No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERTO MENDOZA-SÁNCHEZ,
Petitioner

v.

UNITED STATES,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the immigration court has jurisdiction to remove a noncitizen where the removal proceedings were initiated by a notice to appear that did not include the time and date of the hearing?

2. Whether a removal can be valid if the noncitizen was never properly served with notice of the date of his or her removal hearing?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Roberto Mendoza-Sánchez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *United States v. Mendoza-Sánchez*, 963 F.3d 158 (1st Cir. 2020), and is found at Appendix A. The opinion issued on June 30, 2020. The docket number is 2019-cr-01091 (1st Cir.). The district court's order, dated November 5, 2018, denying Mr. Mendoza-Sánchez's motion to withdraw his guilty plea is unreported and is found at Appendix B. *United States v. Mendoza-Sánchez*, 2018 WL 5816346 (D.N.H.) (unreported). The docket number is 2017-cr-00189 (D.N.H.).

JURISDICTION

The Court of Appeals issued its opinion on June 30, 2020. This petition is being filed within 90 days of that denial. Mr. Mendoza-Sánchez invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. §1229 Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

***

(G)(i) The time and place at which the proceedings will be held.

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(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

8 C.F.R. §1003.14 Jurisdiction and commencement of proceedings

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

8 C.F.R. §1003.15 Contents of the order to show cause and notice to appear and notification of change of address

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;
(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;
(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and
(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with § 1003.26.

(c) Contents of the Notice to Appear for removal proceedings. In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;
(2) The alien's address;
(3) The alien's registration number, with any lead alien registration number with which the alien is associated;
(4) The alien's alleged nationality and citizenship; and
(5) The language that the alien understands.

8 C.F.R. §1003.18 Scheduling of cases

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

STATEMENT OF THE CASE

Roberto Mendoza-Sánchez is a Mexican citizen who has built a life, career, and family in the United States. In 2014, an Immigration Judge (IJ) ordered him removed to Mexico. *United States v. Mendoza-Sánchez*, 963 F.3d 158, 160 (1st Cir. 2020); App. A at 3. On November 28, 2017, while driving in New Hampshire, he was stopped for motor vehicle violations. *Id.* Mr. Mendoza-Sánchez admitted he did not have legal status in the United States and was arrested and charged with illegal reentry in violation of 8 U.S.C. §1326. *Id.* At the time of his arrest, he was working as a drywall installer and living with his girlfriend, her twelve-year-old son, and their young daughter, who was born with laryngomalacia and faced significant medical challenges. Apart from convictions related to driving with a suspended license, which stemmed from his lack of legal status in the United States, Mr. Mendoza-Sánchez had no criminal record. The district court released Mr. Mendoza-Sánchez while the illegal reentry charges were pending.

On May 31, 2018, Mr. Mendoza-Sánchez pled guilty to one count of illegal reentry in violation of 8 U.S.C. §1326. *Id.* On June 21, 2018, this Court held that the service of a notice to appear (NTA) that does not specify a hearing date does not trigger the stop-time rule relevant to cancellation of removal. *Pereira v. Sessions*, --- U.S. ---, 138 S. Ct. 2105 (2018). Based on the sea change wrought by *Pereira*, Mr. Mendoza-Sánchez moved to withdraw his plea and to dismiss the indictment. *Mendoza-Sánchez*, 963 F.3d at 160-61; App. A at 3-4. The district court denied his

motion and sentenced Mr. Mendoza-Sánchez. *Id.*; *see also United States v. Mendoza-Sánchez*, 2018 WL 5816346 (D.N.H.) (unpublished).

Mr. Mendoza-Sánchez's illegal reentry prosecution was predicated on his 2014 removal. *Mendoza-Sánchez*, 963 F.3d at 160; App. A at 3. On May 8, 2014, the Department of Homeland Security (DHS) served Mr. Mendoza-Sánchez with a notice to appear (NTA) that did not specify the date of his removal hearing. *Id.* On May 28, 2014, the immigration court issued a hearing notice that said his hearing would be held a week later, on June 4, 2014. *Id.* This hearing notice said that it was served on Mr. Mendoza-Sánchez's attorney or representative, but the name that appeared in the attorney field was crossed off, and no other representative was listed. *Id.* The IJ ordered Mr. Mendoza-Sánchez removed, and he did not appeal. *Id.*

Mr. Mendoza-Sánchez argued that he should be able to withdraw his guilty plea because after *Pereira*, the immigration court had no jurisdiction to remove him in 2014 because his case was initiated by an undated NTA. *Mendoza-Sánchez*, 963 F.3d at 160-61; App. A at 3-4. Because the court had no jurisdiction to remove him in 2014, this removal could not serve as a basis for an illegal reentry conviction. *Id.* The district court rejected his argument. *Id.* Mr. Mendoza-Sánchez appealed. *Id.*

The First Circuit reaffirmed its holding, made while Mr. Mendoza-Sánchez's appeal was pending, that "the omission of the initial hearing date and time in a notice to appear" does not "deprive[] the immigration court of jurisdiction over a removal proceeding." *Id.* (affirming *Goncalves Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019)). To reach this ruling, it had to resolve a conflict between a statute that

requires a dated NTA and a regulation that does not. *Id.* The First Circuit concluded that these two NTAs are separate documents with distinct purposes. *Id.* at 161-62; App. A at 4-5. It held that because the regulations, not the statute, define the jurisdiction of the immigration court, "an undated notice to appear that complies with the regulations is effective to confer jurisdiction upon the immigration court." *Id.* It further held that even if neither Mr. Mendoza-Sánchez nor his counsel received the hearing notice, the immigration court had jurisdiction based solely on the service of the undated NTA. *Id.* at 162-63; App. A at 5-6.

REASONS FOR GRANTING THE PETITION

I. *Pereira* held that service of an undated notice to appear did not trigger the stop-time rule, but it did not explore whether service of an undated notice to appear deprived the immigration court of jurisdiction. This issue has arisen nationwide, and the Circuits have not analyzed the issue consistently. This Court should grant certiorari to resolve this split in analysis and to clarify the scope and import of *Pereira.*

In *Pereira v. Sessions*, --- U.S. ---, 138 S. Ct. 2105 (2018), this Court considered immigration law relating to cancellation of removal. Cancellation of removal is "a form of discretionary relief" available to some noncitizens "who are subject to removal proceedings and have accrued 10 years of continuous physical presence in the United States." *Id.* at 2109 (citing 8 U.S.C. §1229b(b)(1)). Under the stop-time rule, this 10-year period ends "when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. §1229b(d)(1)(A). Section 1229(a) requires that an NTA include, inter alia, the time and place of the removal hearing. 8 U.S.C. §1229(a)(1)(G)(i). This Court held that: "A notice that does not inform a noncitizen

when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." 138 S. Ct at 2110.

Pereira did not address the impact of the service of an undated NTA on immigration cases more generally. *Id.* (describing narrow issue raised). It did not address whether, or in what circumstances, the immigration court takes jurisdiction over removal proceedings despite the service of an undated NTA. Given DHS's practice of serving undated NTAs, this issue has arisen nationwide. *See Pereira*, 138 S. Ct. at 2111. The Circuit Courts have not taken a consistent approach to analyzing this issue, and none has reached the correct result: the immigration court does not have jurisdiction over a removal until a dated NTA is served.

A. The issue left open by *Pereira*.

Before 1997, deportation proceedings began with an order to show cause that did not have to contain the time and place of the hearing, and a second document gave the noncitizen notice of the time and place. *See* 8 U.S.C. §1252b(a) (repealed). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") abandoned this two-step approach. It included a statute governing the "Initiation of removal proceedings" requiring that at least 10 days before any hearing, a noncitizen be given a "notice to appear," specifying certain information, including the time and place of the hearing. 8 U.S.C. §§1229(a)(1), (b)(1).

One of the regulations promulgated to implement IIRIRA states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]." 8 C.F.R.

§1003.14; *see also* 62 F.R. 444-01, at 444 (Jan. 3, 1997). After IIRIRA, charging documents "include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien." *Id.* Like the statute, the regulations require that an NTA "be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record." *Id.*; *see also* 8 U.S.C. §1229(a)(1).

The issue here arises because the regulations diverge significantly from the statute. The statute states that an NTA must include the time and place of the hearing. 8 U.S.C. §1229(a)(1). The regulation listing the contents of an NTA does not require the inclusion of the time and place of the hearing. 8 C.F.R. §1003.15. Another regulation regarding scheduling says that an NTA need only contain time-and-place information "where practicable." 8 C.F.R. §1003.18(b).

B. The immigration court does not take jurisdiction over a removal proceeding until a dated NTA is properly served. The statute is unambiguous; removal proceedings are initiated by serving a dated NTA. The regulations cannot redefine "notice to appear" to exclude this critical information.

A statute titled "Initiation of removal proceedings," states that to initiate removal proceedings, a noncitizen must be served with a notice to appear. 8 U.S.C. §1229(a)(1). It unambiguously requires that this NTA must include the time and place of the hearing. *Id.* The regulations implementing this statute provide that the immigration court takes jurisdiction when a noncitizen is served with an NTA. 8 C.F.R. §§1003.13 & 1003.14. However, they state that an NTA need only contain time-and-place information "where practicable." 8 C.F.R. §§1003.15 & 1003.18(b).

Given the clarity of the statute, courts "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The BIA cannot redefine an NTA to exclude this critical time-and-place information, and an undated NTA does not confer jurisdiction on the immigration court. Mendoza-Sánchez's removal proceedings began with an undated NTA, so the immigration court never had jurisdiction, and his removal is a nullity that cannot support an illegal reentry conviction.

As in *Pereira*, "[t]he plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion." 138 S. Ct. at 2110. Congress enacted IIRIRA in part because "'lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [had led] some immigration judges to decline to exercise their authority to order an alien deported in absentia.'" *Pereira v. Sessions*, 866 F.3d 1, 7 (1st Cir. 2017) (quoting H.R. Rep. 104-469, pt. I, at 122), *overruled on other grounds by Pereira*, 138 S. Ct. 2105. Congress intended the new NTA "to prevent 'protracted disputes concerning whether an alien has been provided proper notice of a proceeding.'" *Id.*

Requiring time-and-place information in an NTA effectuates this intention. "Conveying such time-and-place information is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings." *Pereira*, 138 S. Ct. at 2115. Allowing undated NTAs to confer jurisdiction would thwart Congress's intent and reintroduce the specter of non-appearances due to insufficient notice. The regulations attempt to

eliminate the unambiguous statutory time-and-place requirement and would allow the immigration court to supply the time-and-place requirement in a later-served hearing notice. 8 C.F.R. §§1003.15 & 1003.18(b). This process mirrors the pre-IIRIRA system that Congress explicitly rejected. *Compare* 8 U.S.C. §1252b(a) (repealed) *with* 8 U.S.C. §1229(a). Regulations cannot revive the rejected system by overriding this unambiguous legislative choice.

Common sense also supports the conclusion that the NTA must contain time-and-place information. Serious consequences flow from a noncitizen's failure to appear—including possible removal in absentia. 8 U.S.C. §1229a(5). Notice of time and place is also necessary to give a noncitizen a meaningful opportunity to find counsel and give that counsel adequate time to prepare. *See Pereira*, 138 S. Ct. at 2115. An undated notice to appear is an oxymoron—it provides no notice of the critical information. *See Pereira*, 138 S. Ct. at 2116 (describing "time and place of removal proceeding" as "integral information"); *Lopez v. Barr*, 925 F.3d 396, 404 (9th Cir. 2019) ("[T]he primary function of a Notice to Appear is to give notice, which is essential to the removal proceeding….").

Allowing an undated NTA to provide jurisdiction disregards important, notice-based concerns. In *Pereira*, this Court wrote that "the omission of time-and-place information is not, as the dissent asserts, some trivial, ministerial defect, akin to an unsigned notice of appeal." *Pereira*, 138 S. Ct. at 2116 (distinguishing *Becker v. Montgomery*, 532 U.S. 757, 763 (2001)). Further, "[f]ailing to specify integral information like the time and place of removal proceedings unquestionably would

'deprive [the notice to appear] of its essential character.'" *Id.* (quoting *Pereira*, 138 S. Ct. at 2127, n.5 (Alito, J., dissenting)). Citing *Pereira*, the Ninth Circuit wrote:

> [T]he primary function of a Notice to Appear is to give notice, which is essential to the removal proceeding, so the Attorney General's reliance on *Becker*, *Scarborough*, and *Edelman* is misplaced. Each of those cases allowed litigants to correct trivial or ministerial errors. The requirements of a Notice to Appear, however, are "substantive." Substantive defects may not be cured by a subsequent Notice of Hearing that likewise fails to conform with the substantive requirements of Section 1229(a)(1). As nothing precludes DHS from issuing a Notice to Appear that conforms to the statutory definition, that is the appropriate course of action for the agency to follow in such situations.

Lopez, 925 F.3d at 404 (citations omitted) (discussing *Becker*, 532 U.S. at 760; *Scarborough v. Principi*, 541 U.S. 401, 416 (2004); and *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 116 (2002)).

C. The Circuit Courts that have held that the regulatory notice to appear is distinct from the statutory notice to appear, so that jurisdiction vests when an undated NTA is served, are incorrect.

Since *Pereira*, the effect of service of an undated NTA has arisen nationwide. The Circuit Courts' analyses have been inconsistent and their results incorrect.

Some Courts have concluded that jurisdiction vests when an undated NTA is served because the regulations, not the statute, control jurisdiction, and the NTA required by the statute differs from that required by the regulations. *See, e.g., Mendoza-Sánchez*, 963 F.3d at 161-62 (App. A at 4-5); *Nkomo v. Attorney General*, 930 F.3d 129 (3d Cir. 2019) (noting that statute does not mention "jurisdiction" while holding that *Pereira* does not "implicate[] the IJ's authority to adjudicate"); *United States v. Cortez*, 930 F.3d 350, 363 (4th Cir. 2019) ("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 under 8 C.F.R. § 1003.14(a)."); *Pierre-Paul v. Barr*, 930 F.3d 684, 689 (5th Cir. 2019) (presenting alternate holdings, including that undated NTA "was not defective"); *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019) (including alternate holding that regulation governs jurisdiction); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019) (holding statute "says nothing about how jurisdiction vests in an immigration court" and regulations require dated NTA only "'where practicable'"); *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) (concluding that undated NTA confers jurisdiction because regulatory definition controls jurisdiction).

In contrast, as another Circuit Court wrote, the conclusion that the statutory NTA and the regulatory NTA are separate documents, is "absurd." *See Ortiz-Santiago v. Barr*, 924 F.3d 956, 961-62 (7th Cir. 2019). The statute, titled "Initiation of removal proceedings," defines how the immigration court takes "jurisdiction" without using that specific word. 8 U.S.C. §1229. A court takes jurisdiction when a proceeding is properly initiated. The statute requires that a dated NTA must be served before the immigration court can take jurisdiction. The regulations cannot remove this requirement by redefining the NTA. *See Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

Even if there is some ambiguity as to whether this statute is jurisdictional, the regulation's effort to implement it is not reasonable. The statutory NTA and the regulatory NTA are one and the same, and the regulations cannot overwrite an

unambiguous statute. Courts "normally presume that the same language in related statutes carries a consistent meaning." *United States v. Davis*, --- U.S. ---, 139 S. Ct. 2319, 2329 (2019); *see also Pereira*, 138 S. Ct. at 2115. The regulations discuss the same documents as the statute and were intended to implement IIRIRA:

> The charging document which commences removal proceedings *under section 240 of the Act* will be referred to as the Notice to Appear, Form I-862, replacing the Order to Show Cause, Form I-221, that was used to commence deportation proceedings and the Notice to Detained Applicant of Hearing Before an Immigration Judge, Form I-110….

62 F.R. 444-01, at 449 (emphasis added). The regulations defining the NTA cite 8 U.S.C. §1229 as their "authority." 8 C.F.R. §§1003.15 & 1003.18(b). The Attorney General recognized that an NTA must contain time-and-place information.

> In addition, the proposed rule implements the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear. The Department will attempt to implement this requirement as fully as possible by April 1, 1997. Language has been used in this part of the proposed rule recognizing that such automated scheduling will not be possible in every situation (e.g., power outages, computer crashes/downtime).

62 F.R. 444-01, at 449. The regulations are inconsistent with this recognition. 8 C.F.R. §§1003.15 & 1003.18(b). Further, although an undated NTA could never confer jurisdiction, the regulations were meant to permit infrequent exceptions, not to become a rule defeating an unambiguous statute. 62 F.R. 444-01, at 449.

D. The Circuit Courts that have held that jurisdiction vests via a two-step process when a dated hearing notice follows an undated NTA, are incorrect.

After *Pereira* was decided, the BIA described jurisdiction vesting as a two-step process. *See Matter of German Bermudez-Cota,* 27 I.&N. Dec. 441 (BIA 2018). It held that an undated NTA gives the immigration court jurisdiction "so long as a

notice of hearing specifying this information is later sent to the alien." 27 I.&N. Dec. at 447. In *Matter of Mendoza-Hernandez*, a closely divided en banc BIA reaffirmed this two-step jurisdiction process and held that the stop-time rule at issue in *Pereira* is triggered when a dated hearing notice follows an undated NTA.[1] 27 I.&N. Dec. 520, 535 (BIA 2019). Several Circuit Courts have followed the BIA. *See Banegas Gomez v. Barr*, 922 F.3d 101, 112 (2d Cir. 2019) ("[A]n 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."); *Pierre-Paul*, 930 F.3d at 689 (5th Cir. 2019) ("'[A]ssuming *arguendo* that the notice to appear were defective, the immigration court cured the defect by subsequently sending a notice of hearing that included the time and date of the hearing."); *Santos-Santos*, 917 F.3d at 486 (concluding immigration court takes jurisdiction when dated hearing notice follows undated NTA).

Six members of the en banc BIA dissented in *Mendoza-Hernandez*:

> A subsequent 'notice of hearing' also cannot complete or cure a deficient 'notice to appear.' First, neither notice would meet, on its own, the definition of 'a notice to appear' under section 239(a)(1). Second, the statute contains no ambiguity or gap that would permit a 'combination' approach to trigger the stop time rule under the plain text roadmap provided by the Supreme Court in *Pereira*.

Mendoza-Hernandez, 27 I.&N. at 539 (Guendelsberger, dissenting). The dissent highlighted that IIRIRA intentionally moved from a "two-step process for initiating

[1] Whether a multi-step process can trigger the stop-time rule is before this Court in *Niz-Chavez v. Barr*, No. 19-863, scheduled for argument in November.

deportation proceedings to a one-step 'notice to appear' that specifies the time and place of hearing as an essential element of a section 239(a)(1) notice to appear." *Id.*; *see also Lopez*, 925 F.3d at 402-04 (refusing to defer to *Mendoza-Hernandez*'s "disingenuous" analysis).

Pereira implicitly rejected a two-step approach by holding that an undated NTA is not "incomplete" in some minor, reparable way; instead, it is not the dated NTA required by the statute. 138 S. Ct. at 2116-17; *see also id.* at 2115-16 (noting that opportunity to get counsel would not be "meaningful" if "the Government could serve a document labeled 'notice to appear' without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing"). The Ninth Circuit explained that the statute unambiguously contemplates a single NTA:

> The Attorney General charts his course around the statute by arguing that a Notice of Hearing may cure a defective Notice to Appear. The phrase "notice of hearing"—or anything resembling it—does not appear in the law. Rather, the statute refers to a "notice to appear" and a "notice of change in time or place of proceedings" and delineates when each document may be issued and what it must contain.
>
> ***
>
> Far from silent, the statute speaks clearly: residence is terminated 'when the alien is served *a notice* to appear.' The use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule.

Lopez, 925 F.3d at 401-02 (citations omitted) (quoting 8 U.S.C. §1229b(d)(1) (emphasis added)). Like the stop-time rule in §1229b, §1229 describes a single document initiating removal proceedings. 8 U.S.C. §1229(a); *see also* 8 C.F.R. §1003.14 ("[j]urisdiction vests…when *a* charging document is filed with the Immigration Court by the Service" (emphasis added)).

The BIA's two-step process dilutes the procedural protections associated with the NTA. The NTA form requires that a government agent certify when and how it was served and that oral notice of the time and place of the hearing was provided. The notice of hearing requires no such signed certification or additional explanation. The statute requires that the NTA be issued at least 10 days before the hearing so that the notice is meaningful. 8 U.S.C. §1229(b)(1). A notice of hearing has no such requirement. 8 C.F.R. §1003.18. The protections associated with the NTA are meant to ensure that the noncitizen knows when and where the hearing will be and has time to obtain representation. Serious consequences can flow from a noncitizen's failure to appear at a hearing, and the critical information in an NTA cannot be separated into a secondary document lacking these protections.

E. The Circuit Courts that have held that these service rules are non-jurisdictional claims-processing rules are incorrect.

Finally, some Circuit Courts have held that an undated NTA is deficient, but the rule that an NTA must be dated is a waiveable, non-jurisdictional claims-processing rule. *See Pierre-Paul*, 930 F.3d at 689 ("[A]ssuming *arguendo* that the notice to appear were defective and the defect could not be cured, 8 C.F.R. § 1003.14 is not jurisdictional. Rather, it is a claim-processing rule, and Pierre-Paul failed to raise the issue in a timely manner."); *Ortiz-Santiago*, 924 F.3d at 958 (concluding that NTA must be dated and two-step process cannot substitute, but dated NTA requirement is a claims-processing rule); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-16 (10th Cir. 2019) (holding neither regulation nor statute is jurisdictional); *Perez-Sanchez v. Attorney General*, 935 F.3d 1148 (11th Cir. 2019) (finding neither

statute nor regulation jurisdictional, and dated NTA requirement claims-processing rule).

This approach erroneously disregards the important notice-based concerns discussed above. *See supra* Part I.B. The NTA serves a critical purpose: it informs an individual that the United States government seeks to remove him or her, that there will be a hearing, and that he or she has certain rights. Given this purpose, time-and-place information is not a formality. *See Pereira*, 138 S. Ct. at 2116 (describing "time and place of removal proceeding" as "integral information"); *Lopez*, 925 F.3d at 404 ("[T]he primary function of a Notice to Appear is to give notice, which is essential to the removal proceeding…."). An undated NTA does not give the immigration court jurisdiction and violates a noncitizen's due process rights.

II. This Court should grant certiorari to establish that *Pereira* dictates that the immigration court cannot validly remove noncitizens without providing adequate notice of the hearing date. Even if the immigration court can take jurisdiction over a noncitizen without service of a dated NTA, it cannot do so unless and until it properly serves that noncitizen with a hearing date.

The First Circuit not only held that an undated NTA confers jurisdiction on the immigration court, it also held that the immigration court can take jurisdiction even if the noncitizen was *never* properly served with the time and place of the hearing. *Mendoza-Sánchez*, 963 F.3d at 162-63; App. A at 5-6. As discussed above, some Courts have held that jurisdiction vests in the immigration court after a two-step process, in which a dated hearing notice completes an undated NTA. *See supra* Part I.D. Mr. Mendoza-Sánchez argues that an undated NTA cannot be "cured" in this way. *See id.* However, this two-step process at least ensures that the noncitizen

receives some notice of the hearing before being removed. The First Circuit's ruling means that a noncitizen can be removed without ever receiving proper notice of the time and place of his or her removal hearing.

This result raises the concerns expressed in *Pereira*:

> If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, *i.e.,* the "time" and "place," that would enable them "to appear" at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings. To hold otherwise would empower the Government to trigger the stop-time rule merely by sending noncitizens a barebones document labeled "Notice to Appear," with no mention of the time and place of the removal proceedings, even though such documents would do little if anything to facilitate appearance at those proceedings. " 'We are not willing to impute to Congress . . . such [a] contradictory and absurd purpose,'" particularly where doing so has no basis in the statutory text.

Pereira, 138 S. Ct. at 2115-16 (internal citations and footnote omitted) (quoting *United States v. Bryan*, 339 U.S. 323, 342 (1950)). It also explained that the statutorily-required opportunity to get counsel is only meaningful if the noncitizen and his or her representative has sufficient time to prepare. *Pereira*, 138 S. Ct. at 2114-15. If the hearing can happen without the noncitizen ever receiving notice, there can be no meaningful opportunity to find counsel.

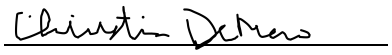
The First Circuit's ruling in *Mendoza-Sánchez* misreads the statutes and regulations and permits removal without proper notice. This Court highlighted the unfairness of such a practice in *Pereira*, and Mr. Mendoza-Sánchez asks it to grant this petition to ensure, at minimum, that the subjects of removal hearings are given

the proper notice and the principles underlying *Pereira* are applied correctly and consistently across the country.

CONCLUSION

For the foregoing reasons, Mr. Mendoza-Sánchez asks this Court to grant this petition, determine that the First Circuit erred in affirming his conviction and sentence and remand this case for further proceedings.

Respectfully submitted,



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