plausible candidate for voluntary departure.[7] The district court did not make any findings with respect to Mr. Sanchez's waiver of appeal.[8]

The United States appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. In its panel opinion, the Ninth Circuit unanimously reversed the district court's dismissal of the indictment.[9] The Ninth Circuit found that the district court improperly excused Mr. Sanchez from failing to file an appeal, relying on this Court's intervening ruling in *United States v. Palomar-Santiago*, 141 S. Ct. 1615

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[5] *See* Appendix B at pp. 13-15.
[6] *See* Appendix B at pp. 16-19. Because it found a due process violation on this basis, the district court made no findings with respect to Ms. Currie provided ineffective assistance of counsel. *See* Appendix B at p. 15 n. 1.
[7] *See* Appendix B at pp. 19-21.
[8] *See generally* Appendix B.
[9] *See United States v. Sanchez*, 853 Fed. App'x 201 (9th Cir. 2021).

(2021). Moreover, the Ninth Circuit rejected the district court's finding that Mr. Sanchez was a plausible candidate for voluntary departure.[10] The Ninth Circuit affirmed the district court's denial of Mr. Sanchez's first motion to dismiss, finding that a defective NTA does not affect subject matter jurisdiction.[11] The Ninth Circuit relied on its prior holdings in both *Karingithi* and *United States v. Bastide-Hernandez*, 3 F. 4th 1193 (9th Cir. 2021).[12]

Mr. Sanchez filed a timely petition seeking rehearing and *en banc* consideration in August 2021. The Ninth Circuit denied that petition on July 20, 2022.[13] This Court (specifically Justice Kagan) granted Mr. Sanchez an extension until December 17, 2022, to file the instant petition. This petition follows.

[10] *See Sanchez*, 853 Fed. App'x at 202.
[11] *See Sanchez*, 853 Fed. App'x at 202-03.
[12] Counsel has separately filed a petition for a writ of certiorari to this Court in *United States v. Bastide-Hernandez*. *See Bastide-Hernandez v. United States*, 22-6281 (Petition filed Nov. 29, 2022).
[13] *See* Appendix C. It appears clear the lengthy delay in ruling on this petition for rehearing was due to the Ninth Circuit granting *en banc* review in *United States v. Bastide-Hernandez*. The order denying rehearing in Mr. Sanchez's appeal was issued 9 days after the *en banc* ruling in *Bastide-Hernandez* was published.

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.[14] 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").[15] 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.[16] 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.[17] 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.**"[18] 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.[19]

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[14] *Gonzalez v. Thaler*, 565 U.S. 134, 141-42 (2012).
[15] Pub. L. 104-208, 110 Stat. 3009 at Division C (Sept. 30, 1996).
[16] *See id.* at Section 309(c)(1).
[17] *See id.* at Section 309(c)(2).
[18] *See id.* (emphasis added).
[19] *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.[20] 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."[21] 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"[22]—is consistent with treating § 1229 as jurisdictional. Initiating proceedings is synonymous with the vesting of jurisdiction.

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[20] *See Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) ("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 v. Garland*, 141 S. Ct. 1474, 1480 (2021) (holding that a Notice to Appear must be a "single document containing the required information, not a mishmash of pieces with some assembly required.").

[21] 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).

[22] *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.[23] 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).[24] Similarly, § 1229(e) defines special rules when a noncitizen is encountered at certain locations such as domestic violence shelters.[25] Like § 1229(a), §1229(e) describes a NTA in the singular as "the Notice," suggesting a single document rather than multiple documents.[26] 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)."[27] 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

[23] *See Niz-Chavez*, 141 S. Ct. at 1483; 8 U.S.C. § 1229(a)(2).
[24] *See Niz-Chavez*, 141 S. Ct. at 1483.
[25] *See Niz-Chavez*, 141 S. Ct. at 1482; 8 U.S.C. § 1229(e).
[26] *See Niz-Chavez*, 141 S. Ct. at 1482-83.
[27] *See Niz-Chavez*, 141 S. Ct. at 1483 (*quoting* 8 U.S.C. § 1229a(b)(7)).

document "'or otherwise.'"[28] 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.[29] 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.[30]

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 panel did not do so in this case despite Mr. Sanchez briefing that argument.[31] The controlling case in the Ninth Circuit, an *en banc* ruling in *United States v. Bastide-Hernandez*, does not address Section 309 at all.[32] Judge Friedland discusses it extensively in her concurrence in *Bastide-Hernandez* yet offers no reason to find that service of a NTA under § 1229 is not a jurisdictional requirement.[33] 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*,[34] the Tenth Circuit held that Section 309 did not clearly show that a NTA under § 1229 was jurisdictional because it references a

[28] *Niz-Chavez*, 141 S. Ct. at 1484 (*quoting* 8 U.S.C. § 1252b(a)(2)(A) (1994 ed.)).
[29] *See Niz-Chavez*, 141 S. Ct. at 1484; 8 U.S.C. § 1229(a)(1).
[30] *See Niz-Chavez*, 141 S. Ct. at 1484.
[31] *See generally Sanchez*, 853 Fed. App'x 201.
[32] *See generally United States v. Bastide-Hernandez*, 39 F. 4th 1187 (9th Cir. 2022).
[33] *See generally id.* at 1194-97 (Judge M. Friedland, concurring).
[34] 951 F.3d 1258 (10th Cir. 2020).

"notice of hearing" rather than a notice to appear.[35] In reaching this holding, the Tenth 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.**"[36] 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."[37]

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.[38] This regulation was maintained despite significant amendments to the regulatory scheme in 1992 following enactment of the Immigration Act of 1990.[39] Finally, following the IIRIRA's enactment, the Attorney General maintained this

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[35] *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).
[36] *See* Pub. L. 104-208, 110 Stat. 3009 at Div. C, Section 309(c)(2) (emphasis added).
[37] *Bastide-Hernandez*, 39 F. 4th at 1195 (Judge M. Friedland, concurring).
[38] *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).
[39] *See* 57 Fed. Reg. 11568-01 at 11571, 1992 WL 66744 (Apr. 6, 1992) (maintaining §3.14 with revisions).

regulation.[40] In doing so, the Attorney General specifically rejected a proposed expansion of who could file a NTA in order to confer and vest jurisdiction in the immigration court.[41] 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.[42]

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 NTA.

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.

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[40] *See* 62 Fed. Reg. 10312-01 at 10332, 1997 WL 93131 (Mar. 6, 1997).
[41] *See id.* at 10322-23.
[42] 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.[43] 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.[44] 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

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

place information optional).[45] Other Circuits, including the Ninth Circuit, have held that the statute does not control when jurisdiction vests but also neither do the regulations, as those are mere "claim processing" rules.[46]

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[47] yet the regulations control what a NTA must contain to generally initiate removal proceedings.[48] 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.[49]

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[45] *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).

[46] *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).

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

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

[49] *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).

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 this issue and provide a definitive answer.

III. The question presented regarding subject matter jurisdiction is important. This Court should grant the instant petition to address that question, though Mr. Sanchez will move to stay consideration of this petition pending a ruling on a previously filed petition in *Bastide-Hernandez v. United States*, 22-6281.

The question presented in this case regarding the subject matter of immigration judges 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 issue cannot be overstated. Immigration offenses (particularly illegal re-entry, the same offense Mr. Sanchez is charged with) are the single-most prosecuted federal crimes in the United States.[50] 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.[51] Given the United States' statements at oral

[50] *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).

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

argument before this Court in *Pereira*,[52] 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.[53]

The question presented regarding jurisdiction 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 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. Sanchez's case is a good vehicle for this Court to consider the question presented regarding jurisdiction. This issue was squarely presented and resolved in the

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[52] *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").

[53] *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*).

district court and before a Ninth Circuit panel. Granting certiorari and addressing the question of jurisdiction in this case would provide an answer applicable in all similar cases. Nevertheless, Mr. Sanchez will separately move this Court to stay consideration of the instant petition pending a ruling on a previously filed petition for certiorari in *Bastide-Hernandez v. United States*, 22-6281, which presents the same question regarding subject matter jurisdiction.

IV. The second question presented regarding the applicability of 8 U.S.C. §1326(d) and a noncitizen's failure to file an appeal in their underlying removal proceedings is also important, and the instant case is a good vehicle to address that question.

The Ninth Circuit reversed the district court's order in part because the district court excused Mr. Sanchez from complying with 8 U.S.C. § 1326(d)'s "exhaustion and judicial review requirements" insofar as he failed to file an appeal in his underlying removal proceedings.[54] Mr. Sanchez had declared and testified in the district court that he had no recollection of his immigration attorney speaking with him about his appeal rights prior to or during his removal hearing. Mr. Sanchez further testified that he told the immigration judge he was waiving his right to appeal only because Ms. Currie had just said that and he did not want to contradict her. The Ninth Circuit found these arguments unpersuasive, citing *Palomar-Santiago*.[55] *Palomar-Santiago* simply does not have this broad of an impact on noncitizens failing to appeal in immigration proceedings.

[54] *See Sanchez*, 853 Fed. App'x at 201-02.
[55] *See id.*

The noncitizen in *Palomar-Santiago* was removed after an immigration judge erroneously concluded that his DUI conviction was an aggravated felony. This Court held that an appeal to the BIA and potentially up to the Ninth Circuit could have fixed the immigration judge's error, and therefore the noncitizen's failure to appeal precluded the collateral attack he was now raising in a § 1326 prosecution.[56] This is literal apples and oranges to the facts of Mr. Sanchez's claim. He is not claiming the immigration judge made some legal error that could have been corrected. Rather, he is arguing that he failed to file an appeal because his counsel provided ineffective assistance and did not advise him about his appeal rights or his chances of success on appeal.

A waiver of appeal simply cannot be "considered and intelligent" under these circumstances. The Supreme Court has long held that waivers of appeal that "were not the result of considered judgments" are "not considered or intelligent."[57] Nothing in *Palomar-Santiago* calls into question the Supreme Court's prior holding in *Mendoza-Lopez*. In fact, the Court cited *Mendoza-Lopez* favorably in *Palomar-Santiago*.[58]

This Court's ruling in *Palomar-Santiago* did nothing more than overrule the Ninth Circuit's narrow holding that a defendant who was "not convicted of an offense that made him removable … is excused from" satisfying § 1326(d)(1) and (2).[59] Holding that

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[56] *Palomar-Santiago*, 141 S. Ct. at 1620-22.
[57] *See United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987).
[58] *See Palomar-Santiago*, 141 S. Ct. at 1619, 1621 n. 2 (*citing Mendoza-Lopez*).
[59] *United States v. Ochoa*, 861 F.3d 1010, 1015 (9th Cir. 2017), *overruled by Palomar-Santiago*, 141 S. Ct. 1615 (2021).

Palomar-Santiago did anything more than that would mean that this Court 1) considered and overruled a line of precedent that the Ninth Circuit explicitly did not rely on in its holding below,[60] 2) went beyond the question presented in the United States' petition for certiorari[61] (in violation of its own rules[62]), 3) overruled *Mendoza-Lopez* despite citing it favorably,[63] and 4) held that the failure of a noncitizen to file an appeal bars relief under § 1326(d)(1) and (2) even where that appeal waiver may be invalid—and that the Supreme Court did all of this silently and implicitly.

Since *Palomar-Santiago* was decided, district court and circuit courts across the country have reached differing opinions on its scope and applicability to various factual scenarios and procedural histories presented in § 1326 prosecutions. This Court has not subsequently addressed the scope of that ruling, particularly with respect to whether an unknowing and unintelligent waiver of appeal (based on ineffective assistance of counsel) would affect the § 1326(d) analysis. This question is squarely presented in the instant case. The Court should grant this petition to address that question.

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[60] *See United States v. Palomar-Santiago*, 813 F. App'x 282, 284 (9th Cir. 2020) (*overruled*).
[61] *See* Petition for a Writ of Certiorari, United States of America v. Palomar-Santiago, 2020 WL 5947898 at *i (U.S. Oct. 2020) (stating the question presented as "whether a defendant automatically satisfies" § 1326(d)(1) and (2) "solely by showing that he was removed for a crime that would not be considered a removable offense under current circuit law, even if he cannot independently demonstrate administrative exhaustion or deprivation of the opportunity for judicial review.").
[62] *See* Supreme Court Rule 14(1)(a) ("Only the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court.").
[63] *See Palomar-Santiago*, 141 S. Ct. at 1619, 1621 n. 2 (*citing Mendoza-Lopez*).

V. The third question presented regarding the standard of review that should apply to a district court's finding regarding plausibility of relief from removal is also important, and the instant case is a good vehicle to address that question.

The district court found that Mr. Sanchez presented sufficient evidence that he was a plausible candidate for relief from removal, in the form of voluntary departure, citing four cases for comparison.[64] The Ninth Circuit reversed the district court's findings on this point, holding the district court "erred" and that Mr. Sanchez's equities were instead most comparable to a single case.[65] Because this finding is inherently a factual finding, it ought to have been subject to "abuse of discretion" review, though the Ninth Circuit appears to have applied a lesser standard of review. Therefore, this Court should grant the instant petition and reverse the Ninth Circuit's ruling reversing the district court's finding because the district court did not abuse its discretion in finding relief plausible.

Neither the United States nor Mr. Sanchez explicitly briefed what the applicable standard of review on this question should be.[66] While rulings on § 1326(d) motions raising due process arguments are subject to de novo review,[67] factual findings are reviewed for clear error.[68] A district court's finding about whether relief from removal

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[64] *See* Appendix B at pp. 19-21.
[65] *See Sanchez*, 853 Fed. App'x at 202.
[66] *See generally* Appellant's Opening Brief, 2020 WL 5579438; Defendant – Appellee's Answering Brief, 2020 WL 7063152.
[67] *See United States v. Reyes-Bonilla*, 671 F.3d 1036 (9th Cir. 2012); *United States v. Raya-Vaca*, 771 F.3d 1195, 1201 (9th Cir. 2014).
[68] *See Raya-Vaca*, 771 F.3d at 1201.

is plausible or not is necessarily a "fact-specific analysis."[69] Therefore, the Ninth Circuit ought to have applied clear error review to the district court's finding regarding plausibility of relief. Clear error review places a "serious thumb on the scale" in favor of the ruling below.[70] This Court has held that "clear error" review is effectively the same as "abuse of discretion" because "clear error" is a term of art derived from the Federal Rules of Civil Procedure.[71]

The Ninth Circuit clearly applied a less-deferential standard of review in overruling the district court's finding regarding plausibility of relief from removal. The Ninth Circuit did not distinguish any of the four cases that the district court cited and compared Mr. Sanchez's case to a single case.[72] Given the obviously deferential standard of review that ought to have applied, it appears clear the Ninth Circuit instead applied de novo review and substituted its own judgment for that of the district court. This Court should grant the instant petition and reverse the Ninth Circuit's ruling on that point because the district court did not clearly err and did not abuse its discretion in finding Mr. Sanchez plausibly could have received relief from removal.

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[69] *Id.* at 1207. *See also United States v. Valdez-Novoa*, 780 F.3d 906, 917 (9th Cir. 2015) (resting analysis of plausibility of relief on the "facts of this case").
[70] *See United States Bank Nat'l Ass'n ex rel. CWCapital Management LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018).
[71] *See Ornelas v. United States*, 517 U.S. 690, 694 n. 3 (1996).
[72] *See Sanchez*, 853 Fed. App'x at 202.

CONCLUSION

For the reasons set forth herein, this Court should grant Mr. Sanchez's petition for a writ of certiorari. Mr. Sanchez will move the Court to stay consideration of this petition pending a ruling on a previously filed petition in *Bastide-Hernandez v. United States*, 22-6281.

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