No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MISAEL HERRERA-FUENTES,
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

Christine DeMaso
Federal Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
Tel: 617-223-8061
Attorney for Petitioner

QUESTIONS 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. Further, whether a deportation can be valid if the removal proceedings were initiated by an undated notice to appear followed by a hearing notice that gave Mr. Herrera-Fuentes only two days' notice of his removal hearing at which he appeared remotely, unrepresented, from a federal detention center?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Misael Herrera-Fuentes, respectfully petitions for a writ of certiorari to review the judgment 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 unreported and is found at Appendix A. The district court's order denying Mr. Herrera-Fuentes's motions to dismiss is unreported and found at Appendix B. *United States v. Herrera-Fuentes*, 2019 WL 3718026 (D.N.H.) (unreported).

JURISDICTION

The Court of Appeals issued its opinion on October 9, 2020. This petition is being filed within 90 days of that denial. Mr. Herrera-Fuentes 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.

***

(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. §1003.13 Definitions

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. … For proceedings initiated after April 1, 1997, these 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.

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

Misael Herrera-Fuentes, a Honduran citizen, was charged with reentering the United States after having been deported and removed in 2007 and 2012. App. B at 1. He filed a motion to dismiss arguing that the immigration court had no jurisdiction to remove him in 2007 or to reinstate that removal in 2012, because the proceedings were initiated by an undated Notice to Appear (NTA). *Id.* at 1-2. The district court denied this motion. *Id.* at 5. Herrera-Fuentes pled guilty reserving his right to appeal this denial. *Id.* at 1-2. Before sentencing, the district court ordered additional briefing and entered a written order denying the motion to dismiss. *Id.* The First Circuit granted the government's motion for summary affirmance. App. A.

On September 13, 2007, the Department of Homeland Security (DHS) served Mr. Herrera-Fuentes with a Notice to Appear (NTA) in Vermont where he was working. App. B at 1. The NTA said that his removal hearing would be held in Hartford, Connecticut "on a date to be set at a time to be set." *Id.* On September 24, 2007, a custodial officer gave Mr. Herrera-Fuentes a notice stating that his removal hearing would be held in two days. *Id.* On September 26, 2007, Mr. Herrera-Fuentes appeared, unrepresented, at his removal hearing by videoconference from the Wyatt Detention Facility in Rhode Island. *Id.* The immigration judge (IJ), counsel for DHS, and a Spanish interpreter were in Hartford. The immigration judge ordered his removal, and he was removed on December 5, 2007.

On October 13, 2012, Mr. Herrera-Fuentes was arrested in Texas, and DHS reinstated the 2007 order of removal without a hearing. *Id.* He was removed on December 17, 2012.

On July 12, 2018, immigration officials conducting "normal field operations" in Manchester, New Hampshire, met Mr. Herrera-Fuentes. He said he had no legal status in the United States and was charged with illegal reentry in violation of 8 U.S.C. §1326(a). *Id.* Mr. Herrera-Fuentes argued that this charge had to be dismissed because his 2007 removal began with an undated NTA, so the immigration court never had jurisdiction. *Id. at 1-2; see Pereira v. Sessions*, --- U.S. ---, 138 S. Ct. 2105 (2018). He asserted that given this lack of jurisdiction, his 2007 removal and its 2012 reinstatement were void and could not support a §1326(a) conviction. App. B at 1-2. After a hearing, the district court denied this motion. *Id.* Mr. Herrera-Fuentes entered a conditional guilty plea, and the court ordered additional briefing on this issue. *Id.* Before sentencing, the district court issued a written opinion denying the motion to dismiss. *Id.* at 5.

Mr. Herrera-Fuentes raised two issues on appeal: 1. Because his removal proceedings began with an undated NTA, the immigration court did not have jurisdiction, and his 2007 and 2012 removals could not support an illegal-reentry conviction; and 2. Giving Mr. Herrera-Fuentes a dated hearing notice two days before his removal hearing could not correct this deficiency. App. A at 1. The First Circuit granted the government's motion for summary affirmance. *Id.* It concluded that the first claim was foreclosed by Circuit precedent. *Id.* (citing *United States v.*

Mendoza-Sánchez, 963 F.3d 158, 161-62 (1st Cir. 2020), *cert. denied by* 2020 WL 6551873). It dismissed the second because the NTA was served 10 days before the removal hearing as required by the statute, and Mr. Herrera-Fuentes could not satisfy plain-error review as he had not identified any cases stating that the government had to provide notice of the hearing date 10 days in advance. *Id.*

REASONS FOR GRANTING THE PETITION

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

In *Pereira*, this Court confronted an issue related to cancellation of removal; "a form of discretionary relief" available to some noncitizens in removal proceedings who "have accrued 10 years of continuous physical presence in the United States." 138 S. Ct. 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) states that an NTA must 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 removal cases more generally. *Id.* (describing narrow issue raised). It did not address whether the service of an undated NTA vests the immigration court with

jurisdiction. Given DHS's practice of serving undated NTAs, this issue has arisen nationwide. *See Pereira*, 138 S. Ct. at 2111. Circuit Court analysis has been inconsistent, and no Circuit has reached the correct result: the immigration court does not have jurisdiction over removal proceedings 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, followed by a second document giving 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, titled "Initiation of removal proceedings," that requires a noncitizen be given a "notice to appear," specifying certain information, including the time and place of the hearing, at least 10 days before 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." 8 C.F.R. §1003.13. 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 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. 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 service of a dated NTA. The regulations cannot redefine "notice to appear" to exclude this critical information.

A statute titled "Initiation of removal proceedings," provides that a noncitizen must be served with an NTA, which must contain the time and place of the hearing. 8 U.S.C. §1229(a)(1). 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).

The statute is clear, and 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. Mr. Herrera-Fuentes's removal proceedings began with an undated NTA, so the immigration court never had jurisdiction, and his removal and its later reinstatement 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 mirror the pre-IIRIRA two-step system that Congress rejected. 8 C.F.R. §§1003.15 & 1003.18(b). *Compare* 8 U.S.C. §1252b(a) (repealed) *with* 8 U.S.C. §1229(a). The regulations cannot revive the rejected system or override the unambiguous legislative choice to require a dated NTA.

Common sense 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

gives a noncitizen a meaningful opportunity to find counsel and gives 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"); *see also 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…."), *reh'g en banc granted by* 948 F.3d 989 (9th 2020).[1]

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.'" *Lopez*, 925 F.3d at 404 (quoting *Pereira*, 138 S. Ct. at 2127, n.5 (Alito, J., dissenting)). Citing *Pereira*, the panel in *Lopez* 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

[1] *Lopez* considered a different issue than that raised here. The panel held that service of a dated hearing notice after an undated NTA did not trigger the stop-time rule. 925 F.3d at 398, 405. This issue is before this Court in *Niz-Chavez v. Barr*, No. 19-863, which was argued on November 9, 2020. The Ninth Circuit granted rehearing en banc in *Lopez* on January 23, 2020, so *Lopez* is not precedential in the Ninth Circuit. However, its reasoning is relevant and persuasive here.

> 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 jurisdiction vests when an undated NTA is served because the regulatory NTA is distinct from the statutory NTA, are incorrect.

Since *Pereira*, the issue of the effect of an undated NTA on jurisdiction 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 statutory and regulatory NTAs are different. *See, e.g.,* App. A at 1 (*citing Mendoza-Sánchez*, 963 F.3d at 161-62 (holding that jurisdiction is governed by regulation and that "regulations do not concern the written notice contemplated" by statute)); *Nkomo v. Attorney General*, 930 F.3d 129 (3d Cir. 2019) (noting that statute does not mention "jurisdiction" and holding that *Pereira* does not "implicate[] the IJ's authority to adjudicate"), *cert. denied by* 140 S. Ct. 2740 (2020); *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"), *cert. denied by* 140 U.S. 2718 (2020); *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), *cert. denied by* 140 S. Ct. 1106 (2020).

However, as another Circuit Court wrote, it is "absurd" to view the statutory NTA and the regulatory NTA as distinct. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961-62 (7th Cir. 2019). The statute is titled "Initiation of removal proceedings." 8 U.S.C. §1229. It does not use the word "jurisdiction," but 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 implementation is not reasonable. The statutory NTA and the regulatory NTA are identical, 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 cannot 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 when a dated hearing notice follows an undated NTA, are incorrect.

After *Pereira* was decided, the BIA concluded that jurisdiction vests via 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. Later, a closely divided en banc BIA reaffirmed this two-step process

and held that the stop-time rule is triggered when a dated hearing notice follows an undated NTA.[2] *Matter of Mendoza-Hernandez*, 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."), *cert. denied by* 140 S. Ct. 954 (2020); *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 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 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.*;

[2] Whether a multi-step process can trigger the stop-time rule is before this Court in *Niz-Chavez v. Barr*, No. 19-863, which was argued on November 9, 2020.

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. 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"). A Ninth Circuit panel 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, 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 claim-processing rules are incorrect.

Finally, some Circuits have held that an undated NTA is deficient, but the requirement that an NTA be dated is a waiveable, non-jurisdictional claim-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…."); *Ortiz-Santiago*, 924 F.3d at 958 (concluding that NTA must be dated and two-step process cannot substitute, but date requirement is claim-processing rule); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-16 (10th Cir. 2019) (finding regulation and statute non-jurisdictional); *Perez-Sanchez v. Attorney General*, 935 F.3d 1148 (11th Cir. 2019) (finding neither statute nor regulation jurisdictional and dated NTA requirement claim-processing rule).

This approach erroneously disregards the important notice-based concerns discussed above. *See supra* Part I.B. The NTA serves a critical function: it informs

an individual that the United States government seeks to remove him, that there will be a hearing, and that he 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"); *see also 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 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.

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. Herrera-Fuentes argues that an undated NTA cannot be "cured" in this way. *Id.* However, to the extent a two-step process is acceptable, it must complete the requirements of the statutory NTA. In particular, the statute provides that a noncitizen will get at least 10 days' notice before any hearing. 8 U.S.C. §1229(b). This requirement makes notice meaningful by giving the noncitizen time to prepare, hire a lawyer, and have that lawyer prepared for the hearing. *Pereira*, 138 S. Ct. at 2114-15. Any two-step process must give the noncitizen at least the same notice. Mr. Herrera-Fuentes received notice of

his hearing only two days in advance, so even assuming a two-step process, the immigration court did not have jurisdiction to remove him.[3]

This Court discussed related concerns 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 counsel have sufficient time to prepare. *Pereira*, 138 S. Ct. at 2114-15.

Mr. Herrera-Fuentes received insufficient notice of his hearing. After DHS served him with an undated NTA on September 13, 2007, Mr. Herrera-Fuentes was detained. App. A at 1. On September 24, 2007, a custodial officer gave him a hearing notice that stated that his removal hearing would be held in 2 days, on September 26, 2007. *Id.* He appeared at this hearing, unrepresented, via video conference from jail while the immigration judge, prosecutor, and interpreter were

[3] The First Circuit held that Mr. Herrera-Fuentes could not satisfy plain-error review with respect to this claim. Add. A at 1.

in the courtroom.[4] *Id.* This hearing notice could not perfect the NTA because it did not give him the statutorily mandated ten-day notice of his hearing.

This Court can consider this issue even though it was reviewed for plain error below. Despite the standard of review, the record contains the necessary information. DHS served Mr. Herrera-Fuentes with an NTA on September 13, 2007. App. B at 1. A custodial officer gave him a hearing notice on September 24, 2007, and his hearing was held two days later. *Id.* The error inherent in giving him only two days' notice was plain. It deprived him of the statutorily required ten days' notice that would have enabled him to prepare and/or to obtain a lawyer and given counsel time to prepare. *See Pereira*, 138 S. Ct. at 2114-15. This error impacted Herrera-Fuentes's substantial rights; he did not have sufficient time to prepare or the opportunity to have an attorney evaluate his case. He was removed by a court that lacked jurisdiction. This error impaired the overall fairness of the proceedings. Even accepting a two-step process for jurisdiction vesting, the immigration court must give noncitizens adequate notice. Final hearings with drastic consequences

---

[4] The fact that Mr. Herrera-Fuentes appeared at his removal hearing is irrelevant. His virtual appearance, guaranteed by the fact that he was in federal custody, cannot excuse the notice defects.

Nor did Mr. Herrera-Fuentes waive his right to properly constituted jurisdiction. At the hearing, the IJ asked him if he wanted additional time to get a lawyer. Mr. Herrera-Fuentes said that he did not. This on-the-spot, uninformed decision was not enough to waive the jurisdictional defect. Apart from this case, Mr. Herrera-Fuentes has no criminal record. The documents he was given were in English, which he does not speak. There was no indication that the hearing notice was translated into Spanish for him or that he knew pro bono legal services were available. Waiver requires "the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 731-36 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). There is no indication that Herrera-Fuentes knew that he was making such a waiver or that he was given the necessary information to do so.

cannot be held on two days' notice when the statute requires ten. This Court highlighted the unfairness of such a practice in *Pereira*, and Mr. Herrera-Fuentes asks it to grant this petition to ensure, at minimum, that the subjects of removal hearings are given proper notice and the principles underlying *Pereira* are applied correctly and consistently across the country.

CONCLUSION

For the foregoing reasons, Mr. Herrera-Fuentes 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,

/s/ Christine DeMaso

Christine DeMaso
Federal Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
(617) 223-8061

Date: January 5, 2021