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Jurisdiction Means Jurisdiction Not Claims-Processing: the Seventh Circuit's Flawed Approach to Pereira v. Sessions in *Ortiz-Santiago v. Barr*

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JURISDICTION MEANS JURISDICTION NOT CLAIMS-PROCESSING: THE SEVENTH CIRCUIT'S FLAWED APPROACH TO *PEREIRA V. SESSIONS* IN *ORTIZ-SANTIAGO V. BARR*

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INTRODUCTION

Through attempts to implement multiple asylum bans, the zero tolerance policy, the public charge rule, and, most recently, the Migrant Protection Protocols (MPP), the Trump administration has arguably made its message clear: immigrants are not welcome.[1] The

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[1] *See* Priyanka Boghani, *A Guide to Some Major Trump Administration Immigration Policies* 10(2019),https://www.pbs.org/wgbh/frontline/article/a-gu*Id*e-to-some-major-trump-administration-immigration-policies. *See also*: Joel Rose, Advocates Say President Trump's Immigration Policy is "A Tool of Cruelty,10(2019),https://www.npr.org/2019/0/01/765987523/advocates-say-trump-s-immigration-plan-creates-nightmarish-situations.

administration's constant efforts to change immigration law and policy have led to prolonged detention, denaturalization, family separation, and the extreme traumatization of immigrants.[2] Given the administration's constant attacks on the immigrant community, advocates unquestionably saw a sliver of hope when the Supreme Court decided *Pereira v. Sessions*.[3]

In *Pereira,* the Supreme Court held that a government-issued notice to appear not specifying the time and place of removal proceedings does not meet the statutory definition of a notice to appear ("NTA"), under 8 U.S.C. § 1227 and therefore, does not trigger what is known as the "stop-time rule."[4] The decision seemed straightforward in one sense: a notice failing to list the time and place of a hearing could not "stop time" and therefore prevent a noncitizen from accruing the required physical presence to cancel his removal from the country.[5]

However, immigrant advocates saw the potential jurisdictional ramifications involved: if, as the *Pereira* court declared, an NTA not listing the date and time of the hearing was an invalid charging document or summons, then, how could the immigration court vest its jurisdiction over a noncitizen's case? Therefore, in direct response to the Court's decision, immigrant advocates across the country challenged and successfully terminated the removal proceedings of at least 9,000 immigrants in the months immediately following the

[2] In June 2018, the Trump administration announced plans to denaturalize at least 2000 citizens who were suspected of committing fraud. Ingrid Rojas Contreras, Donald Trump's Denaturalization task force is New Way to Threaten the American Dream, https://www.usatoday.com/story/opinion/2018/07/24/donald-trump-denaturalization-goals-threaten-american-dream-column/815592002.

[3] While the federal government estimated that about 3,000 children were separated from their families as a result of the Trump administration's zero-tolerance policy, a new report estimates that at least 700 children were separated from their families before the policy was formally announced. *See* Miriam Jordan, Family Separation May Have Hit Thousands More Migrant Children Than Reported, (January 17, 2019), https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html.

[4] Pereira v. Sessions, 138 S. Ct. 2105(2018).

[5] Lonny Hoffman, *Pereira's Aftershock's* 61 WILLIAM & MARY L. REV. 1,5 (2019).

decision.[6] Advocates' argument was seemingly simple. By statute, an immigration court vests its subject matter jurisdiction over a case by serving a charging document (i.e. a notice to appear) and therefore, the Court's decision that an incomplete NTA not listing the date and place of a hearing, was not valid, could be interpreted as denying immigration courts' jurisdiction whenever an incomplete notice was served upon a noncitizen. However, this seemingly simple argument premised on statutory interpretation has left lower courts and the Board of Immigration Appeals ("BIA" or "Board") alike struggling to reach a consensus on how to properly interpret *Pereira*.[7]

To determine how broadly or narrowly *Pereira* should be construed, both lower courts and the Supreme Court must inevitably address numerous questions. First, courts must decide whether immigration court proceedings initiated with a defective NTA are invalidated due to lack of subject matter jurisdiction. Secondly, courts must address whether a two-step process in which a subsequent notice of hearing containing the missing time and place can, in essence, "cure" the initial defective notice.[8] Still, courts must determine who can avail themselves of *Pereira*'s benefits.[9] Is *Pereira* only applicable to those who are currently in removal proceedings initiated by defective NTAs?[10] Does *Pereira* allow for anyone with a final removal order to benefit from being able to challenge an immigration court's jurisdiction over their case?[11] Furthermore, if a *Pereira* claim is allowed, must a person raising such a claim show they were prejudiced after receiving a defective NTA?[12] While courts have begun to address

[6] Reade Levinson & Cristina Cooke, US Courts Abruptly Tossed 9000 Deportation Cases. Here's Why, (October 17, 2018), https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK.

[7] Hoffman, *supra* note 5.

[8] Hoffman, Geoffrey, A., *Litigation Post-Pereira: Where are We Now?* 2 AILA L. J. 135, 135 (October 2019).

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

some of these issues, rather than providing clear answers, lower courts' and the BIA's decisions have further complicated the analysis in answering these questions.[13]

Shortly after the *Pereira* decision, the Board, attempting to provide both immigration courts and attorneys with much needed guidance on *Pereira's* implications, limited the decision to cancellation of removal cases and held that *Pereira* only addressed the issue of whether the stop-time rule was triggered by a defective notice to appear and that immigration courts still had jurisdiction when they issued defective NTAs.[14] Therefore, immigrant advocates could not challenge immigration courts' jurisdiction whenever a noncitizen received a notice not containing the date and time of their removal proceeding. In addition, the Board held that as long as the courts later issued a notice of hearing listing the missing information, the immigration court could vest jurisdiction over the individual's case.[15] The Board, however, did not explicitly state *Pereira* has no jurisdictional ramifications.[16]

As a result, immigration attorneys continued challenging cases initiated by defective NTAs, arguing for the dismissal or termination of cases based on the immigration court's failure to vest jurisdiction.[17] They relied on 8 CFR § 1003.14(a), which provides that the immigration court's jurisdiction "vests" when a "charging document" is filed with the immigration court to argue that NTAs not listing the time and place are not proper charging documents under 8 CFR § 1003.13 and therefore cannot vest the immigration court's jurisdiction over the noncitizen's case.[18]

Lower courts' reviews of the challenges brought after *Bermudez-Cota*, however, only served to complicate everyone's understanding of *Pereira* and immigration law in general. Until recently, there was a

[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] Levinson & Cooke, *supra* note 6.
[18] 8 C.F.R. § 1003.13 (2018); 8 C.F.R. § 1003.14(a) (2018).

circuit split on whether a *Pereira* claim, that a defective notice could not assert jurisdiction over an individual's claim, was valid.[19] Additionally, courts of appeals are still split on many of the questions that inevitably arise in answering the first question.

Following the Board's attempt to clarify *Pereira*'s impact in *Bermudez-Cota*, the Second, Sixth, and Ninth circuits deferred to the Board's rejection of the jurisdictional argument.[20] The Eleventh Circuit, in ruling on a motion for stay of removal, broke this trend, reasoning it was not required to defer to the BIA because the agency's holding was "based on an unreasonable interpretation of the governing statutes and regulations."[21]

The Seventh Circuit, in *Santiago-Ortiz v. Barr* agreed with the Eleventh Circuit and rejected both of *Bermudez-Cota*'s conclusions:(1) that *Pereira* was limited to the question of whether the stop-time rule is triggered and (2) that the two-step process of serving a deficient NTA and subsequently issuing a notice of hearing with the missing date and time was sufficient to be *Pereira* compliant.[22] The court rejected what it considered to be *Bermudez-Cota*'s oversimplification of *Pereira* saying: "*Pereira* is not a one-way, one-day train ticket," and added that the Board "brushed too quickly over the Supreme Court's decision in *Pereira*." [23]

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[19] Katy Lewis, Michelle Mendez, Victoria Neilson, and Rebecca Scholtz, *Practice Advisory: Pereira v. Sessions—Updated Strategies and Considerations*

[20] *See* Banegas Gomez v. Barr, No. 15-3269, 2019 WL 1768914, at *6–8 (2d Cir. Apr. 23, 2019) (holding that jurisdiction vests with the immigration court when the initial notice to appear does not specify the time and place of the proceedings, but notices of hearing served later include that information); Karingithi v. Whitaker, 913 F.3d 1158, 1159–62 (9th Cir. 2019) (same); Hernandez-Perez v. Whitaker, 911 F.3d 305, 312–15 (6th Cir. 2018) (same).

[21] Duran - Ortega v. United States AG, No. 18-14563-D, 2018 U.S. App. LEXIS 33531 (11th Cir. Nov. 29, 2018)(citing United States v. Zapata-Cortinas, 2018 WL 4770868, at *2–3 (W.D. Tex. 2018); United States v. Virgen-Ponce, 320 F.Supp.3d 1164, 1166 (E.D. Wash. 2018), but noting other district courts have disagreed. See, e.g., United States v. Romero Colindres, 2018 WL 5084877, at *2 (N.D. Ohio 2018)).

[22] Ortiz-Santiago v. Barr, 924 F.3d 956 (7th Cir. 2019).

[23] *Id*. at 961-962.

The Seventh Circuit then considered what should result from finding an NTA violated statutory requirements and was therefore noncompliant with *Pereira.*[24] The court explained that while "jurisdiction vests" upon the service of an NTA, "jurisdiction" should not be understood as referring to "jurisdiction" "in the same sense that complete diversity or the existence of a federal question is for a district court."[25] Instead, the court interpreted the question of "jurisdiction" as a "claims-processing rule," which it defined as a rule "seek[ing] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[26] The court noted that failure to comply with a claims-processing rule may result in termination of a noncitizen's removal hearing, meaning a noncitizen could potentially remain in the country.[27] However, a hearing would only be terminated if a noncitizen timely objected to a defective notice.[28] Without a timely objection, the noncitizen, would waive or forfeit his objection.[29]

The Seventh Circuit's new approach in interpreting the issuance of a defective NTA as a violation of a claims-processing rule rather than a jurisdictional violation has provided immigration attorneys with a different avenue to contest defective NTAs. Unfortunately, however, the Seventh Circuit has relied on the reasoning in *Ortiz-Santiago* to deny noncitizens' petitions of review without necessarily delineating what constitutes a timely objection to a defective NTA.[30] Should a noncitizen make this "timely objection" in his initial cancellation of removal request before the immigration

[24] *Id*. at 963.

[25] *Id*. (citing Henderson v. Shinseki, 562 U.S. 428, 435 (2011)).

[26] *Id*. at 963.

[27] *Id*.

[28] *Id*. at 958.

[29] *Id*. at 964.

[30] *See* Vidinski v. Barr, No. 18-3413, 2019 U.S. App. LEXIS 32169 (7th Cir. Oct. 28, 2019); Vyloha v. Barr, 929 F.3d 812 (7th Cir. 2019); Shojaeddini v. Barr, 781 F. App'x 545 (7th Cir. 2019); Vyloha v. Barr, 929 F.3d 812 (7th Cir. 2019).

judge? Should he object to the defective notice after his application for cancellation is denied and he appeals to the Board?

Without addressing what constitutes a timely objection, the Seventh Circuit has quickly rejected numerous petitions for review of Board decisions holding that the noncitizen's objections were untimely.[31] Importantly, the time element would not be so significant had the court agreed that serving a defective NTA implicates a lack of jurisdiction over a case allowing an individual to bring this issue before a court at virtually any point–unlike a claims-processing violation. Furthermore, a claims-processing violation, as noted in *Ortiz-Santiago*, would allow a court to simply dismiss a noncitizen's challenge to a defective notice, on the grounds that the challenge was not timely.

Overall, while the Seventh Circuit correctly concluded the notice served on the noncitizen was defective and properly distinguished the case before it from *Pereira*, its reasoning in denying the noncitizen's petition for review is ultimately flawed. The distinction between a claims-processing rule and jurisdiction matters. Defective notices are not clearly merely a violation of a claims-processing rule as the Seventh Circuit suggests, especially given ambiguities in the statutes delineating what must be included in an NTA and how immigration courts vest jurisdiction.[32] Ruling that defective notices are violations of claims-processing not only potentially diminishes the opportunity of noncitizens to contest their removal hearing based on government error or idleness, but also ignores established Supreme Court precedent indicating statutes should be read in favor of the noncitizen.[33]

This note will review the Seventh Circuit's decision in *Ortiz-Santiago v. Barr* and its approach to *Pereira*. The first section of this note will provide a brief overview of immigration law pertaining to the issues involved in *Pereira* and *Ortiz-Santiago*; including explanations

[31] *Id.*

[32] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (noting jurisdiction is a word of many meanings).

[33] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

of how the government initiates the process of removing a noncitizen from the United States, how someone in that situation can apply for a form of relief that would prevent his removal from the country, and the role the stop-time rule plays in the removal process.

The second section will provide an analysis of *Pereira* as it relates to the stop time rule and the potential ramifications the decision has on noncitizens' ability to cancel their removal from the country. The third section will provide a summary and analysis of *Ortiz-Santiago*. Lastly, the fourth section will discuss the Seventh Circuit's approach to *Pereira* in *Ortiz- Santiago* and why it is ultimately flawed.

I. BACKGROUND

A. The Initiation of Removal Proceedings Through Notices to Appear

Article 1 Section 8 of the U.S. Constitution grants the government the power to establish a uniform rule on Naturalization.[34] To carry out these duties, 8 U.S.C.§1227 gives the government the power to initiate removal proceedings against noncitizens who are undocumented or may have lost their status in the United States.[35]

Removal proceedings, commonly and previously referred to as deportation proceedings, are administrative proceedings held to determine whether noncitizens are can or should be removed from the United States and whether they are eligible for any relief under the Immigration and Nationality Act ("INA").[36] A person is considered removable from the country if he or she: entered the United States without being properly admitted or inspected by an immigration officer; was present in the country unlawfully or stayed in the country beyond the time permitted by his or her visa; or committed crimes the

[34] Edzie, Louisa, *Pereira v. Sessions and the Future of Deportation Proceedings*, IMMIGRATION AND HUMAN RIGHTS L. REVIEW 1, 1 (2019).

[35] *Id*. at 1.

[36] Removal proceedings were previously and are still commonly referred to as deportation proceedings or exclusion proceedings.

government has determined makes a noncitizen deportable or inadmissible such as having been part of the Nazi or Communist parties or having an intent to overthrow the government.[37]

To initiate removal proceedings, the Department of Homeland Security ("DHS") issues administrative summons or charging documents referred to as a notices to appear ("NTAs").[38] Under 8 U.S.C § 1229, an NTA is a written notice served on noncitizens listing the nature of the proceedings against the noncitizen, the legal authority under which the proceedings can be initiated and carried out, the conduct that is arguably in violation of the law, the charges against the noncitizen, and the statutory provisions that the noncitizen has allegedly violated.[39]Additionally, as held in *Pereira*, the NTA must list the time and date of removal hearing.[40]

While there has been much debate about what constitutes a valid NTA, as the Board decided in *Bermudez-Cota*, a decision which all circuits have followed as of this date, the government can still comply with the *Pereira* requirement that a valid NTA must list the date and time of a noncitizen's hearing if it then issues a notice of hearing ("NOH") listing these details initially omitted in the NTA.[41] Courts

[37] 8 U.S.C. § 1229a(e)(2) (1996) ("The term 'removable' means—(A) in the case of an [noncitizen]not admitted to the United States, that the [noncitizen] is inadmissible under section 1182 of this title, or (B) in the case of an [noncitizen] admitted to the United States, that the [noncitizen] is deportable under section 1227 of this title").

[38] 8 U.S.C. § 1229 (2019) ("Initiation of removal proceedings"); *see also* 8 U.S.C. § 1229a(c)(1)(A) (2019) ("At the conclusion of the proceeding the immigration judge shall decide whether a [noncitizen] is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing").

[39] *See* Edzie, *supra* note 32, at 1, citing 8 U.S. Code § 1229.

[40] Pereira v. Sessions,585U.S. 138 S. Ct. 2105 (2018).

[41] Matter of Bermudez-Cota,27 I&N Dec. 441. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1160-61 (9th Cir. 2019) petition for cert. pending, No. 19-475 (filed Oct. 7, 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 112 (2d Cir. 2019) reh'g denied (July 18, 2019) petition for cert. pending No.19-510 (filed Oct. 16, 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019); Ali v. Barr, 924 F.3d 983 (8th Cir. 2019); Nkomo v. Attorney Gen. of United States, 930 F.3d 129, 132-134 (3d

have referred to this as a two-step process of providing the noncitizen with the information required.[42]Importantly, a noncitizen's failure to appear before the judge on either the date and time that is listed on the NTA can result in an immigration judge ordering him removed in absentia.[43]

Immigration judges' decisions can then be appealed to the Board of Immigration Appeals (BIA).[44] Should a noncitizen disagree with the both the immigration court's and the Board's decision on his case, he may appeal to federal courts.[45]

B. Cancellation of Removal

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, grants the U.S. Attorney General the discretion to "cancel removal" and adjust the status of certain noncitizens, if they meet certain statutory eligibility requirements.[46] Allowing noncitizens to request that the government cancel their removal (i.e., their deportation from the country),is known as a petition for cancellation of removal.

Despite what seems to be the harsh consequences of many immigration laws, something still remains true: at least in theory, cancellation of removal, allowing noncitizens to request that the

Cir. 2019); United States v. Cortez, 930 F.3d 350, 359-366 (4th Cir. 2019); Pierre-Paul v. Barr, 930 F.3d 684, 688-691 (5th Cir. 2019); Perez-Sanchez v. U.S. Att'y Gen., 935 F.3d 1148 (11th Cir. 2019); Goncalves Pontes v. Barr, 938 F.3d 1, 5 (1st Cir. 2019); Lopez-Munoz v. Barr, 941 F.3d 1013, 1018 (10th Cir. 2019).

[42] *See* Matter of Mendoza-Hernandez & Capula-Cortes, 27 I&N Dec. 520 (BIA 2019)(holding that a deficient notice to appear lacking the time and place of a noncitizen's initial removal hearing is perfected when the subsequent notice of hearing is sent to the noncitizen specifying the information.).

[43] 8 U.S.C. § 1229a(b)(5) (1996).

[44] INA § 242 8 U.S.C §1252 ("Judicial review of orders of removal"); Reyes Mata v. Lynch, 576 U.S. 135 S. Ct. 2150, 1253 (2015).

[45] 8 U.S.C. § 1326 (d) (1996).

[46] 8 U.S.C.S. § 1229b (b) (1) (1996).

government, in essence, cancel their removal, remains one of the most generous forms of immigration relief available to noncitizens.[47]

Of course, however, the generosity of this law, is potentially outweighed by the strict requirements noncitizens must meet and serve to limit the number of people who can pursue this form of relief. Under 8 U.S.C. § 1229, cancellation of removal is available to legal permanent residents and non-legal permanent residents.[48] referring to individuals who are here as unauthorized immigrants or are present in the United States with a visa, but have not applied to permanently live in the United States.[49]

A legal permanent resident who has been placed in removal proceedings must prove: (1) he was admitted to the country as a legal permanent resident for at least five years; (2) he has continuously resided in the United States for seven years, regardless of his status; and (3) he has not been convicted of any crimes.[50] Similarly, a non-legal permanent resident must appear before an immigration judge and establish:(1) he has been physically present in the United states for at least ten years immediately preceding the date of application;(2) he had good moral character during the period of continuous presences; (3) he had not been convicted of certain offenses; and (4) his removal would cause extreme and unusual hardship to his legal permanent resident ("LPR") or U.S. citizen spouse, parent or child.[51]

C. Stop-Time Rule

The same statute that grants the government the power to cancel the removal of nonpermanent residents meeting the statutory provisions delineated previously also provides that the continuous physical presence requirement "shall be deemed to end . . . when the

[47] Should an applicant be able to prove he

[48] Legal permanent resident refers to

[49] 8 U.S.C.S. § 1229b.

[50] 8 U.S.C. § 1229b(a).

[51] INA § 240A(b)(1); 8 USC 1229 (b)(1).

[noncitizen] is served a notice to appear under 1229(a)."[52] This is known as the stop-time rule.

To understand how this rule works, consider the following example. Maria Sanchez, lived in the United States without leaving from April 1, 2008 until 2018. In 2017, she received a Notice to Appear telling her she should appear before an immigration judge. Given that she has been in the United States since 2008, and in this example, it is currently 2018, it seems clear that she met the 10-year physical presence requirement that would allow her to request that the government cancel her removal. However, Maria, cannot, in fact request cancellation of removal. Although she has lived in the United States for more than ten years, she stopped accumulating time towards the 10 year requirement when she received the NTA. Therefore, the government would consider her to have lived in the United States for only nine years—the nine years she lived in the United States prior to the government ordering her to appear before an immigration judge.

For quite some time, the government had been issuing incomplete NTAs that did not specify all the details required by statute. Lower courts reviewed challenges claiming that NTAs not containing the time a place a noncitizen should appear before an immigration judge were invalid for failing to abide by the requirements set forth by statute and therefore could not be said to allow an immigration court to assert jurisdiction over an individuals' case. However, lower courts' failure to reach a consensus on this question ultimately led to the Supreme Court's decision in *Pereira*, where the Court examined a notice to appear that merely "ordered [a nonresident] to appear before an immigration judge in Boston on a date to be set at a time to be set."[53]

D. Does a notice to appear vest jurisdiction with the immigration court?

To fully understand *Pereira*'s implications, it is important to understand immigrant advocates' jurisdictional argument. Jurisdiction

[52] 8 U.S.C.S. § 1229 b(d).

[53] *Pereira v. Sessions*, 138 S. Ct. 2105, 2112 (2018).

refers to a court's adjudicatory capacity, which is, its subject-matter jurisdiction or personal jurisdiction.[54] The "'first and fundamental question' of jurisdiction applies not only to the appellate courts, but also to the 'the courts from which the records comes[,]' and it is one that 'the court is bound to ask and answer for itself, even when not otherwise suggested.'"[55]

Congress arguably established subject matter jurisdiction through the INA which grants the Attorney General the authority and responsibility to conduct removal proceedings,[56] and directed that "immigration judge[s] shall conduct" those proceedings.[57]

While the INA does not address how jurisdiction vests with the immigration court, an Executive Office for Immigration Review ("EOIR") regulation addresses the issue stating that: "jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court" by the department. [58] The regulation continues by defining a "charging document" as "the written instrument which initiates a proceeding before an Immigration Judge" . . . "includ[ing] a Notice to Appear, a Notice of Referral to Immigration Judge, and Notice of Intention to Rescind and Request for Hearing . . . ."[59] Since filing an NTA initiates removal proceedings and by statute an immigration court vests jurisdiction through the issuance of a charging document, which includes an NTA, the immigration court can be said to vest jurisdiction upon the filing of an NTA.[60]

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[55] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)(quoting Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900)).

[56] INA § 240 (2011).

[57] In re Castro-Tum , 27 I. & N. Dec. 271 (B.I.A. May 17, 2018);INA§ 240(a)(1), 8 U.S.C. § 1229a(a)(1)(2006).

[58] 8 C.F.R. 1003.14(a).

[59] 8 C.F.R. 1003.13.

[60] *See* Matter of Sanchez-Herbert, 26 I&N Dec. 43, 44 (BIA 2012)(finding that "[o]nce a notice to appear has been properly filed, with the Immigration Court, jurisdiction vests").

II. PEREIRA V. SESSIONS AND ITS IMPACT ON REMOVAL

The Supreme Court reviewed the issue of whether a notice to appear that is issued to a noncitizen in removal proceedings triggers the stop-time rule and would therefore make him ineligible to apply for cancellation of removal.[61] In *Pereira v. Sessions,* a Brazilian citizen overstayed his visitor visa in the United States.[62] On May 31, 2006, he was served with a notice to appear by DHS.[63] The notice indicated Pereira had to appear before an immigration judge, but did not specify a time or place for the hearing.[64] More than one year later, the immigration court mailed Pereira a notice listing his hearing for October 31, 2007.[65] However, the notice was sent to the wrong address and he did not receive it.[66] Pereira, not aware that he had a hearing scheduled, did not attend the hearing and the immigration judge ordered him to be removed in absentia.[67] He did not learn of the in absentia removal notice until 2013.[68]

The immigration judge rescinded the in absentia order and reopened proceedings.[69] The immigration judge denied the application for cancellation of removal finding that the notice stopped the accrual of continuous physical presence.[70] The noncitizen then appealed his case to the BIA. Relying on *Matter of Camarillo*, which held that "service of a notice to appear triggers the 'stop-time' rule, regardless of whether the date and time of the hearing have been included in the document," the BIA upheld the immigration judge's decision.[71] Again,

[61] *Pereira*, 138 S. Ct. 2105 at 2112.
[62] *Id*. at 2107.
[63] *Id*. at 2112.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.

the noncitizen appealed, this time to the First Circuit, where his petition for review was denied on the basis that, as an immigration court, part of an agency, is owed deference in its interpretation of the statute delineating the requirements of a valid notice to appear.[72] The case went to the Supreme Court to resolve a circuit split.[73]

The issue before the Supreme Court was whether a document labeled "notice to appear," that does not specify the time and/or place of the removal proceedings, triggers the stop-time rule.[74] In an opinion authored by Justice Sonia Sotomayor, the Court held, 8 to 1, that "[a] notice that does not inform a non-citizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229 (a)' and therefore does not trigger the stop-time rule."[75]

The court reached its decision by looking at the statute listing the requirements of a valid notice to appear. Under 8 U.S.C 1229(a), an NTA is required to list "[t]he time and place the [removal] proceedings will be held."[76] The Court then considered surrounding statutes to understand the relationship between the statutory requirements of notices to appear and those of provision requiring the opportunity to secure counsel, for example.[77] After an evaluation of the surrounding statutes, including the statute indicating who the requirements for a non-citizen to secure counsel, the Court concluded that it made practical sense for the notice to be required to "specify the time and place the noncitizen, and his counsel, must appear at the removal hearing."[78] The Court reasoned its conclusion followed "inescapably and unambiguously" from "the plain text, the statutory context, and common sense."[79] Determining whether the Court's decision was fact specific, however, is something that is still being debated.

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[72] *Id*. at 2128.
[73] *Id*. at 2113.
[74] *Id*. at 2110.
[75] *Id.* at 2107.
[76] *Pereira*,138 S. Ct. at 2114, (quoting 8 U.S.C.1229(a)(1)(G)(i) (2006)).
[77] *Pereira*, 138 S. Ct. at 2109.
[78] *Id.* at 211415.
[79] *Pereira v. Sessions,* 138 S. Ct. 2105, 2110 (2018).

A. Does Pereira have jurisdictional ramifications?

Justice Sotomayor arguably intended to implicate all immigration courts' jurisdiction explaining what constituted a valid NTA. While seemingly clear at first glance, there has been much debate about whether this is true.

As previously stated, immigrant advocates, proponents of an expansive *Pereira* interpretation argue that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229 (a).'" The argument is that "a document isn't a notice to appear if it doesn't have a time and place on it, [and therefore]cannot be a charging document. And without a valid charging document, jurisdiction never vests in the immigration court."[80] The natural next question is just what type of jurisdiction can an immigration court assert: is a court asserting personal or subject matter jurisdiction when it serves an NTA?

In an unpublished opinion, the BIA stated that immigration courts, like Article III courts must have both personal and subject matter jurisdiction.[81] However, under 8 C.F.R. 1003.14(a) "[j]urisdiction vests, and proceedings before an immigration judge commence, when a charging document is filed with the Immigration Court by the Service."[82] This regulation concerns whether a particular case is properly before an immigration court. The idea that a charging document needs to be filed with an immigration court or else it lacks authority to make decisions on the issues raised before it describes the concept of subject-matter jurisdiction.[83] This is the concept the Supreme Court described saying that "courts have a duty to ensure that

[80] Kit Johnson, *Pereira v. Sessions: A Jurisdictional Surprise for Immigration Courts*, 50 Columbia Human Rights L. Review 1, 5 (2019).

[81] *Id*. at 5 n. 4 (citing Marco v. United States, No. 1:09-cv-761, 2010 U.S. Dist. LEXIS 108337 (S.D. Ohio Oct. 12, 201 0).

[82] 8 C.F.R. 1003.14(a)(February 28,2003).

[83] Johnson, *supra* note 81.

their jurisdiction 'defined and limited by statute, is not exceeded.'"[84] Despite this seemingly clear language, scholars, courts, and even the Board have all reached different conclusions regarding this question on numerous occasions.

In response to the notion that the court never mentioned jurisdiction, proponents of an expansive *Pereira* reading argue that a narrow interpretation baldly ignores what the Court did say as the court clearly spoke about 1229(a)'s requirements.[85] The Court, in *Pereira*, rejected the notion advanced by the government and dissent indicating the statute is not worded in definitional terms, saying:

> Section 1229(a)[] does speak in definitional terms, at least with respect to the " time and place at which the proceedings will be held": It specifically provides that the notice described under paragraph (1) is "referred to as a 'notice to appear,'" which in context is quintessential definitional language. It then defines that term as a "written notice" that , as relevant here, "specif[ies] the time and place at which the [removal] proceedings will be held." Thus when the term notice to appear" is used elsewhere int eh statutory section, including as the trigger for the stop-time rule, it carries with is the substantive time-and-place criteria required by 1229(a).[86]

The entire passage is clearly discussing the requirements of 1229(a).[87] Additionally, the majority opinion clearly stated that 1229 (a)'s requirements are applicable to all notices to appear in response to the Justice Alito's argument that the statute is better understood as defining what a "complete' notice to appear should include rather than what a defective notice to appear" deprives it of "essential character as

[84] *Id*.
[85] Hoffman, *supra* note 5, at 30.
[86] *Id*.
[87] *Id*. at 31.

a notice to appear."[88] Even if incomplete, the notice to appear is still a notice to appear.

1. Arguments in Favor of a Narrow Interpretation

On the other side of the spectrum, is the opinion that a defective notice " does not bear on the immigration court's subject matter jurisdiction" since Congress "has not expressly tethered the exercise of jurisdiction for satisfaction of the separate statutory requirements for notice to appear."[89] The reasoning employed in reaching such a conclusion is that the notice to appear "is akin to a summons or citation that is used in state and federal civil cases to notify civil defendants that they have been sued or to the type of charging document that is used in criminal proceedings."[90]

Critics of a broad interpretation, including anything beyond the context of removal cases rely on two main arguments. First, they argue, the Supreme Court did not mention jurisdiction in its decision. In other words, the Court did not hold that all notices to appear should be invalidated when they do not list that date and time of the hearing; and therefore, the case cannot be read so broadly. Additionally, courts adopting this approach have emphasized that the *Pereira* Court went out of its way to say it was only deciding a "narrow" question.[91] In the same vein, the government and lower courts have emphasized the Court did not mention jurisdiction and therefore did not invalidate *Pereira*'s removal order for lack of jurisdiction.[92]

Another main argument advocates for a narrow reading of *Pereira* advance is referred to as the actual notice objection.[93] They essentially argue that if noncitizens receive actual notice of when and where the

[88] *Id*.
[89] Hoffman, *supra* note 5, at 41.
[90] *Id*.
[91] Hoffman, *supra* note 5, at 28.
[92] *Id*.
[93] *Id*. at 29.

removal hearings will be held, *Pereira* does not apply.[94] In doing so, advocates distinguish many of the cases used to challenge removal proceedings initiated through defective notices. While in *Pereira*, the noncitizen never received actual notice because the notice was sent to another address many noncitizens challenging their removal based on defective notices, did, in fact receive their NTAs. The crux of the actual notice argument is that in delineating that a valid NTA must state the place and time, the *Pereira* Court was more concerned with noncitizen's receiving notice, than with a notice listing every item listed in the statute.[95] Many pre-*Pereira* cases upholding a two-step notice process in which a noncitizen is served with an NTA and then receives a notice of hearing listing the date and time have been cited by advocates of a narrow *Pereira* reading illustrate courts worry more about function than form in these cases.[96]

2. Arguments in Favor of a Broad Interpretation

The BIA, in an unpublished opinion, stated that immigration courts, like Article III courts must have both personal and subject matter jurisdiction.[97] Under 8 C.F.R. 1003.14(a) "[j]urisdiction vests, and proceedings before an immigration judge commence, when a charging document is filed with the Immigration Court by the Service."[98] This regulation concerns whether a particular case is properly before an immigration court. The fact that a charging document needs to be filed with an immigration court or else it lacks authority to make decisions on the issues raised before it describes the concept of subject-matter jurisdiction.[99] This is the concept the Supreme Court described saying that "courts have a duty to ensure that

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] Johnson, *supra* note 81, n. 4 citing Marco v. United States, No. 1:09-cv-761, 2010 U.S. Dist. LEXIS 108337 (S.D. Ohio Oct. 12, 2010).

[98] 8 C.F.R. 1003.14(a) (2019).

[99] Johnson, *supra* note 81, at 4.

their jurisdiction 'defined and limited by statute, is not exceeded." [100] Nonetheless, scholars, courts, and even the Board have all reached different conclusions regarding this question on numerous occasions.

B. The Board of Immigration Appeal's Narrowing of Pereira in Bermudez-Cota

Following *Pereira*, the Board issued a decision in *Matter of Bermudez-Cota* limiting *Pereira* to its facts and therefore denying challenges to immigration courts' jurisdiction in removal cases when defective notices were issued.[101] In *Bermudez-Cota*, the non-citizen was served with a notice to appear that did not include the time or place of the hearing.[102] Just over a week later, the immigration court mailed him a notice of hearing that did include the date, time and place of the hearing.[103] At his final hearing, Bermudez-Cota moved to either administratively close his proceedings or request a continuance to apply for adjustment of status.[104] The immigration judge denied both the motion to administratively close the case and the application for adjustment of status and instead issued Bermudez-Cota an order for voluntary departure.[105] Bermudez-Cota appealed the decision to the BIA arguing that the immigration court did not assert jurisdiction based on *Pereira*.[106]

The Board held that "a notice to appear that does not specify the time and place of a noncitizen'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 [non-

[100] *Id*.

[101] Matter of Bermudez-Cota, 27 I.&N. Dec. 441, 441, 2018 BIA LEXIS 31, *1 (B.I.A. August 31, 2018).

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*.

citizen]."[107] The Board distinguished Bermudez-Cota's situation from the one in *Pereira* highlighting that Bermudez-Cota had received a subsequent hearing notice unlike Pereira, and that Bermudez-Cota was " not seeking cancellation of removal, and the 'stop-time rule,'[was therefore] not at issue."[108] In reaching its conclusion that the subsequent issuance of a hearing notice that lists the date, time, and place of the hearing resolves potential jurisdictional issues involved with a defective notice to appear, the Board relied on many decisions that pre-date *Pereira*.[109]

Furthermore, the Board did not base its conclusion on any statutory or regulatory authority.[110] Rather, the court merely reasoned that *Pereira* involved a "distinct set of facts," which did not include a subsequent notice of hearing.[111] The Board made it clear that the Court in *Pereira*, did not indicate the noncitizen's removal hearing was invalid or suggest that the proceedings should be terminated.[112] Instead, the *Pereira* Court remanded the case for further proceedings.[113] Other than distinguishing *Bermudez-Cota* from *Pereira*, however, the Board did not base its conclusion on the jurisdictional issue in *Pereira* or any statute.[114]

This decision has been criticized for its reliance on circuit court decisions issued prior to *Pereira* that embraced a "two-step" notice process.[115] Furthermore, the decision has also been criticized for its reliance on the federal regulation governing NTAs rather than relying on the relevant statute defining what constitutes a proper NTA.[116]

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[107] *Id*. at *16.
[108] *Id*.
[109] Hoffman, Geoffrey A., *supra* note 8, at 4.
[110] *Id*.
[111] Hoffman, Geoffrey A., *supra* note 8, at 3.
[112] *Id*.
[113] *Id*.
[114] Hoffman, Geoffrey A., *supra* note 8, at 3.
[115] *Id*. at 4.
[116] *Id*.

C. Federal Courts' Rulings on Jurisdiction since Bermudez-Cota

To date, all courts of appeals except for the DC circuit have considered whether an immigration court has jurisdiction when it issues a defective or incomplete NTA and have concluded that, despite *Pereira*'s holding, immigration courts do assert jurisdiction even with incomplete NTAs.[117] While consistent in their denial of the claims, however, courts' reasoning further complicates the issue.

For example, the Ninth Circuit, in *Karingithi v. Whitaker*, emphasized that the immigration court's jurisdiction is governed by regulation and not by statute and highlighted how neither the Supreme Court's decision in *Pereira* nor the statutory definition of an NTA at § 1229(a) address jurisdiction.[118] The Ninth Circuit reasoned that the Pereira court relied upon the intersection of the statutory provisions dealing with the stop-time rule and the definition of an NTA. However, it found that the word "under" in the stop-time rule mattered only to the substantive time-and place requirements mandated by § 1229(a) because that word "provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § 1229(a),"[119]32 but "no such statutory glue bonds the Immigration Court's jurisdiction to § 1229(a)'s requirements." [120] Other circuits have also found there is no statutory basis to hold that immigration courts lack jurisdiction based on a defective NTA.

[117] Karingithi v. Whitaker, 913 F.3d 1158, 1160-61 (9th Cir. 2019) petition for cert. pending, No. 19-475 (filed Oct. 7, 2019); Banegas Gomez v. Barr, 922 F.3d 101, 112 (2d Cir. 2019) reh'g denied (July 18, 2019) petition for cert. pending No.19-510 (filed Oct. 16, 2019); Ortiz-Santiago v. Barr, 924 F.3d 956, 963 (7th Cir. 2019); Ali v. Barr, 924 F.3d 983 (8th Cir. 2019); Nkomo v. Attorney Gen. of United States, 930 F.3d 129, 132-134 (3d Cir. 2019); United States v. Cortez, 930 F.3d 350, 359-366 (4th Cir. 2019); Pierre-Paul v. Barr, 930 F.3d 684, 688-691 (5th Cir. 2019); Perez-Sanchez v. U.S. Att'y Gen., 935 F.3d 1148 (11th Cir. 2019); Goncalves Pontes v. Barr, 938 F.3d 1, 5 (1st Cir. 2019); Lopez-Munoz v. Barr, 941 F.3d 1013, 1018 (10th Cir. 2019).

[118] *Karingithi*, 913 F.3d at 1161

[119] *Pereira*, 138 S. Ct. at 2117.

[120] *Karingithi*, *supra* note, 118 at 1161.

Courts' confusion regarding the proper interpretation of *Pereira*, is further highlighted by the Sixth Circuit's decision in *Santos- v. Barr*.[121] Santos-Santos made a *Pereira* jurisdictional claim, arguing that his in absentia order should be rescinded and reopened since it the in absentia order was premised on a defective NTA.[122] The NTA, did not list the date, time, and place of the hearing and therefore, he argued, the immigration judge had no jurisdiction to enter a removal order.[123] Santos also claimed that he never received an NTA nor notice of hearing and that there was no evidence showing whether anyone did in fact try to serve him with a notice of hearing."[124] The Sixth Circuit nonetheless, rejected his jurisdictional challenge holding that *Pereira* was distinguishable from his case for two reasons.[125] First, *Pereira* dealt with the narrow issue of whether the stop-time rule can be triggered by an NTA lacking the time and place of the hearing.[126] Secondly, *Pereira* dealt with statutory provisions that were not at issue in Santos's case.[127]

In stating that *Pereira* dealt with statutory provisions not at issue in Santos's case, however, the Sixth Circuit potentially erred. The court apparently believed that the regulation and the governing statutes referred to two different NTAs and stated: "it bears noting that the Notice to Appear in 8 C.F. R. 1003.13-14. is different from the NTA in 8 U.S.C. 1229(a)(1). [128] Therefore, courts' inconsistent reasoning in concluding a defective NTA does not deprive immigration courts of jurisdiction should encourage attorneys to continue making the challenge.

D. Seventh Circuit Precedent on Pereira Claims

[121] Santos-Santos v. Barr, 917 F.3d 486 (6th Cir. 2019).
[122] *Id*. at 488.
[123] *Id*.
[124] *Id*.
[125] *Id*. at 489.
[126] *Id*.
[127] *Id*.
[128] *Id*. at 490.

The Seventh Circuit has addressed issues other than whether a *Pereira* claim, that an incomplete notice is invalid and cannot assert jurisdiction, can be made. For example in, *Herrera-Garcia v. Barr*, the court considered when the claim could be made.[129] Herrera-Garcia had been denied asylum along with the adjoining claims of withholding of removal and CAT relief, but during the petition for review from the Seventh Circuit, he filed a motion to reconsider before the BIA.[130] In his motion, he asserted that his case implicated *Pereira,* §.[131] In doing so, Herrera-Garcia essentially argued that *Pereira* should be interpreted broadly to include claims outside the stop-time rule context to preclude agency's jurisdiction over his removal proceedings. The Board, however, denied his motion on two grounds: (1) that the motion was untimely, and that (2) it failed on the merits. Herrera-Garcia filed a second petition to review the denied motion to reconsider he filed.[132]

In reviewing his new motion, the Seventh Circuit consolidated his two appeals and ultimately rejected Herrera-Garcia's jurisdictional argument.[133] Herrera-Garcia explained he delayed filing his motion to reconsider because *Pereira* was still pending and argued that he should not have been required to file the motion to reconsider during that time.[134] However, the Seventh Circuit reasoned he could have nonetheless, "raised the issue under consideration in *Pereira* with the Immigration Judge of the Board earlier or at least requested a stay until the case was decided." [135]

There is an argument that the Seventh Circuit, in stating that Herrera-Garcia should have filed his motion to reconsider while *Pereira* was pending ignored the fact that, as noted by Justice

[129] Herrera-Garcia v. Barr, 918 F.3d 558 (7th Cir. 2019).
[130] *Id*. at 560.
[131] *Id*. at 561.
[132] *Id*. at 562.
[133] *Id*.
[134] *Id*. at 561.
[135] *Id*. at 563.

Kennedy in *Pereira*, at least six courts of appeals before *Pereira* had viewed the stop-time rule differently, and moreover, the Supreme Court had interpreted the language to define what constituted a proper NTA.[136]

IV. SEVENTH CIRCUIT- *ORTIZ-SANTIAGO V. BARR*.

The Seventh Circuit, in a decision authored by Judge Diane Wood, disagreed with its sister courts' narrow interpretation of *Pereira*.[137] In *Ortiz-Santiago v. Barr*, the petitioner was a 50-year-old Mexican citizen who resided in the United States continuously since 1999 without legal status.[138] In October 2015, the petitioner was arrested for driving without a license.[139] Shortly after, he received a Notice to Appear stating he was removable because he entered the United States without being admitted or paroled.[140] However, the notice did not list any time or date for his appearance, but merely stated, as in *Pereira* that he was to appear before an immigration judge in Chicago at a date and time "to be set."[141] Eventually, Ortiz received a "Notice of Hearing" indicating he was to appear before an immigration judge on November 12, 2015 at 10:30 am.[142]

At his hearing, Ortiz-Santiago conceded he was removable, but sought cancellation of removal based, in part, on his continuous presence in the United States for more than ten years.[143] The immigration judge denied his cancellation and Ortiz-Santiago

[136] *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018).

[137] *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019).

[138] *Id*. at 958.

[139] *Ortiz-Santiago*, 924 F.3d 956, 958.

[140] *Id.* Paroled refers to an extraordinary measure, sparingly utilized to permit an otherwise inadmissible unauthorized immigrant to enter the United States for a temporary period due to an urgent humanitarian reason or for a significant public benefit. An unauthorized immigrant may also request parole from a U.S. government agency or the Department of State.

[141] *Id.*

[142] *Id*.

[143] *Id*.

appealed to the Board of Immigration Appeals.[144] While his appeal was pending, the Supreme Court decided *Pereira*. [145] About two months after *Pereira*, but before the Board made its final decision on his case, Ortiz filed a motion to remand with the Board, arguing that because the notice he received did not include the date and time, it was not a proper charging document.[146] The Board denied his motion to remand and affirmed the immigration judge's decision.[147] Ortiz then appealed to the Seventh Circuit, arguing that the immigration court did not have jurisdiction over his case due to the defective notice.[148]

The Seventh Circuit agreed with Ortiz-Santiago that the NTA was defective, but denied his petition for review, rejecting his argument that the issuance of a defective NTA meant the immigration court had not vested jurisdiction over his case.[149] The court concluded there was no jurisdictional issue on the straightforward basis that Congress has not linked the immigration court's jurisdiction to the notice to appear. The court explained this concept as follows:

> The fact that the Executive Office for Immigration Review of the Department of Justice purported to describe when 'jurisdiction' vests in a case before an immigration court is neither here nor there. . . . While an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases. . . . [W]hen the agency creates the rules for its adjudicatory proceedings, it must act within the limits that Congress gave it.[150]

Not considering the question before it one of jurisdiction, the court stated defective NTAs instead presented a question of whether a

[144] *Id*. at 958-959.
[145] *Id*. at 958.
[146] *Id.* at 959.
[147] *Id*.
[148] *Id*.
[149] *Id*. at 966.
[150] *Id*. at 963.

claims-processing rule had been violated.[151] The court distinguished jurisdictional rules claims processing rules relying on *Gonzalez v. Thaler*, where the Supreme Court reasoned "truly jurisdictional rules" govern "a court's adjudicatory authority" while "non-jurisdictional ones do not."[152] Applying the *Gonzalez* principle, the Seventh Circuit concluded that "the requirement that a Notice include within its four corners the time, date , and place of the removal proceedings" should not be interpreted to mean jurisdiction in the "sense that complete diversity or the existence of federal question is for a district court."[153] The court defined a claims-processing rule as one "that seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[154]

By referring to the issue in the case as one of claims-processing rather than jurisdictional, the court allowed petitioners the opportunity to terminate their case, but only if a timely objection was raised. The court stated that if a petitioner failed to raise a timely objection, the failure to comply may "be waived or forfeited by the opposing party."[155]

Considering the case as one of claim-processing, the court then turned to the issues of whether the lack of timely objection constituted such forfeiture, whether doing so at the time would have been fruitless given the existing law from federal circuit courts, and whether the major legal change that the *Pereira* decision constituted allowed for the late raising of such objection.[156] The court concluded that there was "no reason . . . to relieve Ortiz-Santiago of the forfeiture" because in Ortiz-Santiago's case there were signs a meritorious argument could have been raised."[157]

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[151] *Id*. at 962-963.

[152] *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

[153] *Ortiz-Santiago*, 924 F.3d 956, 963.

[154] *Id*. (citing Henderson v. Shinseki, 562 U.S. 428, 435, (2011)).

[155] *Id*. at 963.

[156] *Id*. at 964.

[157] *Id*.

The court rejected the Government's argument that there were two NTAs, one being referenced by statute and one in an EOIR regulations as "absurd."[158] Furthermore, the court highlighted *Bermudez-Cota* "brushed too quickly over the Supreme Court's rationale in *Pereira* and tracked the dissenting opinion rather than the majority."[159]

While the distinction between a claims-processing rule and a jurisdictional one may seem simply definitional, the Supreme Court has frequently struggled with distinguishing between the two.[160] For example, the Court considered whether the "fifteen or more employees" standard to hold an employer liable for a Title VII claims was jurisdictional and held that it was not.[161] The Court, in other cases established that claims processing rules are those governing " the presentation and processing of claims."[162] In all cases that reached the Supreme Court, the determining factor of whether a rule was one of claims-processing or jurisdiction was whether Congress intended to treat the rule as jurisdictional.[163]Seventh Circuit's decision in *Ortiz-Santiago*, several other courts of appeals have adopted its reasoning and held that NTA requirements are claims-processing rules.[164]

V. WHY ORTIZ- SANTIAGO V. BARR WAS INCORRECTLY DECIDED

[158] *Id*. at 962.

[159] *Id*.

[160] *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) (noting that "the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice" and that "[c]ourts—including this Court—have sometimes mischaracterized claim processing rules or elements of a cause of action as jurisdictional limitations").

[161] *See*, e.g., Arbaugh v. Y & H Corp., 546 U.S. 500, 503 (2006).

[162] Union Pacific R.R. v. Bd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 61, 71 (2009).

[163] Hoffman, *supra* note 5, at 41.

[164] *See* Pierre-Paul v. Barr, 930 F.3d 684, 688-691 (5th Cir. 2019) (holding that 8 CFR § 1003.14 is a claim-processing rule but upholding two-step process); United States v. Cortez, 930 F.3d 350, 359-366 (4th Cir. 2019) (holding that the regulation is an "internal docketing rule" rather than "a limit on an immigration court's 'jurisdiction' or authority to act").

1. Claiming Pereira *Does not Implicate Jurisdiction Defies Sound Statutory Interpretation.*

As previously mentioned, the argument that a defective NTA does not present jurisdictional concerns is largely based on the reading of the statute and regulations governing removal proceedings. 8 U.S.C. 1229 delineates the criteria for the "[i]nitiation of removal proceedings."[165] The Section provides that "[i]n removal proceedings . . . written notice . . . shall be given in person to the [noncitizen] . . . specifying," among other things "the time and place at which the proceedings will be held."[166] Importantly, Section 1229 does not address how jurisdiction vests in with the immigration court and, therefore, the argument is that "Congress has not 'directly spoken to' that 'precise question."[167] Given the ambiguity in Section 1229, however, an immigration court's interpretation of the statute would be given deference by a reviewing court and in fact, the agency, answered this question in sections 8 C.F.R. §1003.14 and 8 C.F.R. § 1003.13.[168]

Section 1003.14 provides: "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.[169] The statute goes on to define a charging document as a "written instrument which initiates a proceeding before an immigration judge."[170] The language of Section 1003.14 is in line with what the Supreme Court has declared to clearly refer to jurisdiction. Without evidence supporting otherwise, it is evident the Seventh Circuit simply ignored the clear indication Congress intended a notice to appear to serve as a way for the immigration court to vest jurisdiction. Congress organized the code

[165] 8 U.S.C § 1229 (2006).

[166] 8 U.S.C § 1229(a)(1) (G)(j) (2006).

[167] United States v. Rivas-Gomez, No. 2:18-cr-566, 2019 U.S. Dist. LEXIS 111931, at *9 (D. Utah July 3, 2019) (citing *Chevron* v. 467 U.S. at 842).

[168] *Id*.

[169] *Id*.at *10.

[170] 8 C.F.R. § 1003.13 (1997).

logically. The initiation of proceedings must come first, followed by the nature and carrying out of the proceedings. Therefore, 8 U.S.C. 1229 (a) is most reasonably understood to refer to jurisdiction as opposed to claims-processing.

Furthermore, *Pereira* only having precedential force for cancellation cases cannot defend the inconsistency that courts' approach necessarily entails: a notice cannot be insufficient solely for purposes of triggering the stop-time rule but satisfactory for every other purpose. The approach defies reason and cannot be goes against long-established rules of statutory construction.

Considering the statutory interpretation argument, it is not surprising advocates for an expansive *Pereira* reading would want *Pereira* to have subject matter jurisdiction implications.[171] At least in regards to Article III courts, subject matter jurisdiction issues are considered non-waivable, meaning that subject matter jurisdiction can be raised at any time during the trial of the case, or even afterwards on direct appeal.[172] Additionally, federal courts must confirm there is subject matter jurisdiction and, if they find it lacking, dismiss *sua sponte*, regardless of whether the parties raise it on their own. [173]

Some scholars, however, consider that treating *Pereira* as a subject matter jurisdiction problem overlooks how defects in subject matter jurisdiction of Article III or Article I cannot be attacked collaterally.[174] Since subject matter jurisdiction cannot be attacked collaterally, bringing *Pereira* challenges could only benefit noncitizens with pending or future removal orders. If NTAs, in fact, do not implicate subject matter jurisdiction, then the next question should be whether an immigration court asserts personal jurisdiction over an individual when it serves an NTA on a noncitizen.

While treating a defective notice issue as one implicating personal jurisdiction might allow collateral attacks on final

[171] Hoffman, *supra* note 5, at 38.
[172] *Id*.
[173] *Id*.
[174] *Id*.

judgements, the argument assumes a defective NTA implicates some form of jurisdiction in the first place.[175]

Beyond their failure to give proper regard to the clear language in the decision, courts that insist Pereira only has precedential force for cancellation cases cannot defend the inconsistency that their approach necessarily entails: that a notice would be insufficient solely for purposes of triggering the stop time rule but satisfactory for every other purpose. That approach defies reason and cannot be squared with long established rules of statutory construction.

A claims-processing rule, on the other hand, as discussed earlier, is one referring to the way courts carry out their daily administrative tasks. Supreme Court precedent in employment law, indicates 1229(a)'s requirements are more like claims-processing rules and are not jurisdictional.[176] Specifically, in *Arbaugh v. Y & H Corp.,* a case the Seventh Circuit cited in support of its holding that defective notices violate claims-processing rules, the Court held employers' liability being limited to fifteen or more employees in Title VII claims was not jurisdictional.[177] The *Arbaugh* court further noted the dividing line between a jurisdictional and a claims-processing rule is determined by looking to whether Congress expressly indicated a rule should be treated as jurisdictional.[178]

The idea that 1229(a)'s requirements are more like claims-processing rules is potentially strengthened by the Court's decision in another employment law case decided one year after *Pereira*. In *Fort Bend County v. Davis*, the Court considered whether Title VII's charge filing precondition to a suit is a jurisdictional question.[179] The statute

[175] *Id*.

[176] Arbaugh v. Y& H Corp., 546 U.S. 500, 503 (2006).

[177] *Id*.

[178] *See Id.* at 515-516 (noting that it the legislature "clearly states that threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." (footnote omitted)(citations omitted)).

[179] 139 S. Ct. 1843, 1846 (2019).

clearly states that before a claimant can file a Title VII employment discrimination case in court, the complainant must exhaust his administrative charge with the Equal Employment Opportunity Commission.[180] The Court explained that the charge-filing requirement, while mandatory, does not implicate the court's jurisdiction. [181]

Proponents' of a *Pereira* interpretation that does not include jurisdiction have, of course, done their homework and correctly relied on Supreme Court precedent delineating what is or is not a claims-processing rule, even though none of the cases involve statutes or regulations governing immigration cases. However, these same proponents have failed to reconcile the employment law cases distinguishing claims-processing rule violations from jurisdictional ones with Supreme Court precedent that is more clearly related to *Pereira*'s interpretation. The Supreme Court has clearly indicated that due to the high stakes involved in the deportation of noncitizens, which can be considered the "equivalent of banishment or exile, "[182] courts have recognized the need to construe statutes in favor of the noncitizen.[183] Clearly, proponents of allowing immigration courts to assert jurisdiction with improper notices are not taking this approach.

Overall, while the Seventh Circuit correctly ruled the notice served on Ortiz-Santiago was defective, its conclusion that this was a matter of claims-processing rather than jurisdiction is flawed for at least two reasons. First, the court ignored cannons of statutory construction requiring the court to consider the title of Section 1229, delineating how removal hearings are initiated, as well as well as the

[180] *Id*. (citing 42 U.S.C. § 2000e-5(c)).

[181] *Id*. at 1849-51.

[182] Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018)(reiterating that deportation is "particularly severe penalty," which may be of greater concern to a convicted [noncitizen] than 'any potential jail sentence.'").

[183] *Fong Haw Tan*, 333 U.S. 6, 10 (finding that in using the term "more than once," the aim of 8 U.S.C.S. § 155(a) was to deport persons who commit a crime and are sentenced, commit another crime, and are sentenced again rather than to deport a noncitizen who had been convicted of the murder of two different persons on one occasion).

idea that Courts are to give deference to an agency's interpretation of a statute or regulation.[184] Furthermore, the court ignored Supreme Court precedent requiring the statute indicating what constitutes a valid NTA and the regulation governing when jurisdiction vests, to be read in favor of the noncitizen.[185] While the Seventh Circuit's decision has provided immigration attorneys with an avenue to challenge immigrants' removal hearings, it should nonetheless reconsider its reasoning as this could lead to a slippery slope in which our government is allowed to continue violating immigrants' due process rights. Unless Congress changes the governing statutes or the Supreme Court overrules *Fong Haw Tan v. Phelan*, where the court held statutes should be read in favor of the noncitizen[186]

2. The Seventh Circuit's reliance on the "Gonzalez principle" is improper.

The Seventh Circuit acknowledged that the "line of authority" upon which it relied to reach this conclusion "arose in the context of the courts rather than agencies" but nevertheless found "the principle a useful one here as well."[187] There is reason to doubt whether the "*Gonzalez* principle" applies here, to an agency rather than an Article III court.

The Supreme Court, in *City of Arlington v. F.C.C.*, addressed the question of "whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction)." [188] The Court ultimately decided a court must defer to an agency's interpretation . To answer the question before it, the Supreme Court noted the meaningful differences between "jurisdictional" and

[184] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).
[185] *See* Fort Bend County, *supra* note 180, at 1846.
[186] *Id*.
[187] *Ortiz-Santiago*, 924 F.3d at 963.
[188] City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 296-97 (2013).

"nonjurisdicitonal questions in the judicial context, but not necessarily for agencies. The Court also noted that "[t]he misconceptipn that there are for Chevron purposes separate 'jurisdictional' questions on which no deference is due derives perhaps, from a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to the courts." [189] Essentially, the Supreme Court explained that "[w]here Congress has established a clear line the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." [190] In applying the latter rule, a court should not question whether the question presented is "jurisdictional." [191] For if the agency's answer is based on a permissible construction of the statute,' that is the end of the matter."[192]

Here, the relevant statutes sections 1229 and 1229(a) are ambiguous as to when jurisdiction vests with an immigration court. While the Seventh Circuit disagrees, the Attorney General filled a gap to address an ambiguity in Section 1229 with the promulgation of 8 C.F.R. § 1003.13, 1003.14, and 1239.1. There is no reason why the Attorney General interpreting the commencement of immigration proceedings as a jurisdictional question is not "a permissible construction of the statute."[193] Therefore, because this issue relates specifically to the Attorney General's "interpretation of a statutory ambiguity concern[ing] the scope of [his] authority (that is, its jurisdiction," the conclusion that jurisdiction vests when a charging document is filed with the immigration court properly follows. [194]

While it is true there has been disagreement and confusion over what truly constitutes a jurisdictional rule, the Supreme Court has not

[189] *Id*. at 297.
[190] *Id*. at 307.
[191] *Id*.
[192] *Id.* (quoting *Chevron*, 467 U.S. at 842).
[193] *Chevron*, 467 U.S. at 843.
[194] *City of Arlington*, *supra*, note 185, at 296-97.

addressed the nature of NTA's in immigration law. *Pereira* only addressed whether the NTA triggered the stop-time rule and did not specifically state whether the NTA implicates jurisdiction. Therefore, despite other circuits agreeing with the Seventh Circuit, until the Supreme Court reviews whether NTAs assert jurisdiction, the argument that the issue is one of jurisdiction as opposed to claims-processing remains viable.

Recent Seventh Circuit decisions have followed *Ortiz-Santiago* in ruling that incomplete notices are claims-processing violations.[195] However, at least one court has considered *Ortiz-Santiago*'s reliance on *Gonzalez* misguided because *Gonzalez* involved a jurisdictional challenge in an Article III court and not an agency as in Ortiz-Santiago.[196] While the one court to criticize the Seventh Circuit's holding that defective notices are the result of claims-processing rules, and not jurisdiction, was a district court, the analysis makes clear the distinction between a claims-processing rule and jurisdictional one are not clear.

In *United States v. Rivas-Gomez*, the petitioner, a citizen of Mexico, entered the United States without authorization on June of 1997.[197] On June 6, 2002, Rivas-Gomez received a Notice to Appear.[198] On or around June 13, 2002, Rivas-Gomez received a "Notice of Hearing in Removal Proceedings" indicating that Rivas-Gomez had been scheduled for MASTER hearing before the Immigration Court on July 15, 2002 at 8:30 am at a courtroom in Lancaster, California.[199] Mr. Rivas-Gomez was ordered removed at that hearing, but then he re-entered the country.[200] The Government

[195] *See supra* note 165.

[196] United States v. Rivas-Gomez, No. 2:18-cr-566, 2019 U.S. Dist. LEXIS 111931, at *1 (D. Utah July 3, 2019).

[197] *Id*. at *1.

[198] *Id*.

[199] *Id*.at *2.

[200] *Id*. at *19.

alleged that Mr. Rivas-Gomez' re-entry after being removed was illegal.[201] Mr. Rivas -Gomez argued for the dismissal of the illegal re-entry charge because the charge was based on the 2002 notice to appear that could not vest jurisdiction when it did not include all of the information necessary to do so.[202]

The United States District Court for the District of Utah noted how the Seventh Circuit had conceded it was relying on a line of authority arising "in the context of the courts rather than agencies." [203] The district court continued its critique of *Ortiz-Santiago* noting how the court did not provide any statutory or case precedent for relying on that same rationale.[204] The district court held the issue presented was one of jurisdiction and not claims-processing, relying on *City of Arlington*.[205]

2. Practical Implications

The consequences of *Pereira*, the Seventh Circuit failed to consider in *Ortiz-Santiago* are severe: in the months following the *Pereira* decision, the backlog of immigration cases grew from 700,000 to over 800,000.[206] It is very possible that by holding the issue is one of claims-processing, the incomplete notices will continue to be distributed and therefore further increase this backlog. Since almost one hundred percent of the cases were initiated by invalid notices to appear there is an argument that they should all be terminated for lack of jurisdiction.[207]

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[201] *Id*. at *2.

[202] *Id*. at *2-3 (citations and quotations omitted).

[203] *Id*. at *17.

[204] *Id*.

[205] *Id*. at *15-16.

[206] Compare Immigration Court Backlog Tool, TRACT IMMIGRATION, https/perma.cc/BND9-RNGG(data up to May 2018), with http://trac.syr.edu/phtptools/immigraiton/court_backlog/[https://perma.cc/2E2R-73NP9](data through November 2018).

[207] *Pereira*, 138 S. Ct. at 2111(citing transcript).

To address the government's potential concern: while it may seem that all non-citizens would immediately be relieved from removal, it would be relatively easy for the Department of Homeland Security to issue new, complete notices to appear.[208] The fill- in the blanks information on the form-including the respondent's name, address, and why they are subject to removal can easily be copied onto complete notices to appear that comply with the requirements listed in *Pereira*.[209] In fact there is a computer system that would make this even easier.[210] However, as previously mentioned, these arguments have been ignored by all circuits that have reviewed *Pereira* jurisdictional claims.

Therefore, what is left for immigration attorneys to do on the jurisdictional question is to attempt to distinguish as best they can the case they are presenting to the judge from those decided by several circuits already. For example, in some of the federal court decisions, the NTA at issue did not include the time and date of the hearing but did include the place.[211] Therefore, an attorney could argue that lacking the place of hearing was not at issue in *Pereira* and should not

[208] *Rivas-Gomez*, No. 2:18-cr-566, 2019 U.S. Dist. LEXIS 111931, at *16-17.

[209] *Id*.

[210] *Id.*

[211] Some U.S. courts of appeals decisions do explicitly state that the respondent argued the NTA was defective for not including the time or place of the hearing. *See* Banegas Gomez v. Barr, 922 F.3d 101, 112 (2d Cir. 2019) reh'g denied (July 18, 2019) petition for cert. pending No.19-510 (filed Oct. 16, 2019); Ali v. Barr, 924 F.3d 983, 986 (8th Cir. 2019); Nkomo v. Attorney Gen. of United States, 930 F.3d 129, 131 (3d Cir. 2019). None of the cases, however, discusses the immigration court address requirement in 8 CFR § 1003.15 so it does not appear that the noncitizens in these cases argued that the regulations do require the NTA to list the place of the hearing for jurisdiction to vest even if they do not require the NTA to list the time and date. On other hand, other U.S. court of appeals state that the noncitizen argued that the NTA was defective for not including "the time and date" but are silent as to place. For example, Karingithi v. Whitaker, 913 F.3d 1158, 1160 (9th Cir. 2019) petition for cert. pending, No. 19-475 (filed Oct. 7, 2019) says, "Importantly, the regulation does not require that the time and date of proceedings appear in the initial notice." See also Pierre-Paul v. Barr, 930 F.3d 684, 688691 (5th Cir. 2019); United States v. Cortez, 930 F.3d 350, 359-366 (4th Cir. 2019); Soriano-Mendosa v. Barr, 768 F. App'x 796, 802 (10th Cir. 2019).

immediately preclude a jurisdictional claim in the case before them at the moment.

CONCLUSION

The Seventh Circuit's decision in *Ortiz-Santiago* has unquestionably helped immigrant advocates terminate the removal proceedings of many immigrants. However, a problem remains with the framework the Seventh Circuit has set forth. As this article has discussed, the court incorrectly assumed that the jurisdictional argument is completely implausible. Secondly, the court's reliance on a case pertaining to Article III courts rather than agencies, such as an immigration court, is improper. Lastly, in easily dismissing the issues as one of claims processing, the court fails to account for the practical implications its decision will have.

The difference between a claims-processing rule and jurisdictional one may seem to be a mere technicality, however, the distinction matters. It matters because the distinction could determine whether a noncitizen could challenge a government's error at virtually any stage of litigation, or within a given time period.