

No. _____

IN THE
Supreme Court of the United States

JUAN CARLOS BASTIDE-HERNANDEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Unopposed Application for Extension of Time
to File a Petition for Writ of Certiorari**

To the Honorable Elena Kagan
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

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**To the Honorable Elena Kagan, Associate Justice of the United States
Supreme Court and Circuit Justice for the Ninth Circuit:**

Applicant-Defendant Juan Carlos Bastide-Hernandez (“Mr. Bastide-Hernandez”) respectfully requests an extension of time to file a petition for writ of certiorari under Supreme Court Rule 13.5. As explained below, the current deadline for Mr. Bastide-Hernandez to file his petition is November 15, 2022. For good cause set forth herein, Mr. Bastide-Hernandez is requesting a 14-day extension to November 29, 2022, to file his petition for a writ of certiorari. The United States does not oppose this request for an extension.

Background and Procedural History

The United States originally indicted Mr. Bastide-Hernandez in August 2018, charging him with one count of illegal re-entry into the United States in violation of 8 U.S.C. § 1326. The basis for Mr. Bastide-Hernandez’s prosecution is removal proceedings that occurred in 2006. Immigration authorities initiated removal proceedings against him with a Notice to Appear (“NTA”) that failed to inform him of the date and time of his removal hearing. His removal hearing ultimately occurred on June 14, 2006. The immigration judge found him removable and ordered him removed to Mexico.

During his prosecution in the district court below, Mr. Bastide-Hernandez filed a motion to dismiss the indictment. His motion argued that the immigration judge was never properly vested with subject matter jurisdiction over his removal proceedings because the NTA did not contain all information required by the relevant statute (8 U.S.C. §1229(a)(1)), relying on this Court’s ruling in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The district court granted the motion, relying on *Pereira*. The United States filed a timely appeal to the Ninth Circuit.

Following briefing and argument, a divided panel issued a 2-1 opinion on February 2, 2021, with the majority reversing the district court’s ruling.¹ The majority opinion, authored by the Honorable Danny J. Boggs of the Sixth Circuit Court of Appeals, held that defects in a NTA did not affect the subject matter jurisdiction of immigration courts. The majority purported to clarify the confusion that arose following prior panel rulings in *Karingithi v. Whitaker*² and *Aguilar Fermin v. Barr*,³ finding jurisdiction “either exists or it does not” and defects in a NTA have no legal effect.⁴ The dissent held that NTAs must include all information required under the controlling regulations (rather than the statute) for subject matter jurisdiction to vest.⁵

¹ See *United States v. Bastide-Hernandez*, 986 F.3d 1245 (9th Cir. 2021).

² 913 F.3d 1158 (9th Cir. 2019).

³ 958 F.3d 887 (9th Cir. 2020).

⁴ See *Bastide-Hernandez*, 986 F.3d at 1247-48.

⁵ See *id.* at 1251 (Judge M. Smith, dissenting).

Mr. Bastide-Hernandez filed a timely petition for rehearing. Prior to ruling on his petition, the Ninth Circuit directed the parties to submit supplemental briefing regarding the impact (if any) of subsequent Supreme Court rulings in *Niz-Chavez v. Garland*⁶ and *United States v. Palomar-Santiago*.⁷ On July 12, 2021, the panel issued an order withdrawing its original opinion and dissent, filing a new opinion and concurrence.⁸ The new majority opinion (again from Judge Boggs) was substantively identical to the original majority opinion with respect to the subject matter jurisdiction analysis. Neither the majority nor the concurring opinion substantively addressed or even cited *Niz-Chavez* despite receiving supplemental briefing on that case. Both the majority and Judge Smith (now concurring rather than dissenting) found that *Palomar-Santiago* required reversal because Mr. Bastide-Hernandez had not appealed his removal order in his underlying removal proceedings.⁹ Judge Smith continued to hold that defects in a NTA ought to deprive immigration courts of subject matter jurisdiction.¹⁰

Mr. Bastide-Hernandez filed a second timely petition for rehearing. The Ninth Circuit granted this petition and reheard the case *en banc*. Prior to *en banc* oral argument, the parties submitted supplemental briefing. Additionally, a collective of former

⁶ 141 S. Ct. 1474 (2021).

⁷ 141 S. Ct. 1615 (2021).

⁸ See *United States v. Bastide-Hernandez*, 3 F.4th 1193 (9th Cir. 2021).

⁹ See generally *id.*

¹⁰ See *id.* at 1198-1201 (Judge M. Smith, concurring).

immigration judges and members of the Board of Immigration Appeals submitted an amicus brief.

The *en banc* Ninth Circuit issued three opinions on July 11, 2022. The majority opinion reversed the district court’s ruling, finding that defects in a NTA do not affect an immigration court’s jurisdiction.¹¹ The majority joined other Circuit Courts in holding that the relevant regulations are mere “claim processing rules” and the relevant statute does not control the vesting of jurisdiction.¹² Judge Collins concurred in the majority opinion but dissented in part regarding the scope of remand to the district court.¹³ Judge Friedland concurred in the majority’s judgment to reverse and remand “for the district court to decide whether Bastide-Hernandez has satisfied all three requirements of 8 U.S.C. § 1326(d),” citing *Palomar-Santiago*.¹⁴ Judge Friedland’s concurrence appears to reject the majority’s conclusion that the relevant statute does not affect subject matter jurisdiction, citing “strong arguments for the contrary position.”¹⁵ However, Judge Friedland neither expressly adopts this position nor rejects it, instead merely urging the United States “to take seriously the possibility that statutory noncompliance might have jurisdictional consequences.”¹⁶

¹¹ See *United States v. Bastide-Hernandez*, 39 F. 4th 1187 (9th Cir. 2022). This *en banc* opinion is also attached as Appendix A to the instant application for an extension.

¹² See generally *id.*

¹³ See *id.* at 1197-1200 (Judge D. Collins, concurring in part and dissenting in part).

¹⁴ *Id.* at 1194-1197 (Judge M. Friedland, concurring).

¹⁵ *Id.* at 1194.

¹⁶ *Id.* at 1197.

Mr. Bastide-Hernandez filed a timely petition seeking rehearing by the full Ninth Circuit under Circuit Rule 35-3. The Ninth Circuit denied that petition on August 17, 2022. The Ninth Circuit did grant a separate motion to stay the mandate pending an application to this Court for a writ of certiorari. Under Supreme Court Rule 13, Mr. Bastide-Hernandez's petition for a writ of certiorari to this Court is due by November 15, 2022, 90 days from when the petition for rehearing was denied.

Opinion Below

As noted above, Mr. Bastide-Hernandez's appeal (19-30006) presented two questions to the Ninth Circuit, one of which emerged during pendency of the appeal. The first issue was whether the immigration court lacked subject matter jurisdiction due to defects in the NTA, rendering the underlying removal order void. The second issue was whether Mr. Bastide-Hernandez's failure to file an appeal precluded his collateral attack under 8 U.S.C. § 1326(d). The *en banc* Ninth Circuit overruled the district court's ruling, finding that defects in a NTA do not affect subject matter jurisdiction. The two concurring judges held that Mr. Bastide-Hernandez's failure to file an appeal was fatal to his argument, citing *Palomar-Santiago*. The *en banc* Ninth Circuit opinion is attached as Appendix A.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254.

Reasons Extension of Deadline is Justified

Mr. Bastide-Hernandez's appeal presents two distinct issues of significance that will be presented in his petition for certiorari. The first issue presented in his appeal is whether the immigration judge was ever properly vested with subject matter jurisdiction given undisputed defects in the NTA. This Court has spoken to that issue twice, in *Pereira v. Sessions* and *Niz-Chavez v. Garland*. To date, every circuit court to have considered the issue has effectively found either that defects in a NTA do not affect the subject matter jurisdiction of immigration judges or that any such defects can be cured through a subsequent written notice of hearing. To counsel's knowledge, Mr. Bastide-Hernandez's appeal is the first and only *en banc* ruling from any circuit court on this issue.

The second issue presented in Mr. Bastide-Hernandez's appeal is whether his waiver of appeal precluded his collateral attack on his removal order. The Ninth Circuit's *en banc* opinion relied on this Court's ruling in *Palomar-Santiago* to find that it did, effectively ignoring Mr. Bastide-Hernandez's argument that his waiver of appeal is irrelevant because defects in subject matter jurisdiction "can never be forfeited or waived."¹⁷

¹⁷ *United States v. Cotton*, 535 U.S. 625, 630 (2002).

Counsel seeks a 14-day extension of the deadline to file a petition for a writ of certiorari because counsel is concurrently working on pretrial motions for a multi-count drug distribution trial set to commence in mid-December 2022. The pretrial motions deadline is November 16, 2022. Counsel is scheduled to be out of the office on November 14 and 15 for family-related issues. Combined with the federal holiday on November 11, 2022, counsel feels he cannot adequately and competently prepare the petition for a writ of certiorari to this Court given his obligations in other cases, including his upcoming trial. Counsel anticipates that the requested 14-day extension would provide adequate time to file Mr. Bastide-Hernandez's petition to this Court.

Given the paramount importance of this particular issue, which affects thousands upon thousands of both criminal immigration prosecutions and civil immigration proceedings over approximately the last 30 years, counsel simply endeavors to present this Court with the most reasonable and efficient pleadings. For the reasons set forth herein, counsel believes the requested 14-day extension is reasonable, necessary, and appropriate.

Position of the United States

Mr. Bastide-Hernandez's counsel has communicated with counsel for the United States, who has indicated they have no objection to the requested extension of the deadline for Mr. Bastide-Hernandez to file a petition for a writ of certiorari.

CONCLUSION

For the reasons set forth herein, Mr. Bastide-Hernandez respectfully requests an extension of time to file his petition for a writ of certiorari under Rule 13.5. Specifically, Mr. Bastide-Hernandez requests a 14-day extension, which would result in a new deadline of November 29, 2022.

Dated: November 1, 2022.

s/ Paul Shelton

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Proof of Service

STATE OF WASHINGTON)

COUNTY OF YAKIMA)

Paul E. Shelton, being first duly sworn, deposes and says:

I am employed by the Federal Defenders of Eastern Washington and Idaho as counsel appointed to represent petitioner;

That this Application for Extension of Time to File a Petition for Writ of Certiorari is made pursuant to my obligations to represent indigent defendants in federal court and at the request of the petitioner;

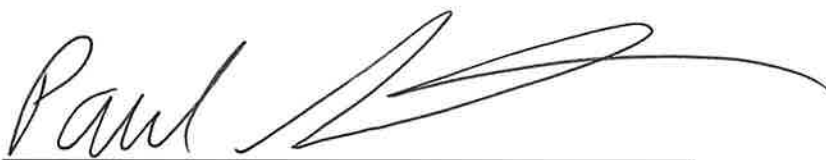
On November 1, 2022, the Application for an Extension Petition for Writ of Certiorari in the above-entitled case was sent by United States mail to the Clerk of the

Supreme Court within the time allowed for filing, including one original and two copies in compliance with Supreme Court Rule 22.2;

An additional copy of the Application was served on counsel for Respondent by placing the same in the United States mail addressed to:

The Honorable Elizabeth Prelogar
Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Mr. Richard A. Burson
Assistant United States Attorney
402 E Yakima Avenue, Suite 210
Yakima, WA 98901



Paul E. Shelton, Affiant

Subscribed and Sworn to before me this 1st day of November, 2022.



Notary Public in and for Yakima County, Yakima,
Washington.

Commission Expires: 5/13/2024

