

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

APPENDIX TO PETITION FOR 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

** Counsel of Record for Petitioner*

APPENDIX

Table of Contents

Appendix A – Order Granting Government’s Motion For Summary Reversal	1a
Appendix B – District Court Order Granting Motion to Dismiss Indictment	2a
Appendix C – <i>United States v. Bastide-Hernandez</i> , 39 F.4th 1187 (9th Cir. 2022) (en banc)	19a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 27 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

LUIS NUNEZ-ROMERO,

Defendant-Appellee.

No. 20-10130

D.C. No. 5:18-cr-00425-LHK-1
Northern District of California,
San Jose

ORDER

Before: CANBY, M. SMITH, and BRESS, Circuit Judges.

Appellant's motion (Docket Entry No. 27) for summary reversal is granted.

See United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

We vacate the district court's order granting appellant's motion to dismiss the indictment, and remand for further proceedings consistent with *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021), and this court's decision in *United States v. Bastide-Hernandez*, 39 F.4th 1187 (9th Cir. 2022) (en banc), *cert. denied*, No. 22-6281, 2023 WL 350056 (U.S. Jan. 23, 2023).

Appellant's motion (Docket Entry No. 4) to transmit an exhibit is denied as moot.

VACATED and REMANDED.

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
LUIS NUNEZ-ROMERO,
Defendant.

Case No. 18-CR-00425-LHK-1

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS INDICTMENT**

Re: Dkt. No. 17

Before the Court is Defendant Luis Nunez-Romero’s (“Defendant”) motion to dismiss the indictment for illegal reentry following deportation in violation of 8 U.S.C. § 1326. ECF No. 17 (“Mot.”). Having considered the filings of the parties, the relevant law, and the record in this case, the Court GRANTS Defendant’s motion to dismiss the Indictment.

I. BACKGROUND

A. Factual Background

Defendant, a citizen of Mexico, was admitted to the United States on or around March 2, 2002. ECF No. 17-1 (“NTA”). On November 6, 2008, an Immigration Enforcement Agent interviewed Defendant while Defendant was held in Santa Clara County jail in Milpitas, California. ECF No. 19 (“Oidem Decl.”) ¶ 7. The government then determined that Defendant

1 had been convicted of an aggravated felony after Defendant's admission into the United States.
 2 *Id.* Accordingly, on November 7, 2008, Defendant was served a Form I-862, Notice to Appear
 3 ("NTA"). NTA at 1. The NTA charged that Defendant was subject to removal under "Section
 4 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time
 5 after admission, you have been convicted of an aggravated felony as defined in Section
 6 101(a)(43)(B) of the Act." *Id.* at 3. The NTA did not identify the address of the immigration
 7 court at which the NTA would be filed. *Id.* at 1. Instead, under the text, "YOU ARE ORDERED
 8 to appear before an immigration judge of the United States Department of Justice at:" the NTA
 9 was left blank. *Id.*

10 Defendant was detained pending removal proceedings. Oidem Decl. ¶ 8. On November
 11 13, 2008, the Immigration Court issued a "Notice of Custody Redetermination Hearing." ECF
 12 No. 19-3. The Notice of Custody Redetermination Hearing indicated that Defendant was
 13 scheduled for a "custody redetermination hearing" on November 24, 2008, at Immigration Court
 14 located at 630 Sansome Street, Room 475, San Francisco CA. *Id.* On November 24, 2008,
 15 Defendant appeared in front of the Immigration Court, where the Immigration Judge ordered
 16 Defendant removed ("November 2008 removal order"). *Id.*; ECF No. 17-3 ("November 2008
 17 removal order"). Defendant waived his right to appeal. *Id.*

18 The November 2008 removal order was the sole removal order entered against Defendant.
 19 ECF No. 17 at 1. The removal order was subsequently reinstated against Defendant on September
 20 8, 2009, April 18, 2011, and April 24, 2014. *Id.*; ECF No. 17-4.

21 **B. Procedural History**

22 On September 6, 2018, a grand jury in the Northern District of California returned an
 23 indictment ("Indictment") that charged Defendant with one count of a violation of 8 U.S.C. §
 24 1326, Illegal Reentry Following Deportation. ECF No. 1 ("Indictment"). Specifically, the grand
 25 jury charged as follows: "On or about March 7, 2018, in Santa Clara County in the Northern
 26 District of California, the [D]efendant, . . . an alien, previously having been excluded, deported
 27 and removed from the United States on or about November 25, 2008, September 8, 2009, April

1 18, 2011, and April 24, 2014, was found in the United States, with the Attorney General of the
2 United States and the Secretary for Homeland Security not having expressly consented to a re-
3 application by the [D]efendant for admission into the United States.” *Id.*

4 On November 4, 2019, Defendant filed a motion to dismiss the Indictment. ECF No. 17
5 (“Mot.”). On December 2, 2019, the government opposed the motion, ECF No. 18 (“Opp’n”), and
6 on December 16, 2019, Defendant filed a reply, ECF No. 20 (“Reply”).

7 On January 9, 2020, the government filed a statement of recent decision. ECF No. 22. On
8 January 23, 2020 and February 26, 2020, Defendant filed two statements of recent decision.¹ ECF
9 Nos. 23, 26.

10 **II. LEGAL STANDARD**

11 **A. Motion to Dismiss Indictment**

12 Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a defendant may move to
13 dismiss an indictment on the ground that the indictment “fail[s] to state an offense.” In
14 considering a motion to dismiss an indictment, a court must accept the allegations in the
15 indictment as true and “analyz[e] whether a cognizable offense has been charged.” *United States*
16 *v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). “In ruling on a pre-trial motion to dismiss an
17 indictment for failure to state an offense, the district court is bound by the four corners of the
18 indictment.” *Id.* A motion to dismiss an indictment can be determined before trial “if it involves
19 questions of law rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448,
20 1452 (9th Cir.), *cert. denied*, 478 U.S. 1007 (1986).

21 **B. Collateral Attack on a Deportation**

22 “For a defendant to be convicted of illegal reentry under 8 U.S.C. § 1326, the Government
23 must establish that the defendant left the United States under order of exclusion, deportation, or
24 removal, and then illegally reentered.” *United States v. Raya-Vaca*, 771 F.3d 1195, 1201 (9th Cir.

25
26 ¹ Defendant also explained that “[s]hould it be helpful to the Court, the defenses requests the
27 opportunity to file a supplemental brief of no more than 3 pages addressing all of the supplemental
28 authority to date.” ECF No. 26 at 2. The Court DENIES as moot Defendant’s request for
supplemental briefing.

2014) (internal quotation marks and citation omitted). “A defendant charged under § 1326 has a due process right to collaterally attack his removal order because the removal order serves as a predicate element of his conviction.” *Id.* (internal quotation marks and citation omitted).

To demonstrate that a prior deportation cannot serve as the basis for an indictment for illegal reentry, 8 U.S.C. § 1326(d) requires that a defendant “demonstrate that (1) he exhausted the administrative remedies available for seeking relief from the predicate removal order; (2) the deportation proceedings ‘improperly deprived [him] of the opportunity for judicial review’; and (3) the removal order was ‘fundamentally unfair.’” *Id.* (quoting 8 U.S.C. § 1326(d)) (brackets in original). “To satisfy the third prong—that the order was fundamentally unfair—the defendant bears the burden of establishing both that the deportation proceeding violated his due process rights and that the violation caused prejudice.” *Id.* (internal quotation marks, citation, and brackets omitted).

III. DISCUSSION

In Defendant’s motion to dismiss the Indictment, Defendant asserts that the United States Department of Homeland Security’s failure to file a proper Form I-862, Notice to Appear (“NTA”), with the Immigration Court deprived the Immigration Court of jurisdiction to remove Defendant. Defendant asserts that this failure provides the grounds for Defendant to collaterally attack the Indictment under 8 U.S.C. § 1326(d). Defendant also claims that the Immigration Court lacked statutory authority to initiate removal proceedings because the NTA did not include the statutorily required time and place information.

For the reasons outlined below, the Court agrees with Defendant. The Immigration Court lacked jurisdiction to issue the November 2008 removal order because of the defective NTA. Further, this lack of jurisdiction permits Defendant to collaterally attack the Indictment under 8 U.S.C. § 1326(d). Because these facts are sufficient to warrant dismissal of the Indictment, the Court need not address Defendant’s further argument that the Immigration Court lacked statutory authority.

A. The Immigration Court Lacked Jurisdiction over Defendant

Defendant argues that the November 2008 removal order cannot constitute a prior lawful deportation that supports the single count violation of 8 U.S.C. § 1326, Illegal Reentry Following Deportation, charged in the Indictment. Mot. at 1. This is so, Defendant claims, because the NTA “did not identify the immigration court address where [the NTA] would be filed, which is a jurisdictional requirement under the regulatory scheme, including 8 C.F.R. § 1003.14(a) and 8 C.F.R. § 1003.15(b)(6).” *Id.* at 2. The government makes two responses to this argument. First, the government asserts that the requirements of 8 C.F.R. § 1003.14(a) is not actually jurisdictional in nature. Instead, the government maintains that 8 C.F.R. § 1003.14(a) sets forth only a “claim-processing rule” that does not limit the Immigration Court’s adjudicatory authority. Opp’n at 4–11. Second, the government asserts that even if 8 C.F.R. § 1003.14(a) is jurisdictional in nature, Defendant had “actual notice” of the removal hearing such that jurisdiction adequately vested in the Immigration Court in any event. *Id.* at 11–13. The Court agrees with Defendant. The defective NTA deprived the Immigration Court of jurisdiction over Defendant for the purposes of the November 2008 removal order. The government’s actions following the filing of the defective NTA did not vest the Immigration Court with jurisdiction.

The Court begins by providing a brief background of the statutory and regulatory scheme that sets forth the contents an NTA must contain. The Court then analyzes the question of whether 8 C.F.R. § 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) set forth jurisdictional rules. Finally, the Court turns to the question of whether Defendant’s purported “actual notice” of the address of the Immigration Court in which the NTA was filed may remedy a jurisdictional defect in the NTA.

1. Statutory and Regulatory Background

The Court begins by providing background on the regulatory scheme that sets forth the content that an NTA must contain. The Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, broadly delegates authority to the Attorney General to “establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.” 8 U.S.C. § 1103(g)(2). Pursuant to this grant of authority, the Attorney General has promulgated regulations that speak to the “[j]urisdiction and commencement of proceedings” in Immigration Court. 8 C.F.R. § 1003.14.

1 In particular, 8 C.F.R. § 1003.14(a) dictates that “[j]urisdiction vests, and proceedings before an
 2 Immigration Judge commence, when a charging document is filed with the Immigration Court by
 3 the Service.” 8 C.F.R. § 1003.14(a). A “charging document” is defined in the regulations to
 4 consist of several types of documents, potentially including “a Notice to Appear.” 8 C.F.R. §
 5 1003.13. Finally, the regulations require that an NTA contain certain information. 8 C.F.R. §
 6 1003.15(b). Importantly for the instant case, the regulations dictate that an NTA “must” include
 7 the “address of the Immigration Court where the Service will file” the NTA. 8 C.F.R. §
 8 1003.15(b)(6).

9 It is undisputed that the NTA at issue in the instant case lacked the “address of the
 10 Immigration Court where the Service” would file the NTA, as required by 8 C.F.R. §
 11 1003.15(b)(6). NTA at 1. Accordingly, the first question before the Court is whether 8 C.F.R. §
 12 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) set forth jurisdictional rules, such that the NTA’s failure
 13 to include the “address of the Immigration Court where the Service will file” the NTA deprived
 14 the Immigration Court of jurisdiction to issue the November 2008 removal order.

15 **2. 8 C.F.R. § 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) Set Forth Jurisdictional Rules**

16 Defendant’s motion to dismiss the Indictment is premised on the argument that 8 C.F.R. §
 17 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) set forth rules that govern the jurisdiction of the
 18 Immigration Court. As Defendant puts it, the “regulation requiring identification of the court
 19 address where the NTA will be filed goes to the authority of the immigration court to adjudicate a
 20 case—i.e., to the court’s subject matter jurisdiction.” Reply at 9. The government disagrees, and
 21 argues that the regulations only set forth a “claim-processing rule.” Opp’n at 4. Thus, the
 22 government claims that the failure to include the Immigration Court address in the NTA did not
 23 deprive the Immigration Court “of ‘jurisdiction’ over Defendant’s removal proceedings insofar as
 24 it concerned the court’s adjudicatory authority.” *Id.* at 5.

25 The Court agrees with Defendant. The requirement that an NTA include the “address of
 26 the Immigration Court where the Service will file” the NTA, 8 C.F.R. § 1003.15(b)(6), is
 27 jurisdictional in nature. The Court reaches this conclusion because it is bound by a recent Ninth

1 Circuit decision, *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). According to Defendant,
 2 the Ninth Circuit’s recent decision in *Karingithi* held that the applicable regulations “govern the
 3 subject matter jurisdiction” of the Immigration Court. Reply at 1. Thus, because “*Karingithi* is
 4 binding on this Court,” Defendant claims that the Court must reject Defendant’s argument that 8
 5 C.F.R. § 1003.15(b) only sets forth a claim-processing rule. *Id.* at 2. The Court agrees.
 6 *Karingithi* stands for the proposition that 8 C.F.R. § 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) are
 7 jurisdictional in nature.

8 In *Karingithi*, the Ninth Circuit considered the question of whether the Immigration Court
 9 lacked jurisdiction over removal proceedings when the NTA that served as the charging document
 10 failed to specify the date and time of the removal hearing as required by 8 U.S.C. §
 11 1229(a)(1)(G)(i). 913 F.3d at 1159–60. The Ninth Circuit answered this question in the negative.
 12 *Id.* at 1160. In the course of doing so, the Ninth Circuit held that “the regulations, not § 1229(a),
 13 define when jurisdiction vests.” Accordingly, because the operative regulations indicate that the
 14 date and time of the removal hearing need only be provided “where practicable,” 8 C.F.R. §
 15 1003.18(b), the Ninth Circuit held that omission of that information did not affect the Immigration
 16 Court’s ability to hold a removal hearing. 913 F.3d at 1160. As the Ninth Circuit put it, “[t]he
 17 regulatory definition, not the one set forth in § 1229(a), governs the Immigration Court’s
 18 jurisdiction. A notice to appear need not include time and date information to satisfy this
 19 standard. *Karingithi*’s notice to appear *met the regulatory requirements and therefore vested*
 20 *jurisdiction in the IJ.*” *Id.* (emphasis added).

21 The natural import of the *Karingithi* court’s holding is that “[t]he regulatory definition” of
 22 an NTA “governs the Immigration Court’s jurisdiction.” *Id.* The regulatory definition of an NTA
 23 includes the requirement that an NTA include the “address of the Immigration Court where the
 24 Service will file” the NTA, 8 C.F.R. § 1003.15(b)(6). Thus, the requirement outlined in 8 C.F.R. §
 25 1003.15(b)(6) “governs the Immigration Court’s jurisdiction.” This is precisely the conclusion at
 26 which most of the district courts in the Ninth Circuit have arrived when confronted with the
 27 applicability of *Karingithi*’s holding to the question before the Court. *See, e.g., United States v.*

1 *Suchite-Ramirez*, No. 19-CR-00118-RMP, 2019 WL 4396142, at *2 (E.D. Wash. Sept. 13, 2019)
 2 (holding that the government’s argument that 8 C.F.R. § 1003.15(b)(6) is claim-processing
 3 “directly contradicts the Ninth Circuit’s reasoning in *Karingithi*”); *United States v. Gutierrez-*
 4 *Ramirez*, No. 18-CR-00422-BLF, 2019 WL 3346481, at *6 (N.D. Cal. July 25, 2019) (“[I]t is clear
 5 that *Karingithi* contemplates that Section 1003.15 is jurisdictional.”); *United States v. Ramos-*
 6 *Urias*, No. 18-CR-00076-JSW, 2019 WL 1567526, at *2 (N.D. Cal. Apr. 8, 2019) (“*Karingithi*
 7 and *Bermudez-Cota* teach that satisfying the regulations, not the statute, is crucial to establish the
 8 Immigration Court’s jurisdiction.”).

9 As discussed *supra*, the language of the regulations governing the jurisdiction of the
 10 Immigration Court also supports the *Karingithi* court’s conclusion. The regulations provide that
 11 jurisdiction “vests” only “when a charging document is filed with the Immigration Court,” 8
 12 C.F.R. § 1003.14, and a “Notice to Appear,” is such a “charging document,” 8 C.F.R. § 1003.13.
 13 The regulation at 8 C.F.R. § 1003.15(b)(6) provides that an NTA “must also include” “[t]he
 14 address of the Immigration Court where the Service will file the Order to Show Cause and Notice
 15 to Appear.” *Id.* Thus, by the plain language of the regulations, a document that lacks “[t]he
 16 address of the Immigration Court where the Service will file the Order to Show Cause and Notice
 17 to Appear” is not an NTA, and therefore cannot “vest” jurisdiction with the Immigration Court. 8
 18 C.F.R. §§ 1003.14, 1003.15(b)(6).

19 Further, as United States District Judge Jeffrey White has noted, 8 C.F.R. §§ 1003.15(a)
 20 and (c) contain a disclaimer that omission of the information mandated by those sections “shall not
 21 be construed as affording the alien any substantive or procedural rights.” 8 C.F.R. § 1003.15(a),
 22 (c); *Ramos-Urias*, 2019 WL 1567526, at *2. By contrast, the regulation at issue in the instant
 23 motion, 8 C.F.R. § 1003.15(b), lacks such a disclaimer, which further confirms the jurisdictional
 24 scope of 8 C.F.R. § 1003.15(b). *See also United States v. Benitez-Dominguez*, No. 19-CR-99
 25 (NGG), 2020 WL 903008, at *7 & n.5 (E.D.N.Y. Feb. 24, 2020) (relying on distinction between 8
 26 C.F.R. § 1003.15(b) and neighboring subsections to conclude that “NTA lacked the address of the
 27 immigration court where it was to be filed is an independently sufficient error that deprived the

1 immigration court of jurisdiction to order . . . removal”).

2 For instance, as Judge White noted, 8 C.F.R. § 1003.15(c) dictates that “[i]n the Notice to
3 Appear for removal proceedings, the Service shall provide the following administrative
4 information to the Immigration Court.” Section 1003.15(c) goes on to list various pieces of
5 information, such as the “alien’s names and any known aliases,” and the “alien’s address.”
6 *Ramos-Urias*, 2019 WL 1567526, at *2. However, the section contains the aforementioned
7 disclaimer, and the regulation thus dictates that omission of the required information “shall not be
8 construed as affording the alien any substantive or procedural rights.” *Id.* Section 1003.15(a),
9 which only concerns orders to show cause, also contains the foregoing disclaimer. 8 C.F.R. §
10 1003.15(a).

11 By contrast, 8 C.F.R. § 1003.15(b), the regulatory section at issue in the instant motion,
12 does not contain the disclaimer. The natural reading of the lack of disclaimer is that omission of
13 the information required by 8 C.F.R. § 1003.15(b)(6) *does* afford the alien “substantive or
14 procedural rights,” in contrast to 8 C.F.R. §§ 1003.15(a) and (c). *See, e.g., United States v.*
15 *Ramos-Urias*, 2019 WL 1567526, at *2 (“The Court agrees with Mr. Ramos-Urias that the
16 absence of the disclaimer in subsection (b) is significant. . . . Drafters of regulations and statutes
17 are presumed to choose their words with precision.” (citations omitted)); *see also N.L.R.B. v. SW*
18 *Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (“If a sign at the entrance to a zoo says ‘come see the
19 elephant, lion, hippo, and giraffe,’ and a temporary sign is added saying ‘the giraffe is sick,’ you
20 would reasonably assume that the others are in good health.”).

21 As Judge White noted, this distinction “is particularly sensible.” *Id.* at *3. Although 8
22 C.F.R. §§ 1003.15(a) and (c) both “describe categories of identifying information of which an
23 alien is likely already aware,” such as the alien’s name and known aliases, 8 C.F.R. § 1003.15(b)
24 demands that an NTA include information about *the removal process itself*. *Id.* “It is logical that
25 an NTA’s failure to include an alien’s alias or preferred language, for example, would not carry
26 the same consequences as an NTA’s failure to include . . . the address of the Immigration Court
27 where the NTA would be filed.” *Id.*

1 In response, the government argues that insofar as *Karingithi* may be read to discuss the
 2 jurisdictional import of 8 C.F.R. § 1003.15(b)(6), this discussion is dicta. Opp’n at 3–4; *see also*
 3 *United States v. Diaz-Lastra*, No. 19-CR-00396-DWL, 2019 WL 4394542, at *3 (D. Ariz. Sept.
 4 13, 2019) (“Those passages, however, are arguably dicta because they were unnecessary to []
 5 resolve the narrow issue before the court. . . .”). The Court disagrees. The *Karingithi* court’s
 6 discussion of the jurisdictional nature of the regulations served as the point of comparison that the
 7 *Karingithi* court used to resolve the question that the *Karingithi* court faced. The *Karingithi* court
 8 thus squarely confronted “an issue germane to the eventual resolution of the case, and resolve[d] it
 9 after reasoned consideration in a published opinion.” *Miranda B. v. Kitzhaber*, 328 F.3d 1181,
 10 1186 (9th Cir. 2003). The *Karingithi* court’s determination that the regulations set forth
 11 jurisdictional requirements for the Immigration Court is therefore not dicta. *Id.*; *see also*
 12 *Gutierrez-Ramirez*, 2019 WL 3346481, at *6 (“*Karingithi* clearly contemplates that the
 13 requirements in Section 1003.15 are ‘for jurisdictional purposes.’”). Further, and in any event, the
 14 Court remains bound by “well-reasoned dicta” of the Ninth Circuit. *See, e.g., Bank of Manhattan*,
 15 *N.A. v. F.D.I.C.*, 778 F.3d 1133, 1136 n.2 (9th Cir. 2015) (“Well-reasoned dicta is the law of the
 16 circuit.” (internal quotation marks and citation omitted)). The reasoning of the *Karingithi* court
 17 clearly dictates that 8 C.F.R. § 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) are jurisdictional, and this
 18 Court would be bound by this conclusion even if it were in fact well-reasoned dicta. *See, e.g.,*
 19 *Andrade v. United States*, No. 19-cv-00930-BAS-WVG, 2020 WL 835304, at *4 (S.D. Cal. Feb.
 20 20, 2020) (“This Court cannot ignore the Ninth Circuit’s statements regarding the scope of the
 21 law, even when made in dicta.”).

22 Additionally, according to the government, “*Karingithi* did not address the meaning of the
 23 term ‘jurisdiction’ as recited in 8 C.F.R. § 1003.14(a).” Opp’n at 3; *see also United States v.*
 24 *Medina*, No. 18-CR-653-GW, 2019 WL 4462701, at *6 (C.D. Cal. Sept. 4, 2019) (“[N]owhere in
 25 [the] decision does the Circuit indicate that the reference to ‘jurisdiction’ means ‘subject matter
 26 jurisdiction’ rather than other types of jurisdiction.”). Thus, the government argues, *Karingithi*
 27 may be read to refer only to a claim-processing rule. Opp’n at 6. The plain import of the

1 *Karingithi* court’s language, however, suggests that the *Karingithi* court was concerned with more
 2 than just a claim-processing rule. For instance, the *Karingithi* court repeatedly pointed to the
 3 regulations as dispositive of when jurisdiction “vests” with the Immigration Court, and when the
 4 Immigration Court has jurisdiction “over [] removal proceedings.” 913 F.3d at 1160, 1162. This
 5 language suggests that the Ninth Circuit’s references to jurisdiction refer to subject matter
 6 jurisdiction. See *United States v. Cruz-Aguilar*, 394 F.Supp.3d 1313, 1318–19 (E.D. Wash. 2019)
 7 (reading *Karingithi* to proscribe “subject matter jurisdiction over a noncitizen’s removal
 8 proceeding”).

9 Indeed, other federal courts of appeals have understood the *Karingithi* language in this
 10 way. See, e.g., *United States v. Cortez*, 930 F.3d 350, 359 (4th Cir. 2019) (citing *Karingithi* as an
 11 example of a case in which a court “treat[ed] § 1003.14(a) as though it implicates an immigration
 12 court’s adjudicatory authority or ‘subject matter jurisdiction’”). The parties in *Karingithi* also
 13 clearly briefed the issue in this way. See, e.g., *Karingithi*, CA No. 16-70885, Supp’l Brief for
 14 Pet’r, Dkt. 56 at 19 (discussing the regulations’ impact on “subject matter jurisdiction”); *id.*,
 15 Supp’l Brief for Resp., Dkt. 57 at 7 (“Under the controlling regulations, the Immigration Court
 16 had subject-matter jurisdiction over *Karingithi*’s removal proceedings.”).

17 Some district courts have attempted to limit the import of *Karingithi* by concluding that
 18 only some of the applicable regulations are jurisdictional in nature. For instance, in *United States*
 19 *v. Arteaga-Centeno*, No. 18-CR-00332-CRB, 2019 WL 3207849 (N.D. Cal. July 16, 2019), the
 20 court held that *Karingithi* should be read to indicate that “the jurisdictional provisions of the
 21 regulations are limited to §§ 1003.13–14,” and do not include 8 C.F.R. § 1003.15. *Id.* at *7; see
 22 also *Diaz-Lastra*, 2019 WL 4394542, at *3 (same). However, the government does not advocate
 23 that interpretation of *Karingithi* in the instant case. On the contrary, the government’s argument
 24 specifically hinges on the proposition that 8 C.F.R. § 1003.14 is also not jurisdictional. E.g.,
 25 Opp’n at 8 (“8 C.F.R. § 1003.14(a) is a claim-processing rule, not a jurisdictional one.”). As a
 26 general matter, the Court agrees that it would be improper to needlessly “contort *Karingithi*” when
 27 “it is clear that *Karingithi* contemplates that Section 1003.15 is jurisdictional.” *Gutierrez-*

Ramirez, 2019 WL 3346481, at *6.

Finally, in the course of its argument, the government cites various decisions from “the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits” as persuasive authority for the proposition that 8 C.F.R. § 1003.15(b) is not jurisdictional. Opp’n at 10. These cases undercut the government’s argument, however. This is so because the authoring courts recognized that their decisions contradicted *Karingithi*, and hence reached a conclusion contrary to Ninth Circuit law. See, e.g., *Perez-Sanchez v. United States Attorney Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019) (listing the Ninth Circuit as a circuit that has “accepted the proposition that 8 C.F.R. § 1003.14 sets forth a jurisdictional rule”); *Cortez*, 930 F.3d at 359 (4th Cir. 2019) (citing *Karingithi* as an example of a case in which a court “treat[ed] § 1003.14(a) as though it implicates an immigration court’s adjudicatory authority or ‘subject matter jurisdiction’”). This Court is bound by the case law of the Ninth Circuit.²

Accordingly, the Court agrees with Defendant that this Court is bound by *Karingithi*, and *Karingithi* stands for the proposition that 8 C.F.R. § 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) are jurisdictional.³ The Court proceeds to consider the government’s argument that Defendant’s “actual notice” of the “address of the Immigration Court where the Service will file” the NTA, 8 C.F.R. § 1003.15(b)(6), nonetheless remedied this jurisdictional defect.

3. Defendant’s Purported “Actual Notice” of the Address of the Immigration Court Did Not Vest the Immigration Court with Jurisdiction

The government asserts that even if the Court concludes that under C.F.R. § 1003.14(a)

² For this reason, it is also of no consequence that the BIA held the regulations to be “claim-processing” in *Matter of Rosales Vargas*, 27 I. & N. Dec. 745 (BIA 2020). The Court is bound by Ninth Circuit’s reasoned determination that the regulations are jurisdictional. See, e.g., *Suchite-Ramirez*, 2019 WL 4396142, at *2 (explaining that argument that 8 C.F.R. § 1003.15(b)(6) is claim-processing “directly contradicts the Ninth Circuit’s reasoning in *Karingithi*, in which the Court concluded that the regulatory requirements governing charging documents, including NTAs, are jurisdictional”). The Court acknowledges that the jurisdictional nature of 8 C.F.R. § 1003.14(a) and 8 C.F.R. § 1003.15(b)(6) is a “hot issue right now” and that it is possible that the Ninth Circuit will eventually change its approach. Oral Argument at 19:45, *Guzman-Nunez v. Barr* (9th Cir. 2020) (No. 19-70315), https://www.youtube.com/watch?v=axd_1oISfaI.

³ In light of the controlling nature of *Karingithi*, the Court need not reach Defendant’s argument that the government is judicially estopped from adopting the litigation position it adopts in the instant case. Reply at 2.

1 and 8 C.F.R. § 1003.15(b)(6), the requirement that an NTA include the “address of the
2 Immigration Court where the Service will file” the NTA is jurisdictional, the Court should still
3 find that the Immigration Court had jurisdiction over removal proceedings in the instant case.
4 Opp’n at 11. According to the government, “multiple documents” may be used to provide “the
5 requisite notice under” 8 C.F.R. § 1003.15(b)(6). *Id.* at 12. Here, the government asserts that the
6 Notice of Custody Redetermination Hearing served on the Defendant provided Defendant with
7 actual notice of the location at which the NTA was filed. *Id.* at 13. As Defendant notes, however,
8 the government’s actual notice argument fails for both legal and factual reasons.

9 First, as a legal matter, and as United States District Judge Beth Labson Freeman
10 explained, “nothing in the regulations indicates that the Government can cure a non-compliant
11 Notice to Appear by serving a non-compliant Notice of Hearing, even if the Notice of Hearing
12 includes the information the Notice to Appear originally omitted.” *Gutierrez-Ramirez*, 2019 WL
13 3346481, at *7; *see also Ramos-Urias*, 2019 WL 1567526, at *3(“[T]he Court can find no
14 regulatory support for the proposition that a notice of hearing cures a regulatorily-deficient NTA
15 or can serve as a separate charging document.”).

16 Second, as a factual matter, Judge Freeman explained that “there is no evidence that
17 Defendant’s Notice of Hearing was ever served on him or that it was ever filed with the
18 Immigration Court.” *Gutierrez-Ramirez*, 2019 WL 3346481, at *7. Thus, “even if a properly
19 served and filed Notice of Hearing could cure a faulty Notice to Appear,” Judge Freeman held that
20 there was insufficient evidence that anything to that effect had happened in *Gutierrez-Ramirez*. *Id.*

21 The Court agrees with Judge Freeman’s analysis of this issue. Here, too, both legal and
22 factual issues preclude the government’s argument that the Notice of Custody Redetermination
23 Hearing cured the jurisdictional defect. Legally, as Judge Freeman observed, “nothing in the
24 regulations indicates that the Government can cure a non-compliant Notice to Appear by serving a
25 non-compliant Notice of Hearing, even if the Notice of Hearing includes the information the
26 Notice to Appear originally omitted.” *Gutierrez-Ramirez*, 2019 WL 3346481, at *7.

27 Further, in the instant case, the government seeks to rely on the Notice of Custody

1 Redetermination Hearing. However, the operative regulation dictates that custody redetermination
 2 hearings may occur in numerous different immigration courts, not just the immigration court with
 3 jurisdiction over the removal proceedings. See 8 C.F.R. § 1003.19 (“Applications for the exercise
 4 of authority to review bond determinations shall be made to one of the following offices, in the
 5 designated order: . . .”). Thus, the Notice of Custody Redetermination Hearing could not have
 6 independently given Defendant notice of the specific location at which the NTA was filed.

7 Factually, there is no evidence that the Notice of Custody Redetermination Hearing ever
 8 fulfilled the requirements of 8 C.F.R. § 1003.15(b) in the instant case. Indeed, similar to
 9 *Gutierrez-Ramirez*, 2019 WL 334648, the Notice of Custody Redetermination Hearing only
 10 indicates that the Notice of Custody Redetermination Hearing was mailed to Defendant through a
 11 “custody officer.” ECF No. 19-3. “There is no evidence that the Custodian Officer ever actually
 12 served the Notice of Hearing on Defendant.” *Gutierrez-Ramirez*, 2019 WL 334648, at *6.
 13 Moreover, “there is no evidence that the Notice of Hearing was ever filed with the Immigration
 14 Court,” as would be required for it to independently function as a kind of “amended charging
 15 document” under 8 C.F.R. § 1003.14. *Id.* These “issues render the Notice of Hearing non-
 16 curative here.” *Id.*

17 The Court therefore concludes that the Notice of Custody Redetermination Hearing did not
 18 cure the jurisdictional defect caused by the NTA’s violation of 8 C.F.R. § 1003.15(b). The Court
 19 therefore concludes that the Immigration Court lacked jurisdiction to issue the November 2008
 20 removal order. The Court finally proceeds to consider whether Defendant satisfies the
 21 requirements of 8 U.S.C. § 1326(d).

22 **B. Defendant Satisfies the Requirements of 8 U.S.C. § 1326(d)**

23 The Court now analyzes the above findings in the context of 8 U.S.C. § 1326(d), which
 24 sets forth three prongs that a defendant must establish to successfully collaterally attack his prior
 25 removal order. “To satisfy the third prong—that the order was fundamentally unfair—the
 26 defendant bears the burden of establishing both that the deportation proceeding violated his due
 27 process rights and that the violation caused prejudice.” *Raya-Vaca*, 771 F.3d at 1201 (internal

1 quotation marks, citation, and brackets omitted). Accordingly, the government argues that
2 Defendant cannot satisfy the third prong of 8 U.S.C. § 1326(d). Opp’n at 13–15.

3 The Court notes that numerous district courts have held that the requirements of 8 U.S.C. §
4 1326(d) do not apply to defendants who challenge the validity of a deportation order when the
5 Immigration Court lacked jurisdiction over the removal proceeding. *See, e.g., Martinez-Aguilar*,
6 2019 WL 2562655, at *4 (“[B]ecause the Notice to Appear issued to Defendant was
7 jurisdictionally deficient, the subsequent removal order which caused Defendant to be deported
8 was invalid as issued without proper jurisdiction, and Defendant does not need to show that he
9 was prejudiced by the lack of jurisdiction before the Immigration Court.”); *United States v.*
10 *Quijada-Gomez*, 360 F. Supp. 3d 1084, 1094 (E.D. Wash. 2018) (“[A] challenge to the
11 immigration court’s jurisdiction need not comply with § 1326(d)’s limitations on collateral
12 attacks.”).

13 United States District Judge Charles Breyer explained this conclusion in *United States v.*
14 *Arteaga-Centeno*, 353 F. Supp. 3d 897 (N.D. Cal. 2019), *vacated on other grounds by United*
15 *States v. Arteaga-Centeno*, 2019 WL 1995766. In *Arteaga-Centeno*, Judge Breyer explained that
16 for the purposes of 8 U.S.C. § 1326(d), there is a distinction between “jurisdictionally-invalid
17 orders and orders that are invalid for any other reasons.” 353 F. Supp. 3d at 903. Judge Breyer
18 noted that Ninth Circuit precedent compels the conclusion “that if the order is void on its face for
19 want of jurisdiction, it is the duty of this and every other court to disregard it.” *Id.* (internal
20 alteration and quotation marks omitted) (quoting *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir.
21 1930)). The government’s argument that 8 U.S.C. § 1326(d) applies “to jurisdictionally-invalid
22 orders, . . . is thus precluded by the Ninth Circuit’s requirement that courts must disregard invalid
23 orders and that such orders are legal nullities.” *Id.* (internal alteration and quotation marks
24 omitted) (quoting *Wilson*, 41 F.2d at 706). Simply put, a Defendant’s challenge to a
25 jurisdictionally deficient removal order “is not a ‘collateral challenge’ to his deportation order,
26 because there is no removal order to be collaterally attacked.” *Id.*

27 In the instant case, the Court need not resolve the question of whether the foregoing

analysis is correct because Defendant meets the requirements of 8 U.S.C. § 1326(d). The Court finds that the November 2008 removal order was “fundamentally unfair” under 8 U.S.C. § 1326(d)(3). First, because jurisdiction never vested in the Immigration Court, the November 2008 removal order violated Defendant’s due process rights. Courts in this circuit have held that when the Immigration Court enters a removal order without jurisdiction over a defendant, the Immigration Court violates the defendant’s due process rights. *See, e.g., United States v. Erazo-Diaz*, No. 18-CR-00311-TUC, 2018 WL 63222168, at *5 (D. Ariz. Dec. 4, 2018) (“The Court agrees that the order of removal is fundamentally unfair under § 1326(d)(3). Because it was entered without jurisdiction, it was a violation of Defendant’s due process rights.”); *see also United States v. Rodriguez-Rosa*, No. 18-CR-00079-MMD, 2018 WL 6635286, at *4 (D. Nev. Dec. 11, 2018) (finding fundamental unfairness where the immigration court did not have jurisdiction).

Second, in light of the defective NTA, Defendant was prejudiced because he was “removed when he should not have been.” *See United States v. Aguilera-Rosa*, 769 F.3d 626, 630, 636 (9th Cir. 2014); *see also United States v. Camacho-Lopez*, 540 F.3d 928, 930 (9th Cir. 2006) (“Camacho was removed when he should not have been and clearly suffered prejudice.”). The government attempts to distinguish the foregoing case law, and argues that the case law concerned situations outside the context of defective NTAs. Opp’n at 21–22. However, the Ninth Circuit’s holdings are readily applicable to the context of a jurisdictionally defective NTA. As the Ninth Circuit has explained, even if the Immigration Court would have otherwise been able to remove Defendant “through a formal removal proceeding” that was jurisdictionally sound, Defendant’s “removal on illegitimate grounds is enough to show prejudice.” *United States v. Ochoa-Oregel*, 904 F.3d 682, 686 (9th Cir. 2018). Having shown a due process violation and prejudice, the Court concludes that Defendant has met his burden to show “fundamental unfairness.”

In the instant case, Defendant has demonstrated a violation of his due process rights. Accordingly, Defendant “need not show exhaustion of administrative remedies or that he was denied judicial review pursuant to § 1326(d)(1) and (2).” *Ramos-Urias*, 348 F. Supp. 3d at 1037;

1 *see also* *Gutierrez-Ramirez*, 2019 WL 3346481, at *8 (“Because Defendant has demonstrated that
2 his removal was fundamentally unfair, ‘he need not show exhaustion of administrative remedies or
3 that he was denied judicial review pursuant to § 1326(d)(1) and (2).’”), *Lazaro v. Mukasey*, 527
4 F.3d 977, 980 (9th Cir. 2008) (“A petitioner is entitled to relief from a defective [Notice to
5 Appear] if he ‘show[s] that the Immigration Court lacked jurisdiction’” (citation omitted)); *United*
6 *Farm Workers of Am., AFL-CIO v. Ariz. Agric. Emp’t Relations Bd.*, 669 F.2d 1249, 1253 (9th
7 Cir. 1982) (“Exhaustion of administrative remedies is not required where . . . the administrative
8 proceedings themselves are void.”); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972)
9 (explaining that exhaustion of administrative remedies is not required where “the agency lacks
10 power or jurisdiction to proceed”).

11 In sum, Defendant has shown that Defendant is entitled to relief. The November 2008
12 removal order is void because the Immigration Court lacked jurisdiction over the removal
13 proceedings. As the November 2008 removal order is void, the Court finds that the government
14 cannot establish a predicate element—the prior removal or deportation of Defendant—of the sole
15 offense in the Indictment. *See Raya-Vaca*, 771 F.3d at 1201. Accordingly, the Court GRANTS
16 the motion to dismiss the Indictment with prejudice.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court GRANTS Defendant’s motion to dismiss the
19 Indictment. The Indictment in the instant case is DISMISSED with prejudice.

20 **IT IS SO ORDERED.**

21
22 Dated: March 9, 2020

23 
24 LUCY H. KOH
25 United States District Judge
26
27
28

39 F.4th 1187

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,

v.

Juan Carlos BASTIDE-HERNANDEZ, aka Jesus Chavez-Gongoria, aka Domingo Chavez-Lopez, aka Francisco Soto Hernandez, Defendant-Appellee.

No. 19-30006

|

Argued and Submitted En Banc
March 22, 2022 Pasadena, California

|

Filed July 11, 2022

Synopsis

Background: Defendant, who had been charged with illegal reentry after removal, filed a motion to dismiss the indictment. The United States District Court for the Eastern District of Washington,  360 F.Supp.3d 1127, Stanley A. Bastian, J., dismissed the indictment. The United States appealed.

[Holding:] On rehearing en banc, the Court of Appeals, Owens, Circuit Judge, held that failure to include the date and time of removal hearing in notice to appear (NTA), which initiated immigration removal proceedings against defendant resulting in his eventual removal, did not deprive the immigration court of subject matter jurisdiction to effect the removal.

Reversed and remanded.

Friedland, Circuit Judge, filed an opinion concurring in judgment.

Collins, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Opinion,  360 F.Supp.3d 1127, vacated.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (5)

[1] Criminal Law Review De Novo

Court of Appeals reviews a district court's decision to dismiss a criminal indictment de novo.

2 Cases that cite this headnote

[2] Aliens, Immigration, and Citizenship Notice; order to show cause

Failure to include the date and time of removal hearing in notice to appear (NTA), which initiated immigration removal proceedings against defendant resulting in his eventual removal, did not deprive the immigration court of subject matter jurisdiction to effect the removal, and thus the entire immigration proceeding was not void ab initio, for the purpose of prosecution for defendant for illegal reentry after removal; regulation that purported to condition the "jurisdiction" of immigration courts upon the filing of a charging document, including NTAs, was a nonjurisdictional claim-processing rule that did not implicate the court's adjudicatory authority. Immigration and Nationality Act §§ 239, 276,  8 U.S.C.A. §§ 1229(a)(1)(G)(i),  1326(d); 8 C.F.R. § 1003.14(a).

74 Cases that cite this headnote

[3] Courts Jurisdiction of Cause of Action

Rules of subject matter jurisdiction are sui generis; they define the class of cases a court has the statutory or constitutional power to adjudicate.

1 Case that cites this headnote

[4] Criminal Law Waiver of objections Criminal Law Jurisdiction

Rules of subject matter jurisdiction can never be waived or forfeited, courts are obligated to raise them sua sponte if the parties fail to do so, and if subject matter jurisdiction is found lacking at

any stage of litigation, the suit must be dismissed, sometimes at considerable cost to the parties and the court.

[5] Indictments and Charging

Instruments 🔑 Defects in charging instrument

Sentencing and Punishment 🔑 Factors enhancing sentence

Although a criminal indictment must, as a matter of constitutional law, charge any facts that enhance the defendant's sentence beyond the statutory maximum, omission of those facts, or any other defect in the indictment, will not oust the court's jurisdiction.

***1188** Appeal from the United States District Court for the Eastern District of Washington, [Stanley A. Bastian](#), Chief District Judge, Presiding, D.C. No. 1:18-cr-02050-SAB-1

Attorneys and Law Firms

[Scott A. C. Meisler](#) (argued), Attorney; [Lisa H. Miller](#), Deputy Assistant Attorney General; [Kenneth A. Polite Jr.](#), Assistant Attorney General; Patrick J. Glen, Senior Litigation Counsel; [John W. Blakeley](#), Assistant Director; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; [Vanessa R. Waldref](#), United States Attorney; [Richard C. Burson](#), Assistant United States Attorney; United States Attorney's Office, Yakima, Washington; for Plaintiff-Appellant.

Paul E. Shelton Jr. (argued), Federal Defenders of Eastern Washington, Yakima, Washington, for Defendant-Appellee.

[Richard W. Mark](#), [Amer S. Ahmed](#), [Alexandra Perloff-Giles](#), and [Cassarah M. Chu](#), Gibson Dunn & Crutcher LLP, New York, New York, for Amici Curiae Former Immigration Judges and Members of the Board of Immigration Appeals.

Before: [Mary H. Murguia](#), Chief Judge, and [M. Margaret McKeown](#), [Kim McLane Wardlaw](#), [Consuelo M. Callahan](#), [Morgan Christen](#), [John B. Owens](#), [Michelle T. Friedland](#), [Ryan D. Nelson](#), [Daniel P. Collins](#), [Danielle J. Forrest](#) and [Patrick J. Bumatay](#), Circuit Judges.

Opinion by Judge [Owens](#);

Concurrence by Judge [Friedland](#);

Partial Concurrence and Partial Dissent by Judge [Collins](#)

OPINION

OWENS, Circuit Judge:

The United States appeals from the district court's dismissal of an indictment charging Juan Carlos Bastide-Hernandez with illegal reentry after removal, in violation of [8 U.S.C. § 1326](#). According to the district court, defects in the notice to appear (“NTA”)—which initiated the immigration proceedings against Bastide-Hernandez resulting in his eventual removal from the United States—deprived the immigration court of subject matter jurisdiction to effect the removal in the first place, thereby rendering the entire immigration proceeding “void ab initio.”

Consistent with our own precedent and that of every other circuit to consider this issue, we hold that the failure of an NTA to include time and date information does not deprive the immigration court of subject matter jurisdiction, and thus Bastide-Hernandez's removal was not “void ab initio,” as the district court determined. We reverse the district court's dismissal and remand for further proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

Bastide-Hernandez, a citizen and native of Mexico, first entered the United States ***1189** in 1996 without inspection. In the years that followed, he was convicted of narcotics and firearms offenses, as well as assault with a deadly weapon.

Bastide-Hernandez has also had extensive contact with the immigration system. In April 2006, he was placed in removal proceedings by U.S. Immigration and Customs Enforcement (“ICE”). ICE sent NTAs to his residence and his immigration detention facility, but neither specified the date or time of the hearing. While ICE later sent a curative notice of hearing for June 14, 2006, via fax to an unidentified custodial officer at the detention facility, Bastide-Hernandez denies receiving the notice of hearing, and the record remains unclear if he did. Though we lack a transcript or recording of the June 14, 2006, hearing, on appeal, Bastide-Hernandez concedes he attended

the hearing via videoconference, and the immigration judge subsequently ordered his removal from the United States.

Despite his removal, Bastide-Hernandez returned to the United States. In 2018, a grand jury in the Eastern District of Washington returned an indictment for illegal re-entry after removal in violation of 8 U.S.C. § 1326(a).¹ Bastide-Hernandez moved to dismiss the indictment and argued that the NTA's omission of the date and time of his removal hearing meant that the immigration court lacked subject matter jurisdiction over his case. Because the immigration court lacked subject matter jurisdiction, the argument went, the removal order underlying the indictment was “void and without legal effect.” And without the underlying removal, Bastide-Hernandez contended, the § 1326 indictment was necessarily defective.

The district court agreed with Bastide-Hernandez and dismissed the indictment. It treated the defective NTA as depriving the immigration court of subject matter jurisdiction and concluded that “[a]bsent jurisdiction, the removal order is void on its face and it is ‘the duty of this and every other court to disregard it.’ ” The court explained that in addition to 8 U.S.C. § 1326(d), which is the statutory vehicle to collaterally attack the underlying deportation order,² “there remains a free-standing due process right to challenge a deportation order issued from a court that lacked subject-matter jurisdiction in a subsequent criminal case in which that order is used as an element, as the immigration court proceeding, its orders, and any protections it may have purported to offer were void ab initio.”³

*1190 The United States appealed, and a three-judge panel held that the defective NTA did not deprive the immigration court of subject matter jurisdiction and remanded the case for further proceedings. *United States v. Bastide-Hernandez*, 3 F.4th 1193, 1196–98 (9th Cir.), vacated, 20 F.4th 1230 (9th Cir. 2021). Judge Milan Smith concurred in the judgment because Bastide-Hernandez failed to satisfy the § 1326(d) requirements, but read our decisions in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), and *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020), to “compel the conclusion that the Immigration Court lacked jurisdiction to issue a removal order because the court never cured the omission of the date and time of the hearing” from the

NTA. *Bastide-Hernandez*, 3 F.4th at 1198 (M. Smith, J., concurring).

Our court voted to take this case en banc to examine what effect, if any, a defective NTA has on an immigration court's subject matter jurisdiction.

II. DISCUSSION

A. Standard of Review

[1] We review a district court's decision to dismiss a criminal indictment de novo, *United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007), as we do its conclusion that a defect in removal proceedings precludes reliance upon the resulting order of removal in a subsequent prosecution under 8 U.S.C. § 1326, *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1042 (9th Cir. 2012).

B. A Defective NTA Does Not Affect the Immigration Court's “Subject Matter Jurisdiction”

[2] [3] [4] “Jurisdiction,” the Supreme Court has cautioned, “is a word of many, too many, meanings.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). It has been invoked, often imprecisely, in reference to forms of relief a court is empowered to grant, see *id.*, duties a judge is authorized to perform, see, e.g., 8 C.F.R. § 1003.14(c), and even the territorial boundaries of a court's authority, see, e.g., 8 C.F.R. § 1003.19(c)(1). But rules of *subject matter* jurisdiction are sui generis. They define the class of cases a court has the “statutory or constitutional power to adjudicate.” *Steel Co.*, 523 U.S. at 89, 118 S.Ct. 1003 (emphasis in original). Such rules can never be waived or forfeited, courts are obligated to raise them *sua sponte* if the parties fail to do so, and if subject matter jurisdiction is found lacking at any stage of litigation, the suit must be dismissed (sometimes at considerable cost to the parties and the court).⁴ See *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012). In short, the consequences of denominating any rule subject matter jurisdictional are “drastic.” *Id.*

Thus, the Supreme Court has sought to impose “discipline” on the use of the term by distinguishing between rules properly

implicating a court's adjudicatory authority and mere claim-processing rules. *1191 *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). Unlike rules of subject matter jurisdiction, claim-processing rules “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,” *id.*, and “may be forfeited if the party asserting the rule waits too long to raise the point,” *Manrique v. United States*, — U.S. —, 137 S.Ct. 1266, 1272, 197 L.Ed.2d 599 (2017) (internal quotation marks omitted). This is not to say the rules are optional. A timely objection to a claim-processing defect can in some cases warrant dismissal of the case. *See, e.g.*, *id.* at 1274. But the Supreme Court “has long rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional.” *Gonzalez*, 565 U.S. at 146, 132 S.Ct. 641 (internal quotation marks and ellipsis omitted).

As relevant here, the Attorney General has promulgated a regulation purporting to condition the “jurisdiction” of immigration courts upon the filing of a charging document, including NTAs. 8 C.F.R. §§ 1003.13, 1003.14(a).⁵ And the question is whether this regulation goes to the subject matter jurisdiction of immigration courts, with all the procedural consequences attending the use of that label. We join the emerging consensus of our sister circuits in holding that it does not.⁶ Section 1003.14(a) is a claim-processing rule not implicating the court's adjudicatory authority, and we read its reference to “jurisdiction” in a purely colloquial sense.

The Fourth Circuit's reasoning in *United States v. Cortez* is especially persuasive. 930 F.3d 350 (4th Cir. 2019). Like Bastide-Hernandez, the defendant in that case was deported following immigration proceedings commenced with an undated NTA. *Id.* at 353–54. He was orally notified of the date and time of his removal hearing and attended it via videoconference, but he never challenged the immigration court's jurisdiction or appealed the order of removal. *Id.* In a subsequent prosecution for illegal reentry, he argued, for the first time, that the NTA was insufficient to vest subject matter jurisdiction in the immigration court under 8 C.F.R. § 1003.14(a) because it lacked date and time information, and thus the resulting order of removal was void. *Id.* at 354–55. After disputing (without conclusively overruling) the parties' assumption that subject matter jurisdiction can be

collaterally attacked in general or attacked without satisfying the 8 U.S.C. § 1326(d) requirements, *id.* at 356–58, the Fourth Circuit held that 8 C.F.R. § 1003.14(a) “is an internal docketing rule, not a limit on an immigration court's ‘jurisdiction’ or authority to act,” *id.* at 358.

As the Fourth Circuit explained, “the immigration courts' adjudicatory authority over removal proceedings comes not from the agency regulation codified at 8 C.F.R. § 1003.14(a), but from Congress: It is the [Immigration and Nationality Act (“INA”)] that explicitly and directly grants that authority.” *Id.* at 360 (internal quotation marks omitted); *see also* 8 U.S.C. § 1229a(a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of [a noncitizen].”). Nothing in the INA, the Fourth *1192 Circuit observed, conditions an immigration court's adjudicatory authority “on compliance with rules governing notices to appear, whether statutory, *see* 8 U.S.C. § 1229(a) (statutory definition of notice to appear), or regulatory, *see* 8 C.F.R. § 1003.18(b).” *Cortez*, 930 F.3d at 360. Nor could that condition spring from 8 C.F.R. § 1003.14(a) because jurisdiction ordinarily operates as an external constraint on a court's authority to act. “To deem such a regulation jurisdictional would be to say that the Attorney General is in effect, ... *telling himself* what he may or may not do.” *Id.* (internal quotation marks omitted) (emphasis in original); *see also* *Garcia v. Lynch*, 786 F.3d 789, 797 n.2 (9th Cir. 2015) (Berzon, J., concurring); *accord* *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019).

We agree. Although 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)(i), this provision chiefly concerns the notice the government must provide noncitizens regarding their removal proceedings, not the authority of immigration courts to conduct those proceedings. *See* *Pereira v. Sessions*, — U.S. —, 138 S.Ct. 2105, 2115, 201 L.Ed.2d 433 (2018). Nowhere does the statute imply, much less “clearly state,” that its requirements are jurisdictional. *See* *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (“We inquire whether Congress has clearly stated

that the rule is jurisdictional; absent such a clear statement, we have cautioned, courts should treat the restriction as nonjurisdictional in character.” (internal quotation marks and alteration omitted)). And Department of Justice (“DOJ”) regulations cannot define the subject matter jurisdiction of immigration courts, because Congress gave the Attorney General “no authority to adopt rules of jurisdictional dimension.” *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 84, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009). The only sensible way to read 8 C.F.R. § 1003.14(a), then, is as a docketing rule whose function extends no further than providing for “the orderly administration of proceedings, including deportation proceedings, before the immigration judges.” *Cortez*, 930 F.3d at 362.

This reading is consistent with the purpose and history of § 1003.14. Cf. *Gundy v. United States*, — U.S. —, 139 S. Ct. 2116, 2126, 204 L.Ed.2d 522 (2019) (plurality) (explaining “competing views” of statutory interpretation). The 1985 Notice of Proposed Rulemaking for § 1003.14's predecessor regulation, 8 C.F.R. § 3.14, notes that then-existing DOJ regulations permitted the Immigration and Naturalization Service (the predecessor of the Department of Homeland Security) to terminate removal proceedings at any time prior to the commencement of the hearing. *Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 50 Fed. Reg. 51,693, 51,693 (Dec. 19, 1985). Thus, by fixing the point at which proceedings commence (and the immigration court's authority is invoked), the regulation “limit[ed] the Service's ability to cancel an Order to Show Cause,” and provided the Executive Office for Immigration Review “with the ability to utilize its resources efficiently by ensuring optimal scheduling of matters on its hearing calendars.” *Id.* Although the regulation and notice of proposed rulemaking speak of “jurisdiction,” clearly their focus was the internal, operational efficiency of the immigration review process, see *Cortez*, 930 F.3d at 361–62, a hallmark of a claim-processing rule unrelated to subject matter jurisdiction.

[5] This reading is also consistent with how we treat charging documents in other contexts. *Federal Rule of Civil Procedure* 3, for example, provides that “[a] civil action *1193 is commenced by filing a complaint with the court.” But the failure to comply with this rule is not a defect of jurisdictional proportion. See *Schlesinger v. Councilman*, 420 U.S. 738,

742 n.5, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975) (“[S]o long as the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed, ... any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment.”). And although a criminal indictment must, as a matter of constitutional law, charge any facts that enhance the defendant's sentence beyond the statutory maximum, *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), omission of those facts (or any other defect in the indictment) will not oust the court's jurisdiction, *United States v. Cotton*, 535 U.S. 625, 630–31, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). If an indictment defect of constitutional magnitude does not affect an Article III court's subject matter jurisdiction, defects in an NTA likewise have no bearing on an immigration court's adjudicatory authority.

Our conclusion here is consistent with *Karingithi*, 913 F.3d 1158. At issue in *Karingithi* was whether the filing of an undated NTA, subsequently supplemented with a notice of hearing that specified the date and time of the removal hearing, was sufficient to vest jurisdiction in the immigration court. *Id.* at 1158. We answered in the affirmative. *Id.* at 1159–60. We acknowledged the Supreme Court's decision in *Pereira* that an undated NTA does not qualify as a notice to appear under 8 U.S.C. § 1229(a) for the purposes of the stop-time rule. *Id.* at 1161; see also *Pereira*, 138 S. Ct. at 2110; 8 U.S.C. § 1229b(d)(1). But we held that DOJ “regulations, not § 1229(a), define when [immigration court] jurisdiction vests,” and “[a] notice to appear need not include time and date information to satisfy this standard.” *Karingithi*, 913 F.3d at 1160.

In so holding, we borrowed the “jurisdiction vests” phraseology of 8 C.F.R. § 1003.14(a). But, like the regulation itself, this reference to “jurisdiction” was colloquial—that is to say, not denoting “subject matter jurisdiction” or the court's fundamental power to act.⁷ Thus, the import of our holding in this case, in concert with that in *Karingithi*, is that § 1003.14(a) is a nonjurisdictional claim-processing rule, and the filing of an undated NTA that is subsequently supplemented with a notice of hearing fully complies with the requirements of that regulation.⁸ See *id.* at 1162;

 *Aguilar Fermin*, 958 F.3d at 895 (extending  *Karingithi* to NTAs that fail to specify the location of the removal hearing).⁹

*1194 Because the district court erroneously concluded that the undated NTA precipitating Bastide-Hernandez's removal in 2006 was insufficient to vest subject matter jurisdiction in the immigration court and thus rendered its removal order “void ab initio,” we reverse and remand for further proceedings consistent with this opinion.¹⁰

REVERSED AND REMANDED.

FRIEDLAND, Circuit Judge, concurring in the judgment: I agree that we should reverse and remand for the district court to decide whether Bastide-Hernandez has satisfied all three requirements of  8 U.S.C. § 1326(d). See *United States v. Palomar-Santiago*, — U.S. —, 141 S. Ct. 1615, 1620–21, 209 L.Ed.2d 703 (2021).¹ I write separately, however, to urge the Government to adhere to the statutory requirements for the notice to appear (“NTA”). See  8 U.S.C. § 1229(a)(1). Although our court today holds that service of an NTA is not required to confer jurisdiction on the immigration court, there are strong arguments for the contrary position. The Supreme Court may therefore hold that jurisdiction *1195 vests over removal proceedings only upon service of a single, statutorily compliant NTA. To minimize disruption to immigration proceedings if the Supreme Court so holds, and because providing the required information at the outset is a better practice in any event, I urge the Government not to interpret the majority opinion as a license for complacency.

In 1996, Congress made sweeping changes to the Immigration and Nationality Act (“INA”) in a law called the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). See Pub. L. 104-208, div. C, 110 Stat. 3009-546 (1996). Bastide-Hernandez makes a strong argument that a transitional provision in IIRIRA shows that Congress intended service of the NTA, as defined in IIRIRA, to be a jurisdictional requirement.

Among IIRIRA's many changes was a modification to how notice of charges of removability must be given to noncitizens. Prior to IIRIRA, the charging document used to begin removal proceedings was called an “order to show cause.”  8 U.S.C. § 1252b(a)(1) (1994); see  *Niz-Chavez*

v. Garland, — U.S. —, 141 S. Ct. 1474, 1484, 209 L.Ed.2d 433 (2021). IIRIRA dispensed with the order to show cause and defined a new charging document, called a “notice to appear,” in a newly enacted section 239 of the INA entitled “Initiation of removal proceedings.” IIRIRA sec. 304, § 239, 110 Stat. at 3009-587 to-589. As codified, that section provides in relevant part:

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: ... The time and place at which the proceedings will be held.

 8 U.S.C. § 1229(a)(1),  (a)(1)(G)(i).²

To guide the transition to IIRIRA, Congress included a provision explaining how the law would affect noncitizens already in exclusion or deportation proceedings. See IIRIRA sec. 309, 110 Stat. at 3009-625 to-627. In general, Congress instructed that IIRIRA's new provisions would not apply to cases already in progress, either at the agency level or on judicial review. *Id.* sec. 309(c)(1), 110 Stat. at 3009-625. But for certain in-progress proceedings in which an evidentiary hearing had not yet been held by the time IIRIRA went into effect, Congress gave the Attorney General discretion to proceed under the post-IIRIRA framework. *Id.* sec. 309(c)(2), 110 Stat. at 3009-626. If the Attorney General chose to invoke the new framework, Congress specified that “the notice of hearing provided to the alien under section 235 or 242(a) of [the INA] shall be valid as if provided under section 239 of [the INA] (as amended by this subtitle) to confer jurisdiction on the immigration judge.” IIRIRA sec. 309(c)(2), 110 Stat. at 3009-626 (emphasis added). As discussed, section 239 of the INA is the provision that defines the NTA, codified at  8 U.S.C. § 1229. Although  § 1229 does not itself use the word “jurisdiction,” the transition statute's use of the word in reference to the notice requirements of

§ 1229 suggests that Congress understood the NTA to have jurisdictional significance.

As Bastide-Hernandez also argues, Congress's reference to “jurisdiction” is consistent with the Executive Branch's apparent understanding, both before and after IIRIRA, that a charging document is a prerequisite to the vesting of jurisdiction in the immigration court. After IIRIRA, the Attorney General announced plans to replace the “Order to Show Cause, Form I-221” with the “Notice to Appear, Form I-862” as the charging document used to initiate removal proceedings. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 444, 449 (proposed January 3, 1997). In the same proposed rulemaking, the Attorney General reaffirmed a longstanding rule that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.” 62 Fed. Reg. at 456 (to be codified at 8 C.F.R. § 3.14).³ That language has since remained unchanged in a regulation entitled “Jurisdiction and commencement of proceedings,” now codified at 8 C.F.R. § 1003.14. The use of “and” in both the text and title of the regulation suggests that the Attorney General has understood the word “jurisdiction” to do work beyond indicating when proceedings commence—that is, beyond the work of a claim-processing rule that “promote[s] the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). That understanding of the regulation would be consistent with Congress's suggestion in IIRIRA that an NTA is what confers jurisdiction on the immigration court. *See* IIRIRA sec. 309(c)(2), 110 Stat. at 3009-626.

If service of an NTA under 8 U.S.C. § 1229 is a jurisdictional requirement, then the Supreme Court's decisions in *Pereira v. Sessions*, — U.S. —, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018), and *Niz-Chavez v. Garland*, — U.S. —, 141 S. Ct. 1474, 209 L.Ed.2d 433 (2021), would seem to compel the conclusion that a notice lacking the time or place of proceedings is inadequate to vest jurisdiction. The Supreme Court held in *Pereira* that “[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a ‘notice to

appear under section 1229(a),’ ” 138 S. Ct. at 2110 (quoting 8 U.S.C. § 1229b(d)(1)), and clarified in *Niz-Chavez* that an NTA must be a single document containing all statutorily required information to trigger the stop-time rule for cancellation of removal, 141 S. Ct. at 1486. Given 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. To minimize the disruption that would follow from a holding that jurisdiction is lacking in proceedings that did not begin with a statutorily compliant NTA, I urge the Government to ensure that, going forward, all NTAs contain the information required by statute.

Even aside from minimizing potential disruption, there are good reasons for the Government to ensure that all putative NTAs contain the time and place of removal proceedings. The Supreme Court has observed that “[c]onveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings.” *Pereira*, 138 S. Ct. at 2115. If the Government does not provide this information at the outset, noncitizens may be deprived of a meaningful opportunity to prepare for their hearings. For instance, the Government “could serve a document labeled ‘notice to appear’ without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing.” *Id.*

An amicus brief filed by former immigration judges elaborates on why it better serves clarity, efficiency, and due process to include the time and location of the hearing in an NTA in the first instance. As amici explain, incomplete initial notice documents create uncertainty both for noncitizens, who are left in the dark as to when and where a potentially life-changing proceeding will be held, and for immigration judges, who cannot be sure if a case can proceed. Amici also note that the Government's notice-by-installment practice creates additional fact-finding obligations for immigration judges, who may need to look to multiple documents to determine whether informational gaps in the initial notice have been filled. And amici caution that, because immigration judges are already overburdened and face pressure to complete cases, ambiguities about notice may

lead immigration judges to order noncitizens removed when they fail to show up at their hearings, even if the noncitizens never received notice of those hearings at all.

In recent years, the Government has failed to comply with the time-and-place requirements of 8 U.S.C. § 1229(a)(1)(G)(i). See *Pereira*, 138 S. Ct. at 2111 (quoting the Government's statement during oral argument in 2018 that “almost 100 percent” of “notices to appear omit the time and date of the proceeding over the last three years”). At oral argument before our court, the Government admitted that, despite progress in this area, some NTAs will continue to have a placeholder reading “to be determined” or “to be set” instead of the time and date of the hearing. This admission shows that, more than a year after the Supreme Court's warning in *Niz-Chavez*, the Government still is not “turn[ing] square corners” when it issues NTAs. 141 S. Ct. at 1486. I urge the Government to redouble its efforts to comply with the statute—and to take seriously the possibility that statutory noncompliance might have jurisdictional consequences.

COLLINS, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion in all respects except for footnote 10, which remands “for the district court to reconsider its § 1326(d) analysis” in light of *United States v. Palomar-Santiago*, — U.S. —, 141 S. Ct. 1615, 209 L.Ed.2d 703 (2021). For three reasons, I see no basis for us to order the district court to undertake the further § 1326(d) analysis that is sketched in that footnote.

First, having properly reversed the district court's dismissal of the indictment, which did not rest on an application of § 1326(d), there is no need for us to specify what particular issues should or should not be considered as the case proceeds on remand. With the indictment thus reinstated, the case will proceed in the ordinary course, and the parties on remand may raise whatever issues they think are appropriate. There simply is no need for us to instruct the district court to consider any particular issue.

*1198 Second, in addition to being unnecessary, the majority's instructions to reconsider the § 1326(d) issue violate the party presentation principle, under which “courts

normally decide only questions presented by the parties.” See

United States v. Sineneng-Smith, — U.S. —, 140 S. Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) (simplified); see also *id.* (“[A]s a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”) (simplified). The majority contravenes this principle by instructing the district court on remand to consider contentions that Bastide-Hernandez has never made and, indeed, has explicitly disavowed.

As reflected in his answering brief, Bastide-Hernandez's position throughout this appeal has been that, if the immigration court *lacked* subject matter jurisdiction when his initial removal order was issued in 2006, then he “*did not need to satisfy* § 1326(d)'s requirements because the underlying removal order supporting the charge was issued *ultra vires*” (emphasis added). Similarly, when asked to file a supplemental brief in this court specifically addressing the impact of *Palomar-Santiago*, Bastide-Hernandez reiterated that the decision did not affect his jurisdictional objections, “which can never be waived or forfeited,” and that the decision therefore “has no bearing or impact on this appeal whatsoever.” Notably, in that brief, Bastide-Hernandez alluded to a *different* potential ground for challenging his 2006 removal order under § 1326(d)—*viz.*, whether his appeal waiver at his 2006 hearing was knowingly and intelligently made—but he noted that the “question of the validity of his appeal waiver was not raised in the district court” and therefore was not at issue in this appeal.

In short, Bastide-Hernandez has never contended in this court that, if the immigration court *had* subject matter jurisdiction, he nonetheless could satisfy the requirements for asserting a collateral challenge under § 1326(d) based on non-jurisdictional defects in the underlying Notice to Appear (“NTA”). Nonetheless, the majority inexplicably remands with instructions to consider whether those non-jurisdictional defects in the NTA could give rise to a challenge under § 1326(d) or whether Bastide-Hernandez “forfeited his claim-processing rights” concerning such defects. See Op. at 1194 n.10.

The majority's remand instructions are all the more puzzling given the explicit position that Bastide-Hernandez's counsel

took when asked about § 1326(d) at oral argument. Counsel affirmatively stated that no § 1326(d) inquiry on remand was warranted if we were to reject his argument that the NTA's defects deprived the immigration court of subject matter jurisdiction. Specifically, when asked whether, if Bastide-Hernandez were to lose on the jurisdictional issue, "there's no remand for § 1326(d)," counsel responded as follows:

Counsel: "That's correct. That is my position. If you say that I do not win on the jurisdiction issue, remand for § 1326(d) is not necessary. Again, because you have already held that I lose on my substantive argument."

Oral Argument at 56:39, *United States v. Bastide-Hernandez*, available at <<https://www.ca9.uscourts.gov/media/video/?20220322/19-30006/>>. Instead, as counsel explained, a remand to consider the § 1326(d) factors was necessary only if he *prevailed* on his jurisdictional argument:

Counsel: "[I]f we lose on the merits it doesn't matter whether we exhausted our remedies. ^[1] It doesn't matter if we *1199 satisfied § 1326(d) if we can't satisfy the substance of the argument."

...

Counsel: "I think if you say I lose on [the] substance, we go back to the district court. *If I win on [the] substance*, but *Palomar-Santiago* applies we still should go back to the district court to address § 1326(d)."

Id. at 55:38, 57:42 (emphasis added).

In nonetheless claiming that Bastide-Hernandez's counsel was unclear on this score, the majority relies on a quotation that it improperly takes out of context, thereby distorting the meaning of what counsel said. *See* Op. at 1194 n.10. Counsel's full statement was:

Counsel: "*Palomar-Santiago* and [§] 1326(d) do not provide a barrier to relief *when you're challenging subject matter jurisdiction* and authority of an immigration court, but at worst, this panel must remand to the district court because Mr. Bastide-Hernandez was not given an opportunity to present evidence regarding [§] 1326(d) because that was not at issue before the district court *because the district court excused him from proving that.*"

Oral Argument at 30:07 (emphasis added). In context, it is clear that counsel was addressing the impact of *Palomar-Santiago* on the district court's holding that a jurisdictional challenge was excused from satisfying the requirements of § 1326(d). Counsel's argument was that if we *agree* with his contention that the defects in the NTA deprived the immigration court of jurisdiction, then either (1) *Palomar-Santiago* and § 1326(d) would "not provide a barrier to relief" because the district court *properly* excused compliance with § 1326(d); or (2) "at worst," *Palomar-Santiago* would require remand for application of § 1326(d). Counsel's point is exactly the same as what he later stated at argument, as quoted above: "*If I win on [the] substance*, but *Palomar-Santiago* applies we still should go back to the district court to address § 1326(d)." Oral Argument at 57:42 (emphasis added). At no point did Bastide-Hernandez or his counsel claim—either in his briefs or at oral argument—that remand for application of § 1326(d) would be warranted if he *lost* his jurisdictional argument.

Thus, Bastide-Hernandez himself has expressly disclaimed the need for any further § 1326(d) analysis *if* we rule against him on the jurisdictional issue. We have now ruled against him on that jurisdictional issue—correctly, in my view. Although Bastide-Hernandez has not asked us in that circumstance to require a reconsideration of the § 1326(d) factors on remand, and has instead affirmatively stated that such an analysis is unwarranted, the majority nonetheless instructs the district court to go ahead and reconsider the very issue that Bastide-Hernandez has consciously and affirmatively waived. That is improper. *See* *Sineneng-Smith*, 140 S. Ct. at 1579.²

Third, the particular issues that the majority conjures up for remand are both irrelevant and meritless.

Having correctly recast the NTA's defects as violations of claim-processing rules, the majority *sua sponte* instructs the district court to conduct a new § 1326(d) analysis that addresses two specific issues: (1) whether Bastide-Hernandez "forfeited his claim-processing rights"; *1200 and (2) whether any such forfeiture "is affected by whether he received a notice of hearing." *See* Op. at 1194 n.10. But as applied to this case, the majority's two issues

concerning forfeiture of claims-processing objections are simply irrelevant, because those non-jurisdictional objections (even if preserved) could not possibly contribute to making the three-prong showing that § 1326(d) requires, as construed in *Palomar-Santiago*. Given that Bastide-Hernandez *did* appear at his immigration court hearing (despite the NTA's failure to include date and time information), there is no plausible sense in which those NTA's *date-and-time defects* could be said to have: (1) rendered an appeal to the BIA unavailable, *see* 8 U.S.C. § 1326(d)(1) (requiring exhaustion only of "available" administrative remedies); *cf.* *Palomar-Santiago*, 141 S. Ct. at 1621; (2) "deprived" him "of the opportunity of judicial review," *id.* § 1326(d)(2); and (3) prejudiced him, much less rendered his proceedings "fundamentally unfair," *id.* § 1326(d)(3); *see also* *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1085 (9th Cir. 2011) (explaining that § 1326(d)(3) can be satisfied by showing that "the deportation proceeding violated the alien's due process rights and the alien suffered prejudice as a result").

Moreover, the majority's two forfeiture issues both lack any plausible merit. Bastide-Hernandez plainly forfeited any objection to the NTA's non-jurisdictional defects by failing

to show that he raised any such objection either during his 2006 immigration proceedings or in the multiple subsequent removal proceedings that were based on the 2006 removal order (including at least one in which he was represented by counsel). *See, e.g.,* *Manrique v. United States*, — U.S. —, 137 S. Ct. 1266, 1272, 197 L.Ed.2d 599 (2017) ("Unlike jurisdictional rules, mandatory claim-processing rules may be forfeited if the party asserting the rule waits too long to raise the point."). And whether Bastide-Hernandez received a written notice of hearing announcing the date and time of his 2006 removal hearing has no bearing on whether he did or did not forfeit his non-jurisdictional objections to the NTA at that hearing.

I am at a loss to understand why the majority, after correctly resolving the main issue on appeal, sees fit to remand with instructions to consider irrelevant and meritless questions concerning an issue that Bastide-Hernandez not only has declined to raise, but has affirmatively forsworn. Accordingly, I respectfully dissent from footnote 10, but I otherwise concur in the majority opinion.

All Citations

39 F.4th 1187, 22 Cal. Daily Op. Serv. 6980, 2022 Daily Journal D.A.R. 7359

Footnotes

1  **Section 1326(a)** requires the government to prove: (1) the defendant was removed from the United States; (2) "thereafter the defendant knowingly and voluntarily reentered the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security, to reapply for admission into the United States"; and (3) "the defendant was [a noncitizen] at the time of reentry." Ninth Circuit Model Criminal Jury Instructions § 7.6 (2022).

2  **Section 1326(d)** provides:

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

- (1) the [noncitizen] 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 [noncitizen] of the opportunity for judicial review; and

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

- 3 In a footnote, the district court explained that if it “were to apply the [8 U.S.C. § 1326\(d\)](#) factors, it would likely find them met” in part because the 2006 removal order was “fundamentally unfair.”
- 4 Less clear, however, is whether subject matter jurisdiction can be attacked collaterally. See [Kontrick v. Ryan](#), 540 U.S. 443, 455 n.9, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (noting, as dictum, that subject matter jurisdiction “may not be attacked collaterally”); [United States v. Cortez](#), 930 F.3d 350, 357 (4th Cir. 2019) (explaining that “the interest in the finality of judgments is sufficiently strong” that a collateral attack on subject matter jurisdiction will be permitted “only in exceptional circumstances”). For the purposes of this opinion, we assume that it can, though we do not decide this issue.
- 5 8 C.F.R. § 1003.14(a) provides, in part, “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.”
- 6 See [Lopez-Munoz v. Barr](#), 941 F.3d 1013, 1016 (10th Cir. 2019); [Perez-Sanchez v. U.S. Att’y Gen.](#), 935 F.3d 1148, 1150 (11th Cir. 2019); [Pierre-Paul v. Barr](#), 930 F.3d 684, 691–93 (5th Cir. 2019), *abrogated in part on other grounds by* [Niz-Chavez v. Garland](#), — U.S. —, 141 S. Ct. 1474, 209 L.Ed.2d 433 (2021); [United States v. Cortez](#), 930 F.3d 350, 358–62 (4th Cir. 2019); [Ortiz-Santiago v. Barr](#), 924 F.3d 956, 962–64 (7th Cir. 2019).
- 7 In the wake of [Karingithi](#), some practitioners interpreted its references to “jurisdiction” as applying to the immigration court’s subject matter jurisdiction, and some case law can be read to suggest that this is the correct reading. See, e.g., [Cortes-Maldonado v. Barr](#), 978 F.3d 643, 646 n.2 (9th Cir. 2020); [Aguilar Fermin v. Barr](#), 958 F.3d 887, 891–95 (9th Cir. 2020); [United States v. Gomez](#), 499 F. Supp. 3d 680, 685–88 (N.D. Cal. 2020); [United States v. Martinez-Gonzalez](#), 417 F. Supp. 3d 1349, 1351–53 (E.D. Wash. 2019), *appeal voluntarily dismissed*, No. 19-30252 (9th Cir. Feb. 10, 2020). To the extent that courts or practitioners have read [Karingithi](#) as holding that the Attorney General’s regulations govern the immigration court’s subject matter jurisdiction, today we clarify that this is not the law in the Ninth Circuit.
- 8 To be clear, [Karingithi](#) did not address whether a timely notice of hearing supplying time and date information missing from the NTA was *required* to comply with § 1003.14(a) and neither do we. [913 F.3d at 1162](#).
- 9 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”).
- 10 The district court assumed that “a challenge to the immigration court’s jurisdiction need not comply with [§ 1326\(d\)](#)’s limitations on collateral attacks.” But the court did not have the benefit of the Supreme Court’s recent decision in [United States v. Palomar-Santiago](#), — U.S. —, 141 S. Ct. 1615, 209 L.Ed.2d 703 (2021). We

remand for the district court to reconsider its [§ 1326\(d\)](#) analysis in light of that decision. And at that time, counsel for Bastide-Hernandez can unequivocally state whether he believes [§ 1326\(d\)](#) relief is available. We do not interpret counsel's statements at oral argument as definitively as the partial dissent does. *Compare* Oral Argument at 56:47–56:52 (“If you say I do not win on the jurisdiction issue, remand for 1326(d) is not necessary.”), *with* Oral Argument at 30:18–30:27 (“[A]t worst, this panel must remand to the district court because Mr. Bastide-Hernandez was not given an opportunity to present evidence regarding 1326(d)”).

We also leave it to the district court to determine on remand whether Bastide-Hernandez forfeited his claim-processing rights by failing to raise them during his 2006 immigration proceedings, and if forfeiture is affected by whether he received a notice of hearing.

1 I read [§ 1326\(d\)](#) to apply to *any* collateral attack on an underlying removal order that is raised during a prosecution for illegal reentry—regardless of whether that collateral attack raises a jurisdictional flaw. See *Palomar-Santiago*, 141 S. Ct. at 1620 (holding that the statute “provides that defendants charged with unlawful reentry ‘may not’ challenge their underlying removal orders ‘unless’ they ‘demonstrat[e]’ that three conditions are met” (alteration in original) (quoting [8 U.S.C. § 1326\(d\)](#))). Accordingly, I believe a remand for consideration of the [§ 1326\(d\)](#) factors would be necessary even if the majority were holding that defects in the notice to appear deprived the immigration court of jurisdiction over Bastide-Hernandez’s original removal proceeding. An absence of jurisdiction in the underlying removal proceeding would, at most, satisfy the [§ 1326\(d\)\(3\)](#) requirement of fundamental unfairness—the requirements of [§ 1326\(d\)\(1\)](#) (exhaustion of available administrative remedies) and [§ 1326\(d\)\(2\)](#) (lack of opportunity for judicial review) would still need to be satisfied for a collateral attack to succeed. And although the majority rejects Bastide-Hernandez’s theory that defects in the notice to appear deprived the immigration court of jurisdiction, Bastide-Hernandez is not precluded from prevailing on remand by arguing that those defects are claim-processing violations (or, for that matter, by raising other challenges to his original removal proceeding, provided those challenges are not waived)—as long as he can meet the requirements of [§ 1326\(d\)](#). Because the district court made no factual findings as to when Bastide-Hernandez learned of his hearing, whether and how he participated in the hearing, what transpired during the hearing, or whether he knowingly waived his right to appeal, we cannot conduct the [§ 1326\(d\)](#) analysis on the record before us.

2 [Section 1229a](#) provides that “[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” [8 U.S.C. § 1229a\(1\)](#).

3 The regulations first used a version of this language in 1985. *Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 50 Fed. Reg. 51,693, 51,697 (Dec. 19, 1985) (proposed rule) (“Jurisdiction vests and proceedings before an Immigration Judge commence when a charging document is filed with the Office of the Immigration Judge.”). In 1987, in response to criticism that the wording was “not detailed enough to cover all situations,” the Attorney General expressed that the rule was “a simple, direct statement of jurisdiction” but added an exception to exclude bond proceedings. *Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 52 Fed. Reg. 2931, 2932, 2937 (Jan. 29, 1987) (final rule). In these regulations, “the Service” refers to the Immigration and Naturalization Service, the predecessor of the Department of Homeland Security.

1 As the majority notes, see Op. at 1189 n.2, exhaustion of administrative remedies is one of the three factors enumerated in [§ 1326\(d\)](#).

- 2 In defending its remand, the majority ignores every point made in this dissent other than this review of counsel's comments at oral argument. See Op. at 1194 n.10. But even if the majority were correct about counsel's comments, it does not address the multiple other reasons why we should not give specific instructions to reconsider the  § 1326(d) issue on remand.