No. 19-475

IN THE

Supreme Court of the United States

SERAH NJOKI KARINGITHI,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF PROFESSOR LONNY HOFFMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Court Should Grant Review to Clarify How to Construe *Pereira*'s Limiting Language. 5

A. The Courts of Appeals are Divided over *Pereira*'s Reach. 5

B. *Pereira*'s Construction of §1229(a) Applies to All Notices to Appear. 12

C. If the Government Serves a Defective Notice, there could be Remedial Consequences under *Pereira*, even if those Consequences are not Jurisdictional. 15

II. The Court Should Grant Review to Clarify that a Two-Step Notice Process is Inconsistent with the Unambiguous Statutory Language. 17

A. The Courts of Appeals are Divided Over the Proper Notification Procedure. 12

B. A Two-Step Notice Process is Squarely Inconsistent with *Pereira*'s Construction of §1229(a). 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Ali v. Barr,
924 F.3d 983 (8th Cir. 2019) 9, 10, 18

Auer v. Robbins,
519 U.S. 452 (1997) 19

Banegas Gomez v. Barr,
922 F.3d 101 (2d Cir. 2019)..... 6, 9, 10, 18

Chevron v. Natural Res. Defense Council, Inc.,
467 U.S. 837 (1984) 11

County of Allegheny v. American Civil Liberties Union,
492 U.S. 573 (1989) 16

Dababneh v. Gonzales,
471 F. 3d 806 (7th Cir. 2006) 24

Goncalves Pontes v. Barr,
938 F.3d 1 (1st Cir. 2019)..... 6, 10

Haider v. Gonzales,
438 F.3d 902 (8th Cir. 2006) 21

Hernandez-Perez v. Whitaker,
911 F.3d 305 (6th Cir. 2018) 9, 10, 14, 18

Lopez v. Barr, 925 F.3d 396 (9th Cir 2019)..... 19, 23

Matter of Bermudez-Cota,
27 I. & N. Dec. 441 (BIA 2018) 9, 19

Matter of Mendoza-Hernandez,
27 I. & N. Dec. 520 (BIA 2019) 18

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 11

Ng Fung Ho v. White, 259 U.S. 276
(1922) 8

Nkomo v. U.S. Att'y Gen.,
930 F.3d 129 (3d Cir. 2019)..... 6, 9

Orozco-Velasquez v. Attorney General United States,
817 F.3d 78 (3d Cir. 2016)..... 23

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

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

Perez-Sanchez v. U.S. Attorney Gen.,
935 F.3d 1148 (11th Cir. 2019) 10, 18, 23

Pierre-Paul v. Barr,
930 F.3d 684 (5th Cir. 2019) 6, 9, 18

Santos-Santos v. Barr,
917 F.3d 486 (6th Cir. 2019) 9, 18

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 16

Taniguchi v. Kan Pacific Saipan, Ltd.,
566 U.S. 560 (2012) 13

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment,
558 U.S. 67 (2009) 11

United States ex rel. Bilokumsky v. Tod,
263 U.S. 149 (1923) 8

United States v. Contreras-Cabrera,
766 F. App'x. 674 (10th Cir. 2019) 6, 9

United States v. Cortez,
930 F.3d 350 (4th Cir. 2019) 6, 10, 18

Statutes

8 U.S.C. §1229(a) .....*passim*

8 U.S.C. §1229a..... 7, 8, 11

8 U.S.C. §1252b (1995) 23, 24

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009..... 23, 24

Other Authorities

5 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §64.02 (rev. ed. 2019)..... 24

8 C.F.R. §1003.13 7

8 C.F.R. §1003.14 ..... 7, 9

8 C.F.R. §1003.18(b) 20

Policy Memorandum (PM 19-08) from Director Hames R. McHenry III (Dec. 21, 2018) 21

Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) 15

Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994) 16

Lonny Hoffman, Pereira*'s Aftershocks*, 61 WM. & MARY L. REV. (forthcoming November 2019) 1, 2

Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, Reuters (Oct. 17, 2018) 2

Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) 15, 16

Kate Smith, *ICE Told Hundreds of Immigrants to Show Up to Court Thursday—for Many, Those Hearings are Fake*, CBS NEWS (Jan 31, 2019) 22

Dianne Solis, *ICE Is Ordering Immigrants to Appear in Court, But the Judges Aren't Expecting Them*, DALLAS MORNING NEWS (Sept. 16, 2018)..... 21

INTEREST OF *AMICUS CURIAE*

Amicus curiae Lonny Hoffman is the Law Foundation Professor of Law at the University of Houston Law Center.[1] A faculty member since 2001, Professor Hoffman teaches courses in and writes extensively on procedural law, including issues related to jurisdiction and the construction of procedural rules and statutes. One other professional background note is helpful to dispel confusion. When it comes to the substance of immigration law, *amicus* is—by far—only the second-most qualified Hoffman on the faculty at the University of Houston Law Center. His (unrelated) colleague, Professor Geoffrey Hoffman, Director of the University of Houston's Immigration Law Clinic, is the real expert. But it is *amicus curiae*'s expertise in procedural law that provided the basis for his recent article, Pereira*'s Aftershocks*, 61 WM. & MARY L. REV.

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[1] As authorized by Rule 37.2, all parties have consented to the filing of this brief. As required by Rule 37.2, counsel for all parties received notice of the intention to file this brief at least 10 days prior to the due date. As required by Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The University of Houston Law Center provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs in preparing this brief. Otherwise, no other person or entity has made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* files this brief in his individual capacity. It is not authorized by, and should not be construed as reflecting on the position of, the University of Houston.

(forthcoming Nov. 2019), available at https://wmlawreview.org/pereiras-aftershocks, on which the views expressed in this brief are based.

SUMMARY OF ARGUMENT

Many of the Court's decisions—even its nearly unanimous ones—stir controversy. But by any measure, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) is different. Hundreds of lower court opinions have struggled to understand it. And with *Pereira* challenges being routinely raised by immigration lawyers across the country, the number of rulings by immigration judges is already well into the thousands.[2]

The volume of cases has not helped to settle the debate. To the contrary, in *Pereira*'s aftermath the courts have taken wildly divergent positions on the case's meaning. The heart of the uncertainty lies in what *Pereira* left unaddressed. The Court construed 8 U.S.C. §1229(a) to require that time-and-place information be included in the "notice to appear," the document that the statute directs the government to serve on a noncitizen. What *Pereira* did not resolve was what should happen if that information is missing

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[2] *See* Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, Reuters (Oct. 17, 2018), https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK [https://perma.cc/8ZCU-AF2A].

from the notice. More precisely, there is a need for clarity on two pressing and consequential issues.

First, there has been a feverous debate post-*Pereira* over how broadly or narrowly to read the Court's opinion. A majority of the courts of appeals read the case to have no relevance beyond the specific context in which it arose. In support, these courts cite the opinion's twice-repeated use of the word "narrow." *Pereira*, 138 S. Ct. at 2110, 2113. Surely, they say, that characterization reflects the Court's intent that its holding only extend to cases involving the cancellation of removal defense. By contrast, the Seventh Circuit correctly understands *Pereira*'s construction of §1229(a) to apply to all notices to appear at a judicial removal hearing.

Pereira's limiting language has also caused confusion in a separate, but related, way. Seeking to maximize *Pereira*'s significance, immigration advocates have argued that a notice that is insufficient under §1229(a) divests the immigration court of subject matter jurisdiction. This argument has confounded and divided the courts of appeals. None have thought that omission of time-and-place information from the notice divests the immigration court of jurisdiction, but their reasoning varies widely and in fundamentally incompatible ways. Six of the courts of appeals, along with the Board of Immigration Appeals, assume that the Court could not have meant for a defective notice to have jurisdictional significance because it characterized its decision as "narrow." These courts reason that *Pereira* would not have used

that sort of limiting language if the decision was meant to have such far-reaching jurisdictional consequences. By comparison, the Seventh and Eleventh Circuits do not read any jurisdictional meaning into *Pereira*'s self-described "narrow" opinion. (Still other decisions recognize that there could be jurisdictional implications if time-and-place information is omitted from the notice, but that any jurisdictional problem is cured if the immigration court clerk subsequently mails that information to the noncitizen, as one of the agency's regulations permit.)

The two related misunderstandings of *Pereira*'s limiting language—that in writing a "narrow" opinion the Court (1) only meant to construe §1229(a) for cancellation of removal cases and (2) did not mean to attach jurisdictional significance to its holding—link together in a critical way. Misconstruing *Pereira*, these courts conflate the (correct) conclusion that a *Pereira* defect does not have any jurisdictional consequence with whether there is any consequence at all if the government serves a defective notice. In practical terms, this means that *Pereira* has been effectively nullified as a controlling precedent (except in cancellation of removal cases—and even then, only with reference to the stop-time rule). The Court should grant review to clarify that *Pereira*'s construction of §1229(a) has no jurisdictional significance, but because all notices to appear must satisfy the statutory requirements, a defective notice could have other remediable consequences, even if those consequences are waivable.

In addition to the question of *Pereira*'s reach, there is a second and even sharper divide over how to apply the decision. Post-*Pereira*, the courts have separated into two camps concerning whether the omission of time-and-place information in the notice to appear can be cured if, as the agency's governing regulations permit, the immigration court subsequently sends a notice of hearing with that information. The Second, Fifth, Sixth, and Eighth Circuits, along with the Board of Immigration Appeals, approve of this two-step notice procedure. By contrast, the Seventh, Ninth, and Eleventh Circuits find the two-step notice procedure incompatible with *Pereira*.

The former view misreads *Pereira*. It also ignores that Congress already rejected a two-step notice procedure when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Court's review is needed to clarify that a proper construction of §1229(a) cannot be squared with the governing regulatory procedures.

ARGUMENT

I. The Court Should Grant Review to Clarify How to Construe *Pereira*'s Limiting Language.

A. The Courts of Appeals are Divided Over *Pereira*'s Reach.

Post-*Pereira*, the courts of appeals have been divided over how broadly or narrowly to read the

Court's opinion. This confusion manifests itself in two separate, but related ways.

1. Does *Pereira*'s construction of §1229(a) apply only to cases involving the cancellation of removal defense?

Most courts of appeals read *Pereira* to have no relevance beyond the context in which the case arose. As central support, they cite the opinion's twice-repeated use of the word "narrow." *Pereira*, 138 S. Ct. at 2110, 2113. *See, e.g.,* Pet. App. at 10 (insisting that *Pereira* "emphasiz[ed] multiple times the narrowness of its ruling" and that "the only question" in *Pereira* was whether the petitioner was eligible for cancellation of removal); *see also Goncalves Pontes v. Barr*, 938 F.3d 1, 5 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 365 (4th Cir. 2019) as amended (July 19, 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 689 (5th Cir. 2019); *United States v. Contreras-Cabrera*, 766 F. App'x. 674, 677 n.4 (10th Cir. 2019).

By contrast, the Seventh Circuit correctly understands *Pereira*'s construction of §1229(a) to apply to all notices to appear, regardless of the specific context in which the notice is served. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961 (7th Cir. 2019) ("*Pereira* is not a one-way, one-day train ticket.").

2. Does the jurisdictional effect, if any, of an insufficient notice depend on *Pereira*'s limiting language?

Complicating the question of *Pereira*'s reach has been judicial treatment of a confounding argument made by immigration advocates. Citing regulatory language that links the notice to appear to jurisdiction, lawyers for noncitizens have insisted that removal proceedings commenced with a defective notice to appear must be treated as void *ab initio* and retried because the notice is insufficient to vest the court with subject matter jurisdiction. The argument is hinged to one of the agency's regulations, which provides: "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the [Immigration and Naturalization] Service." 8 C.F.R. §1003.14(a). Since 1996, the notice to appear has been the primary charging document that the government serves on noncitizens facing removal in adversarial proceedings. *See id.* at §1003.13.

The jurisdictional argument is confounding—and wrong—because Congress has not predicated the immigration court's subject matter jurisdiction on proper notice. Just as Congress has vested Article III courts with adjudicatory authority, it has done the same for immigration courts. But the relevant statute is not §1229. It is §1229a. And the language of §1229a(a)(1) is clear in delineating the class of cases that an immigration court can hear: "An immigration judge shall conduct proceedings for deciding the

inadmissibility or deportability of an alien." 8 U.S.C. §1229a(a)(1).

Of course, there are instances when an immigration court will lack subject matter jurisdiction. For example, §1229a does not give immigration courts authority to decide cases involving United States citizens; the statute only authorizes the courts to decide cases involving the inadmissibility or deportability of aliens. As the Court has observed, "alienage is a jurisdictional fact." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923). An assertion of U.S. citizenship "is thus a denial of an essential jurisdictional fact." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Although it should be clear that the *Pereira* jurisdiction argument founders on Congress's failure to link the immigration court's adjudicatory authority to the notice to appear, the argument has badly confused and splintered the courts of appeals. Relying on *Pereira*'s self-characterization as a "narrow" decision, the Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits, along with the Board of Immigration Appeals, find that omission of time-and-place information from the notice to appear does not have jurisdictional significance. These courts reason that the Court would not have used that sort of limiting

language if it had intended its decision to have far-reaching jurisdictional consequences.[3]

By contrast, the Fifth, Seventh, and Eleventh Circuits recognize that a *Pereira* defect is without jurisdictional significance, not because *Pereira* was a "narrow" decision, but on the straightforward basis that Congress has not linked the immigration court's jurisdiction to the notice to appear.[4]

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[3] *See Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (BIA 2018) ("Had the Court intended to issue a holding as expansive as the one advanced [that the defective notice divested the court of jurisdiction], presumably it would not have specifically referred to the question before it as being 'narrow'"); Pet. App. at 10 ("The Court's resolution of that 'narrow question' cannot be recast into the broad jurisdictional rule Karingithi advocates."); *Banegas Gomez*, 922 F.3d at 112 n.2 ("We do not believe the Supreme Court would have deemed its holding 'narrow' if *Pereira* had the far-reaching jurisdictional consequences Banegas Gomez's reading of that decision would portend."); *accord Nkomo*, 930 F.3d at 133; *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018); *Santos-Santos v. Barr*, 917 F.3d 486, 489-90 (6th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Contreras-Cabrera*, 766 F. App'x. at 677 n.4.

[4] *See Ortiz-Santiago*, 924 F.3d at 963 ("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."); *Pierre-Paul*, 930 F.3d at 692 ("Congress has not 'clearly state[d]' that the

Compounding the confusion, decisions from the First and Fourth Circuits, along with internally inconsistent reasoning employed by the Second, Sixth, Eighth, and Ninth Circuits, conclude that omission of time-and-place information from the notice to appear could have jurisdictional implications, but that any jurisdictional problem is cured if the immigration court clerk later mails the hearing information to the noncitizen, as the agency's regulations permit.[5] But

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immigration court's jurisdiction depends on the content of notices to appear.") (internal citation omitted) (alteration in original); *Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019) ("The problem with treating 8 C.F.R. §1003.14 as a jurisdictional rule is this: 'Congress alone controls [an agency's] jurisdiction.'") (internal citation omitted) (alteration in original).

[5] *See Goncalves Pontes*, 938 F.3d at 7 (deferring to BIA's conclusion that the notice to appear "'vests an Immigration Judge with jurisdiction over the removal proceedings' when a notice of hearing is sent to the alien in advance of those proceedings") (internal citation omitted); *Cortez*, 930 F.3d at 363 ("We agree with the substantial majority of courts to address this issue, as well as the district court here: It is the regulatory definition of 'notice to appear,' and not § 1229(a)'s definition, that controls in determining when a case is properly docketed with the immigration court. . ."); *Banegas Gomez*, 922 F.3d at 112 ("We conclude that an NTA that omits information regarding the time and date of the initial removal hearing is nevertheless adequate to vest jurisdiction in the Immigration Court, at least so long as a notice of hearing specifying this information is later sent to the alien."); *Hernandez-Perez*, 911 F.3d at 914-15 ("jurisdiction vests with the immigration court where . . . the mandatory information about the time of the hearing is provided in a Notice of Hearing issued after the NTA") (internal citation omitted); *Ali*, 924 F.3d at 986; Pet. App. at 8 (the "regulatory definition, not the one set forth [by statute], governs the Immigration Court's jurisdiction").

this has it exactly backward. Whatever the agency meant, the regulation's use of the word "jurisdiction" has no bearing on whether a defective notice divests the immigration court of subject matter jurisdiction. What matters isn't the agency's intent; it is Congress's. *See Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment*, 558 U.S. 67, 71 (2009) ("By presuming authority to declare procedural rules 'jurisdictional,' the panel failed 'to conform, or confine itself, to matters [Congress placed] within the scope of [the Board's] jurisdiction.'") (internal citations omitted).[6] And, as noted, Congress has not predicated the immigration court's subject matter jurisdiction on proper notice. Nothing in §1229a—or in any other statutory section—expressly tethers an immigration court's subject matter jurisdiction to service of the notice to appear.

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[6] *See also generally Chevron v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("We must also reject any suggestion that the [agency] may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress.").

In sum, the courts of appeals have been all over the map on the jurisdictional issue. The Court's review is badly needed to resolve these splintered decisions.

B. *Pereira*'s Construction of §1229(a) Applies to All Notices to Appear.

1. *Pereira* construed §1229(a)'s requirements on their own, not just with reference to the stop-time rule.

Unquestionably, *Pereira* emphasized the textual interplay between the stop-time rule and §1229(a). But the Court's construction of §1229(a) necessarily applies whenever the sufficiency of a notice to appear is at issue. Rejecting the view advanced by the government and the dissent that the statute is not worded in the form of a definition, the Court observed that the statute "does speak in definitional terms," at least with respect to time-and-place requirements to be included in the notice. *Id.* at 2116. Indeed, the Court pointed out that §1229(a) uses "quintessential definitional language" by describing the notice to appear as a "'written notice' that, as relevant here, 'specif[ies] . . . [t]he time and place at which the [removal] proceedings will be held.'" *Id.* (alteration in original) (quoting §1229(a)(1)(G)(i)).

As if to punctuate the point that this construction of §1229(a) was not limited only to its interplay with the stop-time rule, the Court continued: "Thus, when the term 'notice to appear' is used elsewhere in the statutory section, including as the trigger for the stop-

time rule, it carries with it the substantive time-and-place criteria required by § 1229(a)." *Id.*; *see also id.* at 2116-17 ("Failing to specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character.'") (alterations in original) (quoting *id.* at 2127 n.5 (Alito, J., dissenting)).

In short, these passages reflect the Court's construction of §1229(a)'s requirements on their own terms—that is, as requirements applicable to all notices to appear.

2. To limit *Pereira*'s interpretation of §1229(a) is indefensible as a matter of sound statutory construction.

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.

Pereira itself expressly highlighted the need to treat identical words similarly throughout the same statutory scheme. It is "a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same

meaning." *Id.* at 2115 (quoting *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012)).

Even some courts that read *Pereira* to only apply to cancellation cases acknowledge the difficulty with defending such a cramped reading of the decision. In *Hernandez-Perez*, the Sixth Circuit pointed out that there is "common-sense discomfort in adopting the position that a single document labeled 'Notice to Appear' must comply with a certain set of requirements for some purposes, like triggering the stop-time rule, but with a different set of requirements for others." 911 F.3d at 314. *Hernandez-Perez* nevertheless rejected the noncitizen's *Pereira* challenge. It did so because it assumed that a defective notice has jurisdictional consequences. On that assumption alone, it worried that to uphold the noncitizen's challenge "would have unusually broad implications." *Id.* But that view collapses the question of *Pereira*'s jurisdictional meaning with whether it has any meaning at all and, by doing so, effectively abrogates *Pereira* as a controlling precedent.

It is untenable to insist that *Pereira* held that a notice lacking time-and-place information does not interrupt cancellation eligibility, but will be satisfactory for every other purpose. That reading violates firmly established statutory construction principles that *Pereira* itself relied upon. Nor is there any coherent policy reason to read §1229(a)'s time-and-place requirements as more important in cancellation of removal cases than in any other kind of immigration case. Because no other statutory section

delineates the requirements for notices to appear, it makes no sense to say that a notice lacking time-and-place information required by §1229(a) is insufficient only for purposes of using the stop-time rule in cancellation cases, but is otherwise sufficient for all other purposes.

C. If the Government Serves a Defective Notice, there could be Remediable Consequences under *Pereira*, even if those Consequences are not Jurisdictional.

Nothing turns on *Pereira*'s characterization of its decision as "narrow." Of course, even self-described narrow decisions have some precedential reach; the question, as always, is ascertaining how far that reach extends.

Although legal decisions necessarily must be made in relation to the facts in a case, it is unsound to suggest that a case is binding on a lower court only when an identical set of facts are presented in a future case. As Professor Schauer once put it, "No two events are exactly alike. For a decision to be a precedent for another decision does not require that the facts of the earlier and the later cases be absolutely identical. Were that required, nothing would be a precedent for anything else." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987). Complete identity of fact has never been regarded as a requirement of precedent. *See generally* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989);

Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

To be sure, lower courts must pay close attention to and carefully parse the words that appellate judges use. Among other considerations, the language chosen by the author of an opinion may reflect necessary compromises to gain the support of other judges. However, by their very nature, the decisions of higher courts are supposed to bind lower courts to the extent that the precedent case and the subsequent case are materially similar. *See* Schauer, 39 STAN. L. REV. at 576-77. At some essential level, this is a matter of basic fairness—that courts must "[t]reat like cases alike." *Id.* at 596-96.

Courts ascertain the precedential reach of a judicial decision that uses limiting language in the same way that they determine the binding effect of any decision. The relevant inquiry is whether some later set of facts and circumstances are similar enough to justify following the precedent decision—an inquiry that requires consideration of the decision's text and the context in which the case arose, along with the reasoning that the higher court employed to reach its conclusions. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (observing that the Court adheres to the "well-established rationale" upon which prior decisions were based and that "it is not only the result but also those portions of the opinion necessary to that result by which [the Court is] bound"); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in

judgment in part and dissenting in part) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

Which brings us back to this case. Using well-established and familiar means for ascertaining precedential effect, it is evident that nothing turns on *Pereira*'s characterization of its decision as "narrow." The Court should grant review to clarify that, notwithstanding its limiting language, *Pereira*'s construction of §1229(a) applies to all notices to appear—not just to cases in which the noncitizen raises a cancellation of removal defense. By clarifying *Pereira*'s precedential reach, the Court can also dispel the confusion that has developed around why an insufficient notice has no jurisdictional relevance. In sum, by granting review, the Court can make clear that if the government serves a defective notice there could be remedial consequences, even if those consequences do not relate to an immigration court's jurisdiction.

II. The Court Should Grant Review to Clarify that a Two-Step Notice Process is Inconsistent with the Unambiguous Statutory Language.

A. The Courts of Appeals are Divided Over the Proper Notification Procedure.

Beyond the question of *Pereira*'s reach, the courts are also fractured as to how the decision should be applied to the procedure for notifying noncitizens of

impending removal proceedings. Post-*Pereira*, the courts have separated into two distinct camps as to whether the omission of time-and-place information in the notice to appear can be cured if, as the agency's governing regulations permit, the immigration court subsequently sends a notice of hearing to the noncitizen with that information.

The Second, Fifth, Sixth, and Eighth Circuits, along with the Board of Immigration Appeals, find that, even after *Pereira*, §1229(a) does not require time-and-place information to be included in the notice to appear if the immigration court clerk subsequently sends a notice of hearing to the noncitizen with that information. *See Matter of Mendoza-Hernandez,* 27 I. & N. Dec. 520, 529 (BIA 2019) (en banc); *Banegas Gomez*, 922 F.3d at 112; *Pierre-Paul*, 930 F.3d at 690; *Ali*, 924 F.3d at 986; *Cortez*, 930 F.3d at 363; *Hernandez-Perez*, 911 F.3d at 914-15; *Santos-Santos*, 917 F.3d at 490-91.

By contrast, the Seventh and Eleventh Circuits have refused to find the two-step notice procedure consistent with *Pereira*'s construction of §1229(a)'s unambiguous requirements. *See Ortiz-Santiago*, 924 F.3d at 962 (noting that the BIA had "brushed too quickly over the Supreme Court's rationale in *Pereira* and tracked the dissenting opinion rather than that of the majority); *Perez-Sanchez*, 935 F.3d at 1155 ("The government nonetheless urges this Court to defer to the BIA's interpretation that an NTA under section 1229(a) is not deficient so long as a subsequent notice of hearing is later sent and specifies the time and

location of the removal hearing. . . . But the Supreme Court foreclosed this argument in *Pereira*.") (internal citation omitted).

Even the Ninth Circuit has found *Pereira*'s reading of §1229(a) incompatible with the two-step notice procedure, though there is sharp disagreement within the circuit on this issue. *Compare Lopez v. Barr*, 925 F.3d 396, 400, 405 (9th Cir. 2019) (finding that *Pereira* overruled the circuit's pre-*Pereira* decisions that had found it "not statutorily defective" for the government to mail time-and-place information after the notice to appear and distinguishing *Karingithi* on the ground that it "did not address whether a Notice of Hearing can cure a defective Notice to Appear") (citing *Popa v. Holder*, 571 F.3d 890 (9th Cir 2009)) *with id.* at 406, 409 (Callahan, J., dissenting) (declining to "read *Pereira* as holding that the notice of the time and place must be provided in a single document" and concluding that the two-step notice process is "consistent with our opinion in *Karingithi*") *and* Pet. App. at 11 (deferring to BIA's conclusion that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien") (citing *Bermudez-Cota*, 27 I. & N. Dec. at 447) (alteration in original).

The certiorari petition points out that the Ninth Circuit misapplied the deference owed to agencies under *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g.*,

Pet. at i (second question presented). That is a strong reason to grant the petition, but the problem can also be framed even more foundationally than that. The core problem is that administrative regulations directly in conflict with an unambiguous statutory command must yield. To be sure, the petition also repeatedly raises this fundamental error, *see, e.g.*, Pet. at i (first question presented), 3 (arguing that "if a statute and an agency regulation conflict, the statute must prevail—otherwise, the executive branch could override Congress"), and 17-18 (arguing that regulations "must be consistent with the statute under which they are promulgated"), but it is worth emphasizing the problem more centrally because it is a compelling reason why the Court should grant the petition.

B. A Two-Step Notice Process is Squarely Inconsistent with *Pereira*'s Construction of §1229(a).

According to 8 C.F.R. §1003.18(b), time-and-place information for the hearing only needs to be included in the notice to appear "where practicable" and that "[i]f 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."

As *Pereira* itself pointed out, the exception in §1003.18(b) is badly misleading since the government never actually made (and still does not make)

individualized determinations of practicality. Instead, its regular practice pre-*Pereira* was to indicate in the notice to appear that the actual hearing date was "to be determined." *Pereira*, 138 S. Ct. at 2111. Thereafter, the immigration court separately mailed the noncitizen another document, known as the notice of hearing, with the exact time and place of the hearing. *See Haider v. Gonzales*, 438 F.3d 902, 9004 (8th Cir. 2006). This two-step notice process remains the current practice post-*Pereira*, with one important, troubling asterisk that has to be noted.[7]

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[7] A few months after *Pereira*, the government started sending out intentionally false hearing dates—"fake dates" as they have been termed—in notices to appear. *See* Dianne Solis, *ICE Is Ordering Immigrants to Appear in Court, But the Judges Aren't Expecting Them*, DALL. MORNING NEWS (Sept. 16, 2018), https://www.dallasnews.com/news/ immigration/2018/09/16/ice-ordering-immigrants-appear-court-judges-expecting [https://perma.cc/C4K4-N9NF]. Reports indicate that noncitizens are being served with notices that direct them to show up for removal hearings on dates that have not been cleared with the immigration court. *Id.* Notices have even ordered noncitizens to appear at midnight, on weekends, and on dates that do not exist (like one notice that apparently referred to September 31 as the hearing date). *Id.* An extraordinary policy memorandum from the head of the Executive Office of Immigration Review confirms these practices. *See* Policy Memorandum (PM 19-08) from Director James R. McHenry III, Dec 21, 2018, https://www.justice.gov/eoir/file/1122771/download [https://perma.cc/9AB8-ZLJ7] (noting, *inter alia*, that "EOIR will reject any NTA in which the time or date of the scheduled hearing is facially incorrect—*e.g.*, a hearing scheduled on a weekend or holiday or at a time when the court is not open").

The fundamental infirmity with allowing the time-and-place information required by §1229(a) to be later sent by the immigration court clerk is that §1229(a) unambiguously does not authorize a two-step notice procedure. Certainly, giving notice is an essential function of the notice to appear. *Pereira*, 138 S. Ct. at 2114. But it is just as incontrovertible that in §1229(a) Congress required that that essential function be performed by a specific document—the notice to appear. *Id.* (noting that §1229(a) "clarifies that the type of notice 'referred to as a "notice to appear"' throughout the statutory section is a 'written

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The government's actions are an apparent—if contemptuous and utterly indefensible—attempt to pretend compliance with *Pereira*. Indeed, the Court seems to have anticipated, and preemptively disapproved of, these practices. In response to the dissent's worry that requiring time-and-place information in the notice to appear might encourage the government to provide "arbitrary dates and times," *Pereira*, 138 S. Ct. at 2125 (Alito, J., dissenting), the majority specifically observed that the dissent's argument "wrongly assumes that the Government is utterly incapable of specifying an accurate date and time on a notice to appear and will instead engage in 'arbitrary' behavior." *Pereira*, 138 S. Ct. at 2119. The Court also said that it expected immigration officials and the immigration court to be able to "work together to schedule hearings before sending notices to appear." *Id.* Yet, it appears that the government continues to issue notices to appear with knowingly false times and dates. *See* Kate Smith, *ICE Told Hundreds of Immigrants to Show Up to Court Thursday—For Many, Those Hearings are Fake,* CBS NEWS (Jan 31, 2019), https://www.cbsnews.com/news/immigration-court-ice-agents-hundreds-of-immigrants-fake-court-dates-2019-01-30-live-updates/ [https://perma.cc/4SDZ-6ZGF].

notice . . . specifying,' as relevant here, '[t]he time and place at which the [removal] proceedings will be held'") (quoting §1229(a)(1)(G)(i); alteration in original)).

Indeed, *Pereira* rejected prior judicial construction of §1229(a) that read the statutory section as allowing the two-step notice process authorized by the agency's regulations. Both the majority opinion and Justice Kennedy's concurrence specifically call out the earlier cases for having interpreted the statute differently. *See Pereira*, 138 S. Ct. at 2113 n.4 (comparing decisions from Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits with Third Circuit's decision in *Orozco-Velasquez v. Attorney General United States*, 817 F.3d 78 (3d Cir. 2016), the only circuit court pre-*Pereira* to have held that the stop-time rule was triggered only by a notice to appear that satisfied all of §1229(a)'s requirements); *id.* at 2120 (Kennedy, J., concurring) (citing pre-*Pereira* decisions). In light of *Pereira*'s rejection of their reasoning, these cases—and their erroneous construction of §1229(a) as allowing a two-step notice procedure—are no longer good law, as the Seventh, Ninth, and Eleventh Circuits have correctly found. *Ortiz-Santiago*, 924 F.3d at 962; *Lopez*, 925 F.3d at 400-05; *Perez-Sanchez*, 935 F.3d at 1153.

Finally, the majority view ignores that Congress has already rejected a two-step notice procedure when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.). Under the pre-1996

practice, deportation proceedings were initiated by an order to show cause. *See* 8 U.S.C. §1252b (1995); *see also* 5 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §64.02 (rev. ed. 2019). Although the contents of the order to show cause had to include most of the same information that Congress required in §1229(a) of the later-named "notice to appear," the most glaring difference is that the order to show cause did not have to specify the time and place of the deportation hearing. *See* 8 U.S.C. §1252b(a)(1). Instead, §1252b(a)(2) provided:

> In deportation proceedings under section 1252 of this title, written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise, of the time and place at which the proceedings will be held . . .

8 U.S.C. §1252b(a)(2)(A)(i).

With IIRIRA's passage, Congress replaced the order to show cause in §1252b with the notice to appear, delineating its statutory requirements in §1229(a). Notably, Congress required time-and-place information to be included in the notice and omitted the "or otherwise" language that it had previously used in §1252b(a)(2)(A)(i). As the Seventh Circuit has pointed out in rejecting the argument that a two-step notice procedure comports with §1229(a) after *Pereira*, the BIA ignored this statutory history. *Ortiz-Santiago*,

924 F.3d at 962. So too, it can now be said, have the majority of post-*Pereira* courts that, deferring to the BIA's misreading of §1229(a), approve using the two-step notice process.

The Court's review is needed to resolve the split in the courts regarding whether the two-step notice procedure is consistent with the unambiguous text of §1229(a) and to clarify that, because it is not, the inconsistent agency regulations must yield to Congress's directives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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