No. _____

IN THE

Supreme Court of the United States

LUIS NUNEZ-ROMERO,

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

TAMARA CREPET*
LARA S. VINNARD
Assistant Federal Public Defenders
OFFICE OF THE FEDERAL PUBLIC DEFENDER
55 South Market Street, Suite 820
San Jose, CA 95113
(408) 291-7753
tamara_crepet@fd.org

*Counsel of Record

QUESTION PRESENTED

In order to initiate immigration removal proceedings under 8 U.S.C. § 1229(a)(1)(G), the government must serve a single notice to appear (NTA) containing all required information, including the time and place of removal proceedings. *Niz Chavez v. Garland*, 141 S.Ct. 1474, 1479, 1486 (2021).

The question presented is:

Whether a putative notice to appear that does not contain the time and place of removal proceedings, in violation of 8 U.S.C. § 1229(a)(1)(G), is *ultra vires*, and if so, whether the resulting removal order is *ultra vires*.

RELATED PROCEEDINGS

United States v. Nunez-Romero, No. 20-10130, Ninth Circuit Court of Appeals, order filed February 27, 2023.

United States v. Nunez-Romero, 2020 WL 1139642 (N.D. Cal. 2019), D.C. No. CR-18-425 (LHK), order filed March 9, 2020.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases: **Page(s)**

Federal Statutes: **Page(s)**

BIA Decisions: **Page(s)**

Other: **Page(s)**

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 v. Garland*, 141 S.Ct. 1474, 1478 (2021). 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).

This case sadly reflects "the next chapter in the same story" that began with *Pereira* and *Niz-Chavez*. *Niz-Chavez*, 141 S.Ct. at 1479. Even after *Niz-Chavez*, the government continues to justify its failure to comply with § 1229(a)(1)(G), now relying on a novel argument that the statutory time-and-place requirement is a mere "claim-processing" rule subject to waiver.

It appears that this Court, however, has only applied its claim-processing rationale to protect ordinary litigants who fail to satisfy certain "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." *Reed Elsevier, Inc. v. Muchnick*, 559 U. S. 154, 166 (2010). Mr. Nunez-Romero's case, by contrast, involves the govern-

ment's intentional violation of a known statutory requirement – which this Court has held is essential for meaningful notice – in the context of a grave administrative enforcement action that may have serious criminal consequences.

The courts of appeals that have adopted the government's view have not identified a single comparable case in which the *government* has been excused from meeting its statutory obligations in an enforcement action. The circuits' near-uniform endorsement of the government's extra-statutory process, in direct violation of *Pereira* and *Niz-Chavez*, warrants this Court's review. This is an exceptionally important question because it governs the procedural and substantive rights of countless individuals nationwide, most of whom are not represented by counsel. The Court should grant certiorari to hold that the government lacks statutory authority to conduct a removal proceeding when it fails to comply with § 1229(a)(1)(G), so that the resulting order is *ultra vires*.

Certiorari is also warranted because the circuits are split regarding a subsidiary question: whether the government must comply with the statutory definition of a "notice to appear," or whether it can rely on the conflicting regulatory definition. After *Niz-Chavez*, only the Seventh Circuit requires compliance with the statutory definition, albeit in the context of an erroneous claim-processing analysis. *De La Rosa v. Garland*, 2 F.4th 685, 688 (7th Cir. 2021).

Finally, the government's novel claim-processing justification must also be rejected because it constitutes a "legislative rule" that has not

gone through notice and comment. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2420 (2019). As this Court explained in *Niz-Chavez*, the government's "initial response" to IIRIRA "expressly acknowledged" the statutory requirement to include time and place on the "notice to appear." *See Niz-Chavez*, 141 S.Ct. at 1484-86 (discussing 62 Fed. Reg. 449 (1997)). The government's argument that the regulatory definition is controlling is nothing more than a convenient post-*Pereira* litigation position that must be rejected under *Kisor*.

Accordingly, this Court should grant certiorari in order to "ensure the federal government does not exceed its statutory license" when conducting removal proceedings. *Niz-Chavez*, 141 S.Ct. at 1486. Alternatively, the Court should grant certiorari, vacate the Ninth Circuit's summary reversal in Mr. Nunez-Romero'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 2023 WL 2319315, and is reproduced in the appendix. App.1a.

The district court's order granting Mr. Nunez-Romero's motion to dismiss the indictment is not reported, but is available on Westlaw at 2020 WL 1139642 (N.D. Cal. 2020), and is reproduced in the appendix. App.2a.

JURISDICTION

The court of appeals' summary reversal issued on February 27, 2023. 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's time-and-place requirement 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 de-

scribe 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).[1] "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,'"[2] this "where practicable" lan-

---

[1] The relevant portion of this Federal Register publication is contained in the record at ER-174-75.

[2] 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

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

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. According-

---

Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable").

ly, 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 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.*, *United States v. Rojas-Osorio*, 2019 WL 235042, *5-6 & nn.1-2 (N.D. Cal. 2019) (Koh, J.), *vacated on reconsideration and indictment dismissed on other grounds*, 381 F.Supp.3d 1216 (N.D. Cal. 2019) (listing cases granting or denying motions to dismiss on this basis).

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.,* Excerpts of Record (ER) 69, Supp'l Brief for Respondent, *Karingithi v. Whitaker*, No. 16-70886, Dkt. 57 ("Under the Controlling Regulations, The Immigration Court Had Subject-Matter Jurisdiction Over Karingithi's Removal Proceedings").

3. The Board of Immigration Appeals (BIA) and most courts of appeals (including the Ninth) then held that § 1229(a)(1)(G) was not controlling, hold-

ing, *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 that *Pereira* rejected. *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 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

---

[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 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, in contrast to the majority view, held that the statutory requirements were controlling, albeit while concluding that § 1229(a) was a claim-processing rule. *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 later construed by this Court in *Niz-Chavez*, and found that the term "notice to appear" in the statute was "unrelated" to the term "notice to appear" in the regulations. *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," *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).

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

---

[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).

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 then began arguing that an immigration court could exercise statutory authority over removal proceedings "even where an NTA does not meet statutory or regulatory requirements." Appellant's Opening Brief (AOB) 30.

Mr. Nunez-Romero's case is illustrative.[6]

1. In 2002, Mr. Nunez-Romero was admitted to the United States as a Lawful Permanent Resident. ER-88, 94.

2. On November 7, 2008, Mr. Nunez-Romero was served with a putative NTA that did not contain the time or place of his removal hearing. ER-94; AOB-4. The putative NTA alleged that he was deportable because he had been convicted of a drug trafficking offense. ER-149-51.

3. On November 24, 2008, while Mr. Nunez-Romero was in custody, he was taken to a hearing before an IJ. ER-98. He was not represented by

---

[5] That location is known as the "Administrative Control Court," and is the location where all merits briefs must be filed. ER-164.

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

counsel. During the hearing, which lasted approximately three minutes, Mr. Nunez-Romero was not advised of his right to be represented by counsel at no expense to the government, or the availability of pro bono legal services, in violation of 8 U.S.C. § 1362 and 8 C.F.R. § 1240.10. ER-141-42. The IJ entered an order of removal. ER-156.

4. On June 21, 2018, this Court issued *Pereira*.

5. On September 6, 2018, Mr. Nunez-Romero was charged by indictment with illegal reentry into the United States following deportation, in violation of 8 U.S.C. § 1326. ER-178. Relying on *Pereira*, he moved to dismiss the indictment on two grounds. First, he argued that the immigration court's removal order was void because the immigration court lacked subject matter jurisdiction under 8 C.F.R. §§ 1003.13, 1003.14, and 1003.15. ER-131-39. Second, he argued that the immigration court lacked statutory authority to remove him under 8 U.S.C. § 1229(a), *Pereira*, and separation of powers principles, because the putative NTA did not contain the time or place of his removal proceedings, and thus was not a "notice to appear" under § 1229(a). ER-142-46. He also argued that under *Kisor*, the agency's initial position in the Federal Register was controlling. ER-144-45 (citing 62 Fed. Reg. 444, 449). As a result, he argued that the removal order was *ultra vires* to the governing statute, and that the government could not rely on the extra-statutory proceedings to establish the "deportation" element of § 1326. ER-143-47 (citing *City of Arlington v. FCC*, 569 U.S. 290, 296-97 (2013) (noting that agency action beyond its statutory authority is *ultra vires*)); *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*"). Mr. Nunez-Romero further argued that he satisfied all three requirements of 8 U.S.C. § 1326(d)(1)-(3), including exhaustion of available remedies, improper deprivation of judicial review, and fundamental unfairness. ER-140-42.[7]

In response, the government argued that the immigration court "had jurisdiction over and statutory authority to initiate Defendant's removal proceedings" even though the putative NTA did not comply with either statutory or regulatory time-and-place requirements. ER-125. The government did not dispute that an *ultra vires* removal order cannot be used for any purpose, including to support an illegal reentry prosecution, and acknowledged that "[i]f Defendant's argument is accepted on a wider basis, thousands of criminal convictions and sentences would have to be found void *ab initio*." ER-114 (citation and quotation marks omitted). The government argued instead that the time-and-place requirement was only a "claim-processing" rule,

---

[7] Mr. Nunez-Romero argued that he was unaware he could challenge deficiencies in the putative NTA, ER-84-85, and thus did not enter a considered and intelligent waiver of his right to appeal. ER-55; ER-141-42.

violation of which does not require dismissal. ER-109-13.[8]

In reply, Mr. Nunez-Romero refuted the government's claim-processing rationale, arguing in part that none of this Court's claim-processing authorities "involve anything like the government's action here: the placement of noncitizens in proceedings to expel them from the United States, without following the governing statutory or regulatory provisions." ER-48.

6. The district court dismissed the indictment on grounds that at the time of Mr. Nunez-Romero's removal proceedings in 2008, subject matter jurisdiction did not vest in the immigration court.[9] App.2a. The district court held that *Karingithi* "stands for the proposition that 8 C.F.R. § 1003.14(a) and 8

---

[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); AOB-24 (government noting that orders which are void for lack of jurisdiction must be disregarded). "Claim-processing" rules are subject to equitable exceptions, including waiver and forfeiture. AOB-25; *Sebelius v. Auburn Reg'l Med. Center*, 568 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. App.8a-9a (citing cases).

C.F.R. § 1003.15(b)(6) are jurisdictional in nature," which the government itself had argued in *Karingithi*. App.8a, 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.16a-18a. In light of the district court's dismissal on jurisdictional grounds, the court did not reach Mr. Nunez-Romero's further argument that the government lacked statutory authority to remove him. App.5a.

7. The government appealed. In its Opening Brief, the government argued in part that immigration courts have authority to conduct removal hearings "even where an NTA does not meet statutory or regulatory requirements." AOB-30.

8. 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. 19-30006. 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 "notice-by-installment" approach, which exceeded "its statutory license." *Id.* at 1479, 1486.

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

VI. Following *Palomar-Santiago*, the Ninth Circuit adopted the government's claim-processing rationale in an en banc opinion.

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 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-Santiago*. 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). The appellee in *Bastide-Hernandez* petitioned for rehearing en banc.

3. In Mr. Nunez-Romero's case, the Ninth Circuit stayed proceedings, including an opposed government motion for summary reversal, pending resolution of an en banc petition in *Bastide-Hernandez*. Dkt. 30.

4. 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 ac-

quired statutory or regulatory authority in the absence of a valid NTA; that this Court had never applied its claim-processing doctrine to allow the government to evade statutory requirements 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.

5. 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 in-

---

[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).

clude 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 analysis of the regulatory history in *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's has never applied its "claim-processing" doctrine to allow the government to evade statutory requirements in an enforcement action.

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).

VII. The majority of the courts of appeals have continued to hold that the regulations govern the required contents of a "notice to appear," and have rejected consistent application of *Pereira* and *Niz-Chavez*.

1. 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. At-*

torney 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").

2. The Seventh Circuit has continued to hold that § 1229(a) is a "claim-processing" rule, which it now describes as "mandatory." *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").

3. The BIA has held that §1229(a) is a claim-processing rule that does not constrain the government's "authority or power." *Matter of Fernandes*, 28 I. & N. Dec. 605, 608 (BIA 2022).

4. In the instant case, following issuance of the en banc decision in *Bastide-Hernandez*, a panel of the Ninth Circuit granted the government's opposed motion for summary reversal, citing *Bastide-Hernandez*, *Palomar-Santiago*, and *United States v. Hooten*, 693 F.2d 857 (9th Cir. 1982), without allowing Mr. Nunez-Romero to file his Answering Brief App.1a.

Mr. Nunez-Romero 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 purposes." *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 that is "initiat[ed]" through service of a "a notice to appear" must contain 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 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. *See 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 removal proceedings under § 1229a. *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 information. 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. Nunez-Romero 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. Nunez-Romero's Lawful Permanent Resident status was terminated, and he was expelled from the United States, pursuant to an extra-statutory process that also deprived him 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 allows the government to disregard 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 statutory authority to revoke naturalization or promulgate regulations governing same).

After *Niz-Chavez* and *Pereira*, allowing the government to invoke this Court's "claim-processing" doctrine as a defense to its statutory noncompliance 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).

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)). And unlike such ordinary litigants, who may inadvertently overlook procedural requirements that must be completed "before filing a lawsuit," *Reed Elsevier, Inc.*, 559 U. S. at 166, here, the government has been aware of its obligation to provide time-and-place information when initiating removal proceedings since it promulgated the regulations implementing IIRIRA. *Niz-Chavez*, 141 S.Ct. at 1484.

The distinction this Court has drawn between "jurisdictional" requirements and "claim-processing"

rules also makes little sense in the context of § 1229(a). 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 the government's noncompliance with a known statutory requirement.

Finally, 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.

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]

Through the circuits' adoption of the government's claim-processing rationale, the Executive Branch has effectively designed its own extra-statutory process for initiating a removal proceeding and obtaining a removal order. If the deported individual thereafter returns to the United States, the Executive Branch may the prosecute the individual for illegal reentry by relying on the same extra-statutory proceeding to conclusively prove the "deportation" element of the crime of illegal reentry.

---

[11] Because Mr. Nunez-Romero's removal order was *ultra vires*, *Palomar-Santiago* does not undermine the district court's conclusion that §§ 1326(d)(1)-(2) were satisfied. This Court in *Palomar-Santiago* reaffirmed *Mendoza-Lopez*'s due process holding, and did not address the application of § 1326(d) to an order that is *ultra vires* to the governing statute. *Palomar-Santiago*, 141 S.Ct at 1619, 1621-22; *see* App.18a (district court noting that exhaustion is not required where administrative proceedings are void, or where agency lacks power to proceed); *see also 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").

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 circuits are split regarding whether § 1229(a) governs the required contents of a "notice to appear," and the majority view directly conflicts with *Niz-Chavez*.

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 language 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" that functions as a charging document for removal proceedings under § 1229a, 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.22-23 (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").

As this Court observed in *Niz-Chavez*, "[w]ords are how the law constrains power." 141 S.Ct. at 1486. Here, the question of whether § 1229(a)(1)(g) constrains the government's enforcement power is of utmost importance to countless individuals placed in removal proceedings in the United States each year. Although they have statutory and due process rights to receive time-and-place information in the case-initiating document, they are deprived of those

---

[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-Chaves 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 Ninth Circuit's decision in *Singh*).

rights in the vast majority of circuits. This split has only become more entrenched since *Niz-Chavez*.

Additionally, Mr. Nunez-Romero's case is an excellent vehicle to resolve the question presented because it squarely presents the *ultra vires* issue. There is no dispute that he was served with a putative NTA that did not contain the time or place of hearing, after which he was removed from the United States without ever receiving a statutorily-compliant notice. The government contends that it was not required to comply with the statutory time-and-place requirement in order to exercise its statutory removal authority, which it characterizes as a claim-processing rule. AOB-30; *see supra* pp.15-16. The government now seeks to rely upon that extra-statutory process to conclusively prove the "deportation" element of the illegal reentry offense.

In the district court, Mr. Nunez-Romero argued that the government lacked statutory authority, and that the removal order was *ultra vires*. Several of his arguments have since been adopted by this Court. *Compare, e.g.*, ER-144-45 (relying on 62 Fed. Reg. 444, 449 (1997)) *with Niz-Chavez*, 141 S.Ct. at 1486 (same)); *compare* ER-55-56, ER-143-46 (arguing that § 1229(a)(1)(G) limits government's statutory authority) *with Niz-Chavez*, 141 S.Ct. at 1486 (holding that § 1229(a)(1)(G) constrains government's "statutory license" and "power").[13]

---

[13] His case also presents additional facts that further demonstrate that certiorari is warranted. At the time of his hearing, he was a Lawful Permanent Resident. He lost his legal status following a remov-

Accordingly, Mr. Nunez-Romero's case is an excellent vehicle to address whether the government acts *ultra vires* when it intentionally violates 8 U.S.C. § 1229(a)(1)(G).

III. The government cannot rely on new arguments that conflict with the grounds it invoked when it promulgated the relevant regulations.[14]

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

---

al hearing at which he was not represented by counsel, and was not advised of his statutory or regulatory right to counsel. ER-54. Additionally, he did not know that he could challenge the immigration court's authority, and he did not enter a considered and intelligent waiver of his right to appeal. ER-84-85.

[14] The Ninth Circuit did not address this issue in *Bastide-Hernandez*, but it is properly before this Court because it was raised by Mr. Nunez-Romero in the district court, *e.g.*, ER-145; and in the court of appeals, *e.g.,* No. 20-10130, Dkt. 28, at 5-10 & n.3; and during en banc proceedings in *Bastide-Hernandez*. No. 19-30006, Dkt. 90.

2146. The agency's "initial explanation indicates the determinative reason for the final action taken." *Dept. of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 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).[15]

"[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.

B. The government's new arguments constitute legislative rules that have not gone through notice and comment.

The regulatory text, structure, history, and purpose demonstrate that the government promul-

---

[15] 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).

gated the 1997 regulations to implement IIRIRA's statutory time-and-place requirement in the I-862 Form "Notice to Appear." *See Niz-Chavez*, 141 S.Ct. at 1483-84 & n.5 (citing 62 Fed. Reg. 444-01). At that time, the government also recognized that a "notice to appear" must be a single document containing time-and-place information. *Id.* at 1484.[16]

The government's new arguments, including 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. *See Michigan v. EPA*, 135 S.Ct. at 2710 (relying on agency's statements in Federal Register).

Both the government's "regulatory NTA" argument, and its claim-processing rationale, not only conflict with *Pereira* and *Niz-Chavez*, but must also 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. *See Kisor*, 139 S.Ct. at 2420; *id.* at 2417 n.5 (agency has no special authori-

---

[16] 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).

ty to interpret regulatory language that simply "parrots the statutory text").[17]

Finally, neither of these new arguments 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 rea-

---

[17] Indeed, in direct conflict with the government's new argument that the regulations are mere claim-processing rules, the BIA, Congress, and the government had long recognized that the regulations governed 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 regulations "refers to court's authority to adjudicate a case," and comparing to federal district court's subject-matter jurisdiction); P.L. 104-208, Div. C, Sec. 309(c)(2) (1996) (noting in context of transitional statute within IIRIRA that timely notice of hearing under Section 309 would "confer jurisdiction" on immigration judge); ER-69 (government arguing in *Karingithi* that regulations governed subject matter jurisdiction).

son 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*. The Ninth Circuit in *Bastide-Hernandez* solely addressed *Niz-Chavez* in a cursory footnote, and did not address *Kisor* 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. Nunez-Romero's case, the Ninth Circuit provided no analysis on any of these issues, although he had raised them. The Ninth Circuit cited *Hooten* as authority for summary reversal, but *Hooten* involved a motion for summary *affirmance*, and cited, *inter alia*, this Court's then-Rule 16(1)(c) (1982), which allowed for summary affirmance where "'it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.'" *Hooten*, 693 F.2d at 858 (quoting S.Ct.R. 16(1)(c) (1982)). But the defendant's appeal in *Hooten* was a one-page request for a sentencing reduction, *id.* at 858-59, while here, the government's appeal raises substantial questions that affect countless individuals in removal proceedings nationwide.

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 acts *ultra vires* when it violates § 1229(a)(1)(G), because "the law Congress adopted [does not] tolerate[] the government's preferred practice." *Niz-Chavez*, 141 S.Ct. at 1478.

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,

Tamara Crepet
Lara S. Vinnard
Assistant Federal Public Defenders
OFFICE OF THE FEDERAL PUBLIC DEFENDER
55 South Market Street, Suite 820
San Jose, CA 95113
(408) 291-7753
tamara_crepet@fd.org

May 10, 2023