No. 10-658

In the Supreme Court of the United States

DOUGLAS VLADIMIR LOPEZ-DUBON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly deferred, under *Auer* v. *Robbins*, 519 U.S. 452 (1997), to the Board of Immigration Appeals' interpretation of its own regulation as permitting service on a 17-year-old alien of papers relating to his deportation hearing.

2. Whether the court of appeals correctly determined that such service comports with due process because it is reasonably calculated, under all the circumstances, to apprise the alien of the pendency of the action and afford him an opportunity to present his objections.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations: Page

Statutes and regulations—Continued: Page

Regulations—Continued: Page

In the Supreme Court of the United States

No. 10-658

DOUGLAS VLADIMIR LOPEZ-DUBON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 609 F.3d 642.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2010. A petition for rehearing was denied on August 19, 2010 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on November 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This case concerns the interpretation of a regulation, 8 C.F.R. 103.5a, promulgated by the Attorney General under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Section 103.5a governs service of notifications, decisions, and other papers in administrative proceedings—originally by the Immigration and Naturalization Service (INS), now by the Department of Homeland Security. The regulation provides four methods by which any document may be served, including "by certified or registered mail, return receipt requested, addressed to a person at his last known address." 8 C.F.R. 103.5a(a)(2)(iv); see 8 C.F.R. 103.5a(c)(1) and (d). Most documents may also be served by "mailing a copy by ordinary mail addressed to a person at his last known address." 8 C.F.R. 103.5a(a)(1); see 8 C.F.R. 103.5a(d).

The regulation provides for three exceptions to these rules: for minors under 14 years of age; mentally incompetent persons; and persons who are mentally competent but confined in an institution or hospital. 8 C.F.R. 103.5a(c)(2). The first of those exceptions provides that service on a minor under 14 years of age "shall be made upon the person with whom the * * * minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend." 8 C.F.R. 103.5a(c)(2)(ii).[1]

b. The immigration regulations governing detention of aliens cross-reference the service requirements of Section 103.5a. Specifically, they provide that if the

---

[1] Except for an amendment to Section 103.5a(c)(1) not relevant here, the cited provisions of Section 103.5a were identical at the time of the events at issue in this case. See 8 C.F.R. 103.5a (1996).

respondent in immigration proceedings "is confined, or if he or she is an incompetent, *or a minor under the age of 14*, the notice to appear, and the warrant of arrest, if issued, shall be served * * * upon the person or persons specified by [8 C.F.R.] 103.5a(c)." 8 C.F.R. 236.2(a), 1236.2(a) (emphasis added).[2]

c. The foregoing regulations apply to service of documents providing notice of a removal or deportation hearing. This case involves a deportation hearing conducted under a previous version of the INA. Before the INA was amended effective April 1, 1997,[3] an alien who entered the United States without inspection was "deportable." 8 U.S.C. 1251(a)(1)(B) (1994). An alien charged with being deportable before April 1, 1997, was placed in deportation proceedings under 8 U.S.C. 1252b (1994).[4] He was given written notice, known as an Order to Show Cause (OSC), either in person or, "if personal service [was] not practicable, * * * by certified mail to the alien or to the alien's counsel of record, if any." 8 U.S.C. 1252b(a)(1).[5]

Among other things, the written notice informed the alien: (1) that the alien must immediately provide an address and telephone number (if any) at which he could

---

[2] At the time petitioner was served, this regulation appeared at 8 C.F.R. 242.3(a) (1996).

[3] On that date, the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 304(a)(3), 308(b)(6), 110 Stat. 3009-587, 3009-615, generally took effect. See 8 U.S.C. 1101 note.

[4] All references in this brief to provisions of former Section 1252b refer to the 1994 codification.

[5] The provisions affecting notice of, and failure to appear at, removal proceedings under the INA as amended by IIRIRA appear at 8 U.S.C. 1229(a) and 1229a(b)(5).

be contacted regarding his deportation proceedings, 8 U.S.C. 1252b(a)(1)(F)(i); (2) that the alien must provide the immigration court immediately with any change or update to the address or telephone number he had provided, 8 U.S.C. 1252b(a)(1)(F)(ii); and (3) the consequences of a failure to provide address and telephone information, 8 U.S.C. 1252b(a)(1)(F)(iii), which could include ordering the alien to be deported in absentia if the alien fails to attend a proceeding in immigration court, 8 U.S.C. 1252b(c)(1) and (2).

If the time, date, and place of the hearing were not specified in that notice, a separate hearing notice was required to be likewise given to the alien, or sent by certified mail to the alien or his counsel of record. 8 U.S.C. 1252b(a)(2)(A). That notice advised the alien of the time and place of the hearing and the consequences of a failure to appear at the scheduled proceedings except under exceptional circumstances. 8 U.S.C. 1252b(a)(2)(A)(i)-(ii). That written notice was considered sufficient for purposes of the in absentia deportation provision if sent to the most recent address the alien had provided under 8 U.S.C. 1252b(a)(1)(F). See 8 U.S.C. 1252b(c)(1); 8 C.F.R. 3.26(c) (1997).

When an alien failed to appear for a deportation hearing, the immigration judge (IJ) was required to decide whether clear, unequivocal, and convincing evidence showed both that the alien received proper notice of the hearing and that he was deportable. If so, the IJ was to order the alien's deportation in absentia. 8 U.S.C. 1252b(c)(1). Such an order of deportation could be rescinded by the IJ only upon a motion to reopen filed by the alien; there was no time limit on such a motion if the alien demonstrated that he did not receive the statutorily required notice of the proceedings.

2. Petitioner is a native and citizen of Honduras. Administrative Record (A.R.) 202. In September 1996, he entered the United States illegally, near Brownsville, Texas. *Ibid.*; Pet. App. 1a. At that time, the INS apprehended him and issued him an OSC and Notice of Hearing. A.R. 202-206. The notice was personally served on petitioner, and its provisions were read to him in Spanish, his native language. A.R. 206. The notice alleged that he was deportable for having entered the United States without inspection. A.R. 204. At the time, petitioner was 17 years old. See A.R. 199.

Petitioner was informed that he was required by law to provide immediately, in writing, an address (and telephone number, if any) where he could be contacted and that he was required to provide written notice, within five days of any change in his address or telephone number, to the office of the IJ, whose address was listed in the order. A.R. 205, 206. He was also informed that all notices would be mailed only to the last address he provided. A.R. 205. Petitioner provided a Houston mailing address. A.R. 202.

The OSC ordered petitioner to appear at a hearing before an IJ, at a time to be calendared, with "notice [to] be mailed to the address provided by [petitioner]." A.R. 204 (capitalization omitted). One of the warnings read to petitioner advised him that he was required to be present at the deportation hearing. A.R. 205. If he failed to appear at any hearing, and if the INS established that he was deportable and he had been provided the appropriate written notice of the date, time, and location of the hearing, he would be ordered deported in his absence. *Ibid.*

In June 1997, the immigration court mailed a hearing notice, by certified mail, to petitioner at the Houston

address he had provided, apprising him that a hearing had been set for July 14, 1997. A.R. 183-185, 187-188. The notice was returned because petitioner no longer lived at the address he had provided. Pet. App. 1a. As a result of his failure to appear, the IJ, in July 1997, ordered him deported, in absentia, to Honduras. *Ibid.* A.R. 181.[6]

More than nine years later, in November 2006, petitioner moved the IJ to reopen the deportation proceedings. Pet. App. 1a; A.R. 98-106. He also claimed that he had never received the notice of his deportation hearing. Pet. App. 1a-2a. In February 2003, petitioner had married a naturalized U.S. citizen. A.R. 121-122. She filed an I-130 "petition for alien relative" for petitioner's benefit, and the petition was approved in November 2005. Petitioner included, with his motion to reopen proceedings, an application to adjust his status to that of a lawful permanent resident. A.R. 156-162.

The IJ denied the motion to reopen. Pet. App. 2a; A.R. 87-90. He concluded that, even though the notice of hearing was returned as undeliverable, it constituted legal notice of the hearing, given that the requirement to provide a current address and the consequences of failure to appear were communicated to petitioner in the OSC. A.R. 89. The IJ noted that petitioner "had legal notice of his hearing and failed to appear." *Ibid*. The IJ also pointed out that petitioner never inquired about the deportation hearing he knew he was supposed to have; rather, he simply "disappeared for a period of nine years." *Ibid*. And the IJ concluded that although peti-

[6] Other hearing notices were sent to petitioner, at this address and others, as petitioner notes (Pet. 5-6). The notice of the July 14, 1997, hearing is the only one relevant to the order of deportation under review here.

tioner was seeking to apply for relief that had not been available to him at the time of his originally scheduled hearing, a motion to reopen on that basis was time-barred. *Ibid*.

3. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (Board). Petitioner did not discuss the notice sent to him in Houston, but argued that because other notices had erroneously been sent to other addresses or to an attorney who did not represent petitioner, the IJ had erred in concluding that notice of the hearing to petitioner was sufficient. A.R. 43-52.

The Board affirmed. A.R. 30-32. The Board concluded that the OSC was served personally on petitioner and specifically informed him of the requirement to keep the IJ informed of his current address; that notice of the hearing was sent by certified mail to the address furnished by petitioner; and that there was no evidence that petitioner ever filed a change-of-address form. A.R. 30-31. Those facts, the Board concluded, were sufficient to establish by clear, unequivocal, and convincing evidence that the alien received "written notice" of the deportation hearing within the meaning of 8 U.S.C. 1252b(c)(1). A.R. 31. The Board noted that petitioner's contentions about other misdirected notices were "irrelevant": "[t]he fact remains that the last hearing notice * * * was sent by the Harlingen Immigration Court to [petitioner] * * * to his address which appears on the Order to Show Cause." *Ibid.*; see Pet. App. 2a.

The Board also separately affirmed the IJ's denial of reopening to apply for adjustment of status. It explained that an alien is not required to rescind his deportation order if he is pursuing an application for new relief. A.R. 31. Rather, the motion to reopen is subject only to the 90-day filing requirement set forth in the

applicable regulations. Because petitioner's motion was untimely, as it was filed more than 90 days after the IJ's decision, the Board determined that petitioner was precluded from having his motion to reopen considered under the general time limitations. A.R. 32.

4. Petitioner next moved the Board to reconsider its decision. A.R. 19-23. Petitioner again did not address the fact that the hearing notice had been served upon him at his address of record; he did not contend that the service by mail was ineffective or should have been made on someone other than himself. Petitioner made two references to his minority: he asserted that "given the fact that [he] was a minor at the time of these proceedings, any doubt should be resolved in favor of [petitioner]," and he asserted that the oral warnings, delivered in Spanish, of the consequences of failure to appear were ineffective because "[a]s a minor, [petitioner] could not have legally possessed the ability to receive any oral warnings." A.R. 21.

The Board denied the motion to reconsider. Pet. App. 10a-13a. The Board explained that, under the INA, petitioner was given proper notice of the deportation hearing. *Id.* at 11a. The Board noted as an initial matter that the pertinent regulation permitted service on petitioner, rather than on an adult guardian. *Ibid.* Under 8 C.F.R. 103.5a(c)(2)(ii), if an alien is a minor under 14 years old, service must be made upon an adult with whom the minor resides, and on a "near relative, guardian, committee, or [next] friend." The regulation imposes no such requirement with respect to service on 17-year-old aliens like petitioner, however. Service on him was therefore proper, the Board concluded. Pet. App. 11a (citing *Llapa-Sinchi* v. *Mukasey*, 520 F.3d 897 (8th Cir. 2008)). The Board then reiterated its previous

decision that, given the various warnings provided to petitioner, service of the hearing notice by certified mail to his last-provided Houston address was appropriate notice. *Id.* at 12a-13a. The Board also reaffirmed that the motion to reopen for adjustment of status was untimely. *Id.* at 13a.

5. Petitioner filed a petition for review. In the court of appeals, he argued for the first time that the notice of hearing was not properly served on him because he was 17 at the time; he contended that notice should have been served upon a responsible adult instead.

The court of appeals denied the petition for review. Pet. App. 1a-9a.

a. The court first concluded that it had jurisdiction to review petitioner's contentions, because although petitioner had failed to exhaust the issue before the Board, the court concluded that the Board had raised and decided *sua sponte* "the question of whether the notice provided to [petitioner] was insufficient because of his age at the time of his detention." Pet. App. 3a.[7]

b. The court of appeals then rejected petitioner's argument that, under the governing regulations, notice should have been served on an adult. The court held that the Board was entitled to deference and that its interpretation of the regulation was reasonable. Pet. App. 3a-4a, 5a-6a.

The court agreed with the Board that Section 103.5a is an "explicit provision calling for service on an adult only if the detained minor is under 14 years of age." Pet. App. 4a. Petitioner relied on a different regulation, 8 C.F.R. 1236.3, which governs the release of juvenile

[7] The court noted that other courts of appeals follow different approaches in reviewing an unexhausted issue addressed *sua sponte* by the Board. See Pet. App. 2a-3a.

aliens from detention and provides for release of a juvenile under age 18 to a parent, guardian, or other adult as specified in the regulation. But the court of appeals found the release regulation inapplicable to the question of who shall receive notice: Section 1236.3 "says nothing about notice," and it "does not cross-reference or address the service provision." Pet. App. 4a, 6a. The court acknowledged a decision of the Ninth Circuit holding that Sections 103.5a and 1236.3 are "inconsistent" unless read to require service on an adult whenever the alien is under 18. *Id.* at 4a-5a (citing *Flores-Chavez* v. *Ashcroft*, 362 F.3d 1150 (9th Cir. 2004)). But the court disagreed with that analysis: "it would be a strained analysis indeed * * * [to] decid[e] not only that the provisions were inconsistent but that the more general release provision somehow negated the specific service provision despite making no reference to notification at all." *Id.* at 6a. The court therefore upheld the Board's reading of its own regulations as reasonable. *Id.* at 5a-6a.

c. The court also rejected petitioner's argument that service of notice of a deportation hearing on a minor constitutes a deprivation of due process under the Fifth Amendment. Pet. App. 6a. Typically, said the court, sending notice of a deportation hearing to an alien satisfies the requirement that service be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ibid.* (quoting *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)). The court noted that minors can be responsible for their own legal status and can waive their constitutional rights in some circumstances.

Id. at 7a. And many states allow personal service on minors as young as 14. *Ibid.*

Here, when petitioner was served, he was 17 years old, only one year shy of legal adulthood. He conceded that he was told that he would have to appear for a deportation hearing, that he understood this responsibility, and that he planned to appear. The court held that the notice served in this case sufficed under *Mullane* and that there was no due process violation. Pet. App. 7a.

6. The court of appeals denied rehearing en banc with no judge calling for a poll. Pet. App. 14a-15a.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted. Although the Ninth Circuit has reached a different conclusion, its decision misinterprets the regulations and fails to apply the necessary interpretive deference to the Board. Since the Ninth Circuit's decision, two other circuits have disagreed with it, and the question is pending before the Board and may soon be addressed in a precedential decision. Accordingly, the Ninth Circuit's outlier decision provides no basis for further review at this time.

1. a. As the court of appeals correctly recognized, this case involves an agency's interpretation of its own regulations. The agency's interpretation may not be set aside unless it is "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). That principle is controlling here: the Board has reasonably concluded that its regulation addressing service governs when papers must be sent to an alien's adult relative, and that the

separate regulation on release of alien minors from detention does not speak to that question. Contrary to petitioner's contention (Pet. 17-20), the required deference to the Board does not turn on whether the Board has reached that conclusion in the very decision under review, even though that decision is not precedential. Cf. *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880-881, 882 n.9 (2011) (deferring to agency's interpretation of its own regulation expressed in an amicus brief, and rejecting argument that only a formal opinion rendered through specific procedures can receive *Auer* deference).[8] By citing the on-point Eighth Circuit decision, *Llapa-Sinchi* v. *Mukasey*, 520 F.3d 897 (2008), the Board provided a sufficient explanation of its reasoning. See Pet. App. 5a, 11a. In any event, as discussed below, the Board is currently considering the issue and may issue a precedential decision in the near future. See p. 18, *infra*.

b. The court of appeals correctly sustained the Board's reading as reasonable. The applicable regulation, 8 C.F.R. 103.5a, provides that some papers must be delivered by personal service (including certified mail to a person's last known address, return receipt requested) and that regular mail will suffice for service of all other papers. See 8 C.F.R. 103.5a(a), (c)(1) and (d); see also 8 U.S.C. 1252b(a)(2). The regulation then provides three exceptions to those rules: for minors and for incompetents and persons confined in a penal or mental institution or hospital. 8 C.F.R. 103.5a(c)(2). As relevant here, "in the case of a minor under 14 years of age,

[8] The cases on which petitioner relies (Pet. 17-20), by contrast, deal with *Chevron* deference to an agency's interpretation of statutory provisions enacted by *Congress*, a different matter. Cf. *Chase Bank*, 131 S. Ct. at 881-882.

service shall be made upon the person with whom * * * the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend." 8 C.F.R. 103.5a(c)(2)(ii). Thus, notice of petitioner's hearing was served in accordance with the general rules, and because petitioner was not under 14 years of age at the time, the Board reasonably concluded that no more was required. The Eighth Circuit has reached the same conclusion. See *Llapa-Sinchi*, 520 F.3d at 899-901.[9]

Petitioner's contention that Section 1236.3 unambiguously mandates the opposite result is not well taken.[10] Section 1236.3(b) specifies "guidelines" for the release of aliens under age 18. Juveniles who are released from custody (*e.g.*, on bond or parole) are released to one of the adults specified in the regulation, "in order of preference": a parent; a legal guardian; an adult relative; a person designated by a parent or guardian who is in custody or not in the United States; or, "in unusual and compelling circumstances," another adult. 8 C.F.R. 1236.3(b). Adults in the last two categories must "execute an agreement * * * to ensure the juvenile's presence at all future proceedings before [Immigration and Customs Enforcement] or an immigration judge."

---

[9] The Ninth Circuit suggested in *Flores-Chavez* v. *Ashcroft*, 362 F.3d 1150 (2004), that Section 103.5a does not address whether service on a minor between ages 14 and 17 is sufficient, or how service is to be effected on juveniles who are released from custody. See *id.* at 1157-1158. That is incorrect: Section 103.5a(c)(1) and (d) make clear that service by certified mail, return receipt requested, to an alien's last known address always suffices *except* when the alien is under age 14, incompetent, or confined. See also 8 U.S.C. 1252b(a)(2).

[10] The regulation that the Ninth Circuit considered in *Flores-Chavez* now appears at Section 1236.3.

8 C.F.R. 1236.3(b)(3) and (4). Although other provisions of Section 1236.3 discuss various forms of notice to adults, 8 C.F.R. 1236.3(e) and (f), nothing in the regulation addresses who shall receive notice of proceedings against the juvenile once the juvenile is released.

Petitioner's argument, like the Ninth Circuit's in *Flores-Chavez* v. *Ashcroft*, 362 F.3d 1150 (2004), is that Section 1236.3 implicitly gives a particular adult general responsibility for the juvenile alien, a responsibility that, also implicitly, extends to receiving service of official papers in the juvenile alien's stead. See, *e.g.*, *id.* at 1159 (asserting that Section 1236.3 reflects a regulatory "presumption * * * that alien juveniles under eighteen require a responsible adult to help them navigate final immigration proceedings"). But nothing in Section 1236.3 so provides; indeed, the Ninth Circuit drew this proposition not from anything in the text of the regulation, but from what the Ninth Circuit described as "[t]he fair implication of [Section 1236.3] as a whole." *Id.* at 1156. That interpretation is flawed. Section 1236.3 addresses the custodial responsibilities of the adult only in "unusual and compelling circumstances" or when a parent is either in custody or out of the country. See 8 C.F.R. 1236.3(b)(3) and (4). In most cases, Section 1236.3 simply provides that the alien will be released to a parent, guardian, or other relative, without specifying anything about that person's responsibility. See 8 C.F.R. 1236.3(b)(1)(i)-(iii). Mere silence cannot be enough to *unambiguously* displace the plain terms of the service regulation, Section 103.5a.

The Ninth Circuit also erred in its supposition that the release regulation is a more specific provision that presumptively controls over the more general service regulation. 362 F.3d at 1158. The provision that specifi-

cally addresses service of notice, on adults and juveniles alike, is the service regulation, Section 103.5a. Section 1236.3 may provide a "detailed framework for the release and ensuing custody of juveniles," *ibid.*, but nothing in that framework relieves any alien of responsibility to update his address or to act on papers served on him at that address. To the contrary, the detention and release regulations make clear that Section 103.5a governs when service is to be made on a guardian in this context. See 8 C.F.R. 236.2(a), 1236.2(a). And Section 103.5a draws the line at age 14. Other regulations draw the line in other places for other purposes, such as competency to make binding admissions in immigration court. See, *e.g.*, 8 C.F.R. 1240.48(b) (providing that "[t]he immigration judge shall not accept an admission of deportability from an unrepresented respondent who is * * * under age 16 and is not accompanied by a guardian, relative, or friend").[11]

The Board's interpretation of its regulations—that the service provisions of Section 103.5a, not the release provisions of Section 1236.3, specify who shall receive notice—is thus not plainly erroneous or inconsistent with the regulations. The court of appeals correctly deferred to that interpretation.

c. The court of appeals also correctly held that service of notice of a deportation hearing on a minor between ages 14 and 17 does not violate the Fifth Amendment's Due Process Clause. Pet. App. 6a-7a. Analyzing such service under *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950), the court concluded that

[11] The Ninth Circuit in *Flores-Chavez* relied on the predecessor of this regulation and other limitations that would have applied to Flores-Chavez, who was 15. See 362 F.3d at 1159, 1160. None of these limitations would have applied to petitioner, who was nearly 18.

the notice served in this case was reasonably calculated, under all the circumstances, to apprise petitioner of the pendency of the deportation proceeding and to afford him an opportunity to present any objections to the deportability charge. Pet. App. 7a. That decision is consistent with *Mullane* and with this Court's other decisions, and petitioner does not contend that it conflicts with the decision of any other court of appeals.[12] That holding, too, does not warrant further review.

As the court of appeals pointed out (Pet. App. 7a), there is no categorical rule that minors under the age of 18 are incapable of waiving rights (or taking action to preserve rights). Indeed, this Court rejected such a rule in *Reno* v. *Flores*, 507 U.S. 292 (1993), a case also involving juvenile aliens. See *id.* at 309 (declining to presume that juvenile aliens in immigration custody, "[m]ost [of whom] are 16 or 17 years old," are universally "too young or too ignorant to exercise [their] right [to a hearing] when the form asking them to assert or waive it is presented"). And minors are competent to waive various other legal rights, including *Miranda* rights, the right to appeal, and the right to a jury trial. *Ibid.*; *Llapa-Sinchi*, 520 F.3d at 900.

Petitioner argues (Pet. 15) that the notice provided under the regulation is not reasonably calculated to reach alien minors, because the regulation addresses service only of the initiating notice, not a subsequent paper that may contain the time and place of the hearing. But that contention has nothing to do with the

[12] The Ninth Circuit in *Flores-Chavez* did not squarely reach a due process issue, although it interpreted the regulations with constitutional concerns in mind. See 362 F.3d at 1160-1162. See generally, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 381-382 (2005) (contrasting decisions avoiding constitutional questions with decisions resolving them).

question presented in *this* case: whether notice of the time and place of the hearing sent by certified mail to the last known address provided by the alien,[13] coupled with a warning to the alien in his native language that he must keep the immigration court informed of his address, is reasonably calculated to provide constitutionally adequate notice to a 17-year-old alien in petitioner's circumstances. The court of appeals correctly concluded that the procedure is constitutionally adequate.

2. Although there is tension between the decision below and the Eighth Circuit's decision in *Llapa-Sinchi*, on the one hand, and the Ninth Circuit's decision in *Flores-Chavez*, on the other, the issue does not warrant review at this time.

The Ninth Circuit was the first to address the question, and the subsequent decisions in *Llapa-Sinchi* and in this case have clarified several respects in which the Ninth Circuit misinterpreted the regulatory framework. For instance, the Ninth Circuit discerned no reason for departing from what it considered to be a presumption implicit in the release regulation, *i.e.*, that aliens under age 18 require the assistance of an adult. See *Flores-Chavez*, 362 F.3d at 1159. As the Eighth Circuit subsequently explained, the service and release regulations serve different purposes: "The purpose of the notice provision is to let individuals know the details of their legal proceedings. The purpose of the release provision, however, is not to provide knowledge, but to provide assistance to minors in a foreign land, perhaps for the first time," including "assistance * * * to obtain basic necessities." *Llapa-Sinchi*, 520 F.3d at 900-901. The

[13] The statute, not the regulation, prescribed certified mail as the method of notification. See 8 U.S.C. 1252b(a)(2).

Board endorsed the Eighth Circuit's interpretation in this case. Pet. App. 11a. Accordingly, it is entirely possible that the Ninth Circuit will revisit *Flores-Chavez* in a future case. Cf., *e.g.*, *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 677-678 (9th Cir. 2010) (abandoning circuit precedent in light of a subsequent Board decision entitled to *Chevron* deference).

The case for revisiting *Flores-Chavez* would be particularly strong if the Board issues a published, precedential decision on the question. The Board may soon be in a position to do just that. Recently, the Board called for supplemental briefing on this question in a pending case, *In re Mendoza-Arqueta*. The Department of Homeland Security filed its response to the supplemental briefing order in December 2010, and the case is still pending.[14]

Furthermore, this case differs factually from *Flores-Chavez*, and as a result several aspects of the Ninth Circuit's reasoning are inapplicable. In this case, the administrative record does not reflect (and petitioner does not allege) that petitioner was released into the custody of an adult, and if so, whether the adult in fact undertook to ensure that petitioner appeared at his hearing. Compare *Flores-Chavez*, 362 F.3d at 1154 & n.2. The Ninth Circuit also relied on inferences based on how Flores-Chavez, who was 15, would be treated under other age-based regulations. No such inferences would benefit petitioner, who was 17—indeed, nearly 18—at the time of his hearing. See note 11, *supra*. Thus, the Ninth Circuit might well uphold a decision like the

[14] The Second Circuit had previously remanded another case to the Board so that it could provide guidance on this question, see *Llanos-Fernandez* v. *Mukasey*, 535 F.3d 79, 85 (2008), but the issue did not arise on remand in *Llanos-Fernandez* itself.

Board's in this case as reasonable in these circumstances, even in light of *Flores-Chavez*.

3. In any event, this case would be a poor vehicle by which to resolve the questions presented. Petitioner states (A.R. 44) that he has Temporary Protected Status as a citizen of Honduras and thus is not immediately subject to deportation. And although petitioner's motion to reopen his deportation proceedings was intended to allow him to pursue adjustment of status, petitioner need not obtain reopening in order to become a lawful permanent resident. Rather, he may seek the status of lawful permanent resident by applying for an immigrant visa from an overseas consular officer, because petitioner is now the beneficiary of an approved I-130 "immediate relative" visa petition. See 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3). Indeed, whereas adjustment of status is discretionary, a consular officer who is presented with an approved petition for an immediate-relative visa has no discretion to deny an immigrant visa to an alien who is not inadmissible under 8 U.S.C. 1182. See 8 U.S.C. 1201(g); 22 C.F.R. 42.31(a). Petitioner may be subject to a period of inadmissibility based on his having been unlawfully present in the United States for more than one year. See 8 U.S.C. 1182(a)(9)(B)(i)(II). That period, however, may be waived by the Attorney General, the Secretary of Homeland Security, or their designees, based on extreme hardship. See 8 U.S.C. 1182(a)(9)(B)(v); see also 8 U.S.C. 1182(a)(9)(A) (similar period of inadmissibility following removal, also waivable by the Attorney General, the Secretary of Homeland Security, or their designees).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
ROBERT N. MARKLE
Attorneys

MARCH 2011