No. _____

In the Supreme Court of the United States

JOSE JAVIER BANEGAS GOMEZ,

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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QUESTIONS 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). In *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018), this Court concluded that this statutory language is "clear" and "unambiguous."

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). These regulations conform to an older notification system—a system that Congress "rejected" when it enacted § 1229's streamlined procedures. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019).

The Second Circuit, along with the Board of Immigration Appeals and 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 held 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 AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Jose Javier Banegas Gomez 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.

RULE 14.1(B)(iii) STATEMENT

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

In the Matter of Jose Javier Banegas-Gomez, AXXX-XX-254 Order of the Immigration Judge, Michael W. Straus, April 9, 2015, Executive Office of Immigration Review, United States Immigration Court, Hartford, Connecticut, denying relief from removal under Section 237(a)(2)(A)(iii).

In the Matter of Jose Javier Banegas-Gomez, AXXX-XX-254, Banegas Gomez, September 14, 2015, Garry D. Malphus, Panel Member, Executive Office of Immigration Review, Board of Immigration Appeals, denying deferral of removal under the Convention Against Torture.

Jose Javier Banegas Gomez, AKA Jose Banegas v. William P. Barr, United States Attorney General, Case No. 15-3269 (2d Cir.). The Second Circuit Court of Appeals entered judgment in this matter on April 23, 2019. The Second Circuit denied Petitioner's combined petition for panel rehearing and rehearing *en banc* on July 23, 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.

United States v. Banegas-Gomez, Docket No. 7:18-cr-00608-1 - MA (S.D. Tex.). Mr. Banegas-Gomez pleaded guilty to one count of illegal re-entry under 18 U.S.C. § 1326.

United States v. Banegas Gomez, Docket No. 18-40998 (5th Cir.). An appeal of the criminal sentence was filed on October 22, 2018. Briefs have been filed. The appeal remains pending as of October 14, 2019.

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JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229 Initiation of removal proceedings

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person … specifying the following …. The time and place at which proceedings will be held.

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."[1] *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.*[2]

Thus, in a section titled "Initiation of removal proceedings," Congress instructed that the government "shall" serve noncitizens with a single

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

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

"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." 8 C.F.R.§ 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." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986). Thus, if a statute and an agency regulation conflict, the statute must prevail—otherwise, the executive branch could "override Congress." *Id.* 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. 17a.

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. 18a -- 19a (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 was required to first issue an "Order to Show Cause," *see id.* § 1252b(1), then a second document titled "Notice of Time and Place of Proceedings," *id.* § 1252b(2).

Congress streamlined this two-step system in 1996, when it enacted IIRIRA. This law redefined the "sole and exclusive" procedure for removal hearings. 8 U.S.C. § 1229a(a)(3). In a statutory 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).

In addition, the new statute's time-and-place requirement contains no exceptions. In contrast, the statute provides "practicability" exceptions elsewhere: 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) (describing a similar "practicability" carve-out for instances when the government changes the hearing date).

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).

For unknown reasons, two of the agency's regulations attempted to "rewrite 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).

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. The upshot is that DHS has invoked this "practicability" 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.[3] 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 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))).

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

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 BIA never considered the legislative history, nor did it consider Congress's decision to discard the older two-step notification process.

The proceedings below. This case was decided by one member of the Second Circuit and a visiting District Judge; a third member of the original panel was recused. Pet. App. 2a.

Banegas Gomez's notice to appear did not specify when or where he was required to appear. Pet. App. 19a. It was not until later that he received a separate document stating that the hearing would take place two months afterwards. Pet. App. 19a -- 20a.

The Second Circuit never addressed whether Mr. Banegas Gomez's notice to appear complied with the statute. Instead, the panel concluded that this was immaterial, as the statute "does not … explain when or how jurisdiction vests with the immigration judge." Pet. App. 17a (citation omitted). The panel reasoned that the agency's "jurisdiction" was governed by regulation. Id.

The panel also concluded that *Pereira* was limited to cases involving the "stop time rule," and thus it was "not relevant to Banegas Gomez's proceeding at all." Pet. App. 18a.

The Second Circuit denied Mr. Banegas Gomez's petition for rehearing *en banc*, with no judge requesting a vote. Pet. App. 1a.

Though the Second Circuit granted Mr. Banegas Gomez a stay of removal, Second Circuit Docket No. 39, ICE deported him while his request was pending. Afterwards, Mr. Banegas Gomez returned to the country and was subsequently prosecuted for illegal reentry under 18 U.S.C. § 1326. He is now incarcerated. *See generally* Second Circuit Docket No. 126.

REASONS FOR GRANTING THE WRIT

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

Ten circuits, as well as the Board of Immigration Appeals, 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)(1) 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. *Goncalves Pontes v. Barr*, 938 F.3d 1, 7 (1st Cir. 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).[4] 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 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

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[4] 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.

appear, whereas the concept of "jurisdiction" is governed by the agency's regulation. Pet. App. 17a; *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 defer to the agency). *Goncalves Pontes*, 938 F.3d at 7; *Hernandez-Perez*, 911 F.3d at 313; *Karingithi*, 913 F.3d at 1161.[5]

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

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[5] In the proceedings below, Mr. Banegas Gomez maintained that "the NTA was not valid because it failed to meet the statutory requirements of section 1229." Second Circuit Docket No. 94 at 6. He also maintained that the Immigration Court "did not have proper jurisdiction over the removal proceedings." *Id.* His use of the word "jurisdiction" was understandable, given his challenge of *Bermudez-Cota*'s formulation and application of the concept. But throughout, Mr. Banegas Gomez's position has been consistent: "the initiation of proceedings to remove Mr. Banegas from the United States was never properly initiated," id. at 4, "the initiation of proceedings to remove Mr. Banegas from the United States was never properly initiated," *id.*, and that this was a "a purely statutory argument … In the biosphere of an agency proceeding such as immigration, all authority flows directly from the statutory grant provided by legislation." *Id.* at 7.

is 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 appeal, 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." Pet. App. 17a.

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. 17a (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. 19a.[6] Moreover, the Second Circuit agreed with the Board of Immigration Appeals that "an NTA that omits information regarding the time and date of the initial removal hearing is nevertheless adequate to vest jurisdiction in the Immigration Court." Pet. App. 20a.

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

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[6] 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).

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 rules regarding service. 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 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. Banegas Gomez raised this issue in his supplemental brief and petition for rehearing below, and the Second Circuit squarely decided the issue. Moreover, ten circuits have already weighed in on this matter.

IV. This issue is exceptionally important.

To Mr. Banegas-Gomez, every aspect of this case is important. Based on a defective notice to appear, he was detained without civil bond. Pet. App. 37a. He was stripped of his lawful permanent residence (Pet. App. 28a, 33a); returned to a country where he feared for his life (Pet. App. 28a – 30a); and deported while a Stay was pending with the Second Circuit Court of Appeals (Pet. App. 33a – 34a). When Mr. Banegas Gomez fled back to the United States, he was stopped at the border and prosecuted for re-entry after a removal. Pet. App. 37a. He is now in prison. Pet. App. 37a.

But the consequences of this issue extend far beyond the circumstances of Mr. Banegas Gomez's case. In the government's words, the ramifications could be "staggering." Government's Brief, *United States v. Pedroza-Rocha*, No. 18-50828, 2019 WL 1568040, at *28 (5th Cir. Apr. 18, 2019).

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. 20a (recognizing that this issue could have "far reaching … consequences").

The government has made the same point to various courts of appeal. 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.

Indeed, Mr. Banegas Gomez is currently incarcerated, even though one of the elements of his crime (the existence of a removal order) may be invalid. And since the government has sought deference 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. Banegas Gomez 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.

But courts should not rescue the government from its own mistakes. If the agency did not agree with Congress's decision to get rid of the two-step notification process, the remedy is new legislation—not creative judicial decision making.

In sum, 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. Banegas Gomez 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.

***

October , 2019

Respectfully submitted,

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APPENDIX TO THE PETITION
FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of July, two thousand nineteen.

Jose Javier Banegas Gomez, AKA Jose Banegas,

Petitioner,

v.

William P. Barr, United States Attorney General,

Respondent.

ORDER

Docket No: 15-3269

Petitioner, Jose Javier Banegas Gomez, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

15-3269
Banegas Gomez v. Barr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2018

(Argued: February 19, 2019 Decided: April 23, 2019)

No. 15-3269

JOSE JAVIER BANEGAS GOMEZ, AKA JOSE BANEGAS

Petitioner,
-v.-

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL

Respondent.

Before: LIVINGSTON, Circuit Judge, and FAILLA District Judge.*

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*Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

Judge John M. Walker, Jr., originally assigned to the panel, recused himself from consideration of this matter. The two remaining members of the panel, who are in agreement, have decided this case in accordance with Second Circuit Internal Operating Procedure E(b). See 28 U.S.C. § 46(d); *see also United States v. Desimone*, 140 F.3d 457, 458 (2d Cir. 1998).

Petitioner Jose Javier Banegas Gomez ("Banegas Gomez"), a native and citizen of Honduras, seeks review of a September 14, 2015 decision of the Board of Immigration Appeals ("BIA") affirming an April 9, 2015 decision of an Immigration Judge ("IJ") finding Banegas Gomez removable and denying his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Jose Javier Banegas Gomez*, No. A 057 410 254 (B.I.A. Sept. 14, 2015), aff'g No. A 057 410 254 (Immig. Ct. Hartford, CT Apr. 9, 2015). We conclude that Banegas Gomez's conviction for first-degree assault under Connecticut law is an aggravated felony and that the invalidation of 18 U.S.C. § 16(b) in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), does not necessitate a remand to the BIA for consideration of this issue. This conclusion restricts our review to only constitutional errors or errors of law, of which we see none in the agency's decision. Lastly, we reject Banegas Gomez's argument that *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), is properly read to mean that the Immigration Court that ordered his removal lacked jurisdiction because the Notice to Appear ("NTA") that was served on him failed to specify the time or date of hearing, even though a Notice of Hearing containing the requisite information subsequently issued. Accordingly, the petition for review is DENIED.

FOR PETITIONER: GLENN L. FORMICA, Elyssa N. Williams, Formica Williams, P.C., New Haven, CT, for Petitioner.

FOR RESPONDENT: KEITH I. MCMANUS, Joseph H. Hunt, Jessica E. Burns, United States Department of Justice, Civil Division, Washington, DC, for Respondent.

DEBRA ANN LIVINGSTON, Circuit Judge:

Petitioner Jose Javier Banegas Gomez ("Banegas Gomez"), a native and citizen of Honduras, seeks review of a September 14, 2015 decision of the Board of Immigration Appeals ("BIA") affirming an April 9, 2015 decision of an Immigration Judge ("IJ") deeming him removable and denying his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Jose Javier Banegas Gomez*, No. A XX XXX 254 (B.I.A. Sept. 14, 2015), *aff'g* No. A XXX XXX 254 (Immig. Ct. Hartford, CT Apr. 9, 2015). Banegas Gomez makes three challenges to the BIA's decision: (1) that his conviction for Connecticut first-degree assault no longer constitutes an "aggravated felony" or, at the very least, a remand to the BIA is necessary to re-evaluate the issue following the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which invalidated 18 U.S.C. § 16(b) as void for vagueness; (2) that the agency erred when it denied his claim for CAT relief; and (3) that, under the reasoning of the Supreme Court in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the omission of information regarding the time and date of his hearing from his initial Notice to Appear ("NTA") means that jurisdiction never vested in the Immigration Court and thus that the proceedings against him must be terminated.

We conclude that no remand is necessary to determine that Banegas Gomez's conviction for Connecticut first-degree assault constitutes an "aggravated felony," as it fits within the definition of "crime of violence" in 18 U.S.C. § 16(a). And because Banegas Gomez's removal is predicated on commission of an aggravated felony, our jurisdiction is limited to constitutional claims and questions of law. *Ortiz-Franco v. Holder*, 782 F.3d 81, 86 (2d Cir. 2015). We see no such colorable claims in Banegas Gomez's arguments as to the agency's decision to deny him CAT relief. And lastly, we see no basis for reading Pereira—which dealt only with the "stop time" rule, see 138 S. Ct. at 2110, which is not relevant to this case—to divest an Immigration Court of jurisdiction whenever an NTA lacks information regarding a hearing's time and date. We thus join several of our sister circuits in allowing proceedings such as these to proceed.

BACKGROUND

I. Factual Background[1]

Banegas Gomez was born in 1992 in Honduras. In 2004, he entered the United States as a lawful permanent resident on a petition from his stepmother, a United States citizen. Six years later, in November 2010, Banegas Gomez was arrested in Connecticut in connection with a stabbing. In May 2011, he was convicted in Connecticut Superior Court of first-degree assault with intent to cause serious physical injury as well as conspiracy to commit first-degree assault.

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[1] The factual background presented here is derived from materials contained in the Certified Administrative Record ("CAR").

He was sentenced to twelve years in prison, "suspended after 6 years, [and] probation [for] 5 years." Certified Administrative Record ("CAR") 126.

II. Procedural History

On May 8, 2013, Banegas Gomez was served with an NTA. The United States Department of Homeland Security ("DHS") alleged that he was removable due to his Connecticut convictions, which it deemed aggravated felonies, as defined in 8 U.S.C. § 1101(a)(43), which includes "crimes of violence" pursuant to 18 U.S.C. § 16 in its definition of such felonies. S*ee* 8 U.S.C. § 1001(a)(43) ("The term 'aggravated felony' means . . . a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year . . . ." (internal footnote omitted)); see *also id.* § 1127(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

Although Banegas Gomez was imprisoned at the time, he appeared before an IJ via teleconference and through his attorney he denied the charges of removability. He also submitted an application for asylum, though ultimately it was determined that he was eligible only for deferral of removal under the Convention against Torture.

A hearing was held on that claim in April 2015, during which both Banegas Gomez and his father testified in support of his claim. Banegas Gomez argued that he feared torture if returned to Honduras due to the murders of several of his family members, specifically two of his uncles as well as possibly an aunt. The first uncle was killed in a pool club on

Christmas Eve in 2009, and while Banegas Gomez does not know the reason, he heard from others that an argument preceded the murder. Banegas Gomez's father testified that his brother was shot with no warning and did not previously know the man who shot him. Banegas Gomez's other uncle was killed in 2012, and both he and his father believe it was related to drug cartels. Banegas Gomez also testified that he feared both gang-related violence and police detention due to his tattoos—none of which are gang-related—but which might cause him to be seen as a gang member.

On April 9, 2015, the IJ issued a decision denying Banegas Gomez's CAT claim and sustaining the charges of removability against him. The IJ first determined that assault in the first degree, in violation of Section 53i-59(a)(1) of the Connecticut General Statutes, is an "aggravated felony crime of violence under 18 U.S.C. 16(b)." CAR 58. This is because "[t]here is no doubt that to commit this offense . . . serious physical injury must happen to the victim." *Id*.

The IJ then denied Banegas Gomez's CAT claim, concluding that despite the
evidence that several of his family members were killed in Honduras there is "no evidence that the killings of his two uncles are somehow related" and that he would be endangered based on family affiliation. *Id*. at 62. As to Banegas Gomez's fear of gangs in Honduras, the IJ determined that any fear of torture is speculative and that, regardless, "there is no evidence that any torture by gangs would be with the acquiescence or willful blindness of government officials." *Id*. Lastly, the IJ rejected Banegas Gomez's claim that he might be targeted by the police for his tattoos, concluding that the police would know the

difference between gang-related and non-gang-related tattoos and that there is insufficient evidence that, even if he were arrested, the treatment he would receive in a Honduran prison would amount to torture. For these reasons, the IJ ordered Banegas Gomez removed to Honduras. Banegas Gomez appealed. On September 14, 2015, the BIA issued a decision affirming "the Immigration Judge's conclusion that the respondent did not present sufficient evidence to establish that it is 'more likely than not' the respondent would be tortured upon his removal either at the hands of the government of Honduras, or with its acquiescence," either because of his tattoos or the deaths of his family members. *Id*. at 3–4.

The BIA dismissed Banegas Gomez's appeal, and this petition followed. Prior to assessing his claims, we note that despite what was at the time a pending motion in this Court for a stay of removal, Immigration and Customs Enforcement ("ICE") removed Banegas Gomez to Honduras in April 2016. However, he subsequently re-entered the country illegally and is now serving a 30-month sentence ordered by a judge in the United States District Court for the Southern District of Texas for illegal re-entry in violation of 18 U.S.C. § 1326.

DISCUSSION

I

Banegas Gomez first argues that, following the Supreme Court's decision in *Sessions v. Dimaya*, his Connecticut convictions for first-degree assault and conspiracy to commit first-degree assault can no longer be categorized as aggravated felonies and thus he is not removable. In the alternative, he contends that this Court should not decide the issue and should

instead send his petition back to the BIA for it to determine whether either of his convictions can be categorized as such. We disagree.

Whether a conviction is an aggravated felony is a question of law that we review *de novo*. *Pierre v. Holder*, 588 F.3d 767, 772 (2d Cir. 2009). The Immigration and Nationality Act ("INA") categorizes a "crime of violence" as an aggravated felony. 8 U.S.C. § 1101(a)(43)(F). The INA defines a "crime of violence" with reference to 18 U.S.C. § 16. Id. Section 16, in turn, contains two definitions of a crime of violence: "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16.

In 2018, the Supreme Court held that the second subsection, § 16(b), is impermissibly vague in violation of the Due Process Clause of the Constitution. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). Therefore, post-*Dimaya*, a conviction can be categorized as a crime of violence—and thus for this reason an aggravated felony—only if it falls within § 16(a)'s ambit, i.e., if it can be described as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This subsection is often referred to as the "elements clause."

Banegas Gomez is correct that the agency relied solely on § 16(b) when concluding that his Connecticut conviction for first-degree assault constitutes a crime of violence. *See* CAR 58 ("[The] Court finds that DHS has clearly met its burden of

proof that this is an aggravated felony crime of violence under 18 U.S.C. § 16(b).").

However, we reject Banegas Gomez's suggestion that we must remand his case to the agency for this reason. Although the agency relied on § 16(b), we conclude that Banegas Gomez's conviction for first-degree assault under Connecticut law is properly categorized as a crime of violence under § 16(a) as well. Remand is thus unnecessary.

Because we review the agency's interpretations of federal and state criminal laws—including 18 U.S.C. § 16 and Connecticut criminal law—*de novo*, *Jobson v. Ashcroft*, 326 F.3d 367, 371 (2d Cir. 2003), this is not a situation where we would benefit from the agency's reasoning on remand. *Cf. Negusie v. Holder*, 555 U.S. 511, 517 (2009); and Rotimi v. Gonzales, 473 F.3d 55, 58 (2d Cir. 2007). In such circumstances, nothing "'require[s] that we convert judicial review of agency action into a ping-pong game' and . . . remand is not required when it 'would be an idle and useless formality.'" *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 401 (2d Cir. 2005) (*quoting NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)).

The Connecticut first-degree assault statute has a number of subsections, but Banegas Gomez pled guilty to conduct under the first, which provides that "[a] person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument." Conn. Gen. Stat. § 53a-59(a)(1). "Serious physical injury" is defined as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious

impairment of health or serious loss or impairment of the function of any bodily organ." Id. § 53a-3(4). "Dangerous instrument" is defined, in relevant part, as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury." *Id.* § 53a-3(7).

"In determining whether [Banegas Gomez's] conviction falls within the ambit of § 16, the statute directs our focus to the 'offense' of conviction. . . . This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). This method is called the "categorical approach." See *Santana v. Holder*, 714 F.3d 140, 143 (2d Cir. 2013). When a state statute, like Connecticut's for first-degree assault, contains subdivisions, we use what is called the "modified categorical approach," by which we may "ascertain the elements of the offense from such materials as the indictment, a plea agreement, or a plea colloquy"—though, again, we are not to look to the facts of the underlying conviction. *Villanueva v. United States*, 893 F.3d 123, 128 (2d Cir. 2018). "Under the plain language of § 16(a), one of the elements of a crime of violence must be 'the use, attempted use, or threatened use of physical force against the person or property of another.'" *Blake v. Gonzales*, 481 F.3d 152, 156 (2d Cir. 2007) (quoting 18 U.S.C. § 16(a)).

Although this Court has not addressed Connecticut's first-degree assault statute in the context of § 16(a), we have concluded that it is a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA") and its identically worded "elements clause." *See Villanueva*, 893 F.3d at 132. In *Villanueva*, we rejected the argument that because

the requisite serious physical injury under Connecticut's statute can be achieved by use of a "substance" such as poison, the statute does not require the force necessary to constitute a "violent felony." *Id*. at 128. We concluded that attempts such as these, to exclude from the concept of physical force actual or threatened harm inflicted by poison or other "substances," reflect an outdated conception of force. *Id*. at 130. As the Supreme Court stated in *United States v. Castleman*, "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." 572 U.S. 157, 169 (2014). Serious physical injury caused by a dangerous substance thus falls squarely within the definition of force "because the relevant force is the impact of the substance on the victim, not the impact of the user on the substance." Villanueva, 893 F.3d at 129 (emphasis added); cf. *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) ("[F]orce is 'capable of causing physical injury' within the meaning of Johnson when it is sufficient to overcome a victim's resistance.").

Although *Castleman* was interpreting a different statute's use of "force," we have incorporated its reasoning into our analysis of various criminal statutes when employing the categorical approach. *See, e.g., United States v. Hill*, 890 F.3d 51, 58–59 (2d Cir. 2018) (interpreting 18 U.S.C. § 924(c)(3)(B)). Therefore, as we concluded in *Villanueva*, even if a defendant can commit first-degree assault in Connecticut by means of poison, this nonetheless encompasses the requisite force. See 893 F.3d at 129–30. And to the extent Banegas Gomez hopes to rest his argument on our opinion in *United States v. Chrzanoski*, 327 F.3d 188 (2d Cir. 2003), it relied on "an understanding of the use of force that has been abrogated by the Supreme Court's decision in

Castleman." *Villanueva*, 893 F.3d at 130; see also Hill, 890 F.3d at 60.

Furthermore, the use of ACCA case law to interpret § 16(a), and vice versa, is widely accepted by our Court and others. *See, e.g., Johnson v. United States*, 559 U.S. 133, 140 (2010) (observing how § 16 is "very similar" to the elements clause under § 924(e)(2)(B)(i)). In *Villanueva* itself, this Court "accept[ed] Villanueva's premise that 'crime of violence' in subsection 16(a) is the equivalent of 'violent felony' in subsection 924(e)." 893 F.3d at 130. We thus conclude that *Villanueva*'s determination that first-degree assault under Connecticut law has as an element the use of force under ACCA is persuasive as we determine whether this provision fits within § 16(a). *See Stuckey v. United States*, 878 F.3d 62, 68 n.9 (2d Cir. 2017) ("[T]he identical language of the elements clauses of 18 U.S.C. § 16(a) and § 924(e)(2)(B)(i) means that cases interpreting the clause in one statute are highly persuasive in interpreting the other statute.") Connecticut General Statute § 53a-59(a)(1) requires that a defendant cause "serious physical injury" to the victim by means of a deadly weapon or dangerous instrument.

Such a crime appears on its face to involve the use of "violent" physical force, as required by Johnson. 559 U.S. at 140. Furthermore, Villanueva clarifies that just because the physical injury under Connecticut law may be caused by means of a dangerous instrument that is a substance, such as poison, this does not mean that the crime does not require the use of "physical force." *See* 893 F.3d at 128-29. Accordingly, we see no reason not to apply the reasoning of *Villanueva* and we conclude that Banegas Gomez's conviction falls squarely within the definition of a crime of violence under § 16(a).

II

Because Banegas Gomez was ordered removed on account of an aggravated felony, our jurisdiction to review the agency's denial of CAT relief is limited to constitutional claims and questions of law. 8 U.S.C. § 1252(a)(2)(C), (D); *Ortiz-Franco*, 782 F.3d at 86. The likelihood of a future event (such as that an individual will be subject to harm) is a finding of fact, *Hui Lin Huang v. Holder*, 677 F.3d 130, 134 (2d Cir. 2012), which we generally lack jurisdiction to review in a petition from a criminal alien, Ortiz-Franco, 782 F.3d at 86.

To qualify for CAT relief, Banegas Gomez was required to show a likelihood of torture in his particular circumstances. 8 C.F.R. §§ 1208.16(c)(2), 1208.17(a); *Mu-Xing Wang v. Ashcroft*, 320 F.3d 130, 143–44 (2d Cir. 2003). Given the lack of evidence that individuals with non-gang-related tattoos, like Banegas Gomez, were targeted for intentional harm by gangs or Honduran authorities, or that the petitioner's family was targeted for any reason, the agency did not commit legal error in concluding that his fear of torture was too speculative to warrant relief. *See Savchuck v. Mukasey*, 518 F.3d 119, 124 (2d Cir. 2008) (upholding agency's conclusion that CAT claim resting on a chain of unsupported assumptions was too speculative to warrant relief); *Jian Xing Huang v. U.S. INS*, 421 F.3d 125, 129 (2d Cir. 2005) ("In the absence of solid support in the record . . . [an asylum applicant's] fear is speculative at best."). Banegas Gomez testified that two of his friends, who also have non-gang-related tattoos, were temporarily detained after being deported to Honduras. But the reason for their detention is unclear, and Banegas Gomez did not testify that they were tortured. The same holds true for Banegas Gomez's testimony about

the killings of his uncles. Given that the evidence presented demonstrated no connection between the two killings, the agency committed no legal error in concluding that the killings were not shown to be based on family affiliation and instead were "emblematic of the high level of murder in Honduras." SPA 12.

Moreover, the agency did not commit legal error in concluding that even if Banegas Gomez were to be detained by Honduran authorities, harsh detention conditions alone would not constitute torture. *See Pierre v. Gonzales*, 502 F.3d 109, 111 (2d Cir. 2007) (noting that to constitute torture, substandard detention conditions must be extreme and must be "inflicted by government actors (or by others with government acquiescence) intentionally rather than as a result of poverty, neglect, or incompetence"). Banegas Gomez's argument that prison conditions in Honduras amount to torture fails under this Court's decision in Pierre: he points to evidence of overcrowding and harsh conditions, Pet.'s Br. at 15–16, which the agency acknowledged, but he does not point to any evidence that these harsh conditions are intentionally imposed, rather than attributable to a lack of resources. *See Pierre*, 502 F.3d at 111.

Finally, while legal error may occur where the agency "totally overlook[s]" or "seriously mischaracterize[s]" evidence, that was not the case here. *Mendez v. Holder*, 566 F.3d 316, 323 (2d Cir. 2009). The agency acknowledged the generally violent conditions in Honduras, as well as evidence of police corruption and harsh prison conditions, but concluded that Banegas Gomez did not establish that he would more likely than not be tortured by the government or with government acquiescence. This factual

determination is beyond the scope of our review. *Ortiz-Franco*, 782 F.3d at 91.

III

Banegas Gomez raises a new argument in his supplemental briefing, that his removal proceedings must be terminated because his NTA did not include the time and date for his initial hearing. He argues that this defect means that the NTA was inadequate to vest jurisdiction in the Immigration Court. Banegas Gomez relies on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which considered whether service of an NTA omitting reference to the time or place of the initial hearing triggers the INA's "stop time" rule for cancellation of removal. *Id.* at 2113–14; see also 8 U.S.C. § 1229b(d)(1). The Supreme Court held in Pereira that because § 1229b(d)(1)'s stop time rule explicitly provides that it is triggered by service of an NTA "under section 1229(a)," 138 S. Ct. at 2114, which itself specifies that an NTA state the time and place at which proceedings will be held, the INA unambiguously requires an NTA to include such information to trigger the stop time rule and cut off an alien's accrual of physical presence or residence for the purposes of qualifying for cancellation. Id. Like several of our sister circuits, and for the reasons set out below, we conclude that Pereira's self-described disposition of this "narrow question," id. at 2110, is not properly read to void jurisdiction in cases in which an NTA omits a hearing time or place. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1162 (9th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314–15 (6th Cir. 2018). Accordingly, we reject Banegas Gomez's arguments to the contrary. Section 1229a of Title 8 provides that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." And § 1229, entitled

"[i]nitiation of removal proceedings," describes the written notice to be given to an alien—a "notice to appear"—as containing a variety of pieces of information, such as the "nature of the proceedings," "conduct alleged to be in violation of the law," and that the "alien may be represented by counsel." Id. § 1229(a)(1). It also requires that such NTAs provide "[t]he time and place at which the proceedings will be held." *Id*. "The statutory text does not, however, explain when or how jurisdiction vests with the immigration judge—or, more specifically, denote which of the several requirements for NTAs listed in § 1229(a)(1) are jurisdictional." *Hernandez-Perez*, 911 F.3d at 313. Section 1229 in fact "says nothing about the Immigration Court's jurisdiction." *Karingithi*, 913 F.3d at 1160.

The Attorney General has promulgated regulations governing removal proceedings that do address when jurisdiction vests in the Immigration Court. These regulations provide that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). The regulations define a "charging document" as "the written instrument which initiates a proceeding before an Immigration Judge." Id. § 1003.13. The NTA is included among the enumerated examples of charging documents. Notably, the regulations require that an NTA contain the time, date, and place of a hearing only "where practicable." Id. § 1003.18(b) (emphasis added). They direct the Immigration Court to schedule the hearing and provide notice when the NTA does not contain it in the first instance. See *id*.

Relying on *Pereira*, Banegas Gomez argues that because the NTA he received did not provide a

time and date as specified in 8 U.S.C. §1229(a)(1), the NTA was "deprive[d] . . . of its essential character" and thus was not an NTA, or charging document, at all. *See Pereira*, 138 S. Ct. 2105 at 2116–17 (internal citation omitted). However, Banegas Gomez's reliance on Pereira is misplaced.

At the outset, we note the care taken by the *Pereira* Court to emphasize the narrow scope of its holding. *See, e.g., id*. at 2113. The result in Pereira was based on the intersection of two statutory provisions, one of which, addressing the stop time rule, is not relevant to Banegas Gomez's proceeding at all. Thus, the latter stop time provision—§ 1229b(d)(1)—explicitly provides that an alien's period of continuous physical presence for purposes of eligibility for cancellation is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." Id. at 2109 (emphasis added) (quoting 8 U.S.C. § 1229b(d)(1)(A)). The Pereira Court concluded that § 1229b(d)(1)'s reference to "under" was "the glue that bonds the stop-time rule to [§ 1229(a)'s] substantive time-and-place requirements." 138 S. Ct. at 2117. But contrary to Banegas Gomez's claim, no such statutory glue bonds the Immigration Court's jurisdiction to § 1229(a)'s requirements.

This conclusion regarding the statutory text is consistent with the regulations promulgated by the Attorney General. The agency regulations do not refer to § 1229(a)(1)'s requirements when defining what an NTA is for purposes of vesting jurisdiction in the Immigration Court. See 8 C.F.R. § 1003.13; *see also id*. § 1003.15. Nor do they require that an NTA contain the time, date, or place of a hearing, except "*where practicable*." See *id*. § 1003.18(b) (emphasis added). Banegas Gomez's argument from Pereira that jurisdiction does not vest in the Immigration Court

unless an NTA includes the time and place of hearing "would render meaningless [these regulations'] command that such information need only be included 'where practicable.'" *Karingithi*, 913 F.3d at 1160. Notably, moreover, Pereira itself did not question whether jurisdiction had attached in connection with the proceedings at issue there, even though had its holding applied as Banegas Gomez contends, "there also would not have been jurisdiction in *Pereira* . . . ." *Hernandez-Perez*, 911 F.3d at 314.

Our conclusion that Pereira is inapposite is reinforced by the BIA's precedential opinion addressing that decision. *See In re Bermudez-Cota*, 27 I. & N. Dec. 441 (B.I.A. 2018). In *Bermudez-Cota*, the BIA determined that "[t]he regulation [vesting jurisdiction] does not specify what information must be contained in a 'charging document' at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest." *Id*. at 445. Furthermore, the regulation listing what "must be contained in a notice to appear[] does not mandate that the time and date of the initial hearing must be included in that document." *Id*. Instead, the BIA concluded that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien." Id. at 447 (emphasis added). The BIA's interpretation does not conflict with the INA and is consistent with the regulations. We agree with the BIA, moreover, that Pereira is not reasonably read to

pronounce the broad jurisdictional rule for which Banegas Gomez contends.[2]

In this case, Banegas Gomez's May 2013 NTA did not specify the time and date of his initial hearing. However, Banegas Gomez received a hearing notice in June 2013 providing that his initial hearing would take place on August 1, 2013, at 8:30 a.m. He appeared at that hearing, as well as three subsequent hearings in 2014 and 2015. We conclude that an NTA that omits information regarding the time and date of the initial removal hearing is nevertheless adequate to vest jurisdiction in the Immigration Court, at least so long as a notice of hearing specifying this information is later sent to the alien. The Immigration Court thus had jurisdiction when it ordered Banegas Gomez removed in April 2015.

* * *

Because we see no reason to vacate the agency's order of removal, we decline to address Banegas Gomez's arguments about whether, upon vacatur of his removal order, he should be able to re-enter the country as a lawful permanent resident (given his earlier removal to Honduras).

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[2] As the Sixth Circuit recognized in *Hernandez-Perez*, "importing *Pereira*'s holding on the stop-time rule into the jurisdictional context would have unusually broad implications." 911 F.3d at 314. The Supreme Court itself noted that during the three years preceding its decision in *Pereira*, "almost 100 percent of [NTAs] omit[ted] the time and date of the proceeding." 138 S. Ct. at 2111. We do not believe the Supreme Court would have deemed its holding "narrow" if *Pereira* had the far-reaching jurisdictional consequences Banegas Gomez's reading of that decision would portend.

CONCLUSION

For the foregoing reasons, Banegas Gomez's petition for review is DENIED. As we have completed our review, the stay of removal that the Court previously granted in this petition is VACATED.

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A057 410 254 - Hartford, CT
Date: Sept 14, 2015

In re: JOSE JAVIER BANEGAS GOMEZ a.k.a. Jose Banegas

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elyssa Nicole Williams, Esquire

ON BEHALF OF DHS: Leigh Mapplebeck
Senior Attorney

APPLICATION: deferral of removal under the Convention Against Torture

The respondent, a native and citizen of Honduras, has appealed from the decision of the Immigration Judge dated April 9, 2015, denying his request for deferral of removal under the Convention Against Torture (CAT). 8 C.F.R. §§ 1208.16(c)-1208.18. The Department of Homeland Security filed an opposition and requests that the Immigration Judge's decision be summarily affirmed. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by

the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.l(d)(3)(ii). As the respondent's application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act (Exh. 3).

In a claim under the CAT, the alien has the burden to establish that it is more likely than not that he will be tortured in the country of removal. *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006). The evidence must establish that each step in the hypothetical chain of events is more likely than not to occur. *Id*. at 917-18. The fact that a deported alien would be detained upon removal and held in "deplorable" prison conditions does not, by itself, constitute sufficient evidence to prove a claim for relief under the CAT. *Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007) ("[t]he failure to maintain standards of diet, hygiene, and living space in prison does not constitute torture under the CAT unless the deficits are sufficiently extreme and are inflicted intentionally rather than as a result of poverty, neglect, or incompetence"); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002) (holding that the detention of criminal deportees to Haiti did not amount to torture); see also Edouard v. Holder, 480 F. App'x 93 (2d Cir. 2012) (holding that aliens' reliance on harsh conditions in prisons in Haiti was insufficient to demonstrate his eligibility for CAT protection).

We affirm the Immigration Judge's conclusion that the respondent did not present sufficient evidence to establish that it is "more likely than not" the respondent would be tortured upon his removal either at the hands of the government of Honduras, or with its acquiescence (I.J. at 6-7).

8 C.F.R. § 1208.16(c). We agree that the respondent has not met his high burden of establishing eligibility for protection under the CAT (I.J. at 6-7). See 8 C.F.R. §§ 1208.16-.18. The respondent's evidence does not establish that he would be subjected to torture by, at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in Honduras. See *Savchuck v. Mukasey*, 518 F.3d 119 (2d Cir. 2008) (evidence must establish that each step in the hypothetical chain of events is more likely than not to happen) (citing *Matter of J-F-F-,* 23 I&N Dec. 912 (A.G. 2006); *Lin v. US. Dept. of Justice*, 432 F.3d 156 (2d Cir. 2005) (the applicant must adduce sufficient particularized evidence that an individual in his circumstances would more likely than not be tortured in his native country). Contrary to the respondent's appellate assertions (Resp. Br. at 5-13), the Immigration Judge properly considered the evidence presented by the respondent and applied the proper legal standards in assessing such evidence. The respondent argues on the one hand that none of his tattoos are in any way gang related but on the other hand that the police in Honduras will engage in or acquiesce in torture due to his tattoos. The respondent has not established a claim in this regard. The respondent has not identified factual findings in the Immigration Judge's decision that were clearly erroneous, or legal standards that were misapplied. The respondent also provided scant details concerning the deaths of his relatives in Honduras, purportedly by gang members. In summary, the Immigration Judge reasonably determined that the respondent did not establish that there was a clear probability of torture upon his removal to Honduras (I.J. at 6-7).

Based on the foregoing, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ Malphrus, Garry D.

_____

For the Board

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HARTFORD, CONNECTICUT

File: A057-410-254
April 9, 2015

In the Matter of	)	IN REMOVAL
JOSE JAVIER	)	PROCEEDINGS
BANEGAS-GOMEZ	)	

Respondent

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, convicted of an aggravated felony crime of violence.

APPLICATIONS: Deferral of removal under the Convention Against Torture.

ON BEHALF OF RESPONDENT:
ELYSSA WILLIAMS
900 Chapel Street, Suite 1200
New Haven, Connecticut 06510

ON BEHALF OF DHS:
LEIGH MAPPLEBECK
Senior Attorney

ORAL DECISION OF THE IMMIGRATION JUDGE

INTRODUCTION

Respondent is charged with a Notice to Appear with being subject to removal based on a conviction in May of 2011 for assault; first degree and conspiracy to commit assault first degree in violation of Section 59(a)(1) of the Connecticut General Statutes for which he was sentenced to 12 years imprisonment. Respondent denies the factual allegations and the charge. The Court finds that DHS has met its burden of proof by clear and convincing evidence that the respondent is removable as charged. The conviction record reflects that the respondent pled guilty to assault first I degree in violation of Section 532i-59(a)(1) of the Connecticut General Statutes as well as conspiracy and was sentenced to 12 years, execution suspended after six years.

The Court reviewed the elements of the Connecticut Statute. It states that a person is guilty of assault first degree when, with intent to cause serious physical injury to another I person, he causes such injury to such person or to a third person by means of a deadly weapon or dangerous instrument. Court finds that DHS has clearly met its burden of proof that this is an aggravated felony crime of violence under 18 U.S.C. 16(b). This statute requires intent to cause serious physical injury. There is no doubt that to commit this offense, one risks the use of physical force which is clearly inherent in such of an offense because serious physical injury must happen to the victim.

Therefore, the respondent is subject to removal based on clear and convincing evidence. The only

relief for which the respondent is eligible for is deferral of removal under the Convention Against Torture relief.

STATEMENT OF THE FACTS

The respondent was born on December 31, 1992 in San Francisco, Morazan, Honduras. He states that his family had owned some land. He and his father testified that his father had about 15 siblings. Testified that his father's father had owned a three- or four-acre coffee plantation and also grew crops.

Respondent immigrated to the United States on December 16, 2004 when he was about 12 based on a petition filed by his U.S. citizen stepmother. The respondent states he has never returned to Honduras. He claims that a brother of his visited once but he returned early due to violence. Respondent states that his father's brother was killed at a pool club on Christmas Eve of 2009. He claims that he knows or knew the person who killed him. He claims that he heard that there was an argument before that but he does not know for sure why he was killed. He claims that there were statements made and there is a document in the record at Exhibit 5, tabs C, about the shooting. The respondent's father states that. to his knowledge, his brother was shot by Mr. Mejia without any warning. He claims that Mejia had been deported from the United States just a couple of days before that and after the shooting, Mejia returned to the United States and now lives in Atlanta. He claims that he does not know why his brother was killed and his brother did not know Mejia.

The respondent states that another brother of his father's was killed on I October 28, 2012. He did not know whether his uncle was involved in selling

drugs but he thinks that the persons who killed him have connections or involved with a drug cartel. The respondent father also heard that there was drug cartel involvement.

He claims that the persons who killed the respondent's uncle in 2012 told his grandfather not to try any revenge or the whole family will die. He states that no one was arrested for killing of that uncle. There is a death certificate on page 24.

Then he states that there was an aunt (it is unclear what side of the family) who was killed. This appears to be based on a newspaper article which is on tab C, Exhibit 5, page 29 that there was some protest against mining and logging of the forest and claims that his aunt was killed in this incident. He also states that three friends of his were killed by gangs. The respondent states that he has nine tattoos, most of which are either stars or musical notes. He claims that one of them shows his love for his uncle who was killed in 2009 and another. He has also one with a rosary, the Honduran flag, a nickname of his, five arrows and a circle, a rose and skull meaning silence keeping your problems to yourself, as well as his son's name. The respondent claims to know nothing about gang tattoos. He claims that he was never in a gang.

The respondent was arrested for an incident in which he stabbed an individual in November of 2010. This Court noted previously, he pled guilty to assault first degree with a knife.

The respondent states that he is afraid of the people who killed his uncles and that he is afraid that they would think that he would want revenge. He also is afraid of police because of his tattoos. He is

concerned that the police would misidentify him as a gang member and arrest and torture him. He claims he knows deportees who had tattoos who were jailed in Honduras.

His father also is afraid that the respondent would be misidentified as a gang member and put into jail in Honduras.

The Court also reviewed the background materials starting on Exhibit 5, tab E. Respondent submitted on page 65 an article about police involved in death squads in Honduras. Respondent provided. starting on page 80, an article about gangs in Central America and causes and impacts. Other articles discuss the serious high level of violence in Honduras. There were also articles discussing infiltration of gangs into some of Honduran police force. It also discusses death squads that have killed suspected gang members in Honduras. Other articles note the very high level of violent crime in Honduras. Other articles discuss the ties between gangs and drug cartels and violence by both gangs and drug cartels.

The Court reviewed the Human Rights Report for Honduras for the year 2012. It states that there were serious problems with violence against journalists, activists, human rights offenders and perpetrators are rarely brought to justice. The Report discussed a lot of rural violence and violence against transgender persons. It states that prisons were overcrowded with very poor conditions. The Court reviewed the State Department Report for 2013. It states that the most human rights problems were corruption, intimidation, and institutional weakness of the justice system leading to widespread impunity, unlawful and arbitrary killings by security forces, organized criminal elements as well as harsh and

sometimes life-threatening prison conditions. Pervasive societal violence persisted. Organized crime elements including gangs and drug cartels were significant perpetrators of violent crimes and intimidation. It states that members of the security forces committed arbitrary and unlawful killings. The Court reviewed the section under torture. There were reports of police abuse both on the street and at detention centers.

Prison conditions do not meet international standards, were harsh and life threatening due to overcrowding, insufficient access to food and water, violence, abuses by prison officials, and the influence of organized crime. Prisoners suffered from severe overcrowding, malnutrition, and lack of adequate sanitization and medical care. There was impunity for violence between inmates and the influence of gangs. There were credible reports that prison officials used excessive force against prisoners.

STATEMENT OF THE LAW

To qualify for the deferral of removal under the Convention Against Torture, the respondent must demonstrate that it is more likely than not he would be tortured. The Court will be guided by the regulations found at 8 C.F.R. 1208.16(c) and 8 C.F.R. 1208.18.

ANALYSIS AND FINDINGS

The issue in this case is whether the respondent has met his burden of proof that it is more likely than not he would be tortured in Honduras. He is afraid first of all of the men that killed his uncles. Court finds no evidence that the killings of his two uncles are somehow related and would be based on

family affiliation. The Court finds no evidence that he would be targeted just because he is a family member. He claims that a grandfather told him either directly or indirectly that the people that killed his uncle in 2012 said not to seek revenge or the whole family would die. Court finds no evidence that the killings of his uncles would mean that the respondent would necessarily be targeted in Honduras.

Respondent states that he is afraid that he may be targeted by gangs. He claims to have no gang affiliations in the United States, but has tattoos which he claims are not gang related. The Court finds ii is just speculation that he would be tortured by gangs if he goes back to Honduras. While the Court notes the serious problems with corruption in Honduras, there is no evidence that any torture by gangs would be with the acquiescence or willful blindness of government officials. See *Khouzam v. Ashcroft*, 361 F.3d 161, 164 (2d Cir. 2004).

Respondent fears that he would be held by the police due to his tattoos and he would be tortured. Court finds the possibility that he would be held by the police and tortured to be really-speculation. It would be reasonable that the police in Honduras are aware of what tattoos are affiliated with gangs and what are not. The Court certainly notes there has been some abuses by police both at the time of arrest and at a detention center. But finds that the respondent clearly did not meet his burden of proof that first of all he would be arrested by the police and, if he is arrested, that the treatment he would receive would amount to torture. *See Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006). Court is certainly cognizant of the serious shortcomings and the conditions of jails and prisons in Honduras. The Court finds that even if he is held at a jail or prison, there is insufficient

evidence to show that the treatment he would receive there would amount to torture. *See Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

The Court can certainly understand the difficult and violent conditions that exist in the country of Honduras. The Court finds he has not met the burden of proof to show that it is more likely than not he would be tortured there by government officials or by other people with the acquiescence or willful blindness of government officials.

ORDER

HEREBY ORDERED that the respondent's application for deferral of removal under the Convention Against Torture is denied.

IT IS FURTHER ORDERED that the respondent be removed to Honduras.

Please see the next page for electronic signature

MICHAEL W. STRAUS,
Immigration Judge
//s//

strausm on May 28, 2015 at 8:01 PM GMT

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in McAllen

November 13, 2018
David J. Bradley,
Clerk

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
V
JOSE JAVIER BANEGAS-GOMEZCASE

NUMBER: **7:18CR00608-001**
USM NUMBER: 37746-479

☐ See Additional Aliases — Abel Guerrero, AFPD

THE DEFENDANT:
Defendant's Attorney

X pleaded guilty to count(s) 1 of a single-count Indictment on May 30, 2018.
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
8 U.S.C. § 1326(a) and 1326(b)	Being found in the U.S. after previous deportation

Offense Ended	Count
03/15/2018	1

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 18, 2018

Date of Imposition of Judgment

//s//

Signature of Judge

MICAELA ALVAREZ
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

November 9, 2018

Date

[Seal of Department of Justice]
U.S. Department of Justice

Civil Division
Office of Immigration Litigation

VIA CM/ECF

February 15, 2019

Honorable Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Banegas Gomez v. Whitaker, Docket No. 15-32691[3]
(*Case Scheduled for Oral Argument on February 19, 2019). Respondent ' s Notice of Further Developments

Dear Ms. Wolfe:

I am writing to inform the Court that while preparing this week for the upcoming oral argument in this case, I learned new information (and also confirn1ed prior information) pertaining to Petitioner Banegas Gomez. Earlier today I provided notice of that infom1ation to Petitioner's counsel,and am now seeking to provide notice to the Court because the information could

[3] The Court should update the docket to reflect the automatic substitution of newly-confirmed Attorney General William P. Barr as the proper Respondent in this case. See Fed. R. App. P. 43(c)(2).

potentially be relevant to the Court's consideration of the instant case.

On February 13, 2019, I received confirmation from the Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), that on or around April 29, 2016- more than five months after Respondent filed his opposition to Petitioner's motion for a stay of removal-ICE removed Petitioner Banegas Gomez from the United States to his native Honduras. The stay motion was submitted to a panel in late June 2016, and the Court issued an order granting the stay request on January 17, 2017. The parties do not appear to have discussed or presented any argument regarding Petitioner's removal in any subsequent pleading (including their principal briefs) filed in this Com1, although Petitioner's counsel did refer to his client's removal in his Supplemental Brief.

It also appears, according to publicly available information, that Petitioner Banegas Gomez reentered the United States without permission in or around March, 2018 and was subsequently prosecuted in the U.S. District Court for the Southern District of Texas for illegal reentry under 18 U.S.C. § 1326. See *United States v. Banegas-Gomez*, Dkt. No. 7:18-cr-00608-1 (S.D. Tex.). Mr. Banegas Gomez pleaded guilty to the charge and was convicted; he was sentenced to 30 months in federal custody and, according to the Federal Bureau of Prisons' online inmate locator, is currently detained in Beaumont, Texas.2 It further appears that Mr. Banegas Gomez is appealing the sentence in that criminal case; the appeal is currently pending in the Fifth Circuit Court of Appeals and earlier this week the Federal Public Defender representing Mr. Banegas Gomez filed an Anders brief and moved to withdraw as counsel. See

United States v. Banegas Gomez, Dkt. No. 18-40998 (5th Cir.).

Sincerely,

/s/ Keith McManus

KEITH I. McMANUS
Assistant Director
U.S. Dep't of Justice,
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
Tel: (202) 514-3567
Attorney for Respondent

cc: Glenn Formica, Counsel for Petitioner
Via ECMF