No. _____

IN THE

Supreme Court of the United States

MARTIN RAMOS-URIAS,

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

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APPENDIX

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NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. MARTIN RAMOS-URIAS, Defendant-Appellee.	No. 19-10138 D.C. No. 4:18-cr-00076-JSW-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted April 17, 2023**

Before: CLIFTON, R. NELSON, and BRESS, Circuit Judges.

The government appeals from the district court's order dismissing the indictment against Martin Ramos-Urias for illegal reentry in violation of 8 U.S.C. § 1326, and its order denying reconsideration. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court granted Ramos-Urias's motion to dismiss the indictment after concluding that deficiencies in the notice to appear deprived the immigration court of jurisdiction, rendering his 2006 removal order fundamentally unfair and relieving Ramos-Urias of the obligation to meet the other requirements of 8 U.S.C. § 1326(d). During the pendency of this appeal, the Supreme Court held in *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021), that "each of the statutory requirements of § 1326(d) is mandatory." In addition, we decided in *United States v. Bastide-Hernandez*, 39 F.4th 1187 (9th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 755 (2023), that defects in a notice to appear do not deprive the immigration court of jurisdiction. In light of these decisions, we vacate the district court's order dismissing the indictment and remand for further proceedings.

Ramos-Urias's motion to file a supplemental brief is denied. The Clerk will strike the supplemental brief at Docket Entry No. 57.

VACATED and REMANDED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARTIN RAMOS-URIAS,

Defendant.

Case No. 18-cr-00076-JSW-1

ORDER DENYING GOVERNMENT'S MOTION FOR RECONSIDERATION

Re: Dkt. No. 51

Now before the Court is the motion for reconsideration filed by the government. The Court has considered the parties' papers and supplemental briefing, relevant legal authority, and the record in this case, and, in light of *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), DENIES the government's motion for reconsideration. This matter is hereby set for status conference on April 16, 2019 at 1:00 p.m.

BACKGROUND

Defendant Martin Ramos-Urias moved to dismiss his indictment for illegal reentry in violation of 8 U.S.C. § 1326 on November 13, 2018. (Dkt. No. 37.) On January 23, 2019, this Court, applying *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), granted the motion to dismiss on the ground that the Immigration Court that issued the notice to appear ("NTA") in Mr. Ramos-Urias's underlying removal proceedings did not have jurisdiction to do so. (Dkt. No. 49.) After the Court dismissed Mr. Ramos-Urias's indictment, the Ninth Circuit issued an opinion addressing the impact of *Pereira* on an Immigration Court's jurisdiction. *Karingithi*, 913 F.3d 1158. On the basis of *Karingithi*, the government now moves this Court to reconsider its order dismissing the indictment. (Dkt. No. 51.)

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ANALYSIS

A. Applicable Legal Standard.

District courts have "inherent power" to grant motions for reconsideration in criminal cases. *United States v. Lopez-Cruz*, 730 F.3d 803, 811 (9th Cir. 2013). The Ninth Circuit reviews a district court's ruling on a motion for reconsideration for abuse of discretion. *United States v. Rubio*, 727 F.2d 786, 799 (9th Cir. 1983). In the context of criminal cases, motions to reconsider are "governed by the rules that govern equivalent motions in civil proceedings." *United States v. Mendez*, No. 07-cr-00011-MMM, 2008 WL 2561962, at *2 (C.D. Cal. June 25, 2008). The government's motion to reconsider must therefore be evaluated under Federal Rule of Civil Procedure 60. *See Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (holding party may move for reconsideration based on changes in law underlying earlier judgment).

B. *Karingithi* and *Bermudez-Cota*.

In dismissing Mr. Ramos-Urias's indictment, this Court relied upon the *Pereira* decision. In that case, the Supreme Court held, for the purposes of the so-called "stop-time" rule, that an NTA must include the date and time of the removal hearing. *Pereira*, 138 S. Ct. at 2116. Analyzing 8 U.S.C. § 1229(a)(1)(G)(i), the Supreme Court concluded that an NTA that did not include date and time information did not constitute an NTA. *Id.* ("Section 1229(a)(1) does not say a 'notice to appear' is 'complete' when it specifies the time and place of the removal proceedings. Rather, it defines a 'notice to appear' as a 'written notice' that 'specif[ies],' at a minimum, the time and place of the removal proceedings.")

Applying *Pereira*, this Court concluded that the putative NTA Mr. Ramos-Urias received was not statutorily compliant because it did not include the date and time of the removal hearing. (Dkt. No. 49 at p. 6.) Under the applicable regulations, jurisdiction vests with the Immigration Court when an NTA is filed with the Immigration Court. *See* 8 C.F.R. §§ 1003.13, 1003.14(a). Therefore, having reasoned that no valid NTA existed, the Court concluded that jurisdiction never vested with the Immigration Court and, further, that the 2006 removal order issued by the Immigration Court was a nullity. (Dkt. No. 49 at p. 6.)

In its motion to reconsider, the government argues that *Karingithi* upends this Court's prior

analysis. In *Karingithi*, the petitioner, a Kenyan citizen who overstayed her tourist visa, received an NTA stating that the date and time of the removal hearing were "to be set." 913 F.3d at 1159. She later that day received a notice of hearing from the Immigration Court naming the hearing's date and time. *Id.* Examining the statutory regime and the supplemental regulatory framework, the Ninth Circuit concluded that *Pereira* had "no application" to the facts at hand: "[t]he regulatory definition, not the one set forth in § 1229(a), governs the Immigration Court's jurisdiction. A[n] [NTA] need not include time and date information to satisfy this standard. Karingithi's notice to appear met the regulatory requirements and therefore vested jurisdiction in the [Immigration Judge]." *See id.* at 1159-1161.

The Ninth Circuit relied heavily on *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018), a precedential Board of Immigration Appeals ("BIA") decision. In *Bermudez-Corta*, the BIA determined that an NTA that lacks time and date information does not prevent an Immigration Judge from exercising jurisdiction over a noncitizen in removal proceedings so long as a subsequently served notice of hearing specifies this information. *Id.* at 447. The BIA specifically noted that 8 C.F.R. § 1003.15(b), not the statute, "lists the information that must be contained in a notice to appear." *Id.* at 445.

Under *Karingithi* and *Bermudez-Cota*, the failure of Mr. Ramos-Urias's NTA to include the date and time of the removal hearing did not deprive the Immigration Court of jurisdiction.

C. NTA Deficient Under 8 C.F.R. § 1003.15(b).

However, Mr. Ramos-Urias's NTA is deficient in another respect. The NTA Mr. Ramos-Urias was served did not include "the address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear." *See* 8 C.F.R. § 1003.15(b)(6). Because the NTA did not include this information, it did not comply with the requirements that govern the Immigration Court's jurisdiction. *See Karingithi*, 913 F.3d at 1160; *Bermudez-Cota* at 445.

8 C.F.R. § 1003.15 itemizes multiple requirements for the contents of an NTA. Subsection (c) requires an NTA to include the alien's (i) names and aliases, (ii) address, (iii) registration number, (iv) nationality and citizenship, and (v) language of choice. 8 C.F.R. § 1003.15(c). Yet, subsection (c) explains that an omission of any of this information "shall not be construed as

affording the alien any substantive or procedural rights." *Id.* Subsection (a) contains an identical disclaimer, but only applies to orders to show cause. 8 C.F.R. § 1003.15(a). Subsection (b) states that an NTA "must" include: (i) the nature of the proceedings and charges against the alien, (ii) the legal authority of the proceedings, (iii) the acts alleged to violate the law, (iv) the charges against the alien and the statutory provisions violated, (v) notice that the alien may be represented, (vi) the address of the Immigration Court where the NTA will be filed, and (vii) a statement requiring the alien to advise the Immigration Court of his current contact information. 8 C.F.R. § 1003.15(b). Unlike subsections (a) and (c), subsection (b) does not contain a disclaimer.

The Court agrees with Mr. Ramos-Urias that the absence of the disclaimer in subsection (b) is significant. *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) ("If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health."). Drafters of regulations and statutes are presumed to choose their words with precision. *See Williams v. Taylor,* 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). That regulators chose to impose the disclaimer on categories of information described in subsections (a) and (c) but not on subsection (b) indicates that the requirements of subsection (b) should be treated differently than the requirements of subsections (a) and (c). The fact that this regulation's drafters omitted the disclaimer for the contents itemized in subsection (b) suggests to the Court that the drafters intended subsection (b) to provide an alien with substantive and procedural rights.

In context, the absence of the disclaimer in subsection (b) is particularly sensible. *Marx v. Gen. Revenue Corp.,* 568 U.S. 371, 381 (2013) ("The force of any negative implication . . . depends on context."). The items required by subsection (b) are of a different character than those required by subsections (a) and (c). Subsection (b) requires an NTA to provide information about the legal process surrounding a noncitizen's removal, while subsections (a) and (c) describe categories of identifying information of which an alien is likely already aware. It is logical that an NTA's failure to include an alien's alias or preferred language, for example, would not carry the

same consequences as an NTA's failure to include a description of the statute an alien is alleged to have violated or, as here, the address of the Immigration Court where the NTA would be filed.

Karingithi and *Bermudez-Cota* teach that satisfying the regulations, not the statute, is crucial to establish the Immigration Court's jurisdiction. *Karingithi*, 913 F.3d at 1160; *Bermudez-Cota* at 445. The NTA Mr. Ramos-Urias was served did not comply with the regulations because it did not include the address of the Immigration Court where the NTA would be filed. *See* 8 C.F.R. § 1003.15(b)(6). Accordingly, because no regulatorily-compliant NTA was generated, this Court concludes that jurisdiction failed to vest with the Immigration Court. *See* 8 C.F.R. § 1003.14(a).

The government argues that *Karingithi* and *Bermudez-Cota* stand for the proposition that a supplemental notice of hearing cures all NTA deficiencies. The Court does not read these two opinions so broadly. Both opinions confront circumstances and discuss cases where the date and time of the hearing are absent from an NTA, and both opinions explain that, because date-and-time are required by statute *only*, that particular deficiency is immaterial to the Immigration Court's jurisdiction. *See Karingithi*, 913 F. 3d at 1161 ("There is no 'glue' to bind § 1229(a) and the jurisdictional regulations: the regulations do not reference § 1229(a), which itself makes no mention of the [Immigration Judge's] jurisdiction. Pereira's definition of a 'notice to appear *under section 1229(a)*' does not govern the meaning of 'notice to appear' under an unrelated regulatory provision." (emphasis in original)); *Bermudez-Cota* at 447 ("We agree with the Fifth, Seventh, Eighth, and Ninth Circuits that a two-step notice process is sufficient to meet *the statutory notice requirements in section 239(a) of the Act*. Accordingly, an NTA that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and *meets the requirements of section 239(a) of the Act*, so long as a notice of hearing specifying this information is later sent to the alien. . . ." (emphasis added)). Nothing in either opinion serves as a benediction for a two-step notice process in all circumstances,[1] and the Court declines to expand either opinion to a circumstance neither

[1] Even if a two-step notice process properly vested the Immigration Court with jurisdiction, it is unclear to the Court that the notice of hearing was properly served upon Mr. Ramos-Urias. His

contemplated. Moreover, the Court can find no regulatory support for the proposition that a notice of hearing cures a regulatorily-deficient NTA or can serve as a separate charging document.

This Court's prior ruling was based on its conclusion that a defective NTA failed to vest the Immigration Court with jurisdiction over Mr. Ramos-Urias's removal. The NTA remains defective—only now for a regulatory reason rather than a statutory one. The Court therefore incorporates by reference its prior analysis regarding Mr. Ramos-Urias's collateral attack on his removal order, as set forth in its order dismissing the indictment. (See Dkt. No. 49 at p. 8-9.)[2]

CONCLUSION

For the reasons explained above, the Court hereby DENIES the government's motion to reconsider.

IT IS SO ORDERED.

Dated: April 8, 2019

JEFFREY S. WHITE
United States District Judge

United States District Court
Northern District of California

notice of hearing does not indicate that he was personally served as required under 8 C.F.R. § 103.8(c)(2)(i) (requiring that incarcerated person be served notice of hearing). (*See* Dkt. No. 42-2 (Notice of Hearing) (indicating notice of hearing served on Mr. Ramos-Urias's custodial officer but not on Mr. Ramos-Urias).)

[2] The Court need not reach Mr. Ramos-Urias's other arguments.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MARTIN RAMOS-URIAS, Defendant.	Case No. 18-cr-00076-JSW-1 **ORDER GRANTING MOTION TO DISMISS INDICTMENT** Re: Dkt. No. 37

Now before the Court is the motion to dismiss the indictment filed by Defendant Martin Ramos-Urias. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and GRANTS Mr. Ramos-Urias's motion to dismiss. The hearing for this motion, set for January 29, 2019, is HEREBY CONVERTED to a status conference. The government should be prepared to discuss its intent to appeal this Order, and the defense should be prepared to discuss whether Mr. Ramos-Urias will seek to be released.

BACKGROUND

Mr. Ramos-Urias is a Mexican citizen who came to the United States as a child. (*See* Dkt No. 37-1 (Declaration of Hanni Fakhoury in Support of Motion to Dismiss Indictment ("Fakhoury Decl.")), Ex. A (Presentence Investigation Report), ¶¶ 40, 41.)[1] Mr. Ramos-Urias has stated he was granted lawful permanent resident status, but he cannot recall when. (*Id.* ¶ 41.) In 2003, Mr. Ramos-Urias was arrested after police officers recovered twenty grams of methamphetamine and other drug paraphernalia from his vehicle. (*Id.* ¶ 30.) In 2004, he was sentenced to five years of probation after spending one day in jail. (*Id.*) In June of 2005, police found methamphetamine

[1] Ex. A to the Fakhoury Decl. is filed under seal, but Mr. Ramos-Urias refers to certain information from that document in publicly-available filings. (*See, e.g.*, Dkt. 37 p. 6.)

and drug paraphernalia in Mr. Ramos-Urias's car and a firearm and additional drug paraphernalia in his house. (*Id.* ¶ 31.) His probation was revoked, and he was sentenced to serve sixteen months in state prison. (*Id.* ¶¶ 30, 31.)

On May 31, 2006, while Mr. Ramos-Urias was in the custody of Immigration and Customs Enforcement ("ICE") officials, he was served a putative notice to appear ("NTA"), alleging he was removable for having committed an aggravated felony. (Fakhoury Decl., Ex. C (Notice to Appear); Declaration of Samantha Schott ("Schott Decl."), Ex. 1.) The NTA specified the removal hearing would occur on a "date to be set" and a "time to be set." (Fakhoury Decl., Ex. C (Notice to Appear).) Mr. Ramos-Urias appears to have requested an immediate hearing in order to expedite a determination of his case, but indicated that he did not waive his right to a ten-day period before appearing before an immigration judge. (*Id.* at 2.) The certificate of service on the NTA notes that he received oral notice in English of the time and place of his hearing and of the consequences of the failure to appear at the scheduled hearing. (*Id.*)

On June 15, 2006, Mr. Ramos-Urias received personal service of a Notice of Hearing in Removal Proceedings from Immigration Court. (Schott Decl., Ex. 2.) This document indicated that Mr. Ramos-Urias's hearing would take place on July 10, 2006, at 8:30 a.m. (*Id.*) On this scheduled date, Mr. Ramos-Urias appeared before an immigration judge in Eloy, Arizona. (Fakhoury Decl., Ex. D (July 10, 2006 Immigration Judge Order).) The immigration judge ordered him deported to Mexico. (*Id.*) Mr. Ramos-Urias waived his right to appeal and was removed from the United States on July 10, 2006. (*Id.*; Fakhoury Decl., Ex. E (Warrant of Removal).)

Mr. Ramon-Urias returned to the United States; in 2007 and was arrested on state charges and subsequently prosecuted for illegal re-entry. (*United States v. Ramos-Urias*, 07-cr-567-SBA (N.D. Cal.), Dkt. Nos. 1 (Complaint), 6 (Indictment).) He pled guilty to illegal reentry following deportation in the Northern District of California and was sentenced to fifty months in federal prison. (*Id.* Dkt. Nos. 16, 20.) Mr. Martin-Urias's 2006 removal order was reinstated: he completed his federal sentence and was again deported on May 27, 2011. (Fakhoury Decl., Ex. F (Notice of Intent/Decision to Reinstate Prior Order and Warrant of Removal).)

Mr. Ramos-Urias evidently re-entered the United States thereafter. He was again arrested on state charges on October 25, 2017. (Dkt. No. 1 (Indictment in Above-Captioned Case, 18-cr-76-JSW).) He pled no contest, his probation was revoked, and he was resentenced to 365 days of jail time. (Schott Decl., Ex. 4 (Alameda County Clerks Dockets and Minutes.) During this incarceration, Immigration and Customs Enforcement became aware of his presence in the United States. (*Id.*) On February 22, 2018, he was charged with being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. (*Id.*) On May 15, 2018, Mr. Ramos-Urias entered an open guilty plea to the indictment. (Dkt. No. 13.)

On June 21, 2018, the Supreme Court issued its decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Mr. Ramos-Urias had not yet been sentenced in the instant matter, and on August 1, 2018, he filed a motion to withdraw his guilty plea. (Dkt. No. 17.) On October 30, 2018, this Court granted the motion to withdraw. (Dkt. No. 33.) On November 13, 2018, Mr. Ramos-Urias filed a motion to dismiss the indictment. (Dkt. No. 37.)

The Court will address other facts as necessary in its analysis.

ANALYSIS

To secure a conviction under 8 U.S.C. § 1326(a), the government must prove a defendant (i) is an alien, (ii) was previously deported, and (iii) has re-entered the United States without permission. *United States v. Raya-Vaca*, 771 F.3d 1195, 1201 (9th Cir. 2014) (internal quotation marks and citations omitted). Because a removal order is a predicate element of a conviction under § 1326, a defendant so charged has a due process right to collaterally attack a removal order. *Id.* (citing § 1326(d)). Mr. Ramos-Urias challenges the validity of his 2006 deportation because the NTA failed to include the time and date of the hearing as required by 8 U.S.C. § 1229(a) and *Pereira*. He argues that, because his NTA was invalid, jurisdiction never vested with the immigration court that issued his initial 2006 removal order. For the reasons discussed below, the Court agrees with Mr. Ramos-Urias and grants his motion to dismiss.[2]

A. A Deficient Notice to Appear Fails to Vest Jurisdiction in Immigration Court.

[2] As the Court grants Mr. Ramos-Urias's motion to dismiss on these grounds, the Court declines to address his other substantive arguments.

Under § 1229(a), the government must serve noncitizens in removal proceedings with "written notice (in this section referred to as a 'notice to appear') . . . specifying" several pieces of required information including "[t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i). In *Pereira*, in the context of a mechanism called the "stop-time rule[3]," the Supreme Court examined this precise statutory scheme and concluded that a putative notice to appear that does *not* include the time and place at which the removal proceedings would be held is not a notice to appear at all. 138 S. Ct. at 2116 ("Section 1229(a)(1) does not say a 'notice to appear' is 'complete' when it specifies the time and place of the removal proceedings. Rather, it defines a 'notice to appear' as a 'written notice' that 'specif[ies],' at a minimum, the time and place of the removal proceedings.")

Evidently, the Department of Homeland Security's ("DHS") practice is to serve notices to appear indicating the date and time of a removal hearing is "to be determined." *See id.*, at 2111; *see also* Dkt. No. 41 at 10 n.1. Accordingly, *Pereira* has occasioned a flurry of motion practice regarding putative notices to appear. District courts are divided over the precise impact of *Pereira*. Some courts have concluded that the *Pereira* holding applies only to circumstances involving the calculation of the stop-time rule. *See, e.g., United States v. Roberto Arroyo*, No. 18-cr-02049-DCG, 2018 WL 6729029, at *11 (W.D. Tex. Dec. 21, 2018) (*Pereira* should be narrowly applied only in stop-time rule cases). Others have applied *Pereira*'s holding to all putative notices to appear, regardless of whether the case at hand implicated the stop-time rule. *See, e.g., United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wash. 2018). After careful examination of *Pereira*, this Court concludes that the definition of "notice to appear" within this statutory scheme is *not* limited to the application of the stop-time rule.

There is no statutory evidence to support any argument that "notice to appear" means anything other than the explicit definition in § 1229(a). Multiple mechanisms within this statute,

[3] The Attorney General may cancel removal if the noncitizen has "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application" for cancellation of removal." § 1229b(b). Under the so-called stop-time rule, a period of "continuous physical presence" ends when a noncitizen is served a "notice to appear." § 1229b(d)(1)(A).

not just the stop-time rule, implicate or rely upon a "notice to appear" as defined by § 1229(a). *See, e.g.*, § 1229a(b)(5)(C)(ii) (noncitizen may seek to reopen removal proceeding to challenge order issued in absentia if he shows he did not receive a notice "in accordance with paragraph (1) or (2) of section 1229(a)."). Therefore, to conclude that *Pereira*'s holding applies only to the application of the stop-time rule is to entertain the idea, without textual support, that a defined statutory term may carry two (or more) meanings within one statutory scheme. Interpreting and applying a statute this way defies common sense, not to mention basic tenets of statutory construction. *In re Perroton*, 958 F.2d 889, 893 (9th Cir. 1992) (". . . in statutes that contain statutory definition sections, it is commonly understood that such definitions establish meaning where the terms appear in that same Act."). Applying *Pereira* in this manner is not expansive, as some courts have suggested; it is merely sensible. *See Pereira*, 138 S. Ct. at 2116 (time and place requirement pursuant to § 1229(a) is "definitional").

The government argues that this Court should defer to the regulations governing the immigration court's rules of procedure. *See* 8 U.S.C. § 1103(g)(2) (bestowing upon the Attorney General the duty to "establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section"). Yet, these regulations do not require "notices to appear" to disclose the time and place of a removal hearing. *See* 8 C.F.R. § 1003.15(c) (listing required contents for "notice to appear" but omitting statutory date and time requirement); § 1003.18(b) (time and date of removal hearing to be included "where practicable"). To the extent these regulations conflict with the statutory regime giving them authority, the regulations are *ultra vires*. *United States v. Niebla-Ayala*, No. EP-18-cr-3067-KC, 2018 WL 6378019, at *4-5 (W.D. Tex. Dec. 5, 2018). The statutory definition of "notice to appear" is clear and that concludes this Court's inquiry. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Further, in *Pereira*, the Supreme Court expressly rejected the regulation-based interpretation in favor of the

plain language of the statute. *See* 138 S. Ct. at 2111-14.[4]

Where these regulations do not conflict with the statute, however, the regulations are entitled to deference on review. *Chevron*, 467 U.S. at 844. As the government points out, the statute does not address how jurisdiction vests with the immigration court. The regulations, however, do.

Pursuant to these regulations, *"[j]urisdiction vests*, and proceedings before an Immigration Judge commence, *when a charging document is filed* . . . ." 8 C.F.R. § 1003.14(a) (emphasis added). A "charging document" is "the written instrument which initiates a proceeding before an Immigration Judge" and may be a "[n]otice to [a]ppear." 8 C.F.R. § 1003.13. Under the plain language of these regulations, where there is no valid charging document—in other words, no "notice to appear"—the immigration judge lacks jurisdiction to conduct removal proceedings. *See, e.g., United States v. Ortiz*, No. 18-cr-00071-RWG, 2018 WL 6012390, at *2-3 (N.D. Nov. 7, 2018).

An order issued by a court without jurisdiction is void on its face: "[i]f [an] order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it." *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930). A removal order issued by an immigration court not yet vested with jurisdiction is invalid: for the purposes of 8 U.S.C. § 1326(a), there has been no removal at all. *See Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 884 (9th Cir. 2003).

Here, the putative NTA served upon Mr. Ramos-Urias did not include the date and time of his hearing. Accordingly, the document did not constitute a notice to appear under § 1229(a). *Pereira*, 138 S. Ct. at 2113-14. Because the immigration court was not served a valid charging document, the court did not have jurisdiction to issue a removal order for Mr. Ramos-Urias. Accordingly, his 2006 removal order was invalid. Because the removal order was invalid, the government cannot satisfy all requisite elements of the indictment, and the indictment must be

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[4] The practical effect of this application also gives effect to congressional intent. Indeed, "[f]ailing to specify integral information like the time and place of removal proceedings unquestionably would deprive the notice to appear of its essential character." *Id.* at 2116-17 (citations and quotations omitted). The absence, therefore, of those elements is no "trivial, ministerial defect." *Id.*

dismissed.[5]

It is immaterial, for the purposes of this analysis, that Mr. Ramos-Urias requested an expedited hearing, was present at his hearing, was in custody when DHS served his putative NTA, or was served in person. None of these circumstances cure the deficient NTA or bestow jurisdiction upon the immigration court. *See Ortiz,* 2018 WL 6012390, at *2-3 (appearance at removal hearing did not cure invalid notice to appear); *See Niebla-Ayala*, 2018 WL 6378019, at *5; *United States v. Zuniga-Vargas*, No. 18-cr-00081-MMD-WGC, 2018 WL 6653204, at *2–3 (D. Nev. Dec. 19, 2018) (defendant's request for expedited hearing did not cure jurisdictional defect of invalid notice to appear); *Virgen-Ponce*, 320 F. Supp. 3d at 1166 (service of notice of hearing with date and time of hearing and defendant's appearance at hearing did not cure defective notice of appearance); *United States v. Armejo-Banda*, No. 18-cr-308-RP, 2018 WL 6201964, at *1-5 (W.D. Tex. Nov. 28, 2018) (noncitizen's custodial status did not cure deficient notice to appear). The immigration court's subsequent service of a notice of *hearing* also does not cure Mr. Ramos-Urias's deficient NTA. Under the Department of Justice's own regulations, a notice of hearing is not listed as a charging document, and only charging documents can vest an immigration court with jurisdiction. *See* 8 C.F.R. §§ 1003.13, 1003.14(a).[6]

Finally, the government argues that the "disruptive potential" of invalidating notices to appear based on the failure to include a hearing's date and time is "enormous," noting that hundreds of thousands of cases would be affected. (Dkt. No. 41 at 10 n.1.) The Supreme Court considered and rejected a similar argument in *Pereira.* 138 S. Ct. at 2111, 2118-19. Such

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[5] A "valid removal order is a predicate element of a conviction for illegal reentry under § 1326." *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1064 (9th Cir. 2018); *see also United States v. Ubaldo-Figueroa*, 362 F.3d 1042, 1047 (9th Cir. 2004) ("[T]he removal order serves as a predicate element of his conviction.").

[6] The government relies on *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009) to support its position, but *Popa* is no longer good law after *Pereira.* In *Popa*, the Ninth Circuit acknowledged that § 1229 required a notice to appear to specify the time and place of the removal proceedings, but noted "this court has never held that the [notice to appear] cannot state that the time and place of the proceedings will be set at a future time by the Immigration Court." *Id.* at 895. The Ninth Circuit continued: "[t]his Court silently has adopted the rule that the time and date of a removal proceeding can be sent after the first notice to appear." *Id. Pereira*, as explained above, explicitly rejects this reasoning. Under *Pereir*a, a putative notice to appear that lacks date and time information is not a notice to appear.

"practical considerations" are "meritless" and do not justify "departing from the statute's clear text." *Id.* at 2118. Further, as the Court noted, the statute allows for the government to "change or postpone[e]... the time and place of [the removal] proceedings" by issuing another written notice "specifying the new time or place of the proceedings." *Id.* at 2119 (citing § 1229(a)(2)(A)). In other words, after serving a compliant notice, the government has a statutory mechanism to adjust a scheduled hearing to address logistical issues that may subsequently arise.

B. Mr. Ramos-Urias's Removal Was Fundamentally Unfair.

To collaterally attack a removal order a defendant must demonstrate (i) that he exhausted any administrative remedies available to seek relief against the order; (ii) the deportation proceedings at which the order was issued improperly deprived him of the opportunity for judicial review; and (iii) the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d). To show fundamental unfairness, a defendant must establish both that the deportation proceeding violated his due process rights and that the violation was prejudicial. *Raya-Vaca*, 771 F.3d at 1201.

Some district courts have concluded that, where an underlying removal order is void, the noncitizen need not satisfy the three-part test laid out in § 1326(d) because there can be no collateral challenge to a removal order where there is, in effect, no removal order at all. *See, e.g., United States v. Arteaga-Centeno*, 18-cr-332-CRB-1, Dkt. No. 35 (N.D. Cal. Jan. 8, 2019). Other courts have concluded the statutory analysis for collateral attack is necessary, regardless of the nullity of the underlying order. *See, e.g., United States v. Arturo Rojas Osorio*, No. 17-cr-507-LHK, Dkt. No. 49 (N.D. Cal. Jan. 16, 2019). This Court need not decide whether the § 1326(d) analysis is or is not necessary in the context of a void notice to appear, because the Court concludes that Mr. Ramos-Urias makes the requisite showing.

The 2006 removal order was fundamentally unfair under § 1326(d)(3). First, the removal order violated Mr. Ramos-Urias's due process rights because jurisdiction did not vest in the issuing immigration court. *See, e.g., United States v. Erazo-Diaz*, No. 18-cr-331-1-TUC-RM, 2018 WL 6322168, at *5. As discussed above, a valid notice to appear is a jurisdictional prerequisite. Neither Mr. Ramos-Urias's receipt of subsequent information regarding the date and time of his hearing nor his subsequent appearance at the hearing cure this jurisdictional deficiency.

Second, Mr. Ramos-Urias was prejudiced because he was "removed when he should not have been." *See United States v. Aguilera-Rios*, 769 F.3d 626, 630 (9th Cir. 2014). Accordingly, the 2006 removal order was fundamentally unfair.

Because Mr. Ramos-Urias has demonstrated a violation of his due process rights, he need not show exhaustion of administrative remedies or that he was denied judicial review pursuant to § 1326(d)(1) and (2). *See United Farm Workers of Am., AFL-CIO v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982) ("Exhaustion of administrative remedies is not required where . . . the administrative proceedings themselves are void."); *Ortiz*, 2018 WL 6012390, at *2-3 (defendant need not satisfy judicial review requirement where immigration court lacked jurisdiction because requirement "surely . . . requires an Immigration Judge's decision be anchored in an exercise of proper jurisdiction."). Moreover, though Mr. Ramos-Urias evidently waived his right to appeal, as indicated on the 2006 removal order, this waiver cannot be considered knowing and voluntary due to the immigration court's lack of jurisdiction. *Niebla-Ayala*, 2018 WL 6378019, at *7 (". . . an invalid waiver improperly deprives the noncitizen of the ability to both exhaust his administrative remedies . . . and seek judicial review.")

Mr. Ramos-Urias having mounted a successful collateral attack on the 2006 removal order, this Court grants his motion to dismiss the indictment. *See United States v. Cruz-Jimenez*, 2018 WL 5779491, at *8 (W.D. Tex. Nov. 2, 2018) ("Because a valid removal order is a required element under 8 U.S.C. § 1326, the Government is consequently unable to prove an element of the crime charged").[7]

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[7] Mr. Ramos-Urias's 2006 removal order was reinstated in 2011. However, a "successful collateral attack on a removal order precludes reliance on a reinstatement of that same order in criminal proceedings for illegal reentry." *United States v. Arias-Ordonez*, 597 F.3d 972, 980, 982 (9th Cir. 2010).

CONCLUSION

For the foregoing reasons, Mr. Ramos-Urias's motion to dismiss is GRANTED, and the indictment is DISMISSED.

IT IS SO ORDERED.

Dated: January 22, 2019

JEFFREY S. WHITE
United States District Judge