No. _____

In The
Supreme Court of the United States

LAHIM KADRIA,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has determined the "sole and exclusive procedure" for certain removal proceedings. 8 U.S.C. §1229a(a)(3). To commence these proceedings, the government must serve noncitizens with a "notice to appear" specifying the proceedings' "time and place." *Id.* §1229(a)(1)(G)(i).

The agency's implementing regulations give a different definition to the words "notice to appear"—under these regulations, a notice to appear may omit the proceedings' time and place. *See* 8 C.F.R. §1003.15(b).

The Second Circuit, along with seven other Circuits, has concluded that the government may commence removal proceedings by issuing a notice to appear that omits the proceedings' time and place. In contrast, the Seventh Circuit and the Eleventh Circuit hold that doing so violates §1229.

The question presented is therefore:

May the government commence removal proceedings by issuing a Notice to Appear that omits the proceedings' time and place?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Petitioner Lahim Kadria and Respondent William P. Barr,[1] in his official capacity as Attorney General of the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

STATEMENT OF RELATED CASES

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

Kadria v. Barr, No. 18-454, 19-954, U.S. Court of Appeals for the Second Circuit. Judgment entered July 23, 2019; and

In the Matter of Lahim Kadria, A078-280-103, Board of Immigration Appeals, Decision dated April 3, 2019.

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[1] William P. Barr has been substituted for former Acting Attorney General Matthew Whitaker, who was substituted for former Attorney General Jefferson B. Sessions III, who was substituted for former Attorney General Loretta Lynch, who was substituted for former Attorney General Eric Holder.

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The order and opinion of the court of appeals (Pet. App. 1-8) is unreported. The lower court relied on its contemporaneous published decision in *Banegas Gomez v. Barr* (Pet. App. 7). The opinion of the Board of Immigration Appeals (Pet. App. 9-11) is unreported.

JURISDICTION

The order and judgment of the court of appeals was entered on July 23, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at Pet. App. 23-32.

INTRODUCTION

Learned Hand once warned that agencies tend to "fall into grooves, . . . and when they get into grooves, then God save you to get them out." Hearings to Study Senate Concurrent Resolution 21 Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess. 224 (1951) (quoted in Henry J. Friendly, Benchmarks 106 (1967)).

This case is about an agency that fell into a groove, and never got out—even after Congress told the agency to change its ways. As a result, the agency has ignored a federal immigration statute in "almost 100 percent" of cases "over the last three years." *See Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018).

This case involves a dispute over the way the Department of Homeland Security initiates removal proceedings against noncitizens. To explain the dispute, some background is needed: before 1996, Congress allowed the government to initiate removal proceedings in two steps. *See* 8 U.S.C. §1252b (1995).

Congress "rejected the two-step approach when it passed IIRIRA."[2] *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019). A report of the Judiciary Committee of the House of Representatives noted that this legislation was designed to cure "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings." H.R. Rep. 104-469, pt. I, at 122. To fix this problem, Congress decided to "simplify procedures for initiating removal proceedings against an alien" in a key manner: under the new law, "[t]here will be a *single form of notice*." *Id.* at 159 (emphasis added). This single form of notice was calculated to end "protracted disputes concerning whether an alien has been provided proper notice of a proceeding." *Id.*[3]

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[2] "IIRIRA" refers to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

[3] The two-step notification procedure gave the agency twice as many opportunities to make bureaucratic mistakes. For an

Thus, in a section titled "Initiation of removal proceedings," Congress instructed that the government "shall" serve noncitizens with a single "notice to appear" specifying the proceedings' "time and place." *Id.* §1229(a)(1)(G)(i).

But the agency continued as if nothing had changed. When it passed regulations to implement the new law, those regulations conformed to the old regime. One of these regulations allows a notice to appear to omit the proceedings' time and place. 8 C.F.R. §1003.15(b). Another regulation states that a notice to appear must contain this information, but only "where practicable." *Id.* §1003.18(b).

Whether through bureaucratic inertia, administrative resistance to the new law, or something else, the government allowed this exception to swallow the rule. In recent years, the government has "apparently never found it 'practicable' to send Notices that contained time and date information." *Ortiz-Santiago*, 924 F.3d at 960 (citation omitted).

This petition asks whether an executive agency may use its rulemaking power to write loopholes into statutes enacted by Congress. The answer is no.

An executive agency "literally has no power to act . . . unless and until Congress confers power upon it."

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example, look no further than the facts presented in *Pereira*. There, the noncitizen was personally served with a notice to appear, but he never learned when or where he was required to appear. Why? Because the second notice was "sent to the wrong address" after more than a year of delay. 138 S. Ct. at 2107.

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). Thus, if a statute and an agency regulation conflict, the statute must prevail—otherwise, the executive branch could "override Congress." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 374.

In effect, DHS tried to override §1229 by issuing regulations that clung to the older system. And the Second Circuit green-lit the agency's effort to rewrite the United States Code: the court recognized that the statute and the regulations gave conflicting definitions to the same three words—yet the panel concluded that the regulation controlled, not the statute. Pet. App. 7.

The Seventh Circuit recently described this logic as "unpersuasive," "absurd," and contrary to "the most basic rules of statutory interpretation." *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019). And the Eleventh Circuit similarly determined that the government's theory is "foreclosed" by this Court's decision in *Pereira*. *See Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1153 (11th Cir. 2019).

This error alone warrants this Court's intervention. Our legal system contains "no principle of administrative law" that permits the Executive branch to "rewrite" a "clear statutory term." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 n.8 (2014). The Court has "shudder[ed] to contemplate the effect that such a principle would have on democratic governance." *Id.*

This Court's intervention is independently needed to resolve a three-way circuit split. First, the courts are

split as to whether *Auer* deference is warranted. *Compare Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018) (yes) *with Ortiz-Santiago*, 924 F.3d at 962 (no).

Second, the courts are split as to whether the validity of a Notice to Appear implicates the agency's "jurisdiction." *Compare* Pet. App. 7 (yes) *with United States v. Cortez*, 930 F.3d 350, 359 (4th Cir. 2019), *as amended* (July 19, 2019) (no) (recognizing the circuit split on this issue).

Third, courts are split on the most important question of all: whether the government violated the statute. *Compare United States v. Cortez*, 930 F.3d at 349 (no, but recognizing the split) *with Ortiz-Santiago*, 924 F.3d at 962 (concluding that the government "violated the Immigration and Nationality Act"); *Perez-Sanchez*, 935 F.3d at 1153 (deeming the government's actions "unquestionably deficient under the statute").

If the courts agree on anything, it is the exceptional importance of this legal issue, which could affect "thousands, if not millions, of removal proceedings[.]" *Ortiz-Santiago*, 924 F.3d at 962. Accordingly, the potential ramifications are "seismic." *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019).

STATEMENT OF THE CASE

Statutory and regulatory scheme. Before 1996, federal law allowed the government to initiate removal proceedings with a two-step notification system. *See*

8 U.S.C. §1252b (1995). Under that system, the government first issued an Order to Show Cause to the noncitizen, who later received a second document containing the hearing's time and place.

Congress streamlined this two-step system in 1996, when it enacted the Illegal Immigration Reform and Immigration Responsibility Act. This Act sets forth the "sole and exclusive" procedure for removal hearings. 8 U.S.C. §1229a(a)(3). In a statutory section titled "[i]nitiation of removal proceedings," Congress instructed that the government "shall" serve noncitizens with a single "notice to appear" specifying the proceedings' "time and place." *Id.* §1229(a)(1)(G)(i).

This statute contains no exceptions to §1229's time-and-place requirement. The absence of any exceptions is all the more stark given that a "practicability" exception can be found *elsewhere* in the statute: though a notice to appear must ordinarily be served in person, service by mail is permitted "if personal service is not practicable." 8 U.S.C. §1229(a)(1); *see id.* §1229(a)(2) (similar carve-out).

After §1229 was enacted, the agency passed regulations to "*implement* the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear." *See* Conduct of Removal Proceedings, 62 Fed. Reg. 444-01, 449 (proposed January 3, 1997) (emphasis added).

Two of those regulations conflict with the statute. Put simply, these regulations "rewr[ote] the statute." *Lopez v. Barr*, 925 F.3d 396, 401 (9th Cir. 2019).

One regulation carves out an exception that doesn't exist in the statute: the government must provide this time-and-place information only "where practicable." 8 C.F.R. §1003.18(b). Another regulation allows a notice to appear to omit this time-and-place information altogether. *Id.* §1003.15(b).

The agency originally described the "practicability" exception as applying to exceptional circumstances, such as "power outages" or "computer crashes/downtime." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444-01, 449 (1996).

But at some point, the government allowed the exception to swallow the rule. In recent years, the government has "apparently never found it 'practicable' to send Notices that contained time and date information." *Ortiz-Santiago*, 924 F.3d at 960 (citation omitted). This despite the fact that "a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases." *Pereira*, 138 S. Ct. at 2119.

As the government conceded in *Pereira*, DHS invoked this exception in "almost 100 percent" of immigration cases over the past three years. 138 S. Ct. at 2111.

Pereira v. Sessions. In *Pereira*, the Court held that if a document fails to include the hearing's time and place, it cannot qualify as a "notice to appear"

under section 1229.[4] The question arose in the context of the "stop-time rule," which is triggered when a "notice to appear under section 1229(a)" has been filed. *See* 138 S. Ct. at 2109. To answer that "narrow" question, *id.* at 2110, the Court addressed several broader issues. The Court concluded that the phrase "notice to appear" always "carries with it the substantive time-and-place criteria required by § 1229(a)." *Id.* at 2116; *see id.* at 2115 ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (citation omitted).

Pereira recognized that this definition is uniform throughout the statute. For example, the phrase "notice to appear" appears in §1229(b)(1), which governs noncitizens' ability to secure counsel. *Pereira* held that this version of a "notice to appear" necessarily held the same meaning. *See id.* at 2114-15. The Court also recognized that a notice to appear doubles as a charging document under the agency's regulations. *See id.* at 2115 n.7. The Court rejected the notion that this "regulatory" definition could deviate from the statutory definition in a given case—it deemed that notion "atextual," "arbitrar[y]," and lacking any "convincing basis." 138 S. Ct. at 2115 n.7.

In short, the Court has concluded that whenever the statute uses the phrase "notice to appear," the phrase carries the same meaning. *Pereira*, 138 S. Ct. at 2116 ("After all, it is a normal rule of statutory

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[4] *Pereira* reversed decisions reached by the BIA and six courts of appeals. *See* 138 S. Ct. at 2120 (Kennedy, J., concurring).

construction that identical words used in different parts of the same act are intended to have the same meaning." (citing *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012))).

Further, since the statute is "clear and unambiguous," the Court concluded that there was no room for deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *See id.* at 2113.

The Board of Immigration Appeals interprets *Pereira* narrowly. The BIA subsequently concluded that *Pereira* was "narrow" and "distinguishable." *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (BIA 2018). It concluded that *Pereira* does not affect cases where "the 'stop-time' rule is not at issue." *Id.* The BIA therefore concluded that "a two-step notice process is sufficient" and refused to cancel removal proceedings where the notice to appear did not specify the time and place of the initial removal hearing. *Id.* at 447.

The proceedings below. Petitioner Lahim Kadria is a citizen of Albania. In 2000, he entered the U.S. without inspection. Upon arrival, he was placed into removal proceedings by service of a "notice to appear" that lacked the removal hearing's time and place. Pet. App. at 17-22.

Mr. Kadria subsequently filed applications for asylum, withholding of removal, and protection under the United Nations Convention Against Torture. Mr. Kadria's claim was based on his family's persecution under Albania's Communist regime; their involvement

in a land dispute; he and his family's support for and membership in the Democratic Party of Albania and their political activism; and the persecution that he and his family members suffered as a result. Mr. Kadria testified that he was detained four times by the Albanian police between 1991 and 2000, and was beaten in custody. Two brothers were detained as well. Police visited his home on numerous occasions to threaten the family, and tried to take the family's home and land. He was shot at while escaping another detention in 2000. He has been told by his brother that police continue to search for him and await his return.

On June 11, 2001, Immigration Judge Alan Vomacka entered a decision denying Mr. Kadria's applications for relief and ordering him removed to Albania. On April 16, 2003, the Board of Immigration Appeals ("BIA") summarily dismissed Mr. Kadria's timely appeal in a two-line decision.

From 2010 – 2017, Mr. Kadria filed several motions to have his proceedings reopened and reconsidered, based primarily upon worsening country conditions in Albania. Each of these attempts were denied by the BIA and/or the US Court of Appeals for the Second Circuit.

During the pendency of Mr. Kadria's 2018 petition for review (*Kadria v. Barr*, Case. No. 18-454), this Court issued its decision in *Pereira v. Sessions*, prompting Mr. Kadria's most recent motion to reopen to the BIA (July, 2018), which was also denied by the BIA and

appealed to the Second Circuit (*Kadria v. Barr*, Case No. 19-954). These Petitions were then consolidated and denied by issuance of a summary order dated July 23, 2019. Pet. App. at 1-8.

In their July 23, 2019 decision, when it came to the sufficiency of Mr. Kadria's notice to appear, the Second Circuit relied on its decision in *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019). Pet. App. at 7. In that decision, the court never addressed whether the notice to appear complied with the statute. Instead, the court concluded that this was immaterial, as the statute "does not . . . explain when or how jurisdiction vests with the immigration judge." Pet. App. at 7 (citation omitted). The panel reasoned that the agency's "jurisdiction" was governed by regulation. Pet. App. at 7.

The *Banegas Gomez* panel also concluded that *Pereira* was limited to cases involving the "stop time rule," and thus it was "not relevant to [the petitioner's] proceeding at all." *Banegas Gomez v. Barr* at 111.

REASONS FOR GRANTING THE WRIT

I. This issue has left the circuit courts in an intractable three-way split.

Ten circuits have weighed in on the proper definition of a "notice to appear," and those decisions have generated circuit splits on three separate questions:

- Whether *Auer* deference applies;
- Whether 8 U.S.C. §1229(a)(1)(G)(i) is a jurisdictional requirement or a claims-processing rule; and
- Whether the government violated the statute.

This Court's intervention is urgently needed to bring order to the chaos below.

A. Three circuits believe that *Auer* deference is owed, but seven circuits disagree.

The First, Sixth, and Ninth Circuits all lend *Auer* deference to the BIA's reasoning. *Pontes v. Barr*, ___ F.3d ___, No. 19-1053, 2019 WL 4231198, at *5 (1st Cir. Sept. 6, 2019) (extending "great deference" to the BIA) (citation omitted); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019) ("substantial deference"); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018) (same).[5] One of those courts has admitted that its legal analysis generated some "common-sense discomfort" but reassured itself by reasoning that a ruling for the petitioner "would have unusually broad implications." *Id.* at 314.

No other circuit has suggested that any deference is warranted. In fact, in *Ortiz-Santiago*, the Seventh Circuit rejected the BIA's analysis because the agency "brushed too quickly over the Supreme Court's

[5] There, petitioner's counsel raised this argument for the first time in a reply brief, then "abandoned" it during oral argument. *Id.* at 310-11.

rationale in *Pereira* and tracked the dissenting opinion rather than that of the majority." 924 F.3d at 962. And in *Perez-Sanchez*, the Eleventh Circuit concluded that the government's request for deference was "foreclosed" by *Pereira*. 935 F.3d at 1153.

B. Six circuits believe that a notice to appear is a jurisdictional requirement, but four circuits disagree.

The Second, Third, and Eighth Circuits have proceeded under a "jurisdictional" theory: namely, that §1229 governs the requirements of a notice to appear, whereas the concept of "jurisdiction" is governed by the agency's regulation. Pet. App. 7, citing *Banegas-Gomez v. Barr*; *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 134 (3d Cir. 2019). The First Circuit, the Sixth Circuit, and the Ninth Circuit have adopted similar reasoning (though those circuits deffer to the agency). *Pontes*, 2019 WL 4231198, at *5; *Hernandez-Perez*, 911 F.3d at 313; *Karingithi*, 913 F.3d at 1161.[6]

Four circuits, in sharp contrast, have concluded that the agency cannot decide for itself when it is in

[6] In the proceedings below, Mr. Kadria maintained that "defective" notice to appear "did not properly commence proceedings." Petitioner's Opening Brief, Docket No. 33, at 12 (filed August 30, 2018). Mr. Kadria also stated that this flaw affected the Immigration Court's "jurisdiction," *id.* at 12-13, but his position was clear throughout: "to read the statute as allowing for completion by a combination of notices 'resist[s] [the] straightforward understanding of the text.'" *Id.* (quoting *Pereira*, 138 S. Ct. at 2116).

charge. For example, the Seventh Circuit concluded that the statute dictating the content of a Notice to Appear is a claims-processing rule. *Ortiz-Santiago*, 924 F.3d at 963.

After *Ortiz-Santiago* was decided, the Fourth Circuit agreed that the "notice to appear" regulation is a claims-processing rule, though it concluded that the government had complied with the statute and the regulations. *Cortez*, 930 F.3d at 363 (recognizing the circuit split on the jurisdictional issue); *id.* at *9 (recognizing the circuit split on whether the notice to appear violated the statute). The Fifth Circuit largely agreed with the Fourth Circuit's analysis. *Pierre-Paul v. Barr*, 930 F.3d 684, 691 (5th Cir. 2019) (recognizing circuit split). The Eleventh Circuit followed suit, though it ultimately concluded that the government violated §1229. *Perez-Sanchez*, 935 F.3d at 1153.

C. Seven circuits hold that the government complied with §1229, but two circuits hold that the government violated the statute.

In contrast to the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits, the Eleventh Circuit has concluded that the government's acts were "unquestionably deficient under the statute." *Perez-Sanchez*, 935 F.3d at 1153. And the Seventh Circuit was compelled to "conclude that the Notice [Petitioner] received was defective," such that the "omission

violated the Immigration and Nationality Act." *Ortiz-Santiago*, 924 F.3d at 958, 961.

II. The decision below is incorrect.

This confusion below has unspooled across a critical backdrop: the "dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). And according to several courts of appeals, the ruling would "leave it to the agency to decide when it is in charge." *Id.*

Many of those decisions are premised on the notion that §1229 governs the requirements of a notice to appear, whereas the concept of "jurisdiction" is governed by the agency's regulation.

This notion is incorrect, and a simple hypothetical explains why. By way of background, §1229(a)(1) specifies that the notice to appear must be served personally or via mail. Imagine that DHS found this to be impractical, and that it passed a regulation allowing service by email.

Obviously, that would be unlawful, for regulations "must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *accord Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give

effect to the unambiguously expressed intent of Congress.").

Now imagine that the agency passed the following regulation: "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a Notice to Appear is emailed to the noncitizen." Under the Second Circuit's logic, this *would not* violate the statute, because "the regulations, not §1229(a), define when jurisdiction vests," and "Section 1229 says nothing about the Immigration Court's jurisdiction."

Put simply, the Second Circuit's view of "jurisdiction" gives agencies a roundabout method to defy Congress.

This Court has dealt with this concern before. It has explained that in the agency context any distinction between "jurisdictional" and "nonjurisdictional" matters is a "false dichotomy." *Arlington*, 569 U.S. at 304; *id.* at 297 ("a mirage"). For Article III courts, the distinction is "very real," but for agencies, that distinction is "illusory." *Id.* at 297-98. It follows that "judges should not waste their time in the mental acrobatics needed" to decide whether a rule is "jurisdictional" or "nonjurisdictional." *Id.* at 301. Instead, "[n]o matter how it is framed, the question . . . is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* at 297.

Here, the Second Circuit ignored the statute by erecting a false dichotomy: namely, that this argument is "jurisdictional" in nature, and that "Section 1229 says nothing about the Immigration Court's jurisdiction."

Pet. App. at 7 (citation omitted). The court below engaged in similar acrobatics to distinguish *Pereira*: It reasoned that the Court "did not question whether jurisdiction had attached" in that case. Pet. App. at 7.[7]

Arlington tears down this false construct. Viewed as a matter of statutory interpretation, this case is straightforward: Congress determined the "sole and exclusive" procedure for removal hearings like the one at issue here. 8 U.S.C. §1229a(a)(3). In a section titled "Initiation of removal hearings," Congress commanded that the government "shall" serve noncitizens with a single "notice to appear" specifying the removal proceedings' "time and place." *Id.* §1229(a)(1)(G)(i).

This time-and-place requirement has no exceptions. By way of contrast, several neighboring subsections contain "practicability" exceptions: for example, when it comes to the government's efforts to serve the notice. Though a notice to appear must ordinarily be served in person, service by mail is permitted "if personal service is not practicable." 8 U.S.C. §1229(a)(1). A similar exception exists when the government changes the hearing date. *See id.* §1229(a)(2). The statute pointedly omits similar language when it comes to the date-and-time requirement. And "[w]hen Congress provides exceptions in a statute . . . [t]he proper inference . . . is

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[7] In another case, the government agreed: "in the context of administrative courts, 'jurisdiction' is an ill-fitting term; the real question is the agency's statutory authority to act." Government's Supplemental Answering Brief, *United States v. Valverde-Rumbo*, Nos. 16-10188, 17-10415, 2018 WL 5927532, at *8 (9th Cir. Nov. 6, 2018).

that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).

Finally, any lingering doubts can be laid to rest by comparing §1229 to its predecessor. The earlier statute set forth a notification procedure with two steps. *See* 8 U.S.C. §1252b (1995). Congress decided to enact a statute that streamlined the notification procedure, such that it contained only one step. The agency had no power to reject Congress's policy choice.

III. This case is a good vehicle to resolve the confusion below.

This issue presents a purely legal question of statutory interpretation that does not meaningfully vary from case to case. Mr. Kadria raised this issue in his opening brief and reply brief, and the Second Circuit has squarely decided the issue in a published decision. Moreover, ten circuits have already weighed in on this matter.

IV. This issue is exceptionally important.

A. Because of the government's actions, this issue could affect hundreds of thousands of immigration cases.

There is one area where the circuits are unanimous: this issue could affect "thousands, if not millions, of removal proceedings[.]" *Ortiz-Santiago*, 924 F.3d at 962.

The Sixth Circuit recognized that resolving this issue could implicate "unusually broad" consequences. *Hernandez-Perez*, 911 F.3d at 314. And the Eighth Circuit described this issue as containing ramifications that are "seismic." *Ali*, 924 F.3d at 986; *accord* Pet. App. __ (recognizing that this issue could have "far reaching . . . consequences").

The government has made the same point to various courts of appeals. Recently, the government stated that the "disruptive potential of this argument is enormous[.]" Government's Brief, *United States v. Veloz-Alonzo*, No. 18-3940, 2018 WL 6435776, at *28 n.1 (6th Cir. Nov. 30, 2018). It has elsewhere described the issue as "sweeping" and "broad." Government's Supplemental Answering Brief, *United States v. Valverde-Rumbo*, Nos. 16-10188, 17-10415, 2018 WL 5927532 (9th Cir. Nov. 6, 2018), at *13-14.

Since a valid removal order is an element of a prosecution for illegal reentry under 18 U.S.C. §1326, the government has recognized that this issue could affect "the prosecution of thousands of similarly situated defendants." Government's Brief, *United States v. Pedroza-Rocha*, No. 18-50828, 2019 WL 1568040, at *9 (5th Cir. Apr. 18, 2019); *id.* at *28 (deeming the consequences "staggering").

Since several circuits lend deference to the government on an issue with potential criminal consequences, "alarm bells should be going off." *See United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring); *cf. Leocal v. Ashcroft*, 543 U.S.

1, 11-12, n.8 (2004) ("[I]f a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings."); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring) (concluding that if "immigration officers" could "fill gaps in hybrid criminal laws," that would "offend[] the rule of lenity").

It is profoundly regrettable that the Executive branch has chosen to ignore Congress for so long. Mr. Kadria wishes that it were not so. At this point, the Executive branch has committed this error so many times that the prospect of providing judicial relief may seem daunting.

Whatever the short-term consequences may be, they are not a valid reason to deny this Petition. The government should not be allowed to break the law in a systematic fashion, and then invoke the breadth of its lawlessness as a reason to deny Mr. Kadria relief. Accordingly, this Court should grant this Petition and "urge the Department of Homeland Security to be more scrupulous in its statutory compliance: it is much easier to do things right the first time than to do them over." *Ortiz-Santiago*, 924 F.3d at 965.

B. The decision below offends the separation of powers.

Under our system of government, Congress makes laws and the "President, acting at times through agencies . . . , faithfully executes them." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014).

But the Executive's power to execute the laws "does not include a power to revise clear statutory terms that turn out not to work in practice." *Id.* (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute")). Why? Because there is "no principle of administrative law" that permits the Executive branch to "rewrite" a "clear statutory term." *Id.* at 328 n.8.

But that is exactly what the agency did—it "rewr[ote] the statute." *Lopez*, 925 F.3d at 401. Even though Congress enacted a rule that contained no exceptions, the Executive branch bestowed upon itself a "practicability" exception. And after doing so, "DHS apparently never found it 'practicable'" to comply with the statute. *Ortiz-Santiago*, 924 F.3d at 960.

When the agency created this regulatory escape hatch for itself, it did more than break the law; it also violated the separation of powers. The Second Circuit compounded the error—for "[i]f a court mistakenly allows an agency's transgression of statutory limits," then it "green-light[s] a significant shift of power from the Legislative Branch to the Executive Branch." *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting). This Court should not allow lower courts to "go down that road." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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