No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEOPOLDO RIVERA-VALDES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether service of a notice of the time and place for deportation proceedings, sent by certified mail to an alien's self-reported address, consistent with statutory notice procedures under the Immigration and Nationality Act, ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), is constitutionally adequate to support the entry of an *in absentia* deportation order, as contemplated under 8 U.S.C. 1252b(c) (1994).

RELATED PROCEEDINGS

United States District Court (D. Or.):

United States v. *Rivera-Valdes,* No. 19-cr-408 (Aug. 11, 2020)

United States Court of Appeals (9th Cir.):

United States v. *Rivera-Valdes*, No. 21-30177 (June 17, 2024) (panel decision)

United States v. *Rivera-Valdes*, No. 21-30177 (Sept. 18, 2025) (en banc decision)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-66a) is reported at 157 F.4th 978. The prior panel opinion of the court of appeals (App., *infra*, 67a-107a) is reported at 105 F.4th 1118. The relevant opinion of the district court (App., *infra*, 108a-117a) is available at 2020 WL 4606661.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 18, 2025. On December 9, 2025, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 16, 2026. On January 8, 2026, Justice Kagan further ex-

tended the time within which to file a petition for certiorari to and including February 13, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

This case presents a question of exceptional importance for the functioning of the immigration system. In exercising "its broad power over immigration and naturalization," *Reno* v. *Flores*, 507 U.S. 292, 305 (1993), Congress designed a system for removing aliens who are unlawfully present in the United States. That carefully crafted system has long provided for in-person hearings in which an alien has the opportunity to contest his removability. It has also provided a mechanism for immigration courts to enter *in absentia* orders when aliens fail to appear at their hearings. For an *in absentia* order to issue, the government must demonstrate that it complied with the statute's procedures for providing the alien with notice of the hearing—including its provisions for personal service and service by mail.

The en banc Ninth Circuit's decision "throw[s] sand in the gears" of Congress's carefully crafted mechanism by imposing an additional (albeit unspecified) requirement for notice. App., *infra*, 86a (Baker, J., concurring). The court of appeals' requirement drew by analogy from *Jones* v. *Flowers*, 547 U.S. 220 (2006), where this Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225. The court of appeals therefore ruled that respondent, who is charged with unlawful reentry following deportation, suffered a due-process violation when he was ordered deported *in absentia*, because a notice sent by certified mail to the address he had provided was re-

turned as unclaimed and the government did not resort to unspecified nonstatutory measures to supplement its notice efforts. See App., *infra*, 20a.

Due process does not justify the Ninth Circuit's interference with the political departments' responsibility regarding the admission and exclusion of aliens. Rather, the Ninth Circuit failed to appreciate meaningful distinctions between *Jones*'s tax sale and the deportation of aliens who are unlawfully present—distinctions that carry tremendous constitutional and practical significance. This Court has long recognized that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Trump* v. *Hawaii*, 585 U.S. 667, 702 (2018) (citation omitted). And unlike when there is a looming tax sale, an alien in deportation proceedings has every incentive to evade notice if that means the proceeding cannot result in an enforceable deportation order. Those constitutional and commonsense principles should have decided this case.

At minimum, the court of appeals' blanket rule—that regardless of the facts of any particular case, the government must always consider whether there are any additional reasonable steps that would be practicable to take if it learns that a hearing notice sent by mail is returned—far overreads *Jones*. As Judge Bennett's en banc dissent notes, the court of appeals' "new and unjustified per se rule conflicts with the fact-specific and fact-dependent" due process analysis applied in *Jones*, finding the government's efforts at notice inadequate only by ignoring the efforts the government did make. App., *infra*, 35a.

The Ninth Circuit's holding, if left undisturbed, risks "undermin[ing] finality for hundreds, if not thousands, of cases" and "wreck[ing] the federal courts' dockets with an

explosion of litigation." App., *infra*, 83a-84a (Bumatay, J., concurring). It also "require[s] the government to re-examine the adequacy of its notice procedures for the entire immigration system." *Ibid.* At the panel stage, Judge Bumatay highlighted those substantial ramifications—which sow chaos for the Legislative, Executive, and Judicial Branches alike. The en banc court nonetheless granted review and extended new due-process protections to countless aliens, many of whom may now challenge their *in absentia* deportation orders and prosecutions for illegal reentry following deportation by requiring the government to establish that it took, or was not required to take, additional steps to provide notice that the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), itself did not require.

Despite the interlocutory nature of the decision below —which formally leaves it to the district court to determine whether there were in fact sufficiently reasonable additional measures that the government might have taken in 1994, App., *infra*, 26a, 29a—the court of appeals' new rule will be extraordinarily burdensome even if it merely forces the government to litigate that question repeatedly in challenges to countless decades-old *in absentia* deportation orders. This Court should grant the petition for a writ of certiorari.

STATEMENT

A. Legal And Factual Background

1. The facts underlying this case originated before significant changes were made in the mid-1990s to the INA. But both then and now, Congress provided a framework for notifying aliens in the United States about administrative proceedings in which the government was seeking their deportation (or, now, their re-

moval). As relevant to respondent's case, the INA provided that "written notice" of the initiation of deportation proceedings would be provided in the form of an "'order to show cause,'" which was to be "given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. 1252b(a)(1) (1994). An order to show cause informed the alien, among other things, of the requirement that the alien "must immediately provide (or have provided) the Attorney General, with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1252" and the further requirement to "provide the Attorney General immediately with a written record of any change of the alien's address or telephone number." 8 U.S.C. 1252b(a)(1)(F)(i) and (ii) (1994).

Once deportation proceedings were initiated, the alien was also to be given "written notice" of the "time and place" of those proceedings, and of "any change or postponement in the time and place of such proceedings." Those notices about the hearing were, similarly, to be provided "in person to the alien (or, if personal service is not practicable, * * * by certified mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. 1252b(a)(2)(A) and (B) (1994). Congress specified that, when an alien was "not in det[e]ntion," the written notice about the hearing's time and place "shall not be required * * * if the alien has failed to provide the address [as] required." 8 U.S.C. 1252b(a)(2) (1994).

Congress provided that if an alien failed to appear at the deportation hearing "after written notice required under subsection (a)(2) of [Section 1252b] ha[d] been provided to the alien or the alien's counsel of record,"

then that alien "shall be ordered deported * * * in absentia if the [government] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable." 8 U.S.C. 1252b(c)(1) (1994). Congress expressly stated that "[t]he written notice * * * shall be considered sufficient for purposes" of entering an *in absentia* order "if provided at the most recent address provided [by the alien] under subsection (a)(1)(F)." *Ibid.* An *in absentia* deportation order could be rescinded only on limited grounds, including if the alien filed a motion to reopen proceedings and demonstrated "that the alien did not receive notice in accordance with subsection (a)(2)." 8 U.S.C. 1252b(c)(3)(B) (1994).[1]

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[1] Since 1994, the "order to show cause" has been replaced by a "notice to appear," and "deportation" proceedings are now subsumed in "removal" proceedings. Compare 8 U.S.C. 1252b(a)(1) and (2) (1994), with 8 U.S.C. 1229(a)(1). But, with one material difference, the same phrases quoted in the preceding three paragraphs in the text above about the mechanics for providing notice, and the alien's obligations to provide, and keep current, an address at which the alien may be contacted, are still used in the INA's current provisions about the service of a notice to appear in removal proceedings and of notice of any change in the time or place of such proceedings. See 8 U.S.C. 1229(a)(1), (a)(1)(F), (2)(A), and (B). The material difference is that the alternative to in-person service is no longer notice "by certified mail," 8 U.S.C. 1252b(a)(1) and (2) (1994), but notice "by mail," 8 U.S.C. 1229(a)(1) and (2)(A). An alien's failure to appear at a hearing "after written notice required under" current Section 1229(a)(1) or (2) still justifies entry of an *in absentia* order of removal if the government establishes "that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). See generally *Campos-Chaves* v. *Garland*, 602 U.S. 447, 457 (2024) (holding that aliens who received notices of the times and dates of their removal hearings under Section 1229(a)(2) were ineligible for rescission of their *in absentia* removal orders).

2. Respondent is a native and citizen of Mexico. App, *infra*, 6a. He unlawfully entered the United States in 1992 and filed an asylum application with the Immigration and Naturalization Service (INS) in 1993, falsely claiming that he was a citizen of Guatemala. *Ibid.* On his asylum application, he provided an address in Portland, Oregon (4037 N. Cleveland Ave.) as the one at which he could be contacted. *Ibid.*

The INS mailed notices regarding respondent's asylum application and work authorization to that address, instructing him to appear in person at the INS office in Portland in early 1994. App., *infra*, 6a. But when respondent appeared to pick up his work-authorization papers on March 3, 1994, he presented false identification documents. *Id.* at 6a; *id.* at 30a (Bennett, J., dissenting) When confronted about their falsity, respondent admitted to the fraud and withdrew his asylum application, and the agency personally served him with an order to show cause. *Id.* at 6a. The show-cause order stated that respondent would later be notified of the date, time, and place of his deportation hearing, and that the hearing notice would be mailed to the address he provided upon service of the show-cause order. *Id.* at 64a. The show-cause order listed that address as "4037 N. Cleveland, Portland, OR, 97212" (thus omitting "Ave." from what respondent had listed on his asylum application). *Id.* at 7a. The order also informed respondent that he was required to notify the agency of any change of address, and that if he failed to appear at the deportation hearing, the immigration judge could order his deportation *in absentia*. *Id.* at 6a-7a. The order was read to respondent in Spanish, and he acknowledged receipt by signing the document. *Id.* at 7a; *id.* at 32a (Bennett, J., dissenting). Respondent thus had ac-

tual notice that deportation proceedings against him were underway.

Soon thereafter, the INS moved to schedule respondent's hearing. App., *infra*, 7a. On April 20, 1994, a copy of the scheduling motion was sent by regular mail to the address listed on the order, but it was returned by the U.S. Postal Service as "Not Deliverable As Addressed[,] Unable to Forward." *Ibid.*; *id.* at 150a. On April 25, 1994, the immigration court sent a notice of hearing—which contained the date, time, and location of the hearing—to the same address by certified mail. *Id.* at 7a. That notice, however, was "Returned to Sender" as "Unclaimed." *Ibid.*; *id.* at 152a.

Four months later, the immigration court held the deportation hearing. App., *infra*, 7a. Respondent did not appear and was ordered deported *in absentia*. *Ibid.* Respondent was ultimately deported pursuant to that order in 2006. *Ibid.*

B. Proceedings Below

1. Respondent later returned to the United States. App., *infra*, 8a. In 2019, he was detained under the 1994 deportation order and charged with one count of illegally reentering the United States following deportation in violation of 8 U.S.C. 1326(a). App., *infra*, 8a. He conditionally pleaded guilty, but he moved to dismiss the indictment, contending that the underlying deportation order was invalid because he had not received adequate notice of the time and place of his deportation hearing. *Ibid.*

The district court denied the motion to dismiss the indictment, holding that the underlying deportation order was valid because the government had sent its notice of hearing by certified mail to the address respondent acknowledged when he signed the show-cause or-

der. App., *infra*, 116a. The court concluded that the government's approach was "reasonably calculated" to give notice to respondent and that respondent was not additionally entitled to actual notice of his hearing. *Id.* at 116a-117a.

2. A divided panel of the court of appeals initially affirmed. App., *infra*, 67a-78a. In a per curiam opinion, the majority concluded that respondent's *in absentia* deportation order did not violate due process. *Ibid.* It explained that previous circuit precedent had concluded that the government's compliance with statutory notice requirements was constitutionally sufficient, and that "mailing notice * * * to an alien's last provided address is constitutionally sufficient." *Id.* at 71a-72a. The panel majority rejected respondent's contention that the government was required under *Jones* v. *Flowers*, 547 U.S. 220 (2006), to take "additional reasonable steps" to notify him of the hearing, reasoning that the Ninth Circuit had not previously applied *Jones* in the immigration context and that the statutory provisions governing notice were adequate in that context. App., *infra*, 73a-76a. The panel majority further reasoned that even if *Jones* did apply, there were no additional reasonable steps that would have been practicable for the government to take. *Id.* at 76a-77a.

Judge Bumatay filed a concurring opinion, expressing concerns about Judge Sanchez's attempt, in dissent, "to break new constitutional ground to resolve [the] case." App., *infra*, 79a. Judge Bumatay objected to an approach that would expand *Jones* to the immigration context, and he noted that the dissent's approach could "wreck the federal courts' dockets with an explosion of litigation" and "undermine finality for hundreds, if not thousands, of cases." *Id.* at 79a-84a. Judge Baker also

filed a concurring opinion, noting that a rule permitting unclaimed certified mail to rebut the presumption of adequate notice "would reward an alien's evasion." *Id.* at 85a-88a.

Judge Sanchez dissented. App., *infra*, 92a-107a. In his view, the Ninth Circuit had already indicated that *Jones* applies in the immigration context. *Id.* at 97a-99a. He further concluded that compliance with statutory notice requirements does not satisfy due process in every circumstance. *Id.* at 102a-103a. He would have remanded for the district court to apply *Jones*. *Id.* at 99a.

3. The court of appeals granted rehearing en banc, which vacated the panel's decision. App., *infra*, 118a. After hearing oral argument, the eleven-member en banc court vacated the district court's denial of respondent's motion to dismiss the indictment and remanded for further proceedings. *Id.* at 5a-29a.

In an opinion by Judge Sanchez, the six-member majority of the en banc court of appeals concluded that under this Court's precedents in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Jones*, *supra*, the Fifth Amendment's due-process guarantee requires that notice by the government of deportation (or removal) proceedings must be "reasonably calculated to apprise noncitizens of the pendency of removal proceedings and to afford them the opportunity to be present and to participate." App., *infra*, 20a. The court further held that "[w]here the Government learns that its notice efforts have not succeeded, that knowledge triggers an obligation on the Government's part to take additional reasonable steps to effect notice, if it is practicable to do so." *Ibid.* The court rejected the government's contention that by fulfilling its statutory obliga-

tions under the Immigration and Nationality Act, it necessarily satisfied any constitutional due process requirements. *Id.* at 21a-22a. And the court concluded that personally serving the show-cause order on respondent was not constitutionally adequate notice, given that the show-cause order did not contain the date, time, and location of the hearing. *Id.* at 23a-25a. The court further found that the record did not establish that respondent had moved and failed to update his address with the agency, and that even if he had failed to comply with his obligation to update his address, he was still entitled to constitutionally sufficient notice. *Id.* at 25a.

The court of appeals therefore concluded that the appropriate remedy was to remand for the district court to examine whether the agency had other practicable alternatives to provide notice to respondent. App., *infra*, 26a-28a. The majority declined to decide whether respondent could demonstrate prejudice, administrative exhaustion, and deprivation of judicial review, as would be required for him to succeed in his collateral attack under 8 U.S.C. 1326(d) on his prior deportation order. App., *infra*, at 28a.

Judge Bennett, joined in full by Judges Callahan and Ikuta and in part by Judges Miller and Forrest, dissented. App., *infra*, 30a-59a. Judge Bennett rejected the majority's "new and unjustified per se rule" imposing an obligation on the Government to take additional steps to effect notice "any time a mailed notice is returned." *Id.* at 35a. He instead concluded that "the steps the government did take and the notice the government did provide were constitutionally adequate." *Id.* at 35a-36a. He further explained that, even if the government had needed to consider doing more once the mailed notices had been returned, there were no

"'additional reasonable steps'" to be taken under the facts, making the majority's remedy "misplaced." *Id.* at 51a (citation omitted); see *id.* at 50a-55a. Finally, he reasoned that respondent's collateral attack on his deportation order would necessarily fail based on Section 1326(d)'s additional requirements, as he could not show any prejudice from the alleged due-process violation because his "admission to immigration fraud renders it (at best) implausible that he would have received a discretionary grant of voluntary departure" in addition to a removal order. *Id.* at 57a.

Judge Forrest, joined by Judge Miller, also dissented. App., *infra*, 66a. She agreed with Judge Bennett that there were no "'additional reasonable steps'" that the government could have taken to attempt to provide notice to respondent, and that respondent could not "satisfy other requirements for collaterally attacking his removal order" in a criminal prosecution. *Ibid.* (citation omitted).

REASONS FOR GRANTING THE PETITION

This case presents an important question that warrants this Court's review. The court of appeals' decision calls into question the validity of countless *in absentia* orders that were entered in accordance with the INA's statutory procedures; it does so whenever there is evidence that the government learned that its statutory notice procedures may have been unsuccessful in providing actual notice of a hearing's time and place—even when an alien, after being warned of the consequences of such a failure, had failed to update the alien's address of record. The court of appeals' due-process reasoning erroneously extends this Court's precedent in *Jones* v. *Flowers*, 547 U.S. 220 (2006)—a case about the forfei-

ture and sale of a residence to satisfy a tax debt—to an entirely different context.

Although the court of appeals remanded to permit the district court to determine whether there were in fact any "reasonable alternatives" that were "practicable" for the government to have taken to give notice to respondent in 1994, App., *infra*, 26a-28a, the court of appeals has already said that "it was not enough for the Government to throw up its hands and do nothing." *Id.* at 29a. In fact, as all five dissenters from the en banc decision recognized, there were no "additional reasonable steps" that were practicable for the government to take. *Id.* at 50a (Bennett, J., dissenting); see *id.* at 50a-55a; *id.* at 66a (Forrest, J., dissenting); see also *id.* at 82a-83a (Bumatay, J., concurring) (making the same point at the panel-opinion stage). In these circumstances, requiring the government to continue shadowboxing with respondent and others about hypothetical additional steps that might have been taken, often decades ago, in countless cases arising in the Ninth Circuit alone will "throw sand in the gears of immigration enforcement efforts," *id.* at 86a (Baker, J., concurring), and "wreck the federal courts' dockets with an explosion of litigation," *id.* at 83a (Bumatay, J., concurring). This Court should grant review now to preempt that substantial deviation from the INA's notice framework.

A. The Ninth Circuit's Decision Erroneously Requires The Government To Have Considered Taking Steps Beyond The INA's Tailored Requirements For Providing Notice Of The Timing Of Immigration Proceedings

The court of appeals wrongly imposed a new rule on government officials applying the immigration laws. The Ninth Circuit now requires that, in addition to following Congress's tailored framework for providing notice to al-

iens of deportation proceedings, "when the Government learns that its notice effort has not succeeded, this knowledge triggers an obligation on the Government's part to take additional reasonable steps to effect notice, if it is practicable to do so." App., *infra*, 5a. But the tax-sale context from which the Ninth Circuit derived that principle differs fundamentally from the immigration context, which presents distinct constitutional principles, challenges, and incentives. The Ninth Circuit erred in extending *Jones*'s additional-reasonable-steps framework to that dissimilar area. At the very least, the decision below erred in issuing a blanket holding that whenever a mailed notice was returned, the government was required to consider additional reasonable steps to effect notice, regardless of the circumstances of the particular case. Even if the additional-reasonable-steps principle of *Jones*, *supra*, applied, it is incompatible with that categorical rule.

1. The Due Process Clause requires that for a proceeding "to be accorded finality," the government must give "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The government acknowledges that principle applies to deportation (and, now, removal) proceedings—at least, those proceedings that involve aliens who were previously admitted to the United States[2]—but this Court has emphasized that

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[2] Aliens who were never lawfully admitted face an additional obstacle to reliance on *Jones*. Because "an alien who tries to enter the country illegally is treated as an applicant for admission," such aliens' "due process rights" are no greater than "[w]hatever the procedure[s] authorized by Congress." *Department of Homeland Security* v. *Thuraissigiam*, 591 U.S. 103, 139 (2020) (citations omit-

"the possibility of conceivable injury" does not violate due process. *Id.* at 315 (quoting *American Land Co.* v. *Zeiss*, 219 U.S. 47, 67 (1911)). Rather, courts must consider "the just and reasonable character of the requirements" with particular regard to "the subject with which the statute deals." *Ibid.* (quoting *American Land Co.*, 219 U.S. at 67).

Applying those principles in the context of a tax sale, this Court in *Jones*, *supra*, held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." 547 U.S. at 225. In reaching that holding, the Court examined state and federal cases regarding tax sales, state statutes prescribing notice requirements for such sales, and the practicalities arising in that context, underscoring that its reasoning was tailored to that particular context. *Id.* at 227-230.

The Ninth Circuit's en banc majority nonetheless extended *Jones*'s additional-reasonable-steps requirement to the immigration context, reasoning that the principles undergirding that framework applied equally to respondent's deportation proceedings. App., *infra*, 17a-20a. That was error for several reasons.

First, *Jones* "repeatedly cabined its holding to the facts of the case." App., *infra*, 37a (Bennett, J., dissenting). The Court specifically qualified its statements regarding the holding of the case and the issues that it was considering, placing significant emphasis on the tax-

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ted). While respondent was never lawfully admitted, the court of appeals' reasoning extends *Jones*'s additional-reasonable-steps rule to any alien ordered deported *in absentia*, including those who were lawfully admitted and later became deportable. This petition therefore seeks review of that broadly applicable ruling.

sale context. See *Jones*, 547 U.S. at 223, 227, 239. And the Court reasoned that the additional steps that must be considered were particularly appropriate because the case involved a state's exertion of "extraordinary power against a property owner—taking and selling a house he owns." *Id.* at 239. On its face, then, *Jones* is not a returned-mail rule that applies universally to every context—there must be some meaningful reason to justify its extension.

Further, the court of appeals' extension of *Jones* to *in absentia* immigration orders provides inadequate respect for Congress's carefully crafted framework for statutory notice. As the panel majority explained in its per curiam opinion, Congress designed a framework for providing notice of administrative proceedings that "adequately balances the relevant competing interests in the immigration context" and is "'reasonably calculated' to ensure" that aliens receive notice. App., *infra*, 76a (citation omitted). Under that framework, aliens like respondent have been required to update their addresses so that service by mail can be effective. See 8 U.S.C. 1252b(a)(1)(F) (1994); 8 U.S.C. 1229(a)(1)(F).

Congress further provided a mechanism for aliens to move to reopen and seek the rescission of an *in absentia* deportation (and now, removal) order if, *inter alia*, they were not given proper notice of the proceedings. 8 U.S.C. 1252b(c)(3)(B) (1994); see 8 U.S.C. 1229a(b)(5)(C)(ii) (similar, post-1996 provision); see also *Campos-Chaves* v. *Garland*, 602 U.S. 447 (2024) (deciding statutory question regarding such motions to reopen). That mechanism is available for aliens claiming lack of notice to seek rescission and reopening "at any time," and it provides an automatic stay of removal until that motion is resolved. 8 U.S.C. 1252b(c)(3) (1994); 8 U.S.C.

1229a(b)(5)(C). So the statute itself accounted for circumstances in which an alien failed to receive notice "through no fault of the alien," and it offered a procedure for challenging the *in absentia* order—though respondent failed to use that procedure. 8 U.S.C. 1252b(c)(3)(B) (1994). Those statutory protections were "reasonably calculated" to notify aliens of removal proceedings and give them an opportunity to be heard, *Mullane*, 339 U.S. at 314; they therefore satisfy due process, and the decision below erred in finding them inadequate.

The court of appeals' decision to impose additional requirements on the government likewise fails to account for this Court's precedents distinguishing the due-process rights of aliens in deportation or removal proceedings from those of citizens. The court below reasoned that aliens "are entitled to due process protections regardless of whether their presence in this country is lawful."[3] App., *infra*, 17a. But this Court has long

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[3] That premise overlooks this Court's consistent reasoning that aliens who were never lawfully admitted (unlike aliens who are admitted but whose legal status later changes, such as an alien who overstays a visa) lack due-process protections beyond what Congress has provided. See *Thuraissigiam*, 591 U.S. at 139; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 214-215 (1953); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904). That includes aliens paroled into the country "for years" and "aliens who arrive at ports of entry"—all "are treated for due process purposes as if stopped at the border." *Thuraissigiam*, 591 U.S. at 139 (citation omitted). For those aliens, "the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). Nonetheless, because the Ninth Circuit's rule encompasses aliens who may assert additional due-process rights—such as lawfully admitted aliens who have over-

made clear that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003); see *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 79-80 (1976). In *Demore*, for example, the Court upheld an immigration statute providing for detention of aliens during deportation proceedings. 538 U.S. at 522-523. Just as due process does not bar Congress's decision to mandate detention during removal proceedings, see *ibid.*, it does not invalidate Congress's carefully tailored framework for when immigration courts may enter orders *in absentia*. Yet the court of appeals, to justify its extension of *Jones* to immigration proceedings, analogized to criminal defendants and citizens whose property may be seized by the government without accounting for the unique constitutional concerns involved in the regulation of immigration.

As this Court has repeatedly affirmed, "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Trump* v. *Hawaii*, 585 U.S. 667, 702 (2018) (citation omitted). And "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 792 (citation omitted). Congress exercised that sovereign prerogative in crafting the framework for giving aliens notice of deportation proceedings. It provided for personal service or, if personal service was unavailable, service by certified mail to an address provided by the

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stayed their visas or who the government later determines were admitted in error—the Court need not address that issue to review the decision below.

alien; and it permitted an alien to seek rescission of an *in absentia* order if statutory notice was not given. See 8 U.S.C. 1252b(a)(1), (2), and (c)(1)-(3) (1994). That framework was "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. That suffices to satisfy the Due Process Clause.

The on-the-ground realities of the immigration context further confirm that *Jones* is inapposite here. As Judge Bumatay explained below, there is good reason that the Constitution's protections for a property owner subject to a tax sale (as in *Jones*) should not be coextensive with protections for aliens involved in immigration proceedings. "An alien who has unlawfully entered the country," or unlawfully overstayed a visa, "has obvious reasons to avoid appearing for a deportation hearing—unlike a property owner, who has no reason to ignore an imminent tax sale." App., *infra*, 76a (Bumatay, J., concurring). Requiring the government to examine additional steps it might take every time mail is returned as unclaimed "would reward evasion of service." *Ibid.* The Due Process Clause does not impose such a requirement on the political branches as they exercise their immigration-enforcement responsibilities, and the Ninth Circuit was wrong to borrow it from *Jones*'s tax-sale context.

2. The Ninth Circuit was wrong to extend the *Jones* additional-reasonable-steps requirement to the immigration context at all. But even if that requirement had application to *in absentia* orders by immigration courts, the court of appeals went too far in holding that *whenever* the government learned that notice by certified mail had failed, it was required to examine whether

there were additional reasonable steps it could practicably take. App., *infra*, 20a. As the en banc dissenters recognized, that overreading of *Jones* is unsupported and unworkable.

Jones held that in the tax-sale context, if the government learns that its efforts at notice by mail have failed, it must take additional reasonable steps, if they are practicable, to give notice to a property owner of an impending sale of the property. 547 U.S. at 227. But the Court acknowledged that "[d]ue process does not require that a property owner receive actual notice" before a sale. *Id.* at 226. And it identified specific additional steps that were in fact "available to the State," including alternative ways to address and send the mailed notice or simply posting a notice on the front door of the house to be sold. *Id.* at 225, 234-235.

As Judge Bennett explained in dissent, the facts of this case demonstrate that the en banc court's blanket rule is an improper application of *Jones*. Respondent had received actual notice of the proceedings because he was personally served with the show-cause order, and actual notice that he should expect details regarding the time and place of the hearing by mail at the address he provided. App., *infra*, 39a-41a (Bennett, J., dissenting). At minimum, in those and like circumstances, courts should be free to assess whether the notice provided by the government was reasonably calculated to apprise the alien of the proceedings against him and to give him an opportunity to respond. But the court of appeals' blanket rule deems returned or unclaimed mail a categorical trigger for the government to consider (and courts to later examine) additional reasonable steps—regardless of the unique circumstances or facts of the case.

B. The Ninth Circuit's Decision Warrants Further Review

The Ninth Circuit's deeply flawed decision significantly curtails the Executive Branch's authority to effectuate and enforce *in absentia* deportation and removal orders and raises an important question that warrants this Court's review.

1. As both members of the panel majority recognized, the practical consequences of the Ninth Circuit's decision are far-reaching and potentially staggering. See App., *infra*, 83a-84a (Bumatay, J., concurring); *id.* at 85a-87a (Baker, J., concurring). As Judge Bumatay explained, the court of appeals' decision puts "on unsure footing every removal, deportation, and immigration conviction where the government had *any inkling* that the alien did not receive actual notice." *Id.* at 83a. Thousands—or even tens of thousands—of aliens could file motions to reopen their deportation or removal orders based on an assertion that, when a mailed notice was returned as undeliverable or unclaimed, the government could have taken additional reasonable steps beyond those required by the INA in order to attempt to effectuate actual notice.[4] Moreover, when cases involve proceedings that concluded decades ago, records are limited and the relevant officials have long since departed from government service, which will hamstring the government in its efforts to demonstrate that no such steps were practicable. That will foster an "explosion of litigation," as Judge Bumatay predicted. *Ibid.*

2. The reasoning in the decision below will also have substantial effects on the government's ongoing immi-

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[4] A motion to reopen and rescind a deportation or removal order that was entered *in absentia* for lack of notice may be "filed at any time," 8 U.S.C. 1229a(b)(5)(C)(ii); 8 U.S.C. 1252b(c)(3)(B) (1994). There is no statute of limitations.

gration enforcement efforts. The Ninth Circuit held that to satisfy due process, the government must take any practicable additional reasonable steps anytime it has reason to conclude that the statutory process has failed to provide actual notice. App, *infra*, 20a. Unless and until the court of appeals rules on enough follow-on cases to establish that there actually are no practicable steps in cases without some extraordinary indications to the contrary, that holding will mean that, for *in absentia* removal orders to have effect in the Ninth Circuit, the government must, every time a notice of hearing is returned as undeliverable, conduct a case-specific analysis to determine whether there are additional steps it could take to effect notice, whether those steps are reasonable, and whether those steps are practicable. As Judge Bumatay put it, that "thoroughly unworkable" requirement will "forc[e] the government to engage in a game of cat-and-mouse, attempting to provide notice to those who have every reason to evade government attention." *Id.* at 83a. That exceedingly burdensome process could render *in absentia* removal orders effectively unusable anytime a hearing notice is returned. It will thereby create perverse incentives for aliens to frustrate effective service by mail, "reward[ing] an alien's evasion and throw[ing] sand in the gears of immigration enforcement efforts." *Id.* at 85a-86a (Baker, J., concurring).

3. The Ninth Circuit stands alone in extending *Jones* to require the government to consider additional steps to effect notice anytime service by mail is returned. The Seventh Circuit, in discussing the *Jones* additional-reasonable-steps requirement, rejected arguments in an immigration case that mirrored respondent's here, reasoning that a follow-up mailing by regular

mail "is not a constitutional requirement," and that "a property owner is less likely than an illegal immigrant to avoid a hearing." *Derezinski* v. *Mukasey*, 516 F.3d 619, 621-622 (7th Cir. 2008). Indeed, other circuits have ruled that an "unclaimed" notice of a deportation hearing sent by certified mail to the alien's address of record comports with due process. *Giday* v. *INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (unclaimed certified mail); *Fuentes-Argueta* v. *INS*, 101 F.3d 867, 872 (2d Cir. 1996) (per curiam) (same); see also *Yilmaz* v. *Attorney General*, 150 Fed. Appx. 180, 185 (3d Cir. 2005) (same); *Aracely Coello-Amador* v. *Ashcroft*, 125 Fed. Appx. 917, 919 (10th Cir. 2005) (certified mail sent and signed for but not received by alien). While those rulings predate this Court's 2006 decision in *Jones*, in the intervening two decades, those courts have neither cut back on those rulings nor extended *Jones* to the immigration context. Given the substantial practical consequences of the Ninth Circuit's decision, this Court need not wait for other courts to address the issue before granting review of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-30177
D.C. No. 3:19-cr-00408-IM-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEOPOLDO RIVERA-VALDES, DEFENDANT-APPELLANT

Argued and Submitted En Banc March 19, 2025
San Francisco, California
Filed: Sept. 18, 2025

Appeal from the United States District Court
for the District of Oregon
Karin J. Immergut, District Judge, Presiding

OPINION

Before: MARY H. MURGUIA, Chief Judge, and RONALD M. GOULD, CONSUELO M. CALLAHAN, MILAN D. SMITH, JR., SANDRA S. IKUTA, MARK J. BENNETT, ERIC D. MILLER, DANIELLE J. FORREST, GABRIEL P. SANCHEZ, HOLLY A. THOMAS and ROOPALI H. DESAI, Circuit Judges.

Opinion by Judge SANCHEZ; Dissent by Judge BENNETT, joined by Judges CALLAHAN and IKUTA, with

whom Judges MILLER and FORREST join as to Parts III.B and IV only;

Dissent by Judge FORREST, joined by Judge MILLER.

SUMMARY*

Criminal Law / Due Process / Removal

The en banc court vacated the district court's denial of Leopoldo Rivera-Valdes's motion to dismiss an indictment alleging that he reentered the United States following deportation in violation of 8 U.S.C. § 1326, and remanded for further proceedings, in a case in which Rivera-Valdes asserts that the underlying removal order was invalid because he was not afforded "reasonably calculated" notice of his removal hearing when the Government learned that its notice sent by certified mail was returned unclaimed.

The en banc court held that the notice afforded to noncitizens subject to removal is governed by the due process standards articulated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Jones v. Flowers*, 547 U.S. 220 (2006). Notice by the Government must be reasonably calculated to apprise noncitizens of the pendency of removal proceedings and to afford them the opportunity to be present and to participate. The notice must be of such nature as to reasonably convey the required information, and it must afford a reasonable time for those interested to make their appearance. Where the Government learns that its notice efforts have not succeeded, that knowledge triggers an obligation on the Government's part to take additional

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

reasonable steps to effect notice, if it is practicable to do so. Notice is not "reasonably calculated" under the circumstances when the Government knows its method of service was ineffective and takes no additional steps that are reasonably available to it.

The en banc court rejected the Government's arguments that even if *Jones* applies to removal proceedings, its notice to Rivera-Valdes satisfied due process. First, *Jones* forecloses the Government's contention that by fulfilling its statutory notice obligations imposed by the Immigration and Nationality Act, it necessarily satisfied its constitutional due process obligations. Second, Rivera-Valdes did not receive constitutionally adequate notice simply by being personally served with an order to show cause conveying that a deportation hearing may be scheduled at some unknown point in the future. Third, the Government's premise that Rivera-Valdes forfeited his due process claim by not updating his address with the agency is not established by the record, and failure to comply with a statutory obligation to keep his address updated would not, in any event, forfeit his right to constitutionally sufficient notice.

The en banc court concluded that under *Jones*, the appropriate remedy is to remand to allow the district court to determine if the agency had other practicable alternatives through which to attempt notice on Rivera-Valdes. And even if Rivera-Valdes establishes a due process violation, he must demonstrate that he is entitled to relief under the other prongs of collateral attack under 8 U.S.C. § 1326(d)—prejudice, administrative exhaustion, and deprivation of judicial review. The district court left these questions undecided, and the en banc court declined to consider them in the first instance.

Judge Bennett, joined by Judges Callahan and Ikuta, and joined in part by Judges Miller and Forrest, dissented. He wrote that (1) the Constitution required nothing more where the Immigration and Naturalization Service served Rivera-Valdes with an order to show cause, informed him in person of an upcoming deportation hearing, confirmed his current address, instructed him to notify the immigration court within five days of an address change, served him via regular mail the motion to schedule a hearing, and sent him via certified mail a notice that his hearing had been in fact scheduled; (2) even after the mailed notices were returned, there were no further "additional reasonable steps" that the government was constitutionally required to undertake; and (3) Rivera-Valdes cannot meet his burden of showing a due process violation or resulting prejudice, which is required under § 1326(d) for collateral attacks on removal orders.

Judge Forrest, joined by Judge Miller, dissented. She agreed that *Jones* applies to immigration proceedings and, therefore, when the government learned that its attempt to notify Rivera-Valdes of his removal hearing failed, it was required to take additional reasonable steps to attempt to provide notice of the hearing to Rivera-Valdes, if practicable to do so. But under the facts presented here, there were no such steps available to the government. In addition, Rivera-Valdes cannot satisfy other requirements for collaterally attacking his removal order. Accordingly, she disagreed with the majority's decision to vacate the district court's denial of Rivera-Valdes's motion to dismiss his indictment.

SANCHEZ, Circuit Judge:

Seventy-five years ago in *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court stated that an "elementary and fundamental requirement" of due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. 306, 314 (1950). In *Jones v. Flowers*, the Supreme Court explained that one such circumstance is knowledge on the Government's part that its attempt to provide notice has failed. 547 U.S. 220, 225 (2006). Accordingly, under the *Mullane-Jones* due process analysis, when the Government learns that its notice effort has not succeeded, this knowledge triggers an obligation on the Government's part to take additional reasonable steps to effect notice, if it is practicable to do so. *Id.*

Defendant-Appellant Leopoldo Rivera-Valdes ("Rivera-Valdes") challenges the district court's denial of his motion to dismiss an indictment alleging that he reentered the United States following deportation in violation of 8 U.S.C. § 1326. Rivera-Valdes asserts that the underlying removal order was invalid because he was not afforded "reasonably calculated" notice of his removal hearing when the Government learned that its notice sent by certified mail was returned unclaimed. Because the district court did not apply the governing standard set forth in *Jones*, we vacate the district court's denial of Rivera-Valdes's motion to dismiss the indictment and remand for further proceedings.

I.

Rivera-Valdes is a native and citizen of Mexico who unlawfully entered the United States in 1992. In December 1993, he filed an asylum application with the Immigration and Naturalization Service ("INS" or "agency") that falsely asserted he was a citizen of Guatemala and had suffered persecution. The parties agree the asylum application listed the following as his address: Leopoldo Rivera-Valdes, 4037 N. Cleveland Ave., Portland, OR 97212 ("Cleveland Avenue address"). Rivera-Valdes acknowledges that the Cleveland Avenue address is the only address he provided to the agency.

In January 1994, the INS sent a notice acknowledging receipt by regular mail to the Cleveland Avenue address. The following month, the INS mailed Rivera-Valdes notices approving the application and inviting him to retrieve his work authorization papers. When Rivera-Valdes arrived to retrieve his work authorization papers, INS officials told him that they knew the Guatemalan identity he presented was false. He immediately admitted to having purchased a false birth certificate and false paperwork, and withdrew his application for asylum. During this visit, the INS personally served Rivera-Valdes with an Order to Show Cause ("OSC"). The OSC stated that Rivera-Valdes would be subsequently notified of the date, time, and place of the hearing which would determine if he was deportable. It stated that the hearing would be calendared and notice would be mailed to the address he had last provided on his asylum application. The OSC further explained that he must inform the agency of any change of address and that if he failed to appear at his hearing after receiving written notice of the date, time, and location of the hearing, the immigra-

tion judge could order him deported in absentia. The OSC listed Rivera-Valdes's address as 4037 N. Cleveland, Portland, OR, 97212, omitting "Ave." from the address Rivera-Valdes had provided the agency. Rivera-Valdes does not dispute that the OSC was read to him in his native language of Spanish.

On April 20, 1994, the INS filed the OSC with the Immigration Court and moved to schedule the case for a hearing. A copy of the OSC was sent by regular mail to 4037 N. Cleveland, Portland, OR 97212, and was returned as "not deliverable as addressed unable to forward" by the postal service. On April 25, 1994, the Immigration Court sent a notice of hearing by certified mail to 4037 N. Cleveland, Portland, OR 97212, providing the date, time, and location of the hearing. The hearing notice was stamped "returned to sender" and "UNCLAIMED."[1] The word "Ave." was omitted from both unsuccessful mailings. The notice of hearing was sent only once, by certified mail. The INS took no other steps to notify Rivera-Valdes of the date, time, and location of his removal hearing.

Four months later, in August 1994, the Immigration Court held a removal hearing and ordered Rivera-Valdes deported in absentia.[2] The record does not indicate whether the INS informed the Immigration Court that the mailings had gone unclaimed, though it is uncontested that the INS received the returned, unclaimed notice of hearing. Rivera-Valdes was removed in 2006.

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[1] Rivera-Valdes contends this means the addressee abandoned or failed to call for mail.

[2] At the time of the hearing, both the INS and the Immigration Court were within the Department of Justice. *See About the Office*, U.S. Dep't Just., https://perma.cc/EGH6-YU53.

He later returned to the United States and, in 2019, was detained under the 1994 removal order and charged with one count of illegal reentry under 8 U.S.C. § 1326(a).

Rivera-Valdes conditionally pled guilty to illegal reentry, and moved to dismiss the indictment, asserting that the underlying removal order was invalid because he had not received adequate notice of the removal hearing. *See id.* § 1326(d). The district court, reaching only the due process challenge, held that the removal order was valid and denied the motion to dismiss. The district court reasoned that the Government's notice of hearing was "reasonably calculated" to reach Rivera-Valdes when it was sent by certified mail to the last known address listed on his asylum application. The district court observed that Rivera-Valdes was not entitled to actual notice of his hearing and that he had been warned of his obligation to apprise the agency of any change of address. The district court rejected Rivera-Valdes's contention that the address listed on the notice of hearing did not exist, noting that he had previously received mail from the Government at that address. The district court did not address the omission of the word "Ave." from the Cleveland Avenue address or the agency learning that the certified mailing of the hearing notice had gone unclaimed.

Rivera-Valdes timely appealed. A divided three-judge panel of our court held that *Jones* did not apply in the context of immigration proceedings and affirmed the district court's decision. *See United States v. Rivera-Valdes*, 105 F.4th 1118 (9th Cir. 2024) (per curiam), *reh'g en banc granted*, 125 F.4th 991 (9th Cir. 2025). Upon the vote of a majority of non-recused active judges, we

granted rehearing en banc and vacated the three-judge panel decision.

II.

A defendant may collaterally attack the removal order underlying an indictment under 8 U.S.C. § 1326 by arguing that the proceeding which produced the order violated his Fifth Amendment right to due process. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987); *see also United States v. Melendez-Castro*, 671 F.3d 950, 953 (9th Cir. 2012). To prevail, a defendant must show that (1) he exhausted administrative remedies for the removal order, (2) the deportation proceedings improperly deprived him of an opportunity for non-administrative judicial review, and (3) the removal order was fundamentally unfair. 8 U.S.C. § 1326(d); *see also United States v. Palomar-Santiago*, 593 U.S. 321, 324-25 (2021). An underlying removal order is fundamentally unfair if the defendant's due process rights were violated in the removal proceeding and the defendant suffered prejudice as a result. *United States v. Martinez*, 786 F.3d 1227, 1230 (9th Cir. 2015). We have jurisdiction under 28 U.S.C. § 1291. "We review de novo the denial of a motion to dismiss an indictment under 8 U.S.C. § 1326 when the motion is based on alleged due process defects in an underlying deportation proceeding." *Martinez*, 786 F.3d at 1229-30 (quoting *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1201 (9th Cir. 2014)).

Rivera-Valdes contends that his right to due process was violated in the underlying removal proceeding because the agency did not use means reasonably calculated to notify him of his hearing when it sent notice of his hearing by certified mail, learned the notice had gone unclaimed, and took no additional reasonable steps

to effectuate notice. Rivera-Valdes further asserts that the Supreme Court's decision in *Jones* is controlling and that the district court erred when it relied on pre-*Jones* circuit authority that did not address the Government's due process obligations when it becomes aware that mailed notice has been returned unclaimed.

The Government does not meaningfully dispute Rivera-Valdes's factual assertions nor his constitutional right to reasonably calculated notice. Instead, the Government contends that *Jones*'s "additional reasonable steps" requirement does not apply in the context of immigration removal proceedings. The Government further argues that even if *Jones* does apply to immigration removal proceedings, sending notice to Rivera-Valdes by certified mail was sufficient for various reasons discussed below. In short, the parties dispute whether notice was reasonably calculated under the circumstances presented here.[3]

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[3] Although Rivera-Valdes did not cite *Jones* in his motion to dismiss, the parties agree that he did not forfeit his due process claim on appeal. "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration in original) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *see also Singh v. Garland*, 118 F.4th 1150, 1165 (9th Cir. 2024) ("[T]he court is not limited to the particular legal theories advanced by the parties, [and] retains the independent power to identify and apply the proper construction of governing law." (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991))). Because Rivera-Valdes challenged whether the notice of hearing was "reasonably calculated" to reach him in accordance with his due process rights, and the district court addressed and denied the substance of his due process claim, his challenge has been preserved for our review.

A.

We begin with foundational precedent. In *Mullane*, the Supreme Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. Therefore, "[t]he means employed [to provide such notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. In assessing the adequacy of a given form of notice, we must also balance the "interest of the State" against "the individual interest sought to be protected . . . ." *Id.* at 314.

In a series of cases following *Mullane*, the Court elaborated on the principle that "notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). In *Walker*, the Court explained that because it is impossible to establish a "rigid formula" for the type of notice that must be given, the "notice required will vary with circumstances and conditions." *Id.* The Court held that a notice of condemnation published in a local newspaper fell "short of the requirements of due process" in circumstances where the interested landowner's name and information were known to city officials and notice by mail to him was reasonable. *Id.* at 116.

That same year, the Court held in *Covey v. Town of Somers* that notice of a tax foreclosure by mailing, posting, and publication was inadequate where town officials

were aware that the property owner was not competent to manage her own affairs and lacked a guardian to protect her. 351 U.S. 141, 146-47 (1956). Then, in *Robinson v. Hanrahan*, the Court held that notice of a forfeiture proceeding mailed to a vehicle owner's home address was not reasonably calculated where the state knew that the owner was in jail and unlikely to receive it. 409 U.S. 38, 40 (1972) (per curiam).

Finally, in *Greene v. Lindsey*, the Court held that eviction notices posted on tenants' doorways in a multi-tenant building were constitutionally deficient where process servers knew that the notices were being torn down by children and others. 456 U.S. 444, 453-56 (1982). *Greene* explained that "[t]he sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests." *Id.* at 451. Whatever the efficacy of posting notice in other cases, the Court concluded that the "State's continued exclusive reliance on an ineffective means of service is not notice 'reasonably calculated to reach those who could easily be informed by other means at hand.'" *Id.* at 455-56 (quoting *Mullane*, 339 U.S. at 319).

As the Supreme Court's application of *Mullane* across many cases reflects, whether notice is reasonably calculated "will vary with [the] circumstances and conditions" of a particular case, *Walker*, 352 U.S. at 115, and notice "require[s] the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case," *Jones*, 547 U.S. at 230. The Government need not provide actual notice to satisfy due process. *See Dusenbery v. United States*, 534 U.S. 161, 170 (2002). But adequate notice requires

something more than employing means that knowingly result in a failure to provide notice—as *Jones* elaborated upon.

In *Jones*, the Arkansas Commissioner of State Lands sent two notices to Gary Jones by certified mail that his property taxes were delinquent and that, unless Jones redeemed the property, it would be subject to public sale. 547 U.S. at 223-24. Both certified letters were sent to the address registered by Jones and both mailings were returned "unclaimed." *Id.* at 224. The Commissioner took no further steps to notify Jones of the impending foreclosure. *Id.* at 229. A few weeks before the foreclosure sale, the Commissioner also published a notice of public sale in the newspaper. *Id.* at 224. The home was sold to respondent Linda Flowers at a fraction of its fair market value. *Id.* Following the sale, Jones sued the Commissioner and Flowers in state court, asserting that the Commissioner's failure to provide notice of the tax sale and resulting loss of his property was a due process violation. *Id.* The Arkansas Supreme Court affirmed the trial court's grant of summary judgment in favor of Flowers and the Commissioner, holding that attempting to provide notice by certified mail satisfied due process under the circumstances. *Id.* at 225.

The Supreme Court reversed and held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* Applying *Mullane*'s admonition that the means "must be such as one desirous of actually informing the absentee might reasonably adopt," *id.* at 229 (quoting *Mullane*, 339 U.S. at 315), the Court reasoned that "a person who actually

desired to inform" another would not "do *nothing* when a certified letter . . . is returned unclaimed." *Id.* (emphasis added). *Jones* clarified that one of "the circumstances" relevant to determining whether notice was "reasonably calculated" is whether "the government becomes aware . . . that its attempt at notice has failed." *Id.* at 226-27. When the Government has actual knowledge that notice was not effective, it "must take additional reasonable steps to attempt to provide notice . . . if it is practicable to do so." *Id.* at 225; *see id.* at 230 ("[T]he government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice.").

B.

We have applied the *Mullane-Jones* due process analysis to evaluate the adequacy of notice in a variety of contexts. *See, e.g.*, *Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941, 946 (9th Cir. 2006) (pilot license suspension proceedings); *J.B. v. United States*, 916 F.3d 1161, 1173-74 (9th Cir. 2019) (subpoena of tax records); *Grimm v. City of Portland* (*Grimm I*), 971 F.3d 1060, 1068 (9th Cir. 2020) (municipal vehicle towing action); *Taylor v. Yee* (*Taylor V*), 780 F.3d 928, 935-38 (9th Cir. 2015) (state unclaimed property act procedures).

In *Yi Tu*, for example, we considered the notice afforded a pilot who faced Federal Aviation Administration ("FAA") license suspension for "'buzzing' (flying below proscribed minimum safe altitudes)" over Mount Rushmore. 470 F.3d at 943. After the pilot opted for an immediate suspension of his license so that he could appeal the agency's decision, the FAA sent the suspension orders and notices of appeal to him only by certified

mail. *Id.* at 944. The suspension orders were returned "unclaimed," causing the pilot to miss the deadline in which to appeal the agency's decision. *Id.* Applying *Jones*, we held that the FAA provided constitutionally deficient notice of the pilot license suspension orders. *Id.* at 946. The FAA's notice was not "reasonably calculated" to reach the pilot because the FAA knew that its two previous certified mailings had been returned "unclaimed," and yet the agency failed to take additional reasonable steps to notify the pilot of the suspension orders. *Id.* We observed that six weeks after the pilot's suspension, the FAA reverted to sending letters demanding the surrender of his pilot's license by both certified mail and first-class mail, demonstrating the feasibility of first-class mail. *Id.* We noted that when the agency actually desired to inform the pilot, it resorted to regular mail as an additional method of service. *Id.*

Several of our sister circuits have also applied the *Mullane-Jones* framework to evaluate the adequacy of notice in a variety of legal proceedings. *See, e.g.*, *Luessenhop v. Clinton Cnty.*, 466 F.3d 259, 268-72 (2d Cir. 2006) (property foreclosure); *Peralta-Cabrera v. Gonzales*, 501 F.3d 837, 845 (7th Cir. 2007) (removal proceedings); *García-Rubiera v. Fortuño*, 665 F.3d 261, 276 (1st Cir. 2011) (compulsory motor vehicle insurance reimbursement scheme); *Linn Farms & Timber Ltd. P'ship v. Union Pac. R.R. Co.*, 661 F.3d 354, 358-59 (8th Cir. 2011) (mineral rights forfeiture proceedings); *Echavarria v. Pitts*, 641 F.3d 92, 94-95 (5th Cir. 2011) (Department of Homeland Security ("DHS") action), *as revised* (June 21, 2011); *Lampe v. Kash*, 735 F.3d 942, 943-44 (6th Cir. 2013) (bankruptcy action); *Yang v. City of Wyoming*, 793 F.3d 599, 603 (6th Cir. 2015) (Section 1983 action involving building demolition); *D.R.T.G. Builders, LLC v.*

Occupational Safety & Health Rev. Comm'n, 26 F.4th 306, 311 (5th Cir. 2022) (Occupational Safety and Health Administration ("OSHA") action).

For example, in *Echavarria*, the Fifth Circuit held that due process required the DHS to take "additional reasonable steps" to notify a certified class of bond obligors that their cash bonds (posted to secure the release of detained noncitizens) were in breach after the agency learned that the bond demands sent by certified mail were returned as undeliverable. 641 F.3d at 93-95. In so concluding, the Fifth Circuit rejected the Government's argument that *Jones* should not apply in the immigration bond context, explaining that *Jones* stands for the "general principle of requiring additional reasonable steps when the sender knows that notice was not received . . . ." *Id.* at 95; *see also D.R.T.G. Builders*, 26 F.4th at 311 (concluding OSHA "took steps that were reasonably calculated" under *Jones* to provide petitioner notice of a workplace safety citation when it sent additional mailings after discovering its certified mail attempts had failed).

As the foregoing authorities make clear, the due process principles enshrined in *Mullane* and *Jones* apply generally across many legal proceedings and are not limited to tax foreclosure sales or only certain government actions. That is, whenever "notice is a person's due," *Mullane*, 339 U.S. at 315, the Due Process Clause requires that "notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests," *Walker*, 352 U.S. at 115. Under *Jones*, "knowledge on the government's part is a 'circumstance and condition' that varies the 'notice required.'" 547 U.S. at 227. As we

explain next, these due process principles apply with equal force in the context of immigration removal proceedings.

C.

We have repeatedly reaffirmed that "[t]he Due Process Clause protects aliens in deportation proceedings and includes the right to a full and fair hearing as well as notice of that hearing." *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (first citing U.S. Const. amend. V; and then citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)); *see also Dobrota v. INS*, 311 F.3d 1206, 1210 (9th Cir. 2002) ("Aliens facing deportation are entitled to due process under the Fifth Amendment . . . encompassing a full and fair hearing and notice of that hearing."); *Barraza Rivera v. INS*, 913 F.2d 1443, 1447 (9th Cir. 1990) ("The Fifth Amendment guarantees due process in deportation proceedings."); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) (accord). And, indeed, the Government agreed at oral argument that the Due Process Clause applies to everyone who is physically present within the sovereign territory of the United States.

Noncitizens are entitled to due process protections regardless of whether their presence in this country is lawful. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth . . . Amendment[]."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S.

206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that noncitizens "alleged to be illegally here" are still protected by due process of law). And the stakes for an individual subject to removal are no less severe than other legal proceedings. *See Niz-Chavez v. Garland*, 593 U.S. 155, 163-64 (2021) ("A notice to appear serves as the basis for commencing a grave legal proceeding. . . . [I]t is 'like an indictment in a criminal case [or] a complaint in a civil case.'" (citation omitted)).

In the context of a criminal prosecution for illegal reentry, criminal defendants are also entitled to a meaningful opportunity for judicial review of the underlying removal order, including an examination of whether the prior removal proceedings comported with due process. *See* 8 U.S.C. § 1326 (permitting a collateral challenge to underlying removal order); *see also Mendoza-Lopez*, 481 U.S. at 839; *Melendez-Castro*, 671 F.3d at 954-55 (holding that a defect in defendant's removal proceedings violated his right to due process and required the district court to determine if he suffered prejudice); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004) ("In a criminal prosecution under § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation." (quoting *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998))).

While no published Ninth Circuit decision has squarely applied *Jones* in the context of a removal proceeding, we have repeatedly suggested that *Jones* provides the cor-

rect framework to analyze due process claims in this context. In *Chaidez v. Gonzales*, for example, we considered whether a notice of hearing sent by certified mail was adequate when it was signed by an unknown person at that address rather than the person subject to removal. 486 F.3d 1079, 1081 (9th Cir. 2007). Citing *Jones*, we observed that the agency's policy of permitting any person at the noncitizen's address to sign a certified mailing could raise due process concerns. *See id.* at 1086 n.8. We avoided the question, however, after determining that the Government's notice efforts failed to meet even statutory requirements. *See id.* at 1086-87 & n.8.

Likewise, in *Al Mutarreb v. Holder*, we cited *Jones* when considering the adequacy of a notice to appear for removal proceedings. 561 F.3d 1023, 1027 (9th Cir. 2009). There, the agency sent notice by certified mail, the notice was returned to the agency unclaimed, and the agency took no further steps to notify Al Mutarreb or his counsel of record. *See id.* at 1027-28 (citing *Jones*, 547 U.S. at 225). We again avoided the constitutional question—whether the agency's failure to take additional reasonable steps to effectuate notice violated due process—after concluding that the removal order was invalid on other grounds. *Id.* at 1028; *see also Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008) (clarifying that *Mullane-Jones* "provide[s] the 'appropriate analytical framework' for considering the adequacy of notice" in the context of an immigrant petitioner's motion to reopen before the Board of Immigration Appeals (quoting *Dusenbery*, 534 U.S. at 167)).

Today we make explicit what has been implied in our prior case law. We hold that the notice afforded to

noncitizens subject to removal is governed by the due process standards articulated in *Mullane* and *Jones*. Notice by the Government must be reasonably calculated to apprise noncitizens of the pendency of removal proceedings and to afford them the opportunity to be present and to participate. *Jones*, 547 U.S. at 226. "The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane*, 339 U.S. at 314 (internal citations omitted). Where the Government learns that its notice efforts have not succeeded, that knowledge triggers an obligation on the Government's part to take additional reasonable steps to effect notice, if it is practicable to do so. *Jones*, 547 U.S. at 234. Notice is not "reasonably calculated" under the circumstances when the Government knows its method of service was ineffective and takes no additional steps to effect notice that are reasonably available to it. *Id.* at 227, 229.

III.

All eleven members of this panel agree that the due process principles of *Mullane* and *Jones* apply to immigration removal proceedings. The Government contends, however, that even if *Jones* applies to such proceedings, its notice to Rivera-Valdes satisfied due process for three reasons. First, it argues that because the agency met statutory notice requirements, it necessarily satisfied constitutional requirements as well. Second, it argues that Rivera-Valdes was afforded due process because he was made aware of the forthcoming deportation proceedings when he was personally served with the OSC. Finally, the Government argues that Rivera-Valdes forfeited any due process claim when he

failed to update his address with the agency. We address each contention in turn.

A.

First, the Government contends that by fulfilling its statutory notice obligations imposed by the Immigration and Nationality Act ("INA"), it necessarily satisfied its constitutional due process obligations to Rivera-Valdes. This argument is foreclosed by *Jones*. In 1994, the operative provision of the INA required that the Government prove "by clear, unequivocal, and convincing evidence" that "written notice" was "provided to the alien or the alien's counsel of record" before an immigration judge could order removal in absentia.[4] 8 U.S.C. § 1252b(c)(1) (repealed 1996). At the time, section 1252b(a)(2)(A) specified that written notice of deportation proceedings "shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise, of . . . the time and place at which the proceedings will be held." The term "certified mail" was defined as "certified mail, return receipt requested." *Id.* § 1252b(f)(1). The Government asserts that its compliance with these statutory requirements necessarily satisfied its due process obligations to Rivera-Valdes.

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[4] Under the 1994 statutory regime, notice by certified mail created a presumption in the Government's favor of effective service, which a petitioner could rebut by showing (i) that their mailing address had not changed; (ii) that neither the petitioner or a "responsible party working or residing at that address refused service"; and (iii) that there was "nondelivery or improper delivery by the Postal Service." *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997).

As *Jones* makes clear, however, compliance with statutory notice requirements does not resolve whether notice is reasonably calculated under the "practicalities and peculiarities of [an individual] case." 547 U.S. at 230-31 (quoting *Mullane*, 339 U.S. at 314-15). Even when a statute imposes requirements that are "reasonably calculated" to provide notice in the usual circumstance, notice may not satisfy due process in a particular case. *Id.* at 231-32. Although the Commissioner in *Jones* complied with state law by sending notice of Jones's tax delinquency to him by certified mail, *id.* at 224-25, doing so did not insulate the Commissioner against claims that the notice of foreclosure to Jones was constitutionally inadequate. *Id.* at 231-32. Rather, the Supreme Court emphasized that the "government [is required] to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Id.* at 230.

Similarly, in *Yi Tu*, we rejected the FAA's argument that because it was statutorily authorized to give notice of license suspension proceedings by certified mail, its notice to the pilot necessarily satisfied due process. 470 F.3d at 945-46. We concluded that "[a] reasonable agency actually desirous of notifying an individual of his right to be heard would not resort to a 'mechanical adherence' to the minimum form of notice authorized by regulation in the very instance when timely notice is most crucial." *Id.* at 946 (quoting *Dobrota*, 311 F.3d at 1213). That the FAA complied with its statutory obligation to deliver notice by certified mail did not immunize the agency from the claim that its notice failed to satisfy due process under the particular circumstances of that case. *See id.*

B.

Second, the Government contends that Rivera-Valdes was afforded due process because he was personally served with an OSC advising him to expect a subsequent hearing notice. Our dissenting colleague places great emphasis on this point, noting that "Rivera-Valdes had received recent *actual* notice of his deportation proceedings through personal service of the OSC, which was written and read to him in his primary language of Spanish." Diss. at 40. According to the dissent, neither *Mullane* nor any of the cases before it has held that notice must contain the specific date, time, and location of a forthcoming hearing for due process to be satisfied. Diss. at 44. Because Rivera-Valdes knew from the OSC that a deportation proceeding had been commenced against him, and the INS ultimately did send him notice by certified mail of the date, time, and location of his hearing (albeit unsuccessfully), the dissent and the Government contend that Rivera-Valdes was afforded constitutionally adequate notice. We disagree.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Greene*, 456 U.S. at 449 (quoting *Mullane*, 339 U.S. at 314). For that reason, "notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane*, 339 U.S. at 314 (internal citations omitted). Here, the relevant question is whether personal service of the OSC on Rivera-Valdes conveyed the "required in-

formation" which would "afford [him] an opportunity" to appear at his removal hearing and "present [his] objections." *Id.* It did not.

It is true, as our dissenting colleague observes, that Rivera-Valdes learned from the OSC that a deportation hearing would be forthcoming. But notice conveying that a deportation hearing may be scheduled at some unknown point in the future—without specifying the date, time, or location—hardly afforded Rivera-Valdes the opportunity to appear and be heard. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971). But, as *Mullane* cautions, "when notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 315.[5]

Our dissenting colleague relies on the notion that Rivera-Valdes received "actual notice to expect notice of his deportation hearing." Diss. at 42-43. But the Supreme Court in *Jones* rejected the argument that an individual having "inquiry notice" of a potential proceeding relieves a governmental entity of its constitutional obligations. *See* 547 U.S. at 232 ("[T]he common knowledge that property may become subject to govern-

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[5] Indeed, under the statutory regime that applied at the time of Rivera-Valdes's removal, personal service of the OSC only advised Rivera-Valdes that a deportation hearing *might* be scheduled. Service of the OSC did not itself trigger the scheduling of a hearing. *See* 8 U.S.C. § 1252b(a)(1)-(2). Both the INS and the Immigration Court were required to take additional steps for that to occur. *See* 8 C.F.R. § 3.14(a) (1994) (explaining that jurisdiction vests with the Immigration Court upon filing and service of a noticed motion to schedule deportation hearing); *id.* § 3.18 (explaining the Immigration Court's obligation to schedule hearing and send notice to the government and respondent).

ment taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property.").

We have similarly rejected the notion that notice of earlier steps in a proceeding lessens the need to provide constitutionally adequate notice at later steps in a proceeding. In *Yi Tu*, not only was the pilot aware of the license suspension proceedings against him, he had participated in the earlier stages of those proceedings. *See* 470 F.3d at 944. In fact, the FAA sent nine mailings regarding these proceedings, and the pilot received at least four of them. *See id.* at 943-44. Nevertheless, the failure of the FAA to provide the pilot with adequate notice of the order of suspension violated his due process rights. *See id.* at 945-46. Similarly, Rivera-Valdes did not receive constitutionally adequate notice simply by being personally served with the OSC.

C.

Finally, the Government contends that Rivera-Valdes forfeited his due process claim when he failed to update his address with the agency. As we discuss below, the Government relies on a premise not established by the record. It is not at all clear that Rivera-Valdes had moved. But even if he had, *Jones* disposes of the Government's contention. Again, the Court explained that "Jones' failure to comply with a statutory obligation to keep his address updated [did not] forfeit[] his right to constitutionally sufficient notice." 547 U.S. at 232. So too here with Rivera-Valdes.[6]

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[6] The dissent asserts that this case is distinguishable from *Jones*, *Robinson*, and *Covey*, speculating—with no support from the record—that unlike the individuals in those cases who had "every incen-

IV.

It is undisputed that in response to the returned, unclaimed notice of hearing, the Government did nothing. Under *Jones*, the appropriate remedy is to remand to allow the district court to determine if the agency had other practicable alternatives through which to attempt notice on Rivera-Valdes. 547 U.S. at 234; *see also Echavarria*, 641 F.3d at 95.

This is a quintessential factual inquiry best left to the district court to undertake in the first instance. In *Jones*, the Court described other reasonable measures the Government could have taken to effect notice, but cautioned that "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt." 547 U.S. at 234 (alterations in original). Guided by this approach, we outline possible alternatives the district court may consider on remand.

One alternative is to consider whether the address in the A-file[7] matched the address to which the Government sent the notice of hearing by certified mail. The record indicates that, when the approval of Rivera-Valdes's employment authorization application was sent

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tive to learn" of their proceedings, Rivera-Valdes was incentivized to "avoid his deportation proceeding, and to ignore or fail to claim mail." Diss. at 50 n.15. Even were this true, the dissent has not explained why Rivera-Valdes's motives would diminish his due process right to notice reasonably calculated to reach him. As *Jones* confirms, whatever the failings of the interested party, the relevant due process inquiry is whether government knowledge that notice has failed should obligate it to take additional steps to effect notice when it is practicable to do so. *See* 547 U.S. at 234.

[7] An "A-file" is the file DHS keeps on the deportable noncitizen. *See Echavarria*, 641 F.3d at 96 n.3.

to the Cleveland address that included "Ave.," he showed up to retrieve his authorization papers. It was only after subsequent mailings were sent without the word "Ave." in the Cleveland address that the OSC and notice of hearing were returned as "not deliverable as addressed" and "unclaimed." The district court should consider if any discrepancy in the addresses was a basis for the unsuccessful mailings, and if so, whether the Government could have taken additional steps to correct it.

The dissent concludes that remand is unnecessary because Rivera-Valdes "confirmed" or "corroborated" that the address listed on the OSC—which omitted the word "Ave."—was his current address. *See, e.g.*, Diss. at 41. But the dissent misreads what the OSC actually states. The OSC did not prompt Rivera-Valdes to confirm the *accuracy* of the OSC. Rather, the OSC's signature line prompted Rivera-Valdes's "acknowledgment/receipt of this form." This stands in contrast, for example, to the signature line in Rivera-Valdes's application for employment authorization, which required that the signer "certify under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct." In that document, Rivera-Valdes listed his N. Cleveland address *with* the word "Ave."

This discrepancy between the addresses in the record warrants remand to the district court for further factual development. The Fifth Circuit took a similar approach in *Echavarria*, holding that the district court did not err in finding that "the reasonable steps available to DHS included reference to . . . the A-file of the bonded immigrant for alternate contact information."

641 F.3d at 96 (footnote omitted). *Echavarria* observed that "[t]he A-file is readily accessible to DHS. When the government can attempt to ascertain the necessary information through such minimal effort, it is incumbent on the government to do so." *Id.*

Another alternative for the district court to consider may be whether sending the notice of hearing by first-class mail was a feasible option. In *Yi Tu*, we observed that first-class mail may be a reasonably calculated alternative because it can "be examined at the end of the day, [whereas certified mail] can only be retrieved from the post office for a specified period of time." 470 F.3d at 943 n.1 (quoting *Jones*, 547 U.S. at 235); *see id.* at 945 ("[W]here mailed notice is returned unclaimed, the government must take additional steps to [e]nsure notice, if it is practicable to do so."). These suggestions are not exhaustive, and we leave it to the parties to suggest whether other reasonable alternatives were available to the agency.

Even if Rivera-Valdes establishes a due process violation, that is not the end of the district court's inquiry. Rivera-Valdes must demonstrate that he is entitled to relief under the other prongs of collateral attack: prejudice, administrative exhaustion, and deprivation of judicial review. *See* 8 U.S.C. § 1326(d); *Martinez*, 786 F.3d at 1230. The district court left these questions undecided, and we decline to consider them in the first instance.

V.

Under *Mullane* and *Jones*, due process requires that the notice afforded to individuals subject to immigration removal proceedings must be reasonably calculated to inform them of the pendency of the proceedings and a

meaningful opportunity to appear and to contest the charges. When the Government learned that its only attempt to notify Rivera-Valdes of the date, time, and location of his removal hearing had failed, it was not enough for the Government to throw up its hands and do nothing. The Government was obligated to take additional reasonable steps to effect notice, provided it was practicable to do so. *See Jones*, 547 U.S. at 234. We therefore vacate the district court's judgment and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

BENNETT, Circuit Judge, dissenting, with whom CALLAHAN and IKUTA, Circuit Judges, join, and with whom MILLER and FORREST, Circuit Judges, join as to Parts III.B and IV only:

This case concerns whether the government provided Leopoldo Rivera-Valdes with constitutionally adequate notice of his deportation proceedings in 1994. The Immigration and Naturalization Service ("INS" or "agency") served him with an Order to Show Cause ("OSC"), informed him in person of an upcoming deportation hearing, confirmed his current address, instructed him to notify the immigration court within five days of an address change, served him via regular mail the motion to schedule a hearing, and sent him via certified mail a notice that his hearing had been in fact scheduled.

First, on these facts, the Constitution required nothing more. Second, even after the mailed notices were returned, there were no further "additional reasonable steps" that the government was constitutionally required to undertake. Third, Rivera-Valdes cannot meet his burden of showing a due process violation or resulting prejudice, which is required under 8 U.S.C. § 1326(d) for collateral attacks on removal orders. Because each of these three reasons independently precludes Rivera-Valdes's challenge to his indictment, I respectfully dissent.

I.

On March 3, 1994, Rivera-Valdes, a citizen of Mexico, appeared at an INS office to collect his work permit after filing an application for asylum. His application falsely stated that he was a citizen of Guatemala who

feared persecution by guerrillas,[1] but it listed an address at which he was capable of receiving mail.[2] The INS had mailed Rivera-Valdes notices to that address about the receipt of his asylum application, and his grant of work authorization. As instructed by those mailed notices, Rivera-Valdes arrived at the INS office to pick up his employment authorization document. He presented a false Guatemalan birth certificate as proof of identity. When confronted with that falsity, Rivera-Valdes admitted to the fraud[3] and withdrew his asylum application. INS officials personally served him with an OSC.

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[1] The application falsely states, for example:

> I am seeking political asylum due to the fact that when I was 13 the guerrillas forced me to join their group. I didn't realy [sic] understand what was going on but when I realized that they were bad, I tried very hard to escape. My (2) brothers who were also guerrillas were killed, by the military soldiers. I got away, and fled to the United States. . . . I know that the guerrillas would hunt me down and kill me because I abandoned them. . . . I fear very much for my life. Please assist me to get political asylum.

[2] The asylum application uses "Clevenland" in the street name, while other documents in the record use "Cleveland." As the government notes, Rivera-Valdes has not argued below or on appeal that there is a material distinction between the two. Thus, like the majority, I treat it as a single address. *See* Maj. at 7.

[3] The INS Special Agent documented the encounter as follows:

> 1. Subject was encountered this date [March 3, 1994] when he appeared at the Portland Exams Office and presented a false Guatemalan Birth Cert. as proof of identity in order to pick up his EAD [(Employment Authorization Document)].
> 2. Subject freely admitted to being a native and citizen of Mexico who last entered the U.S. as stated above [in February 1993, near Nogales, Arizona, without inspection].

The OSC was written in English and Spanish and read to him in Spanish, his primary language. It stated in English that his deportation hearing would be held at a date "to be calendared and notice provided by the Office of the Immigration Judge," which was translated in Spanish as: "the Office of the Immigration Judge will mail a notice to the address provided by respondent with the date of the hearing."[4] The OSC instructed:

> You are required by law to provide immediately in writing an address (and telephone number, if any) where you can be contacted. You are required to provide written notice, within five (5) days, of any change in your address or telephone number to the office of the Immigration Judge listed in this notice. Any notices will be mailed only to the last address provided by you.

The OSC did not list a telephone number. But Rivera-Valdes confirmed that he could be contacted at the following address, as typewritten on the OSC:

> 4037 N Cleveland
> Portland, Oregon 97212

Rivera-Valdes signed the OSC and provided his right thumbprint. The OSC also stated:

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3. Subject claims that he purchased the false Guat. Birth Cert. and the political asylum paperwork from a man named "Juan" who lives in an apartment on Williams St. in Portland. Claims further that he paid $200 for the [birth certificate]/ paperwork.

[4] The original Spanish text reads: "La Oficina del juez de inmigracion enviara un aviso a la direccion facilitada por demandado con la fecha de la Audiencia." The above English translation is based on how the OSC translates identical terms elsewhere.

> [Y]ou will be ordered deported *in your absence*, if it is established that you are deportable and you have been provided the appropriate notice of the hearing. . . . If you are ordered deported *in your absence*, you cannot seek to have that order rescinded except that: (a) you may file a motion to reopen the hearing within 180 days after the date of the order if you are able to show that your failure to appear was because of exceptional circumstances, or (b) you may file a motion to reopen at any time after the date of the order if you can show that you did not receive written notice of your hearing and you had provided your address and telephone number (or any changes of your address or telephone number) as required . . . .

The OSC is attached as an appendix.

Two notices were mailed to the address confirmed by Rivera-Valdes on the OSC. On April 20, 1994, after filing the OSC with the immigration court and moving to schedule the case for a hearing, the government mailed via regular mail a copy of the scheduling motion[5] to the address listed on the OSC:

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[5] The Certificate of Service was signed by an INS legal technician, and stated:

> I certify that I served this motion on Respondent by sending a true copy to him, along with a copy of the legal aid list for Oregon and Form I-618, by regular mail, postage prepaid to the following address:
>
> Leopoldo RIVERA-Valdes
> 4037 N Cleveland
> Portland OR 97212

Leopoldo Rivera-Valdes
4037 N Cleveland
Portland OR 97212

This notice was returned as "Not Deliverable As Addressed[,] Unable to Forward." On April 25, 1994, once the hearing had been scheduled, the government mailed via certified mail a deportation hearing notice, providing the time and place of the hearing. The certified mail was addressed to:

RIVERA-VALDES, LEOPOLDO
4037 N CLEVELAND
PORTLAND OR 97212

This notice was "Returned to Sender" as "Unclaimed."[6]

On August 12, 1994, the immigration court held the hearing and ordered Rivera-Valdes deported in absentia. Rivera-Valdes was not apprehended and deported until 2006.

At some point following his deportation, Rivera-Valdes returned to the United States. In 2019, he was indicted on one count of illegal reentry. Rivera-Valdes moved to dismiss the indictment, collaterally attacking his 1994 deportation order. In a 2020 declaration, Rivera-Valdes stated that "[i]n 1994, [he] was never informed that any deportation hearing had been scheduled on [his] behalf" and that he "never received notice that [his] deportation hearing had been scheduled for August 12, 1994." His declaration did not state where

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[6] As the majority notes, Rivera-Valdes concedes that according to the U.S. Postal Service, "unclaimed" means the addressee abandoned or failed to call for the mail. Maj. at 8 n.1.

he was living in 1994 or whether 4037 N Cleveland, Portland OR 97212 was his address at any relevant time.

In denying the motion to dismiss the indictment, the district court found that Rivera-Valdes "failed to provide *any* compelling evidence that notice of his removal hearing was not 'reasonably calculated' to reach him" and thus failed to meet his burden of showing a due process violation (emphasis added).[7]

II.

I agree with the majority that "the due process principles" of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Jones v. Flowers*, 547 U.S. 220 (2006), "apply generally across many legal proceedings," including "immigration removal proceedings." Maj. at 17; *see also* Maj. at 21. But in evaluating the notice afforded to Rivera-Valdes of his deportation proceedings, the majority fails to undertake the inquiry required under the *Mullane-Jones* framework. Instead, the majority holds that any time a mailed notice is returned, this "triggers an obligation on the Government's part to take additional reasonable steps to effect notice, if it is practicable to do so." Maj. at 6; *see also* Maj. at 14-15, 20-21. But this new and unjustified per se rule conflicts with the fact-specific and fact-dependent *Mullane-Jones* framework. A proper application of *Mullane-Jones* shows that the steps the government did

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[7] In a collateral attack on a removal order, "the defendant bears the burden of establishing both that the 'deportation proceeding violate[d] [his] due process rights' and that the violation caused prejudice." *United States v. Raya-Vaca*, 771 F.3d 1195, 1202 (9th Cir. 2014) (alterations in original) (quoting *United States v. Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994)), *abrogated in part on other grounds by DHS v. Thuraissigiam*, 591 U.S. 103 (2020).

take and the notice the government did provide were constitutionally adequate, which ends the due process inquiry.

A.

As the majority acknowledges, the governing framework for evaluating the adequacy of notice sets forth a fact-intensive, case-specific inquiry. Maj. at 12 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)). Due process challenges to the adequacy of notice are analyzed under *Mullane*. As explained by *Jones*, *Mullane* held that "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 314). The notice required must be "appropriate to the nature of the case," *id.* at 223 (quoting *Mullane*, 339 U.S. at 313), and "will vary with circumstances and conditions," *id.* at 227 (quoting *Walker*, 352 U.S. at 115). But even in *Jones*, the Court noted: "Due process does not require that a property owner receive actual notice before the government may take his property." *Id.* at 226.

Jones applies *Mullane*'s due process principles in the context of analyzing the notice required for the tax sale of real property. The State of Arkansas began tax delinquency proceedings against a house owned by Gary Jones. *Id.* at 223-25. Jones never received the certified letters sent by the State containing notice of his tax delinquency or notice of the "pendency of the action" against his property. *Id.* at 226. Those letters informed Jones that he had a right to redeem the property; that unless he redeemed the property, it would be subject to

public sale two years later; and that absent any bids in the public sale, the property would be privately sold by the State. *Id.* at 223-24.

The *Jones* Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225. The Court did not hold that any time mail is returned, due process always requires more, no matter what preceded the return. Rather, "[u]nder the circumstances presented" in Jones's tax sale case, the Court held that additional reasonable steps were required and "were available to the State." *Id.* These steps included "resend[ing] the notice by regular mail [instead of certified mail], so that a signature was not required"; "post[ing] notice on the front door"; and "address[ing] otherwise undeliverable mail to 'occupant.'" *Id.* at 234-35. But the State was not required to go so far as to "search[] for [Jones's] new address in the Little Rock phonebook and other government records such as income tax rolls." *Id.* at 235-36. The Court repeatedly cabined its holding to the facts of the case. *See, e.g.*, *id.* at 223 ("*Before a State may take property and sell it for unpaid taxes*, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'" (emphasis added) (quoting *Mullane*, 339 U.S. at 313)); *id.* ("We granted certiorari to determine whether, *when notice of a tax sale is mailed to the owner and returned undelivered*, the government must take additional reasonable steps to provide notice before taking the owner's property." (emphasis added)); *id.* at 227 ("[D]ue process requires the government to do something more *before real*

property may be sold in a tax sale." (emphasis added)); *id.* at 239 ("The Commissioner's effort to provide notice to Jones *of an impending tax sale of his house* was insufficient to satisfy due process *given the circumstances of this case*." (emphases added)).

The other cases cited in the majority's discussion of foundational precedent similarly apply *Mullane*'s due process principles to specific factual contexts. Maj. at 12-13 (citing *Walker*, 352 U.S. at 116 (holding publication notice of condemnation constitutionally deficient when the landowner's name was known to the city); *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956) (holding mailed notices of tax foreclosure constitutionally deficient when the property owner was known by the municipality to be mentally incompetent and without a guardian); *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (per curiam) (holding mailed notice of vehicle forfeiture proceedings constitutionally deficient when the car owner was known by the state to be in jail); *Greene v. Lindsey*, 456 U.S. 444, 453-55 (1982) (holding door-posted notice of eviction proceedings constitutionally deficient when process servers observed those postings "not infrequently" being torn down by children and others)).

As the majority recognizes, *Mullane-Jones* makes clear that across various factual contexts, due process does not require the government to effect *actual* notice. Maj. at 13. Rather, due process "requires only that the Government's effort be '*reasonably calculated*' to apprise a party of the pendency of the action." *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (emphasis added) (quoting *Mullane*, 339 U.S. at 315). And "[i]t is not [a court's] responsibility to prescribe the form of

service that the [government] should adopt." *Jones*, 547 U.S. at 234 (first and third alterations in original) (quoting *Greene*, 456 U.S. at 455 n.9). The government can "defend the 'reasonableness and hence the constitutional validity of any chosen method . . . on the ground that it is in itself reasonably certain to inform those affected.'" *Dusenbery*, 534 U.S. at 170 (omission in original) (quoting *Mullane*, 339 U.S. at 315).

B.

I begin with the fact-intensive inquiry required by *Mullane-Jones*. First, the government knew that Rivera-Valdes had recently provided knowingly false information in an attempt to avoid deportation. These actions were likely criminal.[8] The government knew Rivera-Valdes had received recent *actual* notice of his de-

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[8] *See* 18 U.S.C. § 1001(a) (making a felony "knowingly and willfully[] (1) falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device a material fact; (2) mak[ing] any materially false, fictitious, or fraudulent statement or representation; or (3) mak[ing] or us[ing] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" in "any matter within the jurisdiction of the executive ... branch of the Government of the United States"); *id.* § 1546(a) (making a felony "knowingly forg[ing], counterfeit[ing], alter[ing], or falsely mak[ing] any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utter[ing], us[ing], attempt[ing] to use, possess[ing], obtain[ing], accept[ing], or receiv[ing] any such ... document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained").

portation proceedings through personal service of the OSC, which was written and read to him in his primary language of Spanish. The mailed notices, including the notice providing the time and place of the hearing, were sent to the address printed on the OSC. Rivera-Valdes had confirmed this address to be correct *in person* at the INS office less than two months before the notices were mailed. He knew to expect mail about his deportation hearing at this address—having been specifically informed at the INS office, in written and spoken Spanish, that a notice would be mailed *to this address* with the date of the hearing. He promised to update the INS with any change in address within five days. And he acknowledged that any notices would be mailed only to the *last* address he provided.

The majority makes much of the fact that unlike the version of the address used on the earlier, successfully delivered mailings regarding his asylum application and work authorization, the version of the address on the OSC and subsequent returned mailings omitted "Ave." from the street name. But the version missing "Ave." is the *last* address Rivera-Valdes confirmed, while in person at the INS office. Again, that is the address Rivera-Valdes corroborated was his address, and the address he acknowledged was the precise address to which future mailings about his upcoming deportation hearing would be mailed. Although the majority asserts that "[t]he OSC . . . omitt[ed] 'Ave.' from the address Rivera-Valdes had provided the agency," Maj. at 7-8, Rivera-Valdes does not dispute that he confirmed the address as it was typewritten on the OSC. Below and on appeal, Rivera-Valdes has not discussed or even noted the omission of "Ave." from the version of his address printed on the OSC and the returned mailings. When

asked at oral argument whether "Ave." was a necessary part of the address, counsel for Rivera-Valdes answered, "I don't know." Oral Arg. at 18:37-19:22. In any case, this alleged discrepancy is not material to the relevant question here—whether Rivera-Valdes was provided the process due to him under the Fifth Amendment of the United States Constitution. Regardless of whether "Ave." should have been part of the addresses on the mailed notices, "mailed notice of petitioner's deportation hearing to the address given [by the petitioner as statutorily required[9]] . . . was reasonably calculated to ensure that notice reached the petitioner." *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997). And the return of the mailed notices occurred *after* Rivera-Valdes received actual notice of his impending deportation hearing. It is an important fact that the government knew that Rivera-Valdes had received actual notice.

In *Jones*, by contrast, the government knew that Jones never received actual notice of the impending tax

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[9] I do not argue that an intended recipient's "failure to comply with a statutory obligation to keep his address updated [per se] forfeits his right to constitutionally sufficient notice"—which *Jones* forecloses in the context of a tax sale. 547 U.S. at 232. Rather, as *Jones* makes clear, both the government and the intended recipient's compliance or noncompliance with statutory notice obligations, even in a tax sale case, are facts to be considered in the case-specific *Mullane-Jones* inquiry. *See id.* ("Ark. Code Ann. § 26-35-705 provides strong support for the Commissioner's argument that mailing a certified letter to Jones at 717 North Bryan Street was reasonably calculated to reach him . . . ."); *id.* at 236 ("An open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector—imposes burdens on the State significantly greater than the several relatively easy options outlined above." (citation omitted) (citing Ark. Code Ann. § 26-35-705)).

sale. The return of the certified letters made the government aware that Jones had failed to receive notice of his tax delinquency, let alone notice of the "pendency of the action" against his property. 547 U.S. at 223-24, 226. Jones had furnished the address to which the notices were mailed when he took out the mortgage, 33 years before the first notice of the tax sale proceedings, and he paid off his mortgage—without any continued contact with the State—three years before that notice was mailed. *Id.* at 223-24. Rivera-Valdes, on the other hand, received actual notice of the pendency of his deportation proceedings and actual notice to expect notice of his deportation hearing: he confirmed the address to which the hearing notice would be mailed only a month-and-a-half before that notice was mailed.

The majority nevertheless contends that the notice provided Rivera-Valdes was constitutionally deficient because he "learned from the OSC that a deportation hearing would be forthcoming" but not its specific "date, time, or location." Maj. at 24. The majority quotes *Mullane* for the propositions that (1) "[t]he notice must . . . convey the required information," and (2) the notice "must afford a reasonable time for those interested to make their appearance." Maj. at 20, 24 (quoting *Mullane*, 339 U.S. at 314). For the proposition about conveying the required information, *Mullane* in turn cites *Grannis v. Ordean*, 234 U.S. 385 (1914), which held that the challenged notice "was in due form" when "it contained such notice of the commencement of the action and of its purpose, and such warning to appear and answer." *Id.* at 397. The OSC likewise conveyed the com-

mencement of deportation proceedings,[10] the purpose of the proceedings,[11] and a warning to appear.[12] For the proposition about affording reasonable time for interested parties to appear, *Mullane* cites *Roller v. Holly*, 176 U.S. 398 (1900), which held that the challenged notice—in affording the recipient in Virginia five days to appear in Texas in the late nineteenth century—violated due process. *Id.* at 408, 413. By contrast, the OSC required Rivera-Valdes to appear at a hearing at his local immigration court "scheduled no sooner than 14 days" from the date of service.[13] Thus, under these precedents, the OSC personally served on Rivera-Valdes (1) "convey[ed] the required information" and (2) "afford[ed] a reasonable time for [Rivera-Valdes] to make [his] appearance." *Mullane*, 339 U.S. at 314.

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[10] "Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that: 1) You are not a citizen or national of the United States; 2) You are a native of Mexico and a citizen of Mexico; 3) You entered the United States at or near Nogales, Arizona on or about an unknown date in February 1993; 4[)] You were not then inspected by an immigration officer .... [O]n the basis of the foregoing allegations, it is charged that you are subject to deportation ...."

[11] "The Immigration and Naturalization Service believes that you are an alien not lawfully entitled to be in or to remain in the United States."

[12] "You are required to be present at your deportation hearing .... If you fail to appear at any hearing after having been given written notice of the date, time and location of your hearing, you will be ordered deported *in your absence* ...."

[13] "You will have a hearing before an immigration judge, scheduled no sooner than 14 days from the date you are served with this Order to Show Cause ...."

None of these cases hold that a party must always learn the specific "date, time, or location" of a forthcoming hearing for notice to pass constitutional muster.[14] Maj. at 24. As the majority acknowledges, the notice of deportation hearing that the government ultimately sent by certified mail to Rivera-Valdes *did* contain the date, time, and location of his hearing. Maj. at 8. And as the majority acknowledges, due process required only that this hearing notice be "reasonably calculated" to reach him—not that this notice *actually* reach him. *See* Maj. at 13 (citing *Dusenbery*, 534 U.S. at 170). Even in the context of deportation hearings, our precedents have never required actual notice to comport with due process. *Farhoud*, 122 F.3d at 796 ("An alien does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied."); *accord Popa v. Holder*, 571 F.3d 890, 897 (9th Cir. 2009), *abrogated on other grounds by Pereira v. Sessions*, 585 U.S. 198 (2018).

The majority argues that Rivera-Valdes's actual notice to expect notice of his deportation hearing is akin to the inquiry notice rejected in *Jones*. Maj. at 25. This comparison is inapt. The *Jones* Court stated that "the

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[14] In fact, each case stresses the need for flexibility to accommodate the specific circumstances at hand. *See Mullane*, 339 U.S. at 314-15 ("But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied."); *Grannis*, 234 U.S. at 395 ("'[D]ue process of law' does not require ideal accuracy."); *Roller*, 176 U.S. at 409 ("That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law . . . but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose.").

common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property." 547 U.S. at 232. But here Rivera-Valdes did not have to rely on any "common knowledge" of what might happen—he had actual knowledge that his deportation hearing notice would be mailed to the address that he confirmed on the OSC. This fact was printed and read aloud to him in his primary language of Spanish. That an "OSC d[oes] not itself trigger the scheduling of a hearing," Maj. at 25 n.5, is beside the point when *this* OSC informed Rivera-Valdes that "the Office of the Immigration Judge will mail a notice to the address provided by respondent with the date of the hearing."

Relying on *Tu v. National Transportation Safety Board*, 470 F.3d 941 (9th Cir. 2006), the majority also argues that "notice of earlier steps in a proceeding" cannot "lessen[] the need to provide constitutionally adequate notice at later steps in a proceeding." Maj. at 25. But *Tu* concerned notices that "were not 'reasonably calculated to reach the intended recipient *when sent*.'" 470 F.3d at 946 (quoting *Jones*, 547 U.S. at 226). From earlier notices, the government there "kn[ew] that certified mail was ineffective to reach" the intended recipient but that "[f]irst class mail worked" to reach the recipient, having elicited his timely responses. *Id.* *Under these circumstances*, the government's sending by certified mail alone of the later notices at issue violated due process. *Id.* Here, by contrast, the hearing notice at issue was "reasonably calculated to reach the intended recipient *when sent*"—addressed to the very address that Rivera-Valdes had confirmed, just a month-and-a-half prior, as where he could be reached and where his

hearing notice should be sent. *Id.* (quoting *Jones*, 547 U.S. at 226). The majority's attempted analogy to *Tu* therefore fails.

The Fifth Amendment, as relevant here, provides Rivera-Valdes with "due" process before government can deprive him of his "liberty." The above facts show beyond doubt that Rivera-Valdes received at least the process that he was due. Whatever would be the case if Rivera-Valdes had not been personally instructed as to his responsibilities shortly before the mailings, as he was here, is of no moment. Neither is whatever would be the case if he had furnished his address many years before (as in *Jones*), instead of about 50 days before. Under the circumstances presented here, Rivera-Valdes has failed to show that he did not receive the process he was due.

III.

In the wake of returned mail, the *Mullane-Jones* framework does not establish that due process *always* requires further action by the government—only that in some cases, further action is required, and then only if reasonable and doable. As explained above, the government provided Rivera-Valdes with constitutionally adequate notice despite the returned mail, which ends the due process inquiry. But even if the due process inquiry did not end there, Rivera-Valdes does not, and cannot, identify any *reasonable* steps to effect notice that the government should have undertaken following the returned notices.

A.

Jones does not require further action whenever mailed notice is returned. The State of Arkansas had argued that returned mail should never require further action. *See Jones*, 547 U.S. at 237. Rejecting the State's arguments, the *Jones* Court held that "when mailed notice *of a tax sale* is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225 (emphasis added). In so holding, however, the *Jones* Court did not adopt a categorical rule that returned mail *always* requires further action, or even that returned mail *always* requires the government to evaluate the practicability of further action. Rather, the *Jones* Court again endorsed a fact-specific approach, under which the "additional reasonable steps . . . available to the [government]" depend on "the circumstances presented" by a given case. *Id.* And *Jones* held only that what is required in *some* cases are "*reasonable* additional steps." *Id.* at 234 (emphasis added). Indeed, "if there were no *reasonable* additional steps the government could have taken upon return of the unclaimed notice letter, it [could]not be faulted for doing nothing." *Id.* (emphasis added).

In the majority's characterization of *Jones*, the government's knowledge that "its notice effort has not succeeded . . . triggers an obligation on the Government's part to take additional reasonable steps to effect notice, if it is practicable to do so." Maj. at 6 (citing *Jones*, 547 U.S. at 225); *see also* Maj. at 14-15 (quoting *Jones*, 547 U.S. at 230); Maj. at 20-21 (citing *Jones*, 547 U.S. at 234). According to the majority, returned mail *always* requires the government to at least consider whether fur-

ther action is doable. As explained above, this is an overreading of *Jones*.

Moreover, the language about an "obligation" that is "triggered" is taken from the following passage in *Jones*, which describes two specific cases:

> Under *Robinson* and *Covey*, the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice. That knowledge was one of the "practicalities and peculiarities of the case," that the Court took into account in determining whether constitutional requirements were met. It should similarly be taken into account in assessing the adequacy of notice in this case.

547 U.S. at 230-31 (citation omitted) (quoting *Mullane*, 339 U.S. at 314). In *Covey*, the government knew the intended recipient of notice was incompetent and lacking a guardian, but it made "no attempt . . . to have a Committee appointed for her person or property until after entry of the judgment of foreclosure in this proceeding." 351 U.S. at 146. And in *Robinson*, the government knew the intended recipient of notice was in jail, but it "mailed notice of the pending forfeiture proceedings, not to the jail facility, but to [his] home address." 409 U.S. at 38. No circumstances like those are present in this case; indeed, the government here knew the intended recipient of notice had confirmed his address in person to government officials as recently as a month-and-a-half ago.

The Court's application of *Robinson* and *Covey* in *Jones* further highlights that the majority's per se rule conflicts with *Jones*. The Court emphasized:

> In prior cases [*Robinson* and *Covey*], we have required the government to consider *unique information about an intended recipient* regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.

Jones, 547 U.S. at 230 (emphasis added). Thus, the Court emphasized unique facts about Jones himself: he had made mortgage payments for 30 years (during which the mortgage company paid his property taxes), *id.* at 223; after he paid off his mortgage, the property taxes went unpaid, *id.*; not until three years into tax delinquency was he mailed a notice letter, which "was promptly returned" weeks later, *id.* at 231; and he would have had two years under Arkansas law to exercise his right to redeem his property, *id.* It is those unique facts that triggered the government's further obligation in those three cases, not merely the returned mail. Unlike the unique facts in *Robinson*, *Covey*, and *Jones*, nothing about the "unique" facts here undercut that the steps taken by the government were constitutionally adequate despite the returned mail.[15]

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[15] The government correctly points out that not only is the per se rule the majority establishes inconsistent with *Jones*, but it also has significant negative practical consequences:

> [T]he backdrop of *Jones* is "quite different" because a property owner has no reason to ignore an imminent tax sale of his property while an unlawful entrant has "obvious reasons" to avoid his deportation hearing; requiring "additional steps" would reward evasion of service.

Response to Pet. for Panel Reh'g & Reh'g En Banc at 4, Dkt. 54. Requiring the analysis for additional steps every time an immigration notice is returned would indeed reward evasion of service.

The "unique" facts here make the government's point. As discussed, Rivera-Valdes likely committed criminal acts in an effort

B.

If I am correct that Rivera-Valdes was afforded constitutionally adequate notice, despite the returned mail, and irrespective of what subsequently occurred, that ends the due process inquiry. But even if I am wrong, to the extent that Rivera-Valdes has not forfeited the argument that the government could have done something more after the mailed notices were returned,[16] this argument is unavailing. Again, under certain circumstances (which, as I argue above, are not present here), *Jones* requires "additional reasonable steps." 547 U.S. at 234. And the something more needs to be reasonable, not just doable.

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to avoid deportation, including presenting the government a forged birth certificate and an asylum application consisting of false statements. This is the reverse of the unique circumstances present in *Jones*, *Robinson*, and *Covey*. Those three individuals had no incentive not to learn of the proceedings, and every incentive to learn. Rivera-Valdes had every incentive to avoid his deportation proceeding, and to ignore or fail to claim mail. While this factual difference does not "diminish his due process right," Maj. at 26 n.6, it does mean that returned mail *in this case* was not a unique circumstance requiring the government to do anything further.

One can imagine similar types of unique facts in the deportation context and other contexts featuring incentives to evade service. Simply put, as *Jones* makes clear, there can be no per se rules. And if there are no per se rules, Rivera-Valdes cannot possibly succeed in his challenge, given his unique facts.

[16] While the parties and district court did not address *Jones* below, the district court asked counsel for Rivera-Valdes at the hearing on the motion to dismiss: "[W]hat else should the Government have done . . . if they did not receive any written change of address from your client, other than send it to the last known address?" Rivera-Valdes did not offer any information or argument about what more the government could have done.

The examples of something more offered by the majority and Rivera-Valdes on appeal are not reasonable *given the facts here*. In 1994, the government possessed no other information about Rivera-Valdes's whereabouts besides the one address of record—which he had corroborated in person at the INS office a month-and-a-half before the notices were mailed. The returned notices themselves did not reveal any "new information" about where or how Rivera-Valdes could be reached, which could have in turn advised the government on what additional steps might be "reasonable in response." *Id.* Thus, there were no "*reasonable* additional steps" toward effecting notice that due process required the government to take. *Id.* (emphasis added). Without even considering what steps would be reasonable under the circumstances presented here, the majority remands for further factfinding on the practicability of "possible alternative[]" methods of notice, including those that it and Rivera-Valdes have proposed.[17] Maj. at 27. This remedy is misplaced.

Citing *Jones*, Rivera-Valdes argues that the government could have "easily undertaken" the additional step of posting notice on his front door. But the notices were returned undeliverable and unclaimed from the address Rivera-Valdes had just confirmed in person to INS officials about 50 days earlier. That hardly suggests posting a notice on the door of the same address would be reasonable. Rather, Rivera-Valdes's own recent interactions at the INS office show that effecting such a posting was not a reasonable additional step, even if possi-

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[17] The district court should not even reach what alternatives were practicable, because even if certain additional steps were practicable, they were not reasonable.

ble. I do not claim that such a step would never be appropriate or required were the facts different. But given the facts outlined above, posting a notice was not reasonable.[18]

Again quoting *Jones*, Rivera-Valdes contends the government could have taken the additional step of resending the notice by regular mail. Under the circumstances here, a *third* mailed notice was not reasonable. The facts of *Jones* highlight why: in that case, two notices were returned, both sent by certified mail to Jones's address on record. 547 U.S. at 223-24. To address the possibility that Jones had not been home to provide the signature required for certified mail, the Court deemed reasonable the additional step of resending the notice to the same address by regular mail. *Id.* at 234. The Court reasoned that "[w]hat steps are reasonable in response to new information [about the effectiveness of attempted notice] depends upon what the new information reveals." *Id.*; *see id.* at 231. Here, by contrast, the first notice returned was sent by regular mail, while the second was sent by certified mail. Resending a notice by regular mail after that method had just failed would not be a reasonable response to the supposed new information revealed by the returned certified mail.[19]

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[18] Similarly, despite Rivera-Valdes's argument otherwise, the *Jones* Court's suggestion to address undeliverable mail to "occupant" does not fit this case, which involves not real property interests of an unknown occupant but due process interests of a specific noncitizen facing removal.

[19] Citing *Tu*, the majority suggests that the government could have resent the notice by first class mail. Maj. at 28. As explained above, based on earlier notices sent by both certified and first class

Citing *Echavarria v. Pitts*, 641 F.3d 92 (5th Cir. 2011), both Rivera-Valdes and the majority propose checking his A-file as a reasonable additional step that the government could have taken. Oral Arg. at 15:58-16:20, 21:37-21:40; Maj. at 27-28. But *Echavarria* concerned notice to bond obligors who posted bond to secure the release of immigrant detainees and whose later notices of bond demands were returned as undeliverable. 641 F.3d at 93. The Fifth Circuit held that the district court did not err in finding that reasonable steps under *Mullane-Jones* included "reference to . . . the A-file of the bonded immigrant for alternate contact information" for the obligor. *Id.* at 96 (footnote omitted). For Rivera-Valdes, however, there was no alternate point of contact or address potentially at issue. As in *Jones*, the circumstances of this case did not require the government to conduct "[a]n open-ended search for a new address" for Rivera-Valdes—even in other records readily accessible to the government (like the income tax rolls in *Jones* or the A-file here)—"especially when the [government] obligate[d] the [intended recipient] to keep his address updated" with the relevant agency and the government had no reason to believe the recipient had moved. 547 U.S. at 236. To the extent that the majority suggests that checking the A-file would have been an additional reasonable step to "correct" the "discrep-

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mail, the government's information about the effectiveness of attempted notice in *Tu* included the "know[ledge] [that] certified mail would not reach [the intended recipient], *whereas first class mail would*." 470 F.3d at 942 (emphasis added). Although the government here likewise used two methods of mail, regular and certified, it did not know that one method would not reach Rivera-Valdes, while the other method would. Both methods had resulted in returned mail.

ancy between the addresses in the record" (i.e., the missing "Ave."), Maj. at 27-28, this proposal improperly moves the goalposts of the due process analysis from reasonably calculated notice to actual notice.

Indeed, nothing in the record could have made the government aware in 1994 that Rivera-Valdes might have been reached at a different address or through a different method. Rivera-Valdes does not dispute that he provided only one address to the INS. And Rivera-Valdes does not dispute that he confirmed to INS officials that he could be reached at this address when personally served with the OSC—only a month-and-a-half before the notices were mailed. At oral argument, when asked if the record contained any evidence of where the government could have reached Rivera-Valdes in the weeks between when he confirmed his address at the INS office and when his deportation hearing took place, counsel for Rivera-Valdes conceded that such evidence "was not proffered." Oral Arg. at 2:49-3:17. Rivera-Valdes's 2020 declaration in support of his motion to dismiss states that he never received actual notice of his deportation hearing, but it contains no facts about how the mailed notices were in any way problematic—for instance, that he was no longer living at the address he had confirmed on the OSC or that he was not at home during business hours to sign for certified mail. And when asked at oral argument what new evidence Rivera-Valdes might seek to introduce on remand, his counsel did not identify any specific evidence.[20] Oral Arg. at

[20] Although the majority characterizes the government as "not meaningfully disput[ing] Rivera-Valdes's factual assertions," Maj. at 11, the government *does* dispute Rivera-Valdes's ability to de-

55:04-56:58. The majority's "remand to allow the district court to determine if the agency had other practicable alternatives through which to attempt notice on Rivera-Valdes" is therefore unnecessary.[21] Maj. at 26-27. As *Jones* contemplated, this is a case where "there were no *reasonable* additional steps the government could have taken" in the wake of returned mail. 547 U.S. at 234 (emphasis added).

IV.

For the reasons above, Rivera-Valdes cannot show that the notice of his deportation proceedings violated due process. But even if Rivera-Valdes establishes a due process violation, that would not end the inquiry in his favor. As the majority recognizes, Rivera-Valdes would then have to "demonstrate that he is entitled to relief under the other prongs of collateral attack: prejudice, administrative exhaustion, and deprivation of judicial review."[22] Maj. at 29. Under 8 U.S.C. § 1326(d), Rivera-Valdes must show (1) the entry of his removal order was "fundamentally unfair"; (2) he "exhausted any administrative remedies that may have been available"; and (3) he was "deprived . . . of the opportunity for judicial review." 8 U.S.C. § 1326(d); *see United States v. Palomar-Santiago*, 593 U.S. 321, 329 (2021). All three

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velop additional facts on remand relevant to the due process analysis.

[21] Again, the district court should not reach what alternatives were practicable, because even if certain additional steps were practicable, they were not reasonable.

[22] Because the district court ended its § 1326(d) analysis after finding no due process violation, the majority declines to reach prejudice in the first instance. Maj. at 29. But "[w]e may affirm on any basis supported by the record." *Fisher v. Kealoha*, 855 F.3d 1067, 1069 (9th Cir. 2017) (per curiam).

prongs are mandatory. *Palomar-Santiago*, 593 U.S. at 329; *United States v. Nunez Sanchez*, 140 F.4th 1157, 1163 (9th Cir. 2025).

"An underlying removal order is 'fundamentally unfair' if: (1) a defendant's due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States v. Martinez-Hernandez*, 932 F.3d 1198, 1203 (9th Cir. 2019) (quoting *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004)). To show prejudice, Rivera-Valdes "'does not have to show that he actually would have been granted relief,' but 'that he had a "plausible" ground for relief from deportation.'" *United States v. Melendez-Castro*, 671 F.3d 950, 955 (9th Cir. 2012) (per curiam) (citation omitted) (quoting *Ubaldo-Figueroa*, 364 F.3d at 1050). This "burden . . . rests with the defendant." *United States v. Valdez-Novoa*, 780 F.3d 906, 917 (9th Cir. 2015).

Rivera-Valdes cannot show any prejudice resulting from the allegedly deficient notice. To argue otherwise, he maintains that there was a plausible basis that he would have been granted voluntary departure at his 1994 deportation hearing. "To be eligible for voluntary departure, an alien must show in part that he has been a person of good moral character for the five years immediately preceding his application for voluntary departure." *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000). It is undisputed that within the year of his deportation hearing, Rivera-Valdes admitted filing a false asylum application and presenting a false and fraudulent birth certificate to the INS. And again, Rivera-Valdes did not simply lie about being Guatemalan; he submitted an application with a tale of joining the

guerillas against his will, facing the murders of his brothers by the Guatemalan military, and fearing that the Guatemalan guerillas would "hunt [him] down and kill [him]."

Rivera-Valdes's admission to immigration fraud renders it (at best) implausible that he would have received a discretionary grant of voluntary departure. *Cf. Ahir v. Mukasey*, 527 F.3d 912, 916 (9th Cir. 2008) (noting "an alien found to have 'knowingly made a frivolous application for asylum' . . . becomes 'permanently ineligible for any benefits'" under the Immigration and Nationality Act, so a finding of a frivolous asylum claim requires an immigration judge, "[b]y operation of [law], . . . to deny [the petitioner's] applications for adjustment of status and voluntary departure" (quoting 8 U.S.C. § 1158(d)(6))); *Limsico v. INS*, 951 F.2d 210, 215 (9th Cir. 1991) (finding petitioner's sworn testimony admitting to marriage fraud "would obviously factor into any discretionary determination concerning possible relief from deportation"). The parties dispute whether Rivera-Valdes's admission amounted to an admission of the commission of a crime of moral turpitude, which would have rendered him statutorily ineligible for a finding of good moral character, and thus ineligible for voluntary departure.[23] 8 U.S.C. § 1101(f)(3); *id.* § 1182(a)(2)(A)(i)(I). But statutory eligibility aside, the next step in determining the plausibility of voluntary departure would be to weigh the "negative and positive equities" in Rivera-

[23] The offense of "knowingly and willfully . . . mak[ing] any false, fictitious or fraudulent statements or representations," or "us[ing] any false writing or document knowing [it] to contain any false, fictitious or fraudulent statement"—"in any matter within the jurisdiction" of the federal government—is a crime involving moral turpitude. *Matter of Pinzon*, 26 I. & N. Dec. 189, 194 n.1, 195 (B.I.A. 2013) (quoting 18 U.S.C. § 1001 (1994)).

Valdes's case as of 1994. *Valdez-Novoa*, 780 F.3d at 917. "The negative equities include 'the nature and underlying circumstances of the deportation ground at issue; additional violations of the immigration laws; the existence, seriousness, and recency of any criminal record; and other evidence of bad character or the undesirability of the applicant as a permanent resident,'" while "[t]he positive equities 'are compensating elements such as long residence here, close family ties in the United States, or humanitarian needs.'" *Id.* (quoting *Matter of Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (B.I.A. 1999)). The undisputed fact of Rivera-Valdes's immigration fraud (and the details of that fraud) constitutes a very significant negative equity. Both below and on appeal, he has proffered no countervailing positive equities. I find none in the record. I also note that in 1994, Rivera-Valdes had been in the United States for only about a year, and had no immediate family in the United States.

Rivera-Valdes fails to cite, and I cannot find, a single case in which a similarly situated noncitizen received voluntary departure. And we have even held that "the existence of a single case that is arguably on point means only that it is 'possible' or 'conceivable' that a similarly situated alien would be afforded voluntary departure," which "is plainly insufficient" to show prejudice. *Id.* at 920.

Because Rivera-Valdes cannot show a due process violation or resulting prejudice, he cannot establish that his 1994 deportation order was "fundamentally unfair." 8 U.S.C. § 1326(d)(3). Thus, § 1326(d) bars any collateral attack on his removal order.

V.

(1) The government provided Rivera-Valdes with constitutionally adequate notice of his deportation proceedings. (2) Rivera-Valdes cannot show that the government could have taken additional reasonable steps toward effecting notice after the mailed notices were returned. (3) Rivera-Valdes cannot establish prejudice from the alleged due process violation as required under § 1326(d), precluding any collateral attack on his removal order. For each of these three independent and sufficient reasons, I would affirm the district court's denial of Rivera-Valdes's motion to dismiss the indictment. I therefore respectfully dissent.

APPENDIX

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FORREST, Circuit Judge, joined by MILLER, Circuit Judge, dissenting:

I agree that *Jones v. Flowers* applies to immigration proceedings and, therefore, when the government learned that its attempt to notify Leopoldo Rivera-Valdes of his removal hearing failed, it was required to "take additional reasonable steps to attempt to provide notice" of the hearing to Rivera-Valdes, if "practicable to do so." 547 U.S. 220, 225 (2006). But under the facts presented here, there were no such steps available to the government, as Judge Bennett explains. I also agree with Judge Bennett that Rivera-Valdes cannot satisfy other requirements for collaterally attacking his removal order. Accordingly, I disagree with the majority's decision to vacate the district court's denial of Rivera-Valdes's motion to dismiss his indictment charging him with illegal reentry, and I join Parts III.B and IV of Judge Bennett's dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-30177

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEOPOLDO RIVERA-VALDES, DEFENDANT-APPELLANT

Argued and Submitted: Nov. 9, 2022
Portland Oregon
Filed: June 17, 2024

OPINION

Before: PATRICK J. BUMATAY and GABRIEL P. SANCHEZ, Circuit Judges, and M. MILLER BAKER,[*] International Trade Judge.

Per Curiam Opinion;

Concurrence by Judge BUMATAY;

Concurrence by Judge BAKER;

Dissent by Judge SANCHEZ

PER CURIAM:

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[*] The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

Thirty years ago, Leopoldo Rivera-Valdes failed to appear at his deportation hearing and was ordered deported *in absentia*. He did not attend this hearing despite being directly given an order to appear and then being sent the date of the hearing by certified mail at the address he provided to immigration officials. In 2006, after being apprehended, he was finally deported.

After being deported, Rivera-Valdes again unlawfully entered the United States. In 2019, he was charged with illegal reentry under 8 U.S.C. § 1326. In the district court, he challenged the indictment, alleging that his 1994 *in absentia* deportation order violated due process. The district court denied the motion. Rivera- Valdes then entered a conditional guilty plea, preserving the right to appeal the constitutional challenge to his deportation. He now appeals.

Because Rivera-Valdes failed to establish that his deportation violated his due process rights, we affirm.

I.

Rivera-Valdes, a citizen of Mexico, unlawfully entered the United States in 1992. In December 1993, he applied for asylum and work authorization, falsely claiming that he was a citizen of Guatemala. In that application, Rivera-Valdes provided his address as "4037 N. Cleveland, Portland, OR, 97212." In January 1994, the then-Immigration and Naturalization Service sent Rivera-Valdes a notice acknowledging receipt of the asylum application by regular mail to his Portland address.

In two notices, dated February 3 and 8, the INS informed Rivera-Valdes that his application for work authorization was approved and instructed him to pick up

the authorization at a local INS office. Again, the INS mailed the notices to the Portland address provided by Rivera-Valdes.

Rivera-Valdes presumably received notice of the work authorization approval because he showed up at the local INS office to pick it up on March 3. There, he presented a false Guatemalan birth certificate as proof of his identity. But his deception was discovered. Immigration officials did not hand Rivera-Valdes the work authorization, instead serving him with an "order to show cause and notice of hearing."

The order and notice directed him to appear at deportation proceedings before an immigration judge at a date to be calendared. An immigration official also read the order to Rivera-Valdes in Spanish and he signed the notice, acknowledging its receipt. The order and notice listed Rivera-Valdes's Portland address and warned him that he was required by law to immediately notify the immigration court within five days of any address change. It stated that "[a]ny notices will be mailed only to the last address provided . . . ." The order and notice further advised him that he would be ordered deported *in absentia* if he failed to attend his deportation hearing. Rivera-Valdes did not provide the government with any notice of a change of address.

On April 20, the INS moved the immigration court to schedule a hearing and mailed a copy of the motion to Rivera-Valdes at the Portland address. The postal service returned the mail as "Not Deliverable As Addressed/ Unable To Forward."

On April 25, the immigration court sent Rivera-Valdes notice that his deportation hearing was scheduled for August 12—this time, the notice was sent by certified

mail. The postal service returned this mailing as "unclaimed" a month later.

Rivera-Valdes failed to appear at his August 12 deportation hearing, and the immigration judge ordered him deported *in absentia.*

II.

A defendant charged with violating § 1326 may collaterally attack his underlying deportation order. *See United States v. Martinez*, 786 F.3d 1227, 1230 (9th Cir. 2015). To prevail, a defendant must show that (1) he exhausted administrative remedies; (2) the deportation proceedings improperly deprived him of an opportunity for judicial review; and (3) the deportation order was fundamentally unfair. 8 U.S.C. § 1326(d); *see also United States v. Palomar-Santiago*, 593 U.S. 321, 326, 141 S. Ct. 1615, 209 L. Ed. 2d 703 (2021). A deportation order is fundamentally unfair if the defendant's due process rights were violated "by defects in his underlying deportation proceeding," and the defendant suffered prejudice as a result. *Martinez*, 786 F.3d at 1230.

A.

On appeal, Rivera-Valdes argues that immigration authorities violated his due process rights by ordering him deported *in absentia* despite the notice of the deportation hearing being returned as undeliverable or unclaimed. We disagree.

At the time of Rivera-Valdes's 1994 deportation, Congress required that each alien receive written notice of deportation proceedings in person or "by certified mail." 8 U.S.C. § 1252b(a)(1), (2) (repealed 1996). That statute specified that the alien "must immediately provide" a contact address and "must provide the Attorney Gen-

eral immediately with a written record of any change of the alien's address." *Id.* § 1252b(a)(1)(F)(i)-(ii). If the alien failed to provide up-to-date address information, then Congress said that "written notice shall not be required." *Id.* § 1252b(a)(2). And if the alien failed to attend deportation proceedings after being given notice "at the most recent address provided," Congress commanded that the alien "be ordered deported . . . in absentia" so long as the notice requirements were met. *Id.* § 1252b(c)(1).

Under this statutory regime, service of a deportation notice by certified mail only created a rebuttable "presumption of proper delivery." *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997). If an alien could "establish that her mailing address has remained unchanged, that neither she nor a responsible party working or residing at that address refused service, and that there was nondelivery or improper delivery by the Postal Service, then she [had] rebutted the presumption of effective service." *Id.* at 432. The burden then shifted to the government "to show that a responsible party refused service." *Id.*

More than 25 years ago, we concluded that the government's compliance with these notice provisions satisfied due process, even if the alien did not "actually receive notice of [the] deportation hearing." *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997). In that case, the notice was sent by certified mail to the address provided by the alien and acknowledged by someone at that address. *Id.* The alien claimed that he "did not actually and personally receive the notice of hearing." *Id.* That fact did not make a difference because, we said, "due process is satisfied if service is conducted in a manner 'reasonably calculated' to ensure that notice reaches the

alien." *Id.* And the certified mailing was enough to meet this standard. *Id.*

In the following years, we repeatedly affirmed that mailing notice of immigration proceedings to an alien's last provided address is constitutionally sufficient. *See, e.g., Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) ("Notice of a deportation hearing sent by regular mail to the last address provided by the alien to the INS satisfies the requirements of constitutional due process[.]" (simplified)); *United States v. Hinojosa-Perez*, 206 F.3d 832, 837 (9th Cir. 2000) (holding that an alien's "attempt to claim prejudice from the failure to send notice to a place where he no longer lived is unpersuasive" given that he was "adequately warned of his responsibility to keep his address current"); *Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002) (finding that the government satisfies due process "by mailing notice of [a] hearing to an alien at the address last provided").

We held the same in *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009), *overruled on other grounds by Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019). In that case, the government mailed a notice to appear to the alien's last provided address in Nevada. *Id.* at 898. The alien then moved to California without informing the government, which later mailed a hearing notice to her Nevada address. *Id.* As a result, the alien didn't receive the notice and missed her removal proceeding, and an immigration judge ordered her removed *in absentia*. *Id.* at 893. None of this posed a due process problem. As we said, an alien "does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." *Id.* at 897. Instead, due process "is satisfied if service is conducted in a manner 'reason-

ably calculated' to ensure that notice reaches the alien." *Id.* (quoting *Farhoud*, 122 F.3d at 796). There, the alien's "right to due process was not violated because the Immigration Court mailed notice of her hearing to [her] last provided address." *Id.* at 898.

Here, our precedent shows that the government complied with due process. Rivera-Valdes provided the government with his Portland address in his asylum application. The government personally served him with the order and notice that instructed him to inform the government of any change to his address. Not only that, but an immigration official read the order to him. Rivera-Valdes gave no change of address. The government then sent notice of his deportation hearing to his Portland address via certified mail. Whether he actually received the notice, the government followed its statutory obligations and reasonably attempted to inform him of the hearing by mailing notice to his last (and only) provided address. We thus hold that Rivera-Valdes's deportation *in absentia* did not violate due process.

B.

Despite this clear precedent, Rivera-Valdes argues on appeal that the government should have taken additional steps to notify him of his deportation hearing because, according to him, such steps were required under *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). In *Jones*, the Supreme Court considered the due process rights of a homeowner whose house was forcibly sold by the State for failure to pay property taxes. To notify the homeowner, the State sent two notices of the tax sale by certified mail to the house that were returned as "unclaimed." *Id.* at 223-24, 126 S. Ct. 1708. The State then sold the home. *Id.* The Court said

that these procedures violated due process. In "extinguishing a property owner's interest in a home," *id.* at 229, 126 S. Ct. 1708, "the State should have taken additional reasonable steps to notify [the homeowner], if practicable to do so," *id.* at 234, 126 S. Ct. 1708.

Jones does not help Rivera-Valdes for three reasons.

First, we disagree that our court has already adopted *Jones*'s "additional reasonable steps" requirement in the immigration context. While we must, of course, follow the binding precedent of prior panels, *see Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc), this applies only when a prior panel "squarely addresses" the issue, *United States v. Kirilyuk*, 29 F.4th 1128, 1134 (9th Cir. 2022) (simplified). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *United States v. Ped*, 943 F.3d 427, 434 (9th Cir. 2019) (simplified). Thus, when a "prior case does not raise or consider the implications of a legal argument, it does not constrain" a new panel's analysis. *Kirilyuk*, 29 F.4th at 1134 (simplified).

Neither Rivera-Valdes nor the dissent cites any case applying *Jones*'s "additional reasonable steps" framework to the immigration context. The dissent principally relies on *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008), to claim that we applied *Jones*'s broad ruling to immigration proceedings. But in *Williams*, we cited *Jones* only once, and we did so only to support the Supreme Court latest's articulation of the well-known *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), due process

standard. The sum total of *Williams*'s invocation of *Jones* was this:

> Under that framework, "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (quoting *Mullane*, 339 U.S. at 314, 70 S. Ct. 652).

Williams thus didn't apply *Jones*'s "additional reasonable steps" framework to the immigration context. None of the other precedential cases cited by the dissent apply *Jones*'s "additional reasonable steps" requirement either. *See Chaidez v. Gonzales*, 486 F.3d 1079, 1086 n.8 (9th Cir. 2007) (declining to address *Jones* in the context of who is a "responsible person[ ]" for the delivery of certified mail); *Al Mutarreb v. Holder*, 561 F.3d 1023, 1027-28 (9th Cir. 2009) (mentioning *Jones* but declining to resolve questions about adequacy of notice in that case by assuming it was sufficient).

Second, we disagree that *Jones*'s "additional step" framework applies here. The notice required by due process "will vary with circumstances and conditions," *Jones*, 547 U.S. at 227, 126 S. Ct. 1708 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956)), and "assessing the adequacy of a particular form of notice requires balancing the 'interest of the [government]' against 'the individual interest sought to be protected by the [Due Process Clause]' " in the circumstances at issue, *id.* at 229, 126 S. Ct. 1708 (quoting *Mullane*, 339 U.S. at 314, 70 S. Ct. 652). In the immigration context, we've said that "actual notice" is

unnecessary and that service must only be " 'reasonably calculated' to ensure that notice reaches the alien." *Farhoud*, 122 F.3d at 796.

The statutory regime in place at the time of Rivera-Valdes's 1994 deportation hearing was " 'reasonably calculated' to ensure that" Rivera-Valdes received notice. *See id.* This statutory scheme, which required aliens to update their addresses and permitted aliens to rebut the presumption of service, distinguishes this case from *Jones* and adequately balances the relevant competing interests in the immigration context.

Indeed, the contexts of *Jones* and deportation proceedings are quite different. An alien who has unlawfully entered the country has obvious reasons to avoid appearing for a deportation hearing—unlike a property owner, who has no reason to ignore an imminent tax sale. Requiring the government to do more than send notice to the last address provided would reward evasion of service. Thus, by failing to comply with his statutory obligations, Rivera-Valdes "relieve[d] the government of its responsibility to provide" him with any more notice of the hearing. *See Popa*, 571 F.3d at 897.[1]

Third, even if *Jones*'s "additional reasonable steps" standard did supersede the constitutional adequacy of notice as recognized in our cases, the government still satisfied due process because no additional reasonable steps existed that were practicable for it to take. Rivera-Valdes was personally served the "order to show cause and notice of hearing" initiating his deportation pro-

[1] We express no view on *Jones*'s application in the immigration context outside of the statutory regime that existed in 1994, at the time of Rivera-Valdes's deportation hearing.

ceedings, which was also read to him. The order and notice warned Rivera-Valdes that he must update his address and told him that future notices would be sent to him by mail only. The government then sent Rivera-Valdes notice of the deportation hearing by certified mail to the only address he provided. Not only that, the government *also* used regular mail to send its motion to schedule the hearing. These mailings were returned as "unclaimed" or "not deliverable." *See Jones*, 547 U.S. at 235, 126 S. Ct. 1708 (explaining that resending by regular mail an unclaimed notice of hearing previously sent by certified mail is a reasonable follow-up measure). The government possessed no other information about Rivera-Valdes's whereabouts. Given this, under *Jones*, there were no practicable, reasonable steps left for the government to take. *Id.* at 234, 126 S. Ct. 1708 ("[I]f there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.").[2]

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[2] The dissent would give Rivera-Valdes another bite at the apple by remanding for the district court to consider whether there were any additional, reasonable steps the government could have taken. Even if we agreed that *Jones* applied here, we fail to see how a remand could further develop the factual record about events that transpired thirty years ago. Moreover, we note that Rivera-Valdes raised his *Jones* argument for the first time on appeal, which explains why the district court never considered this issue in the first instance. He can hardly complain about our failure to remand to the district court a question that he never addressed below.

III.

We thus affirm the district court's denial of the motion to dismiss.

AFFIRMED.

BUMATAY, Circuit Judge, concurring:

As the per curiam opinion establishes, this is a straightforward case under our precedent. The government sent notice of the deportation hearing by certified mail to the last address provided by Leopoldo Rivera-Valdes. Case after case says that this satisfies due process and that there's nothing wrong with the *in absentia* deportation order here. To the extent that our court is bound to use an interest-balancing framework to address whether service of notice passes constitutional muster, *see Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), I join the per curiam opinion. But I write separately to express my concerns with the dissent's attempt to break new constitutional ground to resolve this case.

I.

Due process is context specific. When it comes to immigration, courts have "largely defer[red] to the political branches" on what process is due to aliens in removal proceedings. *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1215 (9th Cir. 2022) (Bumatay, J., concurring). That's because "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Trump v. Hawaii*, 585 U.S. 667, 702, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018) (simplified). Thus, it's firmly established that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003).

Rather than accept this principle, the dissent pursues a novel ruling—one that would upend how many immigration proceedings operate. Despite the government's

compliance with applicable statutory notice requirements, the dissent says that's not enough and now the government must also meet the extra burdens set out in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). To my knowledge, no circuit court has ever required this.

It's easy to see why *Jones* doesn't directly apply to the immigration context. In *Jones*, the Supreme Court held that due process requires the government to "take additional reasonable steps to provide notice" to a homeowner "before taking the owner's property." *Id.* at 223, 126 S. Ct. 1708. There, Gary Jones owned a house in Little Rock, Arkansas, for over 30 years. *Id.* He paid the mortgage on the house for 30 years. *Id.* For those 30 years, the mortgage company paid Jones's property taxes. *Id.* But after he finished paying off the mortgage, the property taxes went unpaid. *Id.* The State declared the property delinquent and sought to sell the home. *Id.* To notify Jones, the State sent two notices of the forced tax sale to the home by certified letter. *Id.* at 223-24, 126 S. Ct. 1708. Both letters were returned to the State as "unclaimed." *Id.* at 224, 126 S. Ct. 1708. The State sold Jones's house despite the return of its two notices. *Id.* The buyer, Linda Flowers, then moved to evict Jones's daughter from the house, which led to the case being brought before the Court. *Id.* at 224-25, 126 S. Ct. 1708. These procedures, the Court said, violated due process. To sell a property owner's house, the Court held that "the State should have taken additional reasonable steps to notify [the homeowner], if practicable to do so." *Id.* at 234, 126 S. Ct. 1708.

For the first time in our circuit, the dissent seeks to import *Jones*'s "additional steps" requirement to the im-

migration context. According to the dissent, if the government discovers that notice of immigration proceedings has failed to reach an alien, that "triggers an obligation on the government's part to take additional reasonable steps to effect notice" on the alien "if it is practicable to do so." Dissent 1130 (citing *Jones*, 547 U.S. at 226, 126 S. Ct. 1708). While our court has cited *Jones* for general due process principles in immigration cases, *no* decision has ever required the government to take "additional reasonable steps to effect notice" if it learns that an alien failed to receive actual notice.

There are at least four problems with expanding due process like this.

First, the dissent's view of the law conflicts with circuit precedent. Our caselaw makes clear that certified mailing of notice to the last provided address is constitutionally adequate—even if the alien did not receive actual notice. *See* Per Curiam Op. 1121-22. And our court has continued to adhere to this precedent after *Jones* was decided in 2006, and even after *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008), which the dissent thinks governs, was decided in 2008. *See, e.g.*, *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009), *overruled on other grounds by Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019); *Poursina v. USCIS*, 936 F.3d 868, 876 (9th Cir. 2019) (holding that the government "satisfie[s] due process [when] it sen[ds] notice by regular mail to the address given.") (simplified). Indeed, the only difference between this case and all the other cases upholding *in absentia* removals in similar circumstances is that the government became aware that notice was "undeliverable" or "unclaimed." But that distinction isn't enough to

upset our precedent when the government acted reasonably in attempting to notify Rivera-Valdes.

Second, there's no reason to graft the procedural protections required to remove a person from his home onto the process to remove an illegal alien from this country. As the Supreme Court has said, the regulation of immigration is a "fundamental sovereign attribute" under our Constitution. *See Trump*, 585 U.S. at 702, 138 S. Ct. 2392. So "the removal context is a unique enclave" when it comes to due process. *Rodriguez Diaz*, 53 F.4th at 1216 (Bumatay, J., concurring). And the due process rules for forfeiting a citizen's home do not easily map onto immigration proceedings. Recall that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 522, 123 S. Ct. 1708. Thus, while illegal aliens are protected by due process, that doesn't mean they are entitled to the full panoply of rights afforded to a person whose home is being seized by the government. Above all, *Jones* was expressly animated by the government's "exerti[on of] extraordinary power against a property owner—taking and selling a house he owns." 547 U.S. at 239, 126 S. Ct. 1708. And so, the Court reasoned, it was not asking "too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Id.* Though the removal of an alien is no doubt a solemn process, the rights involved are not the same.

Third, note that the dissent doesn't say what additional steps the government should have taken here. Instead, the dissent's preferred remedy is for our court to remand this case so that the district court can figure it all out. But given that the government possessed no

other information about Rivera-Valdes's whereabouts, what additional steps could the government have taken? Short of ordering the government to conduct a *manhunt* for Rivera-Valdes, it's hard to think of any. Not only would such a requirement contravene our precedent, *see Popa*, 571 F.3d at 897 (noting that an alien "does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied"), but it would constitute a profound intrusion into the executive branch. In fact, Rivera-Valdes likely failed to update his address precisely because he *did not* want the government to know where he was. Forcing the government to engage in a game of cat-and-mouse, attempting to provide notice to those who have every reason to evade government attention, is beyond the requirements of due process and thoroughly unworkable. Even accepting *Jones*, the Court said that the government need not go very far to provide actual notice. *See Jones*, 547 U.S. at 235-36, 126 S. Ct. 1708 ("We do not believe the government was required to go [so] far" as searching for a new address in the phonebook or other government records such as income-tax rolls). And we can't just throw up our hands and ask the district court to solve the issue for us.

Fourth, I fear what this view of the law would mean for immigration proceedings writ large. Importing *Jones*'s "additional reasonable steps" requirement to the immigration setting would put on unsure footing every removal, deportation, and immigration conviction where the government had *any inkling* that the alien did not receive actual notice. The result would wreck the federal courts' dockets with an explosion of litigation and require the government to re-examine the adequacy of its notice procedures for the entire immigration sys-

tem. It would undermine finality for hundreds, if not thousands, of cases. While this would be the price to pay if due process requires it, nothing in the text and historical understanding of the Fifth Amendment supports this. We should not court chaos so carelessly.

BAKER, Judge, concurring:

The per curiam opinion, which I join, applies the due process balancing test of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-15, 70 S. Ct. 652, 94 L. Ed. 865 (1950).[1] *Ante* at 1122-23. In so doing, it distinguishes *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), reasoning that the statutory scheme in place at the time of Rivera-Valdes's 1994 deportation hearing adequately balanced the relevant competing interests by giving him the right to rebut the presumption of effective service. *Ante* at 1123-24. Under that regime, Rivera-Valdes could have done so by demonstrating that his "mailing address . . . remained unchanged, that neither [he] nor a responsible party working or residing at that address refused service, and that there was nondelivery or improper delivery by the Postal Service . . . ." *Arrieta v. I.N.S.*, 117 F.3d 429, 432 (9th Cir. 1997). He made no such showing below.

If we allowed the presumption of service to be rebutted by merely showing that a notice of deportation hearing was returned as unclaimed or undeliverable as the dissent proposes,[2] then it would reward an alien's eva-

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[1] Binding precedent holds that the Due Process Clause applies to deportation (now known as removal) hearings. *See Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *see also Dobrota v. INS*, 311 F.3d 1206, 1210 (9th Cir. 2002) ("Aliens facing deportation are entitled to due process under the Fifth Amendment to the United States Constitution, encompassing a full and fair hearing and notice of that hearing.").

[2] Although this case involves an unclaimed *certified* mailing, under the dissent's logic a returned *regular* mailing would also rebut the presumption of service and require the government to at least

sion and throw sand in the gears of immigration enforcement efforts. *Cf. Terminiello v. City of Chicago*, 337 U.S. 1, 37, 69 S. Ct. 894, 93 L. Ed. 1131 (1949) (Jackson, J., dissenting) (stressing the importance of "a little practical wisdom" in applying the "constitutional Bill of Rights"). It would also cast doubt on the validity of tens, if not hundreds, of thousands of the nearly 1.4 million (and counting) deportations *in absentia* since 1996, and some untold number before that.[3] Due process, how-

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consider what other means were available to provide notice to the alien. This matters because federal law mandated service of a notice of deportation by certified mail from 1990 through 1996. Immigration Act of 1990, Pub. L. 101-649, § 545(a), 104 Stat. 4978, 5061-62. Congress then changed the statute to require service by regular mail, Pub. L. 104-208, § 304, 110 Stat. 3009, 3009-587 to 3009-589 (1996), a requirement that persists to this day, *see* 8 U.S.C. § 1229.

Before 1990, the law left the manner of service to the agency's discretion: "[T]he alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held." Immigration and Nationality Act of 1952, Pub. L. 82-414, § 242(b)(1), 66 Stat. 163, 209. From 1979 to 1990, service of a notice of hearing could be accomplished by either personal service or regular mail. *See* 8 C.F.R. § 242.1(c) (1979) (describing available means to serve a notice of hearing as "personal service or . . . routine service"); 8 C.F.R. § 103.5a(a)(1) (1979) (defining "routine service" as service by regular mail). From 1957 to 1979, the agency served such notices personally or by certified mail. *See* 8 C.F.R. § 242.1(c) (1958).

[3] As detailed in the attached addendum, the government deported 1.376 million aliens *in absentia* from 1996 through the first quarter of fiscal year 2024. (Like others, I have been unable to locate such data for years before 1996. *See* Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court*, 168 U. Pa. L. Rev. 817, 823 n.25 (2020) (explaining that the Executive Office for Immigration Review was unable to provide FOIA-requested re-

ever, does not "place [such] impossible or impractical obstacles in the way" of the government protecting its "vital interest[s]," *Mullane*, 339 U.S. at 313-14, 70 S. Ct. 652, which surely include thwarting unlawful entry into the United States.

Jones is also distinguishable for a second reason—the property owner in that case did not "receive[ ] notice to expect notice." *Derezinski v. Mukasey*, 516 F.3d 619, 622 (7th Cir. 2008) (Posner, J.). Here, in contrast, immigration officials personally served Rivera-Valdes with an order to show cause and notice that he would be mailed a deportation hearing date.

In the context of unlawful entry into the United States, notice to expect notice of a deportation hearing also adequately balances the competing interests of the alien and the government. "The Constitution does not require that an effort to give notice succeed." *Ho v. Donovan*, 569 F.3d 677, 680 (7th Cir. 2009) (Easterbrook, J.) (citing *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002)). "If it did, then peo-

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moval *in absentia* data for years not included in its 2000 statistical yearbook, i.e., 1995 and earlier).)

The Postal Service reports that in fiscal year 2014, 4.3 percent of mail was returned as undeliverable. *See* https://www.uspsoig.gov/reports/audit-reports/management-advisory-strategies-reducing-undeliverable-addressed-mail. Using that percentage as a conservative proxy yields the conclusion that the notice of deportation was returned as unclaimed or undeliverable in at least 60,000 deportations *in absentia* since 1996. In my view, the actual number is likely far larger because individuals seeking to evade deportation are not a representative sample of available data involving unclaimed mail. Such persons of necessity move more often than the general population and have every reason *not* to keep immigration authorities advised of their whereabouts.

ple could evade knowledge, and avoid responsibility for their conduct, by burning notices on receipt—or just leaving them unopened," *id.*, or, I might add, by declining—as Rivera-Valdes did—to notify the government of any change in address after receiving notice to expect notice.[4] "Conscious avoidance of information is a form of knowledge." *Id.*

[4] On this record, common sense tells us that Rivera-Valdes absconded because the INS's motion to schedule his hearing sent by regular mail was returned as "Not Deliverable As Addressed/Unable to Forward."

Appendix

Addendum to Judge Baker's Concurrence

In Absentia Removal (Deportation) Orders, 1996-2024		
Fiscal Year	Number	Source
1996	54,178	2000 EOIR Statistical Yearbook[1]
1997	48,461	
1998	42,243	2002 EOIR Statistical Yearbook[2]
1999	40,719	
2000	39,721	
2001	36,764	
2002	37,316	2002 EOIR Statistical Yearbook[3]
2003	39,948	
2004	47,407	

[1] Exec. Office for Immigration Review, *Statistical Year Book 2000*, at L1, https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf.

[2] Exec. Office for Immigration Review, Exec. Office for Immigration Review, *Statistical Year Book 2002*, at H1, https://web.archive.org/web/20060629172106/http://www.justice.gov/eoir/statspub/fy02syb.pdf.

[3] Exec. Office for Immigration Review, Exec. Office for Immigration Review, *FY 2006 Statistical Yearbook*, at H1, https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy06syb.pdf.

2005	100,937	2002 EOIR Statistical Yearbook[4]
2006	102,850	
2007	35,578	
2008	21,360	
2009	18,658	
2010	20,412	
2011	18,467	2018 EOIR Report[5]
2012	16,491	
2013	18,345	
2014	25,909	2024 EOIR Report[6]
2015	38,260	
2016	34,305	
2017	42,044	

[4] Exec. Office for Immigration Review, Exec. Office for Immigration Review, *FY 2009 Statistical Yearbook*, at H1, https://www.justice.gov/sites/default/files/eoir/legacy/2010/03/04/fy09syb.pdf.

[5] Exec. Office for Immigration Review, In Absentia Exec. Office for Immigration Review, In Absentia *Removal Orders* (2018), https://web.archive.org/web/20180611231211/https://www.justice.gov/eoir/page/file/1060851/download.

[6] Exec. Office for Immigration Review, In Absentia Exec. Office for Immigration Review, In Absentia *Removal Orders* (2024), https://www.justice.gov/eoir/media/1344881/dl.

2018	46,213	
2019	91,285	
2020	87,843	
2021	8,536	
2022	62,646	
2023	159,720	
2024 (first quarter)	42,714	
Total	1,376,330	

[**Editor's Note:** The preceding image contains the reference for footnote [1, 2, 3, 4, 5, 6]].

SANCHEZ, Circuit Judge, dissenting:

When the adequacy of the government's notice to a proceeding is challenged under the Due Process Clause of the Fifth or Fourteenth Amendments, we analyze such claims under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), and *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). Under the Supreme Court's precedents, if the government becomes aware that its attempt to provide notice has failed, for example when mailed notice of a proceeding is returned unclaimed, that knowledge obligates the government to take additional reasonable steps to effect notice, if it is practicable to do so. *See Jones*, 547 U.S. at 225, 126 S. Ct. 1708. Since *Jones* was decided, we have applied these due process requirements in a wide range of government proceedings affecting real property, chattel, government benefits, licenses, privacy, and other legally protected interests. *See infra* 1133-34. Notably, our court has already "clarif[ied] that the general rules concerning adequacy of notice [under *Mullane* and *Jones*] . . . apply in the immigration context." *See Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008).

Despite this clear precedent, the majority holds that *Jones* does not apply in the context of immigration proceedings. The majority offers no plausible explanation why the due process protections announced in *Jones* should bypass immigrant petitioners, and it errs by disregarding our binding precedent in *Williams*. *See Balla v. Idaho*, 29 F.4th 1019, 1028 (9th Cir. 2022) ("We are bound by the law of our circuit, and only an en banc court or the U.S. Supreme Court can overrule a prior panel decision."). Compounding its mistake, the majority re-

solves this appeal by relying on pre-*Jones* circuit precedent that did not address whether mailed notice comports with due process when the government knows its method of notice was ineffective and takes no additional steps that are reasonably available to it. As *Jones* and other decisions of our circuit make clear, mere adherence to statutory notice requirements does not resolve whether the government has satisfied its constitutional obligations. Because the district court did not analyze appellant's due process challenge under *Jones*, I would vacate and remand for further proceedings before the district court. I respectfully dissent.

I.

A defendant may collaterally attack the removal order underlying an indictment for illegal reentry under 8 U.S.C. § 1326 by arguing that the proceeding that produced the order violated his Fifth Amendment right to due process. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839, 107 S. Ct. 2148, 95 L. Ed. 2d 772 (1987); *see, e.g., United States v. Melendez-Castro*, 671 F.3d 950, 953 (9th Cir. 2012). To prevail, the defendant must show (1) he exhausted administrative remedies for the removal order; (2) the deportation proceedings improperly deprived him of an opportunity for judicial review; and (3) entry of the removal order was fundamentally unfair. 8 U.S.C. § 1326(d); *see also United States v. Palomar-Santiago*, 593 U.S. 321, 324-25, 141 S. Ct. 1615, 209 L. Ed. 2d 703 (2021). "An underlying order is 'fundamentally unfair' if (1) a defendant's due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1201 (9th Cir. 2014).

Appellant Leopoldo Rivera-Valdes ("Rivera-Valdes") moved to dismiss his indictment, claiming that the underlying removal proceedings violated his right to due process under the Fifth Amendment because the mailed notice of hearing was not "reasonably calculated to reach" him. Although he was personally served with an Order to Show Cause ("OSC"), the OSC did not advise him of the date, time, and place of his removal hearing, instead stating that the hearing was "to be calendared and notice provided" at a later date. Appellant's motion to dismiss asserted that the notice of hearing was not reasonably calculated to reach him because the agency sent the notice by certified mail to an address that did not exist and the notice was returned to the agency as "unclaimed."

The district court, reaching no other legal question, concluded the notice of hearing was "reasonably calculated" when sent by certified mail to the address listed on his asylum application and denied the motion to dismiss. The court relied on pre-2006 precedent to conclude that the government satisfies due process by "mailing notice of the hearing to an alien at the address last provided to the INS." *Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002). *See also Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997); *United States v. Hinojosa-Perez*, 206 F.3d 832, 836-37 (9th Cir. 2000).

On appeal, Rivera-Valdes contends the agency did not use means reasonably calculated to notify him of his removal hearing when the agency sent notice by certified mail, learned the notice had gone unclaimed, and took no additional reasonable steps to effect notice. The government does not meaningfully dispute Rivera-Valdes's factual assertions nor his constitutional right to

reasonably calculated notice. Instead, the government contends sending notice by certified mail to the address listed on the asylum application was sufficient to satisfy both statutory and constitutional requirements. In short, the parties dispute what "reasonably calculated" notice requires under the circumstances presented here.

II.

Where due process requires notice of government action, *Mullane* and *Jones* provide "the 'appropriate analytical framework' for considering the adequacy of notice of government action." *Williams*, 531 F.3d at 1042. "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones*, 547 U.S. at 226, 126 S. Ct. 1708 (quoting *Mullane*, 339 U.S. at 314, 70 S. Ct. 652). As *Mullane* explains, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315, 70 S. Ct. 652. Adequate notice does not require actual notice. *See Dusenbery v. United States*, 534 U.S. 161, 169, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002). But adequate notice will generally require something more than employing means that knowingly result in a failure to provide notice—as *Jones* elaborated.

In *Jones*, the Arkansas Commissioner of State Lands sent two notices to petitioner Gary Jones by certified mail that his property taxes were delinquent. 547 U.S. at 223-24, 126 S. Ct. 1708. The notices explained that unless Jones redeemed the property, it would be subject to public sale. *Id.* Both certified letters were sent to the address registered by Jones and both were returned

"unclaimed." *Id.* at 224, 126 S. Ct. 1708. The Commissioner took no further steps to notify Jones of his tax delinquency. *Id.* at 229, 126 S. Ct. 1708. The home was sold at a tax foreclosure sale to respondent Linda Flowers at a fraction of its fair market value. *Id.* at 224, 126 S. Ct. 1708. Following the sale, Jones sued the Commissioner and Flowers in state court, asserting that the Commissioner's failure to provide adequate notice of the tax sale and resulting loss of his home was a violation of his right to due process. *Id.* The Arkansas Supreme Court affirmed the trial court's grant of summary judgment for the defendants, holding that attempting notice by certified mail in accordance with state law satisfied due process. *Id.* at 224-25, 126 S. Ct. 1708.

The Supreme Court reversed and held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225, 126 S. Ct. 1708. The Court reasoned that "a person who actually desired to inform" another would not "do *nothing* when a certified letter . . . is returned unclaimed." *Id.* at 229, 126 S. Ct. 1708 (emphasis added). Adequacy of notice still depends on " 'all the circumstances.'" *Id.* at 226, 126 S. Ct. 1708 (quoting *Mullane*, 339 U.S. at 314, 70 S. Ct. 652). But after *Jones*, "knowledge on the government's part is a 'circumstance and condition' that varies the 'notice required.'" *Id.* at 227, 126 S. Ct. 1708 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956)).[1] Even when

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[1] This concept was latent in prior Supreme Court opinions. *See, e.g., Greene v. Lindsey*, 456 U.S. 444, 453-54, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982) (holding notice of detainer action posted on

notice is reasonably calculated to reach a party when first sent, the government's discovery that the notice has failed to reach the intended recipient is a new condition requiring reassessment. *Id.* at 230, 126 S. Ct. 1708. Under such circumstances, the Supreme Court concluded, the Commissioner was required to take additional, reasonable steps to effect notice, if it was practicable to do so. *Id.* at 234, 126 S. Ct. 1708.

We have applied *Jones*'s due process analysis to evaluate the adequacy of notice in many contexts—from government proceedings affecting real property, chattel, and money to proceedings affecting licenses, privacy, and other protected legal interests. *See, e.g., Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941, 946 (9th Cir. 2006) (applying *Jones* to pilot license suspension proceedings); *J.B. v. United States*, 916 F.3d 1161, 1173-74 (9th Cir. 2019) (applying *Jones* to subpoena of tax records); *Grimm v. City of Portland*, 971 F.3d 1060, 1067-68 (9th Cir. 2020) (applying *Jones* to towing of car); *Taylor v. Yee*, 780 F.3d 928, 935-38 (9th Cir. 2015) (applying *Jones* in action challenging California's escheatment statute).

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apartment door was inadequate where process servers were aware the postings were torn down and unlikely to reach intended tenants); *Robinson v. Hanrahan*, 409 U.S. 38, 40, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972) (per curiam) (holding notice of forfeiture proceeding was inadequate where government officials knew vehicle owner was jailed and mailed notice was unlikely to reach him); *Covey v. Town of Somers*, 351 U.S. 141, 146, 76 S. Ct. 724, 100 L. Ed. 1021 (1956) (holding notice of foreclosure by mailing and publication was inadequate where government officials knew the property owner was not mentally competent to manage her affairs and was without a guardian).

Our sister circuits have also applied *Jones* to evaluate the adequacy of notice in various government proceedings. *See, e.g., García-Rubiera v. Fortuño*, 665 F.3d 261, 276 (1st Cir. 2011) (financial action); *D.R.T.G. Builders, LLC v. Occupational Safety & Health Review Comm'n*, 26 F.4th 306, 311 (5th Cir. 2022) (OSHA action); *Echavarria v. Pitts*, 641 F.3d 92, 94-95 (5th Cir. 2011) (DHS action); *Lampe v. Kash*, 735 F.3d 942, 943-44 (6th Cir. 2013) (bankruptcy action); *Peralta-Cabrera v. Gonzales*, 501 F.3d 837, 845 (7th Cir. 2007) (DHS action). These decisions confirm that when notice is due in a government action, the *Mullane-Jones* framework governs whether such notice is constitutionally sufficient.

As we made clear in *Williams*, the same due process analysis governs the adequacy of notice afforded in immigration proceedings. *Williams*, 531 F.3d at 1042. In *Williams*, the petitioner moved to reopen a final order of removal pursuant to regulations implementing the United States' obligations under the Convention Against Torture ("CAT"). *Id.* at 1041. Petitioner missed the deadline established in the CAT regulations for filing a motion to reopen and argued that notice through publication in the Federal Register was insufficient to afford her due process. *Id.* at 1042. *Williams* held that petitioner's due process challenge must be evaluated under the *Mullane-Jones* "'analytical framework,'" that is, "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections.'" *Id.* (quoting *Jones*, 547 U.S. at 226, 126 S. Ct. 1708).[2]

The majority's contention that *Jones* does not apply in immigration proceedings flatly contradicts what was stated in *Williams* and contravenes the long-settled principle that only an en banc court or the Supreme Court can overrule a prior panel decision. *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). While *Williams* did not involve the government discovering that its notice to a petitioner had not succeeded, that left open the question of *how* the due process analysis under *Jones* would apply in a different immigration case, not *whether Jones* should apply to immigration proceedings at all. *Williams* squarely addressed whether the *Mullane-Jones* due process framework applies in immigration proceedings. It does, and it is error for this panel to ignore it. Because the district court below never addressed whether the government had reasonable alternatives available to effect notice in this case, I would remand and direct it to apply *Jones* in the first instance. *See Jones*, 547 U.S. at 234, 126 S. Ct. 1708.

III.

Even if *Williams* were not binding authority, the majority's assertion that immigration proceedings are different and less deserving of the same due process protections under *Jones* is unconvincing and breaks with decades of precedent. We have reaffirmed time and

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[2] We rejected the petitioner's argument that she was entitled to actual notice and concluded that publication in the Federal Register was sufficient notice under the circumstances because "Petitioner cannot establish that the government had anything more than speculative knowledge that she was eligible for CAT relief when the regulations were promulgated." *Id.*

again that "[t]he Due Process Clause protects aliens in deportation proceedings and includes the right to a full and fair hearing as well as notice of that hearing." *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982)). *See also Dobrota*, 311 F.3d at 1210 ("Aliens facing deportation are entitled to due process under the Fifth Amendment to the United States Constitution, encompassing a full and fair hearing and notice of that hearing."); *Barraza Rivera v. INS*, 913 F.2d 1443, 1447 (9th Cir. 1990) ("The Fifth Amendment guarantees due process in deportation proceedings."); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) (accord).

"'The fundamental requisite of due process of law is the opportunity to be heard.'" *Mullane*, 339 U.S. at 314, 70 S. Ct. 652 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914)). "The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance." *Id.* (internal citation omitted). Contrary to the majority's contention, personal service of the OSC on Rivera-Valdes did not satisfy due process because the OSC did not contain the specific date, time, or location of the removal hearing, which had yet to be calendared. The government concedes that the only document containing the specific date, time, and location of the removal hearing was the notice of hearing sent by certified mail, and that notice was returned to the agency as "unclaimed." The government also concedes that the agency took no other steps to notify Rivera-Valdes of his scheduled removal hearing. The due process analysis must therefore focus

on whether any reasonable alternatives were in fact available to the government to effect notice.

The majority errs by relying on pre-*Jones* caselaw to resolve this appeal. These cases did not address the specific question at hand—"whether due process entails further responsibility when the government becomes aware prior to [the government action] that its attempt at notice has failed." *Jones*, 547 U.S. at 227, 126 S. Ct. 1708. In *Farhoud*, the notice of hearing was sent by certified mail to the petitioner, who conceded he was living at that address on that date. 122 F.3d at 796. We held that due process does not require the government to provide actual notice of the hearing; rather, "due process is satisfied if service is conducted in a manner 'reasonably calculated' to ensure that notice reaches the alien." *Id.*

Farhoud did not involve a claim that the government was aware its notice had not reached the intended recipient and it failed to take additional steps to effect notice. *Id.* Nor does any other case cited by the majority. *See Dobrota*, 311 F.3d at 1211-12; *Urbina-Osejo*, 124 F.3d at 1317; *Hinojosa-Perez*, 206 F.3d at 837; *Popa v. Holder*, 571 F.3d 890, 893 (9th Cir. 2009), *abrogation recognized by Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019).[3] Indeed, we have suggested in other immigration cases that, under *Jones*, government knowledge of failed notice is a

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[3] My colleagues cite two cases decided after *Jones*, but neither involved the government becoming aware that its attempt at notice had failed, and thus neither cites nor discusses *Jones* in its analysis. *See Popa*, 571 F.3d at 893; *Poursina v. USCIS*, 936 F.3d 868, 876 (9th Cir. 2019). "[C]ases are 'not precedential for propositions not considered.'" *United States v. Kirilyuk*, 29 F.4th 1128, 1134 (9th Cir. 2022) (internal citation omitted).

circumstance the government must consider when determining the reasonableness of its chosen method of notice. *See Chaidez v. Gonzales*, 486 F.3d 1079, 1086 n.8, 1086-87 (9th Cir. 2007) (citing *Jones* but declining to reach constitutional question where statutory notice was defective); *Al Mutarreb v. Holder*, 561 F.3d 1023, 1027-28 (9th Cir. 2009) (citing *Jones* but avoiding constitutional question after finding removal order invalid for other reasons); *see also Rendon v. Holder*, 400 Fed. Appx 218, 219-20 (9th Cir. 2010) (unpublished) (applying *Jones* to uphold additional steps taken by INS to effect notice). We recognized in these cases that whether notice of a deportation proceeding by certified mail comports with due process is a question governed by *Jones.* The notion that *Jones*'s due process framework has no bearing on immigration proceedings is misguided.

In any event, even if our cases have held that notice of hearing sent by regular mail to an alien's last provided address is "constitutionally adequate," *Urbina-Osejo*, 124 F.3d at 1317, *Jones* requires a different due process analysis when the government learns its attempt at notice has failed. *Jones*, 547 U.S. at 227, 234, 126 S. Ct. 1708. We are bound by this intervening Supreme Court authority. *See Miller*, 335 F.3d at 893.

The majority concludes that because the agency satisfied statutory notice provisions, it necessarily satisfied due process requirements as well. But *Jones* rejected this argument, making clear that "the government [must] consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230, 126 S. Ct. 1708. Although the Commissioner complied with state law when he sent

notice of tax delinquency by certified mail, *id.* at 224-25, 126 S. Ct. 1708, this did not insulate the Commissioner against claims his notice was constitutionally defective. *Id.* at 231-32, 126 S. Ct. 1708. *See also Yi Tu*, 470 F.3d at 945-46 (rejecting agency claim that because it was statutorily authorized to give notice by certified mail, its notice of pilot license suspension proceedings sent by certified mail was constitutionally adequate) (citing *Jones*, 547 U.S. at 224, 126 S. Ct. 1708).

Finally, the majority purports to apply a due process balancing test to justify ignoring *Jones*'s "government knowledge" analysis. According to the majority, the statutory regime in place at the time of Rivera-Valdes's 1994 deportation hearing was "reasonably calculated to ensure that Rivera-Valdes received notice" because it required aliens to update their addresses with the agency. Thus, the majority concludes, "by failing to comply with his statutory obligations, Rivera-Valdes 'relieve[d] the government of its responsibility to provide' him with any more notice of the hearing." *Id.* (quoting *Popa*, 571 F.3d at 897).

The majority's position suffers from two key flaws. First, the interest-balancing called for in *Mullane* and *Jones* is the very analysis the majority seeks to avoid here. To balance the interests of the government and individual, due process requires that the government provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afform them an opportunity to present their objections." *Mullane*, 339 U.S. at 314, 70 S. Ct. 652. Notice is generally sufficient "if it was reasonably calculated to reach the intended recipient when sent" and the government "heard nothing back indicat-

ing that anything had gone awry." *Jones*, 547 U.S. at 226, 126 S. Ct. 1708. But the balance of interests changes when the government becomes aware that its efforts to provide notice have proven ineffective. As *Jones* explained, "[d]eciding to take no further action is not what someone 'desirous of actually informing' [the interested party] would do; such a person would take further reasonable steps if any were available." *Id.* at 230, 126 S. Ct. 1708. The analysis in *Jones* cannot be divorced from *Mullane*, for it addresses what process is due when the government discovers that notice pursuant to its normal procedures has failed and the interested party has not been apprised of the hearing.

Second, *Jones* rejected the majority's view that by failing to comply with a legal requirement to register and keep an address updated, the interested party loses the right to reasonable follow-up measures. *See* 547 U.S. at 231-32, 126 S. Ct. 1708 ("Jones' failure to comply with a statutory obligation to keep his address updated [did not] forfeit[ ] his right to constitutionally sufficient notice," because "[a] party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation.") (citation omitted). Whether in *Jones* or here, a person who fails to meet their statutory obligation to update their address, or to pay their property taxes, does not forfeit their due process right to "adequate notice of the impending [government action]." *Id.* at 234, 126 S. Ct. 1708.[4]

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[4] The majority contends that it would be futile to remand to the district court. But remand was the appropriate remedy in *Jones* for determining whether additional reasonable steps were available to the State to effect notice. *See* 547 U.S. at 234-36, 126 S. Ct. 1708. And in *Echavarria*, the Fifth Circuit left it to the district

IV.

Judge Bumatay writes separately to convey his concern that I would break new constitutional ground to resolve this case. Not so. As I have explained, existing precedent already confirms two points: *first*, immigrants subject to removal are entitled to due process protections under the Fifth Amendment; and *second*, we and other circuits have already applied *Jones* in a variety of government proceedings affecting real and personal property, licensing, privacy, and other protected legal interests. I break no new ground by applying foundational due process principles from *Mullane* and *Jones* to another type of government proceeding. It is the majority who departs from our precedent by failing to apply this due process framework in the context of an immigration case. *See Williams*, 531 F.3d at 1042.

Judge Bumatay's concurrence expresses a novel and overly restrictive view of due process that has yet to gain purchase in our circuit. My colleague cites to his own concurrence in *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022) (Bumatay, J., concurring), for the proposition that removal proceedings are a "unique enclave" when it comes to due process. *Id.* at 1216. But he does not explain what makes removal proceedings different from or less deserving of the "elementary and fundamental" requisites of due process in any govern-

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court to determine that "additional reasonable steps were in fact available, and were not used," by DHS to notify bond obligors about the breach of an immigration bond after notice was returned as undeliverable. 641 F.3d at 95-96 (applying *Jones* in immigration bond context). Because the existing record does not disclose what steps were available to the government here, the district court would be best positioned to determine that question in the first instance.

ment proceeding—notice and an opportunity to be heard. *Mullane*, 339 U.S. at 314, 70 S. Ct. 652. And the stakes to an individual subject to removal are no less severe than other government proceedings. *See Niz-Chavez v. Garland*, 593 U.S. 155, 163-64, 141 S. Ct. 1474, 209 L. Ed. 2d 433 (2021) ("A notice to appear serves as the basis for commencing a grave legal proceeding," "it is 'like an indictment in a criminal case [or] a complaint in a civil case.'" (brackets in original)).

Judge Bumatay's reliance on *Trump v. Hawaii*, 585 U.S. 667, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018), does little to support his position. There, the Supreme Court discussed "certain aliens abroad"—that is, noncitizens *outside* the United States. *Id.* at 675, 138 S. Ct. 2392. The Due Process Clause applies to "persons," regardless of citizenship. *See* U.S. Const. amends V & XIV. Accordingly, this court has consistently held that the Constitution entitles a noncitizen facing removal within the United States to a "full and fair hearing and notice of that hearing." *Dobrota*, 311 F.3d at 1210; *see Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006); *Barraza Rivera*, 913 F.2d at 1447; *Campos-Sanchez*, 164 F.3d at 450. Judge Bumatay's contention that due process protections should apply with less force to individuals suspected of being in the country unlawfully is squarely at odds with our precedent.

My colleagues' concern about the effect *Jones* would have on immigration proceedings is wildly overstated.[5]

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[5] Judge Baker raises the specter that some large portion of the 1.376 million *in absentia* orders issued since 1996 could be called into question, but nowhere in Judge Baker's addendum does it disclose the number of *in absentia* hearings that involved the return

Jones simply prompts further inquiry into whether the government could have taken additional reasonable steps to effect notice when it becomes aware its method of providing notice was unsuccessful. Because this analysis was never undertaken by the district court, we do not know what evidence the government could or would present. To put things in perspective, *Jones* has been the law of the land since 2006, governing the constitutional adequacy of notice afforded to interested parties in countless federal, state, and local government proceedings. Millions of notices of government action have likely been delivered by governments in that time, and yet courts have not ground to a halt and government agencies have found ways to take additional steps to effect notice when it is practicable to do so.

More importantly, the protections enshrined in the Due Process Clause should not be given short shrift simply because of a person's immigration status. I can imagine few interests more important than avoiding persecution or torture—claims regularly raised in removal proceedings. Given the stakes involved, the constitutional protections described in *Mullane* and *Jones* —as well as the flexibility in their application—should find a natural home in immigration proceedings.

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of unclaimed notices of hearing or otherwise reflected government knowledge that notice was ineffective.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:19-CR-00408-IM

UNITED STATES OF AMERICA

v.

LEOPOLDO RIVERA-VALDES, DEFENDANT

Signed: Aug. 11, 2020

OPINION AND ORDER

KARIN J. IMMERGUT, United States District Judge

Defendant Leopoldo Rivera-Valdes is charged with one count of illegal reentry after having been previously arrested and deported from the United States on October 21, 2006, in violation of 8 U.S.C. § 1326. ECF 1. Defendant Rivera-Valdes now moves to dismiss the indictment, bringing a collateral attack against the removal order upon which the indictment is predicated. ECF 22. He contends that the underlying removal order is invalid because his right to due process was violated during the removal proceeding. *Id.* This Court held a hearing on Defendant's motion on August 10, 2020. ECF 36. After considering the pleadings, the record, and the arguments of counsel, this Court finds that Defendant's removal proceeding did not violate his due process rights.

For the reasons set forth below, Defendant's Motion to Dismiss the Indictment, ECF 22, is denied.

BACKGROUND

Defendant Rivera-Valdes is a native and citizen of Mexico who first came to the United States in 1992. ECF 22 at 1. In December of 1993, Defendant paid a third party to prepare an application for asylum that falsely claimed he was a citizen of Guatemala. Defendant submitted this application, also known as a "Form I-589 Request for Asylum in the United States" to the Immigration and Naturalization Service ("INS"). ECF 32 Ex. 1, at 1-5. Defendant also submitted a Form G-325A providing biographic information, *id.* at 6, and a Form I-765 Application for Employment Authorization, *id.* at 7. On all forms, Defendant listed his address as 4037 N. Cleveland Ave., Portland, Oregon 97212 (the "Cleveland Avenue address"). At the hearing on the motion, counsel for Defendant conceded that the Cleveland Avenue address was provided by Defendant, and that Defendant never provided an updated or different address to the INS.

On January 28, 1994, the INS mailed a notice to the Cleveland Avenue address, acknowledging receipt of Defendant's request for asylum. ECF 32 Ex. 2. On February 3, 1994 and February 8, 1994, the INS mailed additional notices to the Cleveland Avenue address stating that Defendant's employment authorization was approved. ECF 32 Ex. 3. The approval notices instructed Defendant to appear in person at the INS office in Portland, Oregon within forty-five days to pick up his employment authorization card. *Id.* at 1, 5. None of these notices were returned as undeliverable.

On March 3, 1994, Defendant appeared at the INS office in Portland, Oregon in order to obtain an employment authorization card pursuant to his previous application. ECF 22 Ex. B. INS officials determined that Defendant had presented a false Guatemalan birth certificate as proof of identity to pick up the card. Defendant claimed to have purchased the false birth certificate and political asylum paperwork from a third-party. *Id.* Defendant then voluntarily withdrew his application for asylum. ECF 22 Ex. D. That same day, INS officers served Defendant personally with an Order to Show Cause ("OSC"), charging Defendant with being subject to deportation and announcing that his removal proceedings would be initiated at an address and on a date "to be calendared and notice provided by the Office of the Immigration Judge" ECF 32 Ex. 5, at 3. The document was written in English and Spanish. It contained several important warnings. First, the OSC stated, "[y]ou will have a hearing before an immigration judge, scheduled no sooner than 14 days from the date you are served with this Order to Show Cause." *Id.* at 2. The OSC also warned:

> You are required to be present at your deportation hearing prepared to proceed. If you fail to appear at any hearing after having been given written notice of the date, time, and location of your hearing, you will be ordered deported *in your absence*, if it is established that you are deportable and you have been provided the appropriate notice of the hearing.

Id. at 4. The OSC also stated:

> You are required by law to provide immediately in writing an address . . . where you can be contacted. You are required to provide written notice, within

> five (5) business days, of any change in your address or telephone number to the office of the Immigration Judge listed in this notice. Any notices will be mailed only to the last address provided by you.

Id. The OSC listed the Cleveland Avenue address as Defendant's address of record. *Id.* at 1. Defendant signed the OSC, and provided his fingerprint confirming personal service. *Id.* at 5. The OSC was read to Defendant in Spanish, his native language. *Id.* Defendant was then released to await the hearing notice from the Office of the Immigration Judge.

On April 20, 1994, the INS District Counsel filed the OSC with the Office of the Immigration Judge and moved the court to schedule the case for a hearing. ECF 32 Ex. 7. A copy of the motion was mailed to the Cleveland Avenue address, but was returned as undeliverable by the United States Postal Service. ECF 30 Ex. 4; ECF 30 Ex. 5. On April 25, 1994, the Office of the Immigration Judge sent a hearing notice to the Cleveland Avenue address instructing Defendant to appear for a deportation hearing on August 12, 1994 at 8:30 A.M. ECF 22 Ex. G. The hearing notice was sent by certified mail, but it was returned as unclaimed on May 23, 1994. ECF 30 Ex. 2, at 2.

The deportation hearing took place as scheduled on August 12, 1994. The Immigration Judge found that Defendant was properly served with the OSC and the notice of the hearing. ECF 22 Ex. H. The Immigration Judge ordered Defendant deported *in absentia, id.*, and issued a warrant for his deportation that same day. ECF 22 Ex. I. On August 30, 1994, the INS sent Defendant a Form I-166, in Spanish, instructing him to appear to the INS office for deportation. ECF 32 Ex. 12.

The letter was sent by certified mail to the Cleveland Avenue address, and again was returned as undeliverable. ECF 32 Ex. 13.

On October 17, 2006, Immigration and Customs Enforcement (ICE) agents found Defendant living in Portland, Oregon. ECF 32 Ex. 14. He was deported on October 21, 2006, pursuant to the August 1994 warrant of deportation. ECF 32 Ex. 15. On April 8, 2019, ICE officers learned of Defendant's presence in the District of Oregon and referred the case for potential criminal prosecution.

On September 10, 2019, a federal grand jury indicted Defendant on a single charge of illegal re-entry in violation of 8 U.S.C. § 1326(a). ECF 1. On May 15, 2020, Defendant filed the present motion to dismiss the indictment, collaterally attacking the underlying removal order. ECF 22. Counsel for Defendant reports that Defendant also moved to reopen his removal hearing before the Portland Immigration Court, but that motion was denied and Defendant intends to appeal the denial with the Board of Immigration Appeals. ECF 35.

STANDARDS

To convict a defendant of illegal reentry under 8 U.S.C. § 1326, "the government must prove that the alien left the United States under order of exclusion, deportation, or removal and then illegally reentered." *United States v. Martinez*, 786 F.3d 1227, 1230 (9th Cir. 2015). A defendant may collaterally attack the validity of a removal order underlying a section 1326 indictment by arguing the administrative proceeding producing the order violated his Fifth Amendment right to due process. *United States v. Melendez-Castro*, 671 F.3d 950, 953 (9th Cir. 2012). "[W]here a deportation proceeding

violates an alien's due process rights, the Government may not rely on any resulting deportation order as proof of an element of a criminal offense." *United States v. Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994) (citing *Mendoza-Lopez*, 481 U.S. at 840).

To prevail on a collateral attack of a section 1326 indictment, a defendant must demonstrate that: (1) he exhausted any administrative remedies available to seek relief against the order; (2) the deportation proceedings improperly deprived him of the opportunity for judicial review; and (3) the entry of the deportation order was fundamentally unfair. 28 U.S.C. § 1326(d). A removal order is "fundamentally unfair" if: (1) the defendant's due process rights were violated by defects in his underlying deportation proceeding; and (2) he suffered prejudice as a result. *Martinez*, 786 F.3d at 1230.

DISCUSSION

Defendant alleges that the removal order underlying the section 1326 indictment is invalid because his right to due process was violated when he was ordered deported *in absentia* without receiving notice of the date, time, and location of his hearing. The threshold and dispositive issue in this case is whether the notice provided for Defendant's deportation hearing comports with due process.

Aliens facing deportation are entitled to due process under the Fifth Amendment to the United States Constitution, encompassing a full and fair hearing and notice of that hearing. *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997). To satisfy due process requirements, the notice afforded aliens about deportation proceedings

must be reasonably calculated to reach them.[1] *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 (9th Cir. 2004). The parties agree that this standard applies. *See* ECF 22 at 6; ECF 32 at 11. Defendant bears the burden of establishing the due process violation. *See United States v. Raya-Vaca*, 771 F.3d 1195, 1202 (9th Cir. 2014) (*abrogated on other grounds by DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020)).

Defendant argues that notice of the deportation hearing was not reasonably calculated to reach him because the notice was returned as unclaimed, the Cleveland Avenue address did not actually exist, and Defendant attests that he never received notice of the date and time of his hearing. ECF 22 at 7. Defendant also argues that he was not provided sufficient notice of his removal hearing under the statutory requirements of the 1994 version of Immigration and Nationality Act ("INA"). ECF 30 at 2-4.

It is well established that "[a]n alien does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." *Farhoud*, 122 F.3d at 796. The government generally satisfies due process by "mailing notice of the hearing to an alien at the address last provided to the INS." *Dobrota v. INS*, 311 F. 3d. 1206, 1211 (9th Cir. 2002); *see also Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997). This rule is particularly strong where the alien is warned of the duty to update the government with any

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[1] The issue of adequate notice is most commonly raised when an alien attempts to reopen his removal proceeding after having been removed *in absentia*. Nevertheless, the same due process standard applies in the context of motions to dismiss an underlying indictment under 28 U.S.C. § 1326(d).

address changes. *See, e.g., United States v. Hinojosa-Perez*, 206 F.3d 832, 836-37 (9th Cir. 2000) (upholding an *in absentia* removal order where defendant was warned in the OSC of his duty to update the government of any mailing address change and notice was sent to his last reported address via certified mail); *Lopez-Lopez v. Holder*, 358 F. App'x. 926, 927 (9th Cir. 2009) (holding due process was satisfied in petitioner's *in absentia* removal proceedings where petitioner received the OSC informing him he must provide the immigration court with written notice of his change of address, and the hearing notice was sent by certified mail to the address he last provided).

The operative statute at the time of Defendant's removal proceedings similarly did not require actual notice. Under the 1994 INA, notice of the time and place of the deportation proceedings was to be "given in person to the alien (or if personal service [was] not practical . . . given by certified mail to the alien . . .)." 8 U.S.C. § 1252b(a)(2)(A) (repealed 1996). Interpreting this provision, the Ninth Circuit held that "notice [of a deportation hearing] by certified mail sent to an alien's last known address" was statutorily sufficient, "even if no one signed for it." *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997). The Ninth Circuit also upheld a "strong presumption of effective service" under the INA where notice of the hearing was sent by certified mail. *Id.*; *see also In re Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995). Removal *in absentia* was proper as long as an Immigration Judge found "clear, unequivocal, and convincing evidence" that these notice procedures were followed. 8 U.S.C. § 1252b(c)(1).

Given this legal context, Defendant has failed to provide any compelling evidence that notice of his removal hearing was not "reasonably calculated" to reach him. Defendant was personally served with the OSC, thus notifying him of the impending deportation proceedings. ECF 32 Ex. 5, at 5. The OSC provided clear warnings of Defendant's duty to report any change of address to the Office of the Immigration Judge. *Id.* at 4. The OSC further provided warning of *in absentia* removal should he fail to appear at his hearing. *Id.* The OSC was signed by Defendant and read to him in his native language of Spanish. *Id.* at 5. It was also written in both English and Spanish. ECF 32 Ex. 5.

Defendant acknowledged his mailing address at Cleveland Avenue when he signed the OSC. ECF 32 Ex. 5. Despite his contention that the address does not exist, Defendant had previously received mail from the government at this address. *See* ECF 32 Ex. 2; ECF 32 Ex. 3. None of the letters sent by the INS to Defendant prior to the issuance of the OSC were returned as undeliverable. Defendant even responded to the notice sent to the Cleveland Avenue address by appearing at the INS office in Portland to pick up his employment authorization card within the forty-five day time period provided in the notice. ECF 22 Ex. B. Indeed, Defendant appears to concede this point. ECF 30 at 3 ("[Defendant] appeared at the INS in person . . . apparently in response to one of [the INS's] mailed notices."). Neither party contests that the hearing notice was sent to the Cleveland Avenue address by certified mail. *See* ECF 30 at 4; ECF 33 at 2; ECF 32 at 5.

On this evidence, Defendant has failed show that the government's method of service was not "reasonably

calculated" to reach him. This Court finds that the notice provided to Defendant for his deportation hearing was sufficient under the due process clause.

CONCLUSION

Defendant bears the burden of establishing that the administrative proceeding producing his deportation order violated his due process rights and he has failed to do so. *See Raya-Vaca*, 771 F.3d at 1202. Because he cannot establish that the entry of the deportation order was fundamentally unfair, Defendant's collateral attack of the order underlying this section 1326 prosecution fails as a matter of law. *See* 8 U.S.C. § 1326(d).[2] For these reasons,

Defendant's Motion to Dismiss the Indictment is DENIED.

IT IS SO ORDERED.

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[2] The parties dispute whether Defendant can establish the remaining elements of his collateral attack under 8 U.S.C. § 1326(d). Because Defendant failed to establish that his due process rights were violated in his underlying removal proceeding, this Court need not reach the parties' remaining arguments. *See United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1126 (9th Cir. 2013) (the three requirements outlined in section 1326 "must all be satisfied").

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-30177
D.C. No. 3:19-cr-00408-IM-1
District of Oregon, Portland

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEOPOLDO RIVERA-VALDES, DEFENDANT-APPELLANT

Filed: Jan. 14, 2025

ORDER

MURGUIA, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 40(c) and Circuit Rule 40-3. The three-judge panel opinion is vacated.

APPENDIX E

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. 1229 provides:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date

in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the

United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

3. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by

civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the

reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or

(2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a

State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regu-

lation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard

to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

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[1] So in original.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

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[2] So in original. A closing parenthesis probably should appear.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

4. 8 U.S.C. 1252b (1994) provided:

Deportation procedures

(a) Notices

(1) Order to show cause

In deportation proceedings under section 1252 of this title, written notice (in this section referred to as an "order to show cause") shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided a list of counsel prepared under subsection (b)(2) of this section.

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1252 of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under subsection (c)(2) of this section of failure to provide address and telephone information pursuant to this subparagraph.

(2) Notice of time and place of proceedings

In deportation proceedings under section 1252 of this title—

(A) written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise, of—

(i) the time and place at which the proceedings will be held, and

(ii) the consequences under subsection (c) of this section of the failure, except under exceptional circumstances, to appear at such proceedings; and

(B) in the case of any change or postponement in the time and place of such proceedings, written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) of—

(i) the new time or place of the proceedings, and

(ii) the consequences under subsection (c) of this section of failing, except under exceptional circumstances, to attend such proceedings.

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under subsection (a)(1)(F) of this section.

(3) Form of information

Each order to show cause or other notice under this subsection—

(A) shall be in English and Spanish, and

(B) shall specify that the alien may be represented by an attorney in deportation proceedings under section 1252 of this title and will be provided, in accordance with subsection (b)(1) of this section, a period of time in order to obtain counsel and a current list described in subsection (b)(2) of this section.

(4) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of ad-

dresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1252 of this title, the hearing date shall not be scheduled earlier than 14 days after the service of the order to show cause, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1252 of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(c) Consequences of failure to appear

(1) In general

Any alien who, after written notice required under subsection (a)(2) of this section has been provided to the alien or the alien's counsel of record, does not attend a proceeding under section 1252 of this title, shall be ordered deported under section 1252(b)(1) of this title in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable. The written notice by the Attorney General shall be considered sufficient for purposes of this

paragraph if provided at the most recent address provided under subsection (a)(1)(F) of this section.

(2) No notice if failure to provide address information

No written notice shall be required under paragraph (1) if the alien has failed to provide the address required under subsection (a)(1)(F) of this section.

(3) Rescission of order

Such an order may be rescinded only—

(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 filing of the motion to reopen described in subparagraph (A) or (B) shall stay the deportation of the alien pending disposition of the motion.

(4) Effect on judicial review

Any petition for review under section 1105a of this title of an order entered in absentia under this subsection shall, notwithstanding such section, be filed not later than 60 days (or 30 days in the case of an alien convicted of an aggravated felony) after the date of the final order of deportation and shall (ex-

cept in cases described in section 1105a(a)(5) of this title) be confined to the issues of the validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether or not clear, convincing, and unequivocal evidence of deportability has been established.

(d) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(1) define in a proceeding before a special inquiry officer or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(2) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(3) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this subsection shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(e) Limitation on discretionary relief for failure to appear

(1) At deportation proceedings

Any alien against whom a final order of deportation is entered in absentia under this section and who, at the time of the notice described in subsection (a)(2) of this section, was provided oral notice, either in the alien's native language or in another language the al-

ien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (f)(2) of this section) to attend a proceeding under section 1252 of this title, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the entry of the final order of deportation.

(2) Voluntary departure

(A) In general

Subject to subparagraph (B), any alien allowed to depart voluntarily under section 1254(e)(1) of this title or who has agreed to depart voluntarily at his own expense under section 1252(b)(1) of this title who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure or the date of unlawful reentry, respectively.

(B) Written and oral notice required

Subparagraph (A) shall not apply to an alien allowed to depart voluntarily unless, before such departure, the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien's native language or in another language the alien understands of the consequences under subparagraph (A) of the alien's remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances.

(3) Failure to appear under deportation order

(A) In general

Subject to subparagraph (B), any alien against whom a final order of deportation is entered under this section and who fails, other than because of exceptional circumstances, to appear for deportation at the time and place ordered shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date the alien was required to appear for deportation.

(B) Written and oral notice required

Subparagraph (A) shall not apply to an alien against whom a deportation order is entered unless the Attorney General has provided, orally in the alien's native language or in another language the alien understands and in the final order of deportation under this section of the consequences under subparagraph (A) of the alien's failure, other than because of exceptional circumstances, to appear for deportation at the time and place ordered.

(4) Failure to appear for asylum bearing

(A) In general

Subject to subparagraph (B), any alien—

(i) whose period of authorized stay (if any) has expired through the passage of time,

(ii) who has filed an application for asylum, and

(iii) who fails, other than because of exceptional circumstances, to appear at the time and place specified for the asylum hearing,

shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the asylum hearing.

(B) Written and oral notice required

Subparagraph (A) shall not apply in the case of an alien with respect to a failure to be present at a hearing unless—

(i) written notice in English and Spanish, and oral notice either in the alien's native language or in another language the alien understands, was provided to the alien of the time and place at which the asylum hearing will, be held, and in the case of any change or postponement in such time or place, written notice in English and Spanish, and oral notice either in the alien's native language or in another language the alien understands, was provided to the alien of the new time or place of the hearing; and

(ii) notices under clause (i) specified the consequences under subparagraph (A) of failing, other than because of exceptional circumstances, to attend such hearing.

(5) Relief covered

The relief described in this paragraph is—

(A) voluntary departure under section 1252(b)(1) of this title,

(B) suspension of deportation or voluntary departure under section 1254 of this title, and

(C) adjustment or change of status under section 1255, 1258, or 1259 of this title.

(f) Definitions

In this section:

(1) The term "certified mail" means certified mail, return receipt requested.

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

5. 8 U.S.C. 1326 provides in pertinent part:

Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admis-

sion and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

* * * * *

(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.

APPENDIX F

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APPENDIX G

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