No. _____

IN THE

# Supreme Court of the United States

ANTONIO ROSAS-RAMIREZ,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In order to initiate immigration removal proceedings under 8 U.S.C. § 1229(a), the government must serve a single notice to appear (NTA) containing all required information, including the time and place of removal proceedings. § 1229(a)(1)(G); *Niz Chavez v. Garland*, 141 S.Ct. 1474 (2021). "An enforcement action must . . . rely on a legislative rule, which (to be valid) must go through notice and comment." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2420 (2019).

The questions presented are:

1. Whether a statutory requirement imposed on the Executive Branch for initiation of an enforcement action may be characterized as a "claim-processing" rule, and if so, whether 8 U.S.C. § 1229(a)(1)(G) is a "claim-processing" rule that the government may choose not to follow, or whether § 1229(a)(1)(G) instead constrains the government's statutory license to proceed.

2. Whether 8 U.S.C. § 1229(a)(1) governs the required contents of a "notice to appear," as the Seventh Circuit has held, or whether the government may instead rely on a conflicting regulatory definition, as the majority of circuits have held, and whether the majority view directly conflicts with *Niz-Chavez*.

3. Whether the government's justifications for omitting time-and-place information from a "notice to appear"—including that 8 U.S.C. § 1229(a) is a "claim-processing" rule, and that the regulatory definition is controlling—constitute invalid legislative rules that have not gone through notice and comment.

## RELATED PROCEEDINGS

*United States v. Rosas-Ramirez*, No. 20-10001, Ninth Circuit Court of Appeals, order filed Nov. 16, 2022.

*United States v. Rosas-Ramirez*, 424 F.Supp.3d 758 (N.D. Cal. 2019), D.C. No. CR-18-0053 (LHK), order filed Nov. 26, 2019.

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## INTRODUCTION

"The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, requires the government to serve a 'notice to appear' on individuals it wishes to remove from this country." *Niz-Chavez*, 141 S.Ct. at 1478. Pursuant to 8 U.S.C. § 1229(a)(1), a "notice to appear" for removal proceedings under 8 U.S.C. § 1229a must be "a single document containing all the information an individual needs to know about his removal hearing," including the nature of the proceedings, the legal authority for the proceedings, the charges, the fact that the noncitizen may be represented by counsel, the time and place at which the proceedings will be held, and the consequences of failing to appear. *Id.* A document that does not contain the time and place of the hearing is not a "notice to appear" under § 1229(a). *Pereira v. Sessions*, 138 S.Ct. 2015, 2110 (2018).

In the years since IIRIRA's enactment, the government and the Board of Immigration Appeals (BIA) have taken at least three different positions regarding the nature and extent of the government's statutory obligation to include time-and-place information in a notice to appear. Only the first of those positions has gone through notice-and-comment. *See Niz-Chavez*, 141 S.Ct. at 1486 (discussing 62 Fed. Reg. 449 (1997)). At that time, the government expressly acknowledged that the time and place of the hearing must be on the "notice to appear," and promulgated regulations to implement IIRIRA's requirements in its new NTA form. *Id.* at 1468.

This case sadly reflects "the next chapter in the same story" that began with *Pereira* and *Niz-Chavez*. *Id.* at 1479. In those cases, this Court made clear that a document which does not contain time-and-place information is not a "notice to appear." *Pereira*, 138 S.Ct. at 2110; *Niz-Chavez*, 141 S.Ct. at 1484. Even after *Niz-Chavez*, however, the government continues to justify its failure to comply with § 1229(a)(1)(G), now on the basis of a novel argument that the statutory requirements are mere "claim-processing" rules subject to waiver. The courts of appeals and the BIA have agreed with the government, but have not identified any case in which this Court has applied its "claim-processing" doctrine to absolve the government from complying with its statutory obligations in an enforcement action. The context presented here—an immigration removal proceeding—should not be the first time.

The government's rationale presents three crucial questions. The first question is whether the Executive Branch may lawfully exercise statutory authority to conduct a removal proceeding when it has not provided all required information, including time and place of hearing, in a single notice, in violation of § 1229(a)(1)(G). The second question, on which the circuits remain split after *Niz-Chavez*, is whether the government may continue to rely on the regulatory definition of an NTA, which does not require time-and-place information, or whether the statutory definition is controlling, as *Niz-Chavez* held. *Id.* at 1484. The final question is whether the government's novel "claim-processing" justification, and its argument that the regulatory definition of an NTA is controlling, constitute invalid "legislative

rules" because they have not gone through notice and comment.

The answers to these questions are gravely important. First, they affect the statutory and due process rights of countless individuals who are placed in removal proceedings under § 1229a every year. Second, they determine whether an individual like Antonio Rosas-Ramirez may be prosecuted for violating 8 U.S.C. § 1326 (illegal reentry after deportation), when the "deportation" element of that crime depends solely on an extra-statutory removal process. Third, the government's conduct implicates significant questions regarding separation of powers, because the government continues to justify its omission of time-and-place information based on its own policy preferences, effectively disregarding the mandate of Congress and the holdings of this Court.

This Court should grant certiorari and reject the government's "claim-processing" argument in order to "ensure the federal government does not exceed its statutory license," because § 1229(a) "constrains" the government's "power" to proceed. *Niz-Chavez*, 141 S.Ct. at 1486.

The Court should also grant certiorari to resolve the circuit split regarding whether the statutory definition of an NTA is controlling, because the majority view adopting the regulatory definition directly conflicts with *Niz-Chavez*. *Id.* at 1484.

Alternatively, the Court should grant certiorari to reject the government's arguments as premature, because they constitute "legislative rules" that govern the rights and obligations of parties in an enforcement action, and have not gone through notice and comment. *Kisor*, 139 S.Ct. at 2420.

In the second alternative, the Court should grant certiorari, vacate the Ninth Circuit's summary reversal in Mr. Rosas-Ramirez's case, and remand (GVR) for consideration of *Niz-Chavez* and *Kisor*.

## OPINIONS BELOW

The Ninth Circuit's order granting the government's opposed motion for summary reversal is not reported, but is available on Westlaw at 2022 WL 17086702, and is reproduced in the appendix. App.1a.

The district court's order granting Mr. Rosas-Ramirez's motion to dismiss the indictment is reported at *United States v. Rosas-Ramirez*, 424 F.Supp.3d 758 (N.D. Cal. 2019), and is reproduced in the appendix. App.2a.

## JURISDICTION

The court of appeals' summary reversal issued on November 16, 2022. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1.

* * *

The Fifth Amendment to the U.S. Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

* * *

8 U.S.C. § 1229(a)(1) provides in pertinent part:

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (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.

. . .

* * *

8 U.S.C. § 1326 provides in pertinent part:

(a) In general

. . . [A]ny 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 . . . .

shall be fined under title 18, or imprisoned . . . or both.

. . .

(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 OF THE CASE

"A notice to appear serves as the basis for commencing a grave legal proceeding." *Niz-Chavez*, 141 S.Ct. at 1482. When commencing such a proceeding, the government must comply with § 1229(a)'s "plain statutory command" requiring "a single and reasonable comprehensive statement of the nature of the proceedings," including the time and place of the removal hearing. *Id.* at 1486. When the government fails to provide that information, it "exceed[s] its statutory license." *Id.*

### I. In 1997, the government promulgated immigration regulations to conform with IIRIRA, but included an extra-statutory exception.

"Before IIRIRA, the government began removal proceedings by issuing an 'order to show cause'—the predecessor to today's 'notice to appear.' Back then, the law expressly authorized the government to specify the place and time for an alien's hearing 'in the order to show cause *or otherwise*.'" *Niz-Chavez*, 141 S.Ct. at 1484 (emphasis in original). IIRIRA, however, "changed all that," both by changing the name of the charging document, and by requiring time and place to be included in the NTA. *Id.*

IIRIRA did so through a new statute entitled "Initiation of Removal Proceedings," 8 U.S.C. § 1229, which set new requirements for initiation of removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1229(a) ("In removal proceedings under Section 1229a of this title, written notice (in this section referred to as a 'NTA') shall be given in person to the alien . . . ."). "[I]n IIRIRA, Congress took pains to describe exactly what the government had to include

in a notice to appear," including "the time and place of the hearing." *Niz-Chavez*, 141 S.Ct. at 1479; 8 U.S.C. § 1229(a)(1)(G)(i).

"[T]he year after Congress adopted IIRIRA the government proposed a rule to create 'the Notice to Appear, Form I-862, replacing the Order to Show Cause, Form I-221.'" *Niz-Chavez*, 141 S.Ct. at 1484 (citing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 449 (1997), 1997 WL 1514). "In the preamble to its proposed rule, the government expressly acknowledged that 'the language of the amended Act indicat[es] that *the time and place of the hearing must be on the Notice to Appear*.'" *Id.* (citing same) (emphasis added by *Niz-Chavez*).

In that preamble, the government also stated that it would "attempt to implement [the statutory time and place] requirement as fully as possible by April 1, 1997." *See* 62 Fed. Reg. at 449. While the government "tempered its candor by promising later in its proposed rule to provide a single notice only 'where practicable,'"[1] this "where practicable" lan-

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[1] 62 Fed. Reg. at 449 ("Language has been used in this part of the proposed rule recognizing that such automated scheduling will not be possible in every situation (e.g., power outages, computer crashes/downtime)."); 8 C.F.R. § 1003.18(b) ("the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable").

guage conflicted with "the plain import of IIRIRA's revisions." *Niz-Chavez*, 141 S.Ct. at 1484 n.5.

The government's regulations implementing IIRIRA also carried forward pre-existing regulations stating that "[j]urisdiction vests" when a charging document is filed with the immigration court. 8 C.F.R. § 1003.14(a); 62 Fed. Reg. at 456-57; *see infra* pp.38-39.

## II. *Pereira* invalidated the government's extra-statutory exception.

Between 1997 and 2018, when this Court decided *Pereira*, the agency's non-compliance with § 1229's time-and-place requirement had extended to "almost 100 percent" of cases. *Pereira*, 138 S.Ct. at 2111. As *Pereira* explained, "[p]er [the 'where practicable'] regulation, the Department of Homeland Security (DHS), at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information." *Id.* at 2112.

*Pereira* rejected the government's extra-statutory practice, and found no room for deference under *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the statute was unambiguous. *Id.* at 2111, 2113, 2115, 2118-19. Under IIRIRA, time-and-place information is "substantive," and a notice to appear that does not contain "integral information like the time and place of removal proceedings" would be deprived of its "essential character." *Id.* at 2116-17. *Pereira* also found that § 1229(a) uses "quintessential definitional language," and held that omission of such information was not "some

trivial, ministerial defect." *Id.* at 2114-17. Accordingly, a putative notice that did not contain time-and-place information would be "incomplete," would not meet "minimum" requirements, and would not be "authoriz[ed]." *Id.* at 2115-16, 2118-19.

## III. After district courts dismissed illegal reentry indictments in light of *Pereira*, the government persuaded numerous courts of appeals that *Pereira* was not controlling.

1. Following *Pereira*, numerous immigration courts terminated proceedings, and numerous district courts granted motions to dismiss illegal reentry indictments, based on the putative NTA's failure to identify the time and place of the hearing. *See, e.g.*, III-ER-337,[2] III-ER-349-72 (IJ termination orders); III-ER-272, III-ER-277, III-ER-337-38 (district court dismissals). The district court in this case also dismissed an indictment on that basis in a separate case. *United States v. Rojas-Osorio*, 2019 WL 235042 (N.D. Cal. 2019) (Koh, J.), *vacated on reconsideration and indictment dismissed on other grounds*, 381 F.Supp.3d 1216 (N.D. Cal. 2019).

2. In response, the government argued that only the regulatory requirements, and not the statutory requirements, governed the required contents of a notice to appear, and that the regulations (which only required time and place "where practicable") independently governed the vesting of subject-matter jurisdiction. *E.g.,* II-ER-55 (*Karingithi v. Whitaker*,

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[2] "ER" refers to the government's three-volume Excerpts of Record in the court of appeals.

No. 16-70886, Supp'l Brief for Resp., Dkt. 57 ("Under the Controlling Regulations, The Immigration Court Had Subject-Matter Jurisdiction Over Karingithi's Removal Proceedings")).

3. The BIA and most courts of appeals (including the Ninth) then held that § 1229(a)(1)(G) was not controlling, holding, *inter alia*, that *Pereira* was limited to the narrow context of cancellation of removal,[3] and/or that § 1229(a)(1) is a claim-processing rule, and continuing to rely on the extra-statutory "where practicable" regulatory exception. *See Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018) (relying on "where practicable" regulation to conclude that "two step notice is sufficient" to satisfy § 1229(a)); *Goncalves Pontes v. Barr*, 938 F.3d 1, 6-7 (1st Cir. 2019) (relying on regulatory definition of NTA and holding that "notice to appear" need not comply with § 1229(a) to vest jurisdiction); *Banegas Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019) (same); *Nkomo v. Att'y Gen. of U.S.*, 930 F.3d 129, 133 (3d Cir. 2019) (same); *United States v. Cortez*, 930 F.3d 350, 364 (4th Cir. 2019) (acknowledging

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[3] While *Pereira* involved cancellation of removal and the "stop-time" rule, *Pereira* interpreted § 1229(a)(1)(G) generally. 138 S.Ct. at 2114-18. *Niz-Chavez* also makes clear that the requirements of § 1229(a) apply across the statutory scheme, and are not limited to the stop-time rule. 141 S.Ct. at 1483-84 (construing § 1229(a)(2)); *id.* at 1482-83 (construing § 1229(e)); *id.* at 1483 (construing § 1229a(b)(7)); *id.* at 1480-81 (construing § 1229b(d)(1)). Accordingly, contrary circuit precedent is erroneous.

regulatory history, 62 Fed. Reg. 444, 449 (Jan. 3, 1997), but holding that regulatory language only required time-and-place information "where practicable" and regulatory definition governed required contents of notice to appear); *Pierre-Paul v. Barr*, 930 F.3d 684, 689-90 (5th Cir. 2019) (holding that regulatory definition was not "textually bonded" to statutory definition); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 313–14 (6th Cir. 2018) (holding that regulatory definition governed required contents of NTA); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019) (same); *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) ("[T]he regulations, not § 1229(a), define when jurisdiction vests" and govern necessary contents of a notice to appear, including "regulatory command" that time and place need only be included "where practicable"); *Martinez-Perez v. Barr*, 947 F.3d 1273, 1277-79 (10th Cir. 2020) (holding that § 1229(a) is a claim-processing rule and relying on "where practicable" regulatory language); *Perez-Sanchez v. Attorney General*, 935 F.3d 1148, 1154-55 (11th Cir. 2019) (holding that § 1229(a) and jurisdiction-vesting regulation are claim-processing rules).

4. The Seventh Circuit found that § 1229(a) was a claim-processing rule, but, in contrast with the majority view deferring to the regulatory definition, held that the statutory requirements were controlling. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) (rejecting government's "absurd" argument that statute and regulations defined different documents both labeled "notice to appear").

The approaches of the Ninth and Fourth Circuits, although they followed slightly different

paths, are illustrative of the majority view after *Pereira*. The Ninth Circuit did not consider the regulatory history, found that the term "notice to appear" in the statute had "no application" to the term "notice to appear" in the regulations," and found that the two are "unrelated." *Karingithi*, 913 F.3d at 1161.[4] On that basis, *Karingithi* declined to apply the "'normal rule of statutory construction'" that "'identical words used in different parts of the same act are intended to have the same meaning.'" *Id.* at 1160 (citation omitted).

The Fourth Circuit, in slight contrast, acknowledged regulatory history "suggesting" that the government promulgated the regulations in order to implement the statutory time-and-place requirement. *Cortez*, 930 F.3d at 364 (citing 62 Fed. Reg. 444, 449 (Jan. 3, 1997)). However, *Cortez* concluded that the agency's definition, which "expressly reject[ed]" that requirement, was controlling. *Id.* Because the regulation only required such information "where practicable," and because the text of the regulation was clear, *Cortez* stated it would not "delve deeply into the tricky question of regulatory intent." *Id. Cortez* also acknowledged that the circuits were split. *Id.* at 363 (noting that "with one exception," circuits had agreed that required contents of notice to appear "are those set out by regulation," not the statute).

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[4] The Ninth Circuit reaffirmed this view in its subsequent en banc decision in *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1193 n.9 (9th Cir. 2022) (en banc).

## IV. District courts dismissed illegal reentry indictments on jurisdictional grounds.

After the majority of the courts of appeals and the BIA concluded that the government was only required to comply with the regulations, that approach also proved problematic for the government. In many cases, the government had not been complying with a separate regulatory requirement to provide, on the NTA, the address of the immigration court where the NTA would be filed. 8 C.F.R. § 1003.15(b)(6).[5] Accordingly, the government now argued that neither the statute nor the regulations constrain the government's authority, and argued that the regulatory requirements are non-jurisdictional "claim-processing" rules. AOB 14-32; II-ER-74-86. Mr. Rosas-Ramirez's case is illustrative.[6]

1. On February 8, 2018, Mr. Rosas-Ramirez was charged by indictment with illegal reentry into the United States, in violation of 8 U.S.C. § 1326. No. CR-18-0053-LHK, Dkt. 2. The indictment alleged

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[5] That location is known as the "Administrative Control Court," and is the location where all merits briefs must be filed. II-ER-138-39.

[6] Because Mr. Rosas-Ramirez was not allowed to file an Answering Brief in the Ninth Circuit, he provides a summary of his arguments in the courts below.

that he had previously been deported in 2014 and 1998.[7]

2. On June 21, 2018, this Court issued *Pereira*. Relying on *Pereira*, Mr. Rosas-Ramirez moved to dismiss the indictment as to the alleged 2014 removal under 8 U.S.C. § 1326(d), arguing that the putative NTA – which did not contain the time or place of his removal hearing – did not trigger the government's statutory authority or jurisdiction to initiate removal proceedings, resulting in an *ultra vires* removal order that could not establish the "deportation" element of § 1326. No. CR-18-0053-LHK, Dkt. 13. He further argued that any contrary holding would violate separation of powers, *Pereira*, and § 1229(a). *Id.*

The government did not dispute that an *ultra vires* removal order cannot be used for any purpose, including to support an illegal reentry prosecution. AOB 21-22; *see also Matter of Rosales Vargas*, 27 I. & N. Dec. 745, 752 n.11 (B.I.A. 2020) (noting that if § 1229 constrains agency's authority to conduct removal proceeding, "any removal proceeding initiated by a notice to appear" not containing time-and-place information "would be *ultra vires*"); *City of Arlington v. FCC*, 569 U.S. 290, 296-97 (2013) (agency action beyond its statutory authority is "ultra vires.").

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[7] The district court separately granted Mr. Rosas-Ramirez's motion to dismiss the indictment as to an alleged 1998 administrative removal, which is not at issue in this petition. 2019 WL 2617096 (N.D. Cal. 2019).

3. After the Ninth Circuit issued *Karingithi*, the district court denied the motion on grounds that under *Karingithi*, the putative NTA was not required to contain the time or place of the hearing. App.26a.

4. On February 2, 2019, Mr. Rosas-Ramirez moved for reconsideration, arguing that *Karingithi* never identified any source of statutory authority for the government's conduct, and that it conflicted with this Court's precedent regarding separation of powers and agency action. No. CR-18-0052-LHK, Dkt. 25; II-ER-185-237. The district court denied reconsideration. App.21a.

5. On October 2, 2019, Mr. Rosas-Ramirez moved for dismissal a second time pursuant to *Karingithi*'s jurisdictional and regulatory analysis, because the putative NTA did not comply with 8 C.F.R. § 1003.15(b)(6). No. CR-18-53-LHK, Dkt. 59. In direct conflict with its own arguments in *Karingithi*, the government now argued that the regulations *did not* govern subject-matter jurisdiction, but were instead "claim-processing" rules. No. CR-18-53-LHK, Dkt. 60.[8]

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[8] Violation of a rule governing statutory authority or jurisdiction would require dismissal, because the proceedings and resulting order would be void. *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930); II-ER-86 (Government noting that if removal orders are void under *Pereira*, illegal reentry convictions based on void orders would also be void). "Claim-processing" rules may be knowingly waived or forfeited, and may be subject to equitable exceptions. *Sebelius v. Auburn Reg'l Med. Center*, 568

6. On November 26, 2019, the district court granted the post-*Karingithi* motion to dismiss. App.2a.[9] The court held that *Karingithi* "stands for the proposition that 8 C.F.R. § 1003.15(b)(6) is jurisdictional in nature," which the government itself had argued in *Karingithi*. App.9a, App.12a. The court further found that all three requirements of 8 U.S.C. § 1326(d) were satisfied because the order was void. App.17a-20a.

7. The government filed a timely notice of appeal. On April 20, 2020, the government filed its Opening Brief, arguing in part that immigration courts have authority to conduct removal hearings "even where an NTA does not meet statutory or regulatory requirements." *U.S. v. Rosas-Ramirez*, No. 20-10001, App.'s Opening Brief at 27-28, Dkt. 6.

8. On June 8, 2020, this Court granted certiorari in *Niz-Chavez*.

9. The Ninth Circuit stayed proceedings in this case following cross motions for stay. No. 20-10001, Dkt. 11, Dkt. 16, Dkt. 21.

10. On February 2, 2021, a divided panel of the Ninth Circuit issued the first of two panel decisions in *United States v. Bastide-Hernandez*, No. 19-

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U.S. 145,158-60 (2013); *Hamer v. Neighborhood Housing Serv. of Chicago*, 138 S.Ct. 13, 17-18 & n.1 (2017).

[9] Numerous district courts granted motions to dismiss illegal reentry indictments on similar grounds. I-ER-15-17 (citing cases).

30006. In the first decision, the majority concluded that the regulatory definition of "notice to appear" was controlling, and that jurisdiction vested in the immigration court upon filing of the putative NTA, even if it did not provide the time, date, or location of the hearing, and remanded for consideration of the exhaustion and judicial review factors set forth in 8 U.S.C. § 1326(d). 986 F.3d 1245, 1248, 1249 (9th Cir. 2021). Judge Smith dissented, stating that in his view, the immigration court lacked jurisdiction, and the factors in § 1326(d) did not apply because the order was void. *Id.* at 1250-53 (Smith, J., dissenting).

## V. *Niz-Chavez* rejected the government's argument that it could evade § 1229(a)(1)(G) by providing piecemeal notice in separate documents.

On April 29, 2021, this Court issued *Niz-Chavez,* rejecting the government's claim that it could provide the information required by § 1229(a) "in separate mailings . . . over time." *Niz-Chavez*, 141 S.Ct. at 1478. This Court emphatically held that "the law Congress adopted [does not] tolerate[] the government's preferred practice." *Id.*

This Court cogently observed that even after *Pereira* held that a "notice to appear" must contain time-and-place information, the government instead sought to "continue down the same old path." *Id.* at 1479. This Court rejected the government's argument that it could provide "notice-by-installment," which exceeded "its statutory license." *Id.* at 1479, 1486.

*Niz-Chavez* further held that the regulations promulgated by the government in 1997 to "imple-

ment" the statutory time-and-place requirement must be consistent with that requirement. *Id.* (citing 62 Fed. Reg. at 449). Accordingly, the conflicting regulatory language in 8 C.F.R. § 1003.18—which purports to authorize "provid[ing] a single notice only 'where practicable'"—"ma[de] no difference" to the Court's statutory analysis because it conflicted with "the plain import of IIRIRA's revisions." *Niz-Chavez*, 141 S.Ct. at 1484 & n.5.

*Niz-Chavez* also rejected the government's claim that the "notice to appear" described in agency regulations was subject to different requirements than the "notice to appear" described in IIRIRA. *Id.* at 1483-84 & n.5. Instead, both are subject to the same time-and-place requirement. *Id.*

After the issuance of *Niz-Chavez*, Mr. Rosas-Ramirez filed a motion to extend the stay of proceedings in the Ninth Circuit pending final resolution of *Bastide-Hernandez*, where the appellee had petitioned for rehearing en banc. No. 20-10001, Dkt. 29 at 9-10. Mr. Rosas-Ramirez argued in part that "the district court should be affirmed in light of *Niz-Chavez*" because Mr. Rosas-Ramirez had raised and preserved many of the same arguments that this Court adopted. No. 20-10001, Dkt. 31 at 9. In support, Mr. Rosas-Ramirez cited *Kisor v. Wilkie*, and noted this Court's construction of the regulatory history in *Niz-Chavez*. *Id.* at 8 & n.3.

## VI. The government persuaded numerous courts of appeals that neither *Pereira* nor *Niz-Chavez* are controlling, and that the regulations govern the required contents of a "notice to appear."

1. On May 24, 2021, this Court issued *United States v. Palomar-Santiago*, 141 S.Ct. 1615 (2021). This Court abrogated *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), in which the Ninth Circuit had held that all three prongs of 8 U.S.C. § 1326(d), including the requirements of administrative exhaustion and judicial review, were necessarily satisfied by an IJ's substantive error in classifying a prior offense as an "aggravated felony." 141 S.Ct. at 1621-22.

2. On July 12, 2021, the *Bastide-Hernandez* panel withdrew its previous opinion on denial of rehearing en banc, and issued a new opinion, largely restating its earlier views, but also remanding for consideration of the § 1326(d) factors in light of *Palomar*. 3 F.4th 1193 (9th Cir. 2021). In a concurrence, Judge Smith agreed that remand was warranted for consideration of the § 1326(d) factors, but reiterated that in his view, the district court lacked jurisdiction. *Id.* at 1198 (M. Smith, J., concurring).

3. The Ninth Circuit then ordered *Bastide-Hernandez* reheard en banc. No. 19-30006, Dkt. 75. In supplemental briefing, Mr. Bastide-Hernandez argued, *inter alia*, that the government had not acquired statutory or regulatory authority in the absence of a valid NTA; that this Court had never applied its claim-processing doctrine to benefit the government in an enforcement action; and that the government's post-*Pereira* arguments should be rejected under *Kisor* and *Niz-Chavez*. *U.S. v. Bastide-*

*Hernandez*, Supplemental En Banc Brief of Appellee, 2022 WL 496458 (2022).

In response, the government cited in part Justice Kavanaugh's dissent in *Niz-Chavez*, wherein he contended that the government need not comply with § 1229(a)(1) to "institute removal proceedings." *U.S. v. Bastide-Hernandez*, Appellant's Response to Appellee's Renewed Petition for Rehearing En Banc, No. 19-30006, at 13, Dkt. 74. The government also claimed that "*Niz-Chavez* treats 8 U.S.C. § 1229(a)(1) . . . as a claim-processing rule." *Id.* at 12.

4. On July 11, 2022, the Ninth Circuit issued its en banc decision, holding that the regulatory requirements, not § 1229(a), govern the required contents of a "notice to appear," and that the regulatory requirements are waivable "claim-processing" rules. 39 F.4th at 1191, 1194 n.9. In a footnote, the Ninth Circuit provided a cursory mention of *Niz-Chavez*, while reaffirming its "regulatory NTA" holding in *Karingithi*:

> After *Niz-Chavez*, the information required in an NTA under § 1229(a) must appear in a single document to trigger the stop-time rule. 141 S.Ct. at 1480. But that decision did not concern the docketing procedure set forth in 8 C.F.R. 1003.14(a). Thus, while the supplement of a notice of hearing would not cure any NTA deficiencies under § 1229(a), we continue to hold that it suffices for purposes of § 1003.14(a). *See Karingithi*, 913 F.3d at 1161 (noting that the definition of "'notice to appear under section 1229(a)' does not govern the meaning of 'notice

> to appear' under an unrelated regulatory provision").

*Id.*[10]

The court acknowledged that "the statutory definition of an NTA requires that it contain the date and time of the removal hearing, 8 U.S.C. § 1229(a)(1)(G)." *Id.* at 1192. However, the court agreed with the Fourth Circuit that "[n]othing in the INA conditions an immigration court's adjudicatory authority" on compliance with either § 1229(a) or the regulatory requirements for notices to appear. *Id.* at 1191-92 (citing *Cortez*, 930 F.3d at 360). The court further held that § 1229(a) does not "concern[] the authority of immigration courts to conduct [removal] proceedings." *Id.* at 1192 (stating that § 1229(a) "chiefly concerns the notice the government must provide noncitizens regarding their removal proceedings"). Thus, under its "claim-processing" analysis, "the failure of an NTA to include time and date information does not deprive the immigration court of subject matter jurisdiction," and a removal order precipitated by a defective NTA is not void. *Id.* at 1188.

The court did not address this Court's express rejection of "notice-by-installment," or this Court's

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[10] Although the Ninth Circuit appeared to suggest that § 1229(a) only applies in the stop-time context, *id.* at 1194 n.9, an earlier panel decision applied § 1229(a) in an *in absentia* proceeding. *See Singh v. Garland*, 24 F.4th 1315, 1318-21 (9th Cir. 2022).

analysis of the regulatory history. *Niz-Chavez*, 141 S.Ct. at 1479, 1484. Nor did the court cite or distinguish *Kisor*, or address Mr. Bastide-Hernandez's argument that this Court has never applied its "claim-processing" doctrine to benefit the government in an enforcement action.

The court remanded for further proceedings consistent with *Palomar-Santiago*. *Id.* at 1194 n.10.

In a partial concurrence, Judge Friedland observed that "[g]iven that the Supreme Court has on two occasions strictly enforced the statutory NTA requirements, and given that there is evidence that Congress intended an NTA to be necessary for jurisdiction over removal proceedings, the Supreme Court may eventually disagree with our court's holding today." *Id.* at 1196 (Friedland, J., concurring in the judgment).

5. After *Niz-Chavez*, the circuit split has continued regarding the viability of the regulatory definition of an NTA, and additional circuits have adopted a claim-processing rationale. *See, e.g., Chery v. Garland*, 16 F.4th 980, 987 & n.36 (2d Cir. 2021) (reaffirming pre-*Niz-Chavez* circuit precedent and citing "where practicable" exception); *Chavez-Chilel v. Attorney General*, 20 F.4th 138, 143 n.4 (3d Cir. 2021) (finding that putative NTA which omitted time-and-place information "complied with the regulations" in light of "where practicable" language; relying on claim-processing rationale; and allowing government to invoke "equitable considerations" to excuse "technical noncompliance"); *United States v. Vasquez-Flores*, 2021 WL 3615366, *2 n.3 (4th Cir. 2021) ("*Niz-Chavez*'s reasoning does not undermine the reasoning in *Cortez*"); *Castillo-Gutierrez v. Garland*,

43 F.4th 477, 480 (5th Cir. 2022) (stating that *Niz-Chavez* did not undermine earlier precedent holding that "the regulations, rather than the statute, govern what a notice to appear must contain").

6. The Seventh Circuit has continued to hold that § 1229(a) is a "claim-processing" rule, which it now describes as "mandatory," and continues to hold that the statutory definition is controlling. *De La Rosa v. Garland*, 2 F.4th 685, 688 (7th Cir. 2021) (holding that § 1229(a)'s requirements are "mandatory claims-processing rules for which noncompliance will result in relief upon a timely objection").

7. Also after *Niz-Chavez*, the BIA has concluded in a precedential decision that §1229(a) is a claims-processing rule, and that § 1229(a) does not constrain the government's "authority or power." *Matter of Fernandes*, 28 I. & N. Dec. 605, 608 (BIA 2022). The BIA stated that it would only apply the Seventh Circuit's approach (that § 1229(a) is a "mandatory" claim-processing rule) in cases arising in the Seventh Circuit. *Id.* at 616 n.9. With respect to the "where practicable" regulatory exception, the BIA narrowed its interpretation of the exception's scope in light of the regulatory history describing the exception as applying in two circumstances: (1) time pressure associated with revising the immigration system prior to the effective date of IIRIRA, and (2) "power outages [and] computer crashes/downtime." *Id.* at 612-13 (citing 62 FR 444, 449 (Jan. 3, 1997)). The BIA found that neither circumstance applied to the case before it. *Id.*

8. In Mr. Rosas-Ramirez's case, after *Bastide-Hernandez*, the government filed a two-page motion for summary reversal, citing *Bastide-Hernandez* and

*Palomar-Santiago*, Dkt. 30, which Mr. Rosas-Ramirez opposed. Dkt. 32. A panel of the Ninth Circuit granted the motion without allowing Mr. Rosas-Ramirez to file his Answering Brief, citing only *Bastide-Hernandez* and *Palomar-Santiago*. App.1a.

Mr. Rosas-Ramirez then filed the instant petition for certiorari.

## REASONS FOR GRANTING THE WRIT

### I. The government cannot evade the statutory time-and-place requirements in 8 U.S.C. § 1229(a) via this Court's "claim-processing" doctrine.

#### A. In light of separation of powers, the government is bound by limits Congress placed on its statutory authority.

Under Article I of the Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. In light of separation of powers, Congress may confer discretion on the Executive to implement and enforce the laws, but the Executive's regulations cannot exceed its statutory authority. *United States v. Haggar Apparel*, 526 U.S. 380, 392 (1999) (noting that regulation will not control if it "is inconsistent with the statutory language or is an unreasonable implementation of it"); *see also Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014).

Additionally, courts and agencies alike are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those pur-

poses." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994).

Accordingly, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington*, 569 U.S. at 297. Courts must "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority." *Id.* at 307. "[T]he scope of the agency's statutory authority (that is, its jurisdiction)" can only be determined by Congress, and any action "beyond [its] jurisdiction" is "*ultra vires*." *Id.* at 296-97.

Against that backdrop, "this Court's task is to discern and apply the law's plain meaning as faithfully as [it] can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" *BP P.L.C. et al. v. Baltimore*, 141 S.Ct. 1532, 1543 (2021) (citation omitted).

### B. Under *Pereira* and *Niz-Chavez*, the government's statutory license to initiate removal proceedings requires compliance with 8 U.S.C. § 1229(a)(1)(G).

"Congress has specified which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 567 U.S. 387, 396 (2012). A person in removal proceedings has a Fifth Amendment due process right to the procedures provided by Congress. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

Pursuant to IIRIRA, a "removal proceeding" under § 1229a, also termed a "section 240 proceeding," must be "initiat[ed]" through service of a particular document ("a notice to appear") which con-

tains the time and place of the removal proceeding. 110 Stat. 3009-546; 8 U.S.C. § 1229(a); *Niz-Chavez*, 141 S.Ct. at 1482 n.2 (describing NTA as a "case-initiating document" that "must contain the catalogue of information" identified by Congress). Indeed, 8 U.S.C. § 1229 is itself entitled "Initiation of Removal Proceedings." *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("any possible ambiguity is resolved against respondents by the title of the [statute]").

Congress' determination that time-and-place information must be included in the NTA in order to "initiate" proceedings is a quintessential legislative function, because the service of the NTA "alter[s] the legal rights, duties, and relations of persons." *I.N.S. v. Chadha*, 462 U.S. 919, 953 (1983); *see also Shaughnessy*, 338 U.S. at 544. Moreover, Congress' "means" and "ultimate purpose" in enacting this portion of IIRIRA were to establish new case-initiating requirements. *Pereira*, 138 S.Ct. at 2119 (finding support for its interpretation in legislative history); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. at 231 n.4.

In sum, § 1229 unquestionably sets bounds on the agency's statutory authority to initiate section 240 removal proceedings. *See Niz-Chavez*, 141 S.Ct. at 1486 (single-notice requirement "ensure[s] the federal government does not exceed its statutory license"); *id.* (time-and-place requirement "constrain[s]" government's "power"); *Pereira*, 138 S.Ct. at 2115-16, 2118-19 (putative NTA lacking time-and-place would not be "authoriz[ed]"). Thus, in light of separation of powers, the government must serve a single notice containing time-and-place in-

formation. 8 U.S.C. § 1229(a)(1); *Utility Air Regulatory Group*, 573 U.S. at 327.

In the instant case, *Pereira* and *Niz-Chavez* plainly hold that Mr. Rosas-Ramirez never received "a notice to appear," because the document he received did not provide either the time or place of his removal hearing. *Pereira*, 138 S.Ct. at 2110; *Niz-Chavez*, 141 S.Ct. at 1486. Accordingly, removal proceedings under § 1229a were never "[i]nitiat[ed]" under § 1229(a), and the Executive Branch lacked authority to remove him. Instead, Mr. Rosas-Ramirez was expelled from the United States pursuant to an extra-statutory process, and deprived of meaningful notice.

### C. This Court's "claim-processing" doctrine is not applicable.

The government does not dispute that it violated § 1229(a) here. The "claim-processing" rationale adopted by the BIA and the courts of appeals, at the government's urging, impermissibly disregards Congress' definition of "notice to appear" in favor of another definition "of [the government's] own choosing." *Utility Air Regulatory Group*, 573 U.S. at 328 ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). As such, it violates separation of powers, and is *ultra vires*. *City of Arlington*, 569 U.S. at 296-97; *compare Nijjar v. Holder*, 689 F.3d 1077 (9th Cir. 2012) (holding that Department of Homeland Security lacked statutory authority to terminate asylum, and regulations governing same were *ultra vires*); *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000) (en banc) (holding that Attorney General lacked statuto-

ry authority to revoke naturalization or promulgate regulations governing same).

After *Niz-Chavez* and *Pereira*, application of a "claim-processing" theory would impermissibly allow the government to perpetuate the same error that this Court has twice sought to eliminate. Moreover, in the context of this "grave legal proceeding," *Niz-Chavez*, 141 S.Ct. at 1482, Congress added the time-and-place requirement in IIRIRA to ensure meaningful notice and a meaningful opportunity to obtain counsel, *Pereira*, 138 S.Ct. at 2114-15, and not merely to "promote the orderly progress of litigation." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Accordingly, the government's obligation to comply with its "its statutory license," *Niz-Chavez*, 141 S.Ct. at 1486, cannot be subject to waiver under a "claim-processing" theory.

This Court's "claim-processing" doctrine is also inapplicable because the party that violated the statute is no ordinary civil litigant seeking her day in court, but is instead the United States government pursuing an enforcement action. This Court has typically applied its "claim-processing" doctrine to excuse ordinary litigants from failure to comply with procedural requirements, such as missing a filing deadline (e.*g. Henderson*, 562 U.S. at 431, *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), *Sebelius*, 568 U.S. at 145), failing to allege the number of employees in an organization (*e.g. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-16 (2006)), or failing to allege a particular claim in an otherwise-properly filed action (*e.g. Fort Bend Cty., Texas*, v. *Davis*, 139 S.Ct. 1848, 1849-50 (2019)).

The distinction this Court has drawn between "jurisdictional" and "claim-processing" rules also makes little sense in the context here. The question in this case is not whether the Executive Branch has "subject-matter jurisdiction," but instead whether it may properly exercise statutory authority to carry out an enforcement action. Nor is there any reason why typical "claim-processing" considerations—such as whether estoppel or equitable tolling might apply—would have any relevance to statutory requirements for initiation of an enforcement action.

Moreover, the immigration removal context is a particularly poor fit for such a significant extension of the doctrine. Indeed, none of the Court's claim-processing cases involve anything like the government's action here: the placement of noncitizens in proceedings to expel them from the United States (many of whom do not speak English, and are not represented by counsel), without following either the governing statutory or regulatory provisions. And unlike ordinary litigants who may inadvertently overlook a procedural requirement, the government has been aware of its obligation to provide time-and-place information since it promulgated the regulations implementing IIRIRA. *Niz-Chavez*, 141 S.Ct. at 1484.

### D. The government cannot define an element of the crime it enforces.

"The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Here, 8 U.S.C. § 1326 is a unique criminal statute in that it incorporates, as an element,

the existence of a prior administrative order. Indeed, this Court has expressed concern regarding "the use of the result of an administrative proceeding to establish an element of a criminal offense." *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 n.15 (1987). However, the Court reserved that "troubling" issue for another day, *id.*, while holding that due process requires judicial review of the order's validity to "be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 838.[11]

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[11] *Palomar-Santiago* reaffirmed *Mendoza-Lopez*'s due process holding, while holding that substantive legal error alone does not satisfy the exhaustion and judicial review prongs of §§ 1326(d)(1)-(2). *Palomar-Santiago*, 141 S.Ct at 1619, 1621-22. Here, unlike *Palomar-Santiago*, the district court did not find that the IJ "committed an error on the merits," *id.* at 1621, but instead found that the order was void, and had no legal effect. App.17a-20a. Additionally, *Palomar-Santiago* did not address the application of § 1326(d) to an order that is *ultra vires* to the governing statute, or long-standing exhaustion principles in that context. *See, e.g., Espinoza-Gutierrez v. Smith*, 94 F.3d 1270 (9th Cir. 1996) ("the exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation because of conflict with a statute"). Finally, Mr. Rosas-Ramirez was unaware that he could challenge deficiencies in the putative NTA, II-ER-72-73, and did not enter a considered and intelligent waiver of his right to appeal. II-ER-40-42; 481 U.S. at 840.

In the context of illegal reentry offenses, application of a claim-processing rationale would impermissibly grant authority to the Executive Branch to rely on an extra-statutory process of its own design to (1) initiate a removal proceeding, (2) obtain and execute a removal order, and (3) rely on that extra-statutory order and process to prove an element of the criminal offense.

This consolidation of power in the Executive Branch violates separation of powers. "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc), *rev'd on other grounds*, 136 S. Ct. 1113 (2016). If there is any ambiguity, the rule of lenity must control. *See Leocal v. Ashcroft*, 543 U.S. 1, 11-12, n.8 (2004).

## II. The Court should grant certiorari to resolve the circuit split regarding whether § 1229(a) governs the required contents of a "notice to appear."

*Niz-Chavez* held that the statutory definition set forth in § 1229(a)(1)(G), and not the conflicting regulatory definition, governs the required contents of a "notice to appear." 141 S.Ct. at 1483-84. In so holding, the Court expressly construed the regulatory intent and history underlying the "Notice to Appear, Form I-862," and concluded that when the government promulgated regulations creating that form, it "expressly acknowledged" that 'the language of the amended Act indicat[es] that the time and place of the hearing must be on the Notice to Appear.'" *Id.* at 1484 (citing 62 Fed. Reg. at 449). *Niz-Chavez* also expressly found that the conflicting lan-

guage provided in the regulatory definition—which purports to authorize "provid[ing] a single notice only 'where practicable'"—violates "the plain import of IIRIRA's revisions." *Id.* at 1484 & n.5.

Similarly, the Court rejected the government's related argument that the form "Notice to Appear" described in § 1229(e)(1) "isn't the same 'notice to appear' described in § 1229(a)(1)." *Id.* at 1483. And the Court rejected the dissent's argument that a "notice to appear" should be viewed differently from other types of charging documents simply because it requires "calendaring" information. *Id.* at 1482 n.2.

Accordingly, *Niz-Chavez* made clear that there is one "notice to appear," which functions as a charging document for all removal proceedings under § 1229a, and which must comply with the statutory time-and-place requirement. *Id.* at 1483 (noting that IIRIRA "changed the name of the charging document—and it changed the rules governing the document's contents").

After *Niz-Chavez*, however, the majority of circuits continue to hold that the government may normally rely on the regulatory definition, even though it directly conflicts with § 1229(a), and continue to cite rationales that this Court rejected. *See, e.g., Garcia v. Garland*, 28 F.4th 644, 647 (5th Cir. 2022) (noting that under post-*Niz-Chavez* circuit precedent, "the regulations, not § 1229(a), govern what an NTA must contain to constitute a valid charging document"); *Bastide-Hernandez*, 39 F.4th at 1194 (reaffirming pre-*Niz-Chavez* precedent holding that § 1229(a) does not govern meaning of "notice to appear" under "unrelated" regulation) *see also supra* pp.23-24 (citing *Chery*, 16 F.4th at 987 &

n.36 (2d Cir.); *Chavez-Chilel*, 20 F.4th at 143 n.4 (3d Cir.); *Vasquez-Flores*, 2021 WL 3615366, *2 n.3 (4th Cir.); *Castillo-Gutierrez*, 43 F.4th at 480 (5th Cir.)).[12]

Only the Seventh Circuit has recognized that the statutory definition is controlling, albeit in the context of an erroneous claim-processing holding. *De la Rosa*, 2 F.4th at 688 (7th Cir.) ("Congress created these requirements, and it is not for us or the Department to pick and choose when or how to alter them").

Accordingly, apart from the question of whether the government may benefit from a claim-processing rationale, the Court should grant certiorari to make clear that § 1229(a) applies to a "notice to appear" for *all* removals under § 1229a, not merely to some narrow subset. This question is of utmost importance to countless individuals placed in removal proceedings in the United States each year. Alt-

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[12] Since *Niz-Chavez*, an additional split has developed regarding whether § 1229(a) applies outside the stop-time rule. *Compare, e.g., Singh*, 24 F.4th at 1318-21 (9th Cir.) (applying § 1229(a)(1) to *in absentia* removal); *Laparra-Deleon v. Garland*, 52 F.4th 514, 520 (1st Cir. 2022) (same) *with Campos-Chavez v. Garland*, 54 F.4th 314, 315 (5th Cir. 2022), *pet'n for cert. filed* Jan. 20, 2023 (applying § 1229(a) to *in absentia* removal when noncitizen did not receive notice of hearing); *Dacostagomez-Aguilar v. Attorney General*, 40 F.4th 1312, 1318-20 & n.3 (11th Cir. 2022) (disagreeing with *Singh*).

hough they have statutory and due process rights to receive time-and-place information in the case-initiating document, they are deprived of those rights in the vast majority of circuits. This split has only become more entrenched since *Niz-Chavez*.

Additionally, Mr. Rosas-Ramirez's case is a good vehicle to resolve the conflict, because he did not receive time or place information in his putative NTA, and was thus removed through an extra-statutory process. II-ER-127.

## III. The government cannot rely on new theories that conflict with the grounds it invoked when it took the action.[13]

### A. Legislative rules must go through notice and comment.

It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S.Ct. 2699, 2710 (2015); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). An agency's "official position" in the Federal Register is generally controlling. *Kisor*, 139 S.Ct. at 138. The agency's "initial explanation indicates the determinative reason for the final action taken."

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[13] The Ninth Circuit did not address this issue in *Bastide-Hernandez*, but it is properly before this Court because it was raised by Mr. Rosas-Ramirez, *e.g.*, II-ER-185-237; No. 20-10001, Dkt. 25, and during en banc proceedings in *Bastide-Hernandez*. No. 19-30006, Dkt. 90.

*Dept. of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. at 1891, 1908 (2020).

"Legislative rules" are those which "bind private parties." *Kisor*, 139 S.Ct. at 2420. Legislative rules have the "force and effect of law"; interpretive rules do not. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015). "An enforcement action must . . . rely on a legislative rule, which (to be valid) must go through notice and comment. *Kisor*, 139 S.Ct. at 2420; *see also Biden v. Texas*, 142 S.Ct. 2528, 2545 (2022).[14]

"[C]ourts retain the final authority to approve—or not—the agency's reading of a notice-and-comment rule," and must consider its "text, structure, history, and purpose." *Kisor,* 139 S.Ct. at 2415, 2420. Courts should not defer to an agency's interpretation that is merely a litigation position or post-hoc rationalization. *Id.* at 2417-18.

When a court finds the grounds for agency action inadequate, the agency may do one of two things: (1) either offer a fuller explanation for the agency's reasoning at the time of the action, or (2) take new agency action, pursuant to which the agency is not limited to its prior reasons. *Biden v.*

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[14] When an agency intends to make a rule—that is, "an agency statement of general or particular applicability and future effect," 5 U.S.C. § 551(4)—it must follow the procedures in 5 U.S.C. § 553, which generally require notice-and-comment. 5 U.S.C. § 553(b).

*Texas*, 142 S.Ct. at 2544; *Regents of Univ. of Cal.*, 140 S.Ct. at 1907-08 (same).

### B. The government's new theories must be rejected as premature, regardless of whether they conflict with *Pereira*, *Niz-Chavez*, and IIRIRA.

Under *Kisor*, the regulatory text, structure, history, and purpose demonstrate that the regulations were promulgated to implement IIRIRA's statutory time-and-place requirement in the I-862 Form "Notice to Appear," and were intended to vest subject-matter jurisdiction in the court. Leaving aside whether the government's new theories violate *Pereira*, *Niz-Chavez*, and IIRIRA, they must be rejected at this stage because they have not gone through notice-and-comment. *See Michigan v. EPA*, 135 S.Ct. at 2710 (relying on agency's statements in Federal Register).

The government's argument in *Bastide-Hernandez*—that the regulations independently govern the contents of a "notice to appear," and that the statutory and regulatory requirements are mere "claim-processing" rules—are not "the grounds that the agency invoked when it took the action." *Id.* at 2710. Accordingly, the government's novel claims must be rejected under *Kisor*.

First, the government's "official position" in 1997, as published in the Federal Register and as subject to notice-and-comment, is binding. *Kisor*, 139 S.Ct. at 138. This Court has already construed the government's intent in promulgating those regulations, noting that the government "expressly acknowledged" that in light of the statutory requirement, time-and-place information must be on

the "notice to appear." *Niz-Chavez*, 141 S.Ct. at 1483-84 (citing 62 Fed. Reg. 444-01).[15]

This Court further held that the agency's 1997 statements reflect the government's recognition that a "notice to appear" must be a single document containing time-and-place information, *id.* at 1484, which is also controlling. *Kisor*, 139 S.Ct. at 2420; *id.* at 2417 n.5 (agency has no special authority to interpret regulatory language that simply "parrots the statutory text").

Additionally, the government's claim-processing argument must be rejected because it has not gone through notice-and-comment, and conflicts with its earlier position. The regulations promulgated after IIRIRA carried forward the longstanding practice of vesting subject-matter jurisdiction upon filing the charging document. 62 Fed. Reg. at 456-67; *see* 52 Fed. Reg. 2931-01, 2932 1987 WL 125277 (Jan. 29, 1987) (stating that precursor to § 1003.14(b), 8 C.F.R. § 3.14(b), "is a simple, direct statement of jurisdiction").

Moreover, these regulations were long understood to govern the subject-matter jurisdiction of the immigration court. *See, e.g., Matter of Cerda-Reyes*, 26 I. & N. Dec. 528, 529 nn.5&6 (BIA 2015) (noting that "jurisdiction" in context of immigration regula-

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[15] The regulation's "where practicable" language conflicted with § 1229(a) from its inception, *Niz-Chavez*, 141 S.Ct. at 1484 & n.5, and has never been valid. *See Rivers v. Roadway Express*, 511 U.S. 298, 813 n.12 (1994).

tions "refers to court's authority to adjudicate a case," and comparing to federal district court's subject-matter jurisdiction). Indeed, Congress recognized the jurisdictional nature of the regulatory scheme when it enacted a transitional statute within IIRIRA to govern pending proceedings. P.L. 104-208, Div. C, Sec. 309(c)(2) (1996) (timely notice of hearing under Section 309 would "confer jurisdiction" on immigration judge).

The government itself recognized the jurisdictional nature of the regulations in its briefs in *Pereira* and *Karingithi*. *See, e.g., Pereira v. Sessions*, Brief for Respondent, 2018 WL 1557067, 35-36 (2017) (describing NTA as jurisdictional document); *see also* II-ER-59 (government arguing in *Karingithi* that regulations governed "subject-matter jurisdiction").

Both the government's "regulatory NTA" argument, and its claim-processing rationale, must be found invalid because they constitute legislative rules that determine the rights and obligations of parties in an enforcement action; they conflict with grounds previously invoked; and they have not gone through notice and comment.

Finally, neither of these new theories is a product of a "fair and considered judgment." *Auer v. Robbins*, 519 U.S. 452, 453 (1997); *Kisor*, 139 S. Ct. at 2417. To the contrary, these are precisely the sorts of "post-hoc rationalizations" that must be rejected as convenient litigation positions, advanced to "defend past agency action against attack." *See Kisor*, 139 S.Ct. at 2417 (citation omitted); *see also Regents of Univ. of Cal.*, 140 S.Ct. at 1908. Both theories have plainly been "contrived" to protect the

government from the consequences of its extra-statutory conduct. *Department of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) (noting that reason for agency's rationale "seems to have been contrived").

## IV. The Court may alternatively GVR for consideration of *Niz-Chavez* and *Kisor*.

Alternatively, the Court should GVR for further consideration of *Niz-Chavez* and *Kisor*. *Niz-Chavez* was only addressed by *Bastide-Hernandez* in a cursory footnote, and *Kisor* was not addressed at all, although both were briefed. Nor did the Ninth Circuit address Mr. Bastide-Hernandez's argument that this Court has never applied its "claim-processing" doctrine to excuse the government from complying with statutory obligations in an enforcement action.

Similarly, in its summary reversal in Mr. Rosas-Ramirez's case, the Ninth Circuit provided no analysis on any of these issues, although he had raised them.

While this Court has typically GVR'd in light of intervening authority, the Court has also GVR'd when it appears that the court below "did not fully consider" "recent developments," and where the court below "shows no sign of having applied the precedents that were briefed." *Lawrence v. Chater*, 516 U.S. 163, 169-70 (1996); *see also Netherland v. Tuggle*, 515 U.S. 951 (1995) (vacating summary order where court of appeals failed to address Supreme Court precedent briefed by parties).

Additionally, the Court has GVR'd when the lower court's decision was inconsistent with this

Court's past precedent. *Grady v. North Carolina*, 575 U.S. 1368 (2015) (concluding that lower court's holding was inconsistent with Supreme Court precedent issued in 2012 and 2013; granting certiorari, vacating, and remanding for consideration of remaining issue); *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (concluding that lower court's decision was inconsistent with Supreme Court's *Brady* precedent, and granting certiorari, vacating, and remanding for further explanation).

Accordingly, if the Court does not grant certiorari and reverse on the grounds outlined above, the Court should GVR with instructions to consider *Niz-Chavez* and *Kisor*, and allow the parties to complete merits briefing.

## CONCLUSION

The Court should grant the petition for a writ of certiorari and hold that the government cannot rely on ether a "claim-processing" rationale, or the conflicting regulatory definition of a "notice to appear," to evade the statutory requirements of § 1229(a)(1)(G).

Alternatively, the Court should grant certiorari, vacate the Ninth Circuit's summary reversal, and remand for consideration of *Niz-Chavez* and *Kisor* on full briefing.

Respectfully submitted,

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March 3, 2023