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

REPLY BRIEF FOR PETITIONER

MATTHEW A. RICHARDS
TRACY S. ICKES
NIXON PEABODY LLP
One Embarcadero Center
32nd Floor
San Francisco, CA 94111
mrichards@nixonpeabody.com
tickes@nixonpeabody.com

JEROME MAYER-CANTÚ
Counsel of Record
4287 Gilbert Street
Oakland, CA 94611
(415) 530-6444
jmayercantu@gmail.com

Attorneys for Petitioner

January 27, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF AUTHORITIES

CASES

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

Auer v. Robbins,
519 U.S. 452 (1997). 2, 3, 4, 8, 9

Banegas Gomez v. Barr,
922 F.3d 101 (2d Cir. 2019) 7

Big Horn County Elec. Co-op., Inc. v. Adams,
219 F.3d 944 (9th Cir. 2000). 12

City of Arlington v. F.C.C.,
569 U.S. 290 (2013). 10, 11

Curtis Publ'g Co. v. Butts,
388 U.S. 130 (1967). 12

Dable v. Barr,
Nos. 18-3037, 19-3011, __ F. App'x __, 2019 WL
6824856 (6th Cir. Dec. 13, 2019) 1, 2

Dep't of Transp. v. Ass'n of Am. R.R.s,
135 S. Ct. 1225 (2015). 11

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010). 13

Gomez-Chavez v. Barr,
No. 19-3027, __ F. App'x __, 2019 WL 6005530
(6th Cir. Nov. 14, 2019) 9

Pereira v. Sessions,
138 S. Ct. 2105 (2018). 1, 6, 9, 10, 12

Perez-Sanchez v. U.S. Att'y Gen.,
935 F.3d 1148 (11th Cir. 2019). 8

Pierre-Paul v. Barr,
930 F.3d 684 (5th Cir. 2019). 7

Santos-Santos v. Barr,
917 F.3d 486 (6th Cir. 2019). 5

United States v. Arteaga-Centeno,
No. 18-cr-332, 2019 WL 3207849 (N.D. Cal. July 16, 2019) 13

United States v. Cortez,
930 F.3d 350 (4th Cir. 2019). 7

United States v. Arteaga-Centeno,
No. 18-cr-332, 2019 WL 3207849 (N.D. Cal. July 16, 2019) 13

Utility Air Regulatory Group v. EPA,
573 U.S. 302 (2014). 11

STATUTES AND REGULATIONS

8 C.F.R. § 1003.18 1

8 U.S.C. § 1229. . . . . 1, 6, 7, 9, 12

8 U.S.C. § 1229(a). 6, 8

8 U.S.C. § 1229(a)(1)(G)(i) 5

8 U.S.C. § 1229a. 5

8 U.S.C. § 1326. 13

The Federalist No. 51. 13

3037, 19-3011, __ F. App'x __, 2019 WL 6824856, at *4 n.6 (6th Cir. Dec. 13, 2019). Petitioner respectfully agrees that it is time.

I. The decision below conflicts with *Kisor v. Wilkie*.

A. The Ninth Circuit, like other circuits, erroneously deferred to the Board of Immigration Appeals.

In its merits briefing below, the government argued that the Ninth Circuit should "defer to [the BIA's] decision" under *Auer v. Robbins*, 519 U.S. 452 (1997). Government's Supplemental Brief, *Karingithi v. Whitaker*, No. 16-70885, Docket No. 57 (9th Cir. Nov. 26, 2018), at 17; *see id.* at 3 (requesting "heightened deference"); *see also* Government's Opposition Brief, *Goncalves Pontes v. Barr*, No. 19-1053 (1st Cir. May 14, 2019), at 26 (maintaining that the BIA's decision "is owed deference by this Court" under *Auer*).

Notwithstanding its request, the government now claims (Br. 14) that the Ninth Circuit never applied *Auer* deference. That is incorrect.

The Ninth Circuit identified the deference standard by reciting *Auer*'s formulation and concluded that the BIA's decision in *Bermudez-Cota* "easily meets this standard." Pet. App. 11 (citations omitted). Summarizing its holding and reasoning in the closing paragraph, the panel referred yet again to the reasoning in *Bermudez-Cota*. Pet. App. 12. Reading the decision as a whole, it is clear that the panel below deferred to the BIA, and that this deference was central to both its reasoning and its holding.

exhaustive list of requirements" (Pet. App. 9), the panel nonetheless deferred to the BIA's interpretation of the regulation. Therein lies the problem: no deference is owed if a regulation is not ambiguous. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

To be clear, the government has reversed course after *Kisor*. In a case involving the same issue, the government recognized that *Kisor* clarified *Auer*'s scope and admitted that "the regulations at issue in this case are not 'genuinely ambiguous,' and thus there is no role for deference to play." Government Response to En Banc Petition, *Aguilar-Galdamez v. Barr*, No. 18-4122, Docket No. 20 (6th Cir. July 30, 2019) at 6 (citing *Kisor*, 139 S. Ct. at 2414).

Because the decision below now conflicts with *Kisor*, this Court—if it does not grant plenary review—should grant the petition, vacate the order below, and remand the case for further consideration.

B. The misapplication of deference below continues despite *Kisor*.

Kisor should have marked the end of the circuit courts' widespread misapplication of deference in this area. But as noted above, even post-*Kisor* agency decisions have cited *Karingithi* for the proposition that deference was given to the BIA. *Matters of Rosales Vargas & Rosales*, 27 I. & N. Dec. 745, 746 (BIA 2020) (describing *Karingithi* as a case "where the United States Court of Appeals for the Ninth Circuit . . . deferred to our interpretation" in *Bermudez-Cota*). Thus, the agency continues to defy *Kisor* because of the misguided analysis of several decisions below.

Finally, the government's theory—that the statute and the regulation "speak to different issues" (Br. 12)—is nothing but historical revisionism. After section 1229 was enacted, the agency passed regulations to "*implement* the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear." *See* Conduct of Removal Proceedings, 62 FR 444-01, 449 (proposed January 3, 1997) (emphasis added).

II. The decision below conflicts with *Pereira v. Sessions*.

The government contends that *Pereira* is inapplicable here because the regulation does not explicitly refer to a "notice to appear *under section 1229(a)*." Br. 11 (emphasis added). But *Pereira* explicitly rejected this argument. Because "identical words used in different parts of the same act are intended to have the same meaning," the Court reasoned the unadorned phrase "notice to appear"—even without a statutory cross-reference—necessarily means "notice to appear under 1229(a)." 138 S. Ct. at 2114–15.

The government also contends (Br. 11) that *Pereira* is inapplicable because § 1229 is silent regarding the agency's jurisdiction. But the relevant question "is not 'jurisdiction' but the extent of the agency's statutory authority." Pet. 16. Section 1229 imposes substantive limitations on how the government may commence removal proceedings: in a section titled "Initiation of Removal Proceedings," the statute requires that a "Notice to Appear" contain the date and time of the

Eighth[9]	No	Yes	No
Ninth[10]	Yes	Yes	No
Tenth[11]	No	No	No
Eleventh[12]	No	No	Yes

The government's brief in opposition does little to piece together these fractured decisions into a consistent jurisprudence. Nor can it.

The government makes scant effort to explain away the most important circuit split of all. It concedes (Br. 17) that the Eleventh Circuit has held that DHS's preferred method of giving notice is "deficient under Section 1229(a)." And the government admits (Br. 18) that the Seventh Circuit has held that DHS's actions violate "both the statute and the regulations."

Nor does the government dispute the existence of a circuit split regarding application of *Auer* deference. The Ninth Circuit deferred to the BIA, and the First Circuit did as well. *See* Part I.A, *supra*; *Goncalves Pontes v. Barr*, 938 F.3d 1, 7 (1st Cir. 2019) ("[W]e see no reason to depart from the general rule that an agency's interpretation of its own regulations is entitled to great deference") (internal quotation and

[9] *Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019).

[10] Pet. App. 1–12.

[11] *Martinez-Perez v. Barr*, No. 18-9573, __ F.3d __, 2020 WL 253553 (10th Cir. Jan. 17, 2020).

[12] *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1153 (11th Cir. 2019).

Next, the government attempts to minimize the circuit split (Br. 17) by arguing that when six courts used the word "jurisdiction," they did not *really* mean jurisdiction. That is easily disproven. *See, e.g.*, *Hernandez-Perez*, 911 F.3d at 310 (using the words "jurisdiction" or "jurisdictional" more than 45 times and describing "jurisdiction" in the strict sense of a challenge to a tribunal's "[s]ubject matter jurisdiction" that "can never be forfeited or waived").

Ultimately, the intractable divide between "jurisdiction" and "claim-processing" speaks to the confusion over the key issue in this case. As this Petition noted, "an agency literally has no power to act ... unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); Pet. 14–16. Thus, agencies have no license to overrun their statutory limits—whether those limits are labeled jurisdictional, claim-processing, or anything else.

Circuit confusion regarding the scope of agency authority threatens the constitutional separation of powers. *See Pereira*, 138 S. Ct. at 2020–21 (describing courts' "cursory analysis" over the scope of "substantive agency powers" as a "troubling" trend that threatens "constitutional separation-of-powers principles") (Kennedy, J., concurring). The decision below recognized a "significant difference" between the statute and the regulation. Pet. App. 8. Nonetheless, the court allowed the agency to sidestep its Congressional restraints by reasoning that the regulation concerns the agency's "jurisdiction," whereas the statute does not. But as this Court held in *City of*

Besides, Ms. Karingithi's argument is timely. Doctrines like waiver and untimeliness do not apply to arguments "based on intervening changes in law." *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000); *accord Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143–44 (1967) (plurality opinion) (defendant could not have waived a constitutional argument before that right was recognized by courts). Here, when Ms. Karingithi's agency proceedings were underway, Ninth Circuit case law foreclosed her argument. *See Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015). While briefing was underway in the Ninth Circuit, *Pereira* abrogated the Ninth Circuit's decision in *Moscoso-Castellanos*. *See* 138 S. Ct. at 2120 (Kennedy, J., concurring). Shortly after *Pereira* altered the legal landscape, Ms. Karingithi presented her argument to the Ninth Circuit, and the Ninth Circuit considered it.

The government never even raised the affirmative defense of timeliness below. It may try to do so on remand, but that future possibility is no meaningful impediment to this Court's review.

V. The questions presented are extraordinarily important.

This issue could affect hundreds of thousands of immigration cases. As this Court observed in *Pereira*, DHS has ignored § 1229 in "almost 100 percent" of cases "over the last three years." 138 S. Ct. at 2111. Accordingly, the repercussions of this issue could resemble "a shifting of the tectonic plates." *Goncalves Pontes*, 938 F.3d at 6.

Respectfully submitted,

JEROME MAYER-CANTÚ
Counsel of Record
4287 Gilbert Street
Oakland, CA 94611
(415) 530-6444
jmayercantu@gmail.com

MATTHEW A. RICHARDS
TRACY S. ICKES
NIXON PEABODY LLP
One Embarcadero Center
32nd Floor
San Francisco, CA 94111
mrichards@nixonpeabody.com
tickes@nixonpeabody.com

Attorneys for Petitioner