ARTICLES

THE STRANGE AND UNEXPECTED AFTERLIFE OF *PEREIRA V. SESSIONS*

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I. INTRODUCTION

Decisions by the United States Supreme Court are sometimes one-off affairs, resolving a specific issue that definitively settles the law on that point going forward. Sometimes the Court tells us this is the case, for instance, limiting its reasoning to the decision at hand.[1] Other times, the nature of the issue

1. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); *see generally* Laurence H. Tribe, Erog v. Hsub *and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 HARV. L. REV. 170, 268–73 (2001) (noting both the explicit and implicit limitations in construing *Bush v. Gore* is "precedential").

clearly demonstrates it is of limited or no prospective importance outside the narrow context in which it was issued.[2]

Alternatively, an initial decision by the Court will set off a flurry of activity, bouncing an issue between the Supreme Court and the courts of appeals. This may be necessary to resolve different interpretive facets of a single statutory provision. For example, the Court's decision in *Moncrieffe v. Holder*, which concerned the aggravated felony drug trafficking provision in the Immigration and Nationality Act ("INA"),[3] concluded a seven-year span of Supreme Court litigation entailing three separate decisions.[4] Or it may be to resolve how an ostensibly definitive interpretation applies upon different practical applications, including how to apply the Armed Career Criminal Act's "residual clause" to a range of different predicate offenses.[5] And of course that enterprise itself ended with a definitive judgment, of sorts, with the Supreme Court finally holding that "residual clause" to be unconstitutionally vague,[6] igniting a chain of vagueness litigation centered on other similarly worded provisions in the federal statutes.[7]

The Supreme Court's recent decision in *Pereira v. Sessions* seemed like a case destined for the former category of narrow, limited holdings.[8] The issue

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2. *See, e.g.*, Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014) (deferring to the Board of Immigration Appeals' interpretation of when aged-out derivative beneficiaries of visa-petitions could retain their visa priority dates and convert the old petition to a new visa-preference category); Holder v. Martinez Gutierrez, 566 U.S. 583 (2012) (holding that the Board reasonably disallowed the imputation of a parent's continuous physical presence to their children for purposes of establishing eligibility for cancellation of removal).

3. *See* 8 U.S.C. § 1101(a)(43)(B) (2012) ("The term 'aggravated felony' means—. . . illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)").

4. *See* Moncrieffe v. Holder, 569 U.S. 184 (2013) (holding that a possession offense that does not establish remuneration or a more-than de minimis amount of marijuana fails to qualify as a felony punishable under the Controlled Substances Act); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (holding that for an alien to be deemed convicted of an aggravated felony, he must actually have been convicted of an offense that would constitute a felony punishable under the Controlled Substances Act, not simply hypothetically subject to such conviction based on the facts and circumstances of his offense); Lopez v. Gonzales, 549 U.S. 47 (2006) (holding that an offense constitutes a drug trafficking crime for immigration law purposes only if it is punishable as a felony under the Controlled Substances Act, regardless of how the state categorizes the offense); *see also Moncrieffe*, 569 U.S. at 206 ("This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.'").

5. *See* Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) ("[For certain convictions] if the violator has three or more earlier convictions for a 'serious drug offense' or a 'violent felony,' the [ACCA] increases his prior term to a minimum of 15 years and a maximum of life."); 18 U.S.C. § 924(e)(2)(B)(ii) ("[A violent felony includes an offense of] burglary, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.") (emphasis added); *see generally* Sykes v. United States, 564 U.S. 1 (2011) (Holding that "knowing or intentional flight from a law enforcement officer" was a violent felony.); Chambers v. United States, 555 U.S. 122 (2009) (failure to report); Begay v. United States, 553 U.S. 137 (2008) (driving-under-the-influence); James v. United States, 550 U.S. 192 (2007) (attempted burglary).

6. *Johnson*, 135 S. Ct. at 2558–60.

7. *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (holding that 18 U.S.C. § 16(b)'s definition of "crime of violence" is unconstitutionally vague); Beckles v. United States, 137 S. Ct. 886 (2017) (rejecting void-for-vagueness challenge to the United States Sentencing Guidelines' provision governing enhancement as a "career offender").

8. 138 S. Ct. 2105 (2018).

presented was technical and narrow, related to whether an alien could establish eligibility for a form of discretionary relief from removal, cancellation of removal, which required that he establish a certain period of continuous physical presence in the United States. Such "presence" is deemed to end for eligibility purposes when the alien has been served with a charging document, the "Notice to Appear."[9] The Supreme Court was asked to resolve a conflict in the courts of appeals over whether a Notice to Appear that did not include the "time and place" of the alien's initial removal hearing was sufficient to "stop" the accrual of continuous physical presence. The issue on its face appears narrow and circumscribed by context. Moreover, the Court, in the course of issuing its decision, emphasized the narrowness of its holding as applicable only to the facts and circumstances of the case.[10] The Court answered the question presented in the negative, holding that to trigger the stop-time rule, the alien must be provided at least with the "time and place" of his removal proceeding.

However, within a month of its issuance, the decision moved quickly from the possible one-off category to that implicating ongoing interpretive concerns.

Immigration advocates began to argue that a statutorily deficient Notice to Appear, as per the Court's holding in *Pereira*, was defective for all purposes under the immigration laws. The logical conclusion of that argument was that ongoing removal proceedings against aliens who had been served with "defective" Notices should be terminated for lack of jurisdiction, and for aliens already ordered removed, the proceedings should be reopened and the orders effectively rescinded.[11] Immigration judges took different approaches in cases presenting this argument, but many accepted the premise and terminated removal proceedings; by the fall of 2018, immigration judges terminated as many as 9,000 proceedings.[12]

Yet, the argument did not remain confined to administrative immigration proceedings. Immigration attorneys embraced it in the criminal context as well, where they argued that the underlying removal orders for aliens charged with illegal reentry were invalid due to the government's failure to provide a statutorily compliant Notice to Appear.[13] The argument gained some traction

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9. *See* 8 U.S.C. § 1229(a) (2012) (defining "Notice to Appear"); *id.* § 1229b(d)(1) (2012) (stop-time rule).

10. *Pereira*, 138 S. Ct. at 2110 ("The narrow question in this case lies at the intersection of [the Notice to Appear provision and the so-called 'stop-time' rule]."); *id.* at 2113 ("[T]he dispositive issue in this case is much narrower . . . Does a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' . . . trigger the stop-time rule?").

11. *See generally* Robin Abcarian, *High court ruling could turn around deportation cases*, L.A. TIMES, July 13, 2018, at B1; Amy Taxin, *Immigration cases tossed in fallout from high court ruling*, CANADIAN PRESS, Aug, 13, 2018; Amy Taxin, *Ruling has lawyers demanding deportation cases be tossed out*, BOSTON GLOBE, Aug. 14, 2018, *available at* 2018 WLNR 24726976.

12. *See* Reade Levinson & Kristina Cooke, *U.S. courts abruptly tossed 9,000 deportation cases. Here's why*, REUTERS NEWS, Oct. 17, 2018.

13. *See, e.g.*, Curt Prendergast, *Ruling has 'wide ramifications' here for criminal border-crossing cases*, ARIZ. DAILY STAR, Jan. 13, 2019, at C4.

with several district court judges who dismissed indictments on that basis,[14] but the majority of district courts have rejected that contention for variable and often overlapping reasons.[15]

After months of uncertainty in the immigration courts and the dismissal of criminal indictments in multiple federal district courts, the Board of Immigration Appeals stepped in at the end of August 2018. In *In re Bermudez-Cota*, the Board held that a *statutorily* deficient Notice to Appear did not deprive the immigration court of jurisdiction in removal proceedings.[16] The Board's conclusion was based on several reinforcing rationales, including that *Pereira* was a limited and narrow decision, the regulations governing the immigration court's jurisdiction did not require "time and place" information in the charging document, and that the Notice of Hearing, which provided the "missing" information, could cure any defect in the Notice to Appear itself.[17] Although some district courts have continued to dismiss indictments in the wake of *Bermudez-Cota*, the courts of appeals have not been open to jurisdictional challenges. The Second, Third, Fifth, Sixth, and Ninth Circuits have specifically deferred to *Bermudez-Cota*,[18] while the Seventh and Eleventh Circuits found the requirements under Section 1229(a)(1) to be an agency claims-processing rule,[19] and a handful of others have distinguished *Pereira* as a case limited to the specific circumstances in which it arose.[20]

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14. *See, e.g.*, United States v. Ortiz, 347 F. Supp. 3d 402 (D.N.D. 2018); United States v. Sandoval-Cordero, 342 F. Supp. 3d 722 (W.D. Tex. 2018); United States v. Virgen-Ponce, 320 F. Supp. 3d 1164 (E.D. Wash. 2018).

15. *See, e.g.*, United States v. Romero-Caceres, 356 F. Supp. 3d 541, 554 n.13 (E.D. Va. 2018) (collecting cases).

16. *See In re* Bermudez-Cota, 27 I. & N. Dec. 441 (B.I.A 2018).

17. *See id*. at 443–47.

18. *See* Banegas Gomez v. Barr, 922 F.3d 101 (2d Cir. 2019); Mejia-Castanon v. Att'y Gen. U.S., 931 F.3d 224, 226–27 (3d Cir. 2019); Pierre-Paul v. Barr, 930 F.3d 684, 690–91 (5th Cir. 2019); Santos-Santos v. Barr, 917 F.3d 486 (6th Cir. 2019); Karingithi v. Whitaker, 913 F.3d 1158 (9th Cir. 2019); Hernandez-Perez v. Whitaker, 911 F.3d 305 (6th Cir. 2018).

19. *See* Perez-Sanchez v. Att'y Gen. U.S., 935 F.3d 1148, 1153 (11th Cir. 2019) ("both the regulation and the statute set forth only claim-processing rules with respect to the service or filing of an NTA"); Ortiz-Santiago v. Barr, 924 F.3d 956, 962 (7th Cir. 2019) (noting that *Burmudez-Cota* "brushed too quickly over the Supreme Court's rationale in *Pereira*").

20. *See, e.g.*, Goncalves Pontes v. Barr, No. 19-1053, 2019 WL 4231198, at *5 (1st Cir. Sept. 18, 2019) ("we hold that the challenged regulations are not in conflict either with section 1229(a) or with the Court's decision in Pereira"); United States v. Cortez, 930 F.3d 350, 358 (4th Cir. 2019), *as amended* (July 19, 2019) ("the failure of the notice to appear filed with the immigration court to include a date and time for his removal hearing [] does not implicate the immigration court's adjudicatory authority or 'jurisdiction.'"); Ali v. Barr, 924 F.3d 983, 986 (8th Cir. 2019) ("As our sister circuits have explained, § 1229(a) says nothing about how jurisdiction vests in an immigration court . . . For that we must turn to the regulations") (internal citation omitted); Mauricio-Benitez v. Sessions, 908 F.3d 144, 148 n.1 (5th Cir. 2018) ("Because the issues in this case pertain only to reopening, *Pereira*'s rule regarding cancellation is inapplicable."); *see also* Soriano-Mendosa v. Barr, 768 Fed. App'x. 796, 802 (10th Cir. 2019) ("*Pereira* was not in any way concerned with the Immigration Court's jurisdiction.") (quoting *Karingithi*, 913 F.3d at 1159); Cuellar Manzano v. Att'y Gen., 765 Fed. App'x. 686. 691–92 (3d Cir. 2019) ("the Supreme Court's decision was a 'narrow' one, addressing what information must be contained in a notice to appear in order to trigger the "stop-time" rule applicable when a petitioner seeks cancellation of removal").

The purpose of this Article is to chart the course of *Pereira* and its fallout and assess the most reasonable ways to address the arguments that have arisen in its wake. Consistent with the Supreme Court's own view of what it was deciding, we believe the impact of the case is narrow, and there is little reason to believe the Court intended to open the Pandora's Box immigration advocates would explore. This is so not only because of the purported narrowness of the Court's own opinion, but also because the issues and contexts into which its holding are being pushed are a poor fit for the legal reasoning that undergirded the Court's decision. In other words, the decision, "lacking roots" in the varied statutory and regulatory provisions governing the contexts into which it has been extended, "is a plant anyone would be hard pressed to grow."[21]

This Article proceeds in three parts. Part One gives a comprehensive background to the Supreme Court's decision by providing an overview of the pre-1996 statute, the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and courts' approaches to ostensibly deficient Notices to Appear prior to the Board's own interpretation. This background is important because it charges both congressional intent and the fashion in which courts had interpreted the relevant provisions in the absence of a governing agency decision. Part One then proceeds to address the Board's adoption of its precedential interpretation in *In re Camarillo* and the courts of appeals' views on that decision.

Part Two addresses *Pereira* itself, including the background of the case as it made its way to the Supreme Court, and the Supreme Court's own decision. This part devotes special attention to what was decided by the Court and what was specifically *not* decided.

Finally, Part Three turns to the application of *Pereira* going forward. Specifically, this section addresses the potential applicability of the reasoning of *Pereira* in three contexts: cancellation of removal, rescission of *in absentia* orders of removal, and challenges to the immigration court's jurisdiction. In the end, although *Pereira* may have some effect in all three areas, it is not as broad or prohibitive as immigration advocates believe. While it is far from certain that the courts will march in lockstep behind the Board's decision in *Bermudez-Cota*, advocates will likely face an uphill battle convincing courts of appeals that *Pereira* has much or any relevance beyond the narrow question resolved in that case.

II. THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT AND THE ROAD TO *PEREIRA*

The issue resolved by the Supreme Court in *Pereira* arose from an interaction between two provisions of the INA—the "Notice to Appear" provision, which provides for notice to an alien of the intent to commence removal

21. Tribe, *supra* note 1, at 269.

proceedings, and the so-called "stop-time" rule for purposes of cancellation of removal, which limits an alien's ability to establish eligibility for discretionary relief from removal after service of the Notice to Appear. The purpose of this Part is to place the issue decided in *Pereira* in historical context, both to understand the Supreme Court's decision in *Pereira* itself and to establish how the agency and courts may permissibly approach the stop-time rule's application after *Pereira*.

To understand the relevant provisions, it is necessary to take into account statutory and regulatory history. Both the Notice to Appear provision and the stop-rule rule were products of the vast reforms Congress instituted in 1996 through the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[22] This history is recounted in Subsection A. Subsection B then recounts court challenges to various aspects of this scheme, including claims that Notices to Appear were deficient for purposes of both jurisdiction and application of the stop-time rule. At that time, the courts were writing on a blank slate, rendering *de novo* holdings in cases presenting issues yet to be addressed by the Board of Immigration Appeals. Subsection C shifts to the Board's own development of precedent on the issue of deficient Notices, and Subsection D traces the courts of appeals' review of these decisions under the deference framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[23]

A. *Statutory and Regulatory Background and History*

Through IIRIRA, Congress sought to institute reforms that more expeditiously removed aliens unlawfully present in the United States, especially criminal aliens and aliens who had overstayed their non-immigrant visas.[24] Additionally, Congress wanted to reform the discretionary relief framework and ensure that such "[r]elief from deportation w[ould] be more strictly limited."[25] As relevant here, it instituted a new unitary "removal proceeding" and enacted a notice provision to govern the conveyance of information to the alien, while simultaneously replacing older forms of relief with a new, stricter form entitled "cancellation of removal."

1. *Streamlining Removal Proceedings and the Advent of the "Notice to Appear"*

Traditionally, "[t]he immigration laws of the United States ha[d] 'historically distinguished between aliens who have "entered" the United States and aliens still seeking to enter (whether or not they are physically on American

22. Pub. L. No. 104–208, Div. C, 110 Stat. 3009–546 (1996).
23. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837 (1984).
24. H.R. REP. NO. 104–469, Pt. 1, 118–25 (1996) (regarding criminal aliens); *id*. at 114–15 (regarding visa overstays).
25. *Id*. at 108.

soil).'"[26] Tracking this distinction, "[i]mmigration proceedings, as historically understood, thus comprised two distinct sets of proceedings depending on the position of the alien—exclusion or inadmissibility proceedings and deportation proceedings."[27] As the Supreme Court recounted, the "deportation proceeding is the usual means of proceeding against an alien already physically present in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission."[28]

Aliens seeking admission to the United States were inspected at a port-of-entry, where the question of their admissibility was determined by a "special inquiry officer."[29] The officer could determine that the alien was excludable and order exclusion,[30] or she could refer the alien to an immigration judge for further proceedings.[31] In cases referred to the immigration judge, including those involving a decision declining to grant asylum or withholding of removal, the alien would be served with a "Notice to Alien Detained for Hearing by an Immigration Judge."[32] Subsequent proceedings before the immigration judge would address not only admissibility issues[33] but also the potential for any forms of relief or protection from removal, including asylum and withholding of removal.[34]

In contrast, aliens charged with deportability were placed into deportation proceedings.[35] Such aliens were provided with written notice, referred to as an "Order to Show Cause," which specified various pieces of information relevant to the institution of proceedings, including "[t]he nature of the proceedings against the alien," "[t]he legal authority under which the proceedings" were to be conducted, "[t]he acts of conduct alleged to be in violation of law," and "[t]he charges against the alien and the statutory provisions alleged to have been violated[.]"[36] In a separate provision of the statute, the

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26. Patrick Glen, Judulang v. Holder *and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 3–4 (2012) (quoting Jama v. Immigration and Customs Enf't., 543 U.S. 335, 349 (2005) (citing Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) ("It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after entry, irrespective of its legality.")).

27. *Id*. at 4.

28. Landon v. Plasencia, 459 U.S. 21, 25 (1982); *see* Patrick Glen, *The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings*, 30 BERKELEY J. INT'L L. 1, 12–13 (2012).

29. *See* INA § 235, 8 U.S.C. § 1225 (1995); INA § 236(a), 8 U.S.C. § 1226(a) (1995); *see also* 8 C.F.R. § 235.1 (1995).

30. *See* 8 U.S.C. § 1226(c) (1995).

31. *See* 8 C.F.R. § 235.6 (1995).

32. *Id*.

33. *See* 8 C.F.R. §§ 236.1, 236.2 (1995).

34. *See* 8 C.F.R. § 236.3 (1995).

35. *See* U.S.C. § 1251 (1995) (grounds for deportation); 8 U.S.C. § 1252 (1995) (governing deportation proceedings).

36. *See* 8 U.S.C. § 1252b(a)(1)(A)–(D) (1995). The OSC was also required to inform the alien that he "may be represented by counsel" and to provide a list of pro bono counsel, § 1252b(a)(1)(E), and to inform the alien of his address reporting requirements and the consequences of failing to provide a current address and contact information, § 1252b(a)(1)(F).

government was also required to provide written notice to the alien of "the time and place at which the proceedings will be held,"[37] but this information could be provided "in the order to show cause *or otherwise*[.]"[38] Deportation proceedings were then officially commenced when the Immigration and Naturalization Service filed the Order to Show Cause with the immigration court,[39] at which point the Office of the Immigration Judge would specify the "time and place" of the deportation hearing.[40]

With IIRIRA, Congress unified this bifurcated procedural framework. Congress "retained the distinction between being inadmissible and being deportable by retaining the separate statutory provisions providing for grounds of inadmissibility and deportability."[41] But it "eliminated the distinction between 'exclusion' and 'deportation' proceedings and replaced them with a single unified proceeding termed a 'removal proceeding.'"[42]

To effectuate this goal, IIRIRA established a unitary process for the "[i]nitiation of removal proceedings," the "Notice to Appear."[43] The new Notice to Appear provision largely tracked the earlier provision relating to Orders to Show Cause for deportation proceedings,[44] with two major differences. First, it moved the requirement that the relevant notice provide the "time and place" of the initial hearing from its standalone placement in the Order to Show Cause provision to the main list of informational requirements in the Notice to Appear provision.[45] Second, it eliminated the explicit exception in the Order to Show Cause statute that the "time and place" information could be provided in a form or notice other than the charging document itself.[46] Regulations implementing the new scheme did, however, retain the freedom of the agency to omit this date on the Notice to Appear and provide it in a later-served Notice of Hearing.[47]

Despite the statutory changes, the legislative history reflects that these amendments were undertaken only to conform the Notice provision to the new unitary concept of a "removal proceeding," as opposed to the prior distinct deportation and exclusion proceedings. As recounted in the Conference Report, "[n]ew section 239 *restates* the provisions of current subsections (a)

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37. § 1252b(a)(2)(A)(i).
38. § 1252b(a)(2)(A) (emphasis added).
39. *See* 8 C.F.R. § 242.1(a) (1995).
40. *See* 8 C.F.R. § 242.1(b) (1995).
41. Glen, *supra* note 26, at 4 (citing 8 U.S.C. § 212 (1996) (grounds of inadmissibility); 8 U.S.C. § 1227 (1996) (grounds of deportability)).
42. *Id*. at 4 (citing IIRIRA § 304(a)(3); 8 U.S.C. §§ 1229, 1229a (1996)); *see* Jama v. Immigration and Customs Enf't, 543 U.S. 335, 349 (2005).
43. 8 U.S.C. § 1229 (1996).
44. *Compare* 8 U.S.C. § 1252b(a) (1995), *with* 8 U.S.C. § 1229(a) (1996).
45. *Compare* INA § 242B(a)(2), 8 U.S.C. § 1252b(a)(2) (1995), *with* INA § 239(a)(1)(G)(i), 8 U.S.C. § 1229(a)(1)(G)(i) (1996).
46. *See id*.
47. *See* 8 C.F.R. § 1003.18(b) (1996) ("the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing.").

and (b) of section 242B regarding the provision of written notice to aliens placed in removal proceedings. These provisions are conformed to the establishment of a single removal hearing to replace the two current proceedings under current section 236 (exclusion) and 242 (deportation)."[48]

2. *Cancellation of Removal and the Tightening of Eligibility Criteria for Discretionary Relief from Removal*

Prior to 1996, deportable aliens in the United States could apply for a form of discretionary relief from removal called "suspension of deportation." To establish their eligibility for this relief, aliens who were deportable on non-criminal grounds had to demonstrate physical presence "in the United States for a continuous period of not less than seven years immediately preceding the date of" the application, good moral character during that period, and that deportation "would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]"[49] Different rules applied to aliens who were deportable under certain criminal provisions or on account of document-fraud or security-related grounds. These aliens had to establish physical presence "in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation," good moral character during that period, and that deportation "would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]"[50] Additionally, special rules applied to a deportable alien who "has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent residence[.]"[51]

Congress altered this framework as part of IIRIRA, repealing the relief of "suspension of deportation" and enacting a new form of relief called "cancellation of removal," thereby changing the original eligibility criteria and establishing a new set of criteria for non-permanent residents. First, Congress established distinct eligibility criteria for lawful permanent residents who were charged with removability. To establish eligibility for cancellation of removal, these aliens had to have been "lawfully admitted for permanent residence for not less than 5 years," "resided in the United States continuously for 7 years after having been admitted in any status," and "not been convicted of any aggravated felony."[52] For such aliens, a grant of cancellation of removal would restore their lawful permanent resident status.

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48. H.R. REP. NO.104–828, at 230 (1996) (emphasis added).
49. 8 U.S.C. § 1254(a)(1) (1995).
50. 8 U.S.C. § 1254(a)(2) (1995).
51. *See* 8 U.S.C. § 1254(a)(3) (1995).
52. 8 U.S.C. § 1229b(a) (1996).

Second, a different set of eligibility criteria applied to non-permanent residents. These aliens had to establish physical presence in the United States "for a continuous period of not less than 10 years immediately preceding the date of" the cancellation application; good moral character during this time period; the absence of any conviction for "an offense under" the grounds of inadmissibility and deportability pertaining to criminal offenses and security threats (8 U.S.C. §§ 1182(a)(2), 1227(a)(2), and 1227(a)(3)); and that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[53] Finally, the new cancellation framework included special rules for spouses and children who had "been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen" or lawful permanent resident.[54]

The new provisions regarding cancellation of removal aimed to "replace the relief [of suspension of deportation]" while "limit[ing] the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted."[55] The provisions accomplish this objective in three principal ways. First, the period of required continuous physical presence was lengthened from seven to ten years.[56] Second, aliens with certain criminal convictions or who were removable on security-related grounds were barred from relief altogether.[57] And third, the standard for establishing hardship was raised from "extreme" hardship to "exceptional and extremely unusual hardship" in a deliberate attempt "to emphasize that the alien must provide evidence of harm to his spouse, parent, or child, substantially beyond that which ordinarily would be expected to result from the alien's deportation."[58] Given these changes, Congress expected that cancellation of removal for nonpermanent residents would be available in only "truly exceptional cases."[59]

Beyond the change to the substantive criteria for relief, Congress also imposed an annual cap of 4,000 on the number of applications for cancellation of removal and adjustment of status that could be granted.[60]

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53. 8 U.S.C. § 1229b(b)(1) (1996).
54. *See* 8 U.S.C. § 1229b(b)(2) (1996).
55. H.R. REP. NO 104–828, at 213.
56. *Compare* 8 U.S.C. § 1254(a)(1) (1995), *with* 8 U.S.C. § 1229b(b)(1)(A) (1996).
57. *Compare* 8 U.S.C. § 1254(a)(2) (1995), *with* 8 U.S.C. § 1229b(b)(1)(C) (1996).
58. H.R. REP. NO 104–828, at 213.
59. *Id*. at 213–14; *accord* Glen, *supra* note 26, at 17–18 ("The heightened requirement reflects Congress's intent to limit cancellations of removal proceedings for nonpermanent residents to 'truly exceptional cases' where the applicant can demonstrate hardship '"substantially" beyond the ordinary hardship that would be expected when a close family member leaves this country.'") (quoting *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 62 (BIA 2001) (en banc)).
60. INA § 240A(e), 8 U.S.C. § 1229b(e) (1996); H.R. REP. NO. 104–828, at 214 (1996) (Conf. Ref.) (cap applicable "regardless of when the alien applied for such relief"); H.R. REP. NO. 104–469, at 160 (1996) ("There is an annual cap of 4,000 on cancellations of removal, to be effective immediately, and to include the cases of persons who are eligible for suspension of deportation because they were served a notice of hearing prior to the enactment of this bill.").

In addition, it enacted the so-called "stop-time" rule, which mandated that the periods for continuous physical presence required to establish eligibility for cancellation of removal would cease upon the earlier of two events: "except in the case of an alien who applies for cancellation of removal under [the special provision relating to battered aliens], when the alien is served a notice to appear under section 1229(a) of this title, or when the alien has committed an offense referred to in section 1182(a)(2) of this title [criminal grounds of inadmissibility] that renders the alien inadmissible . . . under section 1182(a)(2) of this title or removable . . . under section 1227(a)(2) or 1227 (a)(4) of this title[.]"[61]

Under the prior suspension of deportation regime, courts held that aliens continued to accrue time towards meeting the continuous physical presence standard even after having been served an Order to Show Case and placed into removal proceedings.[62] As recounted in the legislative history, "[u]nder the rules in effect [prior to IIRIRA], [a]n otherwise eligible person could qualify for suspension of deportation if he or she had been continuously physically present in the United States for seven years, regardless of whether or when the [government] had initiated deportation proceedings against the person through the issuance of an order to show cause[.] . . . As a result, people were able to accrue time toward the seven-year continuous physical presence requirement after they already had been placed in deportation proceedings."[63] This "loophole" gave rise to procedural abuses. As the House Report noted, "[s]uspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued. This includes aliens who failed to appear for their deportation proceedings and were ordered deported in absentia, and then seek to re-open proceedings once the requisite time has passed."[64] The issue even caught the attention of the Supreme Court, which affirmed the lower court's denial of a motion to reopen a case. In that instance, the alien who made the motion had accrued the requisite period of physical presence only after having an application initially denied and stalling removal by filing a meritless petition for review with the Ninth Circuit. As the Supreme Court observed, "[t]he purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites."[65] The stop-time rule aimed to close this loophole by "bar [ring] additional time from accruing after receipt of a 'notice to appear.'"[66]

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61. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (1996).

62. *See, e.g.*, Ram v. INS, 243 F.3d 510, 513 (9th Cir. 2001) ("Aliens accrued time toward the 'continuous physical presence in the United States' requirement until they applied for suspension of deportation. In short, the commencement of deportation proceedings had no effect on this accrual.").

63. 143 Cong. Rec. S12,265 (daily ed. Nov. 9, 1997), 1997 WL 693186, at S12,266.

64. H.R. REP. NO. 104–469, at 122 (1996).

65. INS v. Rios-Pineda, 471 U.S. 444, 450 (1985).

66. 143 Cong. Rec. S12,265 (daily ed. Nov. 9, 1997), 1997 WL 693186, at S12,266; accord H.R. REP. NO. 104–469 at 160 (1996) ("The time period for continuous physical presence terminates on the date a person is served with a notice to appear for a removal proceedings.").

3. *Legislative Coda: the Nicaraguan Adjustment and Central American Relief Act*

Subsequent to the passage of IIRIRA, one interpretive issue immediately arose – how to construe IIRIRA's transitional rule for suspension of deportation, which provided that the stop-time rule "shall apply to notices to appear issued before, on, or after the date of the enactment of this Act."[67] The Board, as well as Attorney General Reno, addressed the issue in *In re N-J-B-*, which presented the question of "whether the IIRIRA term 'notice to appear' ... refers to a specific document or is a more general term applicable to other documents which 'initiate' proceedings."[68] The Board based its conclusion on "statutory language and legislative history that an 'Order to Show Cause and Notice of Hearing' and a 'notice to appear' are synonymous terms as used in section 309(c)(5)."[69] Accordingly, under the Board's interpretation, the service of an Order to Show Cause prior to IIRIRA's effective date could stop an alien's accrual of continuous physical presence to suspend deportation.[70]

Congress acted quickly to codify this holding. In 1997, as part of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), it directed that the stop-time rule "shall apply to orders to show cause including those referred to in section 242B(a)(1) of the [INA], as in effect [before IIRIRA's effective date], issued before, on, or after the date of the enactment of this Act."[71] As the Board recognized in *In re Nolasco*, NACARA thus statutorily codified the majority's holding in *In re N-J-B-*, that an Order to Show Cause is as effective for stop-time purposes as a "Notice to Appear."[72]

B. *Court of Appeals' Interpretations of the Notice to Appear and Stop-Time Provisions*

Following *In re Nolasco*, it would be over a decade before the Board meaningfully waded back into the interpretive issues of the Notice to Appear and stop-time provisions. In the absence of agency interpretations of the relevant provisions, including the consequences of statutorily non-compliant Notices to Appear, the courts of appeals addressed these issues *de novo*. Such cases arose in three distinct contexts: challenges to the jurisdiction of the immigration court to conduct removal proceedings; the question of when the stop-time rule was triggered for purposes of cancellation of removal, and; whether rescission of an *in absentia* removal order was warranted.

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67. IIRIRA § 309(c)(5).
68. *In re* N-J-B-, 22 I. & N. Dec. 1057, 1063 (B.I.A 1997; A.G. 1999).
69. *Id*.
70. *Id*. at 1068.
71. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, sec. 203 (1), § 309(c)(5)(A), 111 Stat. 2196 (codified at 8 U.S.C. § 1101).
72. *See generally In re* Nolasco, 22 I. & N. Dec. 632 (B.I.A 1999) (en banc) (reviewing NACARA and its legislative history).

1. *Challenges to the Immigration Court's Jurisdiction*

The INA provides that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien,"[73] while also giving the adjudicator broad authority to conduct the proceeding and providing flexibility in the form that proceeding may take.[74] Given the broad delegations of authority to the agency, it is unsurprising that Congress did not itself address in the INA when or how jurisdiction vests with the immigration court.

The issue of the immigration court's jurisdiction was addressed not by Congress through the INA itself, but by the Attorney General through his delegated authority. Congress conferred to the Attorney General the authority and responsibility to conduct removal proceedings,[75] and the authority to "establish such regulations . . . as [he] determines to be necessary for carrying out" his responsibilities under the INA.[76] Pursuant to that authority, the Attorney General established a comprehensive regulatory framework governing proceedings in the immigration courts,[77] including how and when jurisdiction vests.

Under the regulations, "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the" Department of Homeland Security ("DHS").[78] For proceedings initiated after IIRIRA's effective date, the charging document is defined to "include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien."[79] In defining "Notice to Appear," the regulation does not cross-reference the statutory definition at 8 U.S.C. § 1229(a)(1), but rather offers an independent regulatory definition to govern the vesting of jurisdiction with the immigration court.[80] The required contents of a Notice to Appear for purposes of jurisdiction largely duplicate the statutory requirements,[81] with one major difference: the regulation does not require a Notice to include the "time and place" of the initial hearing as a prerequisite to jurisdiction vesting with the immigration court.[82]

In *Dababneh v. Gonzales*, the Seventh Circuit rejected a challenge to the immigration court's jurisdiction premised on a purportedly "deficient" Notice to Appear.[83] In that case, an alien received a notice that indicated that the date and

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73. 8 U.S.C. § 1229a(a)(1) (2012).
74. *See* 8 U.S.C. § 1229a(b)(1) (2012) (describing the authority of the immigration judge in conducting the proceedings); 8 U.S.C. § 1229a(b)(2)(A) (2012) (providing various forms that the proceeding may take).
75. 8 U.S.C. § 1229a(a) (2012).
76. *Id.* § 1103(g)(2) (2012).
77. *See generally* 8 C.F.R. § 1003.12-47 (2019).
78. *See id.* § 1003.14(a).
79. *Id.* § 1003.13.
80. *See id.* § 1003.15(b)–(c).
81. *Compare* 8 C.F.R. § 1003.15(b) (2019), *with* 8 U.S.C. § 1229(a)(1) (2012).
82. *Compare* 8 C.F.R. § 1003.15(b) (2019), *with* 8 U.S.C. § 1229(a)(1)(G)(i) (2012).
83. Dababneh v. Gonzales, 471 F.3d 806, 810 (7th Cir. 2006), *abrogated by* Ortiz-Santiago v. Barr, 924 F.3d 956 (7th Cir. 2019). As noted *infra*, the Seventh Circuit also rejected the argument that the

time of the hearing were "to be set."[84] On petition for review to the Seventh Circuit, the alien argued that proceedings should be terminated because the failure to include the date and time of the initial hearing rendered the Notice defective and precluded jurisdiction from vesting with the immigration court.[85]

The court of appeals rejected this argument. Reviewing the documents in the record, including not only the Notice to Appear but also the Notice of Hearing, the court held that the totality of the information required by Section 1229(a)(1) had been provided to the alien, albeit in two documents rather than one.[86] The court found this two-step process permissible. The regulations provided that jurisdiction vests with the immigration court upon the filing of the Notice to Appear,[87] and that notice of the date, time, and place of the hearing may be provided by the immigration court if not included in the Notice to Appear.[88] Although the date and time of the hearing was not included in the Notice to Appear that was filed with the immigration court and was only subsequently provided through the Notice of Hearing served by the immigration court, "[t]he fact that the government fulfilled its obligations under INA § 239(a) in two documents—rather than one—did not deprive the IJ of jurisdiction to initiate removal proceedings."[89] In the court's view, "[t]ogether, the NTA and the subsequent hearing notice met all of the requirements of § 239(a)(1),"[90] and thus "the IJ had jurisdiction once DHS filed the NTA with the Immigration Court[.]"[91]

2. *Application of the Stop-Time Rule*

The Ninth Circuit was the first court to issue a relevant opinion on the interaction between the stop-time rule and the statutory definition of a Notice to Appear in the context of cancellation of removal.[92] In *Garcia-Ramirez v. Gonzales*, that court confronted a distinct issue regarding the accumulation of continuous physical presence and the applicability of IIRIRA's amendments to occurrences that pre-dated that enactment. But in passing, the court noted that even assuming the initial Notice to Appear had been defective on account of its failure to include the "time and place" of the initial removal hearing, the stop-time rule could still be triggered upon the service of the Notice of Hearing.[93] In other words, an alien's receipt of all information required by the statute triggers the stop-time rule.

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deficient NTA was insufficient to stop-time for purposes of cancellation of removal, given the timely service of the Notice of Hearing on the alien.

84. *Id*. at 807.
85. *Id*. at 807–08.
86. *See id*. at 808–10.
87. *Id*. at 808–09 (citing 8 C.F.R. § 1003.14(a)).
88. *Id*. at 809 (citing 8 C.F.R. § 1003.18).
89. *Dababneh*, 471 F.3d at 809, 810.
90. *Id*. at 809.
91. *Id*. at 810.
92. The statutory framework regarding cancellation of removal is addressed at Section II.A.2.
93. Garcia-Ramirez v. Gonzales, 423 F.3d 935, 937 n.3 (9th Cir. 2005).

The Seventh and Second Circuits subsequently expanded on the Ninth Circuit's conclusory determination. First, in *Dababneh*, the Seventh Circuit extended its jurisdictional analysis into the cancellation of removal context, holding that the alien "received an effective [Notice to Appear] that met the § 239 requirements through receipt of both the [Notice to Appear] and the [Notice of Hearing]. Accordingly, once DHS served [the alien] with those documents, the stop-time rule cut off his accrual of physical presence."[94] Second, in *Guamanrrigra v. Holder*, the alien "argue[d] that the stop-time rule is triggered only by service of a Notice to Appear that, in and of itself, comports with all of the notice requirements of § 239(a)(1), including the time and place requirements of § 239(a)(1)(G)(i)."[95] The Second Circuit rejected this contention, instead concurring with the holding of the Seventh Circuit: "we hold that the stop-time rule is triggered upon service of a Notice to Appear that (alone or in combination with a subsequent notice) provides the notice required by § 239(a)(1)."[96] Such a reading, according to the court, more effectively addressed the practicalities of service (where DHS would not always be privy to date and time information for scheduling purposes) and the purpose behind the stop-time rule, which was to eliminate incentives for aliens to delay proceedings.[97]

3. In Absentia *Orders and Motions for Rescission*

The INA imposes certain obligations on aliens placed into removal proceedings, and part of the statutory function of the Notice to Appear is to convey those obligations to the alien. The Notice must specify the requirement that the alien "immediately provide (or have provided) the Attorney General with a written record of an address . . . at which the alien may be contacted respecting [the removal] proceedings,"[98] and must "immediately" provide the Attorney General with "a written record of any change of the alien's address."[99] The Notice must also specify the consequences for failing to provide such an address.[100]

The most obvious possible consequence of an alien's failure to provide a correct or updated mailing address is the entry of an *in absentia* order of removal. If an alien receives "written notice" through either the Notice to Appear or Notice of Hearing, and then "does not attend [the removal] proceeding," he "shall be ordered removed *in absentia* if the [government] establishes by clear, unequivocal, and convincing evidence that the written notice

94. *Dababneh*, 471 F.3d at 810. *See* Section II.B.1, addressing the Seventh Circuit's jurisdictional holding in the same case.
95. 670 F.3d 404, 409 (2d Cir. 2012).
96. *Id*. at 410.
97. *Id*.
98. 8 U.S.C. § 1229(a)(1)(F)(i) (2012).
99. 8 U.S.C. § 1229(a)(1)(F)(ii) (2012).
100. 8 U.S.C. §§ 1229(a)(1)(F)(iii), (G)(ii) (2012).

was so provided and that the alien is removable."[101] A written notice is sufficient if "provided at the most recent address provided [by the alien] under section 1229(a)(1)(F)."[102] An *in absentia* order may be entered *without* written notice, however, "if the alien has failed to provide the address required under section 1229(a)(1)(F)."[103]

These dynamics were on display in case law arising in the Eighth, Fifth, and Ninth Circuits. In *Haider v. Gonzales*, an Eighth Circuit case, the alien was served with a Notice to Appear that omitted the time and date of his initial hearing and contained a warning of the alien's obligation to keep his address current with the immigration court.[104] Nevertheless, he moved without informing the immigration court; his Notice of Hearing was served at the last address provided and he ultimately failed to appear for his hearing.[105] The court ordered his removal *in absentia*, and both the immigration judge and Board denied his subsequent motion to reopen proceedings and rescind that order.[106] The Eighth Circuit denied a petition for review of those determinations.[107] Reviewing the statute, the court held that "[t]he INA simply requires that an alien be provided written notice of his hearing; it does not require that the NTA served [on the alien] satisfy all of § 1229(a)(1)'s notice requirements."[108] Rather, service of the Notice of Hearing can accomplish a full notice.[109] The court found nothing unlawful or impermissible in conveying the relevant information through service of multiple documents, and noted that "the only reason [the alien] did not receive the [Notice of Hearing] was because he moved without notifying" the government or his attorney "of his new address."[110] The Eighth Circuit did, however, limit its analysis to cases where a subsequent Notice of Hearing *was* served on the alien—either in fact or at the address provided.[111] In other words, failure to appear after service of a defective Notice to Appear by itself would be an insufficient basis on which to enter an *in absentia* order.[112]

The Fifth Circuit subsequently agreed with this reasoning, holding that "[a Notice to Appear] need not include the specific time and date of a removal hearing in order for the statutory notice requirements to be satisfied; that

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101. INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2012).

102. *Id.*; *see* 8 U.S.C. 1229(c) (2012) ("Service [of documents on an alien] by mail . . . [is] sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with [section 1229(a)(1)(F)]").

103. 8 U.S.C. § 1229a(b)(5)(B) (2012).

104. 438 F.3d 902, 903–04 (8th Cir. 2006).

105. *Id.* at 904.

106. *Id.* at 904–05.

107. *Id.* at 910.

108. *Id.* at 907.

109. *See id.* ("[T]he NTA and the NOH, which were properly served on [the alien], combined to provide the requisite notice.").

110. 438 F.3d 902, 908 (8th Cir. 2006).

111. *Id.*

112. *Id.* ("We wish to be clear that the NTA, if it were the only notice served on [the alien] in this case, would not have authorized in absentia removal because [the alien] would not have been served notice of the date and time of the hearing as required by § 1229(a)(1).").

information may be provided in a subsequent [Notice of Hearing]."[113] Shortly thereafter, the Ninth Circuit also found that a "two-step notice procedure is permissible," as such a procedure was not explicitly prohibited under the statute, the regulations specifically contemplated such sequential conveyance of information, and the realities regarding the limited information DHS might have at the time the Notice to Appear was served supported providing such flexibility.[114] Accordingly, "a Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of the hearing is in fact later sent to the alien."[115]

C. *Application of the Stop-Time Rule by the Board of Immigration Appeals*

Although the Board was relatively late in rendering an interpretation of how the stop-time rule operates, it has addressed that application in a variety of contexts since its initial decision in *In re N-J-B-*. In 2000, the Board addressed the issue of whether an alien immediately begins to accrue continuous physical presence after service of the charging document, *i.e.*, whether that service simply interrupts and then resets the accrual of presence in *In re Mendoza-Sandino*.[116] The Board answered in the negative, holding that the service of the charging documents "is not simply an interruptive event that resets the continuous physical presence clock, but is a terminating event, after which continuous physical presence can no longer accrue."[117]

The Board clarified this finding four years later in *In re Cisneros-Gonzalez*, a case presenting the issue of whether an alien could, after having been served a Notice to Appear and departing the United States, return and begin again accruing continuous physical presence for purposes of eligibility for cancellation of removal.[118] The facts present in *Cisneros-Gonzalez* highlighted "ambiguities in the language and purpose of section 240A(d)(1)" not present in *Mendoza-Sandino*, which addressed "whether service of a valid charging document precluded an applicant for relief from accruing a qualifying period of continuous physical presence in the proceedings that arose from service of that charging document."[119] In *Cisneros-Gonzalez*, the Board found the statute ambiguous regarding the effect of a previously served and filed Notice to Appear on subsequent removal proceedings,[120] and held that the notice relevant under the stop-time rule related "only to the charging document served in the proceedings in which the alien applies for cancellation of removal, and not to charging documents served on the alien in prior

113. Gomez-Palacios v. Holder, 560 F.3d 354, 359 (5th Cir. 2009).
114. Popa v. Holder, 571 F.3d 890, 895–96 (9th Cir. 2009).
115. *Id.* at 896.
116. *In re* Mendoza-Sandino, 22 I. & N. Dec. 1236 (BIA 2000).
117. *Id.* at 1241.
118. *In re* Cisneros-Gonzalez, 23 I. & N. Dec. 668 (BIA 2004).
119. *Id.* at 670.
120. *Id.* at 670–71.

proceedings."[121] In other words, an alien may accrue continuous physical presence after issuance of a final order of removal, applicable to eligibility for cancellation of removal in any future removal proceeding.

And in *In re Ordaz*, the Board resolved the issue of what effect, if any, a served but unfiled Notice to Appear has for stop-time purposes.[122] In that case, the alien was served with an unfiled Notice to Appear in 1998 followed by no proceedings.[123] However, the alien was subsequently served with a second Notice to Appear; when DHS instituted proceedings, the question arose as to which notice was relevant for cutting off his accrual of continuous physical presence.[124] The Board found the statute to be ambiguous regarding whether a served, but not filed, Notice to Appear could trigger the stop-time rule.[125] According to the Board, the statutory language "could be interpreted to mean that a written notice is not 'a notice to appear under section 239(a)' absent the actual commencement of proceedings" based on the filing of that notice.[126] The Board concluded that this was the best reading of the language—that proceedings had to be commenced based on the served Notice to Appear before that notice could be given stop-time effect.[127] In the Board's view, "[t]he language and structure of section 240A(d)(1) of the Act [the stop-time rule] do not support giving 'stop-time' effect to a notice to appear that was served on an alien but was never used to commence proceedings."[128]

Finally, in *In re Camarillo*, the Board addressed the issue at the heart of *Pereira*: "whether the 'stop-time' rule applies at the time a notice to appear is served on the alien, even if it does not include all of the information listed in section 239(a)(1) of the Act."[129] Turning first to the language of the statute, the Board agreed that the alien offered a reasonable construction of the stop-time rule's text—that a Notice to Appear "under section 239(a)" "mandates that a notice to appear must comply with all of the provisions of section 239(a)(1) in order for its service to 'stop time' toward accrual of continuous residence."[130] However, the Board also found equally plausible that "under section 239(a)" is definitional and "merely specifies the document the DHS must serve on the alien to trigger the 'stop-time] rule" while "not impos[ing] substantive requirements for a notice to appear to be effective in order for that trigger to occur."[131] Given equally plausible readings of the relevant language, the Board found the statute to be ambiguous.

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121. *Id*. at 672.
122. *In re* Ordaz, 26 I. & N. Dec. 637 (BIA 2015).
123. *Id*. at 637–38.
124. *Id*. at 638.
125. *Id*. at 639.
126. *Id*.
127. 26 I. & N. Dec. 637, 640–42 (BIA 2015).
128. *Id*. at 643.
129. *In re* Camarillo, 25 I. & N. Dec. 644, 646 (BIA 2011).
130. *Id*. at 647.
131. *Ibid*.

The Board concluded that the better interpretation of the statute was that a Notice to Appear need not include all the information required under Section 239(a)(1) in order for its service to trigger the stop-time rule.[132] First, the Board noted that Section 239(a) is the primary reference to a "Notice to Appear" in the INA, and that by using the phrase "under section 239(a)" Congress was simply noting the document whose service would stop-time.[133] Second, the breadth of the statutory reference, to the whole of Section 239(a) rather than specifically to the list of the required information at Section 239(a)(1), also supported the definitional construction of the reference.[134] Third, the regulations specifically allow omission of the date, time, and place of the removal hearing, if the immigration court subsequently provides that information through the Notice of Hearing.[135] Given the permissiveness of the regulatory scheme, it made little sense to read the stop-time rule as imposing substantive requirements on the contents of the Notice to Appear. Fourth, the Board found its reading support by legislative history. With IIRIRA, Congress had wanted to cut back on aliens' ability to delay proceedings while accruing presence after proceedings had begun and after they had been served with the charging document.[136] The Board's reading effectuated this intent. Finally, practical considerations supported the Board's interpretation. In the case where DHS could not provide the date and time information in the Notice to Appear, allowing that additional time between service of the Notice to Appear and service of the Notice of Hearing to inure to the benefit of the alien made little sense – especially given available evidence of legislative intent.[137]

D. Camarillo *in the Courts of Appeals*

As decisions applying *In re Camarillo* began making their way to the courts of appeals, those courts generally deferred to the Board's interpretation of the stop-time rule under familiar principles of *Chevron* deference.[138] Under that framework, courts first examine the statute to determine whether Congress has spoken to the precise question presented.[139] In conducting this analysis, courts may look beyond the text of the statute in isolation by assessing those words "in their context and with a view to their place in the overall

132. *Id*. at 652.
133. *Id*. at 647.
134. *Id*. at 647–48.
135. *In re* Camarillo, 25 I. & N. Dec. 644, 648 (BIA 2011).
136. *Id*. at 649–50.
137. *Id*. at 650.
138. *See, e.g*., *Scialabba*, 573 U.S. at 56 (plurality opinion) (well-established that "[p]rinciples of *Chevron* deference apply when the BIA interprets the immigration laws."); *see also id*. at 2214-16 (Roberts, C.J., concurring in the judgment).
139. *Chevron*, 467 U.S. at 842.

statutory scheme,"[140] while also appealing to legislative history and congressional intent.[141] If the statute is ambiguous, *i.e.*, Congress has not provided an answer to the precise question presented, then the Board's interpretation of the statute "prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best."[142]

Applying the *Chevron* framework, the majority of the courts of appeals agreed with the Board that the statute did not provide a clear answer to whether a Notice to Appear lacking "time and place" information was nonetheless sufficient for stop-time purposes. As the Seventh Circuit noted, "[t]he statute conditions operation of the stop-time rule on service of a 'notice to appear under section 1229(a),'" but "[i]t says nothing about whether a Notice to Appear, in order to function for the stop-time rule, must include the date and time of a hearing."[143] With no clear textual command that a Notice to Appear *must* include all information referenced in Section 239(a)(1), the courts agreed that the statute was susceptible to at least two plausible interpretations.[144] In the words of the Second Circuit, the stop-time rule's "reference to a 'notice to appear under section 1229(a)' might be read to require DHS to serve an alien with a notice that satisfies all the provisions of that section. Alternatively, Congress's reference to 'section 1229(a)'might be read as primarily definitional, providing a reference point for the charging document that triggers the stop-time rule without demanding strict compliance with each of § 1229(a)'s requirements."[145] Given multiple plausible interpretations of the statute, a plain text resolution was not possible: "[w]hen a statute ambiguously lends itself to more than one interpretation, we may not substitute one party's construction for a reasonable interpretation issued by the

140. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); *see* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to . . . the language and design of the statute as a whole.").

141. *See*, *e.g.*, Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 587–90 (2004) (analyzing legislative history at *Chevron* step-one); *Brown & Williamson Tobacco Corp*., 529 U.S. at 132–33 (same); Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 649–50 (1990) (same).

142. Holder v. Martinez Gutierrez, 566 U.S. 583, 591(2012); *see Cuellar de Osorio*, 573 U.S. at 57 (plurality opinion) ("[A] court must defer to the Board's reasonable interpretation, rather than substitute its own reading.").

143. Yi Di Wang v. Holder, 759 F.3d 670, 674 (7th Cir. 2014), *abrogated by* 138 S.Ct. 2105; *accord* Guaman-Yuqui v. Lynch, 786 F.3d 235, 238 (2d Cir. 2015) ("The text of the stop-time rule does not clarify whether a notice to appear must comport with all of the procedural requirements contained in § 1229(a) in order to freeze an alien's period of continuous residence."), *abrogated* by Pereira v. Sessions, 138 S.Ct. 2105 (2018).

144. Additionally, the Ninth Circuit posited a third possibility that harkened back to its own pre-*Camarillo* precedent: "Finally, one might interpret the statute to mean that an NTA in combination with one or more other documents (such as a hearing notice) will meet all the statutory requirements and trigger the stop-time rule." Moscoso-Castellanos v. Lynch, 803 F.3d 1079, 1083 (9th Cir. 2015), *abrogated by* 138 S.Ct. 2105.

145. *Guaman-Yuqui*, 786 F.3d at 238–39; *see* Urbina v. Holder, 745 F.3d 736, 740 (4th Cir. 2014) ("Both the BIA's and Urbina's readings are plausible in light of the text."), *abrogated by* 138 S. Ct. 2105; *accord* Gonzalez-Garcia v. Holder, 770 F.3d 431, 434 (6th Cir. 2014), *abrogated by* 138 S. Ct. 2105.

agency charged with administering it."[146]

Turning to the Board's interpretation of the statute, the courts found it to be reasonable and permissible, and thus entitled to deference under step-two of *Chevron*. Some of these decisions were conclusory in nature, deferring to the Board's decision in summary fashion.[147] But most focused on the rationales provided by the Board and assessed the reasonableness of those justifications.

First, looking to the text and purpose of the Notice to Appear, several courts found ample support for the "definitional" reading of the stop-time rule's reference to Section 239(a). "The statute identifies a form that must be served on the immigrant," but "does not says that only a form that contains every item, including yet-to-be-determined dates for a hearing, stops the ten-year clock."[148] This absence supports the definitional approach. As the Second Circuit observed, "Congress may reasonably have cited" the Notice to Appear provision in the stop-time rule "to 'specify the document the DHS must serve on the alien to trigger the "stop-time" rule,' rather than to impose strict procedural or substantive prerequisites."[149] This interpretation is also supported by the Notice's function "to inform an alien that the government seeks to remove him from the country."[150] This purpose remains the same even where "a notice [] does not specify the date or time of a hearing conveys that intent."[151]

Second, statutory context provided additional support for the reasonableness of the Board's construction. Because the stop-time rule "does not refer simply to § 1229(a)(1), but to 'the entirety of section [122]9(a),' . . . it makes little sense to tie application of the stop-time rule to complete compliance with all its requirements."[152]

Third, like the Board, the courts of appeals saw practical considerations, including that DHS serves the Notice to Appear but it is the immigration court that schedules the hearings, as relevant and worthy of consideration in interpreting the statute.[153] As the Sixth Circuit explained, "[a]ny other interpretation would require Homeland Security investigators to place hearing

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146. *Gonzalez-Garcia*, 770 F.3d at 434; *see Moscoso-Castellanos*, 803 F.3d at 1083 ("Because the statute is susceptible to several interpretations, we hold, at Chevron step one, that the statute is ambiguous."); *Wang*, 759 F.3d at 674 ("[T]he central point for present purposes is that Congress did not resolve the issue in the statute, and so Wang cannot prevail under Chevron's first step.").

147. *See, e.g.*, *Urbina*, 745 F.3d at 740 ("And because the BIA's interpretation in Camarillo is plausible—for the reasons the BIA gave in that case—it merits deference under the second step [of Chevron].").

148. *Gonzalez-Garcia*, 770 F.3d at 434.

149. *Guaman-Yuqui*, 786 F.3d at 239; *see Moscoso-Castellanos*, 803 F.3d at 1083.

150. *Wang*, 759 F.3d at 674.

151. *Id.*

152. *Guaman-Yuqui*, 786 F.3d at 239; *see Moscoso-Castellanos*, 803 F.3d at 1083 ("[A]lthough only § 1229(a)(1) lists the statutory requirements for the NTA, the cross-reference [in the stop-time rule] is to the entirety of § 1229(a).").

153. *See Moscoso-Castellanos*, 803 F.3d at 1083; *Guaman-Yuqui*, 786 F.3d at 239; *Wang*, 759 F.3d at 674.

dates on all notices to appear whether the Executive Office 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."[154] Moreover, such flexibility was specifically contemplated by the regulations: "[c]ontemplating that the time and date of the immigration hearing may sometimes be omitted from the initial notice, those regulations suggest that such scheduling information is not a critical element of DHS's charging document."[155]

Finally, the courts' treatment of the Board's analysis of Congressional intent in *Camarillo* offered additional support for this interpretation. As the Second Circuit acknowledged, "the stop-time rule manifests a clear Congressional intention to discourage aliens from obstructing their immigration proceedings once notified that the government has initiated charges against them. This legitimate government purpose in no way depends on an alien's knowledge of the precise scheduling of his or her initial hearing."[156] Given this stated intent from the legislative history, "the Board reasonably saw its interpretation as consistent with the stop-time rule's basic purpose: to prevent aliens from delaying their immigration proceedings to become eligible for relief from removal."[157]

However, not every appellate court to consider the issue deferred to the Board's interpretation. The Third Circuit broke with its sister circuits in 2016.[158] In *Orozco-Velasquez*, that court determined that the stop-time rule "specifically incorporates" the statutory requirements pertaining to Notices to Appear, and held that "an alien's period of continuous residence is interrupted, that is, *time stops*, only when the government serves a NTA in conformance with 8 U.S.C. § 1229(a)."[159] Resolving the issue at *Chevron* step-one, the Third Circuit rejected the conclusions of the other courts that the statute was ambiguous. It concluded, for instance, that the broad reference to Section 1229(a) as a whole was irrelevant, as that broader incorporation did not diminish or condition the government's obligation to comply with the specific requirements of subsection (a)(1).[160] Its decision also recognized the potential need to change the time and place of the hearing; the broad reference "simultaneously compels government compliance with each of § 1229(a)(1)'s" requirements while "accommodating," through Section 1229(a)(2), "a 'change or postponement'" in those proceedings.[161] According to the Third Circuit, then, "Congress's incorporation of § 1229(a) in its entirety conveys a clear intent: that the government

154. *Gonzalez-Garcia*, 770 F.3d at 434–35.
155. *Guaman-Yuqui*, 786 F.3d at 239; *see Moscoso-Castellanos*, 803 F.3d at 1083.
156. *Guaman-Yuqui*, 786 F.3d at 239 (*citing* Camarillo, 25 I. & N. Dec. 644, 650 (B.I.A 2011), *abrogated by* Pereira v. Sessions, 138 S.Ct. 2105 (2018)); *see* Moscoso-Castellanos, 803 F.3d at 1083; *see also* 143 Cong. Rec. S12265 (daily ed. Nov. 9, 1997) (discussing § 203(a) amendments to IIRIRA).
157. *Wang*, 759 F.3d at 674–75.
158. Orozco-Velasquez v. Att'y Gen. U.S., 817 F.3d 78 (3d Cir. 2006).
159. *Id*. at 82.
160. *See id*. at 82–83.
161. *Id*. at 83.

may freely amend and generally supplement its initial [Notice to Appear]; but to cut off an alien's eligibility for cancellation of removal, it must do so within the ten years of continuous residence[.]"[162]

The Third Circuit also found important Section 1229(a)'s textual command, which used the term "shall"; a "mandatory rather than a hortatory instruction."[163] Thus, a Notice to Appear complies with Section 1229(a)(1), and is effective for stop-time purposes, only when it includes all the material mandated by the statute.[164] In so holding, however, the court did leave open the possibility of an interpretation consistent with the pre-*Camarillo* views of several courts of appeals: "an initial [Notice to Appear] that fails to satisfy § 1229(a)(1)'s various requirements will not stop the continuous residency clock until the combination of notices, properly served on the alien charged as removable, conveys the *complete* set of information prescribed by § 1229(a)(1)[.]"[165]

III. PEREIRA V. SESSIONS

A. *The Underlying Proceedings*

Pereira entered the United States on a non-immigrant visitor's visa in June 2000, overstayed his period of authorized admission, and was subsequently served with a Notice to Appear after his arrest for Driving-Under-the-Influence in 2006.[166] The initial Notice did not contain the date and time of his scheduled hearing, but after its filing with the immigration court, an updated Notice of Hearing was mailed to Pereira containing accurate date and time.[167] However, Pereira never received the subsequent notice, purportedly because of mail-delivery peculiarities specific to the area where he resided. The court then ordered him removed *in absentia* after he failed to appear, but Pereira remained in the United States.[168]

Eight years later, Pereira was again arrested for a motor-vehicle offense.[169] At that point, he successfully sought reopening and rescission of the prior *in absentia* removal order. Despite the effort, the court still found him removable for overstaying the authorized period of admission. Moreover, the court concluded that he was ineligible for cancellation of removal.[170] This latter determination was based on the service of the 2006 Notice to Appear, which, according to the agency, stopped Pereira's accrual of physical presence short of the requisite 10 years.[171] In dismissing Pereira's administrative appeal, the

162. *Id.*
163. *Id.*
164. *See id.*
165. *See id.*
166. *Pereira*, 138 S. Ct. at 2112.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

Board declined to reconsider its holding in *In re Camarillo*.[172] Pereira filed a petition for review with the First Circuit.[173]

The First Circuit denied the petition and agreed with the majority of courts of appeals regarding the ambiguity of the statute and the reasonableness of the Board's interpretation. First addressing ambiguity, the court noted Pereira's argument, that all items required by Section 1229(a)(1) must be provided to the alien, in either the Notice to Appear itself or through subsequent service of the hearing notice, before the stop-time rule could be triggered.[174] It also noted the Third Circuit's recent decision in *Orozco-Velasquez* and the conclusion that the "shall" in Section 1229(a) denotes a mandatory obligation that is unambiguously incorporated into the stop-time rule by that rule's explicit cross-reference to Section 1229(a).[175] But the court did not find the Third Circuit's argument and analysis persuasive. The mandatory "shall" did not occur in the stop-time rule itself, and the question of whether a Notice to Appear had to include all that information to comply with Section 1229(a) was a distinct question from whether total compliance was necessary for purposes of the stop-time rule.[176] Nor was it clear that the "stop-time rule unambiguously incorporates the requirements of § 1229(a)(1)."[177] The stop-time rule itself does not explicitly state that total compliance is necessary before the rule could be triggered, nor did the court view the language of the statute as otherwise unambiguously mandating such a requirement.[178]

Turning to the Board's interpretation of the stop-time rule, the court concluded that "[i]n light of the relevant text, statutory structure, administrative context, and legislative history, the [Board]'s construction of the stop-time rule is neither arbitrary and capricious nor contrary to the statute."[179] Given that the stop-time rule refers not to Section 1229(a)(1) specifically, but to Section 1229(a) generally, "[i]t would make little sense for the stop-time rule's reference to 'a notice to appear under section 1229(a)' to condition the triggering of the rule on the fulfillment of all of the requirements of § 1229(a)."[180] Likewise, "the 'definitional' approach best accords with the process through which enforcement proceedings are initiated," where DHS served the Notice and the immigration court schedules proceedings.[181] Finally, "[t]he legislative history reflects Congress's concern about delay and inefficiency in the immigration process that it sought to address through

172. *Pereira*, 138 S.Ct. at 2112.
173. *See* INA §§ 242(a)(1), (5), (defining petition for review), 8 U.S.C. §§ 1252(a)(1), (5) (2012) (defining petition for review).
174. *Pereira*, 138 S.Ct. at 2113.
175. *Id*. (*citing* Orozco-Velasquez, 817 F.3d at 83).
176. *Pereira*, 866 F.3d 1, 5 (1st Cir. 2017).
177. *Id*.
178. *See id*.
179. *Id*. at 7 (*citing Chevron*, 467 U.S. at 844).
180. *Id* at 6.
181. *Id*. at 6–7.

enactment of IIRIRA."[182] Given this intent "to prevent notice problems from dragging out the deportation process, it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS."[183] All these considerations led to the court's conclusion that the Board's interpretation "is . . . a permissible construction of the statute to which we defer."[184]

B. *The Supreme Court's Decision*

Given the conflict amongst the circuits on the question of whether a statutorily deficient Notice to Appear is sufficient to trigger the stop-time rule, the Supreme Court granted certiorari.[185] Before the Court, the parties took predictable positions. Pereira argued that the statute was plain and that the clear text of the stop-time rule incorporated the full requirements of Section 1229(a)(1).[186] In other words, absent total compliance with the Notice to Appear provision, the stop-time rule was not triggered.[187] The government argued that the best reading of the statute was that total compliance with Section 1229(a)(1) was *not* a necessary precondition to triggering the stop-time rule, and at the very least the Board's decision to that effect was entitled to *Chevron* deference as a reasonable and permissible construction of ambiguous statutory language.[188]

Locating the question "at the intersection of" the Notice to Appear and stop-time provisions, the Court held that "[t]he plain text, the statutory context, and common sense all lead inescapably and unambiguously to" the conclusion that a statutorily deficient Notice is ineffective for stop-time purposes.[189] Focusing on the narrow issue of whether "a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' . . . trigger[s] the stop-time rule,"[190] the Court determined that a resort to *Chevron* deference was unnecessary because "Congress has supplied a clear and unambiguous answer to the interpretive question at hand."[191] "A putative notice to appear that fails to designate the specific time or place of

182. *Id*. at 7.
183. *Pereira*, 866 F.3d at 7.
184. *Id*. at 8.
185. Pereira v. Sessions, 866 F.3d 1, 2 (1st Cir. 2017), *cert. granted*, 138 S. Ct. 735 (2018) (No. 17-459).
186. *See generally* Brief for Petitioner at 24–48, Pereira v. Sessions, 138 S. Ct. 735 (2018) (No. 17-459), 482018 WL 1083742.
187. *Id*. at 25–26.
188. *See generally* Brief for Respondent at 20–46, 46–53, Pereira v. Sessions, 138 S. Ct. 735 (2018) (No. 17-459), 2018 WL 1557067.
189. *Pereira*, 138 S. Ct. at 2110.
190. *Id*. at 2113 ("the Court notes that the question presented by Pereira, which focuses on all 'items listed' in § 1229(a)(1), sweeps more broadly than necessary to resolve the particular case before us.").
191. *Id*.

the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a),' and so does not trigger the stop-time rule."[192]

The Court determined that the "statutory text alone" was "enough to resolve" the case.[193] The stop-time rule's expressed reference to Section 1229(a) "specifie[d] where to look to find out what 'notice to appear' means."[194] Given the explicit cross-reference to Section 1229(a), "it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, 'specif[ies]' the 'time and place' of the removal proceedings."[195] In reaching this determination, the Court rejected the government's contention that the stop-time rule's reference to Section 1229(a) was broad and definitional, since it referred to *all* of that provision, rather than just to Section 1229(a)(1), which contained the list of requirements for a Notice to Appear. The Court concluded that "the broad reference to § 1229(a) is of no consequence, because, as even the Government concedes, only paragraph (1) bears on the meaning of a 'notice to appear.'"[196] Moreover, the Court found support for that conclusion in subparagraph (2), directing notice of "any chance or postponement in the time and place of the proceeding.[197] Unless a "time and place" had been set consistent with the first subparagraph, "there would be no time or place to 'change or postpone.'"[198]

Finally, the Court found support for its interpretation in Section 1229(b)(1), which gives an alien "the opportunity to secure counsel before the first" removal hearing by requiring that the "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear."[199] In the Court's view, this provision could be effectively annulled by the government's interpretation. The government could, after more than the 10 days contemplated by Section 1229(b)(1), supply the missing hearing date, and that date could then be less than 10 days from service of the document setting that date.[200] In such a case, the "opportunity will not be meaningful if, given the absence of a specified time and place, the noncitizen has minimal time and incentive to plan accordingly, and his counsel, in turn, receives limited notice and time to prepare adequately."[201] Given all these considerations, "[i]t therefore follows that, if a 'notice to appear' for purposes of § 1229(b)(1) must include the time-and-place information, a 'notice to appear' for purposes of the stop-time rule under § 1229b(d)(1) must as well."[202]

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192. *Id.* at 2113–14.
193. *Id.* at 2114.
194. *Id.*
195. *Pereira*, 138 S. Ct. at 2114.
196. *Id.*
197. *Pereira*, 138 S. Ct. at 2114 (*quoting* 8 U.S.C. § 1229(a)(2) (2012)).
198. *Id.*
199. *Id.* (*quoting* 8 U.S.C. § 1229(b)(1) (2012)).
200. *Id.* at 2114–15.
201. *Id.* at 2115.
202. *Id.*

Beyond statutory text and context, the Court held that its conclusion was "compel[led]" by common sense.[203] "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."[204] Providing this information "is an essential function of a notice to appear," and thus is a necessary prerequisite to application of the stop-time rule.[205]

Justice Kennedy concurred to take issue with the courts of appeals' application of *Chevron* deference to the question presented.[206] Although the *Chevron* issues with the three opinions of the Supreme Court are outside the scope of this article, Justice Kennedy did hint at what a proper resolution of the stop-time issue might look like going forward. He referred to the pre-*Camarillo* case law of the courts of appeals holding that "the notice necessary to trigger the stop-time rule ... was not 'perfected' until the immigrant received all the information listed in § 1229(a)(1)."[207] Justice Kennedy described this case law as reflecting an "emerging consensus" that was "abruptly dissolved" by the Board's contrary interpretation in *Camarillo*.[208] Accordingly, although the issue of when time stops was not passed on in *Pereira* itself, the justice who raised the issue appeared to view the pre-*Camarillo* case law favorably.[209]

IV. OPEN QUESTIONS AND THE RATIONAL LIMITATIONS OF ARGUING FROM *PEREIRA*

Given the discrete question presented and resolved in *Pereira*, and the narrowness of the decision that the Court itself assigned to its opinion, one could be forgiven for assuming that beyond that issue, *Pereira* is unlikely to have significant effect. The litigation of the preceding year undercuts that assertion, and even on its own terms *Pereira* left at least one significant question open. This Section addresses both that open question, and the more tenuous applications of *Pereira* that have thus far been attempted.

This Section proceeds thematically, examining the main areas in which *Pereira* is or could be relevant in continuing litigation. First, cancellation of removal and voluntary departure: these forms of relief are most directly affected by *Pereira* since the decision dealt specifically with cancellation of

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203. *Id.*
204. *Id.*
205. *Id.*
206. *Pereira*, 138 S. Ct. at 2120–21 (Kennedy, J., concurring).
207. *Id.* at 2120 (*citing Guamanrrigra*, 670 F.3d at 410; *Dababneh*, 471 F.3d at 809; *Garcia-Ramirez*, 423 F.3d at 937 n.3).
208. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring).
209. Justice Alito was the sole dissenter. He found the statute ambiguous, and the Board's decision in *In re Camarillo* a reasonable and permissible construction of that ambiguous language. *See Pereira*, 138 S. Ct. at 2121–29 (Alito, J., dissenting).

removal, while the voluntary departure eligibility criteria are phrased in an almost identical fashion to the relevant cancellation provision. *Pereira* definitively resolved the question of when time does *not* stop for purposes of cancellation of removal, but it left open the question of when time *could* or *would* stop if the initially served Notice to Appear is statutorily deficient. Second, *in absentia* orders of removal: entry of these orders turns on whether an alien has been provided with required statutory notice, and this, at least in part, implicates the sufficiency of the Notice to Appear that was served on the alien. The Notice to Appear in such cases is only part of the analysis, but it has provided a foothold for arguments premised on *Pereira*. Finally, the third thematic area considered is jurisdiction of the immigration court, which is the apex of the Notice-to-Appear-is-deficient-for-all-purposes argument. The immigration court obtains jurisdiction over removal proceedings once the Notice to Appear is filed with the court, and the argument has arisen that if the Notice does not include all information required under the statute, it is defective for regulatory conferral-of-jurisdiction purposes as well.

There are fairly straightforward answers to all these issues, which are more fully addressed below. First, the stop-time rule should be triggered once the alien has been provided with all the information required under the statute, and *Pereira* is not to the contrary. Second, *Pereira* should be irrelevant to the *in absentia* provisions, as those provisions require notice in one of two ways, meaning a deficient Notice to Appear is unlikely to end the inquiry. Finally, the jurisdiction of the immigration court is a creature of regulation, not statute, meaning the direct holding of *Pereira* has no relevance when considering the distinct and dissimilar provisions addressing the requirements of a "Notice to Appear" for jurisdictional purposes. In the end, *Pereira*'s continuing relevance is not likely to last long.

A. *Cancellation of Removal and Voluntary Departure*

The most obvious and—until recently—noncontroversial point going forward relates to application of the Supreme Court's narrow holding in *Pereira*: a Notice to Appear that fails to designate the date, time, and place of the initial removal hearing will be ineffectual for purposes of the stop-time rule.[210] The resolution of this narrow issue is also likely to be the only decision from the Supreme Court on the requirements of a Notice to Appear for stop-time purposes. Although the Court declined to render a decision on whether any of the other information required by Section 1229(a)(1) is strictly necessary before the stop-time rule could be triggered,[211] that is a

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210. *See Pereira*, 138 S. Ct. at 2113–14 ("A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a),' and so does not trigger the stop-time rule.").

211. *Id.* at 2113 ("As a threshold matter, the Court notes that the question presented by Pereira, which focuses on all 'items listed' in § 1229(a)(1), sweeps more broadly than necessary to resolve the particular case before us."); *see id.* at 2113 n.5.

largely formalistic question only. The Notice to Appear contains much of the information that is statutorily mandated as boilerplate in the form itself, while the main additional information that should be included, the charge or charges of removability against the alien and the factual aversions that constitute the foundation for the charges, will be included as a matter of necessity.[212] Absent a charge of removability and a factual basis for the charge, there would be no reason to serve the Notice in the first place.

The only necessary corollary to the Court's explicit holding relates to voluntary departure, an issue not before the Court in *Pereira* but likely resolved by its decision in that case. To establish eligibility for voluntary departure at the conclusion of removal proceedings, the alien must establish, *inter alia*, that he or she "has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a)[.]"[213] Given the similarity of phrasing between this provision and the stop-time rule itself, both of which relate to notice served "under section 1229(a)" of the INA,[214] a reasonable application of the Court's rationale in *Pereira* appears to indicate that a statutorily deficient Notice to Appear would not be a legitimate temporal marker from which to assess the alien's physical presence in the United States for purposes of voluntary-departure eligibility.

Although *Pereira* resolved the immediate effect of a statutorily deficient Notice to Appear on the stop-time rule—*i.e.*, such a Notice is insufficient to trigger that rule—it left open the question of when the stop-time rule does take effect in a case where the initial Notice fails to specify the "time and place" of the initial removal hearing. Prior to the Board's decision in *In re Camarillo*, several courts of appeals had held that, in cases where the Notice to Appear did not specify the "time and place" of the hearing, accrual of continuous physical presence nonetheless ended when the immigration court served a Notice of Hearing on the alien.[215] Notably, Justice Kennedy's concurrence in *Pereira* seemed to look favorably on these decisions, characterizing those cases as an "emerging consensus" that was dissolved by the Board's decision in *In re Camarillo*.[216]

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212. *See id.* at 2113 ("the Government acknowledges that '[m]uch of the information Section 1229(a)(1) calls for does not' change and is therefore 'included in standardized language on the I-862 notice-to-appear form.'") (quoting Brief for Respondent 36); *see also id.* ("the Government's 2006 notice to Pereira included all of the information required by § 1229(a)(1), except it failed to specify the date and time of Pereira's removal proceedings.").

213. INA § 240B(b)(1)(A), 8 U.S.C. § 1229c(b)(1)(A) (2012).

214. *Compare* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2012) (time stops "when the alien is served a notice to appear under section 1229(a) of this title"), *with* INA § 240B(b)(1)(A), 8 U.S.C. § 1229c(b)(1)(A) (2012) (relevant date for assessing eligibility is "the date the notice to appear was served under section 1229(a) of this title").

215. *See* Section I.B.2.

216. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring).

Post-*Pereira*, there are various potential approaches to determining when and how the accrual of continuous physical presence stops.[217] Pre-IIRIRA Board precedent provides at least two possibilities: the period of continuous physical presence ends upon the filing of the cancellation application with the immigration court, or it may be continuous and the relevant time-frame is counted backward from the final adjudication of the application.[218] The courts of appeals' pre-*Camarillo* case law provides a third option: that the accrual is stopped upon service of the Notice of Hearing, which effectively "completes" the statutory notice requirements.[219] And finally, presence may accrue until the government serves a Notice to Appear that in and of itself is fully compliant with the statutory requirements.

The best interpretation of the various statutory provisions after *Pereira* is that time stops when the alien has been provided with all the information to which he is entitled under Section 1229(a)(1), which should occur upon service of the Notice of Hearing. This position is consistent with the text of the statute itself, with how the Supreme Court has addressed the curability of defects in other pleadings and filings, and with Congressional intent in enacting the stop-time rule. Indeed, the Board largely affirmed this approach in *In re Mendoza-Hernandez* when it addressed the specific question of whether the stop-time rule is triggered when an alien is served with a Notice of Hearing containing the time and place of proceedings information that was absent in the initial Notice to Appear.[220]

First, stopping time once the alien has received all the information to which he is entitled pursuant to Section 1229(a)(1) is consistent with the language of that provision. That section is most directly concerned with the provision of notice to an alien regarding certain aspects of the soon-to-be-instituted removal proceeding, including the "time and place" those proceedings will be held.[221] However, that provision does not technically mandate that the government provide that information in any particular form or

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217. This article does not address the second subpart of INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1), which stops the accrual of continuous physical presence upon the commission of certain criminal offenses. *Pereira* is not relevant to application of that provision.

218. *Cf. In re* Ortega-Cabrera, 23 I. & N. Dec. 793–95 (BIA 2005) (raising these possibilities for purposes of determining the time period in which the alien would have to establish good-moral character, a period that under the statutory language is coterminal with the continuous physical presence requirement).

219. *See Guamanrrigra*, 670 F.3d at 409–10; *Dababneh*, 471 F.3d at 810; *Garcia-Ramirez*, 423 F.3d at 937 n.3.

220. *In re* Mendoza-Hernandez, 27 I. & N. Dec. 520, 522 (BIA 2019); *see also* Garcia-Romo v. Barr, No. 18-3857, 2019 WL 4894346, at *8 (6th Cir. Oct. 4, 2019) (affording *Chevron* deference to *Mendoza-Hernandez*). The Board's decision in *Mendoza-Hernandez* was accompanied by a vigorous dissent, arguing that *Pereira* compels the conclusion that a Notice of Hearing "does not meet the definition of" Notice to Appear under Section 1229(a)(1), and thus does not stop-time when the initial Notice to Appear lacks time and date information. *Id*. at 536. We address this argument below.

221. *See* INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (2012) ("In removal proceedings under section 1229a . . . written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien . . . specifying the following").

format,[222] and the "Notice to Appear" form itself was a creation of the government post-dating the statute.[223] In other words, the form "Notice to Appear" is not necessarily identical to the statutory "notice to appear," which is used in the INA only as shorthand denoting the universe of information that the alien should be provided with.[224] In the absence of a statutory directive to provide the relevant information in a single form or document, the government should be entitled to some discretion in how it provides this information.[225]

This view of the statute is also consistent with the relevant regulations, both prior to IIRIRA and after its enactment. Consistently, the regulations have afforded the government discretion to provide notice of the "time and place" of the proceeding in *either* the charging document itself *or* through a subsequently served Notice of Hearing.[226] Although the Supreme Court declined to view the regulation as supporting the proposition that time stops absent compliance with Section 1229(a)(1), that conclusion should not bar the government from relying on the regulatory framework in making the distinct argument that it retains discretion in how it *completes* service of the relevant information upon the alien. This statutory construction is also consistent with the unanimous view of those courts of appeals that addressed similar questions prior to the Board's decision in *Camarillo*. Without exception, those courts determined that provision of the information that had been missing from the Notice to Appear "cured" the underlying deficiency and brought

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222. *See generally* INA § 239(a), 8 U.S.C. § 1229(a) (2012).

223. This is particularly relevant given the Ninth Circuit's recent decision in *Lopez v. Barr*. 925 F.3d 396, 400 (9th Cir. 2019). There, the court noted the Supreme Court's "compelling" reasoning where it held that "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)." *Id*. (quoting *Pereira*, 138 S. Ct. at 2116). As the Ninth Circuit stated, "any document containing less than the full set of requirements listed in Section 1229(a)(1) is not a Notice to Appear within the meaning of the statute—regardless of how it is labeled by DHS." This argument becomes less persuasive when considered against the absence of a specific "Notice to Appear" document in existence at the time the statute was passed. Moreover, use of the word "notice" in the singular is not dispositive of a two-step notice approach. *Compare id*. at 402 ("The use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule."), *with id*. at 407 (Callahan, J., dissenting) (internal citation and quotations omitted) ("use of the singular contemplates that the notice to appear is generally issued in a single document, it does not follow that all the criteria listed in § 1229(a) must be contained in a single document . . . [i]n determining the meaning of any Act of Congress, unless the context indicates otherwise– words importing the singular include and apply to several persons, parties or things"), *and* Garcia-Romo v. Barr, No. 18-3857, 2019 WL 4894346, at *5 (6th Cir. Oct. 4, 2019) ("This interpretation of the statute lacks merit. It gives too cramped a reading to the meaning of the indefinite article 'a' as understood in ordinary English. When the word 'a' precedes a noun such as 'notice,' describing a written communication, the customary meaning does not necessarily require that the notice be given in a single document. Rather, there may be multiple communications that, when considered together, constitute 'a notice.'").

224. *See* INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (2012) ("written notice (*in this section referred to as a 'notice to appear'*) (emphasis added).

225. *See also Lopez*, 925 F.3d at 406 (Callahan, J., dissenting) ("I do not read Pereira as holding that the notice of the time and place must be provided in a single document. Rather, I read Pereira as not prohibiting the Government from supplementing a deficient notice to appear by subsequently providing notice of the time and place of the removal proceedings"); *Garcia-Romo*, 2019 WL 4894346, at *8 ("the plain and ordinary meaning of the word 'a' as used in context naturally contemplates that service of the required information can be achieved through written communication in multiple installments").

226. *See* 8 C.F.R. § 242.1(b) (1995); 8 C.F.R. § 1003.18(b) (2012).

the government into compliance with its statutory obligations.[227] And even the single court that had rejected *Camarillo* assumed that timely provision of the Notice of Hearing would have been sufficient to trigger the stop-time rule.[228]

Second, construing the Notice of Hearing as "curing" any defect in the initial Notice to Appear is consistent with Supreme Court precedent holding that a subsequent act can cure an initial defect in a pleading or filing in other contexts. For example, in *Becker v. Montgomery*, the Supreme Court considered whether Federal Rule of Civil Procedure 11(a)'s signature requirement necessitated dismissal of an otherwise timely filed notice of appeal where the notice was not signed within the jurisdictional filing period.[229] The *pro se* petitioner in *Becker* submitted a notice of appeal lacking his signature.[230] The court of appeals dismissed the appeal, stating that it lacked jurisdiction because the notice of appeal was not signed.[231] The petitioner filed a motion for reconsideration, to which he attached a new, signed notice of appeal.[232] The Supreme Court concluded that while rule 11(a) does require a signature, a failure to sign can be cured even after the time to appeal has expired.[233]

Subsequently, in *Edelman v. Lynchburg College*, the Court considered whether an Equal Employment Opportunity Commission (EEOC) regulation allowed a timely filed discrimination charge to be amended outside of the charge-filing period, where the amendment included a required verification that was previously omitted.[234] In determining that such an amendment was allowed, the Court referenced *Becker* and described its decision as having allowed "relation back" of the later document with the proper signature to the original timely filed notice of appeal.[235] Further, it stated:

> There is no reason to think that relation back of the oath here is any less reasonable than relation back of the signature in *Becker*. Both are aimed at stemming the urge to litigate irresponsibly, and if relation back is a good rule for courts of law, it would be passing strange to call

227. *See Guamanrrigra*, 670 F.3d at 409-10; *Dababneh*, 471 F.3d at 810; *Garcia-Ramirez*, 423 F.3d at 937 n.3.

228. *See Orozco-Velasquez*, 817 F.3d at 83.

229. Becker v. Montgomery, 532 U.S. 757, 760 (2001).

230. *Id.* at 760–61.

231. *Id.* at 761.

232. *Id.*

233. *Id.* at 768; *but see id.* at 764. The Court discussed the implication of rule 11(a)'s correction component, that "'omission of the signature may be 'corrected promptly after being called to the attention of the attorney or party.'" *Id.* Further, the Rules Advisory Committee states that a correction can be made "by signing the paper on file or by submitting a duplicate that contains the signature." Thus, the Court concluded that the "[t]he remedy for the signature omission . . . is part and parcel of the [signature] requirement itself." *Id.* at 765.

234. Edelman v. Lynchburg College, 535 U.S. 106, 109 (2002).

235. *Id.* at 115–16 (citing *Becker*, 532 U.S. at 765).

it bad for an administrative agency.[236]

Even apart from *Becker*'s support, the Court pointed to "tacit congressional approval of the EEOC's position" over time.[237]

More recently, in *Scarborough v. Principi*, the Supreme Court relied on both *Becker* and *Edelman* to conclude that a timely fee application under the Equal Access to Justice Act (EAJA) could be amended after the filing period expired to cure an initial failure to raise a core allegation.[238] The Court reasoned that the core allegation — that the "position of the United States was not substantially justified"— "imposes no proof burden on the fee applicant. It is . . . nothing more than an allegation or pleading requirement."[239] Additionally, the Court also relied in part on the fact that permitting such an amendment advanced Congress's purpose in enacting EAJA.[240]

Allowing a Notice of Hearing to "cure" a deficient Notice to Appear is consistent with this line of cases.[241] As the Court noted in *Scarborough*, a curative effect is consistent with Congressional intent to cease the accrual of

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236. *Edelman*, 535 U.S. at 116. In a footnote, the Court also referenced Federal Rule of Civil Procedure 15(c), regarding relation back of amendments in some situations. *See id.* at 116 n.10 (citing Fed. R. Civ. P. 15(a)). Rule 15(c) states:

> (c) Relation Back of Amendments.
> (1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:
> (A) the law that provides the applicable statute of limitations allows relation back;
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.
> (2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

Fed. R. Civ. P. 15(c).

237. *Edelman*, 535 U.S. at 116–17.

238. *See* Scarborough v. Principi, 541 U.S. 401, 406 (2004). EAJA amended 28 U.S.C. § 2412 to authorize attorney's fee awards against the Federal Government. *Id.* To qualify, a party seeking an award had to submit an application with a showing of expenses, eligibility, that the party prevailed in the action, and an allegation that the "position of the United States was not substantially justified," within thirty days of the final judgment. *Id.* at 407–08. The petitioner in *Scarborough* failed to allege that the "position of the United States was not substantially justified." *Id.* at 409.

239. *Id.* at 414.

240. *Id.* at 417.

241. While the Supreme Court distinguished *Becker* in *Pereira*, noting that the "omission of time-and-place information is not . . . some trivial, ministerial defect, akin to an unsigned notice of appeal," *Becker* and its progeny remain relevant when evaluating whether the provision of essential time-and-place information is *curative*. *Cf.* Lopez v. Barr, 925 F.3d 396, 404 (9th Cir. 2019) (suggesting reliance on *Becker*, *Scarborough*, and *Edelman* is "misplaced" because omitting time-and-place information is a "substantive" defect).

physical presence once the government has definitively indicated its intent to seek the removal of an alien.[242] And Congress should be deemed to have acted against the backdrop of agency law, both prior to and after 1996, which permitted the provision of "time and place" information through the Notice of Hearing (if not contained in the Notice to Appear).[243] As with *Edelman*, Congress has provided its "tacit . . . approval" of the agency's provision of notice.[244]

Finally, this interpretation has the benefit of fulfilling Congressional intent in enacting the stop-time rule. In establishing the stop-time rule, Congress sought to mark a line beyond which continuous physical presence could not accrue, and it did so in a fashion that would render *every* alien's period of presence to end once the government had served them with a charging document (if it did not end even earlier upon commission of certain criminal offenses). Congress specifically sought to forestall accrual of additional time while the proceeding itself unfolded.[245] Concluding that the Notice of Hearing may stop time fulfills this congressional purpose. Once the government serves the alien with notice of the "time and place" of his hearing, it has completed its show of "intent" to place him into proceedings. At that point, Congress's express intent should dictate that the alien may no longer accrue time towards fulfillment of the continuous physical presence requirement.

Nor is the Supreme Court's view of the legislative history in *Pereira* fatal to this argument.[246] In *Pereira*, the Court opined that "neither [statutory purpose nor legislative history] supports the Government's atextual position that Congress intended the stop-time rule to apply when a noncitizen has been deprived notice of the time and place of his removal proceedings."[247] But this view is no reason to doubt that statutory purpose and legislative history *do* support triggering the stop-time rule upon an alien's receipt of notice of the "time and place" of his proceedings. In such a case, the alien would have received the information to which he was statutorily entitled and the only question would be whether the manner of service was somehow contrary to the statute. Yet, as more fully addressed above, the statute does not dictate any particular manner or format for service. Hence, considerations of congressional intent play a legitimate role in assessments of the government's manner of conveying information.[248] Here, deeming the stop-time rule

242. *See id*. at 417 (noting preference for a permissible interpretation that advanced Congress's purpose in enacting the provisions at issue).

243. *See* 8 C.F.R. § 242.1(b) (1995); 8 C.F.R. § 1003.18(b) (2012); *see also Guamanrrigra*, 670 F.3d at 409–10; *Dababneh*, 471 F.3d at 810; *Garcia-Ramirez*, 423 F.3d at 937 n.3; *cf. Orozco-Velasquez*, 817 F.3d at 83.

244. *Edelman*, 535 U.S. at 116–17.

245. *See* H.R. REP. NO. 2202, at 122 (1996); 143 CONG. REC. 12,266 (1997).

246. *Cf*. Lopez v. Barr, 925 F.3d 396, 400 (9th Cir. 2019) (holding that the "plain language of the statute forecloses" the possibility that a later-sent Notice of Hearing may cure a defective Notice to Appear).

247. 138 S. Ct. at 2119.

248. *See also Lopez*, 925 F.3d at 408 (Callahan, J., dissenting) ("the majority's reliance on 'a notice' frustrates, rather than furthers, Congress' aim") (internal quotations omitted).

triggered upon service of the Notice of Hearing is absolutely consistent with every available indication of what Congress intended to accomplish in 1996.

No other approach to this issue is as consistent with all the relevant sources—statutory text, purpose, and legislative history. Allowing time to accrue throughout the proceeding and counting the requisite physical presence period back from the date of adjudication is contrary to the very existence of the stop-time rule, which sought to forestall the accrual of additional time towards the eligibility requirements after the institution of proceedings. It would also open up possibilities for delay by the alien, in clear contravention of Congress's desire to close that pre-IIRIRA loophole.

For similar reasons, using the date of the application itself would run counter to the stop-time rule and legislative history; that application may be filed only months or even years after service of the Notice to Appear or the Notice of Hearing, meaning the alien would accrue presence well after the formal initiation of proceedings. Again, the existence of the stop-time rule and its bright-line for cutting off the accrual of continuous physical presence cannot be easily squared with a rule that would permit such accrual while removal proceeding are ongoing.

Finally, mandating that the government serve a new Notice to Appear containing the "time and place" of the proceeding makes little sense and is not required by any explicit statutory directive. The "time and place" information can easily be provided through service of the Notice of Hearing once that Notice to Appear has been filed with the immigration court. Given the immigration court's ability to provide the necessary information, there is no compelling practical reason why the government should be required to serve a superseding Notice to Appear. Nor is there a legal reason why this should be *required*. As noted earlier, the statute, read in its simplest terms, only requires that certain information be provided to the alien; it does not direct any particular form or format in which that information should be provided. Although the stop-time rule talks in terms of service of "a notice to appear under section 1229(a),"[249] the best reading of this language is not that it refers to a single form, but only to the provision of the information required under Section 1229(a). Again, "notice to appear," as used in the statute, is shorthand and not a reference to the form Notice to Appear which post-dates IIRIRA. To be sure, nothing would stop the government from serving a second, fully compliant Notice to Appear on the alien, in which case time would stop upon service. But nothing in the statute *requires* that, and such a process would entail procedural inefficiencies that are hard to justify as a practical matter.

249. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2012).

B. *In Absentia Proceedings*

The second area in which *Pereira* arguments have been raised is the *in absentia* removal scheme. As noted earlier, if an alien fails to appear after having been provided statutorily adequate notice of his or her hearing, they may be ordered removed *in absentia*.[250] *Pereira*, in the emerging arguments, is relevant to the question of whether statutorily adequate notice *has* been provided. For instance, as an alien recently argued in a petition for a writ of certiorari, "[t]he statutory language of both 8 U.S.C. §§ 1229a(b)(5)(A) and 1229(a)(1) is clear and unambiguous—an alien can only be ordered removed in his or her absence if proper statutory notice was provided to the alien *via the service of an NTA* that specifies the time and place of the alien's removal hearing."[251]

A cursory examination of the statute establishes that this argument is incorrect. The court's authority to enter an *in absentia* removal order follows from it having provided the requisite written notice of the removal hearing pursuant to *either* "paragraph (1) *or* (2) of section 1229(a)."[252] The Notice to Appear is thus not the only form of written notice that meets the government's statutory obligations for purposes of the *in absentia* removal provision. Rather, proper notice may be provided through the subsequently served Notice of Hearing pursuant to subsection (2) of Section 1229(a).

This fact entails a few common-sense points which render *Pereira* largely irrelevant to the *in absentia* removal order context. A Notice to Appear that *did* provide the "time and place" of the removal hearing *would be* a sufficient basis on which to enter an *in absentia* order, assuming the alien failed to appear at the scheduled hearing. Likewise, a court could permissibly enter an *in absentia* order even if the Notice to Appear did not contain the requisite notice, so long as it supplemented the Notice of Hearing that *did* contain the "time and place" of the hearing. The only context where a statutorily deficient Notice to Appear would be relevant is when a Notice of Hearing was not subsequently served or properly received by the alien. But in that case, entry of the *in absentia* order would be prohibited under the clear terms of the statute, and an alien would not need *Pereira* in order to make that argument.

This straightforward analysis is consistent with how courts of appeals addressed similar claims prior to *Pereira*. In those decisions, the question was whether statutory notice was provided under *either* of the two modes contemplated by the *in absentia* provision.[253] Even if the Notice to Appear was itself insufficient to convey that notice, the alien's claim failed if notice

250. *See generally* INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5) (2012).

251. *See* Petition for Writ of Certiorari, Mauricio-Benitez v. Whitaker, (139 S. Ct. 2767) (No. 18-1055) 2019 WL 585625 at 12 (emphasis added).

252. INA § 240(b)(5)(A), 8 U.S.C. 1229a(b)(5)(A) (2012) (emphasis added); *see also In re* Miranda-Cordiero, 27 I&N Dec. 551, 553 (BIA 2019) (contrasting the statutory language for in absentia orders with the provisions at issue in *Pereira*); *In re* Pena-Mejia, 27 I. & N. Dec. 546, 548 (BIA 2019) (similarly contrasting the statutory language for in absentia orders).

253. *See Popa*, 571 F.3d at 895–96; *Gomez-Palacios*, 560 F.3d at 359; *Haider*, 438 F.3d at 907–908.

had subsequently been provided by the immigration court through the Notice of Hearing.[254] Further, underscoring the irrelevance of *Pereira*, the courts also noted how a deficient Notice to Appear standing alone would be an insufficient basis on which to enter an *in absentia* order; in such cases, proper notice would not have been provided to the alien.[255]

Given this, it is unsurprising that the courts of appeals that have addressed some permutation of the *Pereira* argument—that a Notice to Appear without time and place information was insufficient to convey notice even if notice had subsequently been provided through the Notice of Hearing—in the *in absentia* context have rejected it. The Fifth Circuit, for instance, maintained its pre-*Pereira* approach in a case where the Notice to Appear was deficient, but a Notice of Hearing had been properly served at the last address provided by the alien.[256] More recently, the Sixth Circuit upheld the agency's entry of the *in absentia* order and denial of a motion to reopen to rescind that order in a case where the Notice to Appear lacked the date and time of the initial hearing.[257] Rejecting the alien's reliance on *Pereira*, the court noted that "[a]lthough [the alien] may have met his burden in showing that he did not receive a notice in accordance with paragraph (1) [*i.e.*, the Notice to Appear provision], he did not meet his burden to show lack of notice in accordance with paragraph (2) [*i.e.*, the Notice of Hearing provision]."[258] In short, a statutorily deficient Notice to Appear may be relevant to whether an *in absentia* order was properly entered, but it is only one part of the analysis. There is little reason to believe *Pereira* will alter this calculus.

C. *The Immigration Court's Jurisdiction*

The most disruptive aspect of the post-*Pereira* legal developments relates to the immigration court's jurisdiction. Advocates vigorously pressed the argument that a statutorily defective Notice to Appear was insufficient to vest jurisdiction with the immigration court, and this argument entailed a flood of terminated proceedings over the course of the summer in 2018. Beyond that, it also affected ongoing criminal proceedings, including the prosecution of illegal reentry cases. Several district courts dismissed indictments on the theory that the underlying removal was invalid because it had been entered by an immigration judge who, on account of a "defective" Notice to Appear, was never properly vested with jurisdiction.

This Section proceeds in two main parts, and in a potentially counter-intuitive fashion. The first part addresses the merits of the contention that *Pereira*

254. *See id.*

255. *See Haider*, 438 F.3d at 908 ("We wish to be clear that the NTA, if it were the only notice served on [the alien] in this case, would not have authorized *in absentia* removal because [the alien] would not have been served notice of the date and time of the hearing as required by § 1229(a)(1).").

256. *See* Petition for Writ of Certiorari, *Mauricio-Benitez*, 908 F.3d at 146–51.

257. *See Santos-Santos*, 917 F.3d at 491–93.

258. *Id.* at 491.

could affect the immigration court's jurisdiction. This position is wrong for at least two reasons: 1) the jurisdiction of the immigration court is entirely a creation of regulation, and its proper vesting is not dependent on a Notice to Appear that complies with the distinct requirements of the statute, and; 2) even assuming *Pereira*'s relevance, there is no reason to believe that the requisite regulatory and statutory notice could not be provided in two documents, meaning that service of the Notice of Hearing by the immigration court would cure any jurisdictional shortcoming stemming from the Notice to Appear itself.

The second part shifts from the merits analysis to threshold considerations that would usually precede the merits, including whether the regulation at issue is truly "jurisdictional," and even if so, whether it relates to "personal" jurisdiction or to the immigration court's "subject matter" jurisdiction. These issues are complicated but ultimately seem incapable of providing a basis on which to resolve the question of "jurisdiction" in the immigration context. Rather, the simplest and most straightforward analysis should focus on the text of the regulation and permissibility of the agency adopting that process for purposes of vesting jurisdiction. Courts of appeals have primarily embraced this approach in the wake of *Pereira*. Absent a compelling reason for addressing the thorny issues surrounding the concept of "jurisdiction," it is the most sensible option going forward.

1. *Pereira is inapposite to the question of whether or when jurisdiction vests with the immigration court*

a. The vesting of jurisdiction is governed by regulation, not statute

As noted earlier, the INA does not explicitly address the issue of when or how jurisdiction vests with the immigration court. Rather, the Act provides only that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."[259] The statute thus does grant jurisdiction to immigration judges to conduct removal proceedings, but it otherwise fails to address when or how that jurisdiction is triggered.

To fill this gap, the Attorney General exercised his authority "to establish such regulations . . . as [he] determines to be necessary for carrying out" his responsibilities under the INA,[260] by promulgating a regulatory scheme to govern when and how jurisdiction vests. "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the" government.[261] Such a charging document is defined to include a "Notice to Appear."[262] Importantly, the regulation does not cross-reference the statutory definition of "Notice to Appear"

259. INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2012).
260. 8 U.S.C. § 1103(g)(2).
261. 8 C.F.R. § 1003.14(a) (2003).
262. *See* 8 C.F.R. § 1003.13 (1997).

but rather specifically defines the necessary contents for the purpose of vesting jurisdiction.[263] Under the regulations, there are both "required" components of the Notice to Appear, and more permissive components. First, the Notice must include:

1) The nature of the proceedings against the alien;
2) The legal authority under which the proceedings are conducted;
3) The acts or conduct alleged to be in violation of law;
4) The charges against the alien and the statutory provisions alleged to have been violated;
5) Notice that the alien may be represented, at no cost to the government by counsel or other representative authorized to appear pursuant to 8 C.F.R. 1292.1;
6) The address of the Immigration Court where [DHS] will file the Order to Show Cause and Notice to Appear; and
7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with § 1003.26.[264]

This list largely duplicates the statutory definition of "Notice to Appear,"[265] with one major exception: it does not include any requirement that the "time and place" of the initial hearing be included in the Notice before jurisdiction may vest with the immigration court.[266] A Notice to Appear that lacks the "time and place" of the initial removal hearing is thus sufficient to vest jurisdiction with the immigration court pursuant to the regulations, and this regulatory compliance is all that is necessary to resolve the question.[267]

The contention that *Pereira* dictates a different result largely ignores this distinct framework governing jurisdiction while attempting to shoehorn the *statutory* standard into the regulatory context. But there is little reason to believe that the statutory standard has any relevance in the context of

263. *See* 8 C.F.R. §§ 1003.15(b) & (c) (1997).
264. 8 C.F.R. § 1003.15(b) (1997).
265. *See generally* 8 U.S.C. §§ 1229(a)(1)(A)–(F) (2012).
266. *Compare* INA § 239(a)(1)(G)(i), 8 U.S.C. § 1229(a)(1)(G)(i) (2012) (requiring time and place at which proceeding will be held), *with* 8 C.F.R. 1003.15(b). (A "Notice to Appear for removal proceedings" should also include other information, including that "alien's name and any known aliases," his or her address, "[t]he alien's registration number," the alleged nationality and citizenship of the alien, and "[t]he language that the alien understands,") *see* 8 C.F.R. § 1003.15(c), but the "[f]ailure to provide" all of the information required by Section 1003.15(c) "shall not be construed as affording the alien any substantive or procedural rights.") 8 C.F.R. § 1003.15(c).
267. *See, e.g.*, Sorcia v. Holder, 643 F.3d 117, 119 n.1 (4th Cir. 2011); Lazaro v. Mukasey, 527 F.3d 977, 980 (9th Cir. 2008) ("The INS filed the NTA with the Immigration Court in accordance with 8 C.F.R. § 1003.14(a). Jurisdiction therefore vested, and the IJ did not err in proceeding with Lazaro's case.").

jurisdiction. The statutory Notice to Appear provision speaks only in terms of serving the *alien* with certain required information.[268] Nothing in Section 1229 itself, or in Section 1229(a)'s provisions regarding the responsibilities and authorities of immigration judges in conducting removal proceedings, mandate that the filing of a statutorily compliant Notice to Appear is necessary to vest jurisdiction with the agency. In fact, there is no other provision of the INA that even remotely speaks to this issue or establishes a mechanism or framework through which jurisdiction should vest with the immigration court. Moreover, the crux of the Supreme Court's holding in *Pereira* related to the stop-time rule's explicit cross-reference of Section 1229(a).[269] But in the absence of such a cross-reference, which is lacking in the regulation governing jurisdiction, there is little reason to believe that the statutory definition of "Notice to Appear" has any role to play. In other words, where Congress sought to import the concept of the statutory Notice to Appear, it did so explicitly.[270] In the absence of such cross-reference in any of the provisions governing notice and the conduct of removal proceedings, the statute evinced a gap that the Attorney General reasonably filled with the immigration court's rules of procedure.[271]

The Ninth Circuit recently adopted this reading of the regulations contra an argument that *Pereira* deprived the immigration court of jurisdiction.[272] "The flaw" in that argument, the court reasoned, was "that regulations, not § 1229(a), define when jurisdiction vests. Section 1229 says *nothing* about the Immigration Court's jurisdiction."[273] That court also concluded that the regulatory definition, which contained an "exhaustive list of requirements,"[274] rebutted any presumption that the statutory definition should govern in the absence of a specific directive to that effect.[275] It further found that importing the statutory definition into the regulations would "render meaningless" the separate command that "time and place" information need be included in the Notice to Appear only "where practicable."[276]

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268. *See* 8 U.S.C. § 1229(a) ("[i]n removal proceedings under section 1229a . . . written notice (in this section referred to as a "notice to appear") shall be given in person *to the alien* . . .) (emphasis added).

269. *See Pereira*, 138 S. Ct. 2117.

270. *See*, *e.g.*, 8 U.S.C. §§ 1229a(b)(5)(A), (C)(ii) (2012); 8 U.S.C. § 1229a(b)(7); 8 U.S.C. § 1229c(b)(1)(A).

271. *See Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a Congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) ("[T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.").

272. *See Karingithi*, 913 F.3d at 1159.

273. *Id.* at 1160 (emphasis added).

274. *Id.*

275. *Id.* (citing Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)).

276. *Id.* (citing 8 C.F.R. § 1003.18(b)).

The court found this analysis simple enough on its face and consistent with *Pereira*.[277] The relevant analysis in *Pereira* "hinge[d] on 'the intersection' of two statutory provisions,"[278] and it was "the statutory cross-reference [that was] crucial," providing the "'glue'" that bound application of the stop-time rule to compliance with the statutory definition of "Notice to Appear."[279] In the jurisdictional context, however, "[t]here is no 'glue' to bind § 1229(a) and the [] regulations: the regulations do not reference § 1229(a), which itself makes no mention of the IJ's jurisdiction."[280] In short, "*Pereira's* definition of a 'notice to appear *under section 1229(a)*' does not govern the meaning of 'notice to appear' under an unrelated regulatory provision," and thus that case "simply has no application" in assessing the immigration court's jurisdiction.[281]

The Sixth Circuit also adopted this reasoning, "find[ing] that the INA contains language regarding 'proceedings for deciding the inadmissibility or deportability of an alien[,]' but does not address jurisdictional prerequisites."[282] Instead of explicitly addressing the jurisdictional issue, "the INA allows the Attorney General to promulgate regulations to govern removal hearings, which include provisions for when and how jurisdiction vests with the IJ."[283] When it reviewed these regulations, the court concluded that "[n]o references to the time and place of the hearing are required to vest jurisdiction under the regulation."[284]

b. Even assuming relevance, jurisdiction would be proper upon service of the notice of hearing

A second path to rejecting the jurisdictional argument lies with the same two-step notice process advocated in the context of cancellation of removal. Even assuming that the statutory definition of Notice to Appear has relevance in the jurisdictional context, thus implicating *Pereira*'s holding, jurisdiction would vest when all section 1229(a) required information missing from the notice is provided. This approach is of course not without precedent, as the Seventh Circuit had adopted this construction as far back as 2006, holding that "[t]he fact that the government fulfilled its obligations under INA § 239(a) in two documents—rather than one—did not deprive the IJ of jurisdiction to initiate removal proceedings."[285] Moreover, the Supreme Court's jurisprudence on the curative effect of a later filing or action is especially appropriate in this

277. *See Karingithi*, 911 F.3d at 1160 ("*Pereira* does not point to a different conclusion.").
278. *Id.* at 1160–61 (quoting *Pereira*, 138 S. Ct. at 2110).
279. *Id.* (quoting *Pereira*, 138 S. Ct. at 2117).
280. *Id.* at 1161.
281. *Id.*
282. *See Santos-Santos*, 917 F.3d at 490 (quoting INA § 240, 8 U.S.C. § 1229a (2012)).
283. *Id.* (citing INA §§ 103(g)(2), 240(a), 8 U.S.C. §§ 1103(g)(2), 1229a(a) (2012); 8 C.F.R. §§ 1003.13, 1003.14(a)).
284. *Id.*
285. *See Dababneh*, 471 F.3d at 809-10.

context; in those cases, the initial defects were in a sense jurisdictional, but each was cured once the defect itself was addressed (proper signature in *Becker*, and proper pleadings in both *Edelman* and *Scarborough*).[286]

Since *Pereira*, the Board has also adopted this approach. In *Bermudez-Cota*, the Board began by distinguishing *Pereira* and limiting it to its own "distinct set of facts."[287] Unlike in *Pereira*, the alien in *Bermudez-Cota* had received a Notice of Hearing and appeared at his proceeding, demonstrating that he "clearly was sufficiently informed to attend his hearings."[288] Moreover, there was little reason to believe that *Pereira* applied beyond the stop-time context from which it arose; otherwise, the Court would not have repeatedly emphasized the narrow scope of the question presented or "that the dispositive question was whether a document that fails to specify the time and place of proceedings triggers the 'stop-time' rule."[289] Finally, the Board found persuasive the fact that Pereira's own proceedings were permitted to continue on remand, and that "[the Court] did not indicate that proceedings involving" similarly deficient Notices to Appear "should be invalidated or that the proceedings should be terminated."[290]

Having distinguished *Pereira*, the Board concluded that termination was inappropriate for a number of reasons. First, termination would require the Board to "disregard" the regulation allowing a Notice to Appear to omit the "time and place" of the hearing, despite being compelled to comply with that regulation.[291] Second, it would be inconsistent with the regulatory scheme governing the vesting of jurisdiction with the immigration court, which does not require inclusion of "time and place" information on the charging document before jurisdiction vests.[292] Third, and most significantly, the courts of appeals had, prior to *Pereira*, uniformly permitted a two-step notice process in cases implicating compliance with Section 1229(a).[293] The Board "agree[d] with the Fifth, Seventh, Eighth, and Ninth Circuits that a two-step notice process is sufficient to meet the statutory notice requirements in section 239(a) of the Act."[294] Thus, "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the alien."[295]

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286. *See* Section IV.A.
287. *See In re* Bermudez-Cota, 27 I. & N. Dec. 441, 443 (BIA 2018).
288. *Id*.
289. *Id*.
290. *Id*. at 443–44.
291. *Id*. at 444 (citing *In re* L-M-P-, 27 I. & N. Dec. 265, 267 (BIA 2018)).
292. *Id*. at 444–45 (citing 8 C.F.R. § 1003.14(a), 1003.15(b) (2018)).
293. *Id*. at 445–47 (citing *Popa*, 571 F.3d 890; *Gomez-Palacios*, 560 F.3d 354; *Haider*, 438 F.3d 902; *Dababneh*, 471 F.3d 806).
294. *Id*. at 447.
295. *Id*.

Within a month of its issuance, the Sixth Circuit had issued an opinion deferring to *Bermudez-Cota*.[296] Beginning with the statute, the court noted that while Section 1229(a)(1) addresses the jurisdiction of the immigration judge to conduct proceedings, it neither states "how or when" that jurisdiction vests with the immigration judge, nor that any of the required contents of a Notice to Appear under Section 1229(a)(1) are jurisdictional.[297] It thus concluded that "Congress did not address that question," and that "the agency had some discretion in fashioning a set of jurisdictional requirements."[298] The Board, the court reasoned, could not "abrogate the requirements of § 1229(a)(1)," but it could, as it did in *Bermudez-Cota*, issue a decision on how those requirements could be met, and its determination that "'a two-step process is sufficient' . . . [and] is not inconsistent with the text of the INA."[299]

Turning to the regulations, the court also found little support for the contention that a charging document must include the "time and place" of the initial hearing at the time it is filed with the immigration court. It noted that the regulations themselves do *not* require this information, nor is there any cross-reference in the regulations to the statutory definition that was the linchpin of the Supreme Court's analysis in *Pereira*.[300]

The only remaining question was whether this conclusion could be consistent with *Pereira* itself. For instance, the Supreme Court saw its holding as supported by "common sense," a rationale not necessarily limited to cancellation of removal cases.[301] Conversely, the court found, "importing *Pereira*'s holding on the stop-time rule into the jurisdictional context would have unusually broad implications."[302] Ultimately, it held that "*Pereira*'s emphatically 'narrow' framing" counseled against importing the holding of that case into the jurisdictional context.[303] Likewise, the Supreme Court's failure to question its own jurisdiction in *Pereira* cautioned against finding a jurisdictional flaw in a statutorily deficient Notice to Appear.[304] In the end, the court "agree[]d with the Board that *Pereira* is an imperfect fit in the jurisdictional context[.]"[305] It "therefore conclude[d] that jurisdiction vests with the immigration court where . . . the mandatory information about the time of the

296. *See Hernandez-Perez*, 911 F.3d 305.
297. *Id*. at 313.
298. *Id*. (citing *Vt. Yankee*., 435 U.S. at 543).
299. *Id*. at 313 (quoting *Bermudez-Cota*, 27 I&N Dec. at 447).
300. *Hernandez-Perez*, 911 F.3d at 313–14.
301. *Id*. at 314.
302. *Id*.
303. *Id*. (citing *Pereira*, 138 S. Ct. at 2113).
304. *Id*. (citing Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) (requiring courts to examine their own jurisdiction even if the parties "have disclaimed or have not presented" the issue)); *see also* Goncalves Pontes v. Barr, No. 19-1053, 2019 WL 4231198, at *4 n.1 (1st Cir. Sept. 18, 2019) ("Indeed, if the petitioner's argument were correct, then the immigration court would not have acquired jurisdiction over Pereira's removal proceedings and the Supreme Court would have had at hand a ready means for disposing of the case without pausing to delve into the intricacies of the stop-time rule.").
305. *Hernandez-Perez*, 911 F.3d at 314.

hearing . . . is provided in a Notice of Hearing issued after the [Notice to Appear]."[306]

The Ninth Circuit also exhibited deference to *Bermudez-Cota*. In *Karingithi*, the court first determined that a Notice to Appear is not required to contain "time and place" information before jurisdiction vests. Then, turning to the Board's decision, the court recognized the overlap between *Bermudez-Cota* and its own analysis of the regulations, and held that deference was warranted and that *Pereira* did not argue for a different result.[307]

2. *Threshold questions relating to the nature and scope of regulatory "jurisdiction"*

The Board and those courts of appeals that have thus far addressed this issue have based their resolution of the question on the foregoing merits considerations: first, that the vesting of jurisdiction is a regulatory matter outside the scope of the issue resolved in *Pereira*, and second, assuming some relevance of the *statutory* definition, jurisdiction would be properly vested upon provision of all the information required under Section 1229(a)(1), *i.e.*, upon service of the Notice of Hearing.

Nevertheless, there are also threshold jurisdictional issues that have arisen at least in the context of district court challenges to indictments under the illegal reentry provision. First is the question of whether the regulation is in fact "jurisdictional" in nature, or whether it is more accurately characterized as a "claims-processing" rule. The distinction is important, since a jurisdictional defect cannot be waived whereas a "claims-processing" rule may be subject to waiver and other equitable exceptions.[308] Second, even if the regulation is properly characterized as "jurisdictional," should it be characterized as personal or subject matter jurisdiction? Again, the distinction is relevant for purposes of waiver analysis; personal jurisdiction may be waived by appearance and plea, whereas subject-matter jurisdiction may not be waived.

There is no question that these issues may be important for already-completed cases, including all removal proceedings where an illegal reentry indictment is entered and any completed immigration proceedings pending on further review at the time *Pereira* was issued. Barring unusual circumstances, the alien will have appeared and pled, and thus could be construed as having waived any defect in the charging document. In contrast, where aliens are *currently* objecting to the jurisdiction of the immigration court, and clearly not waiving that challenge through pleas, adjudicators will likely have to resort to an analysis of the merits of the challenge. Accordingly, although the proper characterization of the issue may indeed have relevance

306. *Id.* at 314–15.

307. *See Karingithi*, 913 F.3d at 1161–62.

308. *See, e.g.*, *Ortiz-Santiago*, 924 F.3d at 963 (citing Kontrick v. Ryan, 540 U.S. 443, 456–58 (2004) ("it simply means that an aggrieved party can forfeit any objection she has by failing to raise it at the right time").

to many of the cases currently pending, it is not likely a matter of significant importance for cases presently being litigated in the agency.

a. Is the regulation a "claims-processing" rule or is it "jurisdictional"?

Many district courts, including those that have both accepted and rejected challenges to Section 1326 indictments, have construed the regulation as addressing the subject-matter jurisdiction of the immigration court.[309] The Seventh Circuit and a number of other district courts, however, have questioned whether the regulation is jurisdictional or merely a "claims-processing" rule, a regulation merely providing for the orderly consideration of cases before the agency.[310]

Prior to the 1990s, the Supreme Court and lower courts often indulged a broad interpretation of what could constitute a "jurisdictional" limitation on an adjudicatory body's ability to hear a case.[311] Beginning in the late 1990s, however, the Court began a concerted effort to clarify the meaning of a "jurisdictional" limitation.[312] It noted that the term "jurisdiction" was "a word of many, too many, meanings,"[313] and that it had sown significant confusion by using the term jurisdiction too loosely "to describe emphatic time prescriptions in rules of court."[314] Accordingly, the Court began to distinguish between jurisdictional and non-jurisdictional claims-processing rules. It held that a rule cannot be construed as jurisdictional "unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction."[315] Claims-processing rules, on the other hand, "are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[316] In drawing this line, the Court made the nature of the rule the focal point of analysis, although Congress may attach jurisdictional consequences to what would otherwise be construed as a claims-processing rule.[317]

Since this turn in its jurisprudence, the Court has proven far more likely to conclude that a particular rule is claims-processing rather than jurisdictional. The Court found that the following were all non-jurisdictional claims-

309. *See, e.g.*, United States v. Garcia, No. 2:18-cr-68-FtM-38MRM, 2019 WL 399612, at **3–4 (M.D. Fla. Jan. 31, 2019); United States v. Cortez, No. oo-CV-229-B, 2018 WL 6004689, at **3–4 (W.D. Va. Nov. 15, 2018).

310. *See, e.g.*, *Ortiz-Santiago*, 924 F.3d 956; United States v. Rivera Lopez, 355 F. Supp. 3d 428, (E. D. Va. 2018); United States v. Arroyo, 356 F. Supp. 3d 619, 622–630 (W.D. Tex. 2018).

311. *See* Sebelius v. Auburn Regional Medical Ctr., 568 U.S. 145, 153–55 (2013) (recounting this history).

312. *See id.*

313. Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663, n. 2 (D.C. Cir. 1996).

314. *Kontrick*, 540 U.S. at 454.

315. Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 433 (citing Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010)).

316. *Id.* at 435 (citations omitted).

317. *Id.* (citing Bowles v. Russell, 551 U.S. 205, 212–13 (2007); Arbaugh v. Y & H Corp., 546 U.S. 500, 514–15 & n.11 (2006)).

processing rules: the 180-day deadline for filing an administrative appeal from a Medicare reimbursement determination with the Provider Reimbursement Review Board,[318] the 120-day statutory time limitation for filing an appeal with the United States Court of Veterans' Claims,[319] the time limit contemplated by Rule 33 of the Federal Rules of Criminal Procedure, permitting vacatur of judgment and the granting of a new trial "if the interest of justice so requires,"[320] the time limitation for filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2244(d),[321] the filing deadline for a complaint under the Federal Rules of Bankruptcy,[322] exhaustion under the Prison Litigation Reform Act,[323] and the Copyright Act's registration requirement.[324]

The Court has been especially vigilant about drawling lines between claims-processing and jurisdictional rules when responding to assertions that agency regulations impose jurisdictional requirements. It has held that an agency retains interpretive authority to construe statutory ambiguities that relate to the scope of its jurisdiction.[325] However, it has also been forceful in ensuring that administrative agencies "conform, or confine" themselves "to the jurisdiction Congress gave" them.[326] In *Union Pacific*, for instance, the Court concluded that the Railway Labor Act did not provide any authority or discretion to the National Railroad Adjustment Board to prescribe rules or regulations of a jurisdictional character; in the absence of any such provisions, the agency could not limit the scope of Congress's jurisdictional grant.[327] Although the Supreme Court has not addressed an immigration case in this context, the courts of appeals have generally concluded that internal filings deadlines and requirements are claims-processing rules rather than jurisdictional limitations on the Board's authority to act.[328]

Against this legal background, it is not unreasonable for district courts to construe the regulation as a claims-processing rule. The regulation emphasizes "the initiation of proceedings and [] service to the opposing party suggest[ing] it is focused not on the immigration court's fundamental power to act but rather on 'requiring that the parties take certain procedural steps at

318. *Sebelius*, 568 U.S. at 153–55.
319. *Henderson*, 562 U.S. at 437–39.
320. *See* Eberhart v. United States, 546 U.S. 12 (2005).
321. Holland v. Fla., 560 U.S. 631, 644–45 (2010).
322. *Kontrick*, 540 U.S. at 444.
323. *See* Woodford v. Ngo, 548 U.S. 81, 84 (2006).
324. Reed Elsevier v. Muchnick, 130 S. Ct. 1237, 1239 (2010).
325. *See* Arlington Cty. v. F.C.C., 133 S. Ct. 1863, 1868–73 (2013).
326. Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'r, 558 U.S. 67, 86 (2009).
327. *See id*. at 83–86.
328. *See* Hernandez v. Holder, 738 F.3d 1099, 1101–02 (9th Cir. 2013) (8 C.F.R. § 1003.2(a)'s requirement that a motion to reopen be filed with the last adjudicator to render a decision in the case was a non-jurisdictional claims-processing rule); Irigoyen-Briones v. Holder, 644 F.3d 943, 947–49 (9th Cir. 2011) (filing deadline for administrative appeal with the Board was a non-jurisdictional, claims-processing rule).

certain specified times[.]'"[329] The history of the regulation also indicates that it was likely meant only to mark "an agency internal boundary."[330] The regulation sets the point in time where the immigration court takes over the conduct of proceedings from the Department of Homeland Security (and formerly the Immigration and Naturalization Service).[331] Finally, "to accept that Regulation 1003.14(a)—a rule that was not promulgated to interpret any statute—speaks to or conditions the immigration judge's subject matter jurisdiction is to say that the Attorney General is 'in effect, . . . *telling himself* what he may or may not do.'"[332]

However, some potential problems with this analysis make the question less straightforward than it may seem. For instance, the INA's broad grants of authority to the Attorney General make it more likely than in other contexts that Congress intended to give him the authority to prescribe rules of a jurisdictional character, at least concerning the conduct of removal proceedings.[333] The lack of a definitive statement of such purpose in the regulatory history of Section 1003.14 may constitute an argument against construing the regulation in such a manner, but it is not an argument against the Attorney General's *authority* to define and condition the jurisdiction of the immigration court. Moreover, contrary to the position of the district court in *Arroyo*, by providing for an orderly process to trigger the immigration court's jurisdiction, the Attorney General is not meaningfully limiting the jurisdiction conferred by Congress. Providing that jurisdiction vests only upon the service of a charging document does not limit an immigration judge's jurisdiction to conduct removal proceedings, as such service and filing is simply an antecedent condition to their operation. The jurisdiction of the courts of appeals is similarly not limited in cases where an untimely notice of appeals is filed; in both cases, Congress has granted the adjudicatory body jurisdiction, and the only question is whether it has been properly invoked.[334]

Leaving aside these questions, however, another potential problem lurks—the fact that a non-jurisdictional claims-processing rule can nevertheless be a *mandatory* limitation on the adjudicator's authority. Such mandatory rules may be subject to principles of waiver, meaning that if a party does not challenge a purported failure to comply with the rule, the challenge may be

329. United States v. Rivera Lopez, 355 F. Supp. 3d 428, 439 (E.D. Va. Dec. 28, 2018) (quoting *Henderson*, 562 U.S. at 435–436); *see Arroyo*, 356 F. Supp. 3d at 625.

330. *Arroyo*, 356 F. Supp. 3d at 628.

331. *See id*. at 625–628 (recounting the history of this regulatory provision).

332. *Id*. at 629 (*quoting* Garcia v. Lynch, 786 F.3d 789, 797 (9th Cir. 2015) (Berzon, J., concurring)).

333. *Cf*. Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'r, 558 U.S. 67, 84–85 (2009) (holding that NRAB panels had no authority to define their jurisdiction in the absence of Congressional authorization); *see generally* INA § 103(g)(2), 8 U.S.C. § 1103(g)(2) (2012); INA §§ 240(b)(1)–(3), (6), (d), 8 U.S.C. §§ 1229a(b)(1) – (3), (6), (d) (2012).

334. *But see* United States v. Cotton, 535 U.S. 625, 629–31 (2002) (an omission or defect in an indictment does not deprive the district court of subject matter jurisdiction).

deemed forfeited.[335] But mandatory rules may also be inflexible and not subject to any equitable exceptions, meaning that even if they are not technically "jurisdictional," they function as de facto jurisdictional limitations.[336] There are aspects of the regulatory scheme that may be construed as mandatory, such as the requirement that a charging document be filed before jurisdiction vests and the ostensibly mandatory inclusion of certain information in the charging document.[337] In the absence of a charging document having actually been filed, for instance, the immigration court would not be entitled to exercise jurisdiction in a removal proceeding, and this requirement may not likely be waived.[338] But perhaps a challenge to a defective Notice to Appear that *is* filed with the immigration court could be waived once the alien appears and pleads.[339]

For all this analysis, however, the practical importance of the distinction seems minimal from a litigation perspective. To be sure, if the regulation is only a claims-processing rule then any challenge to the validity of the removal proceedings will be waived by appearance and pleading to the charges in the Notice to Appear. This may be of importance in arguing against the dismissal of criminal indictments and in contesting motions to reopen or remand filed with the Board or courts of appeals in immigration cases. But it is of no significance in post-*Pereira* cases where the alien is actively contesting jurisdiction based on a purportedly deficient Notice to Appear. In such cases, challenges will not be waived and the adjudicator will presumably have to address the merits of the issue—whether the Notice was sufficient to vest jurisdiction. Given the strength of the merits-based arguments against termination of proceedings, consideration on the merits appears to be an easier path

335. *See Eberhart*, 546 U.S. at 18–20 ("These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them."); *see also Kontrick*, 540 U.S. at 456.

336. *See, e.g.*, Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019) ("Though subject to waiver and forfeiture, some claim-processing rules are 'mandatory'—that is, they are unalterable if properly raised by an opposing party.") (internal quotation marks and citations omitted); *see also Woodford*, 548 U.S. at 93–99.

337. *See* 8 C.F.R. §§ 1003.14(a), 1003.15(b).

338. *See, e.g.*, Shogunle v. Holder, 336 F. App'x 322, 324–25 (4th Cir. 2009) ("[T]he court did not have jurisdiction" if the note is filed and "it was still within the discretion of DHS whether to file the notice with the immigration court").

339. See, e.g., Ortiz-Santiago v. Barr, 924 F.3d 956, 964 (7th Cir. 2019) ("Ortiz-Santiago did not raise DHS's failure to include the time and date of his removal hearing . . . In the usual case, we would have no trouble saying that his delay resulted in the forfeiture of this point" but for the need to consider whether "Pereira was a sufficient intervening cause to excuse an otherwise clear case of forfeiture"); Qureshi v. Gonzales, 442 F.3d 985, 990 (7th Cir. 2006) ("Because Qureshi failed to object to the admission of the [deficient] NTA, conceded his removability, and pleaded to the charge in the NTA, all before claiming that the certificate of service was defective, he was waived his challenge to the IJ's jurisdiction over the removal proceedings."); *see also* Kohli v. Gonzales, 473 F.3d 1061, 1068–69 (9th Cir. 2007) (holding no prejudice from allegedly defective Notice to Appear where alien "appeared before the IJ, [] accepted service of the NTA, admitted the factual allegations in the NTA, and conceded removability."); see generally Vyloha v. Barr, 929 F.3d 812, 817 (7th Cir. 2019) (finding the alien failed to make a timely objection to a violation of the claim-processing rule, and was further unable to show prejudice excusing his forfeiture).

to resolution, even if such ultimately leaves certain questions regarding the nature of the regulation unresolved.[340]

b. If jurisdictional, does it sound in "personal" or "subject matter" jurisdiction?

The question of whether the regulation relates to personal or subject matter jurisdiction follows a similarly complicated chain of analysis. "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."[341] This concept encompasses both subject matter jurisdiction and personal jurisdiction. The former relates to limitations on a court's authority to act in a case based on constitutional and statutory constraints.[342] The latter addresses an individual's amenability to the jurisdiction of a particular sovereign and is a function of "individual liberty" stemming from the Due Process Clause.[343] The differences between the two concepts have profound consequences. Subject matter jurisdiction either exists or it does not; it cannot be conferred by consent of the parties or via estoppel,[344] nor can it be waived by failure to challenge.[345] Moreover, it requires a court to inquire *sua sponte* into its jurisdiction: "the rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record."[346] By contrast, "the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue."[347]

What is the nature of the vesting regulation, 8 C.F.R. § 1003.14(a)? The regulation determines when the immigration judge obtains jurisdiction over and may commence proceedings.[348] Read in this fashion, it seems to

340. *Cf. Arroyo*, 356 F.Supp.3d at 630–32 (denying motion to dismiss indictment because prior proceeding complied with the statutory and regulatory definitions of "Notice to Appear," even after opinion that the regulation constitutes a claims-processing rather than jurisdictional rule).

341. R.I. v. Mass., 37 U.S. 657, 714 (1838).

342. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–02 (1982).

343. *Id*. at 702.

344. *See* Cal. v. LaRue, 409 U.S. 109 (1972); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17–18 (1951).

345. *See Compagnie des Bauxites*, 456 U.S. at 702.

346. Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884); *but cf*. Lewis v. Casey, 518 U. S. 343, 352 n.2 (1996) ("we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."); Fed. Election Com'n v. NRA Political Victory Fund, 513 U.S. 88, 97 (1994) ("The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us."); Will v. Mich. Dept. of State Police, 491 U.S. 58, 63 n.4 (1989) ("[T]his Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issues before us") (citation and internal quotation marks omitted).

347. *See Compagnie des Bauxies*, 456 U.S. at 704.

348. 8 C.F.R. § 1003.14(a) (2003) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court . . .").

constitute a limitation on the manner in which the immigration judge may exercise jurisdiction over removal proceedings by limiting jurisdiction to only those cases where the government filed a Notice to Appear. At the same time, the regulation also prioritizes service of the Notice on the opposing party,[349] which is in line with the nature of the obligations under the statute; the statutory Notice to Appear provision is concerned solely with the provision of Notice to the alien.[350] Is this regulatory limitation akin to a due process requirement because it ensures the requisite notice to the alien prior to the commencement of proceedings? In that case, appearing at the hearing and pleading to the Notice would constitute waiver of any jurisdictional objection.[351]

Again, the distinction does not seem to matter for immigration purposes in cases going forward. As with the jurisdictional versus claims-processing rule question, the distinction may impact already completed cases. If the regulation is more accurately characterized as reflecting a rule directed at personal jurisdiction, then prior appearance and plea will defeat any challenge to the underlying jurisdiction of the immigration court. But in current cases where the challenge has not been waived, the adjudicator will again have to address the merits of the question of jurisdiction—whether the immigration judge properly exercised jurisdiction based on a potentially deficient Notice to Appear. Thus, although the outcome of this analysis *may* have the effect of streamlining the consideration of certain cases, including those relating to illegal reentry indictments, it is unlikely to provide a fruitful basis for inquiry by immigration judges dealing with these issues in the first instance post-*Pereira*.

V. CONCLUSION

The Supreme Court's decision in *Pereira* evoked a more significant afterlife than could have been expected when the case was granted and even at the time the decision was issued. Yet after a chaotic summer in 2018, the legal landscape looks significantly calmer today. The Board has weighed in on the jurisdictional issue and rejected the contention that the immigration court lacks jurisdiction if a Notice to Appear fails to include the "time and place" of the initial removal proceeding. The Sixth and Ninth Circuits have upheld this interpretation either based on the clear language of the regulations or deference to the Board's decision, while other courts of appeals have rejected reliance on *Pereira* outside the narrow context in which it appeared. And even though some district courts have continued to dismiss criminal indictments, those decisions are prone to correction on appeal.

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349. *Id.* ("The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed.").

350. *See* INA § 239(a)(1) (2012); 8 U.S.C. § 1229(a)(1) (2012).

351. *Cf. Kohli*, 473 F.3d at 1068–69; *Qureshi*, 442 F.3d at 990.

All this is as it should be. Despite the best efforts of immigrant advocates, *Pereira* is a case of limited importance. To be sure, it will keep the clock running for stop-time purposes in cases where the initially served Notice to Appear is statutorily defective, but that is all. It does not resolve when time stops, it has no relevance to *in absentia* cases, and the best reading of the regulations regarding jurisdiction would give it no role in that context. All this could change, and the virtual unanimity of opinion contra the preferred position of advocates may be a temporary setback. Recall, the government's position had prevailed in seven out of eight cases in the courts of appeals prior to the grant of certiorari in *Pereira*. But this article has established that the stronger legal arguments do not align with the contention that a statutorily deficient Notice to Appear cannot be cured or must be deemed defective for all purposes. That is the reason that courts of appeals have rejected these arguments when they have been raised and why there is every reason to believe they will continue to do so.