NO._____

IN THE SUPREME COURT OF THE UNITED STATES

LUIS LEON PINA and
SAUL ZAMORA DE ANDA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the immigration court issuing orders of removal against each petitioner lacked jurisdiction to issue such orders, so that use of such orders in a prosecution for illegal reentry violated the separation of powers and due process.

PARTIES TO THE PROCEEDINGS

Petitioners were convicted in separate proceedings before the district court, and the United States Court of Appeals for the Fifth Circuit entered separate judgments in each of their cases. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. *See* Sup. Ct. R. 12.4. All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.

DIRECTLY RELATED CASES

- *United States v. Pina*, No. 19-cr-81, U.S. District Court for the Southern District of Texas. Judgment entered November 19, 2019.
- *United States v. Pina*, No. 19-20777, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 28, 2020.
- *United States v. Zamora De Anda*, No. 19-cr-248, U.S. District Court for the Southern District of Texas. Judgment entered January 28, 2020.
- *United States v. Zamora De Anda*, No. 20-20012, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 12, 2020.

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MISCELLANEOUS

PRAYER

Petitioners Pina and Zamora respectfully pray that this Court grant their consolidated petition for certiorari.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in petitioners' cases are attached to this petition as Appendices A and B. The opinions and orders of the United States District Court for the Southern District of Texas are attached as Appendices C and D.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinions on August 28, 2020, for Mr. Pina and on October 12, 2020, for Mr. Zamora. *See* Appendices A-B. This petition is filed within 150 days after entry of judgment in each case. *See* Sup. Ct. Order of Mar. 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The texts of the following relevant constitutional, statutory, and regulatory provisions involved are attached as Appendix E:

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

These cases were originally brought as federal criminal prosecutions under 8 U.S.C. 1326. The district court therefore had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

STATEMENT OF THE CASE

In separate proceedings in the United States District Court for the Southern District of Texas, petitioners were charged by indictment with the offense of illegal reentry of a previously deported alien, in violation of 8 U.S.C. § 1326. Each petitioner filed a motion to dismiss the indictment in his respective case, arguing that, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the prior order of removal and any reinstatement thereof was void because the Immigration Judge issuing the order did not have jurisdiction to issue such an order and that the use of such a void order violated due process. Specifically, each petitioner argued that the "Notice to Appear" provided by immigration authorities alleging the grounds of removal prior to issuance of the first order of removal did not state the time and place at which removal proceedings were to be held and, in light of *Pereira*, such a document lacking that information was not a valid "Notice to Appear" under 8 U.S.C. § 1229(a)(1)(G)(i). Consequently, petitioners argued, the document did not vest jurisdiction with the immigration court in light of regulations which provide that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when" the Department of Homeland Security files a notice to appear with the immigration court. 8 C.F.R. § 1103.14(a); *see also* 8 C.F.R. 1003.13. The district court denied the motion in each case. *See* Appendices C-D, and petitioners timely appealed.

In both of Petitioners' appeals, the government filed a motion for summary affirmance relying on the decision in *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2769 (2020). In *Pedroza-Rocha*, the Fifth Circuit held that the omission of the hearing time did not make the notice to appear defective because

the regulatory definition of the notice to appear (which does not require a hearing time), not the statutory definition (which does), controls. *Pedroza-Rocha*, 933 F.3d at 497 (citing *Pierre-Paul v. Barr*, 930 F.3d 684, 689-90 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2718 (2020)). Even if the notice to appear was defective, the later notice of hearing cured it. *Pedroza-Rocha*, 933 F.3d at 497. And the regulation requiring a notice to appear to be filed with the immigration court was not jurisdictional. *Id.* at 497-98. Consequently, the Fifth Circuit, relying on *Pedroza-Rocha*, affirmed the judgment in each of petitioners' cases. *See* Appendices A-B.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to address the important issue whether, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the immigration court issuing orders of removal against each petitioner lacked jurisdiction to issue such orders, so that use of such orders in a prosecution for illegal reentry violated the separation of powers and due process.

A. The decisions below in each case are incorrect and violate the separation of powers.

An agency's power to act comes from Congress. *City of Arlington v. F.C.C.*, 569 U.S. 290, 298 (2013). Courts must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority." *Id.* at 307.

The notice to appear is such a limit. Congress specified that the notice to appear must be served on every noncitizen in removal proceedings. § 1229(a)(1). It also required that a notice to appear must have a hearing time. § 1229(a)(1)(G)(i). The omission of a hearing time cannot be cured; without it, the document is not a notice to appear. *Pereira*, 138 S. Ct. at 2116.

Without a notice to appear, the immigration court lacks authority to remove a noncitizen. § 1229(a)(1). That is because service of the notice to appear is necessary for subject matter jurisdiction—the immigration judge's authority to preside over cases. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (describing subject matter jurisdiction as "the courts' statutory or constitutional power to adjudicate the case" (cleaned up)).

Immigration judges only have authority to decide cases in which the Department of Homeland Security chooses to serve a notice to appear. § 1229(a)(1). In contrast, immigration officials—not judges—can rule on a noncitizen's deportability and inadmis-

sibility through certain expedited procedures when no notice to appear is filed. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1), 1228(b). The notice to appear confers subject matter jurisdiction by defining the cases over which immigration judges preside. *See Bowles v. Russell*, 551 U.S. 205, 213 (2007) ("the notion of subject-matter jurisdiction obviously extends to classes of cases . . . falling within a court's adjudicatory authority" (cleaned up)).

The government has sought to avoid this straightforward application of § 1229(a)(1) and *Pereira* by arguing that the regulatory definition of a notice to appear, not the statutory one, applies to the notice to appear required to start the removal proceeding. The regulations do not require a hearing time. 8 C.F.R. §§ 1003.15(b), 1003.18(b).

In *Pierre-Paul* and *Pedroza-Rocha*, the Fifth Circuit agreed. By ignoring the jurisdictional import of § 1229(a)(1) and finding "no glue" between the regulations and § 1229(a)(1), the Fifth Circuit distinguished *Pereira* and approved a two-step procedure: first a notice to appear with no hearing time, and then a notice of hearing. *Pierre-Paul*, 930 F.3d at 691.

But there is glue binding the statute to the regulations. Congress's transitional instructions recognize the jurisdictional significance of the notice to appear. Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, § 309(c)(2), Pub. L. No. 104-208, 110 Stat 3009 (1996) (making certain documents "valid as if provided under [§ 1229] (as amended by this subtitle) to confer jurisdiction on the immigration judge"). And the regulations incorporate the statutory jurisdictional limit by providing that a charging document such as a notice to appear vests jurisdiction with the immigration court. §§ 1003.13, 1003.14(a); *see* 8 C.F.R. § 1239.1.

The agency even acknowledged the need to "implement[ ] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear" and committed to providing a hearing time in the notices to appear "as fully as possible by April 1, 1997[.]" Immigration and Naturalization Service and EOIR, Proposed Rules, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444-01, 1997 WL 1514 (Jan. 3, 1997). But the agency created an exception that hearing times could be omitted if providing them was not practicable, such as when "automated scheduling [is] not possible . . . (e.g., power outages, computer crashes/downtime)." *Id.* at 449; *see* 8 C.F.R. §§ 1003.15(b), (c); 1003.18.

Two decades later, "almost 100 percent of notices to appear omit the time and date of proceeding[.]" *Pereira*, 138 S. Ct. at 2111 (cleaned up). The "where practicable" regulatory exception swallowed the statutory rule of including the hearing time in the notice to appear. And the Fifth Circuit sanctioned the agency's attempt to rewrite the statute. This violates the separation of powers. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) (agencies cannot "revise clear statutory terms that turn out not to work in practice").

B. This Court should resolve a circuit split over whether, in light of *Pereira*, the statutory definition of "notice to appear" defines the jurisdiction of the immigration courts.

Eleven circuits, as well as the Board of Immigration Appeals ("BIA"), have weighed in on the proper definition of a "notice to appear" and the effect of a putative notice missing a hearing time. The circuits are split on whether the statutory or regulatory definition of a notice to appear governs, and whether a notice to appear is a jurisdictional requirement or

a claims-processing rule.

Two circuits hold that the statutory definition of a notice to appear applies to starting a removal proceeding, but eight circuits and the BIA hold that the regulatory definition does.

The Seventh and Eleventh Circuits, applying this Court's reasoning in *Pereira*, interpret § 1229(a)(1) as requiring the notice to appear used to begin removal proceedings to have a hearing time. The Seventh Circuit rejects as "absurd" the government's argument that the notice to appear referenced in the regulations is not the same notice to appear defined in the statute. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961-62 (7th Cir. 2019). The Eleventh Circuit explains that, per § 1229(a)(1), Congress intended for service of the notice to appear to "operate as the point of commencement for removal proceedings[,]" and "the agency was not free to redefine the point of commencement[.]" *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019).

The First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits find that the regulatory definition of a notice to appear, which does not require a hearing time, applies for beginning removal proceedings.[1] Several circuits also hold that a later notice of hearing cures any statutory defect. *See Pierre-Paul*, 930 F.3d at 690; *but see Lopez v.*

[1] *See Goncalves Pontes v. Barr*, 938 F.3d 1, 6-7 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110-12 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 954 (2020); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133-34 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2740 (2020); *United States v. Cortez*, 930 F.3d 350, 363 (4th Cir. 2019); *Pierre-Paul*, 930 F.3d at 690; *Santos-Santos v. Barr*, 917 F.3d 486, 490-91 (6th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161-62 (9th Cir. 2019), *cert. denied sub nom. Karingithi v. Barr*, 140 S. Ct. 1106 (2020).

Barr, 925 F.3d 396, 405 (9th Cir. 2019) (a defective § 1229(a)(1) notice to appear cannot be cured by a notice of hearing for the stop-time rule), *rehearing en banc granted*, 948 F.3d 989 (9th Cir. 2020).

In finding that the regulatory definition controls, the First, Sixth, and Ninth Circuits specifically defer to the BIA's reasoning. *Goncalves Pontes*, 938 F.3d at 7; *Karingithi*, 913 F.3d at 1161; *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018). The BIA interpreted *Pereira* narrowly, limiting it to the stop-time rule, and approved the two-step process of a notice to appear without a hearing time followed by a notice of hearing. *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443-47 (BIA 2018). The Seventh Circuit, however, sharply criticized reliance on the BIA's decision, which it found "brushed too quickly over the Supreme Court's rationale in *Pereira*" and failed to consider significant legislative history. *Ortiz-Santiago*, 924 F.3d at 962.

Four circuits and the BIA believe that a notice to appear is a jurisdictional requirement, but five circuits disagree. The Second and Eighth Circuits hold that a notice to appear, as defined by the regulations, confers "jurisdiction" on the immigration court. *Ali*, 924 F.3d at 986; *Banegas Gomez*, 922 F.3d at 112. The Sixth and Ninth Circuits adopt similar reasoning after deferring to the BIA. *Karingithi*, 913 F.3d at 1161; *Hernandez-Perez*, 911 F.3d at 314-15; *see Bermudez-Cota*, 27 I. & N. Dec. at 447.

The Fourth and Fifth Circuits disagree and find that the regulations provide a claims-processing, not jurisdictional, rule. *Pierre-Paul*, 930 F.3d at 692; *Cortez*, 930 F.3d at 362. The Seventh and Eleventh Circuits also hold that the statutory time requirement is a claims-processing, not a jurisdictional rule. *Perez-Sanchez*, 935 F.3d at 1154; *Ortiz-Santiago*, 924

F.3d at 963. Similarly, the Tenth Circuit holds that neither the statute nor the regulations provide a jurisdictional rule. *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-18 (10th Cir. 2019).

The First and Third Circuits reject that § 1229(a)(1) has jurisdictional significance but do not decide whether the regulations do. *Goncalves Pontes*, 938 F.3d at 7 n.3; *Nkomo*, 930 F.3d at 134. In light of the fractured reasoning of the circuits' decisions on the jurisdictional significance of the statutory and regulatory definitions of "Notice to Appear," certiorari should be granted.

C. The Fifth Circuit's restrictions on collaterally attacking removal orders in illegal-reentry prosecutions conflict with this Court's precedent and violate due process.

The offense of illegal reentry depends on a determination made in an administrative proceeding. 18 U.S.C. § 1326(a); *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987). The government must prove the defendant is a noncitizen who "has been . . . removed" from the United States and later reenters the United States without permission. 18 U.S.C. § 1326(a). Section 1326(d) provides that a defendant "may not challenge the validity of the deportation order . . . unless" the defendant shows exhaustion of administrative remedies, deprivation of judicial review, and fundamental unfairness. Due process, however, requires a defendant be allowed to challenge the jurisdictional basis of the administrative order being used to prosecute him.

This Court considered the use of an administrative order to impose criminal sanctions when selective service registrants, whose military inductions were ordered by local boards, were prosecuted for refusing to be inducted into the military. *Estep v. United*

States, 327 U.S. 114 (1946). Even though the statute did not specify that defendants could collaterally attack those induction orders, the Court could not "believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Id.* at 121. The Court refused to resolve any statutory ambiguity against the accused, noting that "[w]e are dealing here with a question of personal liberty." *Id.* at 122.

Here, too, we are dealing with a question of personal liberty and an administrative agency that acted outside the authority defining its jurisdiction. Congress limits any challenge to the "validity of the deportation order" in § 1326(d), but that cannot be read to remove the government's burden to prove that a defendant has been removed. *See* 18 U.S.C. § 1326(a). Just as a notice to appear without a hearing time is not a notice to appear, *Pereira*, 138 S. Ct. at 2116, a removal order entered without jurisdiction is not a removal order.

Alternatively, § 1326(d) is unconstitutional if it prevents a defendant from challenging the jurisdictional validity of the removal order. To comport with due process, a defendant must be able to challenge whether the immigration court lacked jurisdiction even if he cannot satisfy the § 1326(d) criteria. The Fifth Circuit's contrary decision in *Pedroza-Rocha*, applied in petitioners' cases, conflicts with this Court's precedent in *Estep*.

D. The Court should grant certiorari.

For decades, immigration authorities ignored the statutory requirement to include a hearing time in the notice to appear. In the past two decades, well over 200,000 notices to

appear were filed on average per year.[2] Most of those notices lacked hearing times. *Pereira*, 138 S. Ct. at 2111. As a result, millions of people have been deported by an agency without authority to do so.

Many of those removed came back unlawfully. Illegal reentry continues to be the most prosecuted federal felony.[3] In fiscal year 2018, more than 18,000 people were sentenced for illegal reentry.[4] These prosecutions not only cost defendants their liberty, taxpayers pay approximately $27,000 to detain a defendant for the average 10-month sentence.[5] The number of people affected militates against leaving the agency's deliberate, decades-long violation of a congressional directive unchecked.

For these reasons, the consolidated petition for certiorari should be granted.

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[2] *See* U.S. Dep't of Justice, Executive Office for Immigration Review (EOIR), Statistics Yearbook FY 2018, at 7, https://www.justice.gov/eoir/file/1198896/download; U.S. Dep't of Justice, EOIR, FY 2013 Statistics Yearbook, at A7 (Apr. 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf; U.S. Dep't of Justice, EOIR, FY 2008 Statistical Year Book, at B1 (Mar. 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/03/27/fy08syb.pdf; U.S. Dep't of Justice, EOIR, FY 2003 Statistical Year Book, at B2 (Apr. 2004), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy03syb.pdf.

[3] TRAC-Immigration, Immigration Prosecutions for 2019 (Oct. 31, 2019), https://tracfed.syr.edu/results/9x705dbb47e5a0.html.

[4] U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses (Fiscal Year 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf.

[5] U.S. Dep't of Justice, U.S. Marshals Service, FY 2020 Performance Budget: Federal Prisoner Detention Appropriation 19 (Mar. 2019), https://www.justice.gov/jmd/page/file/1144161/download (daily non-federal facility cost in fiscal year 2018 was $90.17).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: January 8, 2021

Respectfully submitted,

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