19-30006

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

JUAN CARLOS BASTIDE-HERNANDEZ,

Defendant - Appellee.

On Appeal From The United States District Court
For The Eastern District of Washington
District Court No. 1:18-cr-2050-SAB-1
The Honorable Stanley A. Bastian, United States District Judge

DEFENDANT - APPELLEE'S PETITION FOR REHEARING *EN BANC*

Paul E. Shelton
Federal Defenders of Eastern Washington & Idaho
306 E. Chestnut Ave.
Yakima, WA 98901
(509) 248-8920
Email: paul_shelton@fd.org

Attorney for Defendant - Appellee

UNITED STATES OF AMERICA, **Plaintiff-Appellant,** **v.** **JUAN CARLOS BASTIDE-HERNANDEZ,** **Defendant-Appellee.**	**U.S.C.A. No. 19-30006** **U.S.D.C. No. 1:18-cr-2050-SAB-1** **Defendant-Appellee's Petition for Panel Rehearing *En Banc***

I. INTRODUCTION

On February 2, 2021, a panel for this Court issued a split decision [Attached as Appendix A] reversing the district court's dismissal. It is important to recognize the Honorable Danny J. Boggs, of the United States Circuit for the U.S. Court of Appeals for the Sixth Circuit, was not only the tie-breaking vote but issued the majority opinion. In defense counsel's judgment, rehearing *en banc* is warranted pursuant to Rules 35(a)(1) and (a)(2) of the Federal Rules of Appellate Procedure. First, this matter is one of exceptional importance because it potentially affects hundreds of thousands of criminal immigration prosecutions and civil immigration proceedings. A ruling in this case regarding competing statutes passed by Congress, regulations implemented by an agency, and the agency's interpretations of those regulations will have broad-reaching implications in a variety of other contexts.

Further, consideration by the full *en banc* court is necessary to secure and maintain uniformity of this Court's decisions. As Honorable M. Smith of this Court stated in his

dissent, the majority's "interpretation ignores *Karingithi's* holding that the regulations—and specifically the regulatory requirements for an NTA—control when jurisdiction vests."[1] The majority substantially departed from this Court's prior panel rulings in *Karingithi v. Whitaker*[2] and *Aguilar Fermin v. Barr*,[3] both of which found jurisdiction vested in an immigration court only where a subsequent curative document had been served. Instead, here the two-judge majority of this panel held that a single sentence of one regulation controls the vesting of jurisdiction while subsequent sentences of the same regulation and related regulations have no impact whatsoever. To definitively resolve this issue, *en banc* review is necessary.

II. STATEMENT OF THE CASE[4]

Mr. Bastide-Hernandez's relevant removal proceedings began in April 2006. Specifically, immigration authorities encountered him in a county jail serving time on local charges.[5] On August 26, 2006, immigration prepared two Notices to Appear ("NTA") and served both on Mr. Bastide-Hernandez.[6] Both NTAs were prepared the

---

[1] *United States v. Bastide-Hernandez*, 986 F.3d 1245, 1252 (9th Cir. 2021) (2-1 decision) (Smith, M., dissenting).
[2] 913 F.3d 1158 (9th Cir. 2019).
[3] 958 F.3d 887 (9th Cir. 2020).
[4] Mr. Bastide-Hernandez and the United States submitted full statements of the case and statements of fact in their respective briefs. *See* Dkt. Entries 3 and 27. For the sake of brevity, Mr. Bastide-Hernandez only summarizes the most relevant facts and procedural history in this petition.
[5] ER 19-20. "ER" refers to the Excerpts of Record submitted with the United States' opening brief. *See* Dkt. Entry 3.
[6] ER 21-24.

same day by the same officer.[7] Both NTAs advised him to appear for a removal hearing at a date and time "to be set" at an immigration court in Seattle, Washington.[8] Both NTAs reflect that they were served the same day on Mr. Bastide-Hernandez.[9] The certificates of service state that he was served in-person and provided oral notice in Spanish of the time and place of his removal hearing—an impossibility because no date had been set.[10]

Approximately two weeks after the NTAs were prepared and served, the Seattle immigration court prepared a Notice of Hearing ("NOH") regarding Mr. Bastide-Hernandez's removal hearing.[11] The NOH advised that his removal hearing was set for June 14, 2006, at the NWDC in Tacoma.[12] The certificate of service states that the NOH was served by "fax" on Mr. Bastide-Hernandez "c/o Custodial Officer" the same day it was prepared.[13] Mr. Bastide-Hernandez's signature nor his initials appear anywhere on the NOH.[14] The United States offered no additional proof in the district court record to show that Mr. Bastide-Hernandez was actually served with the NOH, and if so when.

---

[7] ER 21, 23.
[8] ER 21, 23.
[9] ER 22, 24.
[10] ER 21-24.
[11] ER 25.
[12] *Id.*
[13] *Id.*
[14] *Id.*

Mr. Bastide-Hernandez's removal hearing occurred on June 14, 2006 as scheduled. The hearing was apparently presided over by the immigration court in Seattle.[15] However, it appears that Mr. Bastide-Hernandez did not appear in-person because he was served with the removal order via "fax … c/o custodial officer" rather than personal service.[16] The removal order indicates that Mr. Bastide-Hernandez did not make any applications for relief from removal, including voluntary departure.[17] He also did not appeal the removal order.[18] The immigration judge found Mr. Bastide-Hernandez removable and ordered him removed to Mexico.

The United States indicted Mr. Bastide-Hernandez for illegal reentry on August 14, 2018, citing his June 2006 removal order.[19] Mr. Bastide-Hernandez filed a motion to dismiss the indictment in November 2018, alleging the underlying removal order was void because the immigration court lacked subject matter jurisdiction due to the NTA not including the date and time of his removal hearing.

Following a hearing where no testimony was admitted,[20] the district court issued an order granting the motion to dismiss.[21] The district court held that the Supreme

---

[15] ER 26.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] ER 48-49.
[20] SER 1-42 (transcript of hearing on motion to dismiss). "SER" refers to the supplemental excerpts of record prepared and submitted with the answering brief. *See* Dkt. Entry 28.
[21] ER 3-18.

Court's analysis in *Pereira v. Sessions*[22] applied and the NTA was deficient under 8 U.S.C. § 1229 (which the Court held applied to the regulation defining when jurisdiction vests, 8 C.F.R. § 1003.13) for failing to include the date and time of the removal hearing.[23] The district court further found that the NOH did not cure the NTA's deficiencies because the NOH is not a "charging document" under 8 C.F.R. § 1003.13, the NOH was issued by the immigration court rather than filed with the court by immigration authorities, and the NOH was served by fax despite a requirement under both a statute and applicable regulations that it be served either in-person or by mail.[24] The district court further held that Mr. Bastide-Hernandez did not need to satisfy 8 U.S.C. §1326(d)'s requirements to collaterally attack a removal order because the immigration court lacked subject matter jurisdiction, rendering the removal order "void on its face."[25]

The United States filed a timely notice of appeal.[26] Following full briefing, this case was argued and submitted December 7, 2020. A divided panel issued a 2-1 opinion in this matter on February 2, 2021, with the majority reversing the district court's holdings and remanding the case for further proceedings.[27] The majority opinion, authored by the Honorable Danny J. Boggs of the Sixth Circuit Court of Appeals, held

[22] 138 S. Ct. 2105 (2018).
[23] ER 5-11.
[24] ER 12-13.
[25] ER 15-17.
[26] ER 1-2.
[27] *Bastide-Hernandez*, 986 F.3d 1245 (9th Cir. 2021).

that the regulations control when jurisdiction of the immigration court vests and that it vests upon filing of a NTA, even when a NTA fails to advise the noncitizen of the time, date, or location of the hearing.[28] The majority recognized the confusion as to when jurisdiction vests that was created by the prior panel rulings in *Karingithi* and *Aguilar Fermin*; however, they stated that commencing removal proceedings with a defective NTA does not affect jurisdiction because jurisdiction "either exists or it does not" and jurisdiction cannot "unvest" even when the NTA "lacked required time, date, and location information."[29]

The dissent, authored by the Honorable Milan D. Smith, Jr, would affirm the district court's dismissal and stated that, "if the regulations determine when jurisdiction vests, and the regulation's optional inclusion of the hearing information allows a later cure, then the regulation's mandatory information should be required for jurisdiction to vest."[30] The dissent stated that both *Karingithi* and *Aguilar Fermin* relied on the fact the deficiencies in the NTA were later cured and the majority's opinion is a "clear rejection of our binding precedent."[31] The dissent further stated that, under the majority's view, "filing any document that purports to be a Notice to Appear with the Immigration Court is enough to vest jurisdiction with the IJ, even if that document

[28] *Id.* at 1247-48.
[29] *Id.* at 1248.
[30] *Bastide-Hernandez*, 986 F.3d at 1251 (M. Smith, dissenting).
[31] *Id.*

does not comply with the regulatory requirements for an NTA, and those deficiencies are never cured."[32]

III. THE COURT SHOULD GRANT REHEARING *EN BANC* AND AFFIRM THE DISTRICT COURT'S ORDER OF DISMISSAL.

A. As an initial matter, just as the panels did in *Karingithi* and *Aguilar Fermin*, this panel erred in finding the regulations are controlling. The *en banc* Court should find that the statute, not the regulations, control when an immigration court's jurisdiction vests.

The substantive basis for Mr. Bastide-Hernandez's motion to dismiss was that a putative "Notice to Appear" that does not comply with 8 U.S.C. § 1229(a)(1) is not truly a Notice to Appear, and thus not sufficient to vest subject matter jurisdiction in an immigration judge. This argument relies on the Supreme Court's ruling in *Pereira v. Sessions*.[33] A panel of this Court rejected this argument in *Karingithi*, holding that 8 U.S.C. § 1229(a) "says nothing about the Immigration Court's jurisdiction" and instead it is the "regulations" that control when jurisdiction vests, citing 8 C.F.R. §§ 1003.13, 1003.14, 1003.15, and 1003.18.[34]

Every circuit to address a *Pereira*-based attack on an immigration court's subject matter jurisdiction has similarly rejected the argument, holding either that the regulations control when jurisdiction vests (as this Court held in *Karingithi*) or that the regulations do not affect subject matter jurisdiction because they are mere "claim

[32] *Id.* at 1251-52.
[33] 138 S. Ct. 2105 (2018).
[34] *Karingithi*, 913 F.3d at 1160.

processing" rules.[35] In the latter cases, the courts also still find that § 1229 has no effect on jurisdiction despite finding the regulations do not affect jurisdiction, begging the question of what does control the jurisdiction of these legislatively-created courts if neither the applicable statutes nor regulations do. In any event, despite the consistency of the circuit courts in finding otherwise, legislative history and the enactment of 8 U.S.C. § 1229 makes clear that the statute actually *does* control an immigration court's jurisdiction.

When enacted, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[36] made a multitude of changes to immigration laws generally and to removal proceedings specifically. Among them, Congress enacted 8 U.S.C. § 1229 regarding the "Initiation of Removal Proceedings" and repealed 8 U.S.C. § 1252b.[37] This statute (§ 1229) specifically states that "written notice (…a 'notice to appear') shall be given" to the person in removal proceedings, and this NTA must specify "the time and place at which the [removal] proceedings will be held."[38] Congress did not include an "or otherwise" provision in § 1229, a conscious deletion from the pre-IIRIRA law.

---

[35] *See, e.g., Perez-Sanchez v. U.S. Att'y Gen.,* 935 F.3d 1148 (11th Cir. 2019). The Board of Immigration Appeals has reached a similar conclusion. *See Matter of Rosales Vargas*, 27 I. & N. Dec. 745 (B.I.A. 2020).

[36] Congress enacted the IIRIRA as part of the Omnibus Consolidated Appropriations Act of 1997. *See* 110 Stat. 3009, P.L. 104-208 (Sept. 30, 1996). For the Court's convenience, the entirety of the IIRIRA is attached as Appendix B.

[37] Appendix B at 33-34, 53.

[38] Appendix B at 33-34.

Functionally, this significant shift from pre-IIRIRA law to the new statutes affected a number of pending deportation/removal cases. To account for the significant shift from pre-IIRIRA law to the new statutes, Congress included a transition statute within the IIRIRA.[39] This transition statute specified that, generally, the new laws would not apply to persons in pre-IIRIRA exclusion or deportation proceedings.[40] However, the transition statute gave the Attorney General the option to convert pre-IIRIRA cases and proceed under the new law if an evidentiary hearing had not yet been held.[41]

If the Attorney General chose to transition a person from pre-IIRIRA exclusion or deportation proceedings to post-IIRIRA removal proceedings, the transition statute required the Attorney General to provide written notice to the noncitizen at least 30 days prior to any evidentiary hearing.[42] The transition statute provided that a timely notice of hearing under this section "shall be valid **as if provided under section 239 of such Act … to confer jurisdiction on the immigration judge.**"[43] Section 239 is 8 U.S.C. § 1229, which defines the required contents of a Notice to Appear.[44] Thus, a plain reading of the transition statute makes clear that Congress intended for a NTA **as defined under 8 U.S.C. § 1229** to confer jurisdiction on immigration judges to conduct removal proceedings.

---

[39] Appendix B at 67-68 (P.L. 104-208 at Div. C, Sec. 309).
[40] Appendix B at 67 (Sec. 309(c)(1)).
[41] Appendix B at 67 (Sec. 309(c)(2)).
[42] Appendix B at 67 (Sec. 309(c)(2)).
[43] Appendix B at 67 (Sec. 309(c)(2)) (emphasis added).
[44] Appendix B at 33-34.

This transition statute undermines the Ninth Circuit's holdings and reasoning in *Karingithi*, *Aguilar Fermin*, and in this case. While 8 U.S.C. § 1229 does not explicitly state that service of a NTA as defined in § 1229(a)(1) is required to confer jurisdiction on the immigration judge, the IIRIRA *did* explicitly say exactly that in the transition statute, and the transition statute directly references § 1229. Thus, service of a § 1229-compliant NTA is necessary to confer jurisdiction on an immigration judge.

Consequently, to confer jurisdiction on an immigration judge, immigration officials must serve a noncitizen with a NTA that complies with 8 U.S.C. § 1229. This Court should grant rehearing *en banc* and reconsider its prior rulings that § 1229 has "nothing" to do with jurisdiction and give this argument the consideration it merits. When it does, this Court should find that the statute does affect jurisdiction and that service of a document purporting to be a NTA that does not contain all information required under § 1229(a) fails to vest the immigration court with subject matter jurisdiction.

B. Rehearing *en banc* is necessary to secure and maintain uniformity due to the conflicting opinions in *Karingithi*, *Aguilar Fermin*, and this case regarding how and when jurisdiction vests in an immigration court.

The majority opinion rests on two conclusions, neither of which are sound. First, the majority set aside (with insufficient substantive analysis) the requirement found in both *Karingithi* and *Aguilar Fermin* that information not provided in the NTA must be provided in a subsequent document prior to the hearing for jurisdiction to fully vest.

Second, the majority relies on the first sentence of one subsection of a single regulation (8 C.F.R. § 1003.14(a)), ignoring subsequent language within the same regulation and language in surrounding regulations (8 C.F.R. §§ 1003.13, 1003.15, and 1003.18) that clearly define what a charging document is, what information it must contain, and why the vesting of jurisdiction depends on compliance with all of these regulations.

1) As Honorable M. Smith's dissent recognizes, *Karingithi and Aguilar Fermin* required curative actions when a NTA is deficient for jurisdiction to vest in the immigration court

One panel of this Court held in *Karingithi v. Whitaker* that the regulations promulgated by the Attorney General controlled the vesting of jurisdiction in immigration courts and that the relevant statute (8 U.S.C. § 1229) did not.[45] The Court found in that case that failing to include the date and time of the removal hearing in a NTA did not deprive the immigration court of subject matter jurisdiction so long as that information was provided in a subsequent NOH.[46] This holding in *Karingithi* was "specifically conditioned" on the subsequent notice being made.[47]

Another panel of this Court subsequently ruled in *Aguilar Fermin v. Barr* that failing to include the address of the immigration court in the NTA does not deprive an immigration court of jurisdiction, so long as that information is provided in a

[45] *See* 913 F.3d 1158, 1160 (9th Cir. 2019) ("[T]he regulations, not § 1229(a), define when jurisdiction vests.").
[46] *See id.* at 1161-62 (*citing Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (B.I.A. Aug. 31, 2018)).
[47] *Bastide-Hernandez*, 986 F.3d at 1250 (M. Smith, dissenting) (*citing Karingithi*, 913 F.3d at 1162).

subsequent notice.[48] As in *Karingithi*, the Court found the address of the immigration court could be provided in a subsequent NOH.[49] The dissenting judge in the panel on this appeal noted that the ruling in *Karingithi* ought to have led to a different result in *Aguilar Fermin*, putting those cases in "tension" with one another.[50]

In this appeal, the majority found jurisdiction vests as soon as a defective NTA is filed, even where the defects are never cured. This is a conscious disregard for the regulatory requirement that information not provided in the NTA must subsequently be provided in another document.[51] Moreover, this is a substantial departure from the prior panel rulings in both *Karingithi* and *Aguilar Fermin*, where subsequent documentation had been provided to cure defects in the NTA. The analysis and explanation for this departure consists of two paragraphs and the selective citation of the first sentence of one regulation, 8 C.F.R. § 1003.14(a), with no discussion as to why the remainder of that same regulation subsection does not require that the address of the immigration court be included in either the NTA or in a subsequent curative document for jurisdiction to vest. The majority also dedicates zero analysis to 8 C.F.R. § 1003.15(b), which defines the required contents of a NTA, nor any to 8 C.F.R. §1003.18(b), which requires that any information missing from the NTA be provided in a subsequent written notice.

---

[48] *See* 958 F.3d 887, 893-95 (9th Cir. 2020).
[49] *See id.* at 895.
[50] *Bastide-Hernandez*, 986 F.3d at 1251 (M. Smith, dissenting).
[51] *See* 8 C.F.R. § 1003.18(b).

Although ignored by the majority, the Honorable M. Smith in his dissent recognized the already existing conflict between *Karingithi* and *Aguilar Fermin*, where a plain and straightforward reading of *Karingithi* should have led to a different result in *Aguilar Fermin*.[52] The dissent further stated a "faithful application of *Karingithi* requires us to affirm the district court's dismissal of the indictment."[53] The conflicting holdings between this Court's panel opinions in *Karingithi*, *Aguilar Fermin*, and this appeal, along with the exceptional importance of the ultimate question presented (what, if anything, controls the subject matter jurisdiction of immigration courts?) creates a necessity for this entire Court to hear this appeal.

2) By deviating from precedent, the panel majority created even more confusion about what exactly defines and determines the subject matter jurisdiction of immigration courts.

Despite recognizing that both *Karingithi* and *Aguilar Fermin* held jurisdiction vested where deficiencies in a NTA had been cured through service of subsequent documents, the majority here found a defective NTA need not be cured. Instead, the majority found the mere filing of a NTA, even a defective one, immediately and irrevocably vests the immigration court with jurisdiction. The majority rationalized their

[52] *See Bastide-Hernandez*, 986 F.3d at 1251 ("When applied to the separate question of the address where the NTA will be filed, *Karingithi's* analysis dictates that jurisdiction does not vest in the immigration court if the NTA excludes the address. If the regulations determine when jurisdiction vests, and the regulation's optional inclusion of the hearing information allows a later cure, then the regulation's mandatory information should be required for jurisdiction to vest.").
[53] *Id.* at 1253.

decision by stating that jurisdiction either exists or it does not and that it cannot be lost once it is established.[54]

As the Court previously did when deciding *Aguilar Fermin*, the majority here read the first sentence of 8 C.F.R. § 1003.14(a) as completely disconnected from the second sentence (which requires the address of the immigration court to be included in the NTA) as well as from § 1003.15(b)(6) (which requires the same).[55] Also like the Court failed to do in *Aguilar Fermin*, the majority here did not sufficiently explain ***why*** these regulations should be read in such a disconnected manner. It is nonsensical to only consider one sentence in 8 C.F.R. § 1003.14 and ignore others (including the next sentence in the same regulation) that are just as important and impactful on vesting jurisdiction. These regulations ought to be read harmoniously.[56]

If the case stands as is, the United States has successfully abdicated its requirement to cure deficiencies in NTA's, a requirement that its own regulations impose. *See* 8 C.F.R. § 1003.18(b). This Court should read all relevant regulations as requiring that a NTA contain certain information and that any missing information be provided for jurisdiction to vest. Because no such curative document exists in this case, the immigration court was never vested with subject matter jurisdiction.

---

[54] *See id.* at 1248.
[55] *See* 958 F.3d at 895 (*citing Matter of Rosales Vargas*, 27 I. & N. Dec. 457 (B.I.A. Jan. 9, 2020).
[56] *See Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1016 (9th Cir. 2017) ("[W]e apply the familiar rule of construction that, where possible, provisions of a [regulation] should be read so as not to create a conflict.") (internal quotations omitted).

IV. CONCLUSION

For the reasons set forth herein, this Court should grant rehearing *en banc* and affirm the district court's ruling granting the motion to dismiss.

Dated: March 2, 2021.

s/ Paul Shelton
Paul Shelton, 52337
Federal Defenders of Eastern
Washington and Idaho
306 East Chestnut Avenue
Yakima, Washington 98901
(509) 248-8920
(509) 248-9118 (fax)
Paul_Shelton@fd.org
Attorney for Defendant-Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 19-30006

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,440.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Paul E. Shelton **Date** Mar 2, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 19-30006

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

○ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

◉ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

USA v Isidro Muniz-Sanchez, 19-30182 (panel opinion issued 2/5/21, counsel intends to file petition for rehearing); USA v Jose Gonzalez-Valencia, 19-30222 (panel opinion issued 2/12/21, counsel intends to file petition for rehearing);USA v Rubisel Delcarmen-Abarca, 19-30153 (panel opinion issued 2/18/21, counsel intends to file petition for rehearing); USA v Jose Miranda-Reyes, 20-30057 (presents substantively similar question, fully briefed, may be set for oral argument in future); USA v Romero-Romero, 19-30144 (presents substantively similar question, fully briefed, may be set for oral argument in future); USA v Manuel Sanchez, 20-30084 (presents substantively similar question, fully briefed, may be set for oral argument in future).

Signature s/Paul E. Shelton **Date** Mar 2, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

U.S.C.A. No. 19-30006
U.S.D.C. 1:18-CR-02050-SAB-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

JUAN CARLOS BASTIDE-HERNANDEZ,

Defendant - Appellee.

Appeal from the United States District Court
For the Eastern District of Washington

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING *EN BANC*

Joseph H. Harrington
Acting United States Attorney
Richard C. Burson
Assistant United States Attorney
402 E. Yakima Avenue, Suite 210
Yakima, WA 98901
Telephone: (509) 454-4425

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

REGULATIONS

I. INTRODUCTION

The Federal Rules of Appellate Procedure allow *en banc* rehearings for only two reasons: to secure or maintain uniformity of the court's decisions or to resolve a question of exceptional importance. This case presents neither of those circumstances.

First, the majority's decision is not in conflict with prior decisions of this Court. In each of *Karingithi* and *Aguilar Fermin*, this Court left unanswered the question of whether a subsequent hearing notice is required to vest jurisdiction when the NTA filed with the immigration court did not include date, time or place information. The majority's opinion here answered that question and married those two prior decisions into one coherent statement of law: jurisdiction vests in the immigration court upon the filing of an NTA, regardless of whether it included date, time or place information. The decision finally brought clarity to this Circuit on that question. Furthermore, the majority's opinion was the only application of *Karingithi* and *Aguilar Fermin* capable of avoiding a shape-shifting definition of jurisdiction that allowed the immigration court to vest, divest and re-vest jurisdiction before ever conducting a hearing.

Second, the majority's opinion resolved the issue in this case consistent with the rulings of at least five other United States Circuit Courts of Appeal and BIA

precedent that already bound immigration courts around the country. Granting an *en banc* rehearing will not resolve any issue of exceptional importance, but instead, will create discord among the circuits on this issue.

The Defendant disagrees with the analysis and decision of the majority. But an *en banc* hearing is not justified merely because a party or another judge would have ruled differently. An *en banc* hearing is justified only in the two circumstances proscribed by the Rule. Because neither of those circumstances is present, nor can be presented if the Defendant's petition is granted, the Defendant's petition should be denied.

II. PROCEDURAL HISTORY

A. COURSE OF IMMIGRATION REMOVAL PROCEEDINGS

On April 26, 2006, the Defendant, a citizen and national of Mexico, was encountered in the United States by the Bureau of Immigration and Customs Enforcement ("ICE") while in the custody of the State of Washington for pending state criminal assault and firearms charges. ER-19. On the same day, ICE officials personally served the Defendant two notices to appear ("NTA"). ER-21-24. Neither NTA served on the Defendant specified the date nor time of the Defendant's initial hearing before an immigration judge, and instead stated that the appearance before an immigration judge would occur "on a date to be set at a time to be set." *Id*. at 22, 24.

On May 2, 2006, a copy of one of the NTAs served on the Defendant was sent to the Executive Office for Immigration Review ("EOIR"). ER-23. On May 12, 2006, EOIR mailed to the Defendant a Notice of Hearing in Removal Proceedings ("NOH"), informing the Defendant that he was to appear before an immigration judge on June 14, 2006, at 1:00 p.m., at the address listed on the notice. ER-25. On June 14, 2006, the Defendant appeared in front of an immigration judge, who found the Defendant removable on the charges set forth in the NTA, and ordered the Defendant removed to Mexico. ER-26. The Defendant waived appeal of the immigration judge's order and was removed to Mexico on June 15, 2006. ER-27-28.

B. COURSE OF DISTRICT COURT PROCEEDINGS

On August 14, 2018, a federal grand jury returned a one-count Indictment charging the Defendant with being found in the United States after having been previously denied admission, excluded, deported and removed from the United States. ER-48-49. On November 23, 2018, the Defendant filed a motion to dismiss, arguing that the immigration judge's order underlying the Defendant's prior removal was void because the NTA served on the Defendant on April 26, 2006, did not specify a date or time for the Defendant's initial appearance. CR-26. On December 20, 2018, the district court granted the Defendant's motion to dismiss, finding that the immigration judge in the predicate removal proceedings did not have jurisdiction to order the

Defendant removed to Mexico. ER-3-18. The United States timely appealed the ruling of the district court.

C. THE PRIOR DECISION OF THIS COURT

On February 2, 2021, this Court issued for publication its decision in the government's appeal. *United States v. Bastide-Hernandez*, 986 F.3d 1245 (9th Cir. 2021). Recognizing that two prior decisions by this Court, *Karingithi* and *Aguilar Fermin*, had "created some confusion" about when jurisdiction actually vests in the immigration court, this Court reached the "only logical" conclusion that jurisdiction vested upon the filing of an NTA, even one that does not include the time, date and location of the hearing. *Id.* at 1248, citing *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020). As the majority pointed out, the alternative reading of the regulations governing jurisdiction would have incorporated a definition of jurisdiction that would allow the immigration courts to vest, un-vest, and re-vest jurisdiction, a concept wholly irreconcilable with the very concept of jurisdiction. *Id.*

The majority went on to provide an appropriate remedy for any due process violation caused by lack of notice, citing 8 U.S.C. § 1326(d)'s provision of a means by which to collaterally attack a prior removal order in an illegal reentry prosecution. *Id.* Unlike attempting to define when jurisdiction vests in a scheme in which

jurisdiction can vest, un-vest and re-vest, 1326(d) sets out a straightforward path for any undocumented individual in removal proceedings who was aggrieved by insufficient notice. In short, the majority finally and firmly defined when and how jurisdiction vests in the immigration court and what happens when an initial removal hearing is not properly noticed.

In a dissenting opinion, the Honorable Milan D. Smith, Jr. conceded that *Karingithi* left open the question of the effect of a failure to cure missing date and time information on an NTA, but wrote that he would have applied *Karingithi* to hold that missing date and time information must be cured with a subsequent hearing notice in order to vest jurisdiction.

None of the judges and no U.S. Circuit Court of Appeal to have decided the issue has held that an NTA that fails to include time, date and place information incurably fails to vest jurisdiction, as the Defendant urges in his petition.

III. DISCUSSION

THIS COURT SHOULD DENY THE PETITION FOR REHEARING *EN BANC* BECAUSE THE MAJORITY'S OPINION MAINTAINED UNIFORMITY IN THIS COURT'S PRIOR DECISIONS AND RESOLVED THE RELEVANT QUESTION CONSISTENT WITH OTHER COURTS OF APPEAL.

En banc rehearings are not favored and ordinarily not ordered. FED. R. APP. P. 35(a). Indeed, unless *en banc* consideration is necessary to secure or maintain uniformity of this Court's prior decisions or where the proceeding involves a question

of exceptional importance, this Circuit's Rules compel denial of the petition for rehearing. *Id.* A determination that a panel's decision is incorrect is insufficient to grant an *en banc* rehearing. *Kipp v. Davis*, 986 F.3d 1281, 1285-86 (9th Cir. 2021) (Miller, E., concurring).

The majority's decision here already secured uniformity of this Court's prior decisions in *Karingithi* and *Aguilar Fermin*. As both the majority and dissent noted, those two decisions had caused confusion prior to the panel's decision. *See Bastide-Hernandez*, 986 F.3d at 1248, 1251 (Smith, M., dissenting). The confusion was not caused by inconsistency, but rather, a question regarding immigration court jurisdiction left unanswered by each. That question was resolved by the majority. An *en banc* review is not necessary to achieve uniformity where uniformity was accomplished by the majority's decision.

Similarly, the petition for *en banc* rehearing is not necessary to resolve a question of exceptional importance. The majority's resolution of the ultimate question at issue – what happens to jurisdiction when an NTA does not include date, time or location information – was not only firmly resolved so as to give undocumented individuals in removal proceedings clarity as to when their case is properly before an immigration judge, but was also in conformity with five other United States Circuit Courts of Appeal.

1. The panel's opinion created uniformity in this Court's prior decisions.

En banc rehearings are disfavored and not ordinarily ordered unless one of two "exacting" standards are met, one of which is that the panel decision conflicts with preexisting precedent and therefore a rehearing is necessary to maintain uniformity. *Kipp*, 986 F.3d at 1282; FED. R. APP. P. 35(a)(1). Not only was the panel's opinion consistent with existing precedent, but it successfully harmonized two prior published decisions that each left open a crucial question regarding when jurisdiction vests in the immigration court.

In *Karingithi,* this Court held that federal immigration regulations govern the vesting of jurisdiction in the immigration courts, and that pursuant to those regulations, jurisdiction vests when an NTA is filed. 913 F.3d at 1158. The *Karingithi* panel noted that the inclusion of the time and date of a removal hearing is not required by the regulations governing jurisdiction, and therefore, the immigration court had jurisdiction over the removal proceedings when the NTA was filed. *Id. Karingithi*'s holding was in no way on the subsequent provision of a hearing notice. The Court expressly declined to decide the question raised in this case. Although the Court made note of the fact that the petitioner in *Karingithi* had been provided actual notice of the time and date of her removal hearing, the Court "[did] not decide whether jurisdiction would have vested if she had not received this information in a timely fashion." *Id.* at 1162. If this Court had wanted to

resolve the question then and there and establish a hearing notice as a condition precedent to jurisdiction, it could have. Instead, it expressly chose not to.

In *Aguilar Fermin*, this Court applied *Karingithi* to a case in which an NTA failed to include not only date and time information, but also the address of the immigration court at which the NTA was to be filed. 958 F.3d at 893. As noted by the *Aguilar Fermin* panel, unlike date and time information, the address of the immigration court *was* required by the regulations. *Id.* at 893-894, *citing* 8 C.F.R. § 1003.15(b)(6). Nevertheless, this Court deferred to the Board of Immigration Appeals' ("BIA") interpretation of the regulation and held that the provision requiring the address of the immigration court did not deprive the immigration court of jurisdiction if not met. *Aguilar Fermin*, 958 F.3d at 895. While the *Aguilar Fermin* panel held that the appropriate remedy for a missing address was the subsequent provision of that information, it did not hold that lack of subsequent notice would divest the immigration court of jurisdiction, and, like *Karingithi*, left that question unanswered. *Id.*

Karingithi and *Aguilar* are not in tension. Rather, as the majority here held, *Karingithi* and *Aguilar Fermin* both failed to address exactly when jurisdiction vests in the immigration court. The only reasonable answer to that question is, as held here, that jurisdiction vests pursuant to the regulation exactly when the regulation says it

does: "when [an NTA] is filed with the Immigration Court." *Bastide-Hernandez*, 986 F.3d at 1248, *citing* 8 C.F.R. § 1003.14(a). To interpret the regulations otherwise would be to create a scheme whereby jurisdiction vests "upon the filing of" an NTA with the immigration court, but then divests at some ethereal point in time if a subsequent hearing notice is not provided, or alternatively, contemplates the immigration court docketing, scheduling, sending notices and ordering appearances for cases it has yet to acquire jurisdiction over. Neither of those interpretations is reasonable, and indeed, the majority's interpretation was the only reasonable way to interpret the regulations and answer the question left open by *Karingithi* and *Aguilar Fermin*.

The dissent and the Defendant would have applied *Karingithi* and *Aguilar Fermin* differently. But disagreement as to the application of precedent is not the same as establishing conflict with precedent. The panel's opinion here does not conflict with either *Karingithi* or *Aguilar Fermin*, but rather, the natural evolution of those holdings. Thus, Federal Rule of Appellate Procedure 35(a)(1) provides no basis for which to grant an *en banc* rehearing.

2. The question raised by this case was firmly answered by the majority and was consistent with other Courts of Appeal.

Alternatively, an *en banc* rehearing can be granted where the matter at stake is one of "exceptional importance." FED. R. APP. P. 35(a)(2). The quintessential

matter of "exceptional importance" involves an issue where the majority decision conflicts with decisions of other United States Circuit Courts of Appeal. *Id*. at (b)(1)(B); *see also id.*, Committee Notes on Rules – 1998 Amendment (citing only one example - intercircuit conflict - as a reason for finding that a proceeding involves a question of exceptional importance). As the 1998 commentary to Rule 35 makes clear, the provision for *en banc* rehearing exists to avoid needless litigation and differing rights and duties depending on where a case is litigated. *Id*. Although the question decided by the majority here is relevant to a significant amount of criminal and civil immigration cases, and thus of significance importance, the decision reached by the majority is consistent with the current BIA precedent that has bound the immigration courts since August of 2018 and the authoritative decisions of at least five other United States Circuit Courts of Appeal. Thus, the issue of exceptional importance has already been resolved.

The Defendant, in asking for an *en banc* rehearing and subsequent reversal, is staking out a position that will lead to intercircuit disagreement and make the subject matter jurisdiction of immigration courts subject to their geographic location. Assuming the issue at stake is truly one of exceptional importance, certainty and uniformity across circuits is crucial and best served by denial of the Defendant's petition. Indeed, the Defendant's preferred holding – that 8 U.S.C. § 1229(a) controls

immigration court jurisdiction and thus an NTA lacking date and time information fails to vest jurisdiction and cannot be cured with a subsequent hearing notice – has been rejected by each of the eleven United States Circuit Courts of Appeal to have considered it.[1]

The question here of immigration court jurisdiction has caused uncertainty in immigration courts across the country for almost three years. In June of 2018, the Supreme Court decided *Pereira v. Sessions*, in which it held that an NTA that does not include date or time information does not trigger the "stop-time" rule for a form of immigration relief not relevant here. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Relying on that case, the petitioner in *Matter of Bermudez-Cota* (and hundreds, if not thousands of litigants) sought termination of removal proceedings, arguing that the immigration court never acquired jurisdiction over the case because of missing date and time information. 27 I & N Dec. 441 (BIA 2018). The BIA rejected the petitioner's argument in a published decision in August of 2018. *Id.* Specifically, the

[1] *Goncalves Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019); *Nkomo v. Att'y Gen. of United States*, 930 F.3d 129, (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018); *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019); *Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148 (11th Cir. 2019).

BIA held that the regulations governed the immigration court's jurisdiction and that failure to include time and date information on the filed NTA did not affect such jurisdiction, because although the regulation requires a charging document (such as an NTA) to vest jurisdiction, it does not require the charging document to include a date or time. *Id*. at 444-445. The BIA stopped short of finding whether an NTA vested jurisdiction regardless of whether the information was ever provided in a subsequent notice.

The BIA finally took the opportunity to fully answer that question in *Matter of Rosales Vargas* and held that the regulations did not restrict subject matter jurisdiction, but were instead claim-processing rules. 27 I & N Dec. 745, 750-51 (BIA 2020). Thus, jurisdiction vests upon the filing of an NTA regardless of whether the NTA includes the date, time or place information required by regulation. *Id*. at 753.

The BIA's decision – that an NTA vests jurisdiction in the immigration court upon filing, regardless of the inclusion of date, time or place information or the provision of any subsequent hearing notice – is and was consistent with the decisions of at least five other Circuit Courts of Appeal. *See Lopez-Munoz*, 941 F.3d at 1016 (10th Cir. 2019) ("Because the Attorney General could not restrict an immigration judge's jurisdiction through a regulation, 8 C.F.R. § 1003.14 does not establish immigration judges' jurisdiction."); *Perez-Sanchez*, 935 F.3d at 1155 (11th Cir. 2019)

(holding that "8 C.F.R. § 1003.14, despite its language, sets forth not a jurisdictional rule but a claim-processing one"); *Pierre-Paul*, 930 F.3d at 693 (5th Cir. 2019) (same); *Cortez*, 930 F.3d at 358-59, 361 (4th Cir. 2019) (holding the same and stating that 8 C.F.R. § 1003.14(a) is a claim-processing rule because it "lay[s] out the procedural steps that must be taken to docket a case before an immigration judge"); *Ortiz-Santiago*, 924 F.3d at 963 (7th Cir. 2019) (stating, with reference to 8 C.F.R. § 1003.14, that while "an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases"). And while four other Circuits have left open the question as to whether a subsequent hearing notice is required to vest jurisdiction, no United States Circuit Court of Appeal to have answered it has found that a hearing notice is required. *See Goncalves Pontes*, 938 F.3d at 7 (1st Cir. 2019); *Nkomo*, 930 F.3d at 134 (3d Cir. 2019); *Ali*, 924 F.3d at 986 (8th Cir. 2019); *Banegas Gomez*, 922 F.3d at 111 (2d Cir. 2019); *Hernandez-Perez*, 911 F.3d at 315 (6th Cir. 2018).

The majority's decision in this case establishes uniformity with those circuits and conforms with BIA precedent to which the immigration courts are bound. The Defendant's preferred outcome, on the other hand, would result in immigration courts in New Mexico having jurisdiction over cases that immigration courts in neighboring Arizona would not. The ability of an undocumented

immigrant to rely upon an immigration court's decision (granting them asylum, for instance) would depend on the state in which they were present.

Granting a petition in this case would not resolve any exceptionally important issue, but rather, create intercircuit discord on the issue. That is the opposite of resolution. For that reason, the Defendant's petition should be denied.

IV. CONCLUSION

The Defendant's petition fails to establish that an *en banc* rehearing is necessary to seek intracircuit uniformity, and indeed, the majority's decision already ensures uniformity. Similarly, the Defendant's petition fails to establish that an *en banc* rehearing will resolve an issue of exceptional importance, and rather, ultimately seeks a decision from this Court that will create discord amongst the Circuits. For those reasons, the Defendant's petition should be denied.

Date: April 6, 2021.

Joseph H. Harrington
Acting United States Attorney

s/Richard C. Burson
Richard C. Burson
Assistant United States Attorney

CERTIFICATE OF SERVICE

It is hereby certified that on April 6, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants who are registered EM/ECF users will be served by the appellate CM/ECF system.

Paul Shelton, Esq.
Federal Defenders of Eastern Washington & Idaho
306 E. Chestnut
Yakima, WA 98901

s/Richard C. Burson
Richard C. Burson
Assistant U.S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-30006

I am the attorney or self-represented party.

This brief contains 3,095 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ◉ complies with the length limit designated by court order dated Mar 16, 2021 .
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Richard Burson **Date** Apr 6, 2021

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

19-30006

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

JUAN CARLOS BASTIDE-HERNANDEZ,

Defendant - Appellee.

On Appeal From The United States District Court
For The Eastern District of Washington
District Court No. 1:18-cr-2050-SAB-1
The Honorable Stanley A. Bastian, United States District Judge

DEFENDANT - APPELLEE'S
PETITION FOR REHEARING *EN BANC*

Paul E. Shelton
Federal Defenders of Eastern Washington
& Idaho
306 E. Chestnut Ave.
Yakima, WA 98901
(509) 248-8920
Email: paul_shelton@fd.org

Attorney for Defendant - Appellee

UNITED STATES OF AMERICA, **Plaintiff-Appellant,** **v.** **JUAN CARLOS BASTIDE-HERNANDEZ,** **Defendant-Appellee.**	**U.S.C.A. No. 19-30006** **U.S.D.C. No. 1:18-cr-2050-SAB-1** **Defendant-Appellee's Renewed Petition for Panel Rehearing *En Banc***

I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY[1]

On February 2, 2021, a panel for this Court issued a split decision[2] reversing the district court's granting of a Motion to Dismiss the Indictment charging Mr. Bastide-Hernandez with illegal re-entry. Honorable Danny J. Boggs of the United States Circuit for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation, was the tie-breaking vote and issued the majority opinion.

Mr. Bastide-Hernandez filed a timely petition for rehearing.[3] The parties subsequently submitted supplemental briefing regarding the impact of the U.S. Supreme Court's recent rulings in both *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) and *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021).[4]

---

[1] Mr. Bastide-Hernandez previously submitted a more detailed history of the case in his first petition for rehearing. *See* Dkt. Entry 55-1 at pp. 2-7. He incorporates that history herein by reference.
[2] *See* Appendix A.
[3] *See* Dkt. Entry 55-1.
[4] *See* Dkt. Entries 60, 62, 65, and 67.

On July 12, 2021, the panel issued an order withdrawing its previously issued opinion and dissent, filing a new opinion and concurrence.[5] The new majority opinion from Judge Boggs is substantively identical with respect to its analysis of whether the immigration court had subject matter jurisdiction over the removal proceedings.[6] The majority's "clarification" of this Court's prior holdings in *Karingithi v. Whitaker*[7] and *Aguilar Fermin v. Barr*[8] remains identical.[9]

Both the majority and concurring opinions fail to substantively address or even cite *Niz-Chavez*. Both opinions also fail to address any of the arguments set forth in the relevant supplemental briefing on that case.[10]

Judge Boggs' majority opinion does address *Palomar-Santiago*, finding that Mr. Bastide-Hernandez's failure to appeal his removal order may preclude relief (and thus also warrant reversal) under 8 U.S.C. § 1326(d).[11] Honorable Milan Smith, who had previously dissented, now concurs with the majority only as to the result, finding that *Palomar-Santiago* requires that Mr. Bastide-Hernandez "satisfy the requirements of 8 U.S.C. § 1326(d) to obtain the relief he requests."[12] Judge Smith continues to disagree

---

[5] *See* Appendix B.
[6] *Compare* Appendix A at pp. 4-6 *with* Appendix B at pp. 4-7.
[7] 913 F.3d 1158 (9th Cir. 2019).
[8] 958 F.3d 887 (9th Cir. 2020).
[9] *See* Appendix B at pp. 5-7.
[10] *See* Appendix B.
[11] *See* Appendix B at pp. 8-9.
[12] Appendix B at p. 12.

with the majority's holding as to subject matter jurisdiction, finding that the district court correctly concluded that the immigration court lacked subject matter jurisdiction due to defects in the Notice to Appear.[13] The Court noted in its order that subsequent petitions for rehearing and rehearing en banc may be filed.[14]

Mr. Bastide-Hernandez Rehearing now files a new petition requesting *en banc* rehearing. Rehearing *en banc* is warranted pursuant to Rules 35(a)(1) and (a)(2) of the Federal Rules of Appellate Procedure. First, this matter is one of exceptional importance because it potentially affects hundreds of thousands of criminal immigration prosecutions and civil immigration proceedings. A ruling in this case regarding competing statutes passed by Congress, regulations implemented by an agency, and the agency's interpretations of those regulations will also have broad-reaching implications in a variety of other contexts in both civil and criminal law.

Further, consideration by the full *en banc* court is necessary to secure and maintain uniformity of this Court's decisions. Despite the panel's new agreement that remand is appropriate to address the legal effect (if any) of Mr. Bastide-Hernandez's waiver of appeal in his removal proceedings, the panel remains split on the central issue regarding an immigration court's subject matter jurisdiction. Even if remand is ultimately necessary to address Mr. Bastide-Hernandez's waiver of appeal and § 1326(d), this

[13] *See id.*
[14] *See* Appendix B at p. 4.

Court should take this opportunity now, in a fully briefed appeal where the question is clearly presented and unambiguous, to resolve the contradictions between its opinions in *Karingithi*, *Aguilar Fermin*, and this appeal, including dissent between the two Ninth Circuit judges on this panel. In order to definitively resolve the effect (if any) of a defective Notice to Appear on an immigration court's subject matter jurisdiction, *en banc* review is both necessary and appropriate.

II. THE COURT SHOULD GRANT REHEARING *EN BANC* AND AFFIRM THE DISTRICT COURT'S ORDER OF DISMISSAL. ALTERNATIVELY, THE COURT MAY REMAND FOR A LIMITED QUESTION REGARDING 8 U.S.C. § 1326(d).

A. As an initial matter, just as the panels did in *Karingithi* and *Aguilar Fermin*, this panel erred in finding the regulations are controlling. The *en banc* Court should find that the statute, not the regulations, control when an immigration court's jurisdiction vests.

The substantive basis for Mr. Bastide-Hernandez's motion to dismiss was that a putative "Notice to Appear" that does not comply with 8 U.S.C. § 1229(a)(1) is not truly a Notice to Appear, and thus not sufficient to vest subject matter jurisdiction in an immigration judge. This argument relied on the Supreme Court's ruling in *Pereira v. Sessions*.[15] A panel of this Court rejected this argument in *Karingithi*, holding that 8 U.S.C. § 1229(a) "says nothing about the Immigration Court's jurisdiction" and instead it is the "regulations" that control when jurisdiction vests, citing 8 C.F.R. §§ 1003.13, 1003.14, 1003.15, and 1003.18.[16]

[15] 138 S. Ct. 2105 (2018).
[16] *Karingithi*, 913 F.3d at 1160.

Every circuit to address a *Pereira*-based attack on an immigration court's subject matter jurisdiction has similarly rejected the argument, holding either that the regulations control when jurisdiction vests (as this Court held in *Karingithi*) or that the regulations do not affect subject matter jurisdiction because they are mere "claim processing" rules.[17] In the latter cases, the courts also still found that § 1229 has no effect on jurisdiction despite finding the regulations do not affect jurisdiction, begging the question of what does control the jurisdiction of these legislatively-created courts if neither the applicable statutes nor regulations do. In any event, despite the consistency of the circuit courts in finding otherwise, legislative history and the enactment of 8 U.S.C. § 1229 makes clear that the statute actually *does* control an immigration court's subject matter jurisdiction.

When enacted, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[18] made a multitude of changes to immigration laws generally and to removal proceedings specifically. Among them, Congress enacted 8 U.S.C. § 1229 regarding the "Initiation of Removal Proceedings" and repealed 8 U.S.C. § 1252b.[19]

---

[17] *See, e.g., Perez-Sanchez v. U.S. Att'y Gen.,* 935 F.3d 1148 (11th Cir. 2019). The Board of Immigration Appeals has reached a similar conclusion. *See Matter of Rosales Vargas*, 27 I. & N. Dec. 745 (B.I.A. 2020).

[18] Congress enacted the IIRIRA as part of the Omnibus Consolidated Appropriations Act of 1997. *See* 110 Stat. 3009, P.L. 104-208 (Sept. 30, 1996). Mr. Bastide-Hernandez previously submitted the entirety of the IIRIRA with his first petition for rehearing. *See* Dkt. Entry 55-3. For the Court's convenience, Mr. Bastide-Hernandez now attaches only the relevant pages of the IIRIRA. *See* Appendix C.

[19] Appendix C at pp. 2-4.

This statute (§ 1229) specifically states that "written notice (…a 'notice to appear') shall be given" to the person in removal proceedings, and this NTA must specify "the time and place at which the [removal] proceedings will be held."[20] Congress did not include an "or otherwise" provision in § 1229, a conscious deletion from the pre-IIRIRA law.

Functionally, this significant shift from pre-IIRIRA law to the new statutes affected a number of pending immigration cases. To account for the significant shift from pre-IIRIRA law to the new statutes, Congress included a transition statute within the IIRIRA.[21] This transition statute specified that, generally, the new laws would not apply to persons in pre-IIRIRA exclusion or deportation proceedings.[22] However, the transition statute gave the Attorney General the option to convert pre-IIRIRA cases and proceed under the new law if an evidentiary hearing had not yet been held.[23]

If the Attorney General chose to transition a person from pre-IIRIRA exclusion or deportation proceedings to post-IIRIRA removal proceedings, the transition statute required the Attorney General to provide written notice to the noncitizen at least 30 days prior to any evidentiary hearing.[24] The transition statute provided that a timely notice of hearing under this section "shall be valid **as if provided under section 239 of such Act … to confer jurisdiction on the immigration judge.**"[25] Section 239 is

[20] Appendix C at pp. 2-3.
[21] Appendix C at pp. 5-6 (P.L. 104-208 at Div. C, Sec. 309).
[22] Appendix C at p. 5 (Sec. 309(c)(1)).
[23] Appendix C at p. 5 (Sec. 309(c)(2)).
[24] Appendix C at p. 5 (Sec. 309(c)(2)).
[25] Appendix C at p. 5 (Sec. 309(c)(2)) (emphasis added).

8 U.S.C. § 1229, which defines the required contents of a Notice to Appear.[26] Thus, a plain reading of the transition statute makes clear that Congress intended for a NTA **as defined under 8 U.S.C. § 1229** to confer jurisdiction on immigration judges to conduct removal proceedings.

This transition statute undermines this Court's holdings in this appeal as well as in *Karingithi* and *Aguilar Fermin*. While 8 U.S.C. § 1229 does not explicitly state that service of a NTA as defined in § 1229(a)(1) is required to confer jurisdiction on the immigration judge, the IIRIRA *did* explicitly say exactly that in the transition statute, and the transition statute directly references § 1229. Thus, service of a § 1229-compliant NTA is necessary to confer jurisdiction on an immigration judge.

Consequently, to confer jurisdiction on an immigration judge, immigration officials must serve a noncitizen with a NTA that complies with 8 U.S.C. § 1229. This Court should grant rehearing *en banc* and reconsider its prior rulings that § 1229 has "nothing" to do with an immigration court's subject matter jurisdiction and give this argument the consideration it merits. When it does, this Court should find that the statute controls when jurisdiction vests. The Court should further find that service of a putative NTA that does not contain all information required under § 1229(a) fails to vest the immigration court with subject matter jurisdiction.

[26] Appendix C at pp. 2-3.

B. The Supreme Court's ruling in *Niz-Chavez v. Garland* makes clear that a Notice to Appear must be a single document as defined under 8 U.S.C. § 1229(a)(1).

The Supreme Court recently issued its opinion in *Niz-Chavez v. Garland*.[27] Despite this panel not addressing this ruling in its re-issued opinion in this appeal, the Supreme Court's opinion is clearly relevant to the question presented in this appeal and countless other appeals presenting *Pereira*-based arguments. The primary question in *Niz-Chavez* was whether a "notice to appear" is "a single document containing all the information an individual needs to know about his removal hearing" or if that required information could be provided in multiple documents.[28] Looking to the relevant statute, 8 U.S.C. §1229(a), the Court found that the statute contemplates service of "'a' notice," meaning a Notice to Appear should be "'a' single document containing the required information, not a mishmash of pieces with some assembly required."[29]

The Court was not swayed by various arguments that "a notice to appear" could mean multiple documents. Like an indictment, a criminal information, and a civil complaint, a notice to appear "serves as the basis for commencing a grave legal proceeding."[30] Like those documents, a notice to appear ought to be "a single document highlighting certain salient features of the [removal] proceedings against" a noncitizen.[31]

---

[27] 141 S. Ct. 1474 (Apr. 29, 2021).
[28] *Niz-Chavez*, 141 S. Ct. at 1478.
[29] *Id.* at 1480.
[30] *Id.* at 1482.
[31] *Id.*

The Court pointed to multiple other sections of 8 U.S.C. § 1229, as well as another statute, evidencing that a Notice to Appear must be a single document.[32] Moreover, the Court pointed to the historical context of the passage of the IIRIRA. Specifically, prior to the IIRIRA, the government could initiate removal proceedings using an "Order to Show Cause," and the place and time of the removal hearing could be contained "'in the order to show cause *or otherwise*.'"[33] The IIRIRA eliminated the "or otherwise" language and instead explicitly required that "time and place information must be included in a notice to appear."[34] This was a clear indication that Congress intended immigration authorities to initiate removal proceedings with "a single fully compliant document."[35] Even the United States recognized the clear import of this change to the statutory language shortly after the IIRIRA was enacted.[36] The Court held that the government's "self-serving regulations" purporting to set forth different requirements for a Notice to Appear must give way to "'the statute's clear text.'"[37]

---

[32] *See id.* at 1480-81 (discussing the "stop-time rule" of 8 U.S.C. § 1229b(d)(1)), 1482-83 (discussing § 1229(e)(1), which sets forth special rules for notice when a noncitizen is found at certain locations, such as a domestic violence shelter), 1483 (discussing §1229a(b)(7), which describes the consequences of failing to appear for a removal hearing), and 1483-84 (discussing § 1229(a)(2), the provision applicable to changing a noncitizen's removal hearing date).

[33] *Id.* at 1484 (*quoting* 8 U.S.C. § 1252b(a)(2)(A) (1994 ed.)).

[34] *Id.*

[35] *Id.*

[36] *Id.* (discussing a proposed rule set forth in 62 Fed. Reg. 449 (1997) acknowledging that "the time and place of the hearing must be on the Notice to Appear").

[37] *Id.* at 1485 (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2118 (2018)).

C. The Supreme Court's ruling in *Niz-Chavez* undermines this Court's ruling in the instant appeal. Jurisdiction to commence removal proceedings only vests after service of a Notice to Appear, which must be a single document fully compliant with 8 U.S.C. § 1229.

The panel majority's initial opinion and subsequent opinion in this appeal effectively hold that service of any document purporting to be a "Notice to Appear," regardless of its actual contents, is sufficient to vest an immigration court with subject matter jurisdiction over removal proceedings. This "clarified" the Court's prior rulings in *Karingithi* and *Aguilar Fermin*, both of which had held there was certain information that must be provided to the noncitizen to vest an immigration court with jurisdiction; both cases held that information not contained in a Notice to Appear could be provided in subsequent documents prior to the actual removal hearing.

The Supreme Court's ruling in *Niz-Chavez* undermines this Court's holdings in all three cases. The Supreme Court unequivocally held that a "Notice to Appear" is a single document containing all required information within it. This ruling and the Court's analysis is not limited to the "stop time" rule set forth in 8 U.S.C. § 1229b(d)(1). This is clear because the Court noted numerous other subsections of both 8 U.S.C. §1229 and § 1229a which refer to "a notice to appear."[38] At the outset of its opinion, the Court noted that the IIRIRA "requires the government to serve 'a notice to appear' on individuals it wishes to remove from this country."[39]

---

[38] *See id.* at 1480-81 (citing 8 U.S.C. § 1229b(d)(1)), 1482-83 (citing 8 U.S.C. §1229(e)(1)), 1483 (citing 8 U.S.C. § 1229a(b)(7)), and 1483-84 (citing 8 U.S.C. § 1229(a)(2)).
[39] *Id.* at 1478.

The position that *Niz-Chavez* and *Pereira* are limited to the context of the "stop-time rule" is simply not maintainable. As *Niz-Chavez* notes, the IIRIRA fundamentally changed the charging document that would be used to initiate all removal proceedings. Specifically, the IIRIRA expressly required a Notice to Appear to include time and place information.[40] "Nor was the alteration an insensible one. Recall that [the] IIRIRA *also* created the stop-time rule and pegged it to the service of a notice to appear."[41] So yes, a Notice to Appear is inextricably linked to the "stop-time rule." However, the IIRIRA also linked the Notice to Appear to all removal proceedings generally,[42] to the timeline for when removal hearings must be scheduled,[43] to eligibility for voluntary departure,[44] and to whether a noncitizen can be removed *in absentia* if they fail to appear at their removal hearing,[45] among many other things. Arguing that a Notice to Appear as defined under 8 U.S.C. § 1229 has no relevance outside of the stop-time rule ignores multiple sections of the same act (the IIRIRA) that created and defined a Notice to Appear.

The Supreme Court has now recognized not once but twice that Congress clearly and unambiguously defined the required contents of a Notice to Appear within §

---

[40] *See id.* at 1484.
[41] *Id.*
[42] *See* ECF 55-3 at p. 33 (8 U.S.C. § 1229(a)(1)).
[43] *See* ECF 55-3 at p. 34 (8 U.S.C. § 1229(b)(1)).
[44] *See* ECF 55-3 at p. 39 (8 U.S.C. § 1229c(b)(1)(A)).
[45] *See* ECF 55-3 at p. 35 (8 U.S.C. § 1229a(b)(5)(A)).

1229.[46] The Executive Branch agencies granted authority over immigration proceedings have no authority to override this clear and unambiguous statute via self-serving regulations.[47] As the Court noted in *Niz-Chavez*, "self-serving regulations never 'justify departing from the statute's clear text.'"[48]

This Court relied on those same self-serving regulations in both *Karingithi* and *Aguilar Fermin*, and in the instant appeal, to find jurisdiction existed even where required information under § 1229 was ultimately provided in multiple documents. These rulings can no longer be maintained because *Niz-Chavez* specifically rejects this "notice-by-installment" concept of curing defects, instead requiring a Notice to Appear to be a "single and comprehensive" document.[49]

D. Rehearing *en banc* is appropriate at this time even if remand is ultimately necessary to address whether Mr. Bastide-Hernandez satisfies 8 U.S.C. § 1326(d). Remand now without definitively resolving the question of subject matter jurisdiction would only result in further appellate briefings and proceedings, in this case and many others, where the same question is presented.

All three members of the panel now agree that remand is necessary and appropriate because the district court excused Mr. Bastide-Hernandez from showing he satisfied 8 U.S.C. § 1326(d). There was no dispute in the district court that he waived

[46] *See generally Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).
[47] *See, e.g., United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Ocampo v. Holder*, 629 F.3d 923, 927 (9th Cir. 2010).
[48] *Niz-Chavez*, 141 S. Ct. at 1485 (*quoting Pereira*, 138 S. Ct. at 2118).
[49] *Niz-Chavez*, 141 S. Ct. at 1479.

his right to appeal in his immigration proceedings. The district court found § 1326(d) did not prohibit relief if the immigration court lacked subject matter jurisdiction. The panel now finds that the Supreme Court's ruling in *Palomar-Santiago* requires Mr. Bastide-Hernandez to substantively address whether he can satisfy § 1326(d)'s requirements.[50]

Mr. Bastide-Hernandez previously briefed why *Palomar-Santiago* should have no legal effect or relevance in his case.[51] In short, because Mr. Bastide-Hernandez argues that the immigration court lacked subject matter jurisdiction, his waiver of appeal is irrelevant because "defects in subject-matter jurisdiction … can never be forfeited or waived."[52] The Supreme Court's ruling in *Palomar-Santiago* does nothing to change that. Nevertheless, this panel has now unanimously found that *Palomar-Santiago* requires remand to the district court to address whether Mr. Bastide-Hernandez can satisfy §1326(d).

Even if remand is necessary on that question, this Court should nevertheless grant rehearing to definitively address the question presented in the appeal. Specifically, the *en banc* Court should determine what legal effect (if any) there is on an immigration court's subject matter jurisdiction where a putative "Notice to Appear" is not a "Notice

[50] *See* Appendix B at pp. 7-10, 12.
[51] *See* Dkt. Entry 65.
[52] *United States v. Cotton*, 535 U.S. 625, 630 (2002).

to Appear" as defined under 8 U.S.C. § 1229(a). This question is fully briefed and ripe for disposition in the instant appeal.

Refusing to grant rehearing en banc only further delays a final disposition not only in this case but in a multitude of appeals in this Circuit awaiting a definitive answer on this question. In this appeal in particular, the case would be remanded to the district court for further briefing on § 1326(d) and Mr. Bastide-Hernandez's waiver of appeal, then almost certainly appealed whether the district court yet again grants the motion to dismiss or if the district court denies it. The parties would then re-brief the same substantive issues yet again. Barring the *en banc* Court definitively addressing the *Pereira* and *Niz-Chavez*-based attack on an immigration court's subject matter jurisdiction in the interim, *en banc* hearing would still be necessary at that point. It would be far more efficient to address this question now.

It is not clear why the panel decided to not address *Niz-Chavez* in its re-issued opinion despite having supplemental briefing from both parties on that case. Regardless of the reason, the *en banc* Court should grant rehearing now and give not only the United States and Mr. Bastide-Hernandez but all interested persons in this Circuit a definitive answer on the question presented regarding the subject matter jurisdiction of immigration courts and a Notice to Appear. Assuming the *en banc* Court finds a defective Notice to Appear deprives the immigration court of jurisdiction, the *en banc* Court could also address whether a waiver of appeal in removal proceedings would matter. In other words, despite clear Supreme Court precedent that defects in subject

matter jurisdiction cannot be waived, is § 1326(d) a valid exception to that rule? If it is not, the Court could definitively resolve this appeal without further remand.

III. CONCLUSION

For the reasons set forth herein, this Court should grant rehearing *en banc*. The *en banc* Court should affirm the district court's granting of the motion to dismiss. Alternatively, the *en banc* Court should address and rule on the question of subject matter jurisdiction then remand if necessary to address the impact of Mr. Bastide-Hernandez's apparent waiver of appeal in his removal proceedings.

Dated: March 2, 2021.

s/ Paul Shelton
Paul Shelton, 52337
Federal Defenders of Eastern
Washington and Idaho
306 East Chestnut Avenue
Yakima, Washington 98901
(509) 248-8920
(509) 248-9118 (fax)
Paul_Shelton@fd.org
Attorney for Defendant-Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 19-30006

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,563.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Paul E. Shelton **Date** Jul 26, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 19-30006

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

○ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

◉ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Each of these cases presents a substantively similar argument:
US v Jose Gonzalez-Valencia, 19-30222 (new panel opinion issued 7/20/21, counsel intends to file a new petition for rehearing); US v Manuel Sanchez, 20-30084 (panel opinion issued 7/14/21, counsel intends to file a new petition fore rehearing); US v Isidro Muniz-Sanchez, 19-30182 (panel opinion issued 2/5/21, petition for rehearing pending); US v Rubisel Delcarmen-Abarca, 19-30153 (panel opinion issued 2/18/21, petition for rehearing pending); US v Jose Miranda-Reyes, 20-30057 (appeal stayed on 5/21/21 pending issuance of the mandate in Bastide-Hernandez); US v Romero-Romero, 19-30144 (fully briefed, not currently set for oral argument).

Signature s/Paul E. Shelton **Date** Jul 26, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

U.S.C.A. No. 19-30006
U.S.D.C. 1:18-CR-02050-SAB-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

JUAN CARLOS BASTIDE-HERNANDEZ,

Defendant - Appellee.

Appeal from the United States District Court
For the Eastern District of Washington

APPELLANT'S RESPONSE TO APPELLEE'S RENEWED PETITION FOR REHEARING *EN BANC*

Joseph H. Harrington
Acting United States Attorney
Richard C. Burson
Assistant United States Attorney
402 E. Yakima Avenue, Suite 210
Yakima, WA 98901
Telephone: (509) 454-4425

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

REGULATIONS

I. INTRODUCTION

The Federal Rules of Appellate Procedure allow *en banc* rehearings for only two reasons: to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance. This case presents neither of those circumstances.

First, the majority's decision is not in conflict with prior decisions of this Court. In each of *Karingithi* and *Aguilar Fermin*, this Court left unanswered the question of whether a subsequent hearing notice is required to vest jurisdiction when the NTA filed with the immigration court did not include date, time or place information. The majority's opinion here answered that question and married those two prior decisions into one coherent statement of law: jurisdiction vests in the immigration court upon the filing of an NTA, regardless of whether it included date, time or place information. The decision finally brought clarity to this Circuit on that question. Furthermore, the majority's opinion was the only application of *Karingithi* and *Aguilar Fermin* capable of avoiding a shape-shifting definition of jurisdiction that allowed the immigration court to vest, divest and re-vest jurisdiction before ever conducting a hearing.

Second, the majority's opinion resolved the issue in this case consistent with the rulings of at least seven other United States Circuit Courts of Appeal and BIA

precedent that already bound immigration courts around the country. Granting an *en banc* rehearing will not resolve any issue of exceptional importance, but instead, will create discord among the circuits on this issue. In the three years since the Supreme Court issued *Pereira*, this issue of immigration court subject matter jurisdiction has generated consistent nationwide litigation. Now, with uniformity across the circuits and legal reliability within reach, the Defendant wants this Court to throw discord into the system and leave immigrants in removal proceedings uncertain as to whether they can rely on their immigration courts having jurisdiction, by having this Court depart from its own recent precedent and every circuit that has addressed the issue.

The Defendant disagrees with the analysis and decision of the majority. But an *en banc* hearing is not justified merely because a party or another judge would have ruled differently. An *en banc* hearing is justified only in the two circumstances proscribed by the Rule. Because neither of those circumstances is present, nor can be presented if the Defendant's petition is granted, the Defendant's petition should be denied.

II. THE PRIOR DECISIONS OF THIS COURT

On February 2, 2021, this Court issued for publication its decision in the government's appeal. *United States v. Bastide-Hernandez*, 986 F.3d 1245 (9th Cir.

2021). Recognizing that two prior decisions by this Court, *Karingithi* and *Aguilar Fermin*, had caused some confusion about when jurisdiction actually vests in the immigration court, this Court reached the "only logical" conclusion that jurisdiction vested upon the filing of an NTA, even one that does not include the time, date and location of the hearing. *Id.* at 1248, citing *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020). In a dissenting opinion, the Honorable Milan D. Smith, Jr. conceded that *Karingithi* left open the question of the effect of a failure to cure missing date and time information on an NTA, but wrote that he would have applied *Karingithi* to hold that missing date and time information must be cured with a subsequent hearing notice in order to vest jurisdiction.

Following the Defendant's filing of a Petition for Rehearing *En Banc*, the Supreme Court issued decisions in *Niz-Chavez* and *Palomar-Santiago*. Both parties filed supplemental briefing on the impact of both decisions. On July 12, 2021, the panel reissued its decision. The panel's opinion remained unchanged with respect to the question of whether subject matter jurisdiction vested in the immigration judge upon the filing of an NTA, even one that does not include the time, date and location of the hearing. *United States v. Bastide-Hernandez*, 3 F.4th 1193 (9th Cir. 2021). The panel also took the opportunity to apply *Palomar-Santiago* to the facts of this case,

and determined that the Defendant's argument failed not only substantively, but also because he had not met all three requirements of 8 U.S.C. § 1326(d) as required by *Palomar-Santiago*. On this latter point, the decision was unanimous.

III. DISCUSSION

THIS COURT SHOULD DENY THE PETITION FOR REHEARING *EN BANC* BECAUSE THE MAJORITY'S OPINION MAINTAINED UNIFORMITY IN THIS COURT'S PRIOR DECISIONS AND RESOLVED THE RELEVANT QUESTION CONSISTENT WITH OTHER COURTS OF APPEAL.

En banc rehearings are not favored and ordinarily not ordered. FED. R. APP. P. 35(a). Indeed, unless *en banc* consideration is necessary to secure or maintain uniformity of this Court's prior decisions or where the proceeding involves a question of exceptional importance, this Circuit's Rules compel denial of the petition for rehearing. *Id.* A determination that a panel's decision is incorrect is insufficient to grant an *en banc* rehearing. *Kipp v. Davis*, 986 F.3d 1281, 1285-86 (9th Cir. 2021) (Miller, E., concurring).

The majority's decision here already secured uniformity of this Court's prior decisions in *Karingithi* and *Aguilar Fermin*. As both the majority and dissent noted, those two decisions had caused confusion prior to the panel's decision. *See Bastide-Hernandez*, 3 F.4th at 1199 (Smith, M., dissenting). The confusion was not caused by inconsistency, but rather, a question regarding immigration court jurisdiction left unanswered by each. That question was resolved by the majority. An *en banc* review

is not necessary to achieve uniformity where uniformity was accomplished by the majority's decision.

Similarly, the petition for *en banc* rehearing is not necessary to resolve a question of exceptional importance. The majority's resolution of the ultimate question at issue – what happens to jurisdiction when an NTA does not include date, time or location information – was not only firmly resolved so as to give undocumented individuals in removal proceedings clarity as to when their case is properly before an immigration judge, but was also in conformity with seven other United States Circuit Courts of Appeal. If this Court were to grant the Defendant's petition and reverse the panel's decision, it would have the opposite effect of resolution. Instead, it would create further uncertainty and leave the question of immigration court subject matter jurisdiction dependent on what circuit a non-citizen resided in.

1. The panel's opinion created uniformity in this Court's prior decisions.

En banc rehearings are disfavored and not ordinarily ordered unless one of two "exacting" standards are met, one of which is that the panel decision conflicts with preexisting precedent and therefore a rehearing is necessary to maintain uniformity. *Kipp*, 986 F.3d at 1282; FED. R. APP. P. 35(a)(1). Not only was the panel's opinion consistent with existing precedent, but it successfully harmonized two

prior published decisions that each left open a crucial question regarding when jurisdiction vests in the immigration court.

In *Karingithi,* this Court held that federal immigration regulations govern the vesting of jurisdiction in the immigration courts, and that pursuant to those regulations, jurisdiction vests when an NTA is filed. 913 F.3d at 1158. The *Karingithi* panel noted that the inclusion of the time and date of a removal hearing is not required by the regulations governing jurisdiction, and therefore, the immigration court had jurisdiction over the removal proceedings when the NTA was filed. *Id. Karingithi*'s holding was in no way conditioned on the subsequent provision of a hearing notice. The Court expressly declined to decide the question raised in this case and "[did] not decide whether jurisdiction would have vested if she had not received this information in a timely fashion." *Id.* at 1162. If this Court had wanted to resolve the question then and there and establish a hearing notice as a condition precedent to jurisdiction, it could have. Instead, it expressly chose not to.

In *Aguilar Fermin*, this Court applied *Karingithi* to a case in which an NTA failed to include not only date and time information, but also the address of the immigration court at which the NTA was to be filed. 958 F.3d at 893. As noted by the *Aguilar Fermin* panel, unlike date and time information, the address of the

immigration court *was* required by the regulations. *Id.* at 893-894, *citing* 8 C.F.R. § 1003.15(b)(6). Nevertheless, this Court deferred to the Board of Immigration Appeals' ("BIA") interpretation of the regulation and held that the provision requiring the address of the immigration court did not deprive the immigration court of jurisdiction if not met. *Aguilar Fermin*, 958 F.3d at 895. While the *Aguilar Fermin* panel held that the appropriate remedy for a missing address was the subsequent provision of that information, it did not hold that lack of subsequent notice would divest the immigration court of jurisdiction, and, like *Karingithi*, left that question unanswered. *Id.*

Karingithi and *Aguilar* are not in tension. Rather, as the majority here held, *Karingithi* and *Aguilar Fermin* both failed to address exactly when jurisdiction vests in the immigration court. The only reasonable answer to that question is, as held here, that jurisdiction vests pursuant to the regulation exactly when the regulation says it does: "when [an NTA] is filed with the Immigration Court." *Bastide-Hernandez*, 986 F.3d at 1248, *citing* 8 C.F.R. § 1003.14(a). To interpret the regulations otherwise would be to create a scheme whereby jurisdiction vests "upon the filing of" an NTA with the immigration court, but then divests at some ethereal point in time if a subsequent hearing notice is not provided, or alternatively, contemplates the immigration court docketing, scheduling, sending notices and ordering appearances

for cases it has yet to acquire jurisdiction over. Neither of those interpretations is reasonable, and indeed, the majority's interpretation was the only reasonable way to interpret the regulations and answer the question left open by *Karingithi* and *Aguilar Fermin*.

The dissent and the Defendant would have applied *Karingithi* and *Aguilar Fermin* differently. But disagreement as to the application of precedent is not the same as establishing conflict with precedent. The panel's opinion here does not conflict with either *Karingithi* or *Aguilar Fermin*, but rather, the natural evolution of those holdings. Thus, Federal Rule of Appellate Procedure 35(a)(1) provides no basis for which to grant an *en banc* rehearing.

2. The question raised by this case was firmly answered by the majority and was consistent with other Courts of Appeal.

Alternatively, an *en banc* rehearing can be granted where the matter at stake is one of "exceptional importance." FED. R. APP. P. 35(a)(2). The quintessential matter of "exceptional importance" involves an issue where the majority decision conflicts with decisions of other United States Circuit Courts of Appeal. *Id*. at (b)(1)(B); *see also id.*, Committee Notes on Rules – 1998 Amendment (citing only one example - intercircuit conflict - as a reason for finding that a proceeding involves a question of exceptional importance). The provision for *en banc* rehearing exists to avoid needless litigation and differing rights and duties depending on where a case is

litigated. *Id*. Although the question decided by the majority here is relevant to a significant amount of criminal and civil immigration cases, and thus of significance importance, the decision reached by the majority is consistent with the current BIA precedent that has bound the immigration courts since August of 2018 and the authoritative decisions of at least seven other United States Circuit Courts of Appeal. Thus, the issue of exceptional importance has already been resolved.

The Defendant, in asking for an *en banc* rehearing and subsequent reversal, is staking out a position that will lead to intercircuit disagreement and make the subject matter jurisdiction of immigration courts subject to their geographic location. Assuming the issue at stake is truly one of exceptional importance, certainty and uniformity across circuits is crucial and best served by denial of the Defendant's petition.

The question here of immigration court jurisdiction has caused uncertainty in immigration courts across the country for three years. In June of 2018, the Supreme Court decided *Pereira v. Sessions*, in which it held that an NTA that does not include date or time information does not trigger the "stop-time" rule for a form of immigration relief not relevant here. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Relying on that case, the petitioner in *Matter of Bermudez-Cota* (and hundreds, if not thousands of litigants) sought termination of removal proceedings, arguing that the

immigration court never acquired jurisdiction over the case because of missing date and time information. 27 I & N Dec. 441 (BIA 2018). The BIA rejected the petitioner's argument in a published decision in August of 2018. *Id.* Specifically, the BIA held that the regulations governed the immigration court's jurisdiction and that failure to include time and date information on the filed NTA did not affect such jurisdiction, because although the regulation requires a charging document (such as an NTA) to vest jurisdiction, it does not require the charging document to include a date or time. *Id*. at 444-445. The BIA stopped short of finding whether an NTA vested jurisdiction regardless of whether the information was ever provided in a subsequent notice.

The BIA finally took the opportunity to fully answer that question in *Matter of Rosales Vargas* and held that the regulations did not restrict subject matter jurisdiction, but were instead claim-processing rules. 27 I & N Dec. 745, 750-51 (BIA 2020). Thus, jurisdiction vests upon the filing of an NTA regardless of whether the NTA includes the date, time or place information required by regulation. *Id*. at 753.

The BIA's decision – that an NTA vests jurisdiction in the immigration court upon filing, regardless of the inclusion of date, time or place information or the

provision of any subsequent hearing notice – is and was consistent with the decisions of at least seven other Circuit Courts of Appeal.[1]

The majority's decision in this case establishes uniformity with those circuits and conforms with BIA precedent to which the immigration courts are bound. The Defendant's preferred outcome, on the other hand, would result in immigration courts in New Mexico having jurisdiction over cases that immigration courts in neighboring Arizona would not. The ability of an undocumented immigrant to rely upon an immigration court's decision (granting them asylum, for instance) would depend on the state in which they were present.

---

[1] *Goncalves Pontes v. Barr*, 938 F.3d 1, 6 (1st Cir. 2019) (the regulations control jurisdiction and are not concerned with information provided to the noncitizen); *Nkomo v. Att'y Gen. of United States*, 930 F.3d 129, 134 (3d Cir. 2019) (Pereira's holding not applicable to the regulations governing jurisdiction); *Apolinar v. Barr*, 945 F.3d 1072, 1075 (8th Cir. 2019); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1016 (10th Cir. 2019) ("Because the Attorney General could not restrict an immigration judge's jurisdiction through a regulation, 8 C.F.R. § 1003.14 does not establish immigration judges' jurisdiction."); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019) (holding that "8 C.F.R. § 1003.14, despite its language, sets forth not a jurisdictional rule but a claim-processing one"); *Pierre-Paul v. Barr*, 930 F.3d 684, 693 (5th Cir. 2019) (same); *United States v. Cortez*, 930 F.3d 350, 358-59, 361 (4th Cir. 2019) (holding the same and stating that 8 C.F.R. § 1003.14(a) is a claim-processing rule because it "lay[s] out the procedural steps that must be taken to docket a case before an immigration judge"); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) (stating, with reference to 8 C.F.R. § 1003.14, that while "an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases").

Granting a petition in this case would not resolve any exceptionally important issue, but rather, create intercircuit discord on the issue. That is the opposite of resolution. For that reason, the Defendant's petition should be denied.

3. *Niz-Chavez* has no more bearing on immigration court subject matter jurisdiction than did *Pereira*, and did not change the relevant analysis.

Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), does not "undermine" this Court's ruling in the instant appeal. Nor does it undermine *Aguilar Fermin* or any of the line of cases supporting the panel's opinion. In *Niz-Chavez* - as in *Pereira v. Sessions*, 138 S.Ct. 2105 (2018) before it - the Supreme Court addressed "[w]hat qualifies as a notice to appear sufficient to trigger the stop-time rule" under 8 U.S.C. § 1229b. *Niz-Chavez*, 141 S. Ct. at 1479. This stop-time rule limits how noncitizens can establish "continuous presence" when applying for cancellation of removal. *Id*. It has nothing to do with the immigration court's subject matter jurisdiction. Moreover, *Niz-Chavez* treats 8 U.S.C. § 1229(a)(1) - the statute describing the contents of an NTA necessary to trigger the stop-time rule - as a claim-processing rule (which it was required to address because Niz-Chavez timely objected to the government's lack of compliance with the rule), not as a jurisdictional defect that rendered the removal proceeding itself a legal nullity. Niz-Chavez's removal proceeding was initiated by a two-step process in which he was first served with an NTA that did not contain date and time information, then with

a Notice of Hearing that did. If the use of that process was "a truly jurisdictional rule[]" that governed the immigration court's "adjudicatory authority" rather than a non-jurisdictional claim-processing rule, the Supreme Court would have been obligated to consider the defect sua sponte and would have ordered the dismissal of Niz-Chavez's removal proceeding for lack of jurisdiction, which the Supreme Court did not do. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented."). Indeed, neither the majority opinion nor the dissent even mentions the word "jurisdiction." And the majority opinion did not question or otherwise respond to Justice Kavanaugh's point in dissent that it is beyond argument that the government need not comply with Section 1229(a)(1) to institute removal proceedings. *Niz-Chavez*, 141 S. Ct. at 1491 (Kavanaugh, J., dissenting).

That the Supreme Court did not treat the statutory NTA requirements as jurisdictional is consistent with the controlling "clear statement principle" that a rule is jurisdictional only "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Gonzalez*, 565 U.S. at 141-42. Section 1229(a) does not contain any clear statement of a jurisdictional limitation. Rather, it states that "[i]n removal proceedings," an immigrant shall be

served, personally or by mail, with "written notice" specifying certain information - which is to say it uses the language of a claim-processing rule to be followed "[i]n removal proceedings." 8 U.S.C. § 1229(a)(1).

Furthermore, nothing in *Niz-Chavez* addresses - or undermines - this Court's holding that case law interpreting the stop-time rule and Section 1229(a)(1) "simply has no application" to the regulations governing immigration court jurisdiction, which use different language. *Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019). Decisions interpreting the stop-time rule thus "do not address the requirements for an NTA to vest an immigration court with jurisdiction." *Aguilar Fermin*, 958 F.3d at 893. The rule is simply "irrelevant" to Defendant's claim. *Id*. at 891.

Finally, the Supreme Court has categorically denied certiorari in cases presenting the jurisdictional question raised by the Defendant's appeal both before and after granting certiorari in *Niz-Chavez*, establishing that the Supreme Court itself views the issues as distinct.[2] It cannot be that the Supreme Court has spent 18 months

[2] *See Vana v. Barr*, No. 20-369 (Nov. 9, 2020); *Fermin v. Barr*, 141 S. Ct. 664 (2020); *Bhai v. Barr*, 141 S. Ct. 620 (2020); *Milla-Perez v. Barr*, 141 S. Ct. 275 (2020); *Castro-Chavez v. Barr*, 141 S. Ct. 237 (2020); *Mayorga v. United States*, 141 S. Ct. 167 (2020); *Cantu-Siguero v. United States*, 141 S. Ct. 166 (2020); *Pineda-Fernandez v. United States*, 141 S. Ct. 166 (2020); *Ferreira v. Barr*, 140 S. Ct. 2827 (2020); *Ramos v. Barr*, 140 S. Ct. 2803 (2020); *Pedroza-Rocha v. United*

denying certiorari on the jurisdictional issue only to implicitly reject the unanimous view of the courts of appeals on that issue in *Niz-Chavez*, a case presenting an entirely *different* issue.

In short, this Court's opinion in the instant appeal is not inconsistent with *Niz-Chavez*. *Niz-Chavez* presents no reason to vacate the panel's opinion.

IV. CONCLUSION

Because the Defendant's petition fails to establish that an *en banc* rehearing is necessary to seek intracircuit uniformity or resolve an issue of exceptional importance, the Defendant's petition should be denied.

Date: August 30, 2021

Joseph H. Harrington
Acting United States Attorney

s/ Richard C. Burson
Richard C. Burson
Assistant United States Attorney

States, 140 S. Ct. 2769 (2020); *Nkomo v. Barr*, 140 S. Ct. 2740 (2020); *Gonzalez-De Leon v. Barr*, 140 S. Ct. 2739 (2020); *Mora-Galindo v. United States*, 140 S. Ct. 2722 (2020); *Callejas Rivera v. United States*, 140 S. Ct. 2721 (2020); *Araujo Buleje v. Barr*, 140 S. Ct. 2720 (2020); *Pierre-Paul v. Barr*, 140 S. Ct. 2718 (2020); *Karingithi v. Barr*, 140 S. Ct. 1106 (2020).

CERTIFICATE OF SERVICE

It is hereby certified that on August 30, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants who are registered EM/ECF users will be served by the appellate CM/ECF system.

Paul Shelton, Esq.
Federal Defenders of Eastern Washington & Idaho
306 E. Chestnut
Yakima, WA 98901

s/ Richard C. Burson
Richard C. Burson
Assistant U.S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-30006

I am the attorney or self-represented party.

This brief contains 3,094 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Richard C. Burson **Date** 8/30/21