

*PEREIRA V. SESSIONS: THE SUPREME COURT'S CALL
FOR COMMON SENSE*

No time? No place? Then
Pereira (and sense) says, "NO
NOTICE TO APPEAR!"

In Pereira v. Sessions, the Supreme Court held that a putative "notice to appear" that does not specify the time and place of a removal hearing does not trigger the stop-time rule with regard to cancellation of removal. This seemingly simple decision sent shock waves through the immigration system as it potentially undermined an immigration judge's jurisdiction in any case initiated by a "notice to appear" lacking time-and-place information. Although the Board of Immigration Appeals and numerous circuits have rejected such Pereira-based jurisdictional arguments, this Note argues that Pereira should be extended to allow defendants in criminal prosecutions for illegal reentry to collaterally attack their predicate removal orders on the basis of a lack of subject matter jurisdiction.

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I. INTRODUCTION

On June 21, 2018, the Supreme Court of the United States threw the nation's immigration courts into disarray when it answered "a simple, but important, question of statutory interpretation": does a putative "notice to appear" that does not specify the time and place of a removal hearing trigger the stop-time rule with regard to cancellation of removal?¹ Relying on the plain text of the statute, its context, and common sense, the Court, in *Pereira v. Sessions*,² held that it did not.³ As a matter of fact, such a notice was not actually a "notice to appear" at all.⁴

For the petitioner in *Pereira*, the Court's holding meant that he could be eligible for cancellation of removal which would allow him to stay in the United States with his family.⁵ However, almost immediately, immigration judges and attorneys realized that the Court's "simple" decision had much further-reaching implications for many immigrants navigating the nation's complicated immigration system.⁶ Indeed, within just ten weeks of the decision, "a record 9,000 deportation cases . . . were terminated."⁷ Why this sudden rush?

Judges and attorneys alike recognized that *Pereira* essentially undermined an immigration judge's jurisdiction in any case initiated by a notice to appear lacking time-and-place information.⁸ Thus, without jurisdiction, many immigration judges felt they had no choice but to terminate the cases.⁹ However, less than three months after the Court's decision, the Board of Immigration Appeals ("BIA") put a halt to this rush of terminations with its ruling in *Matter of Bermudez-Cota*.¹⁰ In that case, the BIA ruled that *Pereira* had no effect on an immigration judge's jurisdiction, as well as that a notice

1. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). As will be apparent throughout this Note, some cases and sources refer to "time and place" while others refer to "time and date." For the sake of accuracy, this Note throughout will use whatever phrase the relevant source used, since the legal principles apply equally.

2. 138 S. Ct. 2105 (2018).

3. *Id.* at 2110.

4. *Id.*; e.g., *United States v. Valladares*, No. A-17-CR-00156-SS, 2018 U.S. Dist. LEXIS 199044, at *12 (W.D. Tex. Oct. 30, 2018), *rev'd sub nom.* *United States v. Alfredo-Valladares*, 790 F. App'x 1 (5th Cir. 2020).

5. *See Pereira*, 138 S. Ct. at 2110, 2112–14.

6. *See infra* Subpart III.C for a discussion of the quick reaction of immigration judges and attorneys following the *Pereira* decision.

7. Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, REUTERS (Oct. 17, 2018, 7:06 AM), <https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK>.

8. *See infra* Subpart III.C.

9. Although termination removed the immediate threat of deportation, the Department of Homeland Security could (and did in many cases) appeal the dismissals or restart proceedings with a valid notice to appear. *See Levinson & Cooke, supra* note 7.

10. 27 I. & N. Dec. 441 (B.I.A. 2018).

to appear lacking time-and-place information vests jurisdiction in an immigration judge so long as a later notice of hearing provides the requisite information.¹¹ Since then, district courts initially split over *Pereira*'s application in various contexts,¹² but the majority of circuits have now rejected *Pereira*-based jurisdictional arguments.¹³

This confusion and disagreement arising after *Pereira* calls for a thorough exploration of the legal background, the case itself and its immediate effects, and its potentially far-reaching implications. Part II of this Note surveys the state of the law leading up to the *Pereira* decision. Part III gives an overview of the facts of *Pereira*, the Court's disposition of the case, and the resulting chaos. Part IV contends that *Pereira*'s application should not be limited to the stop-time rule in cancellation of removal proceedings. Specifically, Part IV argues that *Pereira* should be extended to allow defendants in criminal prosecutions for illegal reentry to collaterally attack their predicate removal orders on the basis of a lack of subject matter jurisdiction. In doing so, Part IV recommends that lower courts should view this issue through the commonsense lens used by the Court in *Pereira*. Part V provides a brief conclusion.

II. STATE OF THE LAW PRE-*PEREIRA*

A. *Cancellation of Removal and the Stop-Time Rule*

Motivated in large part by humanitarian purposes, Congress has long provided noncitizens residing in the United States the opportunity to seek relief from deportation.¹⁴ Beginning with the

11. *Id.* at 447.

12. *See, e.g.*, *Jorge S. v. Sec'y of Homeland Sec.*, No. 18-CV-1842, 2018 U.S. Dist. LEXIS 205099, at *19, *23 (D. Minn. Nov. 15, 2018) (declining to apply *Pereira* on a petition for a writ of habeas corpus); *United States v. Valladares*, No. A-17-CR-00156-SS, 2018 U.S. Dist. LEXIS 199044, at *13 (W.D. Tex. Oct. 30, 2018) (holding that *Pereira*'s time-and-place requirement "applies to contexts outside of the stop-time rule"), *rev'd sub nom.* *United States v. Alfredo-Valladares*, 790 F. App'x 1 (5th Cir. 2020); *United States v. Ibarra-Rodriguez*, No. CR-18-190-M, 2018 U.S. Dist. LEXIS 164127, at *6–7 (W.D. Okla. Sept. 25, 2018) (holding that *Pereira* had no application in deciding a motion to dismiss an indictment for illegal reentry).

13. *See* *Goncalves Pontes v. Barr*, 938 F.3d 1, 6 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 105 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 954 (2020); *Nkomo v. Attorney Gen. of the U.S.*, 930 F.3d 129, 133–34 (3d Cir. 2019), *petition for cert. denied*, 2020 U.S. LEXIS 2579 (May 2020); *United States v. Cortez*, 930 F.3d 350, 362–65 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 690–91 (5th Cir. 2019), *petition for cert. denied*, 2020 U.S. LEXIS 2490 (2020); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 311–15 (6th Cir. 2018); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962–64 (7th Cir. 2019), *reh'g denied*; *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1159 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020); *Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019).

14. *See, e.g.*, *INS v. Errico*, 385 U.S. 214, 225 (1966) (construing the Immigration and Nationality Act "in the light of its humanitarian purpose of

Alien Registration Act of 1940,¹⁵ the Attorney General could suspend deportation of a noncitizen provided certain criteria were met.¹⁶ Although this type of relief has evolved over time,¹⁷ the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) now offers noncitizens, whether lawful permanent residents or nonpermanent residents, a similar form of relief known as “cancellation of removal.”¹⁸

Eligibility for this discretionary relief hinges upon several requirements: most importantly for purposes of this Note, nonpermanent residents must establish a ten-year period of continuous presence in the United States.¹⁹ Prior to enactment of IIRIRA, a noncitizen continued to accrue continuous presence or residence time even after removal proceedings commenced.²⁰ However, in IIRIRA, Congress included a “stop-time rule” to prevent noncitizens from using administrative delays to “buy time” until the necessary period of continuous presence or residence had accrued.²¹ The stop-time rule provides that a noncitizen’s period of continuous presence or residence ends when the noncitizen either commits a specified offense or is “served a notice to appear” for removal proceedings under 8 U.S.C. § 1229(a).²²

B. Adoption of a Two-Step Notice Process

Removal proceedings commence when a charging document, such as a notice to appear, is filed with the immigration court after service on the noncitizen.²³ Section 1229(a) requires that a notice to appear include, among other things, “[t]he time and place at which the

preventing the breaking up of families composed in part at least of American citizens”).

15. Alien Registration Act, ch. 439, § 20, 54 Stat. 670 (1940) (amended 1948, 1950).

16. *Id.* § 20, 54 Stat. at 671. Under this section, the Attorney General could suspend deportation of a deportable alien who had “proved good moral character for the preceding five years” and whose deportation “would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien.” *Id.* § 20, 54 Stat. at 672.

17. *See, e.g.*, 8 U.S.C. § 1254 (1952) (repealed 1996).

18. 8 U.S.C. § 1229b (2018).

19. *Id.* § 1229b(b)(1). Lawful permanent residents may apply for cancellation of removal after seven years of continuous residence. *Id.* § 1229b(a)(2).

20. *See, e.g.*, *Ram v. INS*, 243 F.3d 510, 513 (9th Cir. 2001).

21. *Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004) (citing H.R. REP. NO. 104-469 (1996)). The stop-time rule applies to cancellation of removal for both lawful permanent residents and nonpermanent residents. 8 U.S.C. § 1229b(d)(1).

22. 8 U.S.C. § 1229b(d)(1).

23. 8 C.F.R. § 1003.14(a) (2019) (“[P]roceedings before an Immigration Judge commence[] when a charging document is filed with the Immigration Court by the Service.”); *id.* § 1003.13 (listing “Notice to Appear” as a charging document).

proceedings will be held.”²⁴ However, following passage of IIRIRA, “the Attorney General promulgated a regulation stating that a ‘notice to appear’ served on a noncitizen need only provide ‘the time, place and date of the initial removal hearing, *where practicable*.’”²⁵ Should the information be omitted from the initial notice to appear, the regulation tasked the immigration court with scheduling the hearing and providing notice.²⁶ Unfortunately, this regulation led to a rather “byzantine” process²⁷ with extended delays²⁸ and the potential for various errors.²⁹ At one point, the Executive Office of Immigration Review and the Department of Homeland Security (“DHS”) developed an “Interactive Scheduling System” which enabled DHS to access the immigration courts’ Master Calendar availability and issue initial “notices to appear” with actual times and dates.³⁰ However, this system gradually fell into disuse,³¹ and by 2018 “almost 100 percent” of notices to appear served in the previous three years omitted the time-and-date information.³²

Despite the administrative difficulties, various circuits accepted this two-step notice procedure: an initial notice to appear with charging information followed later by a notice of hearing setting the time and date.³³ At least two circuits, however, specified that a noncitizen’s accrual of continuous presence only halted on the date that the notice was perfected, i.e., once the immigration court served the notice of hearing with the date and time information.³⁴ In *Garcia-*

24. 8 U.S.C. § 1229(a)(1)(G)(i).

25. *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018) (emphasis added) (citing 62 Fed. Reg. 10332 (Mar. 6, 1997)).

26. 8 C.F.R. § 1003.18(a).

27. Brief of Former BIA Chairman and Immigration Judge Paul Wickham Schmidt as Amicus Curiae Supporting Petitioner at 4, *Pereira*, 138 S. Ct. 2105 (No. 17-459).

28. For example, in the case at hand, Mr. Pereira was initially served with a putative notice to appear on May 31, 2006; DHS did not file the notice until August 9, 2007, more than a year later. *Pereira*, 138 S. Ct. at 2112.

29. Brief of Former BIA Chairman and Immigration Judge Paul Wickham Schmidt as Amicus Curiae Supporting Petitioner, *supra* note 27, at 4 (describing how documents “were frequently lost and not readily retrievable” and how data entry errors were common due to “the volume of cases, time pressures, and periodic staffing shortages”).

30. *Id.* at 6.

31. *Id.* at 7.

32. *Pereira*, 138 S. Ct. at 2111 (quoting Transcript of Oral Argument 52–53).

33. See, e.g., *Dababneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006) (“[The noncitizen] received an effective NTA [notice to appear] that met the . . . requirements through receipt of both the NTA and the NOH [notice of hearing].”), *abrogated by* *United States v. Hernandez-Perdomo*, 948 F.3d 807 (7th Cir. 2020); *Haider v. Gonzales*, 438 F.3d 902, 906–07 (8th Cir. 2006) (“If the NTA does not contain this information, however, then the Immigration Court must . . . provid[e] notice to . . . the alien of the time, place, and date of hearing.” (internal quotation marks omitted) (quoting 8 C.F.R. § 1003.18(b) (2005))).

34. *Guamanrri-gra v. Holder*, 670 F.3d 404, 410 (2d Cir. 2012); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005).

Ramirez v. Gonzales,³⁵ the Ninth Circuit expressly noted that the noncitizen's period of continuous physical presence only ended when she received a "proper hearing notice" which specified the date and location of her immigration hearing, *not* when she had received an initial notice to appear lacking such information.³⁶ Similarly, in *Guamanrrigra v. Holder*,³⁷ the Second Circuit held that activation of the stop-time rule required service of the notice mandated by § 1229(a), including time-and-date information.³⁸ Thus, although the noncitizen received a notice to appear in April 2000,³⁹ his accrual of continuous presence only terminated the following month, when he received a notice of hearing with the requisite information.⁴⁰

C. Clarification by the Board of Immigration Appeals

In 2011, the BIA definitively addressed the issue in *Matter of Camarillo*.⁴¹ In that case, DHS initially served the respondent with a notice to appear which did not set a time and date for the removal proceedings; however, approximately two years later, the immigration court issued her a notice of hearing with the missing information.⁴² During removal proceedings, the immigration judge "granted her application for cancellation of removal," ruling that the stop-time rule was not triggered until the respondent had received the time-and-date information, by which point she had accrued the necessary years of continuous residence.⁴³

Upon appeal by DHS, the BIA reversed, holding that:

[A]ny period of continuous residence or continuous physical presence of an alien applying for cancellation of removal . . . is deemed to end upon the service of a notice to appear on the alien, even if the notice to appear does not include the date and time of the initial hearing.⁴⁴

In coming to this conclusion, the BIA first relied on the plain meaning of the words as well as their statutory context to determine that the statutory language was ambiguous.⁴⁵

The BIA then found that the stop-time rule's reference to a "notice to appear under section 1229(a)" merely specified what

35. 423 F.3d 935, 941 (9th Cir. 2005) (denying petition for review of decision finding noncitizen ineligible for cancellation of removal due to a five-month absence interrupting her period of continuous physical presence).

36. *Id.* at 937 n.3.

37. 670 F.3d 404 (2d Cir. 2012).

38. *Id.* at 410.

39. *Id.* at 406.

40. *Id.* at 410.

41. 25 I. & N. Dec. 644, 645 (B.I.A. 2011).

42. *Id.* at 645–46.

43. *Id.* at 645.

44. *Id.* at 652.

45. *Id.* at 646–47.

document DHS needed to serve but did not impose any substantive requirements on the document itself.⁴⁶ The BIA found support for this interpretation in a regulation promulgated by the Department of Justice (“DOJ”), which permitted time, place, and date information to be omitted from a notice to appear when its inclusion would be impractical.⁴⁷ Turning to the stop-time rule’s legislative history, the BIA asserted that Congress intended service of a notice to appear to trigger the stop-time rule since it enacted the rule to prevent noncitizens from delaying removal proceedings long enough to accrue the necessary period of continuous presence.⁴⁸ Furthermore, the BIA expressly noted that service of a notice to appear *alone* triggered the stop-time rule; subsequent service of a notice of hearing was irrelevant with regards to activating the stop-time rule.⁴⁹ The BIA concluded that its interpretation of the rule was “a reasonable choice within a gap left open by Congress.”⁵⁰

D. *Development of a Circuit Split*

Following the *Camarillo* decision, several circuits addressed the BIA’s interpretation under the framework established in *Chevron v. National Resources Defense Council*.⁵¹ In reviewing an agency’s interpretation of a statute under *Chevron*, a court must first determine “whether Congress has directly spoken to the precise question at issue.”⁵² If Congress’s intent is clear, then the court “must give effect to the unambiguously expressed intent of Congress.”⁵³ The reviewing court must rigorously employ the “traditional tools of statutory construction” in ascertaining Congress’s intent.⁵⁴ If, however, Congress’s intent is not clear—because the statute is either silent or ambiguous on the issue at hand—then the court must defer to the agency’s interpretation as long as the interpretation is “based on a permissible construction of the statute.”⁵⁵ The reviewing court

46. *Id.* at 647.

47. *Id.* at 648 (citing 8 C.F.R. § 1003.18(b) (2011)).

48. *Id.* at 649–50.

49. *Id.* at 651. The BIA noted, however, that with regard to vesting jurisdiction in an immigration court, a notice to appear lacking time-and-date information may be considered defective if such information is not later provided to the noncitizen. *Id.* at 648–49.

50. *Id.* at 651.

51. 467 U.S. 837 (1984).

52. *Id.* at 842.

53. *Id.* at 842–43.

54. *Id.* at 843 n.9. Such tools include an examination of the statute’s plain meaning, structure, context, purpose, and legislative history. *See, e.g.,* *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (considering the statute’s context); *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591–92, 594 (2012) (considering the statute’s purpose and legislative history); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (considering the statute’s plain language and legislative history).

55. *Chevron*, 467 U.S. at 843.

cannot replace an agency's reasonable interpretation with its own preferred construction.⁵⁶

Prior to the First Circuit's decision in *Pereira*, the Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits each had the opportunity to assess the BIA's interpretation of the stop-time rule under the *Chevron* framework.⁵⁷ All but the Third Circuit summarily held the statute was ambiguous under *Chevron*'s first step and then proceeded to defer to the BIA's interpretation.⁵⁸ The Third Circuit, however, rigorously analyzed the statute and concluded that Congress had made its intent clear: "[A]n NTA [notice to appear] served 'under section 1229(a)' is effective, for purposes of the 'stop-time' rule, only when it includes each of the items that Congress instructs 'shall be given in person to the alien.'"⁵⁹ Thus, the court had no need to defer to the BIA's interpretation under *Chevron*'s second step.⁶⁰ The Third Circuit's decision created a split between the circuits, which was further deepened by the First Circuit's decision in Mr. Pereira's case.

III. *PEREIRA V. SESSIONS*

A. *Background of the Case*

The determination of the statutory interpretation question at issue in this case has life-altering implications for those subject to removal proceedings, such as the petitioner in *Pereira*, Wesley Pereira. After entering the country on a tourist visa in 2000, Mr. Pereira began to build a life for himself in the United States, which by the time his case reached the Supreme Court included a wife, two young U.S. citizen children, and steady work as a handyman on Martha's Vineyard.⁶¹ The Supreme Court's disposition of this case determined whether Mr. Pereira would be eligible for cancellation of removal or would be deported to Brazil.⁶²

In 2006, DHS sought to initiate removal proceedings against Mr. Pereira by serving him with a document entitled "Notice to Appear."⁶³ This putative notice to appear lacked a time or date for the hearing,

56. *Id.* at 844.

57. *See* *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 237 (2d Cir. 2015); *Orozco-Velasquez v. Attorney Gen.*, 817 F.3d 78, 79 (3d Cir. 2016); *Urbina v. Holder*, 745 F.3d 736, 737 (4th Cir. 2014); *Gonzalez-Garcia v. Holder*, 770 F.3d 431, 432 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670, 671 (7th Cir. 2014); *Moscoco-Castellanos v. Lynch*, 803 F.3d 1079, 1081 (9th Cir. 2015).

58. *Moscoco-Castellanos*, 803 F.3d at 1083; *Guaman-Yuqui*, 786 F.3d at 238–40; *Gonzalez-Garcia*, 770 F.3d at 434–35; *Wang*, 759 F.3d at 674–75; *Urbina*, 745 F.3d at 740.

59. *Orozco-Velasquez*, 817 F.3d at 83 (footnotes omitted).

60. *Id.* at 84.

61. Brief for Petitioner at 31, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459).

62. *Id.* at 17–19.

63. *Pereira*, 138 S. Ct. at 2112.

instead stating that the time and date were “to be set.”⁶⁴ After this document was filed with the immigration court over a year later, the court attempted to mail Mr. Pereira an additional notice with the actual date and time of his removal hearing; however, due to an administrative error, Mr. Pereira did not receive the notice and thus failed to appear for his hearing.⁶⁵ The court subsequently ordered Mr. Pereira removed *in absentia*.⁶⁶

Mr. Pereira did not learn of his removal order until 2013, at which time the immigration judge reopened the removal proceedings since the second notice had not been properly mailed.⁶⁷ Having now lived in the United States for over ten years, Mr. Pereira applied for cancellation of removal.⁶⁸ The immigration judge, however, denied his application, holding that the 2006 “Notice to Appear” triggered the stop-time rule, thus cutting off Mr. Pereira’s period of continuous residence before the required ten years had been achieved.⁶⁹

Following the BIA’s affirmance of this decision,⁷⁰ Mr. Pereira filed a petition for review with the First Circuit.⁷¹ Applying *Chevron’s* two-step process, the First Circuit denied the petition for review.⁷² After holding the statute was ambiguous, the court deferred to the BIA’s interpretation as a permissible reading of the statutory language.⁷³ The Supreme Court subsequently granted Mr. Pereira’s petition for a writ of certiorari.⁷⁴

B. *The Court’s Decision*

In an 8-1 decision, the Court relied on “[t]he plain text, the statutory context, and common sense” to determine that a notice lacking the time or place information “is not a ‘notice to appear under section 1229(a)’ and therefore does not trigger the stop-time rule.”⁷⁵ The Court began by noting that it needed not defer to the agency’s interpretation of the statute because “Congress . . . [had] supplied a clear and unambiguous answer” to the narrow question before it.⁷⁶

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2112–13.

73. *Id.* at 2113.

74. *Id.*

75. *Id.* at 2110 (citing 8 U.S.C. § 1229b(d)(1)).

76. *Id.* at 2113. Justice Kennedy further chastised the various Courts of Appeals that had addressed this issue by referring to their analysis of Congress’s intent and the BIA’s interpretation as “cursory.” *Id.* at 2120 (Kennedy, J., concurring).

Most importantly, the Court held that the plain text of the statute provided the clear intent of Congress.⁷⁷ The stop-time rule straightforwardly states that a noncitizen's period of continuous physical presence ends "when the alien is served a notice to appear under section 1229(a)."⁷⁸ The Court went on to state that § 1229(a) clarifies that a "notice to appear" as used "throughout the statutory section" refers to one which specifies "at the very least . . . the 'time and place' of the removal proceedings."⁷⁹

Furthermore, the Court found contextual support for this meaning in paragraph (2) of § 1229(a), as well as in § 1229(b)(1). Paragraph (2) of § 1229(a) permits the Government to change or postpone removal proceedings to a "new time or place."⁸⁰ The Court indicated that this reference to a *new* time or place "reinforces the conclusion" that the original notice had included an initial time and place.⁸¹ Section 1229(b)(1) provides that a removal hearing cannot be scheduled less than ten days after the notice to appear is served so that the noncitizen has time to secure counsel before the hearing.⁸² The Court reasoned that § 1229(b)(1) would be meaningless unless the notice to appear included the time and place at which the noncitizen and his counsel needed to appear.⁸³ Thus, if a notice to appear under § 1229(b)(1) requires time-and-place information, so too must a notice to appear under § 1229(d)(1) since ordinarily "identical words used in different parts of the same act are intended to have the same meaning."⁸⁴

Finally, the Court called for the exercise of common sense, stating that time-and-place information is essential, "for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings."⁸⁵ The Court considered it absurd to allow the Government "to trigger the stop-time rule" with a "barebones document" that "would do little if anything to facilitate [a noncitizen's] appearance at those proceedings."⁸⁶

Having identified Congress's clear and unambiguous intent, the Court then addressed the arguments put forth by the Government and the dissent.⁸⁷ First, the Government and the dissent argued that § 1229(a) is not definitional but merely provides the various pieces of

77. *Id.* at 2114 (majority opinion).

78. *Id.* (citing 8 U.S.C. § 1229b(d)(1)).

79. *Id.*; *see also* 8 U.S.C. § 1229(a)(1)(G)(i) (2018).

80. *Pereira*, 138 S. Ct. at 2114; *see also* 8 U.S.C. § 1229(a)(2).

81. *Pereira*, 138 S. Ct. at 2114; *see also* 8 U.S.C. § 1229(a)(2).

82. *Pereira*, 138 S. Ct. at 2114; *see also* 8 U.S.C. § 1229(b)(1).

83. *Pereira*, 138 S. Ct. at 2114–15; *see also* 8 U.S.C. § 1229(b)(1).

84. *Pereira*, 138 S. Ct. at 2115 (quoting *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012)).

85. *Id.*

86. *Id.* at 2115–16.

87. *Id.* at 2116–20.

information that make a notice to appear “complete.”⁸⁸ The Court dismissed this argument, describing § 1229(a) as “quintessential definitional language”;⁸⁹ thus, including time-and-place information is a “substantive” requirement “integral” to a notice to appear, not something that can be fixed or filled in later.⁹⁰

Second, the Government and the dissent asserted that the word “under” in the stop-time rule could have different meanings, such as “subject to” or “authorized by,” thus making the statute ambiguous.⁹¹ Conceding that “under” is a “chameleon,” the Court nonetheless declared that within the context of the stop-time rule, “under” means “in accordance with” or “according to” and thus “provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § 1229(a).”⁹²

Third, the Government made several strained arguments based on other provisions within § 1229(a), which the Court dispensed with as “unsound,” overly complicated, irrelevant, and not “comport[ing] with the actual statutory language and context.”⁹³

Fourth, the Government and the dissent argued that requiring time-and-place information on “notices to appear” would be difficult administratively and would encourage DHS to use random dates which would later need to be changed, thereby confusing the noncitizens who received them.⁹⁴ The Court gave little credence to these arguments and stated that they did “not justify departing from the statute’s clear text.”⁹⁵

Finally, the Government resorted to the statutory purpose and legislative history of the stop-time rule to support its interpretation.⁹⁶ The Court, however, held that requiring time-and-place information on a notice to appear was “entirely consistent” with Congress’s intent to “prevent noncitizens from exploiting administrative delays.”⁹⁷

Based on these reasons, the Court reversed the First Circuit’s decision and remanded the case for further proceedings.⁹⁸

C. *The Aftermath*

Immediately following the Court’s June 21, 2018, decision, immigration courts began grappling with *Pereira*’s ramifications.

88. *Id.* at 2116.

89. *Id.*

90. *Id.* at 2116–17.

91. *Id.* at 2117.

92. *Id.*

93. *Id.* at 2117–18.

94. *Id.* at 2118–19. These concerns proved to be well-founded as DHS did, in fact, issue notices to appear with fake dates in the months following this decision. See *infra* text accompanying notes 106–10.

95. *Pereira*, 138 S. Ct. at 2118–19.

96. *Id.* at 2119.

97. *Id.*

98. *Id.* at 2120.

Court administrators questioned whether they should continue accepting notices to appear without time-and-place information;⁹⁹ immigration judges sought guidance on the meaning of *Pereira*, noting its “VERY large implications”;¹⁰⁰ and DOJ debated whether it should “turn back on” the Interactive Scheduling System.¹⁰¹ The answers to these questions were not immediately clear.

For example, on June 27, 2018, a chief immigration judge directed the courts to reject notices to appear lacking time and date;¹⁰² however, by July 11, 2018, DOJ had reversed course and directed the courts to begin accepting “To Be Determined” notices to appear again.¹⁰³ Similar confusion accompanied the use of the Interactive Scheduling System. The initial timetable for “turning on” the Interactive Scheduling System for all cases by mid-July¹⁰⁴ encountered various logistical difficulties causing delay of its implementation until at least the end of December 2018.¹⁰⁵

99. E-mail from Rene Cervantes, Court Adm’r, San Diego Immigration Court, to Rico Bartolomei, Jr., Assistant Chief Immigration Judge, San Diego Immigration Court (June 22, 2018, 7:17 AM) (https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf).

100. E-mail from Richard Averwater, Immigration Judge, Memphis Immigration Court, to H. Kevin Mart, Assistant Chief Immigration Judge, Atlanta Immigration Court (June 25, 2018, 10:24 AM) (https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf).

101. E-mail from Mark Pasierb, Chief Clerk of the Immigration Court, to Rico Bartolomei, Jr., Assistant Chief Immigration Judge, San Diego Immigration Court (June 22, 2018, 12:34 PM) (https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf); E-mail from Print Maggard, Deputy Chief Immigration Judge, to Rene Cervantes, Court Adm’r, San Diego Immigration Court, Mark Pasierb, Chief Clerk of the Immigration Court, and Rico Bartolomei, Jr., Assistant Chief Immigration Judge, San Diego Immigration Court (June 22, 2018, 7:46 PM) (https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf); E-mail from Mark Pasierb, Chief Clerk of the Immigration Court, to Print Maggard, Deputy Chief Immigration Judge (June 25, 2018, 11:44 AM) (https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf).

102. E-mail from Donna L. Wilson on behalf of MaryBeth Keller, Chief Immigration Judge, to “Judges and Court Adm’rs” (June 27, 2018, 1:48 PM) (https://cdn.muckrock.com/foia_files/2018/09/12/2018-37358_Doc_01_2_pgs.pdf).

103. E-mail from Christopher A. Santoro, Principal Deputy Chief Immigration Judge, to “All of OCIJ HDQ and Courts” (July 11, 2018, 12:45 PM) (https://cdn.muckrock.com/foia_files/2018/09/12/2018-37358_Doc_01_2_pgs.pdf).

104. E-mail from Donna L. Wilson on behalf of MaryBeth Keller to “Judges and Court Adm’rs”, *supra* note 102.

105. Memorandum from James R. McHenry III, Dir., Exec. Office for Immigration Review, Acceptance of Notices to Appear and Use of the Interactive Scheduling System 1–2 (Dec. 21, 2018), <https://www.justice.gov/eoir/file/1122771/download>. Due to “impossible to overcome” “operational logistics,” the Executive Office for Immigration Review does not intend to use the Interactive Scheduling System for detained cases. *Id.* at 1 n.1.

In the meantime, DHS began to “comply” with *Pereira*’s directive by issuing “notices to appear” with “fake dates.”¹⁰⁶ Some immigrants received notices setting their hearing times at night, during a weekend, or on a date that did not exist.¹⁰⁷ Many others received seemingly real dates, only to discover later that their hearings were not actually on the courts’ dockets.¹⁰⁸ As a result, hundreds of immigrants nationwide have attempted to appear for their hearings, only to be turned away with no explanation.¹⁰⁹ This confusion continues to plague the immigration system, even almost two years after the *Pereira* decision.¹¹⁰

While the government struggled with how to implement *Pereira* logistically, immigration advocates began exploring ways in which its holding could be applied and extended. Most obviously, noncitizens currently in removal proceedings—who had not accrued the necessary period of continuous presence prior to the stop-time rule being triggered by service of a defective notice to appear—could now seek cancellation of removal if they had accrued the necessary time in the interim.¹¹¹ Logically, this also afforded those already ordered

106. Dianne Solis, *ICE Is Ordering Immigrants to Appear in Court, but the Judges Aren’t Expecting Them*, DALLAS MORNING NEWS (Sept. 16, 2018, 6:30 AM), <https://www.dallasnews.com/news/immigration/2018/09/16/ice-ordering-immigrants-appear-court-judges-expecting>.

107. *Id.*

108. *Id.*

109. Monique O. Madan, *Fake Court Dates Are Being Issued in Immigration Court. Here’s Why*, MIAMI HERALD, <https://www.miamiherald.com/news/local/immigration/article234396892.html> (last updated Sept. 23, 2019, 9:56 PM); Elvia Malagon, *Immigration Attorneys Blame Glitch for Long Lines in Chicago Court*, CHI. TRIB. (Oct. 31, 2018, 6:45 PM), <https://www.chicagotribune.com/news/local/breaking/ct-met-immigration-court-long-lines-20181031-story.html>.

110. See, e.g., Madan, *supra* note 109; Kate Smith, *ICE Told Hundreds of Immigrants to Show Up to Court Thursday – For Many, Those Hearings Are Fake*, CBS NEWS, <https://www.cbsnews.com/news/immigration-court-ice-agents-hundreds-of-immigrants-fake-court-dates-2019-01-30-live-updates/>, (last updated Jan. 31, 2019, 5:39 AM).

111. DAN KESSELBRENNER ET AL., NAT’L IMMIGRATION PROJECT OF THE NAT’L LAWYERS GUILD & THE IMMIGRANT DEF. PROJECT, PRACTICE ADVISORY: CHALLENGING THE VALIDITY OF NOTICES TO APPEAR LACKING TIME-AND-PLACE INFORMATION 13–14 (2018). In a sharply divided en banc decision, the BIA sought to foreclose this avenue by again embracing a two-step process for triggering the “stop-time” rule. *Mendoza-Hernandez*, 27 I. & N. Dec. 520, 528 (B.I.A. 2019). Nine members of the BIA agreed that a defective notice to appear could be “perfected” by a subsequent notice of hearing with the required time-and-place information. *Id.* at 529. Seven members dissented, asserting that the majority’s approach ignored the plain text of the statute and the reasoning of the *Pereira* Court. *Id.* at 542–43 (Guendelsberger, dissenting). Within weeks, the Ninth Circuit rejected the BIA’s two-step process, noting that deference to the agency was unwarranted and calling the BIA’s analysis “disingenuous.” *Lorenzo-Lopez v. Barr*, 925 F.3d 396, 402–03 (9th Cir. 2019).

removed the opportunity to move to reconsider or reopen previous removal proceedings.¹¹²

In addition to these straightforward applications, immigration advocates also saw in *Pereira* an opportunity to challenge an immigration court's jurisdiction.¹¹³ They argued that since jurisdiction only vests with the immigration court when a valid charging document (e.g., a notice to appear) is filed and a notice to appear lacking time-and-date information is not valid, then the filing of a putative notice to appear fails to vest jurisdiction in the immigration court.¹¹⁴ Relying on this lack of jurisdiction, immigration attorneys moved to dismiss illegal reentry charges, challenge *in absentia* removal orders, and terminate active removal proceedings.¹¹⁵ Indeed, within ten weeks of *Pereira*, "a record 9,000 deportation cases . . . were terminated," representing "a 160 percent increase from the same time period a year earlier."¹¹⁶

On August 31, 2018, the BIA addressed attempts to use *Pereira* to challenge jurisdiction in *Matter of Bermudez-Cota*. In that case, the respondent initially received a notice to appear with the date and time "to be set."¹¹⁷ He later received a notice setting the date and time of his hearing, at which he subsequently appeared.¹¹⁸ Following the *Pereira* decision, the respondent moved to terminate the proceedings, arguing that absence of time-and-date information in a notice to appear "renders it defective for all purposes" and thus the notice "cannot vest jurisdiction with the Immigration Judge."¹¹⁹

The BIA rejected this argument, concluding 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 and meets the requirements of section 239(a) of the Act [8 U.S.C. § 1229(a)], so long as a notice of hearing specifying this information is later sent to the alien.¹²⁰

In its decision, the BIA first sought to distinguish *Pereira*. The BIA acknowledged that the *Pereira* Court had held that a notice to appear lacking time-and-place information is not, in fact, a notice to appear

112. See KESSELBRENNER ET AL., *supra* note 111, at 14. Those moving to reconsider or reopen had a very limited window of time in which to file. *Id.* at 11.

113. See, e.g., Kit Johnson, *Pereira v. Sessions: A Jurisdictional Surprise for Immigration Courts*, 3 COLUM. HUM. RTS. L. REV. ONLINE 1, 2 (2018) ("[T]he Court's opinion . . . necessarily undermines the jurisdictional basis for any case in immigration court commenced pursuant to an invalid notice.").

114. *Id.* at 2–3.

115. See generally KESSELBRENNER ET AL., *supra* note 111 (outlining strategies to challenge jurisdiction).

116. Levinson & Cooke, *supra* note 7.

117. *Bermudez-Cota*, 27 I. & N. Dec. 441, 441 (B.I.A. 2018).

118. *Id.*

119. *Id.* at 442–43.

120. *Id.* at 447.

under 8 U.S.C. § 1229(a);¹²¹ however, the BIA stated that the Court's reason for so holding was because "[c]onveying 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."¹²² Thus, the BIA reasoned, *Pereira* had no application when, as in the case before it, the respondent had received sufficient information through a subsequent notice of hearing.¹²³ The BIA also emphasized that the Supreme Court intended its holding to be limited to the "narrow" question of whether a notice to appear lacking time-and-date information triggers the stop-time rule for cancellation of removal purposes.¹²⁴ Furthermore, the BIA noted that the Supreme Court remanded the case for "further proceedings" without suggesting that it should be terminated and "did not indicate that proceedings involving similar notices to appear . . . should be invalidated or . . . terminated" either.¹²⁵

Having dispensed with *Pereira*, the BIA then called attention to the regulations applicable to vesting jurisdiction, stating that they do not require the charging document to include the time and date of the hearing.¹²⁶ Finally, the BIA relied heavily on pre-*Pereira* decisions from the Fifth, Seventh, Eighth, and Ninth Circuits, all holding that "a two-step notice process is sufficient to meet the statutory notice requirements in section 239(a) of the Act [8 U.S.C. § 1229(a)]."¹²⁷ Thus, in denying the respondent's motion to terminate on jurisdictional grounds, the BIA declined to apply *Pereira* and instead returned to the prior reasoning of the Courts of Appeals.

Since the BIA's decision, the majority of circuits have also rejected *Pereira*-based jurisdictional challenges, although for varying reasons.¹²⁸ First, several circuits have rejected jurisdictional challenges on the basis of the BIA's two-step notice process.¹²⁹ For

121. *Id.* at 443.

122. *Id.* (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018)).

123. *Id.*

124. *Id.*

125. *Id.* at 443–44.

126. *Id.* at 445.

127. *Id.* at 447.

128. See *Goncalves Pontes v. Barr*, 938 F.3d 1, 6 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 105 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 954 (2020); *Nkomo v. Attorney Gen. of the U.S.*, 930 F.3d 129, 133–34 (3d Cir. 2019), *petition for cert. denied* 2020 U.S. LEXIS 2579 (May 2020); *United States v. Cortez*, 930 F.3d 350, 362–65 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 690–91 (5th Cir. 2019), *petition for cert. denied*, No. 2020 U.S. LEXIS 2490 (2020); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 311–15 (6th Cir. 2018); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962–64 (7th Cir. 2019), *reh'g denied*; *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1159 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020); *Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019).

129. See *Pierre-Paul*, 930 F.3d at 690–91; *Banegas Gomez*, 922 F.3d at 111–12; *Hernandez-Perez*, 911 F.3d at 313.

example, in *Hernandez-Perez v. Whitaker*,¹³⁰ the Sixth Circuit deferred to the BIA's interpretation, concluding that jurisdiction had vested in the immigration court where a subsequent notice of hearing provided the time-and-date information missing from the initial notice to appear.¹³¹ Besides largely adopting the reasoning of the BIA, the Sixth Circuit also expressed concern with the "unusually broad implications" of "importing *Pereira's* holding . . . into the jurisdiction context" since nearly all "notices to appear" issued in the last several years lacked time-and-date information.¹³²

Second, other circuits have held that a notice to appear lacking time-and-place information is nonetheless sufficient to vest jurisdiction because it satisfies the regulatory requirements.¹³³ For example, in *Karingithi v. Whitaker*,¹³⁴ the Ninth Circuit stated that jurisdiction vested "[b]ecause the charging document . . . satisfied the regulatory requirements."¹³⁵ The court proceeded to explore the various regulations that govern removal proceedings.¹³⁶ To begin, the regulations state that, "[j]urisdiction vests . . . when a charging document is filed with the Immigration Court"¹³⁷ and that a notice to appear is one example of a charging document.¹³⁸ The regulations then go on to list the required contents of a notice to appear;¹³⁹ however, time-and-place information is only required "where practicable" and can be provided later by the immigration court.¹⁴⁰ The court concluded that *Pereira* had no application because "the regulations, not § 1229(a), define when jurisdiction vests."¹⁴¹

Finally, a few circuits have held that the regulation "vesting jurisdiction" has nothing to do with jurisdiction at all but is instead

130. 911 F.3d 305 (6th Cir. 2018) (considering the question on a petition for review of the BIA's denial of a motion to reopen removal proceedings).

131. *Id.* at 314–15.

132. *Id.* at 314. Other circuits have also expressed this concern. *See, e.g., Goncalves Pontes*, 938 F.3d at 6 (noting that accepting the petitioner's jurisdictional argument would render nearly every recent removal proceeding vulnerable to challenge); *Nkomo*, 930 F.3d at 134 (noting that petitioner's "argument would invalidate scores of removal orders"); *Ali*, 924 F.3d at 986 (noting "seismic ramifications" of a lack of subject matter jurisdiction).

133. *See Goncalves Pontes*, 938 F.3d at 2 (1st Circuit); *Cortez*, 930 F.3d at 355 (4th Circuit); *Pierre-Paul*, 930 F.3d at 689 (5th Circuit); *Ali*, 924 F.3d at 986 (8th Circuit); *Karingithi*, 913 F.3d at 1159 (9th Circuit).

134. 913 F.3d 1158 (9th Cir. 2019) (considering the question on a petition for review of the BIA's order of removal).

135. *Id.* at 1159.

136. *Id.* at 1159–61.

137. *Id.* at 1159 (internal quotation marks omitted) (quoting 8 C.F.R. § 1003.14(a)).

138. *Id.* at 1159–60 (citing 8 C.F.R. § 1003.13).

139. *Id.* at 1160 (citing 8 C.F.R. § 1003.15(b)).

140. *Id.* (quoting 8 C.F.R. § 1003.18(b)).

141. *Id.* at 1160–61.

simply a claim-processing rule.¹⁴² The Seventh Circuit took this approach in *Ortiz-Santiago v. Barr*,¹⁴³ expressly rejecting the BIA's two-step notice process.¹⁴⁴ The court conceded that the notice to appear referenced in the regulation is one and the same as the notice to appear in the statute.¹⁴⁵ Thus, a notice to appear lacking time-and-place information is defective for all purposes because the statutory, not regulatory, requirements govern.¹⁴⁶ However, the court held that this was not fatal to an immigration court's jurisdiction because the regulation is a claim-processing rule (not a jurisdictional rule), which merely "seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain times."¹⁴⁷ Failure to comply with such a rule does not "divest[] a tribunal of adjudicatory authority" but may be grounds for dismissal if timely raised.¹⁴⁸

As these cases were pending before the courts of appeals for various circuits, district courts across the nation confronted the jurisdictional question on their own, frequently in the context of challenges to indictments for illegal reentry after deportation.¹⁴⁹ Under federal law, unlawfully reentering the United States after having been deported is a felony offense punishable by fine, imprisonment, or both.¹⁵⁰ To convict a defendant for illegal reentry, "the Government must prove three elements: 'that the defendant (1) is an alien, (2) was previously deported, and (3) has re-entered the

142. See *United States v. Cortez*, 930 F.3d 350, 358–62 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 691–93 (5th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962–63 (7th Cir. 2019); *Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1154–57 (11th Cir. 2019).

143. 924 F.3d 956 (7th Cir. 2019).

144. *Id.* at 962 (noting that *Bermudez-Cota* "brushed too quickly over the Supreme Court's rationale in *Pereira*").

145. *Id.* at 961–62 (describing the Government's position that there are two different notices as "absurd").

146. *Id.* at 961 ("We thus conclude that the Notice Ortiz-Santiago received was defective.").

147. *Id.* at 963 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

148. *Id.*

149. *E.g.*, *United States v. Mejia*, No. 18-cr-133-01-JL, 2018 U.S. Dist. LEXIS 196624, at *1 (D.N.H. Nov. 19, 2018); *United States v. Pedroza-Rocha*, No. EP-18-CR-1286-DB, 2018 U.S. Dist. LEXIS 178633, at *3–4 (W.D. Tex. Sept. 21, 2018), *rev'd*, 933 F.3d 490 (5th Cir. 2019); *United States v. Torres-Medina*, No. 5:17-CR-281-1H, 2018 U.S. Dist. LEXIS 151794, at *2–4 (E.D.N.C. Sept. 6, 2018). It is not surprising that district courts have frequently been presented with these challenges, considering that illegal reentry offenses, combined with illegal entry offenses, are the most federally prosecuted offenses, totaling "almost half of *all* prosecutions in federal court" in 2016. AM. IMMIGRATION COUNCIL, PROSECUTING MIGRANTS FOR COMING TO THE UNITED STATES 2 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_migrants_for_coming_to_the_united_states.pdf.

150. 8 U.S.C. § 1326(a) (2018).

United States without proper permission.”¹⁵¹ Defendants in these cases challenged the second element, arguing that *Pereira* invalidated their underlying removal orders,¹⁵² thus undermining the Government’s case.¹⁵³

This type of argument, known as a collateral attack, has a long history in illegal reentry prosecutions.¹⁵⁴ The circuits initially split on whether 8 U.S.C. § 1326 permitted a collateral attack on an underlying deportation order.¹⁵⁵ However, in *United States v. Mendoza-Lopez*,¹⁵⁶ the Supreme Court resolved the conflict, holding that while “Congress did not intend the validity of the deportation order to be contestable in a § 1326 prosecution,”¹⁵⁷ due process required such a challenge to be permitted “where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review”¹⁵⁸ Congress subsequently amended § 1326 to include a statutory right of collateral attack, codifying, at least in part, *Mendoza-Lopez*.¹⁵⁹ The statute now provides that in order to collaterally attack an underlying deportation order in an illegal reentry prosecution,

the alien [must] demonstrate[] that--

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.¹⁶⁰

151. *United States v. Ortiz*, 347 F. Supp. 3d 402, 405 (D.N.D. 2018) (quoting *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 n.15 (8th Cir. 2001)).

152. An order of removal is also subject to direct review by the court of appeals; however, a petition for such review must be filed within thirty days of the final order of removal. 8 U.S.C. § 1252(b)(1).

153. See cases cited *supra* note 149.

154. See Brent S. Wible, *The Strange Afterlife of Section 212(C) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After St. Cyr*, 19 GEO. IMMIGR. L.J. 455, 457–62 (2005).

155. *Id.* at 460–62.

156. 481 U.S. 828 (1987) (superseded by statute).

157. *Id.* at 837.

158. *Id.* at 839.

159. Compare *United States v. Moreno-Tapia*, 848 F.3d 162, 169 (4th Cir. 2017) (stating that § 1326 codifies *Mendoza-Lopez*), with *United States v. Garcia-Martinez*, 228 F.3d 956, 959–60 n.5 (9th Cir. 2000) (stating that § 1326 “partially codifies the due process standard governing collateral attacks established by the Supreme Court” in *Mendoza-Lopez* (emphasis added)).

160. 8 U.S.C. § 1326(d) (2018).

Several circuits also require a showing of prejudice—that “there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported.”¹⁶¹

Many district courts limited *Pereira*'s application to cancellation of removal proceedings and accepted *Bermudez-Cota*'s two-step notice procedure for vesting jurisdiction.¹⁶² These courts, therefore, found no grounds for a collateral attack on an underlying deportation order.¹⁶³ Other courts, however, ruled that filing a notice to appear lacking time-and-place information failed to confer jurisdiction on an immigration court and could not be cured by a subsequent notice of hearing.¹⁶⁴ Despite this initial agreement, however, these courts diverged on whether a lack of jurisdiction is sufficient to meet § 1326(d)'s collateral attack requirements.¹⁶⁵

IV. ARGUMENT

In resolving the question presented by Mr. Pereira, the Supreme Court could easily have rested its decision solely on the statute's text and context; but instead, it went one step further and called for common sense.¹⁶⁶ It emphasized that a notice to appear lacking time-and-place information would not actually facilitate a noncitizen's appearance at removal proceedings.¹⁶⁷ The Court pointedly refused to “impute to Congress . . . such [a] contradictory and absurd purpose.”¹⁶⁸ Therefore, lower courts should use their own common sense in interpreting and applying *Pereira* rather than reverting to their faulty, pre-*Pereira* reasoning.

This Part contends that *Pereira*'s application should not be limited to the stop-time rule in cancellation of removal proceedings. Rather, it should be extended to allow defendants in criminal

161. *United States v. Cordova-Soto*, 804 F.3d 714, 719 (5th Cir. 2015) (quoting *United States v. Benitez-Villafuerte*, 186 F.3d 651, 658–59 (5th Cir. 1999)); see also *United States v. Soto-Mateo*, 799 F.3d 117, 124 (1st Cir. 2015); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004).

162. See, e.g., *United States v. Mejia*, No. 18-cr-133-01-JL, 2018 U.S. Dist. LEXIS 196624, at *7–8 (D.N.H. Nov. 19, 2018); *United States v. Romero-Caceres*, 356 F. Supp. 3d 541, 551 (E.D. Va. 2018); *United States v. Ibarra-Rodriguez*, No. CR-18-190-M, 2018 U.S. Dist. LEXIS 164127, at *6–7 (W.D. Okla. Sept. 25, 2018).

163. See *Mejia*, 2018 U.S. Dist. LEXIS 196624, at *11–12; *Romero-Caceres*, 356 F. Supp. 3d at 555; *Ibarra-Rodriguez*, 2018 U.S. Dist. LEXIS 164127, at *5–7.

164. See, e.g., *United States v. Rangel-Rodriguez*, 367 F. Supp. 3d 836, 845 (N.D. Ill. 2019); *United States v. Erazo-Diaz*, 353 F. Supp. 3d 867, 871 (D. Ariz. 2018); *United States v. Pedroza-Rocha*, No. EP-18-CR-1286-DB, 2018 U.S. Dist. LEXIS 178633, at *9 (W.D. Tex. Sept. 21, 2018).

165. Compare *Pedroza-Rocha*, 2018 U.S. Dist. LEXIS 178633, at *13–14, and *Erazo-Diaz*, 353 F. Supp. 3d at 877–78, with *Rangel-Rodriguez*, 367 F. Supp. 3d at 844–45.

166. *Pereira v. Sessions*, 138 S. Ct. 2105, 2110, 2114–16 (2018).

167. *Id.* at 2115.

168. *Id.* at 2115–16 (alteration in original) (quoting *United States v. Bryan*, 339 U.S. 323, 342 (1950)).

prosecutions for illegal reentry to collaterally attack their predicate removal orders on the basis of a lack of subject matter jurisdiction. A consideration of subject matter jurisdiction is particularly salient in these cases because the removal order—a civil adjudication—serves as the basis for a criminal prosecution. Civil adjudications already have a lower threshold to satisfy due process,¹⁶⁹ and those conducted within the immigration system frequently raise additional due process concerns.

For example, many noncitizens are ordered removed *in absentia*, meaning that the immigration judge conducted the removal hearing despite the noncitizen's failure to appear.¹⁷⁰ In 2017 alone, 41,384 *in absentia* orders were issued—over a quarter of all decisions that year.¹⁷¹ Far more alarming is that for noncitizens who were never detained, almost half of removal decisions in 2017 were ordered *in absentia*.¹⁷² Given that almost all notices to appear served within the three years preceding *Pereira* lacked time-and-place information¹⁷³ and that removal proceedings can drag on for years¹⁷⁴ with numerous hearings¹⁷⁵ and continuances,¹⁷⁶ it should hardly be surprising that many noncitizens fail to appear for at least one of their hearings.¹⁷⁷

169. *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002) (citing *United States v. Benitez-Villafuerte*, 186 F.3d 651, 657 (5th Cir. 1999)).

170. 8 U.S.C. § 1229a(b)(5)(A) (2018) (providing that a noncitizen who fails to appear for a removal proceeding “shall be ordered removed in absentia” so long as the government proves that the noncitizen is removable and received written notice of the proceedings).

171. EXEC. OFFICE FOR IMMIGRATION REVIEW, DOJ, STATISTICS YEARBOOK FISCAL YEAR 2017 34 (2017), <https://www.justice.gov/eoir/page/file/1107056/download>.

172. *Id.* at 33.

173. *Pereira*, 138 S. Ct. at 2111 (quoting Transcript of Oral Argument 52–53).

174. In FY 2018, respondents whose cases were pending in immigration court had spent, on average, 718 days in removal proceedings. *See Asylum in the United States*, AM. IMMIGR. COUNCIL (May 14, 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>. For an online tool to access extensive data on immigration court backlogs, see *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog (last visited May 7, 2020).

175. Noncitizens who have applied for relief from removal average seven hearings over the course of their proceedings. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 66–68 (2015).

176. *See, e.g.*, *United States v. Erazo-Diaz*, 353 F. Supp. 3d 867, 869 (D. Ariz. 2018) (noting that following an initial notice to appear lacking date and time information, defendant was served with *eleven* Notices of Hearing continuing his hearing date).

177. *See Pereira*, 138 S. Ct. at 2115–16 (noting that “the Government cannot reasonably expect the noncitizen to appear for his removal proceedings” if the notice to appear did not include time-and-place information). At least one study has shown that appearance rates decline with each scheduled hearing. Christopher Stone, *Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project*, 14 GEO. IMMIGR. L.J. 673, 683 fig. 1 (2000).

In addition, many of those who do appear are unrepresented by counsel for various reasons.¹⁷⁸ A 2015 study found that in “individual removal cases decided on the merits, . . . only 37% of immigrants had counsel.”¹⁷⁹ The same study also found that unrepresented respondents do not fare as well as those represented by counsel.¹⁸⁰ For example, detained respondents represented by counsel “were ten-and-a-half times more likely to succeed” in their removal proceedings than their pro se counterparts.¹⁸¹ Thus, many removal orders result from proceedings in which the noncitizen either did not appear or was not represented by counsel. Considering these disadvantages, it makes sense for courts to take a hard look at an immigration judge’s subject matter jurisdiction before allowing a removal order to serve as a predicate for a criminal prosecution for illegal reentry. However, before addressing whether *Pereira* impacts an immigration judge’s subject matter jurisdiction, this Part will first consider whether *Pereira* extends beyond the stop-time rule at all.

A. *Extension Beyond the Stop-Time Rule*

Contrary to the decisions of several circuits and the BIA’s conclusion in *Bermudez-Cota*, common sense indicates that the Supreme Court did not intend for its decision in *Pereira* to be limited to the context of the stop-time rule in cancellation of removal proceedings. First, although the Court did refer to the issue at hand as “narrow” several times,¹⁸² a close look at the context shows that the Court was not expressly limiting its holding to the stop-time rule.¹⁸³ Instead, it was limiting the issue to whether a putative notice to appear *lacking time-and-place information*, was, in fact, a notice to appear under the statute. The question that Mr. Pereira had presented to the Court focused on the necessity of “all ‘items listed’ in § 1229(a)(1)”;¹⁸⁴ the Court chose, however, only to address the necessity of time-and-place information.¹⁸⁵ Even the dissent recognized this distinction.¹⁸⁶

178. For a discussion of the differences in representation rates based on detention status, geographic location, and the respondent’s nationality, see Eagly & Shafer, *supra* note 175, at 30–47.

179. *Id.* at 7.

180. *Id.* at 9 (stating that represented respondents “fare better at every stage of the court process”).

181. *Id.* at 49.

182. *Pereira*, 138 S. Ct. at 2110, 2113.

183. See, e.g., *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961 (7th Cir. 2019) (“*Pereira* is not a one-way, one-day train ticket.”).

184. *Pereira*, 138 S. Ct. at 2113.

185. *Id.* at 2113 n.5 (“The Court leaves for another day whether a putative notice to appear that omits any of the other categories of information enumerated in § 1229(a)(1) triggers the stop-time rule.”).

186. *Id.* at 2125–26 (Alito, J., dissenting).

The Court's reason for limiting itself in this way is apparent—the notice to appear at issue in *Pereira* lacked time-and-place information, not any of the other elements delineated in § 1229(a)(1). The Supreme Court has long held that it does not have the power to give advisory opinions on “what the law would be upon a hypothetical state of facts.”¹⁸⁷ Thus, the Court merely addressed the facts actually before it: a notice to appear lacking time-and-place information. However, that this issue arose in the context of triggering the stop-time rule in cancellation of removal proceedings does not preclude application of the Court's reasoning in other settings.¹⁸⁸

Second, this lack of preclusive effect is evident from a close analysis of the language of the decision. The Court straightforwardly concluded 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.”¹⁸⁹ The part of the sentence preceding “and therefore” is an independent statement in itself that does not depend in any way on the remainder of the sentence. The second part of the sentence just necessarily follows from the conclusion already drawn. This sentence construction is repeated later in the Court's opinion: “A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a ‘notice to appear under section 1229(a),’ and so does not trigger the stop-time rule.”¹⁹⁰ If the Court had wished to limit its conclusion to application of the stop-time rule, it could instead have said, “A putative notice to appear lacking time-and-date information is not a notice to appear *for the purposes of* the stop-time rule.” The Court chose not to use that phrasing and even went on to state that “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).”¹⁹¹ Thus, since § 1229 governs initiation of removal proceedings,¹⁹² the Court made clear that *any* notice to appear used in such proceedings must include time-and-place information.

Finally, the Supreme Court's failure to address jurisdiction and its decision to remand the case for further proceedings does not indicate that it accepted the immigration court's jurisdiction. The

187. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. v. Haworth*, 300 U.S. 227, 241 (1937)); *see also* *Muskrat v. United States*, 219 U.S. 346, 351–53 (1911).

188. *MK Hillside Partners v. Comm'r*, 826 F.3d 1200, 1206 (9th Cir. 2016) (“[W]e are ‘bound not only by the holdings of [the Supreme Court's] decisions but also by their mode of analysis.’” (alteration in original) (quoting *United States v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir. 2009))).

189. *Pereira*, 138 S. Ct. at 2110 (emphasis added).

190. *Id.* at 2113–14 (emphasis added).

191. *Id.* at 2116 (emphasis added).

192. 8 U.S.C. § 1229 (2018).

Supreme Court frequently assumes jurisdiction to resolve a case¹⁹³ but “is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.”¹⁹⁴ Thus, the Court’s failure to address jurisdiction where neither party raised the issue has “no precedential effect.”¹⁹⁵

The BIA’s decision not to apply *Pereira* beyond the stop-time rule shows a blatant disregard for the plain meaning of the Court’s decision and its call for common sense. By simply adopting its prior reasoning (which the Court rejected in *Pereira*), the BIA bowed to DOJ’s goal of clearing the immigration docket’s “massive backlog of cases” at whatever the cost,¹⁹⁶ rather than adhere to the statutory language as the Court interpreted it.

B. Subject Matter Jurisdiction

Not only is it clear that *Pereira* should extend beyond the stop-time rule, but common sense also indicates that *Pereira* necessarily undermines an immigration judge’s jurisdiction. The argument here is simple and the result is clear. Under the governing regulation, jurisdiction only vests when a charging document, such as a notice to appear, is filed with the immigration judge.¹⁹⁷ In light of *Pereira*, a notice to appear for all removal proceeding purposes is defined in § 1229(a) and must include time-and-place information.¹⁹⁸ Thus, without time-and-place information, a notice to appear does not vest jurisdiction in an immigration judge.

193. KESSELBRENNER ET AL., *supra* note 111, at 18.

194. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

195. *United States v. Rivera Lopez*, 355 F. Supp. 3d 428, 437 n.14 (E.D. Va. 2018) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006)); *see also In re Bradford*, 830 F.3d 1273, 1278 (11th Cir. 2016).

196. Joel Rose, *Sessions Pushes to Speed Up Immigration Courts, Deportations*, NPR: MORNING EDITION (Mar. 29, 2018, 5:01 AM), <https://www.npr.org/2018/03/29/597863489/sessions-want-to-overrule-judges-who-put-deportation-cases-on-hold>.

197. *See* 8 C.F.R. § 1003.14(a) (2019) (“Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court.”). However, the circuits disagree on whether the regulation actually governs jurisdiction. *Compare* *Nkomo v. Attorney Gen. of the U.S.*, 930 F.3d 129, 133 (3d Cir. 2019) (referring to the regulation as “jurisdiction-vesting”), *Banegas Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019) (“The Attorney General has promulgated regulations governing removal proceedings that *do* address when jurisdiction vests in the Immigration Court.”), *and* *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) (“[T]he regulations, not § 1229(a), define when jurisdiction vests.”), *with* *Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019) (“We therefore agree . . . that 8 C.F.R. § 1003.14, despite its language, sets forth not a jurisdictional rule, but a claim-processing one.”), *and* *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) (“While an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases.”).

198. *Pereira v. Sessions*, 138 S. Ct. 2105, 2110, 2114 (2018).

Admittedly, the regulations could be construed to provide a competing definition of a notice to appear which only requires time and date “where practicable.”¹⁹⁹ However, while the BIA chose to defer to this purported regulatory definition of a notice to appear,²⁰⁰ that choice is foreclosed by *Pereira*. In essence, the Court held that Congress left no room for DOJ to redefine a notice to appear. An unambiguous statute cannot be displaced by a contrary regulation, no matter how convenient such a regulation would be.²⁰¹ *Pereira* states, in no uncertain terms, that § 1229(a) is not ambiguous and thus a notice to appear must include time-and-place information to be a notice to appear at all.²⁰² The Court also made clear that concerns over practicality were irrelevant to statutory interpretation.²⁰³

Furthermore, it would defy common sense for the requirements for a notice to appear to change based on the notice’s function.²⁰⁴ Whether the notice serves as a trigger for the stop-time rule, a charging document, or some other purpose, the requirements logically should be the same since it is, in fact, the same single document served on the noncitizen at a single point in time. Noncitizens do not receive one notice that charges them and a second notice that triggers the stop-time rule. It is one document serving multiple purposes, and therefore it would be “absurd” to say that the notice has different requirements based on its purpose.²⁰⁵ Thus, since the statute is unambiguous and governs removal proceedings, the requirements of § 1229(a) for a notice to appear should be the requirements for all notices to appear in all matters relating to removal proceedings.

In addition, the BIA’s contention that a subsequent notice of hearing can remedy any defect in the initial notice to appear is unfounded. The BIA essentially states that a putative notice to appear and a notice of hearing together can vest jurisdiction with an immigration judge.²⁰⁶ However, in *Pereira*, the Court held that a notice to appear lacking time-and-place information is not a notice to appear at all.²⁰⁷ Thus, the BIA’s reasoning fails because, despite the

199. 8 C.F.R. § 1003.18(b) (2019); *see also id.* § 1003.15(b).

200. Bermudez-Cota, 27 I. & N. Dec. 441, 445 (B.I.A. 2018).

201. *See Pereira*, 138 S. Ct. at 2118 (“These practical considerations are meritless and do not justify departing from the statute’s clear text.”); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327 (2014) (“[A]n agency may adopt policies [only] . . . within the bounds established by Congress.”).

202. *Pereira*, 138 S. Ct. at 2113–14.

203. *Id.* at 2118. The Court seemed particularly unconcerned about this since the problem was of DHS’s own making and within its power to rectify. *Id.* at 2119.

204. *See, e.g., United States v. Cruz-Jimenez*, No. A-17-CR-00063-SS, 2018 U.S. Dist. LEXIS 187870, at *16 (W.D. Tex. Nov. 2, 2018) (citing *Pereira*, 138 S. Ct. at 2115 n.7).

205. Again, the Supreme Court refused to impute to Congress an “absurd” purpose and the lower courts should do the same here.

206. Bermudez-Cota, 27 I. & N. Dec. 441, 447 (B.I.A. 2018).

207. *Pereira*, 138 S. Ct. at 2110; *see supra* Subpart IV.A.

initial notice being entitled “Notice to Appear,” it is not in fact a notice to appear and therefore cannot vest jurisdiction even in combination with a subsequent notice of hearing.²⁰⁸ The regulations governing the vesting of jurisdiction also foreclose the BIA’s decision because they state that filing of a notice to appear vests jurisdiction; no mention of a notice of hearing is made.²⁰⁹ Since the *Pereira* Court held that a notice to appear lacking time-and-place information is not a notice to appear at all, then logically there is nothing that a notice of hearing could cure and no proceeding in which the notice of hearing could even be filed.²¹⁰ Simply put, there is no way that a notice of hearing combined with a putative notice to appear could vest jurisdiction.

Thus, a commonsense reading of *Pereira* and the governing statute and regulations establish that a notice to appear lacking time-and-place information fails to vest subject matter jurisdiction. Logically, without jurisdiction over the removal proceedings, an immigration judge does not have the authority to order a noncitizen’s removal.²¹¹ The resulting removal order is therefore “void on its face.”²¹²

C. Application to Criminal Prosecutions for Illegal Reentry

As noted above, questions regarding lack of subject matter jurisdiction have frequently arisen in criminal prosecutions for illegal reentry.²¹³ A noncitizen who reenters the United States without permission after being deported “while an order of exclusion, deportation, or removal is outstanding” is subject to criminal prosecution.²¹⁴ These prosecutions require the government to prove, among other things, that the noncitizen was previously deported.²¹⁵ Challenges to the order underlying this deportation typically must meet the collateral attack requirements of 8 U.S.C. § 1326(d).²¹⁶

However, this Subpart contends that these collateral attack requirements should not apply where, as here, the court did not have

208. See, e.g., *United States v. Armejo-Banda*, 352 F. Supp. 3d 703, 712 (W.D. Tex. 2018).

209. 8 C.F.R. § 1003.14(a) (2019); see also *id.* § 1003.13.

210. See, e.g., *United States v. Soto-Mejia*, 356 F. Supp 3d 1053, 1058 (D. Nev. 2018).

211. Clearly, immigration judges recognized this following *Pereira* as they scrambled for guidance and terminated a record number of deportation cases. See *supra* Subpart III.C.

212. *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930) (“[I]f the order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it.”).

213. See *supra* Subpart III.C.

214. 8 U.S.C. § 1326(a)(1) (2018).

215. See *id.*

216. *United States v. Valladares*, No. A-17-CR-00156-SS, 2018 U.S. Dist. LEXIS 199044, at *4 (W.D. Tex. Oct. 30, 2018).

subject matter jurisdiction over the proceedings to begin with.²¹⁷ If, as argued above, a lack of subject matter jurisdiction renders the order void, then a court is obligated to disregard it completely.²¹⁸ One district court has analogized a void removal order to a blank sheet of paper.²¹⁹ As such, the noncitizen could not have been deported while an order was outstanding because, from a court's point of view, the order does not exist at all. Thus, the government's case for illegal reentry fails entirely because the government cannot prove that the noncitizen was previously deported. Similarly, the noncitizen could not possibly have pursued an appeal from the order because again, from a court's perspective, the order does not exist at all.²²⁰ Thus, it would be absurd to require a noncitizen to meet the collateral attack requirements of § 1326(d) when there is nothing to be attacked.

In the alternative, a deportation order resulting from removal proceedings initiated by a notice to appear lacking time-and-place information can satisfy the collateral attack requirements mandated by § 1326(d) (i.e., fundamental unfairness, exhaustion of administrative remedies, and deprivation of the opportunity for judicial review).

1. *Fundamental Unfairness*

First, a defendant challenging a predicate removal order must establish that the removal order was “fundamentally unfair.”²²¹ Frankly, the *Pereira* Court probably would have considered this a matter of common sense—what could be more fundamental to a proceeding than that the court actually has the authority to render a decision? However, even beyond common sense, a lack of subject matter jurisdiction results in the entry of the order being fundamentally unfair. In removal proceedings, “[f]undamental fairness is a question of procedure.”²²² Thus, a noncitizen facing deportation must “be provided (1) notice of the charges against him, (2) a hearing before an executive or administrative tribunal, and (3) a

217. Several district courts have held that § 1326(d)'s requirements are inapplicable where challenges are based on lack of subject matter jurisdiction. *See, e.g., id.* at *4–5; *United States v. Ortiz*, 347 F. Supp. 3d 402, 407 (D.N.D. 2018). The Fourth Circuit, however, has recently rejected this argument. *See United States v. Cortez*, 930 F.3d 350, 357 (4th Cir. 2019).

218. *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930) (“[I]f the order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it.”).

219. *United States v. Quijada-Gomez*, 360 F. Supp. 3d 1084, 1095 (E.D. Wash. 2018). This analogy is reminiscent of the Government's concession in *Pereira* “that a blank piece of paper would not suffice to trigger the stop-time rule.” *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 n.7 (2018).

220. *See, e.g., Ortiz*, 347 F. Supp. 3d at 407 (citing *United States v. Mendez-Morales*, 384 F.3d 927, 930 (8th Cir. 2004)).

221. 8 U.S.C. § 1326(d)(3) (2018).

222. *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002) (citing *United States v. Lopez-Vasquez*, 227 F.3d 476, 484 (5th Cir. 2000)).

fair opportunity to be heard.”²²³ Clearly, a proceeding conducted without subject matter jurisdiction does not satisfy the second element. Imagine, for instance, if a noncitizen had his removal proceedings conducted in traffic court. Although such a proceeding is technically a hearing before a tribunal, no one would consider this to satisfy the second element because the traffic court lacks subject matter jurisdiction. In the same way, removal proceedings conducted before an immigration judge without jurisdiction cannot satisfy this second element. Furthermore, such a proceeding fails to satisfy the third element for the same reasons. A proceeding conducted without subject matter jurisdiction can hardly be considered a fair opportunity to be heard. Thus, proceedings conducted without subject matter jurisdiction fail to comport with due process and are thereby fundamentally unfair.

2. *Exhaustion of Administrative Remedies*

Next, a defendant challenging a predicate removal order must also establish that he “exhausted any administrative remedies that may have been available to seek relief against the order.”²²⁴ Exhausting one’s administrative remedies against removal requires one to “first adjudicate them before an immigration judge in an adversarial proceeding, appeal to the Board of Immigration Appeals, receive a final decision, and then file a PFR [Petition for Review] with a federal circuit court.”²²⁵ Many noncitizens seeking to challenge their underlying deportation orders do not meet this requirement on its face because they waived any appeals at their removal hearings.²²⁶

However, common sense calls for an exception to this requirement for several reasons. First, while some district courts considering the exhaustion requirement have stated that courts cannot excuse statutorily mandated exhaustion requirements like the one in § 1326(d),²²⁷ several circuits have recognized that exceptions to statutory exhaustion requirements can be “carved out,” especially where “resort to the agency would be futile.”²²⁸ Considering that prior to *Pereira*, “notices to appear” lacking time-and-place information were standard and the two-step notice procedure had been widely accepted, noncitizens facing removal had no reason to challenge an

223. *Id.* at 230 (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597–98 (1953)).

224. 8 U.S.C. § 1326(d)(1).

225. Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1235, 1251 (2018).

226. *See, e.g.*, *United States v. Lopez-Urgel*, 351 F. Supp. 3d 978, 983 (W.D. Tex. 2018); *United States v. Lira-Ramirez*, No. 18-10102-JWB, 2018 U.S. Dist. LEXIS 176652, at *6 (D. Kan. Oct. 15, 2018).

227. *See, e.g.*, *United States v. Larios-Ajualet*, No. 18-10076-JWB, 2018 U.S. Dist. LEXIS 176649, at *20 n.6 (D. Kan. Oct. 15, 2018).

228. *Sousa v. INS*, 226 F.3d 28, 32 (1st Cir. 2000); *see also Singh v. Reno*, 182 F.3d 504, 511 (7th Cir. 1999).

immigration court's jurisdiction and doing so would have been to no avail. Second, an immigration court's lack of jurisdiction renders the removal proceeding and resulting order void²²⁹ and therefore subject to collateral attack even without exhausting administrative remedies.²³⁰ Third, "lack of subject matter jurisdiction may be raised at any time."²³¹ Thus, defendants should not be required to have exhausted their administrative remedies in order to collaterally attack their underlying removal orders.

3. *Deprivation of Opportunity for Judicial Review*

Finally, defendants must also establish that "the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review."²³² As noted in *Mendoza-Lopez*, some procedural errors "are so fundamental that they may functionally deprive the alien of judicial review."²³³ In that case, the Court held that the respondents were deprived of judicial review where "the waivers of their rights to appeal were not considered or intelligent" but were instead based on improper advice from the immigration judge.²³⁴ An immigration court's lack of jurisdiction presents an analogous situation. A court purporting to have jurisdiction when it does not is seriously misleading to a defendant. Such misinformation would inhibit the defendant from making a "considered or intelligent decision" regarding his right to appeal. Thus, proceedings conducted without jurisdiction effectively deprived the defendant of "the opportunity for judicial review."

V. CONCLUSION

Ultimately, the Supreme Court's "simple" decision in *Pereira v. Sessions* has created additional issues for the nation's immigration system. If, as argued here, *Pereira* undermines an immigration judge's subject matter jurisdiction, then the ramifications of that decision go much further than even challenges to criminal

229. See *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930) ("[I]f the order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it."); *supra* Subpart IV.B.

230. See *Jacuzzi v. Pimienta*, 762 F.3d 419, 420 (5th Cir. 2014) ("[A]ny judgment may be collaterally attacked if it is void for lack of jurisdiction. A defendant is always free to ignore the judicial proceedings . . . and then challenge that judgment on jurisdictional grounds in a collateral proceeding." (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982))).

231. *United States v. Rodriguez-Rosa*, No. 3:18-cr-00079-MMD-WGC, 2018 U.S. Dist. LEXIS 214623, at *22 (D. Nev. Dec. 11, 2018) (citing *Henderson ex rel. Henderson*, 562 U.S. 428 (2011)).

232. 8 U.S.C. § 1326(d)(2) (2018).

233. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 n.17 (1987), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441(a), 110 Stat. 1214 (1996) (codified at 8 U.S.C. § 1326(d)).

234. *Id.* at 840.

prosecutions for illegal reentry.²³⁵ Unless the Court decides to step in and resolve the question over subject matter jurisdiction, lower courts and the BIA should use their own common sense in applying *Pereira* in whatever context it arises.

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235. For example, although a lack of subject matter jurisdiction seems like a boon to those faced with an adverse decision in immigration court, what is its effect for those who received a positive outcome in court?

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