No. _____

In the
Supreme Court of the United States

Eric Romero-Lobato,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented for Review

I. Whether the minority status of a noncitizen at the time an *in absentia* deportation order is issued falls among the compelling circumstances sufficient to warrant rescission of that order under 8 U.S.C. § 1252b(c)(3)(A) (1994).

II. Whether the presumption of regularity doctrine can be applied despite the absence of regularity.

Related Proceedings

The United States District Court for the District of Nevada denied Petitioner Eric Romero-Lobato's motion to dismiss the indictment on April 1, 2019. App. 7a–14a. The Ninth Circuit affirmed in an unpublished decision on November 3, 2023 (App. 2a–6a) and denied rehearing on February 9, 2024 (App. 1a).

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Petition for Writ of Certiorari

Petitioner Eric Romero-Lobato respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The district court's order denying Romero-Lobato's motion to dismiss is unpublished but electronically available at *United States v. Romero-Lobato*, Case No. 3:18-cr-00047-LRH-CBC, 2019 WL 1446975 (D. Nev. Apr. 1, 2019). App. 7a–14a.

The Ninth Circuit's memorandum affirming the district court is unpublished but electronically available at *United States v. Romero-Lobato*, Case No. 22-10091, 2023 WL 7271091 (9th Cir. Nov. 3, 2023). App. 2a–6a.

The Ninth Circuit's order denying rehearing and en banc review is unpublished but available on the Ninth Circuit's electronic docket at *United States v. Romero-Lobato*, Case No. 22-10091, Dkt. No 47 (9th Cir. Feb. 9, 2024). App. 1a.

Jurisdiction

The Ninth Circuit entered final judgment denying rehearing on February 9, 2024. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely. Sup. Ct. R. 13.1.

Relevant Provisions

1. The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

2. Title 8, Section 1326 of the United States Code (1996) provides, in relevant part:

> (d) Limitation on collateral attack on underlying deportation order
>
> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

3. Title 8, Section 1252b of the United States Code (1994) (*repealed* 1996) is provided in the Appendix. *See* App. 15a–20a.

Introduction

This case raises important concerns about the procedures that must be followed to deport a noncitizen from the United States and the proper judicial review to assess those procedures.

Statement of the Case

A. Statutory Background

A noncitizen who is criminally charged with being found in the United States after being previously deported under 8 U.S.C. § 1326(a) (1996) has a Fifth Amendment right to collaterally attack the validity of the underlying deportation order.[1] *United States v. Orozco-Orozco*, 94 F.4th 1118, 1122 (9th Cir. 2024). To successfully lodge a collateral attack, the noncitizen must show: (1) exhaustion of available administrative remedies; (2) deprivation of the opportunity for judicial review; and 3) fundamental unfairness in the entry of the order because of a due process violation and prejudice from that violation. 18 U.S.C. § 1326(d) (1996).

The issue here involves the fundamental unfairness prong of § 1326(d). A prior deportation order is fundamentally unfair when the "(1) [noncitizen's] due process rights were violated by defects in the underlying deportation proceeding, and (2) he suffered prejudice as a result." *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1203–04 (9th Cir. 2004) (per curiam) (cleaned up). To establish prejudice, the

[1] Congress codified the right to collaterally challenge a prior deportation order in response to this Court's decision in *United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987), r*ev'd on other grounds by United States v. Palomar-Santiago*, 593 U.S. 321 (2001). *Mendoza* made clear that, "at a minimum," "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the [noncitizen] to obtain judicial review." *Id.* at 839.

noncitizen "must demonstrate plausible grounds for relief from deportation." *United States v. Garcia-Martinez*, 228 F.3d 956, 963 (9th Cir. 2000).

Romero-Lobato's immigration proceedings commenced before April 1, 1997, and his *in absentia* deportation order was entered in July 1996. This case is therefore governed by the law in effect before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), *e.g.*, the Immigration and Nationality Act (INA), § 242B, *as amended*, 8 U.S.C. § 1252b (1994); and 8 C.F.R. §§ 103.5a, 242.24.

Under 8 U.S.C. § 1252b(c)(3) (1994), a deportation order may be rescinded:

> (A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or
>
> (B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

The term "exceptional circumstances" as used in § 1252b(c)(3)(A) refers to those circumstances beyond the control of the noncitizen, "such as serious illness" of the noncitizen, the death of his immediate relative, or equally compelling circumstances. 8 U.S.C. § 1252b(f)(2).

The statutory service methods refenced in § 1252b(c)(3)(B) are limited to either personal service or certified mail service, § 1252b(a)(2)(A), with a "return receipt requested," *id.* § 1252b(f)(1).

B. Factual and Procedural Background

In 1986, when Eric Romero-Lobato was just six or seven years old, his mother, a legal permanent resident (LPR), brought him to the United States from Mexico. App. 7a. He spent his childhood living in Reno, Nevada, with his mother and his siblings, some of whom are U.S. citizens. 2-ER-162, 198.[2] When he was just 16 years old, the United States deported Romero-Lobato to Mexico, separating him from his mother and siblings. The following summarizes the underlying deportation proceedings.

1. Immigration Detainer

In September 1995, at age 15, Romero-Lobato came to the attention of the Immigration and Nationalization Service (INS)[3] following his arrest by Reno police. 2-ER-1, 196. He was placed in INS custody but later detained and charged at a local juvenile facility. App. 7a. INS subsequently issued an immigration detainer for Romero-Lobato. App. 7a.

2. Orders to Show Cause

Also in September 1995, INS issued an Order to Show Cause (OSC) charging Romero-Lobato with entering the United States without inspection. App. 7a. However, the 1995 OSC failed to identify the date, time, or location of Romero-Lobato's deportation hearing. App. 7a–8a; 2-ER-209. The 1995 OSC also lacked Romero-Lobato's thumbprint or signature to demonstrate he received personal

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[2] ER citations refer to the Ninth Circuit's Excerpts of Record.

[3] "INS ceased to function in 2003" and "most of its law enforcement responsibilities were transferred to Immigration and Customs Enforcement ("ICE")." App. 7a.

service of the OSC. App. 7a–8a; 2-ER-210. Lacking proof that INS served the 1995 OSC on Romero-Lobato, INS declined to pursue deportation. 2-ER-166–167.

In January 1996, Nevada declared Romero-Lobato a ward of the court and placed him on juvenile probation. App. 8a. INS again attempted to serve Romero-Lobato with an OSC in 1996. App. 8a. But the 1996 OSC also failed to identify the date, time, or location of his deportation hearing and used an incorrect mailing address for Romero-Lobato. App. 8a; 2-ER-213. Indeed, INS records contain only copies of "certified mail receipts" for the 1996 OSC signed by someone who provided a misspelled and incomplete signature for an "Eric Lovato." App. 8a; 2-ER-208.

3. Notice of Hearing

In March 1996, and again using an incorrect mailing address, INS issued a notice of hearing for Romero-Lobato identifying a date and time for his July 1996 deportation hearing. App. 8a; 2-ER-217. There is no evidence or admission that INS served the 1996 notice of hearing on Romero-Lobato (or his guardian mother) by *personal service* or by c*ertified mail return receipt requested*—the only two statutory service methods then permitted. 2-ER-216; 8 U.S.C. § 1252b(a)(2)(A), (f)(1) (1994). When Romero-Lobato did not appear for the scheduled deportation hearing, an immigration judge entered an *in absentia* order of deportation against him in July 1996. App. 8a; 2-ER-186.

4. Order to Report for Deportation

In September 1996, INS issued an order for Romero-Lobato to report for deportation, once again using an incorrect mailing address for him. App. 8a; 2-ER-221. The order also incorrectly advised: "A review of your file indicates there is *no*

administrative relief which may be extended to you, and it is now incumbent upon this Service to enforce your departure from the United States." 2-ER-221 (emphasis added). Romero-Lobato did not appear for deportation at the time and location indicated in the order. App. 8a.

In November of 1996, INS located and deported Romero-Lobato to Mexico. App. 8a. Romero-Lobato was barely 16 at the time of his deportation. 2-ER-164.

5. Collateral Challenge to Deportation Order

Romero-Lobato subsequently reentered the United States, leading to reinstatement of the 1996 *in absentia* deportation order in 1998, 1999, and 2002. App. 7a.

In 2018, Romero-Lobato was federally indicted with one count of unlawfully reentering the United States under 8 U.S.C. § 1326(a) (1996). App. 7a. Romero-Lobato moved to dismiss the indictment, collaterally challenging his immigration proceedings as fundamentally unfair under 8 U.S.C. § 1326(d) (1996). App. 7a–14a.

Among his collateral challenges, Romero-Lobato argued two defects in his immigration proceedings rendered his *in absentia* deportation order fundamentally unfair, each of which satisfied § 1326(d)'s relief requirement: (1) lack of statutory notice of the July 1996 deportation hearing as required by 8 U.S.C. § 1252b(a)(2)(A), (f)(1) (1994);[4] and (2) the affirmatively misleading September 1996 advisement that no relief from deportation existed for him. App. 7a–14a. Because Romero-Lobato

[4] Romero-Lobato also challenged the various service defects in the 1995 and 1996 OSCs such as the use of incorrect mailing addresses and the INS's failure to serve his mother as his guardian with any of the immigration documents, though he does not pursue those challenges here. *See* App. 3a.

had multiple avenues of relief from deportation available to him had he been properly advised,[5] each of these fundamental due process violations prejudiced him. App. 12a. Romero-Lobato was thus eligible for rescission of the *in absentia* deportation order as he did not appear at the deportation hearing due to exceptional circumstances through no fault of his own. *See* 8 U.S.C. § 1252b(c)(3)(A), (f)(2).

The district court denied Romero-Lobato's motion to dismiss. App. 7a–14a. The district court did so by finding effective service of the notice of deportation hearing without reaching the prejudice inquiry. App. 8a–12a. The court based its service finding on the notice of hearing having been "sent" in a "mailing" to the same incorrect address used in the 1996 OSC. App. 3a (referencing 8a–12a). The district court, however, "made no finding as to whether the notice of hearing was personally served or sent by certified mail" to Romero-Lobato, and no evidence suggested such service was made. App. 5a. The district also concluded that "even assuming" the order to report violated his due process rights because of its erroneous advisement as to available relief, Romero-Lobato did not demonstrate prejudice as it was not plausible his *in absentia* deportation removal order could be reopened under 8 U.S.C. § 1252b(c)(3) (1994). App. 13a–14a.

Following the district court's denial, Romero-Lobato entered a conditional guilty plea that preserved his right to appeal the denial. 2-ER-35–49. The district court then sentenced Romero-Lobato to 57 months' imprisonment and three years'

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[5] For example, Romero-Lobato could have petitioned to obtain legal permanent resident status, sought a waiver under INA § 212(h) and 8 U.S.C. § 1182(h), sought Special Immigrant Juvenile Status, or sought voluntary departure. App. 12a.

supervision, concurrent with a separate sentence imposed in *United States v. Romero-Lobato*, No. 3:18-cr-00049-LRH-CLB (D. Nev.). 1-ER-2–4.

6. Ninth Circuit Court of Appeals

Romero-Lobato timely appealed the district court's decision to the Ninth Circuit, arguing his immigration proceedings were fundamentally unfair under 8 U.S.C. § 1326(d) (1996). App. 2a–6a. Among his challenges, he raised two due process claims, each of which establishes the fundamental unfairness of his immigration proceedings under 8 U.S.C. § 1326(d)(3).

First, the July 1996 notice of deportation hearing violated due process by failing to reasonably apprise Romero-Lobato of the hearing and an opportunity to contest deportation. App. 2a–3a; 8 U.S.C. § 1326(d)(3) (1996). In support, Romero-Lobato relied on the complete lack of record evidence demonstrating that INS either served or attempted to serve him with the notice of deportation hearing by personal service or certified mail—the only two statutorily available service methods under 8 U.S.C. § 1252b(a)(2)(A), (f)(1) (1994). This service failure rendered Romero-Lobato eligible for rescission of his *in absentia* deportation order under § 1252b(c)(3)(B).

Second, the INS affirmatively misled Romero Lobato by advising in the September 1996 order to report for deportation that no relief from deportation was available to him. App. 3a–4a; 8 U.S.C. § 1326(d)(3) (1996). Contrary to this advisement, the law provided Romero-Lobato an opportunity to reopen the *in absentia* deportation order.[6] Romero-Lobato's status as a 15-year-old unmarried

[6] *See supra*, n.5.

minor at the time of the immigration proceedings constituted an exceptional circumstance warranting rescission of the deportation order under § 1252b(c)(3)(A).

Because Romero-Lobato had multiple, plausible grounds for relief from the deportation order,[7] he argued any purported waiver of review was invalid and effectively eliminated the availability of administrative remedies and judicial review. *See* 8 U.S.C. § 1326(d)(1), (d)(2). However, because the district court did not address § 1326(d)(1) or (d)(2),[8] he requested reversal and remand with instructions that the district court evaluate whether he also satisfied the administrative exhaustion and judicial review requirements warranting relief under § 1326(d) pursuant to *Palomar-Santiago*, 141 S. Ct. 1615.

In response the government argued, for the first time, that the Ninth Circuit should apply the "presumption of regularity" doctrine to find the INS complied with due process in serving the notice of deportation hearing. This doctrine, the government claimed, permitted the Ninth Circuit to presume INS officials properly discharged their duties to effectively serve the notice of hearing on Romero-Lobato despite the lack of evidence to support such a presumption. And while the government conceded the INS incorrectly advised Romero-Lobato as to available relief in the September 1996 order to report for deportation, it claimed the general

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[7] *See id.*

[8] The district court issued its decision before this Court's decision in *United States v. Palomar-Santiago*, 593 U.S. 321 (2021). *Palomar-Santiago* overruled prior Ninth Circuit precedent and held a collateral attack on a prior deportation order must satisfy all three prongs of § 1326(d), not simply the third fundamental unfairness prong in § 1326(d)(3). 593 U.S. at 325–26. The district court therefore never addressed whether Romero-Lobato satisfied § 1326(d)(1), or (d)(2).

information contained in the OSCs—issued before and containing contrary information to the order to report for deportation—were sufficient to notify Romero-Lobato of his avenues for relief to seek rescission of an *in absentia* deportation order.

Romero-Lobato offered four reasons why the presumption of regularity should not be applied. First, the government waived the presumption by seeking its application for the first time on appeal. Second, the presumption "only comes into play" after the proponent makes a "prima facie showing" the agency complied with the challenged requirement, but the government never attempted to make that showing in either the district court or appellate court. *Kohli v. Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007). Third, even if applied, Romero-Lobato rebutted the presumption because the record lacks any evidence of regularity: there was no indicia of personal service or a certified mailing, return receipt requested. Fourth, the unrefuted declaration of Romero-Lobato's mother asserts she would have ensured her son attended immigration court if INS had actually served the deportation hearing notice on him as she had already initiated proceedings for him to receive LPR status.[9]

[9] Indeed, as Romero-Lobato's mother petitioned for him to obtain LPR status *before* the July 1996 deportation hearing notice issued, Romero-Lobato thus had every motivation to attend the hearing. *See Sembiring v. Gonzales*, 499 F.3d 981, 988–89 (9th Cir. 2007) (finding presumption of regularity overcome where petitioner sought asylum before removal hearing, affirmatively "bringing herself to the attention of the government" and demonstrating her motivation to attend immigration proceedings).

Romero-Lobato also explained that, even if INS had properly served the OSCs on him (a contention he contested), the later-issued order to report for deportation issued in September 1996 negated the initial advisement to the extent it advised him "that he did not qualify" for relief from deportation. *See United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012) ("A reasonable person in Melendez-Castro's position would have been discouraged from applying for voluntary departure to an extent that it is as if he was told that he did not qualify for this relief. Melendez-Castro knew he had a criminal record, and heard the [immigration judge] state without qualification that he would not get this relief. It is no wonder that he did not formally apply.").

At oral argument the government made a critical concession: "Romero-Lobato's A-file[10] did not contain any evidence indicating the record related to Romero-Lobato's notice of [deportation] hearing includes evidence of mailing" that notice to him as statutorily required under 8 U.S.C. § 1252b(a)(2)(A), (f)(1) (1994)—"no certified mail receipts, no mailing envelope, no signature, and no postage." App. 4a. Nor did the government identify any evidence that INS personally served Romero-Lobato with the notice of hearing.

7. Split Ninth Circuit Decision

A three-judge panel of the Ninth Circuit issued a split opinion on November 3, 2023. App. 2a–6a. The panel disagreed whether the July 1996 notice of

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[10] "A-Files contain all records of any active case of an alien not yet naturalized as they passed through the United States immigration and inspection process." Alien Files (A-Files), https://www.archives.gov/research/immigration/aliens (accessed Apr. 26, 2024).

deportation hearing violated Romero-Lobato's due process rights. And while the panel agreed the September 1996 order to report for deportation violated Romero-Lobato's due process rights, it disagreed whether Romero-Lobato's youth at the time of deportation constituted an "exceptional circumstance" for purposes of seeking rescission of the *in absentia* deportation order under 8 U.S.C. § 1252b(c)(3)(A) to establish prejudice from either of the due process violations.

a) Panel Majority

As to the due process violation that Romero-Lobato asserted arose from the INS's flawed service of the notice of deportation hearing, the majority readily acknowledged "the record does not contain evidence that the notice of hearing was served in the manner required by section 1252b(a)(2)." App. 4a (citing *United States v. Arias-Ordonez*, 597 F.3d 972, 977 (9th Cir. 2010) ("We have long held there is a violation of due process when the government affirmatively misleads an alien as to the relief available to him."). Yet the majority concluded the district court could permissibly find Romero-Lobato did not show he would have been able to "demonstrate[ ]" inadequate notice so as to be entitled to rescission." App. 4a. In other words, even though the record contains no evidence INS attempted service as statutorily mandated under § 1252b(a)(2)(A), the majority believed the lack of evidence favored the government, not Romero-Lobato, for purposes of rescission under § 1252b(c)(3)(B). *See* App. 4a–5a. In this way "[t]he majority suggest[ed]" the statement of Romero-Lobato's trial counsel that the notice was "sent" in a "mailing"] is sufficient for the presumption of regularity to apply" and conclude the statutory service requirements were met. App. 4.

As to the mis-advisement of available relief in the 1996 order to report for deportation, the majority concluded Romero-Lobato established a due process violation. App. 4a. The majority, however, did not believe Romero-Lobato's youth at the time of deportation qualified as an exceptional circumstance sufficient to seek rescission of the deportation order under 8 U.S.C. § 1252b(c)(3)(A) to demonstrate prejudice from the mis-advisement. App. 3a.

b) Panel Dissent

The dissent agreed with the majority that "Romero-Lobato's order to report for deportation affirmatively misled him by telling him that 'there is no administrative relief which may be extended to you,'" violating due process. App. 4a. The dissent, however, concluded it was "unreasonable for the district court to expect Romero-Lobato to determine that the order to report's representation about his rights at the time of his removal was in fact incorrect." App. 5a. This is because, "[t]he "immigration laws are complex, [and] minors face a substantial risk of error in navigating the system." App. 5a.

The dissent also parted ways with the majority on two issues "related to Romero-Lobato's notice of hearing." App. 4a–5a. The dissent would have "remand[ed] for the district court to consider": (1) "whether Romero-Lobato's due process rights were also violated by the service of his notice of hearing"; and (2) whether "for purposes of prejudice" analysis "Romero-Lobato's notice of hearing was sent consistent with statutory requirements such that he has a plausible ground for relief from deportation." App. 4a–5a. The dissent explained remand was necessary

to evaluate whether the notice of hearing violated Romero-Lobato's due process rights on multiple fronts.

As a matter of law, the "the majority confuse[d] the standards for whether there is a due process violation and whether there is prejudice." App. 5a. The due process inquiry asks if "notice was 'reasonably calculated'" to reach Romero-Lobato. App. 5a. The prejudice inquiry asks if Romero-Lobato "received notice consistent with statutory requirements." App. 5a. "[M]ere mailing [of the notice of hearing] is insufficient" to resolve the prejudice inquiry in the government's favor, and "the majority reache[d] a contrary conclusion by neglecting the statutory requirements." App. 5a.

The dissent concluded, no evidence demonstrates the July 1996 notice of hearing comported with due process by serving the notice on Romero-Lobato either personally or by certified mail. App. 4a–5a. As a result, the presumption of regularity suggested by the majority to presume INS's compliance with its statutory obligation to serve the notice of hearing personally on Romero-Lobato or by certified mail does not apply. App. 4a–5a. The "invocation of a presumption of notice requires the INS to prove that the notice (1) was properly addressed; (2) had sufficient postage; and (3) was properly deposited in the mails." App. 4a (quoting *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003)). The presumption is thus ill-fated absent this statutory showing by the government, especially where the government concedes (as it did here) that no evidence of statutory service exists. App. 4a–5a.

8. Rehearing denied

Romero-Lobato timely petitioned for panel rehearing and rehearing en banc. Ninth Cir. Dkt. 46. Though the dissent voted to grant the petition for rehearing and rehearing en banc, the petition was denied. App. 1a.

Reasons for Granting the Petition

This Court should grant review to correct the Ninth Circuit's erroneous belief that juvenile status cannot constitute a basis to seek rescission of an *in absentia* order under 8 U.S.C. § 1252b(c)(3)(A) (1994). This provision allows deported noncitizens to move to reopen the detention hearing and seek rescission of the *in absentia* deportation order more than 180 days after its issuance by showing they failed to appear at the hearing because of either compelling circumstances or failure to receive the required statutory notice of the deportation hearing. 8 U.S.C. § 1252b(c)(3). Failure to comply with this process, in turn, allows criminal defendants to collaterally attack the *in absentia* deportation order in a criminal prosecution for unlawful reentry under 8 U.S.C. § 1326.

The Ninth Circuit, in a split decision, erroneously: (1) limited the compelling circumstances sufficient to seek rescission, flatly excluding juvenile status as a qualifying circumstance; and (2) ignored the statutory service requirements INS must undertake to serve a deportation hearing notice and improperly presumed service occurred. The Ninth Circuit's rejection of juvenile status as a compelling circumstance cannot be squared with this Court's historical tradition of considering minor status as a compelling basis to treat minors differently than adults under our laws. And the Ninth Circuit's application of the presumption regularity doctrine

conflicts with the approach applied by the Second and Third Circuits. As the Ninth Circuit reviews the national majority of deportation decisions and criminal prosecutions for unlawful reentry under 8 U.S.C. § 1326, it is important that the Ninth Circuit honor this Court's historical tradition of protecting minors and properly apply the presumption of regularity doctrine. This Court should grant the petition for a writ of certiorari and reverse.

I. The Ninth Circuit impermissibly limited the compelling circumstances that may be considered to rescind a deportation order under 8 U.S.C. § 1252b(c)(3) (1994).

A. Compelling circumstances under 8 U.S.C § 1252b(c)(3)(A) (1994) should include the youth of the noncitizen.

It is estimated there are more than 1.1 million undocumented minors in the United States.[11] However, the undocumented minor of today "may well be the legal alien of tomorrow." *Plyler v. Doe*, 457 U.S. 202, 207 (1982) (quoting *Doe v. Plyler*, 458 F. Supp. 569, 577 (E.D. Tex. 1978)). Undocumented minors, however, face incredible obstacles to obtaining legal status through no fault of their own as they are especially vulnerable to the United States' complex maze of immigration policies and procedures. Sadly, their failure to successfully navigate this maze may result in their deportation to an unfamiliar country, completely separated from their families and "the loss of all that makes life worth living." *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (cleaned up). To compound this hardship, once deported, these minors

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[11] *Unauthorized Immigrant Population: National and State Trends*, Pew Research Center (2010), https://www.pewresearch.org/raceandethnicity/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/ (accessed May 4, 2024).

are forever subject to criminal prosecution and punishment if they return to the United States without authorization. *See* 8 U.S.C. § 1326.

Despite the deleterious impact of deportation, Congress permits deportation orders to be issued *in absentia* if the INS "establishe[d] by clear, unequivocal, and convincing evidence that": (1) it provided written notice of the deportation hearing to the minor in accord with the statutory procedural requirements; and (2) the minor is deportable. 8 U.S.C. § 1252b(a)(2), (c)(1).

At the same time, Congress also provided avenues for relief from *in absentia* deportation orders. 8 U.S.C. § 1252b(c)(3). For example, noncitizens long ago ordered deported *in absentia* may move to reopen their deportation hearings and rescind the deportation order by demonstrating their "failure to appear" was due to "compelling" circumstances" "beyond their control." 8 U.S.C. § 1252b(c)(f)(2) (defining exceptional circumstances), (c)(3)(A) (permitting rescission of deportation order more than 180 days after its issuance upon showing of exceptional circumstances). Congress provided non-exclusive examples of circumstances beyond a deported noncitizen's control—the minor suffered a "serious illness," the "death of immediate relative" of the minor, or other "compelling circumstances." *Id.* To assess the existence of such circumstances, court must "look[] to the particularized facts presented in each case." *Singh v. I.N.S.*, 213 F.3d 1050, 1052 (9th Cir. 2000).

This Court should find the minority status of the noncitizen at the time of the deportation proceedings falls among the compelling circumstances under § 1252b(c)(3)(A) to warrant rescission. Age is undeniably a circumstance beyond a minor's control. It is also a status that inherently limits a minor's physical and

mental abilities, as well as socioeconomic status. Indeed, "the regulatory framework" governing the notice of the deportation hearing to minors "assumes that a juvenile over fourteen is not competent to assure his presence at the hearing." *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1157 (9th Cir. 2004) (referencing INA § 242.24).

Yet the federal circuits have not deemed a noncitizen minor's age at the time of deportation proceedings to be a compelling circumstance sufficient to warrant rescission. *See e.g.*, App. 3a; *Ortiz v. Barr*, 819 F. App'x 546, 547–48 (9th Cir. 2020) (finding no law supports the argument that the age of a minor during deportation proceedings should be considered an exceptional or compelling circumstance); *Llanos-Fernandez v. Mukasey*, 535 F.3d 79, 85 (2d Cir. 2008) (it is "logical for the regulations to provide that minors entering the country illegally can be responsible for receiving notice regarding their court proceedings and yet also provide that minors may need assistance from adults to obtain basic necessities").

Rather, courts have found compelling circumstances to be limited to:

(1) "physical reasons, such as serious illness, or by reason of a moral imperative, such as the death of an immediate relative," *Mardones v. McElroy*, 197 F.3d 619, 624 (2d Cir. 1999);

(2) the receipt of ineffective assistance of counsel concerning the immigration proceedings, *Aris v. Mukasey*, 517 F.3d 595, 599 (2d Cir. 2008); *Iturribarria v. I.N.S.*, 321 F.3d 889, 897–98 (9th Cir. 2003);

(3) the "timely filing of a motion to reopen deportation proceedings before [the] scheduled voluntary departure date," *Barrios v. Att'y Gen. of U.S.*, 399 F.3d 272, 275 (3d Cir. 2005); and

(4) in some cases, failing to appear on time for the deportation hearing on time, *Nazarova v. I.N.S.*, 171 F.3d 478, 485 (7th Cir. 1999); *Jerezano v. I.N.S.*, 169 F.3d 613, 615 (9th Cir. 1999).

The compelling circumstances sufficient to warrant rescission, however, are not as limited as the circuits have interpreted. This Court has repeatedly "stated that in the absence of a statutory definition we 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 (1989) (citations omitted). This analysis is undertaken "in the light of the 'object and policy' of the statute. *Id.* (cleaned up).

Applying the ordinary meaning of the words in § 1252b(c)(3)(A), (f)(2), a noncitizen's age at the time of the deportation proceedings, a compelling circumstance is one beyond the minor's control that has "the power to persuade." "Compelling." Merriam-Webster.com, https://www.merriam-webster.com/thesaurus/compelling (accessed May 5, 2024). The examples provided to warrant rescission—serious illness or death of a family member—are manifestly nonexclusive as the statute that also specifically permits equally persuasive grounds to provide relief.

There is no valid reason to exclude a noncitizen's juvenile status as a compelling ground sufficient to obtain rescission of an *in absentia* deportation order.

Rather, "[c]hildren have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (J. Frankfurter, concurring). This Court has thus repeatedly concluded minors should be treated differently from adults under our laws. Perhaps the most obvious reason for protecting minors is that, as a class, minors are developmentally and neurologically less developed than adults, rendering minors less culpable than adults. *Roper v. Simmons,* 543 U.S. 551, 569 (2005) ("scientific and sociological studies . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults"); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (minors, even those who have reached the age of 16, customarily ""lack the experience, perspective, and judgment' expected of adults, even those at age 16") (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

This Court has thus concluded "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). This "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven" for their conduct. *Id*.

Minor status is thus at least as compelling a circumstance as receiving incorrect legal advice, inadvertently arriving late to the deportation hearing, suffering serious illness, or experiencing the death of a family member. *Mardones,* 197 F.3d at 624; *Aris*, 517 F.3d at 599; *Iturribarria*, 321 F.3d at 897–98; *Nazarova*,

171 F.3d at 485; *Jerezano*, 169 F.3d at 615. Given the lack of control over one's minor status and the lessened moral culpability traditionally attendant to it, this Court should conclude a noncitizen's minority status at the time of *in absentia* deportation proceedings is a compelling circumstance that may provide grounds to seek rescission of the underlying deportation order.

B. The Ninth Circuit's decision is incorrect.

The Ninth Circuit concluded the INS's mis-advisement in its 1996 order to report for deportation violated Romero-Lobato's due process rights. App. 3a. Without engaging in any analysis, the Ninth Circuit erroneously concluded this due process violation did not prejudice Romero-Lobato because his minor status at the time of deportation was not a "compelling circumstance" that reflected an "impediment comparable to serious illness or death of a relative" under 8 U.S.C. § 1252b(c)(3)(A). App. 3a–4a. The court thus found no basis to warrant to reopen his deportation hearing and seek rescission of the *in absentia* deportation order entered when he was just 15 years old. App. 3a–4a.

The Ninth Circuit's position that Romero-Lobato had a due process right without a remedy for the violation of that right finds no support in this Court's decisions which recognize minor status as a circumstance warranting special consideration and protection. *See Roper*, 543 U.S. at 569; *Johnson v. Texas*, 509 U.S. 350, 367 (1993)*; Eddings*, 455 U.S. at 116; *May*, 345 U.S. at 536 (J. Frankfurter, concurring). The Ninth Circuit's refusal to honor this well-regarded tradition is untenable.

The Ninth Circuit's decision also contravenes the plain language of 8 U.S.C. § 1252b(c)(3)(A) and (f)(2). Congress's choice to use the term "compelling circumstances" to qualify for relief is broader than the Ninth Circuit espoused. This longstanding precedent makes clear minor status has persuaded this Court in its decisions. *See supra*, p. 21. No authority from this Court supports the Ninth Circuit's very narrow interpretation of this term.

There is also no legitimate policy interest served by the Ninth Circuit's departure from this Court's recognition that minor status presents a compelling interest sufficient to receive judicial protection. To the contrary, the Ninth Circuit's decision contravenes one of the rather broadly written safeguards Congress implemented to provide relief from *in absentia* orders—the existence of a compelling circumstance beyond one's control.

C. This important issue warrants the Court's review.

"The very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . ." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Thus, "every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* Whether a noncitizen may move to reopen a closed *in absentia* deportation proceeding—that occurred during minority and with an established due process violation—is an important question warranting this Court's review. Otherwise, the due process guaranteed by the INA's procedures is no right at all.

Indeed, in the decades since the INA's enactment, no federal court has recognized minority status alone as a compelling circumstance to qualify for rescission of *in absentia* deportation order. The lifelong hardships suffered by deported minors and the criminal sanctions likely to be imposed upon their return are too serious to allow courts to exclude minor status as a compelling circumstance under 8 U.S.C. § 1252b(c)(3)(A), (f)(2), especially where, as here, the INS unquestionably violated the minority's due process rights. This Court's intervention is warranted.

II. The Ninth Circuit has impermissibly expanded the presumption of regularity beyond its capabilities.

A. The presumption of regularity doctrine.

The presumption of regularity is a judicial doctrine invoked to "reflect[] respect for a coordinate branch of government whose officers not only take an oath to support the Constitution, . . . but also are charged with "faithfully execut[ing]" our laws." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2579–80 (2019) (J. Thomas, J. Gorsuch, J. Kavanaugh, concurring in part) (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941) (presumption of regularity ensures that the "integrity of the administrative process" is appropriately respected)). As such, "[w]here there are equally plausible views of the evidence, one of which involves attributing bad faith to an officer of a coordinate branch of Government, the presumption compels giving the benefit of the doubt to that officer." *Id.* at 2583*; see also U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("a presumption of regularity attaches to the actions of Government agencies).

But the presumption is far from impenetrable. The presumption only supports a finding that "the official acts of public officers" were "properly discharged" in "the absence of clear evidence" to the contrary. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15, 4 (1926). The presumption "affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue." *Snyder v. McDonough*, 1 F.4th 996, 1004 (Fed. Cir. 2021) (citation and emphasis omitted). But to benefit from the presumption, that party must produce "predicate evidence" to trigger the presumption. *Id.* Only then may "the further evidentiary gap [be] filled by the presumption." *Id.*

Federal courts have addressed the presumption's applicability where there is no claim the public official personally served the required notice through "*certified mail,* return receipt requested" as the governing statutes commands. *Santana Gonzalez v. Att'y Gen. of U.S.*, 506 F.3d 274, 277 (3d Cir. 2007) (citing 8 U.S.C. § 1252b(a)(2)(A)). In such cases, the government may trigger the rebuttable presumption of regularity by producing a "certified mail log (or equivalent)." *O'Rourke v. United States*, 587 F.3d 537, 540 (2d Cir. 2009); *see also Clough v. Comm'r*, 119 T.C. 183, 186-188 (2002) (certified mail list represents direct documentary evidence of date and fact of mailing, and compliance with certified mail list procedures raises presumption of official regularity in mailing); *Follum v. Comm'r*, 128 F.3d 118, 121 (2d Cir. 1997) (trial court can accept certified mail list as sufficient proof that notice was sent by certified mail). In such cases, where a paper

trail exists for the certified mail, a presumption of regularity makes sense. *See Sembiring v. Gonzales*, 499 F.3d 981, 987 (9th Cir. 2007). Without predicate evidence, however, the presumption is not triggered. *Snyder*, 1 F.4th at 1004.

Federal courts have also addressed what opponents must present to rebut the presumption that a notice was issued through certified mail. "Though a statement of nonreceipt standing alone is not enough to rebut the presumption, a statement of nonreceipt coupled with other evidence can be." *Romero v. Tran*, 33 Vet. App. 252, 264 (2021). That "other evidence" can include "clear evidence" that the agency's service procedures were "not regular" or not regularly followed. *Id. ; see also Cones v. Wilkie*, 825 F. App'x 841, 843 (Fed. Cir. 2020) (same).

B. The Ninth Circuit misapplied the presumption of regularity, splitting from the Second and Third Circuits.

The presumption of regularity does not work as both the sword *and* the shield to protect the officials acts of public officials from scrutiny. Instead, when considering the applicability of the presumption, courts must balance the existence of predicate evidence triggering the presumption against the evidence presented rebutting the presumption. The Ninth Circuit majority opinion did neither here.

Unlike the Second and Third Circuits, the Ninth Circuit applied the presumption of regularity despite the absence of a paper trail to demonstrate the notice of deportation hearing was sent to Romero-Lobato via certified mail, return receipt requested, or its equivalent. *Compare*, *O'Rourke*, 587 F.3d at 540, and *Santana Gonzalez*, 506 F.3d at 277, *with* App. 3a–5a. This is especially troubling given: (1) INS's demonstrated history of failing to properly serve Romero-Lobato

with immigration documents (*e.g.*, by failing to properly serve the 1995 and 1996 OSCs and using an incorrect mailing address for immigration documents purported to have been sent to Romero-Lobato); (2) INS's history of misadvising Romero-Lobato of his rights (*e.g.*, by misadvising him as to available forms of relief from deportation); and (3) the government's concession that Romero-Lobato's A-file contains no evidence the 1996 notice of deportation hearing was sent by certified mail to Romero-Lobato (*e.g.*, no receipts, no signatures, no postage).

C. It is important for this Court correct the Ninth Circuit's opinion.

A presumption of regularity simply cannot be applied absent predicate proof of regularity. *Snyder*, 1 F.4th at 1004. The Ninth Circuit's decision, if left uncorrected, stands to allow violations of law committed by public officials to be excused based on a presumption of regularity, despite no evidence of regularity. This Court should not permit the presumption doctrine to be abused in this way. Otherwise, the presumption does far more than promote respect for public officials' decisions—it inoculates those decisions from review no matter the egregiousness of the illegality and without a legitimate basis to predicate such protection.

III. This case presents an ideal vehicle for review.

This case is an ideal vehicle for the Court to address whether a minor status constitutes a compelling circumstance under 8 U.S.C. § 1252b(c)(3)(A), (f)(2), and the limits of the presumption of regularity doctrine. These issues are each squarely presented and preserved for adjudication.

Conclusion

This Court should grant this petition for a writ of certiorari.

Dated: May 8, 2024.

Respectfully submitted,

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