PEREIRA V. SESSIONS: A JURISDICTIONAL SURPRISE FOR IMMIGRATION COURTS∅

Kit Johnson*

The U.S. Supreme Court issued a bombshell opinion regarding immigration court procedure on June 21, 2018: *Pereira v. Sessions*.[1] On its face, the case is a boon for certain noncitizens seeking relief from deportation. Yet, as this Essay explains, *Pereira*'s implications are far greater. Although the Court's opinion never mentions jurisdiction, *Pereira* necessarily means that immigration courts lack jurisdiction over virtually every case filed in the last three years, plus an unknown number of earlier-filed cases. This situation arises from the chronic failure of the Department of Homeland Security (DHS) to comply with the law in commencing deportation proceedings. With the clarity afforded by *Pereira*, the result is that these pending removal cases should be dismissed.

In an 8–1 decision, *Pereira* held that when a noncitizen receives a document called a notice to appear, and where that document does not have a time or place listed for the removal proceedings, then it is not a valid notice to appear, and thus it does not "stop time" for purposes of establishing the noncitizen's continuous physical presence in the United States.[2] That clock-stopping question was crucial in

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∅ This Essay first appeared in *HRLR Online* in August 2018. *See* http://hrlr.law.columbia.edu/files/2018/08/HRLR-Online-3-1-2018-Johnson.pdf. It remains the same with the exception of a few stylistic edits. The Appendix, which immediately follows the Essay, has not been previously published. It explores the ways in which courts have struggled with *Pereira v. Sessions* in the months since publication of the Supreme Court's opinion, and it considers the future of *Pereira*-related litigation.

* Associate Professor at the University of Oklahoma College of Law. I am incredibly grateful to Steve Gensler, Jill Family, and Eric E. Johnson for their comments.

1. Pereira v. Sessions, 138 S. Ct. 2105 (2018), available at https://www.supremecourt.gov/opinions/17pdf/17-459_1o13.pdf [https://perma.cc/X5ZF-4LXY] (to be reported at 585 U.S. __).

2. *Id.* at 2109–10.

Pereira, because the petitioner sought cancellation-of-removal relief, which is available only to noncitizens who can establish continuous physical presence in the United States for ten years.[3]

The Court's opinion, authored by Justice Sonia Sotomayor, held that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a).'"[4] That conclusion followed, the Court said, "inescapably and unambiguously" from "[t]he plain text, the statutory context, and common sense."[5]

Pereira has thrown the immigration bench and bar for a loop because what DHS did with Pereira's notice was not unusual, or even merely typical. "[A]lmost 100 percent" of cases filed in the last three years were initiated by notice-to-appear documents that omitted the time and place of the proceeding.[6]

While the Court's opinion explicitly concerns only the stop-time rule, it necessarily undermines the jurisdictional basis for any case in immigration court commenced pursuant to an invalid notice. Here's why: The Executive Office of Immigration Review (EOIR), which encompasses immigration courts, is part of the U.S. Department of Justice.[7] As such, Congress has said that the EOIR is "subject to the direction and regulation of the Attorney General,"[8] including regulations promulgated by the Attorney General.[9] Current Attorney-

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3. Immigration and Nationality Act (INA) § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A) (2012).

4. *Pereira*, 138 S. Ct. at 2110. The Court repeated this language. *Id.* at 2118 ("A document that fails to include such information is not a 'notice to appear under section 1229(a)'"); *see also id.* at 2116–17 ("Failing to specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character.'") (quoting *id.* at 2127 n.5) (alteration in original).

5. *Id.* at 2110.

6. *Id.* at 2111 (citation and internal quotation marks omitted).

7. Prior to 1983, immigration courts were organized under the Immigration and Naturalization Service (INS), the same agency that employed trial attorneys who opposed immigrants' claims in courts. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 325 (2007). Now, counsel for the government in immigration proceedings are employed by Immigration and Customs Enforcement, a branch of the Department of Homeland Security, an agency distinct from the Department of Justice. *Id.* at 325–26.

8. 6 U.S.C. § 521(a) (2018). Note that the Attorney General is the head of the Department of Justice. 28 U.S.C. § 503 (2018). *See also* About the Office, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office [https://perma.cc/EVM8-L93Y] ("Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings[.]").

9. 8 U.S.C. § 1103(g)(2) (2012).

General-issued regulations delimit the jurisdiction of immigration courts, providing that "[j]urisdiction vests . . . when a charging document is filed with the Immigration Court."[10] Those regulations define a "charging document" as the "written instrument which initiates a proceeding before an Immigration Judge . . . includ[ing] a Notice to Appear."[11] If, as *Pereira* clearly states, a document isn't a notice to appear if it doesn't have a time and place on it,[12] then it cannot be a charging document. And, without a valid charging document, jurisdiction never vests in the immigration court.[13]

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10. 8 C.F.R. § 1003.14(a) (2018).

11. 8 C.F.R. § 1003.13 (2018); *see also* Martinez-Garcia v. Ashcroft, 366 F.3d 732, 735 (9th Cir. 2004) ("The only charging document available after April 1, 1997, is the Notice to Appear.").

12. The Court called it a "putative" notice to appear. Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018). Merriam Webster defines "putative" as "commonly accepted or supposed; assumed to exist or to have existed." *Putative*, MERRIAM-WEBSTER DICTIONARY, http://www.Merriam-Webster.com/dictionary/putative [https://perma.cc/A7ET-YQ36]; *see also* Removal Proceedings, Decision and Orders of Immigration Judge Ana Partida at 3, July 6, 2018 (noting same) (on file with author).

13. The fact that courts have previously found that a notice to appear without a time or place vested immigration courts with jurisdiction is irrelevant because those cases pre-date the Court's determination that such documents are not notices to appear at all. Examples of such irrelevant prior cases are *Guamanrrigra v. Holder*, 670 F.3d 404, 409–10 (2d Cir. 2012); *Dababneh v. Gonzalez*, 471 F.3d 806, 807, 810 (7th Cir. 2006); *Haider v. Gonzales*, 438 F.3d 902, 909–910 (8th Cir. 2006); *Qumsieh v. Ashcroft*, 134 F. App'x 48, 49–51 (6th Cir. 2005); *Marco v. United States*, No. 1:09-cv-761, 2010 WL 3992113, at *6–7 (S.D. Ohio Oct. 12, 2010). Similarly, pre-*Pereira* cases that discuss the jurisdictional effect of a "defective" notice to appear are irrelevant because, again, a notice to appear without a time and place can no longer be characterized as "defective" but rather is "putative." For an example of such a case, see *Kohli v. Gonzales*, 473 F.3d 1061, 1066–70 (9th Cir. 2007) (rejecting jurisdictional challenge based on defective notice to appear for lack of prejudice). Finally, *Pereira* eviscerates the notion that a putative notice to appear could be cured by a subsequent notice of hearing issued by the immigration court itself. For a pre-*Pereira* case holding a subsequent notice is effective, see *Guamanrrigra*, 670 F.3d at 411 ("Service of the April 2000 Notice to Appear and the May 2000 Notice of Hearing, in combination, satisfied the notice requirements[.]"). As Immigration Judge Ana Partida has held, it "clearly cannot be legally correct" that "the EOIR [can] perfect (or vest) jurisdiction upon itself by issuance of a Notice of Hearing, which turns a putative NTA into an actual NTA." Removal Proceedings, Decision and Orders of the Immigration Judge Ana Partida at 3, July 6, 2018 (on file with author).

In other words, any action by an immigration court absent a valid notice to appear is an *ultra vires* or extrajudicial act, as it exceeds the court's Congressionally delegated power.[14]

Lawyers representing immigrants quickly perceived that *Pereira* has jurisdictional ramifications, and in the following weeks, they used the case to raise jurisdictional challenges. But those challenges, as well as the government's responses and courts' reactions, are in disarray.

At the heart of the confusion is a failure to characterize the jurisdictional issue as one of personal jurisdiction or subject-matter jurisdiction. The regulatory law itself does not indicate what form of jurisdiction vests with the notice to appear.[15] And briefs filed by private and government counsel, as well as the orders filed by courts, have shied away from taking a position on whether this is an issue of subject-matter jurisdiction or personal jurisdiction.[16] Yet the characterization of the jurisdictional issue cannot be glossed over. The distinction matters greatly: Defects in personal jurisdiction are waived by appearance, while defects in subject-matter jurisdiction persist.

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14. *Cf.* Linda D. Jellum, *Dodging the Taxman: Why the Treasury's Anti-Abuse Regulation Is Unconstitutional*, 70 U. MIAMI L. REV. 152, 218 (2015) ("[E]ven if one could find an implicit delegation of either power to the Treasury, the agency's action was *ultra vires* because the regulation exceeds the limits of any delegated power."). This analysis indicates that 8 C.F.R. § 1003.13 is truly jurisdictional in nature and not among the type of "claim-processing rules" at issue in cases such as *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 154 (2013) and *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015). The "subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy" as the Court called it in *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 511 (2006), concerns whether a statutory requirement is an element of a plaintiff's claim for relief or a jurisdictional mandate. Under the *Arbaugh* logic, the notice-to-appear requirement is not in the realm of "claims for relief" ingredients; it is instead about whether immigration courts are acting within their Congressionally-delegated powers.

15. An unpublished opinion from the Board of Immigration Appeals indicates that immigration courts, like Article III federal courts, must have both personal and subject-matter jurisdiction. *In re* Elba Isabel Sanchez-Briones, A72 328 292, 2006 WL 2008363, at *1 (B.I.A. June 2, 2006) ("[A]n Immigration Judge denied the motion on the ground that the Immigration Court no longer had personal or subject matter jurisdiction over the respondent.").

16. *Cf.* DAN KESSELBRENNER ET AL., PRACTICE ADVISORY: CHALLENGING THE VALIDITY OF NOTICES TO APPEAR LACKING TIME-AND-PLACE INFORMATION 16 (July 5, 2018), http://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2018_5July_PereiraAdvisory.pdf [https://perma.cc/9G5L-SZUD] ("Whether the purported [notice to appear] creates an issue around personal jurisdiction or subject-matter jurisdiction, the IJ has an overarching obligation to determine deportability before entering any removal order . . .").

So which is it? The *Pereira* jurisdictional issue must be one of subject-matter jurisdiction. To begin with, a plain reading of the relevant regulation indicates that it references subject-matter jurisdiction.[17] On its face, 8 C.F.R. § 1003.14(a) concerns whether a particular case is properly before an immigration court. Without this propriety, an immigration court lacks authority to render any decisions regarding the issues raised. Any court action taken without this prescribed prerequisite is an extrajudicial act.[18] This is the conceptual domain of subject-matter jurisdiction—what the Supreme Court was speaking of when it stated that courts have a duty to ensure that their jurisdiction "defined and limited by statute, is not exceeded."[19]

Notably, in the 2009 case of *Shogunle v. Holder*, the Fourth Circuit held that an immigration court did not have jurisdiction to hear a case where a notice to appear was not filed with the immigration court before a hearing notwithstanding the fact that the immigrant petitioner showed up to the hearing.[20] Since personal jurisdiction is waived by appearance, *Shogunle* must have understood 8 C.F.R. § 1003.14(a) to speak of subject-matter jurisdiction.

Acknowledging that the notice-to-appear jurisdictional defect concerns subject-matter jurisdiction provides clarity on post-*Pereira* jurisdictional arguments. For instance, one immigration court sought to avoid a post-*Pereira* jurisdictional mishap by concluding that the petitioner "waived any challenge to the notice to appear by appearing at his removal hearing," thereby "voluntarily submit[ting] himself to the court's jurisdiction."[21] This reasoning is erroneous, however, because it rests on the assumption that the "jurisdiction" referenced in 8 C.F.R. § 1003.14(a) is a sort of personal jurisdiction and therefore

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17. Marco v. United States, No. 1:09-cv-761, 2010 WL 3992113, at *6–7 (S.D. Ohio Oct. 12, 2010) (holding same). One might question whether additional words of the regulation inform its interpretation. The full first sentence of 8 C.F.R. § 1003.14(a) is "Jurisdiction vests, *and proceedings before an Immigration Judge commence*, when a charging document is filed with the Immigration Court by the Service." (emphasis added). These additional words confirm that the requirement is one of subject-matter jurisdiction. *See Saqr v. Holder*, 580 F.3d 414, 421 (6th Cir. 2009) (holding that "'commence' is a term of art which defines when jurisdiction vests in an Immigration Court").

18. Rhode Island v. Massachusetts, 37 U.S. 657, 714 (1838) ("Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them.").

19. Louisville & Nashville RR Co. v. Mottley, 211 U.S. 149 (1908); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

20. Shogunle v. Holder, 336 F. App'x. 322 (4th Cir. 2009).

21. On file with author.

waivable.[22] But the jurisdictional issue is not a matter of the person appearing before the court. It is, instead, an issue with the legally prescribed capacity of the court to act, and thus the subject-matter jurisdiction deficiency is non-waivable.[23]

In California, a federal district court declined to allow a *Pereira*-based jurisdictional challenge for a different reason, holding the only consequence with which *Pereira* was concerned was the stop-time rule.[24] But because *Pereira* controls on the question of what makes a notice to appear valid or invalid, and because the filing of a notice to appear is what confers and delimits the immigration court's subject-matter jurisdiction, courts are without discretion to ignore that lack of jurisdiction.[25]

It is understandable that courts and government lawyers would resist the idea that *Pereira* means what it says. After all, there are over 700,000 pending cases in immigration court today.[26] If immigration courts lack jurisdiction over every removal case that was initiated by a void notice, that requires the dismissal of a large chunk of the court's caseload on the basis of a decision that never mentions jurisdiction. Yet *Pereira* itself teaches against contriving the law in this area for the sake of convenience, stating that "practical considerations are meritless and do not justify departing from the statute's clear text."[27]

The bottom line is that all cases with invalid notices to appear must be dismissed for lack of subject-matter jurisdiction. This will, of

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22. *See* Fed. R. Civ. P. 12(h)(1).

23. *See supra* note 19.

24. Order Granting Motion to Dismiss For Lack of Subject Matter Jurisdiction, Ramat v. Nielsen, No. 3:17-cv-02474-BEN-JLB, at 7–8 (S.D. Cal. July 6, 2018), https://www.courtlistener.com/recap/gov.uscourts.casd.555103/gov.uscourts.casd.555103.17.0.pdf [https://perma.cc/EXQ4-2KBS]. Several immigration judges have also held that the effect of *Pereira* is limited to the stop-time rule. Orders on file with author; *cf.* AM. IMMIGRATION COUNCIL & CATHOLIC LEGAL IMMIGRATION NETWORK, STRATEGIES AND CONSIDERATIONS IN THE WAKE OF *PEREIRA V. SESSIONS*, add. A, at 2 (2018), https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Practice-Advisory-Pereira.pdf [https://perma.cc/2E2R-73NP] (citing email from Deputy Chief Immigration Judge explaining that EOIR and courts "should accept Notices to Appear that do not contain the time and places of the hearing" notwithstanding *Pereira*).

25. Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973) ("Where there is no jurisdiction over the subject matter, there is, as well, no discretion to ignore that lack of jurisdiction.").

26. *Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/BND9-RNGG].

27. Pereira v. Sessions, 138 S. Ct. 2105, 2118 (2018).

course, be a paperwork headache for government immigration lawyers. But it is a problem of their own making. The government chose not to comply with the clear requirements of the statutory law in bringing removal cases before the immigration courts. That choice should be honored. And whatever removal cases the government wishes to pursue can be re-filed with valid notices to appear.

Going forward, immigration courts should recognize that re-filed cases demand an immigrant-centered approach. Noncitizens should have the chance to re-litigate issues lost in the first litigation—but should be permitted to keep their wins. The government, in contrast, should be bound by its losses. This approach is justified because, as the courts have recognized, the deportation that noncitizens face in removal proceedings "can be the equivalent of banishment or exile."[28] It is because of these high stakes that courts have recognized the need to construe statutes in favor of the noncitizen.[29] This implies that immigration courts should analogously give deference to prior favorable determinations to noncitizens. Such an approach also conforms to notions of basic fairness. Allowing noncitizens to keep their wins and re-litigate their losses protects noncitizens from bearing the burden of the government's choice to wander from the law's requirements. Any other approach would impermissibly render the noncitizen's "right to remain here dependent on circumstances . . . fortuitous and capricious."[30]

Pereira's effect on immigration proceedings will reverberate for years to come. The courts will no doubt feel pressure to avoid the massive inconvenience entailed by the government's longstanding failure to heed to statutorily required procedure. But the fact that immigration courts lack subject-matter jurisdiction over a vast swath of their cases cannot be ignored.

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28. Delgadillo v. Carmichael, 322 U.S. 388, 391 (1947); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) ("[T]his Court has reiterated that deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence.'").

29. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

30. *Delgadillo*, 332 U.S. at 391.

APPENDIX

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INTRODUCTION

This Appendix provides an update to the preceding Essay, explaining what courts and agencies have done in the intervening months regarding the jurisdictional issues raised by *Pereira v. Sessions*.[31] This Appendix also makes recommendations for how courts should resolve the disputes revolving around *Pereira* and jurisdiction.

Since publication of the above Essay, government agencies have continued to struggle with *Pereira*. This may be surprising, as *Pereira* does not ask much of agencies—just the inclusion of a time and place on a respondent's notice to appear (NTA),[32] the document that initiates proceedings to remove noncitizens from the United States.[33] As *Pereira* explains, a document styled as an NTA that does not include this minimum statutorily required information is not an NTA at all.[34] The natural consequence of this decision, set forth in the above Essay and explained further in this Appendix,[35] is that a putative NTA, lacking essential time and place information, cannot initiate removal proceedings because only the filing of a true NTA vests immigration courts with subject matter jurisdiction over removal cases. Cases improperly commenced should therefore be dismissed for lack of jurisdiction and refiled.

In fact, there is no inherent barrier for the agency that drafts NTAs, the Department of Homeland Security (DHS),[36] that would prevent the inclusion of accurate time and place information on these documents. DHS simply needs access to a computerized scheduling system operated by the Department of Justice (DOJ)—access DHS has had in the past.[37] Yet DHS was not immediately granted access to this

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31. Pereira v. Sessions, 138 S. Ct. 2105 (2018).

32. *Id.* at 2109–10.

33. 8 C.F.R. § 1003.14(a) (2018) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court . . . "); *id.* § 1003.13 (defining the "charging document" as the NTA); 8 U.S.C. § 1229(a)(1) (2012) (setting out the statutory requirements of an NTA).

34. *Pereira*, 138 S. Ct. at 2114–15.

35. *See infra* Part II.

36. Regulations specify exactly which immigration officers within DHS have the authority to issue an NTA. 8 C.F.R. § 239.1(a) (2018).

37. Matthew Hoppock, *Post-Pereira, the DOJ Chooses Harsh IJ Performance Metrics over Compliance with Supreme Court Mandate*, HOPPOCK LAW FIRM (Sept. 20, 2018), https://www.hoppocklawfirm.com/post-pereira-the-doj-chooses-harsh-ij-performance-metrics-over-compliance-with-supreme-court-mandate/?fbclid=IwAR0haLprrdgrEWUyGOfiHdDZyzn_6k2GG9qdpFIbZdU70dFccdchYKfbLE [https://perma.cc/4RKC-6BNB].

system post-*Pereira*.[38] The DOJ has not explained why it did not grant DHS access to the system for several months. One commentator has suggested, on the basis of internal DOJ e-mails, that the reason the DOJ did not give DHS access was that access would make it impossible for immigration judges to comply with recently introduced performance metrics.[39]

This Appendix proceeds in two parts. Part I surveys the reactions of courts and agencies to *Pereira*. Part II makes various suggestions about how courts should apply *Pereira* going forward.

I. COURTS' AND AGENCIES' REACTIONS TO *PEREIRA*

Pereira induced the Department of Homeland Security to change its practices regarding the initiation of removal proceedings, caused the immigration court system to terminate many pending removal cases, and led district courts to dismiss a number of criminal indictments of previously removed noncitizens charged with unlawful reentry. This Part discusses each of those changes in turn.

A. The Department of Homeland Security

Removal hearings are the adjudicatory proceedings that take place in an immigration court.[40] The hearings are the mechanism by

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38. *Id.*; Memorandum from James R. McHenry, III, Director, Executive Office for Immigration Review, to All of EOIR, Acceptance of Notices to Appear and Use of the Interactive Scheduling System, (Dec. 21, 2018) [hereinafter McHenry Memo].

39. *Id.*

40. As mentioned in the original Essay above, immigration courts are units of the Executive Office of Immigration *Review* (EOIR), an agency of the Department of Justice. *See supra* note 7 and accompanying text. The EOIR itself came into existence in 1983. 48 Fed. Reg. 8038-02 (Feb. 25, 1983); *see also Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/D2ED-ERFR] (outlining the history of the immigration court system prior to the creation of the EOIR). The EOIR's immigration judges are not administrative law judges (ALJs). *See*, *e.g.*, Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1358–59 (1992) (explaining how EOIR has avoiding using ALJs in its adjudicatory process). ALJs operate pursuant to the Administrative Procedures Act (APA). *Id.* at 1342. Immigration judges do not. *Id.* at 1359. As one professor has noted, "immigration judges remain a category of deciders who function much like ALJs but do not achieve their level of status and independence." *Id.*; *see also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1636 (2010) (endorsing "proposals for converting the current immigration judges into administrative law judges, who enjoy greater job security, and moving them from the Department of Justice into a new, independent executive branch

which the government determines if noncitizens are inadmissible, meaning that they should not be allowed into the United States in the first instance, or that they are deportable, meaning that they were once allowed into the United States but now must leave.[41]

As discussed in the original Essay above, removal proceedings officially commence when DHS files a "charging document" with the immigration court.[42] That charging document is called the "notice to appear" or NTA.[43] NTAs have long been standardized in a form called the I-862.[44] It is the filing of this form that vests immigration courts with jurisdiction over the removal proceedings.[45]

Following *Pereira*, DHS continued its practice of using Form I-862 for notices to appear. What changed was that the government began issuing these documents with time and place information as required by the Supreme Court's decision. Instead of issuing NTAs that instructed noncitizens to appear before an immigration judge at "a date to be set" and a "time to be set,"[46] the post-*Pereira* NTAs told noncitizens to show up to specific immigration courts at dates and times certain.

Unfortunately, the information provided on these post-*Pereira* NTAs has been, in many cases, entirely false.[47] Immigrants have

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tribunal"). Removal proceedings in immigration courts are conducted pursuant to the Immigration and Nationality Act. *See* 8 U.S.C. §§ 1229, 1229a (2012).

41. 8 U.S.C. § 1229a(a)(1), (3); *see also id.* § 1182 (listing inadmissibility grounds); *id.* § 1227 (listing deportability grounds).

42. 8 C.F.R. § 1003.14(a) (2018).

43. *Id.* § 1003.13 The charging document for cases filed before April 1, 1997 was called an "Order to Show Cause." *Id.*

44. *DHS Notice to Appear Form I-862*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/dhs-notice-appear-form-i-862 [https://perma.cc/EMT9-GS4N]; *see also Do You Have a Form Called an "NTA"? Are You Confused About What It Means?*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/sites/default/files/pages/attachments/2016/01/14/do_you_have_a_form_called_an_nta.pdf [https://perma.cc/ 2ZGQ-VQ7K] (displaying a blank I-862 form as an example of an NTA and explaining its meaning).

45. 8 C.F.R. § 1003.14(a). The NTA must also be served on the noncitizen who is the subject of the removal proceedings. 8 U.S.C. § 1229(a)(1).

46. Pereira v. Sessions, 138 S. Ct. 2105, 2111–12 (2018) (discussing this practice); *Notice to Appear Form*, REDBUS2US, https://redbus2us.com/wp-content/uploads/2018/07/Notice-to-Appear-NTA-Sample-USCIS-ICE-and-DHS.png [https://perma.cc/6S9G-GLRH] (a redacted NTA issued in this manner).

47. Dianne Solis, *ICE Is Ordering Immigrants to Appear in Court, but the Judges Aren't Expecting Them*, DALLAS NEWS (Sept. 16, 2018), https://www.dallasnews.com/news/immigration/2018/09/16/ice-ordering-immigrants-appear-court-judges-expecting [https://perma.cc/MJU5-5WNA]; *see also* Gal Tziperman Lotan, *Immigrants Arrive in Droves at Orlando Court—Only to Find Hearing Dates*

received notices to appear "at midnight, on weekends and on a date that doesn't exist: Sept. 31."[48] Those who received notices with facially reasonable information showed up in courts from California to Florida only to be turned away by court personnel who openly characterized the notices as including "fake" dates.[49]

The scope of the problem prompted the Department of Homeland Security and the Department of Justice to issue a joint public statement, in which they described the "fake dates" practice as resulting from "minor logistical errors."[50] The two agencies went on to say: "These errors will be resolved and will not prevent these cases from being docketed properly in a timely fashion."[51] Despite these assurances, the government has not provided clear answers about when and how these logistical errors will be resolved.[52]

B. Immigration Courts and the Board of Immigration Appeals

Chief Immigration Judge[53] MaryBeth Keller responded to the *Pereira* decision on June 27, 2018, six days after the Supreme Court's decision, by stating that "effective immediately," immigration court clerks should not accept NTAs "that do not specify the time and place of the hearing."[54] This policy did not last long. On July 11, 2018,

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Were 'Fake,' Lawyers Say, ORLANDO SENTINEL (Nov. 1, 2018), https://www.orlandosentinel.com/news/breaking-news/os-ne-orlando-immigration-court-fake-dates-perriera-20181031-story.html (additional reporting of non-citizens appearing at the time and date listed on their NTAs to find no hearing was actually scheduled); Catherine E. Shoichet, *100+ Immigrants Waited in Line in 10 Cities for Court Dates That Didn't Exist*, CNN (Nov. 2, 2018), https://www.cnn.com/2018/10/31/us/immigration-court-fake-dates/index.html [https://perma.cc/4JKA-KKPG] (reporting same).

48. Solis, *supra* note 47; *see also NTA Example*, CNN, https://www.documentcloud.org/documents/5026186-Ntaexample.html#document/p1/a464245 [https://perma.cc/96ZB-H666] (an NTA for a hearing at "12:00 AM," shared by Atlanta immigration attorney Rachel Effron Sharma). Since December 21, 2018, the EOIR has stated that it will "reject any NTA in which the time or date of the scheduled hearing is factially incorrect—e.g. a hearing scheduled on a weekend or holiday or at a time when the court is not open." McHenry Memo, *supra* note 38.

49. Solis, *supra* note 47.

50. Shoichet, *supra* note 47. The joint statement could not be located on either of the DHS or DOJ websites.

51. *Id.*

52. *Id.*

53. The chief immigration judge "establishes operating policies and oversees policy implementation for the immigration courts." *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge [https://perma.cc/ZWV9-AD6C].

54. Hoppock, *supra* note 37. This mandate undoubtedly helped spur DHS to include this information on NTAs.

Principal Deputy Chief Immigration Judge Christopher A. Santoro told court personnel that "effective immediately, courts should begin accepting TBD NTAs."[55] That is, immigration courts returned to accepting NTAs that instructed noncitizens to appear before an immigration judge at "a date to be set" and a "time to be set."

Regardless of what was happening in the clerk's office at immigration courts in response to the above guidance, immigration judges, in the weeks following the Supreme Court's *Pereira* decision, terminated some 9,000 pending cases where the underlying NTA did not specify the time and place of the removal proceedings.[56] These judges found, under *Pereira* and consistent with this Essay, that the lack of information on the applicable notices meant there was no valid charging document to initiate removal proceedings, and so the cases were terminated for lack of jurisdiction.[57]

Not all immigration judges were swayed by this interpretation of *Pereira*. Many immigration judges refused to terminate proceedings despite the defects in the underlying charging document.[58] Still others chose not to take action at all beyond rescheduling affected cases in the hopes that the Board of Immigration Appeals (BIA), a unit of the EOIR that hears appeals from the immigration courts,[59] would soon provide guidance about how to interpret *Pereira*.[60]

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55. *Id.*

56. Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, REUTERS (Oct. 17, 2018), https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK [https://perma.cc/D7JX-XU2R].

57. *Id.* Examples on file with author.

58. Examples on file with author.

59. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/FC3P-97EW]. The BIA, like immigration courts, is a part of the Executive Office of Immigration Review and part of the Department of Justice. *See supra* note 7 and accompanying text. Decisions of immigration judges can be appealed to the Board of Immigration Appeals. 8 C.F.R. § 1003.1(b) (2018).

60. Daniel González, *Supreme Court Ruling Could Upend Thousands of Deportation Cases, Sowing Chaos in Court*, ARIZ. REPUBLIC (Aug. 27, 2018), https://www.azcentral.com/story/news/politics/immigration/2018/08/27/supreme-court-ruling-could-upend-thousands-deportation-cases/797321002/?fbclid=IwAR2mguAI-kf7LMNVbGslUFRg995itTjqJklp4RKqYL68HQC-m5qb7skdkjI [https://perma.cc/K76U-MFVS] (quoting immigration judge John Richardson) ("I am going to bump it down the road . . . and I can only hope by then someone resolves this mess. . . .").

On August 31, 2018, the BIA provided much-anticipated direction on *Pereira*'s implications with *Matter of Bermudez-Cota*.[61] The case was one of the thousands in which an immigration court determined it lacked jurisdiction on the basis of *Pereira*. In the appeal, the BIA addressed whether removal proceedings, initiated by an NTA without a time or place, warranted termination. The court concluded that termination was not required.[62]

In *Bermudez-Cota,* the BIA determined that the Supreme Court could not have possibly intended *Pereira* to have jurisdictional impact. The BIA emphasized the Court's characterization of *Pereira* as "narrow"[63] and the opinion's focus on the stop-time rule.[64] Additionally, the BIA highlighted the fact that the Court neither terminated the proceedings nor invalidated the underlying removal proceedings after finding the charging document to be invalid.[65] Rather, the Supreme Court remanded the case for further proceedings.[66] These steps were not consistent, the BIA held, with a ground-shifting jurisdictional opinion.[67]

In addition to concluding that the Supreme Court did not intend *Pereira* to have jurisdictional consequences, the BIA's *Bermudez-Cota* opinion approved what can be called the "two-step workaround," where two different documents, created at different times, are construed as a single "charging document." The BIA began by focusing on 8 C.F.R. § 1003.14(a), the regulation driving so many

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61. 27 I. & N. Dec. 441 (B.I.A. 2018).

62. *Id.* at 447.

63. *Id.* at 443 ("Had the Court intended to issue a holding as expansive as the one advanced by the respondent, presumably it would not have specifically referred to the question before it as being 'narrow.'"); *see also* Pereira v. Sessions, 138 S. Ct. 2105, 2110 (2018) ("The narrow question in this case"); *id.* at 2113 ("[T]he dispositive question in this case is much narrower. . . ."); *id.* ("In addressing that narrower question"); *id.* at 2121 (Alito, J., dissenting) ("[T]his case presents a narrow and technical issue of immigration law. . . .").

64. *Bermudez-Cota*, 27 I. & N. Dec. at 443. ("The Court specifically stated multiple times that the issue before it was 'narrow' and that the 'dispositive question' was whether a notice to appear that does not specify the time and place at which proceedings will be held . . . triggers the 'stop-time' rule for purposes of cancellation of removal.").

65. *Id.*

66. *Id.*

67. *Id.* at 444 ("While the Court held that such a notice to appear is insufficient to trigger the 'stop-time' rule, it did not indicate that proceedings involving similar notices to appear, including those where cancellation of removal, asylum, or some other form of relief had been granted, should be invalidated or that the proceedings should be terminated.").

immigration courts to terminate removal proceedings. The BIA noted that while the regulation states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a *charging document* is filed with the Immigration Court by [DHS]," the regulation does not specify what information must be included in a valid charging document.[68] The BIA concluded that, in the absence of specificity, a "charging document" could comprise (1) service of a notice to appear without the time or place of removal proceedings, followed by (2) service of a notice of hearing from the immigration court with the time and place of removal proceedings.[69] The BIA emphasized that the government achieved step one with the *Pereira* petitioner, but never step two, as the latter paperwork was never properly served nor received.[70] By contrast, the BIA reasoned that the respondent, German Bermudez-Cota, had indeed received both parts of a two-step notice; thus the court held there was no reason to terminate pursuant to *Pereira*.[71] To support its reading of *Pereira*, the BIA cited numerous pre-*Pereira* cases from U.S. Courts of Appeals, which supported the idea of a two-step notification.[72]

Once issued, the BIA's opinion in *Bermudez-Cota* became binding precedent for all immigration courts.[73] *Bermudez-Cota* thus stopped the judge-by-judge split over the jurisdictional implications of *Pereira* in immigration courts.

Notably, *Bermudez-Cota* did not change the outcome for cases the BIA deemed squarely within *Pereira*'s ambit[74]—cases involving the stop-time rule. Indeed, immigration judges continue to apply *Pereira* to cases with similar facts. As discussed above, *Pereira* involved a noncitizen who sought cancellation of removal, a form of relief from deportation.[75] The government determined Mr. Pereira had not lived in the United States long enough to be eligible for this form of relief,

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68. *Id.* at 444–45 (quoting 8 C.F.R. § 1003.14(a) (2018)).

69. *Id.* at 445–47.

70. *Id.* at 443.

71. *Id.* at 447.

72. *Id.* at 445–46 (citing Popa v. Holder, 571 F.3d 890 (9th Cir. 2009); Gomez-Palacios v. Holder, 560 F.3d 354 (5th Cir. 2009); Haider v. Gonalzes, 438 F.3d 902 (8th Cir. 2006); Dababneh v. Gonzales, 471 F.3d 806 (7th Cir. 2006)).

73. *14.4 Decisions of Administrative Appellate Bodies*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2281/0-0-0-2354.html [https://perma.cc/2PCN-4N37].

74. *See, e.g.*, *In re* J H A-V, [case number redacted] (B.I.A. Sept. 17, 2018) (remanding case to immigration judge to determine eligibility for cancellation of removal in light of *Pereira*) (on file with author).

75. Pereira v. Sessions, 138 S. Ct. 2105, 2109 (2018).

for Mr. Pereira's time in the United States was legally bounded by service of a proper notice to appear despite his lengthy continuing residence in this country thereafter.[76] This is the "stop-time" rule.[77] However, Mr. Pereira received a notice to appear without a time or date on it, and the Court concluded it was therefore only a putative NTA, not one that would trigger the stop-time rule.[78] Thus, Mr. Pereira's time in the United States continued to accrue after receipt of this non-NTA, making him potentially eligible for the relief he sought.[79] Currently, because of *Pereira*, immigration courts routinely grant motions to reopen filed by noncitizens who were initially found ineligible for cancellation of removal relief based on the failure to accrue sufficient time in the United States prior to receiving a notice to appear that did not include time and place information.[80] This being the case, noncitizens in a *Pereira*-type situation can get another chance at establishing their eligibility for relief from removal.

C. Federal District Courts

Federal district courts have also been faced with *Pereira* challenges. Federal district court litigation has arisen in a particular context: noncitizens indicted for reentering the United States after deportation.[81] These noncitizens have argued that their indictments should be dismissed on the basis of *Pereira*.

The argument made by these noncitizens centers on the fact that an essential element for a reentry-after-deportation conviction under 8 U.S.C. § 1326 is the existence of a valid deportation.[82] Defendants have been arguing, consistent with this Essay, that when their underlying removal was initiated on the basis of a charging document that was missing essential information—time and place—it was only a putative charging document, leaving the immigration court without jurisdiction over the underlying removal proceedings. Since the removal proceedings were conducted without jurisdiction, they

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76. *Id.*
77. *Id.*
78. *Id.* at 2113–14.
79. *Id.* at 2109.
80. Examples on file with author.
81. *See* 8 U.S.C. § 1326 (2012) (making it a crime to attempt to enter, enter, or be found in the United States subsequent to deportation).
82. *See* Kit Johnson, *A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes*, 92 DENV. U. L. REV. 863, 865–66 (2015).

were void, and could not be the basis for a § 1326 conviction. Several federal courts have agreed with this analysis.[83] Others have not.[84]

II. THE FUTURE OF *PEREIRA* LITIGATION

At the time of this writing, the respondent in *Bermudez-Cota* is appealing the BIA's decision to the U.S. Court of Appeals for the Ninth Circuit, though initial briefing has not yet commenced.[85] In addition, *Pereira*-related cases are pending in multiple other federal appellate courts, including the First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.[86] Currently, the only circuit courts of appeals to weigh in on *Pereira*'s jurisdictional effect have been

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83. *See, e.g.*, United States v. Cruz-Jimenez, No. A-17-CR-00063, 2018 WL 5779491, at *7–8 (W.D. Tex. Nov. 2, 2018); *see also* United States v. Pedroza-Rocha, No. EP:18-CR-1286-DB, Doc. No. 53, 2018 WL 6629649, at *5 (W.D. Tex. Sept. 21, 2018); United States v. Virgen-Ponce, 320 F. Supp. 3d 1164, 1166 (E.D. Wash. 2018); United States v. Armejo-Banda, No. 1:18-CR-308-RP, 2018 WL 6201964, at *6 (W.D. Tex. Nov. 28, 2018); United States v. Lopez-Urgel, No. 1:18-CR-310-RP, 2018 WL 5984845, at *5 (W.D. Tex. Nov. 14, 2018); United States v. Rodriguez-Rosa, No. 3:18-cr-00079-MMD, 2018 WL 6635286, at *3–4 (D. Nev. Dec. 11, 2018); United States v. Erazo-Diaz, No. CR-18-00331-001-TUC-RM (LAB), 2018 WL 6322168, at *3 (D. Ariz. Dec. 4, 2018); United States v. Soto-Mejia, No. 2:18-cr-00150-RFB-NJK, 2018 WL 6435882, at *2 (D. Nev. Dec. 7, 2018); United States v. Ortiz, No. 3:18-cr-00071-RWG, 2018 WL 6012390, at *1 (D.N.D. Nov. 7, 2018); United States v. Tzul, No. 4:18-CR-0521, 2018 WL 6613348, at *6 (S.D. Tex. Dec. 4, 2018); United States v. Leon-Gonzalez, No. EP-18-CR-2593-DB, 2018 WL 6629655, at *2 (W.D. Tex. Nov. 20, 2018); United States v. Vallardes, No. 1:17-cr-00156-SS (W.D. Tex. Oct. 30, 2018); United States v. Zapata-Cortinas, No. SA-18-CR-00343-OLG, 2018 WL 6061076, at *7 (W.D. Tex. Nov. 20, 2018). This analysis has also been the basis for at least one successful motion to withdraw a guilty plea. *See* United States v. Rojas Osorio, No. 17-CR-00507-LHK-1, 2018 WL 6069935, at *3 (N.D. Cal. Nov. 20, 2018).

84. *See, e.g.*, United States v. Romero-Caceres, No. 1:18-cr-354, 2018 WL 6059381, at *6–8 (E.D. Va. Nov. 19, 2018); United States v. Cortez, No. 6:18-cr-22, 2018 WL 6004689, at *3–4 (W.D. Va. Nov. 15, 2018); United States v. Romero-Colindres, No. 1:18-cr-00415, 2018 WL 5084877, at *2 (N.D. Ohio Oct. 18, 2018); United States v. Fernandez, No. 7:18-CR-11-BO-1, 2018 WL 4976804, at *1 (E.D.N.C. Oct. 15, 2018); United States v. Munoz-Alvarado, No. CR-18-171-C, 2018 WL 4762134, at *1 (W.D. Okla. Oct. 2, 2018); United States v. Hernandez-Ruiz, No. 1:17-CR-00226-ELR, 2018 U.S. Dist. LEXIS 195354, at *2–3 (N.D. Ga. Sept. 21, 2018); United States v. Ornelas-Dominguez, No. EDCR 18-00110-CJC, 2018 U.S. Dist. LEXIS 195582, at *11 (C.D. Cal. Aug. 10, 2018); Ramat v. Nielsen, 317 F. Supp. 3d 1111, 1117 (S.D. Cal. 2018).

85. *Matter of* Bermudez-Cota, 27 I. & N. Dec. 441 (B.I.A. 2018), *appeal docketed*, No. 18-72573 (9th Cir. Sept. 21, 2018).

86. List of pending litigation on file with author.

the Sixth Circuit, in the case of *Hernandez-Perez v. Whitaker*,[87] and the Ninth Circuit, in *Karingithi v. Whitaker*.[88]

What can we expect from this next round of federal litigation? Courts will almost certainly address the *Chevron*[89] doctrine as well as the merits of the BIA's analysis in *Bermudez-Cota*. New arguments may also arise. I provide analysis of these issues below.

A. Chevron

The first issue that courts must tackle in the pending *Pereira*-related litigation is whether the *Chevron* doctrine should apply to review of the BIA's decision in *Bermudez-Cota*. Articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[90] the doctrine requires that courts give deference to a federal agency's interpretation of an ambiguous statute that the agency is in charge of implementing so long as that interpretation is reasonable.[91] The Supreme Court has determined that the *Chevron* doctrine applies to BIA decisions regarding immigration law.[92]

The statute at issue in currently pending litigation has not changed since *Pereira*. It remains 8 U.S.C. § 1229(a)(1). And the same

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87. Hernandez-Perez v. Whitaker, 911 F.3d 305, 314–15 (2018) (concluding the lack of time and place information on an NTA does not deprive an immigration court of subject matter jurisdiction). Citing *Hernandez-Perez*, the Sixth Circuit recently rejected an appeal seeing to reopen an *in abstentia* removal order entered in a case initiated by an NTA lacking time and place information where the petitioner argued that the immigration court lacked jurisdiction given the NTA's deficiencies. Santos-Santos v. Barr, No. 18-3515, 2019 WL 961560 (6th Cir. Feb. 28, 2019).

88. Karingithi v. Whitaker, No. 16-70885, 2019 WL 333335, *3–4 (9th Cir. Jan. 28, 2019) (rejecting petitioner's argument that in light of *Pereira* the failure to include a date and time on the notice to appear deprives the immigration court of jurisdiction).

89. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

90. *Id.*

91. *Id.* at 2782 ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."); *see also* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 104 (2017) (describing the doctrine).

92. Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012) (deferring to the BIA's "reasonable construction" of the Immigration and Nationality Act "whether or not it is the only possible interpretation or even the one a court might think best"); see also Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 552 (2014) ("[T]he Court has made clear that decisions of the Board of Immigration Appeals (BIA) carry the force of law and are Chevron-eligible . . . .").

issues raised about § 1229(a)(1) in *Pereira* are at issue now, namely, the question of what must be included in a valid notice to appear. On this point, the Supreme Court in *Pereira* held that § 1229(a) provides a "clear and unambiguous answer" about what information is required on a valid notice to appear.[93] The clarity of that statutory language prompted the Court to note that it "need not resort to Chevron deference."[94] Given that the exact same statutory language is fundamentally at issue, it would be appropriate for federal courts to conclude that *Chevron* deference continues to be inapt.

Yet there is a wrinkle in current litigation. It is not solely about the statutory language of § 1229(a)(1). It is also about a federal regulation: 8 C.F.R. § 1003.14(a). This difference offers the government an argument for getting around the lack of *Chevron* deference in *Pereira*—by following the Supreme Court's decision in *Auer v. Robbins*.[95]

Auer involved a lawsuit by several St. Louis police sergeants who sought payment for overtime.[96] The city's board of police commissioners determined that the plaintiffs were not entitled to overtime because, under the relevant statute,[97] they were exempt from overtime provisions as "bona fide executive, administrative, or professional" employees.[98] A key issue in the case was whether the U.S. Secretary of Labor, bestowed with the power to "defin[e] and delimi[t]" this statutory exemption, acted reasonably by establishing, in regulations, a "salary-basis" test for determining an employee's exempt status.[99] In a unanimous opinion, the Court held that the regulation was "based on a permissible construction of the statute."[100] Moreover, the Court noted that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"[101]

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93. Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018).
94. *Id.*
95. Auer v. Robbins, 519 U.S. 452 (1997).
96. *Id.* at 455.
97. The Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 et seq.
98. Auer v. Robbins, 519 U.S. 452, 455 (1997).
99. *Id.* at 454.
100. *Id.* at 457 (citing *Chevron*).
101. *Id.* at 461. Notably, *Kisor v. Wilkie*, a case currently pending before the Supreme Court and set for oral argument on March 27, 2019, raises the issue of whether the Court should overrule *Auer*.

Much like the statutory authority conferred on the Secretary of Labor in *Auer*, Congress has given the U.S. Attorney General the statutory authority to "establish such regulations" as "necessary for carrying out" the powers set forth in the Immigration and Nationality Act.[102] There can be no debate that 8 C.F.R. § 1003.14(a) was promulgated pursuant to that authority. The question then becomes whether the BIA's interpretation of this regulation in *Bermudez-Cota* is "plainly erroneous." It is. Here's why.

In *Bermudez-Cota*, the BIA acknowledged that under 8 C.F.R. § 1003.14(a), "[j]urisdiction vests . . . before an Immigration Judge . . . when a *charging document* is filed with the Immigration Court."[103] The BIA argued, however, that "[t]he regulation 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."[104] As a result, the BIA determined that it would be reasonable to interpret "charging document" as two different documents, served sequentially on respondents: (1) a notice to appear without the time and place of removal proceedings, followed by (2) a notice of hearing from the immigration court with the time and place of removal proceedings.[105]

There is a critical problem with this analysis, however. *Bermudez-Cota* ignores 8 C.F.R. § 1003.13, which defines "charging document" as the "written instrument which initiates a proceeding before an Immigration Judge . . . a Notice to Appear."[106] And *Pereira*, as discussed, held that under 8 U.S.C. § 1229(a)(1), a notice to appear must include time and place information,[107] or else it is not a notice to appear at all.[108] Given the Court's holding on what is statutorily required of a notice to appear, and given the definition provided by 8 C.F.R. § 1003.13, it follows that a charging document for purposes of 8 C.F.R. § 1003.14(a) must also have time and place information. The BIA's contrary interpretation is plainly erroneous in light of the Supreme Court's analysis of 8 U.S.C. § 1229(a)(1), and it cannot merit

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102. 8 U.S.C. § 1103(g)(2) (2012).
103. *Matter of* Bermudez-Cota, 27 I. & N. Dec. 441, 444 (B.I.A. 2018).
104. *Id.* at 445.
105. *Id.* 445–47.
106. 8 C.F.R. § 1003.13 (2018). Prior to April 1, 1997, the "charging document" was an "Order to Show Cause." *See supra*, note 43. At present, however, the only charging document is the NTA. *See supra*, note 11.
107. Pereira v. Sessions, 138 S. Ct. 2105, 2110 (2018).
108. *Id.* at 2114–15.

deference given its inconsistency with the unambiguous definition of charging document set out in the regulation itself.[109]

At least two courts have reached a contrary conclusion: the Sixth Circuit[110] and the Eastern District of Virginia.[111] These courts found the BIA worthy of "substantial deference" in its "binding" interpretation of 8 C.F.R. § 1003.14(a) and, accordingly, upheld *Bermudez-Cota*.[112] In support of this deference, the courts emphasized two things: (1) the lack of any reference to 8 U.S.C. § 1229(a) in the regulation,[113] and (2) the lack of any reference to jurisdiction in the Immigration and Nationality Act.[114]

It is true that 8 C.F.R. § 1003.14(a) does not explicitly cross-reference 8 U.S.C. § 1229(a). In this way, the facts underlying *Bermudez-Cota* differ from the facts underlying *Pereira*. *Pereira* concerned 8 U.S.C. § 1229b(d)(1). In explaining when "continuous residence or continuous physical presence in the United States shall be deemed to end," § 1229b(d)(1) says that it ends "when the alien is served a notice to appear *under section 1229(a) of this title*."[115] In contrast to this language, 8 C.F.R. § 1003.14(a) merely states that "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." Other regulations define a "charging document"

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109. See Christensen v. Harris Cty., 529 U.S. 576, 588 (2000) (refusing to defer to an agency's interpretation of an unambiguous regulation and noting that deference in such circumstances "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation").

110. Hernandez-Perez v. Whitaker, 911 F.3d 305 (6th Cir. 2018).

111. United States v. Romero-Caceres, No. 1:18-cr-354, 2018 WL 6059381 (E.D. Va. Nov. 19, 2018).

112. *Hernandez-Perez*, 911 F.3d at 312 ("*Bermudez-Cota* is the Board's binding interpretation of regulations promulgated by the Department of Justice. . . . [W]e . . . afford 'substantial deference' to [the BIA's] 'interpretation of the INA and accompanying regulations.'"). Notably, the Sixth Circuit did not mention *Chevron* in this decision, but it cited *Shaya v. Holder*, 586 F.3d 401, 405 (6th Cir. 2009), in support of its conclusion to afford "substantial deference" to the BIA's analysis. *Hernandez-Perez*, 911 F.3d at 312. *Shaya*, in turn, cites *Chevron*. *Shaya*, 586 F.3d at 405 ("[W]e owe *Chevron*-type deference to BIA interpretations of its own empowering statutes and regulations . . . ."). In contrast, the district court in *Romero-Caceres* explicitly invoked *Chevron* in upholding *Bermudez-Cota*. *Romero-Caceres*, 2018 WL 6059381, at *8 ("[T]he BIA's decision in *Bermudez-Cota* is entitled to Chevron deference.").

113. *Hernandez-Perez*, 911 F.3d at 313; *Romero-Caceres*, 2018 WL 6059381, at *7.

114. *Hernandez-Perez*, 911 F.3d at 313; *Romero-Caceres*, 2018 WL 6059381, at *8.

115. 8 U.S.C. § 1229b(d)(1) (2012) (emphasis added).

as the "written instrument which initiates a proceeding before an Immigration Judge . . . a Notice to Appear."[116] Still other regulations offer guidance on the contents of a notice to appear,[117] without including the "time and place" specification found in the statute.[118] While none of these regulations include the phrase "under section 1229(a)" found in § 1229b(d)(1)(A), they cannot be understood apart from 8 U.S.C. § 1229(a) because the regulations concern notices to appear. And *Pereira* stated that § 1229(a) "speaks in definitional terms, requiring that a notice to appear specify, among other things, the 'time and place at which the proceedings will be held.'"[119]

In this way, *Bermudez-Cota* is distinguishable from *Auer*. *Auer* involved a regulation that was truly interpretative: It established a "salary-basis" test for interpreting the statutory exemption of "bona fide executive, administrative, or professional" employees from overtime.[120] Here, 8 C.F.R. § 1003.14(a) is not a regulation offering a reasonable interpretation of 8 U.S.C. § 1229(a). It is, instead, a regulation that *incorporates* the statutory requirements of 8 U.S.C. § 1229(a). This critical difference explains one way in which courts have gone wrong in affording deference to *Bermudez-Cota*.[121]

The second reason courts have afforded deference to *Bermudez-Cota* is because the INA itself does not address the jurisdiction of immigration courts.[122] As explained by the Sixth Circuit:

> [T]he INA provides that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien," 8 U.S.C. § 1229a(a)(1), and contains a section titled "Initiation of removal proceedings" that describes what information must be specified in an NTA, *id.* § 1229. The statutory text does not, however, explain when or how jurisdiction vests with the immigration judge—or, more specifically,

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116. 8 C.F.R. § 1003.13 (2018).
117. *Id.* § 1003.15.
118. 8 U.S.C. § 1229(a)(1)(G)(i) (2012).
119. Pereira v. Sessions, 138 S. Ct. 2105, 2108–09 (2018).
120. Auer v. Robbins, 519 U.S. 452, 455 (1997).
121. *Cf.* Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (holding that *Auer* deference is inappropriate when the regulation at issue is "a parroting regulation" that repeats or summarizes statutory phrases, for in such cases the question is "not the meaning of the regulation but the meaning of the statute").
122. Hernandez-Perez v. Whitaker, 911 F.3d 305, 313 (6th Cir. 2018); United States v. Romero-Caceres, No. 1:18-cr-354, 2018 WL 6059381, at *8 (E.D. Va. Nov. 19, 2018).

> denote which of the several requirements for NTAs listed in § 1229(a)(1) are jurisdictional.[123]

Given this statutory silence, the Sixth Circuit determined that the Attorney General had "discretion in fashioning a set of jurisdictional requirements."[124] And the court concluded that the BIA's determination that a two-step notification process satisfied those requirements is "not inconsistent with the text of the INA."[125]

This argument misses an important logical step. To be sure, the Attorney General had the statutory authority to promulgate a regulation regarding the jurisdiction of immigration courts.[126] Having promulgated a regulation that incorporates a statutory requirement, however, there is no room for interpreting that regulation in a manner inconsistent with the statute.[127] And *Bermudez-Cota*'s interpretation of 8 C.F.R. § 1003.14 is inconsistent with § 1229a(a)(1) since it endorses notices to appear that lack the statutorily-required time and place information.

In summary, *Bermudez-Cota* conflicts with the interpretation of 8 U.S.C. § 1229(a) laid out by the Supreme Court in *Pereira*. Although *Bermudez-Cota* centers primarily on a regulation, it is a regulation that incorporates the statute previously interpreted by the Supreme Court. Thus, because of the conflict between *Bermudez-Cota* and *Pereira*, the BIA's decision should neither be accorded *Chevron* nor *Auer* deference.[128] To the contrary, federal district and appeals courts are bound to follow the Supreme Court in *Pereira*.

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123. *Hernandez-Perez*, 911 F.3d at 313.

124. *Id.*

125. *Id.*

126. 8 U.S.C. § 1103(g)(2) (2012).

127. Justice Kennedy, in particular, might have found the Sixth Circuit's analysis concerning. In his concurrence in *Pereira*, Justice Kennedy specifically noted that deference to "an agency's interpretation of the statutory provisions that concern the scope of its own authority" is particularly "troubling." Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (citing Arlington v. FCC, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge . . . .")).

128. The foregoing analysis details the *Chevron* issues that are likely to arise in future federal court litigation at the district court or circuit court level. Should any of these cases find their way to the U.S. Supreme Court, two additional *Chevron* issues may come into play. First, the Supreme Court might revisit its prior conclusion that *Chevron* deference should be afforded to the Board of Immigration Appeals. *See, e.g.,* Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012). Justice Kennedy's concurrence in *Pereira* chided appellate courts for generally engaging in "cursory analysis" coupled with "reflexive deference" to the BIA. *Pereira*, 138 S. Ct.

B. The BIA's Analysis

In addition to assessing the applicability of *Chevron*, federal courts must also contend with the substance of the BIA's analysis in *Bermudez-Cota*, including its conclusions (1) that *Pereira* only informs analysis of the stop-time rule, (2) that the Supreme Court did not intend for *Pereira* to have jurisdictional effect, and (3) that the two-step workaround satisfies *Pereira*'s requirements about notice. I address these arguments in turn.

1. *Pereira*'s Narrowness

In *Bermudez-Cota*, the BIA emphasized that *Pereira* described itself as a "narrow" decision focused on the stop-time rule that determines how long a noncitizen has been physically present in the United States for purposes of a specific form of relief from deportation called cancellation of removal.[129] Therefore, the BIA determined that *Pereira* should not apply to cases like *Bermudez-Cota* that did not involve the stop-time rule.[130]

The BIA correctly noted that the Supreme Court limited the "dispositive question" in *Pereira* to whether a notice to appear lacking time and place information could trigger the stop-time rule.[131] And the

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at 2120 (Kennedy, J., concurring). If the Court as a whole is concerned about "reflexive deference" to the BIA, it might choose to overrule prior caselaw and to determine that *Chevron* is no longer applicable in the immigration context. *See*, *e.g.*, Family, *supra* note 91 (discussing the implications of eliminating *Chevron* in the immigration context). Second, the Supreme Court might revisit *Chevron* entirely. *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring) ("Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision.") (internal citations omitted); *see also* Heather Elliott, *Justice Gorsuch's Would-Be War on Chevron*, 21 GREEN BAG 2D 315 (2018) (discussing Justice Gorsuch's expressed desire to overturn *Chevron*). Scholars have called upon the Court to abandon the *Chevron* doctrine. *See*, *e.g.*, Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1 (2017); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010). A *Pereira* appeal might just present that opportunity.

129. *Matter of* Bermudez-Cota, 27 I. & N. Dec. 441, 442–43 (B.I.A. 2018).

130. *Id.*

131. *Pereira*, 138 S. Ct. at 2113 ("[T]he dispositive question in this case is much narrower, but no less vital: Does a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by § 1229(a)(1)(G)(i), trigger the stop-time rule?"); *see also id.* at 2110 ("The narrow question in this case lies at the intersection of those statutory provisions. If the

Supreme Court did characterize this question as "narrow."[132] To answer this question, however, the Court needed to understand the statutory requirements for all notices to appear because all noncitizens in removal proceedings receive the same document—a notice to appear.[133] This is true regardless of whether the noncitizen is seeking the specific form of affirmative relief from removal at issue in *Pereira*—cancellation of removal, eligibility for which turned on the stop-time rule—or indeed whether the noncitizen is seeking relief from removal at all.[134]

To figure out what must be included in a notice to appear, the Court started with the statute itself.[135] It held that the "statutory text alone is enough to resolve this case."[136] That statutory language, 8 U.S.C. § 1229(a), dictated that a notice to appear must include "[t]he time and place at which the [removal] proceedings will be held."[137] Without this information, a notice to appear would be merely "putative."[138]

The Court went on to consider the relationship between this statutory requirement and other nearby statutory provisions, including the opportunity to secure counsel.[139] For the latter provision to have "any meaning," the Court wrote, "the 'notice to appear' must specify the time and place that the noncitizen, and his counsel, must appear at the removal hearing."[140] That makes practical sense. It would be incredibly difficult for a respondent to hire counsel to represent their interests in immigration court at a time and place "to be determined."[141]

Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule?").

132. *Id.* at 2113.

133. *See* 8 U.S.C. § 1229(a) (2012); *Pereira*, 138 S. Ct. at 2110.

134. *See supra* notes 2–3 and accompanying text.

135. *Pereira*, 138 S. Ct. at 2114.

136. *Id.*

137. *Id.* (quoting 8 U.S.C. § 1229(a)(1)(G)(i)).

138. *Id.* at 2113–14.

139. *Id.* at 2114–15 (discussing the relationship between 8 U.S.C. § 1229(a)(1)(G)(i) and 8 U.S.C. § 1229(b)(1)).

140. *Id.*

141. Prior to *Pereira*, DHS issued notices to appear with times, dates, and places "to be determined" or "to be set." *Id.* at 2111–12.

Beyond its construction of the relevant statute and assessment of the language in light of surrounding provisions, the Court also employed "common sense" analysis:[142]

> If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, *i.e.*, the "time" and "place," that would enable them "to appear" at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings.[143]

All of these arguments—considering at the statutory language of 8 U.S.C. § 1229(a), looking at the surrounding statutes, and considering common sense—involved consideration of notices to appear generally. The factual context of *Pereira* may have been limited to the petitioner's stop-time argument, but the Court's analysis is and must be applicable outside of that limited context.

The applicability of *Pereira*'s NTA analysis to the analysis of NTAs for purposes of vesting jurisdiction in immigration courts is further made clear in *Pereira* when the Court rejected the government's argument that 8 U.S.C. § 1229(a) did not set forth a "definition" of an NTA and so should not be understood to require the inclusion of time and place information on the document.[144] The Court determined the statute included "quintessential definitional language" and went on to say: "Thus, when the term 'notice to appear' is used *elsewhere in the statutory section*, including as the trigger for the stop-time rule, it carries with it the substantive time-and-place criteria required by § 1229(a)."[145] This language is important because it indicates that *Pereira* is not limited to interpretation of the stop-time rule found at 8 U.S.C. § 1229b(d)(1)(A); it is relevant to the entire code including 8 U.S.C. § 1229(a). The language is also important because, although *Pereira*-related litigation involves interpretation of

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142. *Id.* at 2115.
143. *Id.*
144. *Id.* at 2116.
145. *Id.* (emphasis added); *see also* Lonny Hoffman, Pereira's Aftershocks 22 (n.d.) (work-in-progress) (on file with author) (highlighting this language as significant for the same reason).

a regulation, that regulation must be consistent with the statute.[146] A clear reading of the Supreme Court's decision therefore indicates that, despite the narrowness of the factual context of *Pereira*, the reasoning of the case applies to the jurisdictional requirements of 8 C.F.R. § 1003.14(a).

The above analysis dispenses with the argument that *Pereira* is nothing but a stop-time case. In the words of Dr. Seuss' character Horton, the Court might well tell future litigants: "I meant what I said, and I said what I meant."[147] What it meant is clear: "A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a).'"[148]

Still, what a valid notice to appear must include is a different question from whether initiating proceedings based on a putative notice to appear strips an immigrant court of subject matter jurisdiction.[149] This is the novel question that courts must now tackle. For the reasons outlined in the above Essay,[150] judges should conclude that, in fact, proceedings begun without a valid NTA are defective for lack of subject matter jurisdiction.[151]

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146. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In determining whether a challenged regulation is valid, a reviewing court must first determine if the regulation is consistent with the language of the statute.").

147. DR. SEUSS, HORTON HATCHES THE EGG (1940).

148. *Pereira*, 138 S. Ct. at 2110. The Court repeated this language. *Id.* at 2118 ("A document that fails to include such information is not a 'notice to appear under section 1229(a) . . . .'"); *see also id.* at 2116–17 ("Failing to specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character.'") (quoting *id.* at 2127 n.5) (alteration in original).

149. *See, e.g.*, United States v. Ramirez, No. 3:18-cr-00026, 2018 WL 6037540, at *1 (W.D. Va. Nov. 16, 2018) (noting the government's concession that the applicable NTA was "defective under § 1229(a)(1) and *Pereira*" but finding that the immigration court had subject matter jurisdiction over his deportation proceedings); *see also* Hoffman, *supra* note 145 ("[T]reating improper notice as relevant to the immigration court's subject matter jurisdiction over removal proceedings is wrongheaded thinking.").

150. *See supra* notes 7–13 and accompanying text; *see infra* Section II.C.2.

151. *See supra* notes 17–20 and accompanying text; *see also* Marco v. United States, No. 1:09–cv–761, 2010 WL 3992113, at *8 (S.D. Ohio Oct. 12, 2010) (concluding that 8 C.F.R. § 1003.14 "denotes subject-matter jurisdiction"); Alderete-Lopez v. Whitiker, No. CIV 18-1114 JB\SCY, 2018 WL 6338420, at *12 n.10 (D.N.M. Dec. 5, 2018) ("8 C.F.R. § 1003.14 and 8 C.F.R. § 1245.2 regulate the immigration court's, and other tribunals'—like the federal courts'—subject-matter jurisdiction.").

2. *Pereira*'s Conclusions About Jurisdiction

The BIA, however, does not believe that proceedings begun without a valid NTA are defective for lack of subject matter jurisdiction. In addition to arguing that *Pereira* is a narrow case, applicable only to the stop-time rule, the BIA draws support for its conclusion by arguing that the Supreme Court could not have intended for *Pereira* to have jurisdictional consequences given the Court's procedural resolution of the case: It was remanded for further proceedings.[152] If the Court had found a jurisdictional error, the BIA figured, it would have terminated all court proceedings or invalidated the underlying removal action.[153]

It is incorrect to draw jurisdictional lessons from the Court's procedural resolution of *Pereira* given that the case itself never mentions jurisdiction.[154] That is because the Supreme Court has previously held that it "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."[155]

We can tell that jurisdiction was not questioned in *Pereira* by referencing the briefs. In the initial round of briefs, jurisdiction was not mentioned other than a simple stipulation regarding the Supreme Court's jurisdiction over the appeal itself.[156] In the second round of

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152. *Matter of* Bermudez-Cota, 27 I. & N. Dec. 441, 443 (B.I.A. 2018).

153. *Id.*

154. The only use of the word "jurisdiction" is an incidental mention in Justice Kennedy's concurrence. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J. concurring). ("The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."); *see also* Hoffman, *supra* note 145 at 22 ("[B]ecause the question of jurisdiction under section 1003.14 was not raised by either party in *Pereira*, the Court's decision does not tell us anything about what the justices might have thought if the question had been raised.").

155. United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (citing Justice Marshall's opinion in United States v. More, 7 U.S. (3 Cranch) 159 (1805)).

156. *See* Brief for the Respondent in Opposition at 1, Pereira v. Sessions, 138 S. Ct. 2105 (2018) (No. 17–459), 2017 WL 6399165, at *1 ("The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)."); Brief for Petitioner at 1, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2018 WL 1083742, at *1 ("The jurisdiction of this Court rests on 28 U.S.C. § 1254(1)."); Brief for the Respondent at 1, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2018 WL 1557067, at *1. Jurisdiction is not mentioned at all in the petitioner's writ of certiorari or reply brief., Petition for Writ of Certiorari, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2017 WL 4326325; Reply Brief for Petitioner, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2017 WL 6524823. It is also not mentioned in amicus briefs filed by the American Immigration Lawyers Association, the Immigrant Defense Project, and the National Immigrant Justice Center. Brief for

briefs, the only additional reference to jurisdiction was a tangential one located in a single paragraph of the government's 53-page brief.[157] There was no further discussion of jurisdiction in the petitioner's reply brief.[158] Not only was the issue of jurisdiction not put before the Court in the briefs, the word "jurisdiction" was never uttered in the oral argument before the Supreme Court.[159]

The documentary record of *Pereira* at the Supreme Court confirms that jurisdiction was not questioned and was not an issue in that case. Therefore, the BIA was wrong to conclude that it could infer how the court would confront the jurisdictional issue raised in *Bermudez-Cota* from the court's silence on the issue in *Pereira*.

It is important to distinguish the BIA's rhetorical move in *Bermudez-Cota* from the argument advanced in this Essay and

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Amicus Curiae the American Immigration Lawyers Association in Support of Petitioner, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2017 WL 4918302; Brief for Amici Curiae the American Immigration Lawyers Association and the Immigrant Defense Project in Support of Petitioner, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2018 WL 1156646; Brief for the National Immigrant Justice Center as Amicus Curiae in Support of Petitioner, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2018 WL 1156644. Only the brief for amicus curiae Former BIA Chairman and Immigration Judge Paul Wickham Schmidt mentions the concept, and he does so only in passing. *See* Brief of Former BIA Chairman and Immigration Judge Paul Wickham Schmidt as Amicus Curiae in Support of Petitioner at 3, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2018 WL 1156645, at *3 ("In fact, under current regulations and procedures, the Immigration Court does not actually take jurisdiction over a removal case until the NTA is 'filed' with the Immigration Court by DHS and entered into the Immigration Court's computerized docket system—and that can take a while.").

157. Brief for the Respondent, *supra* note 156, at *30–31. The government asserted that it would be illogical to understand the stop-time rule as kicking in only when a noncitizen received an NTA with time and place information. *Id.* at *30. The government noted that "[t]he immigration court does not acquire jurisdiction until the notice to appear (or other 'charging document') is 'filed with the Immigration Court.'" *Id.* (quoting 8 C.F.R. § 1003.14(a) (2018)). Yet understanding § 1229(a) to require time and place information "would require [DHS] investigators to place hearing dates on all notices to appear whether [EOIR] was prepared to schedule them or not—an approach that might do more to confuse than inform immigrants about the process triggered by the notice." *Id.* (quoting Gonzalez-Garcia v. Holder, 770 F.3d 431, 434–35 (6th Cir. 2014)).

158. Reply Brief for Petitioner, *Pereira*, 138 S. Ct. 2105 (No. 17–459), 2018 WL 1792078.

159. Transcript of Oral Argument, *Pereira*, 138 S. Ct. 2105 (No. 17–459), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-459_1bn2.pdf [https://perma.cc/RHW9-LUZ7]; *see also* Richard H. Walker & David M. Levine, *The Limits of Central Bank's Textualist Approach—Attempts to Overdraw the Bank Prove Unsuccessful*, 26 HOFSTRA L. REV. 1, 35 n.205 (1997) (examining oral argument to discern the reasoning of a district court opinion).

Appendix. The BIA argued that the Supreme Court made a jurisdictional point with *Pereira*, albeit obliquely, through its procedural actions. As explained, the Supreme Court made no such point. At best, it passed on the issue of jurisdiction *sub silentio*. In contrast to the BIA, this Essay and Appendix do not argue that *Pereira* made any conclusion about jurisdiction. Rather, this Essay and Appendix argue that the holding of *Pereira*—that section 1229(a) requires the inclusion of time and place information on an NTA—has jurisdictional *implications*. That is because the regulation governing immigration court jurisdiction, 8 C.F.R. § 1003.14, encompasses the statute at issue in *Pereira*: 8 U.S.C. § 1229(a). And so, *Pereira*'s twin conclusions that (i) § 1229(a) requires a valid NTA to include time and place information and (ii) a document without this information is not an NTA, in turn, have jurisdictional implications, for immigration courts only have jurisdiction over cases begun with a valid NTA.

3. Two-Step Notice

The final *Bermudez-Cota* argument that federal courts will have to tackle is the question of whether the government's two-step notification process satisfies *Pereira*'s requirements.[160] The BIA has held that it is entirely proper for the government to issue an NTA with "to be determined" as the only information regarding the time and place of the noncitizen's removal hearing so long as that NTA is followed up with a "notice of hearing" that contains the relevant information.[161]

The BIA's reasoning is inconsistent with the analysis of *Pereira*. *Pereira* dictated what information needs to be in an NTA in order to make it valid as opposed to putative: details about when and where to appear for a removal hearing.[162] The Supreme Court acknowledged that, once set, the time and place of a removal hearing can be changed by a subsequent notice.[163] That is, however, an entirely

160. *Matter of* Bermudez-Cota, 27 I. & N. Dec. 441, 445–47 (B.I.A. 2018).

161. *Id.*

162. *Pereira*, 138 S. Ct. at 2110. The Court repeated this point. *Id.* at 2118 ("A document that fails to include such information is not a 'notice to appear under section 1229(a)' . . . ."); *see also id.* at 2116 ("Failing to specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character.'") (quoting id. at 2127 n.5) (alteration in original).

163. *Id.* at 2119 ("§ 1229(a)(2) expressly vests the Government with power to change the time or place of a noncitizen's removal proceedings . . . . Nothing in our decision today inhibits the Government's ability to exercise that statutory authority

different proposition from authorizing the BIA's "two-step notice process," which would begin with an NTA lacking any of the statutorily required information.[164]

The facts of *Pereira* did not lend themselves to consideration of the BIA's two-step process. The respondent received an initial NTA but never a notice of hearing.[165] Still, the government raised, albeit obliquely, this issue in its second response brief.[166] The government condemned the "illogic" of having DHS supply an "aspirational future hearing date on the notice to appear to be replaced later by the immigration court once it determines the actual hearing date—but not permit[ing] DHS to inform the alien transparently (as it did here) that the hearing date is still 'to be set.'"[167] Despite this argument, the Supreme Court did in fact conclude that DHS must include time and place information on any notice to appear.[168]

In addition to conflicting with the clear and straightforward language of *Pereira* itself, the BIA erred by finding support for its two-step process in cases that have been abrogated by *Pereira*.[169] Each of the four circuit court cases cited in *Bermudez-Cota* are referenced in and consistent with the BIA's decision in *Matter of Camarillo*,[170] which was the decision overruled by *Pereira*.[171] *Camarillo* concerned a respondent who was served with an NTA that did not contain time and place information, but who later received a notice of hearing that did contain this information.[172] The central issue in *Camarillo* was whether the initial NTA without time and place information stopped

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after it has served a notice to appear specifying the time and place of the removal proceedings.") (emphasis added).

164. *Bermudez-Cota*, 27 I. & N. Dec. at 447.

165. *Pereira*, 138 S. Ct. at 2107.

166. Brief for the Respondent, *supra* note 156, at *30–31; *see supra* notes 156–157 and accompanying text.

167. Brief for the Respondent, *supra* note 156, at *30–31.

168. *Pereira*, 138 S. Ct. at 2110.

169. *See supra* note 72 and accompanying text; *see also* United States v. Zapata-Cortinas, No. SA-18-CR-00343-OLG, 2018 WL 6061076, at *6 n.6 (W.D. Tex. Nov. 20, 2018) ("[T]he BIA's opinion relies on a line of case law that seemingly is no longer applicable (at least with respect to the validity of a deficient NTA as a charging document) following *Pereira*.").

170. 25 I. & N. Dec. 644, 648 (B.I.A. 2011).

171. *Pereira*, 138 S. Ct. at 2113 (noting the Court granted certiorari in *Pereira* to resolve a circuit split over *Camarillo*).

172. *Camarillo*, 25 I. & N. Dec. 644–45.

time for purposes of cancellation of removal.[173] The BIA concluded that it did.[174] The Supreme Court rejected this holding in *Pereira*.[175]

Critically, immigration courts are courts of limited subject matter jurisdiction.[176] They have been empowered by Congress to conduct removal hearings,[177] which require a notice to appear specifying the time and place of the proceedings.[178] As the Attorney General has explained, it is this notice to appear that confers jurisdiction on the immigration court and begins the removal hearing.[179] The connection between the NTA and subject matter jurisdiction is not a technical one, open to the technical two-step solution the BIA advocates.[180] Strict adherence to the subject matter jurisdiction granted by Congress is necessary to maintain the constitutionally mandated separation of powers.[181] For federal agencies can only exercise those powers lawfully delegated to them by

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173. *Id.* at 651.

174. *Id.*

175. *Pereira*, 138 S. Ct. at 2112; *id.* at 2120 (Kennedy, J., concurring).

176. Ashley v. Ridge, 288 F. Supp. 2d 662, 667 (D.N.J. 2003) ("The Immigration Court and Board of Immigration Appeals are courts of limited jurisdiction . . . ."); Andric v. Crawford, No. CV06-0002-PHX-SRB, 2006 WL 1544184, at *3 (D. Ariz. May 31, 2006) ("Immigration Courts have limited jurisdiction.") (citing 8 C.F.R. § 1003.14(a)).

177. 8 U.S.C. § 1229a(a)(1) (2012).

178. *Id.* § 1229(a)(1)(G)(i) ("[W]ritten notice (in this section referred to as 'notice to appear') *shall* be given . . . specifying the following . . . The time and place at which the proceedings will be held.") (emphasis added).

179. 8 C.F.R. § 1003.13 (2018); see also McHenry Memo at 1 ("Jurisdiction with the court does not vest until the NTA is filed."); id. ("although the DHS may serve the NTA to an individual with a time and date for a hearing on it, the immigration court does not actually acquire jurisdiction—and, thus, the case is not actually 'scheduled' and no record of proceedings exists—until the DHS files the NTA with the court.").

180. *Cf.* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3522 (3d ed. 2008) (describing a federal court's subject matter jurisdiction as "no mere technical violation" nor a "simple question of procedural regulation of practice," rather, "nothing less than an unconstitutional usurpation of state judicial power").

181. *See, e.g.*, Daniel Manry, *Agency Exercise of Legislative Power and ALJ Veto Authority*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 421, 422 (2008) ("Separation of powers problems occur . . . when agency action, undertaken through either rulemaking or adjudication of individual cases, arrogates legislative power by enlarging or modifying adequate standards that Congress or the legislature provides in the terms of the enabling statute."); *cf.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (describing subject matter jurisdiction as springing "from the nature and limits of the judicial power of the United States" and "inflexible and without exception") (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)).

Congress.[182] When an agency exceeds its delegated powers, its actions must be invalidated.[183] With *Bermudez-Cota*, the BIA purports to authorize immigration courts to act beyond their Congressional mandate by initiating removal proceedings with an NTA that does not comply with the operative statute.

Another problem with the BIA's two-step process is that it would create a system wherein the exact same document—an NTA—must include specific information in one context (to "stop-time" for purposes of eligibility for cancellation of removal) but not in another context (initiating removal proceedings). Section 1229(a) spells out the notice that "shall be given" to noncitizens and the information it must specify.[184] The statute does not carve out different requirements for different circumstances.

Interestingly, even as the Sixth Circuit disagreed with the analysis of *Pereira* in this Essay and Appendix, the court acknowledged a "common-sense discomfort in adopting the position that a single document labeled 'Notice to Appear' must comply with a certain set of requirements for some purposes, like triggering the stop-time rule, but with a different set of requirements for others, like vesting jurisdiction with the immigration court."[185] Despite the court's "discomfort" with *Bermudez-Cota*, however, the Sixth Circuit ultimately upheld the decision in large part because of the "broad implications" of concluding that an NTA must always contain time and place information.[186]

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182. KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 45 (2014) ("Agencies only have the powers given them by statute."); City of Arlington v. FCC, 569 U.S. 290, 301 (2013) (setting aside the issue of whether "an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional'" in favor of asking "whether the statutory text forecloses the agency's assertion of authority, or not."); *cf.* Bowles v. Russell, 551 U.S. 205, 216 (2007) (holding federal district court violated the "mandatory and jurisdictional" statutory limitations on the timing of appeals set by Congress).

183. WERHAN, *supra* note 182 at 45 ("If [agencies] exceed those powers [given them by statute], courts invalidate their actions upon judicial review.").

184. 8 U.S.C. § 1229(a)(1) (2012).

185. Hernandez-Perez v. Whitaker, 911 F.3d 305, 314 (6th Cir. 2018) (noting this problem, but finding it unpersuasive); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 170–73 (2012) (identifying the following canon of interpretation: "A word or phrase is presumed to bear the same meaning throughout a text. . . ."); *see also id.* at 322 ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction.").

186. *Hernandez-Perez*, 911 F.3d at 314–15.

Specifically, the Sixth Circuit was concerned about the government's historic practice of failing to include such information on NTAs.[187]

In some ways, *Pereira*'s implications are indeed broad. There are more than 800,000 removal cases currently pending in the United States.[188] Assuming none of those cases were initiated with a valid notice to appear,[189] all should be terminated for lack of jurisdiction.[190]

At the same time, it would be administratively easy for DHS to restart all 800,000 of those dismissed removals. As mentioned, the NTA is a standardized form.[191] The fill-in-the-blanks information on the form—including the respondent's name, address, and why they are subject to removal—can be copied from the initial NTA onto a new, *Pereira*-compliant NTA.[192] The only difference will be the inclusion of time and place information. As it turns out, there is a computer system that would make it easy for DHS to include this information on new NTAs.[193]

This is not to dismiss out of hand the difficulties inherent in issuing 800,000 new NTAs. Certainly, it would require time and effort. But paperwork is already a significant component of law enforcement work.[194] And, as far as paperwork goes, copying an old NTA to create a new NTA is not unduly burdensome.

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187. *Id.* at 314.

188. *See Immigration Court Backlog Tool*, *supra* note 26 and accompanying text.

189. *See Hernandez-Perez*, 911 F.3d at 314 ("According to the Government, 'almost 100 percent' of NTAs issued during the three years preceding *Pereira* did not include the time and date of the proceeding.").

190. *See supra* notes 26–27 and accompanying text.

191. *See supra* note 44 and accompanying text.

192. Of course, a noncitizen's address may have changed during the course of the pending removal hearing. But noncitizens are admonished on the NTA itself to "notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding." T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES: SELECTED STATUTES, REGULATIONS AND FORMS 1011 (2016 ed.) (providing a copy of an NTA). Noncitizens are also statutorily required to "notify the Attorney General in writing of each change of address and new address within ten days from the date of such change . . . ." 8 U.S.C. § 1305(a) (2012).

193. See *infra* Section II.C.1.

194. *See, e.g.*, NUANCE COMMC'NS, INC., 2018 ROLE OF TECHNOLOGY IN LAW ENFORCEMENT PAPERWORK ANNUAL REPORT 2 (2018), https://www.nuance.com/content/dam/nuance/en_us/collateral/dragon/brief/bf-dragon-role-of-tech-in-police-paperwork-report-en-us1.pdf [https://perma.cc/B6RW-YAZP] (noting law enforcement personnel spend over 50% of an average shift on paperwork); Paul F. Kendall & Anne E. Gardner, *Legislation: A New Design for Justice Integration*, 30 MCGEORGE L. REV. 9, 14 n.36 (1998) (citing Ray Dussault, *L.A. Cops Get Wired*,

Moreover, indulging the government's desire to avoid additional paperwork seems unwarranted in a case, such as this, where the problem is one of the government's own making. As the Court explained in *Pereira*, Congress provided "clear and unambiguous" direction as to what should be included in a valid notice to appear.[195] The government should face the consequences, which are not terribly harsh, of failing to abide by that clear direction.

Pereira itself teaches that the Sixth Circuit erred in allowing the "broad implications" of the Supreme Court's decision to lead the court to approve of the two-step process in *Bermudez-Cota*. The government raised "a number of practical concerns" in *Pereira*.[196] None moved the Court, which held, "These practical considerations are meritless and do not justify departing from the statute's clear text."[197]

The plain text of the statute dictates the same outcome here. An NTA must include time and place information for jurisdiction to vest in the immigration court. A valid NTA cannot, contrary to *Bermudez-Cota*, provide that the removal hearing will be held at a time and place "to be determined."

C. New Arguments

Beyond *Chevron* and *Bermudez-Cota*, federal courts may end up addressing new arguments, including challenges to the legitimacy of the government's practice of including fake dates on NTAs and the jurisdictional implications of 8 C.F.R. § 1003.14(a). In this section, I provide my analysis of these issues.

GOV'T TECH., Dec. 1997, at 40) ("[I]n Los Angeles, until two years ago, over 4 million incident reports were filed by hand each year, keeping officers off the streets . . . ."); *id.* (citing Blake Harris, *Goin' Mobile*, GOV'T TECH., Aug. 1997, at 1, 42) ("[W]hile the Lakewood, Colorado police have been described as one of the best urban forces in the country, the communication manager for the department acknowledges that one-half an officer's time is spent printing reports by hand.").

195. Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018) (citing 8 U.S.C. § 1229(a)).

196. *Id.* at 2118.

197. *Id.*; *see also* SCALIA & GARNER, *supra* note 185, at 352–53 (arguing that it is not the role of the judiciary to concern itself with the consequences of statutory interpretation) ("When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy.") (citation omitted).

1. The Fake Date Problem

In his dissent from *Pereira*, Justice Alito anticipated that the government might resort to putting fake dates on NTAs.[198] He noted that the Department of Homeland Security is the agency responsible for issuing NTAs,[199] yet those responsible for conducting the removal hearing itself, the immigration courts, are part of the Department of Justice.[200] "The Department of Homeland Security cannot dictate the scheduling of a matter on the docket of the Immigration Court, and at present, the Department of Homeland Security generally cannot even access the Immigration Court's calendar," Justice Alito wrote.[201] As a result, Justice Alito predicted that DHS might resort to issuing NTAs with time and place information that is only "a rough estimate subject to considerable change."[202] Such a practice, Justice Alito concluded, is

> likely to mislead many recipients and to prejudice those who make preparations on the assumption that the initial date is firm. And it forces the Government to go through the pointless exercise of first including a date that it knows may very well be altered and then changing it once the real date becomes clear. Such a system serves nobody's interests.[203]

The Court found Justice Alito's assumption that DHS would be "utterly incapable of specifying an accurate date and time" to be "unsupported" given the government's concession that "a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases."[204] The Court wrote: "Given today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear."[205]

In point of fact, there is no technological barrier to the intra-agency communication necessary for accurate NTAs. The Department

198. *Pereira*, 138 S. Ct. at 2124–25 (Alito, J., dissenting).
199. *See id.* at 2124–25 (characterizing *Pereira*'s "real-world effects" as "arbitrary dates and ties that are likely to confuse and confound all who receive them").
200. *Id.* at 2124.
201. *Id.* at 2124–25.
202. *Id.* at 2125.
203. *Id.*
204. *Id.* at 2119.
205. *Id.*

of Justice maintains an Interactive Scheduling System (ISS).[206] This is the system to which DHS previously had access.[207] Yet DHS was not immediately given access to ISS after *Pereira*.[208] The question is why not. One possibility is that the DOJ withheld access, at least in part, so that immigration judges could meet new performance metrics rolled out by the DOJ.

Here are the facts that support that possibility.

We know that Chief Clerk of the Immigration Court Mark Pasierb flagged the relationship between ISS and *Pereira* early, writing in an e-mail to the judges in the Office of the Chief Immigration Judge (OCIJ) on June 22, 2018: "A major issue is do we turn on ISS ASAP."[209] Hours later, Deputy Chief Immigration Judge Print Maggard wrote that "at this time we are not turning on ISS."[210] Thus, the OCIJ decided not to share the ISS database with DHS.[211]

Days later, a meeting was scheduled by to discuss "Pereira/scheduling."[212] Principal Deputy Chief Immigration Judge Christopher A. Santoro gave a "heads-up" in advance of the meeting that, in the wake of *Pereira*, "it looks like we're going to . . . turn ISS back on."[213] Judge Santoro indicated that the meeting would concern "how we want to accomplish that."[214]

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206. Hoppock, *supra* note 37.

207. *Id.*

208. It took as much as six months to get DHS access to ISS. *See* McHenry Memo, *supra* note 38 (noting, in memo dated six months to the day following *Pereira*, that "all three DHS components authorized to issue NTAs now have access to ISS").

209. E-mail from Mark Pasierb, Chief Clerk to the Immigration Court, to Rico Bartolomei, Jr, Assistant Chief Immigration Jude, et al. (June 22, 2018, 12:34 PM), https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf#page=6 [https://perma.cc/L9W6-PTVV], *cited in* Hoppock, *supra* note 37.

210. E-mail from Print Maggard, Deputy Chief Immigration Judge, to Rene Cervantes et al. (June 22, 2018, 7:46:00 PM), https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf#page=1 [https://perma.cc/J4H5-AA8W], *cited in* Hoppock, *supra* note 37.

211. *Id.*

212. E-mail from Christopher Santoro, Principal Deputy Chief Immigration Judge, to Print Maggard & Mary Beth Keller (June 25, 2018, 10:34 PM), https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf#page=6) [https://perma.cc/J4H5-AA8W], *cited in* Hoppock, *supra* note 37.

213. *Id.*

214. *Id.*

Judge Santoro's e-mail also flagged a separate issue: recently issued performance metrics governing immigration judges.[215] These performance metrics, which came into effect October 1, 2018, expect immigration judges to complete seven hundred cases a year.[216] In addition, immigration judges are to be evaluated on how "timely, efficient, and effective" they are in meeting this goal.[217]

In his e-mail, Judge Santoro explained the relationship between these performance metrics and *Pereira*-compliant NTAs:

> [W]e were also told that, consistent with the benchmarks that went out with the new court performance measures, we need to get detained NTAs their first [master calendar hearing] within 10 days of filing and non-detained NTAs their first [master calendar hearing] within 90 days of filing. We also cannot be "full"—in other words, if DHS wants to file an NTA, there must be a slot for them to schedule it within 10/90 days.[218]

Judge Maggard responded to Judge Santoro's e-mail with a question: "Do we know if the system will let us continue to fill a slot or will it block additional NTAs as being full?"[219] Chief Clerk Mark Pasierb answered, "if a session is full, DHS cannot schedule into it."[220]

We know these facts. We also know that the DOJ did not give DHS access to ISS until late in 2018 and, even then, only for scheduling non-detained cases.[221] What insight can we draw from this internal

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215. *Id.*; *see EOIR Performance Plan: Adjudicative Employees*, CNN, https://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf [https://perma.cc/VB5T-HDNG].

216. *EOIR Performance Plan: Adjudicative Employees*, *supra* note 215 at 2.

217. *Id.* at 1.

218. E-mail from Christopher Santoro, Principal Deputy Chief Immigration Judge, to Print Maggard & Mary Beth Keller, *supra* note 212.

219. E-mail from Print Maggard to Christopher Santoro et al. (June 25, 2018, 11:11 AM), https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf#page=6 [https://perma.cc/J4H5-AA8W], *cited in* Hoppock, *supra* note 37.

220. E-mail from Mark Pasierb, Chief Clerk to the Immigration Court, to Print Maggard (June 25, 2018, 11:44:18 AM), https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf#page=6 [https://perma.cc/J4H5-AA8W], *cited in* Hoppock, *supra* note 37.

221. McHenry Memo, *supra* note 38 at 2 ("All three DHS components authorized to issue NTAs have now been granted access to ISS"); *id.* at 1 n.1 (explaining the "operational logistics" relating to "fluctuations in the detained

exchange at the COIJ level about *why* the DOJ decided not to give DHS access to ISS right away?

Immigration lawyer Matthew Hoppock has opined that the answer lies in the fact that giving DHS access to ISS will keep immigration judges, DOJ employees, from being able to satisfy recently issued performance criteria.[222] This explanation seems more than plausible. It is clear that when DHS has access to ISS, then every time the agency encounters a noncitizen subject to removal, it will issue an NTA and populate that NTA with data from ISS. That has the effect of signing up a particular noncitizen for a particular slot of time before an immigration judge.[223] That slot is then "full." And the hearing for the next potentially-removable noncitizen receiving an NTA will be set a little further into the future. The performance-metric meltdown results from the fact that immigration judges are judged on the basis of how quickly they are able to meet with noncitizens in removal proceedings and dispose of their cases, with the clock starting with the filing of the NTA. So when DHS writes up an NTA with some far-in-the-future hearing date—which it will necessarily have to do as slots fill-up in ISS—every immigration judge will already fail the performance metric for a given case as soon as the case is filed.[224]

The need for accurate time and place information on NTAs is far from academic or simply a matter of performance metrics. A noncitizen who fails to appear for a scheduled hearing is subject to removal *in absentia*.[225] The consequences are laid out on the NTA itself, which notifies respondents: "If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS."[226]

Given the severe penalty for failure to appear, noncitizens will continue to flock to courthouses *en masse* for false hearing dates. This practice is wasteful. It calls upon noncitizens to arrange for potentially lengthy and expensive transportation to court, to take time off from

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population" make it difficult to use ISS for scheduling these cases such that EOIR provides dates to DHS directly for detained cases).

222. Hoppock, *supra* note 37.

223. McHenry Memo, *supra* note 38 at 2 n.2 ("ISS allows DHS to control scheduling on EOIR's docukets and to determine which cases are scheduled for particular dates and times.").

224. *Id.*

225. 8 U.S.C. § 1229a(b)(5)(A) (2012).

226. See ALEINIKOFF ET AL., *supra* note 192, at 1011.

other activities (such as work or childcare) to attend court, and to pay for the unnecessary presence of private counsel.[227]

There are two reasons why the fake date practice may be more than just wasteful, it may be unconstitutional. The first is what one might term a "per se" violation of due process. In *Accardi v. Shaughnessy,* the Supreme Court held that if an agency violates its own regulations, it violates due process.[228] The second rationale, which requires more elaboration, comes from the Court's series of cases developing the concept of procedural due process.

As to the per se violation: An NTA with dummy dates is equivalent to the putative NTA discussed in *Pereira*. It is not an NTA at all. And, as discussed previously, jurisdiction in immigration courts does not vest without the issuance of a valid NTA. Any immigration court that proceeds without a valid NTA and in violation of the agency's own regulations is violating the noncitizen's due process rights. *Accardi v. Shaunghnessy* requires this result: an agency violates due process when it fails to follow its own regulations.[229]

The rationale from procedural due process caselaw flows from the fact that noncitizens in the United States enjoy the protections of the U.S. Constitution, including due process rights.[230] Due process is particularly important in connection with removal proceedings.[231] The Supreme Court has determined that noncitizens are entitled to "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection."[232] Not only that, "[t]he notice must be of such nature as reasonably to convey the required information."[233]

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227. Tziperman Lotan, *supra* note 47; Shoichet, *supra* note 47.

228. 347 U.S. 260, 268 (1954).

229. *Id.*

230. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

231. Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

232. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). While courts have spilled much ink on the question of what notice is "reasonably" calculated, the cases frequently confront the issues of mailed versus personal service, notice by publication, and service after a change of address. *See, e.g.*, Caplash v. Johnson, 230 F. Supp. 3d 128, 139–44 (2017) (discussing such cases and finding notice unreasonable under facts of the case).

233. *Mullan*e, 339 U.S. at 314. *Compare id. with* Moreland Properties, LLC v. City of Thornton, 559 F. Supp. 2d 1133, 1159 (D. Colo. 2008) (finding a notice

In assessing whether an NTA with a fake or dummy date complies with constitutional mandates, courts should consider, as the Court has directed with regard to procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[234]

Let us take each of these in turn.

First, the private interest at issue in removal cases is very significant, because it is the ability of the noncitizen to remain in the United States. This interest has previously been described by the Court as "weighty."[235]

Second, the practice of putting fake dates on NTAs risks erroneous deprivation of this interest. There are multiple reasons why. For one, if noncitizens show up to court only to be turned away and told that their NTA contained fake information, they may conclude that there is no reason to show up to the next-noticed date.[236] Alternatively, noncitizens may see the news stories about fake-date hearings, conclude that the information on their own NTA is false, and thus fail

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that stated the city council was considering "[a]n Ordinance adding a new Section to the [Code] to create an overlay zone for the [NW Subarea] Plan" did not reasonably convey to plaintiffs that the ordinance "might deprive it of its protected property interest in the zoning classification of its land") (alterations in original); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 919 (9th Cir. 1995) (stating that mailing a letter addressed to the Hopi chairman to the Navajo Nation in an envelope addressed to the Navajo chairman violated the constitutional entitlement to "notice . . . of such nature as reasonably to convey the required information" given that it "raised the unfortunate prospect that the recipient would misapprehend the letter's import, mistakenly assume the letter was misaddressed or otherwise fail to be meaningfully informed by it in a timely manner") (quoting *Mullane*, 339 U.S. at 314).

234. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

235. Landon v. Palsencia, 459 U.S. 21, 34 (1982) (describing the right of a lawful permanent residents or green-card holders to remain in the United States as a "weighty" interest under *Mathews v. Eldridge*).

236. *See* Tziperman Lotan, *supra* note 47 ("People who receive notices to appear can call the court's hotline, 1-800-898-7180, to get an automated system with information about their hearings, but not everyone does.").

to show up to a properly noticed hearing. Moreover, noncitizens who have a scheduled hearing at the same time as one of the "dummy dates" may be caught up in the "[l]ines snaked around the block outside immigration courts," rendering them late or absent from their own hearings.[237] In any case, when noncitizens fail to show up for their hearings, they are subject to deportation based on their failure to appear.[238]

Finally, granting DHS access to ISS is a simple and practical solution to the potentially erroneous deprivation of a noncitizen's interest in remaining in the United States that can result from utilization of dummy dates on NTAs.[239] Intra-agency access to ISS alleviates these risks without fiscal or administrative burden.[240]

2. When Jurisdiction Doesn't Mean Jurisdiction

The final new argument that courts may end up tackling in *Pereira*-related litigation has been advanced by Professor Lonny Hoffman.[241] Professor Hoffman contends that the sole limitation on the subject matter jurisdiction of immigration courts is found in 8 U.S.C. § 1229a(a)(1), which states that immigration judges "shall conduct proceedings for deciding the inadmissibility or deportability of an alien."[242] While 8 C.F.R. § 1003.14(a) talks about the vesting of "jurisdiction," Professor Hoffman argues that it does not delimit subject matter jurisdiction.[243] Even if the agency intended that 8 C.F.R. § 1003.14(a) would divest immigration judges of jurisdiction in the absence of a proper NTA, Professor Hoffman argues, that would be impossible in the absence of congressional authority to curtail subject matter jurisdiction, and there has been no such congressional grant of authority.[244]

The problem with Professor Hoffman's argument lies in the statutory provisions at issue. Section 1229 sets forth the criteria for "[i]nitiation of removal proceedings."[245] This includes details about the "notice to appear" and its requirement to include "[t]he time and place

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237. Shoichet, *supra* note 47.
238. *See supra* note 225 and accompanying text.
239. *See supra* notes 205–209, and accompanying text.
240. *Id.*
241. Hoffman, *supra* note 145.
242. 8 U.S.C. § 1229a(a)(1) (2012), *quoted in* Hoffman, *supra* note 145, at 25.
243. Hoffman, *supra* note 145, at 24.
244. *Id.* at 26.
245. 8 U.S.C. § 1229 (2012); see also SCALIA & GARNER, *supra* note 185, at 221 ("The title and headings are permissible indicators of meaning.").

at which the proceedings will be held."[246] It is the *next* statutory provision, Section 1229a, that Professor Hoffman focuses on. Section 1229a concerns "Removal Proceedings,"[247] discussing the nature of the proceedings as well as the conduct at such proceedings.[248]

As a matter of logic, the initiation of proceedings must come first. Once begun, one can discuss the nature and conduct of the proceedings. This is how Congress organized the code, therefore, 8 U.S.C. § 1229(a) is most reasonably understood to be jurisdictional.[249]

Given that initiation of proceedings comes first, we must then consider how proceedings are properly initiated. Remember that the Executive Office of Immigration Review (EOIR), which encompasses immigration courts, is part of the Department of Justice,[250] and it is "subject to the direction and regulation of the Attorney General,"[251] including regulations promulgated by the Attorney General.[252] As discussed previously, current Attorney-General-issued regulations provide that "[j]urisdiction vests . . . when a charging document is filed with the Immigration Court."[253] Regulations further define "charging document" to be the notice to appear.[254]

With *Pereira*'s clear statement that a document is not a notice to appear if it does not have a time and place on it,[255] then such a paper cannot be a charging document. Therefore, a case begun pursuant to a document that is not a notice to appear and is not a charging document, was never, in fact, properly initiated. Jurisdiction never vested in the immigration court. As a result, removal proceedings conducted in such cases would be in contravention of 8 U.S.C. § 1229(a) and would be *ultra vires*.[256]

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246. 8 U.S.C. § 1229(a)(1)(G)(i).
247. *Id.* § 1229(a).
248. *Id.* § 1229a(a)–(b).
249. *See* SCALIA & GARNER, *supra* note 185, at 167 ("Context is the primary determinant of meaning.").
250. *See supra* note 7 and accompanying text.
251. *See supra* note 8 and accompanying text.
252. *See supra* note 9 and accompanying text.
253. *See supra* note 10 and accompanying text.
254. *See supra* note 11 and accompanying text.
255. Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018).
256. *See supra* note 14 and accompanying text.

CONCLUSION

Pereira is a straightforward case. When Congress specified what need to be included in a notice to appear, it listed among that criteria "[t]he time and place at which the [removal] proceedings will be held."[257]

This Appendix, and the foregoing Essay, lay out the equally straightforward consequences of *Pereira*. Given that jurisdiction vests in immigration courts only when a valid NTA is filed, immigration courts do not have jurisdiction over cases initiated by a non-compliant NTA. To follow the BIA's conclusions to the contrary would require courts to find that a "notice to appear" has one set of requirements in one circumstance (cancellation of removal) and another set of requirements in other circumstances (removal generally). The statute leaves no room for such an interpretation. Neither does *Pereira*.

It is true that the implications of *Pereira* are broad and growing. In the months following publication of the above Essay, the backlog of immigration cases has grown from 700,000 to over 800,000.[258] That is no small problem where the government has failed to issue proper NTAs in nearly all of those pending cases.[259]

But this jurisdictional problem is entirely of the government's making. It is the result of the government's knowing and intentional failure to comply with the clear and explicit statutory language regarding the requirements of notices to appear, failure that continued post-*Pereira* as the government included knowingly false information on NTAs.

Just as *Pereira* is straightforward and the consequences of the case are straightforward, the action federal courts must now take is equally straightforward. All removal cases filed without a valid NTA

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257. 8 U.S.C. § 1229(a)(1)(G)(i) (2012).

258. Compare *Immigration Court Backlog Tool*, TRAC IMMIGRATION, https://perma.cc/BND9-RNGG (data through May 2018), *with id.*, http://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/2E2R-73NP] (data through November 2018). That number will certainly increase in light of the recent government shutdown. *See* Cristina Maza & Jeff Stein, *Donald Trump's Border Wall Government Shutdown Will Mean Some Immigrants Get to Stay in America Longer*, NEWSWEEK (Dec. 29, 2018), https://www.newsweek.com/tk-shutdown-immigration-1274473 [https://perma.cc/X5GY-GZXP] (quoting Omar Jadwat, Director of the ACLU's Immigrant Rights Project, that the government shutdown would "exacerbate the backlogs").

259. *See supra* note 6 and accompanying text; Hernandez-Perez v. Whitaker, 911 F.3d 305, 314 (6th Cir. 2018).

must be dismissed for lack of jurisdiction. The DHS may refile them in a manner consistent with *Pereira*.