Strategies and Considerations in the Wake of *Pereira v. Sessions*

Practice Advisory[1]

July 20, 2018

Introduction

In *Pereira v. Sessions*, __ U.S. __, 138 S. Ct. 2105 (2018), the U.S. Supreme Court held that service of a putative charging document that does not specify the time and place of removal proceedings does not meet the statutory definition of a Notice to Appear (NTA) under 8 U.S.C. § 1229(a) and, therefore, does not cut off a noncitizen's ability to accrue the time in the United States required to qualify for cancellation of removal. Although the government is attempting to cabin the ruling's impact to the cancellation of removal context, practitioners can apply the rationale underlying the Court's interpretation of § 1229(a) to a wider variety of challenges. Furthermore, practitioners can file motions to reconsider and/or reopen prior removal orders predicated on defective NTAs within 30 to 90 days of the decision or as soon as practicable after learning of the decision.

Part I of this advisory provides a brief overview of cancellation of removal, the *Pereira* decision, and its impact on the stop-time rules affecting eligibility for cancellation of removal and post conclusion voluntary departure. **Part II** discusses due process concerns regarding the implementation of the *Pereira* decision by the Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS). **Part III** examines potential broader applications of *Pereira* beyond the stop-time context, including challenges to immigration court jurisdiction and in absentia orders, as well as responses to potential counter-arguments. **Part IV** discusses strategy considerations and the availability and timing of legal vehicles for raising *Pereira*-based arguments in removal cases under 8 U.S.C. § 1229a, reinstatement cases under 8 U.S.C. § 1231(a)(5), and criminal prosecutions under 8 U.S.C. § 1326.[2]

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[1] This practice advisory is intended for authorized legal counsel and is not a substitute for independent legal advice supplied by legal counsel familiar with a client's case. The authors of this advisory are Michelle Mendez, Victoria Neilson, Rebecca Scholtz, Karolina Walters, Kristin Macleod-Ball, and Trina Realmuto. The authors would like to thank Patrick Taurel, Kara Hartzler, Stacy Tolchin, Valerie Zutkin, David Stern, and Anna Hysell for their contributions. Please direct questions regarding this advisory to clearinghouse@immcouncil.org.

[2] CLINIC is creating a repository of sample motions raising *Pereira*-based arguments and responses to DHS oppositions to such motions. Attorneys interested in accessing, or contributing to, the repository may contact Michelle Mendez at mmendez@cliniclegal.org.

PART I - *Overview*

A. Cancellation of Removal

Cancellation of removal is a form of relief from deportation that is available in removal proceedings initiated on or after April 1, 1997. It is available to lawful permanent residents (LPRs) under 8 U.S.C. § 1229b(a), to non-lawful permanent residents (non-LPRs) under 8 U.S.C. § 1229b(b)(1),[3] and to certain battered spouses and children under 8 U.S.C. § 1229b(b)(2)[4] if the applicant meets a set of statutory criteria. If an immigration judge (IJ) determines that an individual meets these criteria and merits a favorable exercise of discretion, the IJ may "cancel" removal and the individual either retains or gains LPR status, respectively.[5]

- **Cancellation of Removal for LPRs**

Under 8 U.S.C. § 1229b(a), an individual must demonstrate:

- admission as an LPR for not less than 5 years;
- continuous residence in the United States for 7 years after admission in any status; and
- that he or she has not been convicted of an aggravated felony.

- **Non-LPR Cancellation of Removal**

Under 8 U.S.C. § 1229b(b)(1), an individual must demonstrate:

- continuous physical presence in the United States for not less than 10 years immediately preceding the date of application;
- good moral character during such period;
- that he or she has not been convicted of certain criminal offenses; and
- that removal would result in exceptional and extremely unusual hardship to the individual's U.S. citizen or LPR spouse, parent, or child.

- **The Stop-Time Rule**

Section 1229b(d) of 8 U.S.C., also known as the stop-time rule, governs the calculation of continuous residence or physical presence for accumulating either the 7 years of continuous residence required for LPR cancellation or the 10 years of continuous physical presence required for non-LPR cancellation. Subsection (A) of 8 U.S.C. § 1229b(d)(1), provides that the accrual of these time periods "shall be deemed to end . . . when the [noncitizen] is served a notice to appear under [8 U.S.C. § 1229(a)]."[6]

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[3] An LPR may apply for non-LPR cancellation. *See Matter of A-M-*, 25 I&N Dec. 66, 74-76 (BIA 2009).

[4] This advisory does not address the specific requirements for this form of cancellation of removal because it does not require an individual to demonstrate time in the United States and, therefore, is not impacted by the Supreme Court's decision in *Pereira*.

[5] The applicant bears the burden of establishing both statutory eligibility and that he or she merits a favorable exercise of discretion. 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

[6] Subsection (B) of § 1229b(d)(1) is triggered by the commission of certain crimes. That provision is beyond the scope of this practice advisory.

B. Supreme Court Decision in *Pereira v. Sessions*

- **Facts and Holding**

In *Pereira,* the Supreme Court held that an NTA that does not include the date, time, and place of the scheduled immigration court hearing does not trigger the stop-time rule for purposes of non-LPR cancellation. Mr. Pereira, the petitioner in the case, had entered the United States in 2000. In 2006, DHS served him with an NTA that did not include the date, time, and place of a hearing. The NTA stated that the time and place of the hearing were "to be set." Subsequently, Mr. Pereira moved, and although he submitted the required change of address documents, the court mailed a hearing notice advising him of the time and place to appear to the wrong address. As a result, he was ordered removed in absentia in 2007. He did not learn of this order until 2013. Due to the lack of notice, however, the immigration court subsequently rescinded the in absentia order and reopened proceedings. On the merits, the IJ denied his application for non-LPR cancellation, finding that the 2006 NTA stopped the accrual of continuous physical presence in the United States. Relying on *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), the BIA upheld the IJ's decision, as did the First Circuit Court of Appeals.

In an 8-1 decision, authored by Justice Sotomayor, the Supreme Court found 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."[7] The Court found that the plain language of § 1229(a)(1)(G)(i), which unambiguously defines an NTA as specifying where and when the noncitizen must appear for removal proceedings compelled this result.[8] Thus, the Court concluded that NTAs that do not contain at least this basic information do not meet the definition of an NTA under 8 U.S.C. § 1229(a)(1) for purposes of the stop-time rule and remanded Mr. Pereira's case for further proceedings.[9] Justice Kennedy issued a concurring opinion, and Justice Alito dissented.

- **Key Points**

The following points may inform future litigation on the scope of the decision:

- At oral argument, when asked how many NTAs omit the date and time of the hearing, the Assistant to the Solicitor General responded, "almost 100 percent."[10]

- The Court referred to individuals in removal proceedings as noncitizens, *not* aliens, except when quoting the statutes and regulations that use this term.[11]

- The Court indicated that the case presented a "narrow question" and referred to its holding as applicable to the stop-time rule.[12]

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[7] *Pereira*, 138 S. Ct. at 2110.
[8] *Pereira*, 138 S. Ct. at 2110.
[9] *Pereira*, 138 S. Ct. at 2113-14, 2120.
[10] *Pereira*, 138 S. Ct. at 2111 (citing transcript).
[11] *Pereira*, 138 S. Ct. at 2110 n.1.
[12] *See, e.g.*, *Pereira*, 138 S. Ct. at 2110, 2113-14.

- The Court was cognizant of 8 C.F.R. § 1003.18, which indicates that DHS shall provide NTAs containing "the time, place and date of the initial removal hearing, where practicable."[13] Where such information is not provided, that regulation places the burden on the immigration court to schedule and provide notice to DHS and the noncitizen of the initial hearing.

- The Court based its analysis on the plain language of 8 U.S.C. §§ 1229(a) and 1229b(d)(1) and rules of statutory construction. The Court rejected the contrary conclusion of the BIA, as well as six courts of appeal, which had found the language of the stop-time rule ambiguous and had deferred to the agency's position that NTAs without a specific time and place could trigger the stop-time rule.[14]

- The statutory analysis rested on the Court's findings that:

  - ✓ § 1229(a)(1) defines NTAs to include written notice of the date and place of the removal hearing as set forth in § 1229(a)(1)(G)(i);
  - ✓ § 1229(a)(2), which authorizes a change or postponement of proceedings to a new "time or place," presumes that DHS already served an NTA containing a time and place;
  - ✓ § 1229(b)(1), which affords noncitizens at least 10 days after service of an NTA to secure counsel before the first court appearance unless waived, must be read to require a specific time and place on the NTA to have meaning; and
  - ✓ common sense dictates that the words "notice to appear" require notice of the information individuals need to appear for removal hearings.[15]

- The word "under," as used in the phrase "served a notice to appear under section 1229(a)" in the stop-time rule provision, is not ambiguous. It means "in accordance with" or "according to;" it does not mean "subject to," "governed by," or "issued under the authority of."[16]

- The notice pursuant to 8 U.S.C. § 1229(a)(1) referenced in 8 U.S.C. § 1229a(b)(5)(A) (authorizing issuance of an in absentia order where the government provided "written notice required under" section 1229(a)), 8 U.S.C. § 1229a(b)(5)(C)(ii) (allowing for rescission of an in absentia order where notice was not received "in accordance with" §

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[13] *Pereira*, 138 S. Ct. at 2111 ((citing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedure, 62 Fed. Reg. 10312, 10332 (Mar. 6, 1997)).

[14] *Pereira*, 138 S. Ct. at 2113-14 (referencing the decisions from the Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits). In his concurrence, Justice Kennedy expressed concern that lower courts, when applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), were giving a "cursory analysis" to ascertaining congressional intent and "reflexive deference" to the BIA's position. *Id.* at 2120 (Kennedy, J., concurring).

[15] *Pereira*, 138 S. Ct. at 2114-16.[16] *Pereira*, 138 S. Ct. at 2117.

[16] *Pereira*, 138 S. Ct. at 2117.

1229(a)), and 8 U.S.C. § 1229b(d)(1) (service of notice to appear "under" § 1229(a) stops the accrual of time) *all* refer "to notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1)."[17]

- The Court held that 8 U.S.C. § 1229a(b)(7), the provision that bars certain discretionary relief to individuals with in absentia orders if the individual received notice of, inter alia, the time and place of the relevant hearing, "reveals nothing" about whether a defective NTA can trigger the stop-time rule.[18]

- The Court rejected the government's argument that specifying a time and place of removal proceedings would be administratively challenging, noting "[g]iven today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not . . . work together to schedule hearings before sending notices to appear."[19]

- Even assuming the legislative history and statutory purpose of the stop-time rule were applicable to the analysis, they are consistent with applying the stop-time rule only after the government notifies the noncitizen of the date and place of the hearing.[20]

C. *Pereira's* Impact on Cancellation and Post Conclusion Voluntary Departure

For many years, DHS has issued and served NTAs that provide that the place, date, and/or time of the removal proceedings is "to be determined." Subsequently, after DHS filed the NTA with an immigration court, the court would send a hearing notice containing the specific place, date, and time of the hearing.

In the wake of *Pereira*, NTAs that do not specify the time and place of removal proceedings cannot trigger the stop-time rule under 8 U.S.C. § 1229b(d)(1). Since the *Pereira* Court was interpreting a statutory provision, which, by its own terms, applies both to LPR cancellation and to non-LPR cancellation, the decision should be immediately applied to both types of cancellation cases, even under its narrowest construction.

Significantly, a stop-time rule nearly identical to § 1229b(d)(1) exists in 8 U.S.C. § 1229c(b)(1)(A). That provision authorizes IJs to grant voluntary departure in lieu of a removal order at the conclusion of proceedings if, in addition to meeting other statutory criteria, the noncitizen:

> has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of [Title 8].

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[17] *Pereira*, 138 S. Ct. at 2117-18.
[18] *Pereira*, 138 S. Ct. at 2118.
[19] *Pereira*, 138 S. Ct. at 2118-19.
[20] *Pereira*, 138 S. Ct. at 2119 (explaining the government alleged that the objective of the stop-time rule was "to prevent noncitizens from exploiting administrative delays" by accumulating time during proceedings).

The *Pereira* Court examined the meaning of the phrase "is served a notice to appear under [8 U.S.C. § 1229(a)]" in § 1229b(d)(1) and determined that a defective NTA "is not a 'notice to appear' that triggers the stop-time rule."[21] Because the language of the stop-time rule in § 1229c(b)(1)(A) is nearly identical to the language at issue in *Pereira*, the Court's analysis should similarly apply. Accordingly, individuals served with defective NTAs within a year of their arrival in the United States now should be eligible for post conclusion voluntary departure, provided that other statutory criteria are met. *See generally* 8 U.S.C. § 1229c(b)(1).

PART II – *Legal and Practical Concerns*

A. Concerns About Anticipated DHS and EOIR Collaboration to Schedule Hearings

In *Pereira*, the majority rejected the government's suggestion, echoed in the dissent, that providing a specific time and place of a hearing on NTAs would be difficult given the "administrative realities of removal proceedings."[22] Rather, the Court indicated that any time and place information on the NTA was not "etched in stone" and that the government has "the power" to later change the time or place of the hearing under 8 U.S.C. § 1229(a)(2).[23] The Court reasoned that this provision "mitigates any potential confusion that may arise from altering the hearing date."[24] The Court further noted that DHS and immigration courts had coordinated setting hearing dates in the past and posited that "[g]iven today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear."[25]

Though perhaps well-intentioned, the Court's misapprehension about the ease of changing the time or place of a scheduled removal hearing and its implicit support of a collaborative scheduling system raises concerns. First, if the hearing is scheduled at an inconvenient (or entirely inappropriate) time or place, the burden falls on the noncitizen to either affirmatively move to continue the hearing to another time or move to change the venue of proceedings.

Second, the Court's suggestion that DHS play a role in selecting both the time and venue of removal proceedings is troubling. Although venue is within the control of the immigration courts once an NTA is filed, 8 C.F.R. § 1003.20, DHS initiates removal proceedings by filing NTAs at the immigration court of its choice. 8 C.F.R. § 1003.14(a). If DHS collaborates with the immigration courts, DHS – the prosecutor in removal proceedings and the executor of final administrative removal orders – could influence, or even select, not only the immigration court of its choice, but also the date and time. Accordingly, DHS could select the immigration judge of its choice, based on the days that certain judges hear cases. As such, DHS would have the unprecedented ability to manipulate the timing, potential adjudicator, and venue of removal

[21] *Pereira*, 138 S. Ct. at 2115.
[22] *Pereira*, 138 S. Ct. at 2118-19.
[23] *Pereira*, 138 S. Ct. at 2119.
[24] *Pereira*, 138 S. Ct. at 2119.
[25] *Pereira*, 138 S. Ct. at 2119; *see also id.* at 2115 n.6.

proceedings.[26]

As a practical matter, if DHS and EOIR collaborate on scheduling the date and place of removal hearings in advance of serving NTAs, motions to continue proceedings and/or motions to change venue are likely to increase. For example, motions to continue proceedings are likely to increase if the collaboration between DHS and EOIR allows DHS to schedule hearings so quickly as to not allow for sufficient attorney case preparation time.

B. Concerns About Ex Parte Communications Between EOIR and DHS

Attached to this Practice Advisory as Addendum A is a generic opposition to a motion to terminate based on *Pereira* filed in a case in the San Diego Immigration Court by the local DHS Office of Chief Counsel. Notably, pasted into that opposition is the text of *an internal EOIR email* sent from Deputy Chief Immigration Judge Christopher A. Santoro to all Office of Chief Immigration Judge Headquarters staff and all immigration courts within EOIR on July 11, 2018. The email advises EOIR to accept NTAs with the time and place of the hearing to be determined even after *Pereira* and supersedes prior guidance. Troublingly, the San Diego DHS Office of Chief Counsel had access to an internal EOIR email stating EOIR's position with respect to NTAs post-*Pereira*. This evidences high-level ex parte communications between EOIR, the agency charged with adjudicating removal hearings impartially, and DHS, the agency that acts as the prosecutor in removal proceedings and the executor of final orders. Practitioners representing individuals may wish to preserve due process arguments regarding inappropriate ex parte communications between EOIR and DHS discussing implementation of the *Pereira* decision.

PART III – Broader *Pereira*-Based Arguments

A. Statutory & Regulatory Provisions Implicating NTAs Defined in 8 U.S.C. § 1229(a)

The following is a noncomprehensive list of statutory and regulatory provisions referencing 8 U.S.C. § 1229 or implicating NTAs or charging documents more generally. Attorneys may develop legal challenges related to these provisions after *Pereira*. *See* Part III.B, *infra*.

- **Notices to Appear**: 8 U.S.C. § 1229(a); 8 C.F.R. §§ 239, 1239; and 8 C.F.R. § 1003.18—relating to issuance and service of NTAs and scheduling of immigration cases.

[26] Courts have rejected policies that would allow one party to manipulate the course of proceedings. *See, e.g.*, *Matter of Valles*, 21 I&N Dec. 769, 773 (BIA 1997) (holding that a noncitizen may not defeat an immigration agency appeal of a bond decision by continually filing bond redetermination requests); *Matter of Brown*, 18 I&N Dec. 324, 325 (BIA 1982) (holding that a noncitizen may not defeat an immigration agency appeal and nullify deportation proceedings by departing and then reentering); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) ("It is unnatural to speak of one litigant withdrawing another's motion."); *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) ("To allow the government to cut off [a petitioner's] statutory right to appeal an adverse decision . . . simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process.") (citation omitted); *Nat'l Immig. Project v. Dep't of Homeland Security*, 868 F. Supp. 2d 284, 296 n.4 (S.D.N.Y. 2012) ("Indeed, as only one party to the removal proceeding, ICE cannot determine whether [a noncitizen]'s presence is required.").

- **Immigration Court Jurisdiction**: 8 C.F.R. § 1003.14—indicating that jurisdiction vests and removal proceedings commence when DHS files a charging document with the immigration court, and that a charging document must include a certificate of service and identify the court in which it is filed.

- **In Absentia Orders**: 8 U.S.C. §§ 1229a(b)(5), (b)(7); 8 C.F.R. §§ 1003.23(b)(4), (d)(2)—relating to the authority to issue in absentia orders, the requirements for rescission of in absentia orders, and the bar to discretionary relief resulting from issuance of an in absentia order.

- **Post Conclusion Voluntary Departure**: 8 U.S.C. § 1229c(b)(1)(A); 8 C.F.R. § 1240.26—relating to the authority of IJs to grant voluntary departure in lieu of a removal order at the conclusion of proceedings.

- **Grounds of Inadmissibility/Waivers Based on Prior Orders**: 8 U.S.C. §§ 1182(a)(9)(A), (a)(9)(C)(i)(II), (ii) and (iii), 8 C.F.R. §§ 212.2, 1212.2—relating to inadmissibility bars for having a prior removal order and available waivers.

- **Conditional Resident Status**: 8 C.F.R. §§ 216.3, 1216.3, 216.4, 1216.4—requiring USCIS to "issue a notice to appear in accordance with 8 CFR part 239" when providing notice of termination of conditional permanent resident status and to "cancel any outstanding notice to appear in accordance with § 239.2" if USCIS approves a late filed joint petition to remove the conditional basis of such status.

- **Naturalization**: 8 C.F.R. §§ 318.1, 329.2(e)—providing that, for purposes of 8 U.S.C. § 1429 (related to the prerequisites for naturalization), "a notice to appear issued under 8 CFR part 239 . . . shall be regarded as a warrant of arrest" and that a naturalization applicant "may be naturalized even if an outstanding notice to appear pursuant to 8 CFR part 239 . . . exists."

- **Immigration Court Jurisdiction in Asylum and Withholding of Removal Cases**: 8 C.F.R. §§ 208.2(b), 1208.2(b)—indicating that IJs "shall have exclusive jurisdiction" over asylum applications only after a charging document has been served on the applicant and filed with the immigration court.

B. Potential *Pereira*-Based Arguments

The *Periera* Court's express holding is limited to the validity of a notice that lacks specific time and/or place of a hearing for purposes of the stop-time rule for cancellation of removal. Significantly, however, the Court's rationale for that holding—namely, its interpretation of § 1229(a)—is not limited to the stop-time context and may have a much broader application. This is because courts should not interpret § 1229(a)(1) one way for one purpose and another way for another purpose. Rather, "it is a normal rule of statutory construction that identical words used in

different parts of the same act are intended to have the same meaning."[27] For this reason, it is advisable to frame broad *Pereira*-based arguments as compelled by the *rationale* underlying the decision, not its specific holding. Below are some potential arguments and responses to potential DHS counter-arguments.

- **IJs may lack subject matter jurisdiction over proceedings commenced by defective NTAs.** For subject matter jurisdiction to vest with the immigration court, and for removal proceedings to commence, DHS must file a "charging document" with the immigration court. *See* 8 C.F.R. § 1003.14(a). Thus, absent the filing of another type of charging document specified by regulation, DHS must file a valid NTA for jurisdiction to vest with an immigration court. *See* 8 C.F.R. § 1003.13 (defining charging document to include an NTA). In *Pereira*, the 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)'."[28] Relying on the statutory text, the majority found that § 1229(a) "speaks in definitional terms," and concluded that "[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.'"[29] An NTA lacking time and place information is deprived of its "essential character," and, thus, cannot confer subject matter jurisdiction over removal proceedings. This argument could provide the basis for a motion to terminate pending removal proceedings or a motion to reconsider/reopen removal proceedings.

- **IJs may lack personal jurisdiction where DHS did not serve a valid NTA.** A fundamental tenet of civil procedure is that an adjudicator lacks personal jurisdiction "unless the defendant has been served in accordance with Fed. R. Civ. P. 4." *S.E.C. v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007) (quotations and citation omitted).[30] For an individual to be served "in accordance with Fed. R. Civ. P. 4," the charging document must "name the court" where, and "state the time" at which, the proceedings will take place. *See* Fed. R. Civ. P. 4(a)(1). Although the Federal Rules of Civil Procedure do not apply in immigration court, *Matter of Benitez*, 19 I&N Dec. 173, 174 (BIA 1984), one could argue by analogy that an NTA lacking time and place information cannot confer personal jurisdiction over an individual. This argument could provide the basis for a motion to terminate pending removal proceedings or a motion to reconsider/reopen removal proceedings.

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[27] *Pereira*, 138 S. Ct. at 2115 (quoting *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012)); *see also Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give the[] same words a different meaning for each category [under the statute] would be to invent a statute rather than interpret one.").
[28] *Pereira*, 138 S. Ct. at 2110.
[29] *Pereira*, 138 S. Ct. at 2116-17 (internal citations omitted).
[30] *See also Simon v. S. R. Co.*, 236 U.S. 115, 129 (1915) (stating that "[S]ervice defines the court's jurisdiction" and finding that, if a defendant has not been legally served, "the court can exercise no jurisdiction over him.").

- **IJs may not issue in absentia orders in cases with defective NTAs.** The *Pereira* Court reasoned that the notice at issue in: (1) 8 U.S.C. § 1229a(b)(5)(A) (authorizing issuance of an in absentia order where the government provided "written notice required under," inter alia, section 1229(a)(1)); (2) 8 U.S.C. § 1229a(b)(5)(C)(ii) (allowing for rescission of an in absentia order where notice not received "in accordance with," inter alia, § 1229(a)(1)); and (3) 8 U.S.C. § 1229b(d)(1) (service of notice to appear "under" § 1229(a) stops the accrual of time) all refer "to notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1)."[31] Even if an individual received another form of notice providing the time-and-place criteria required, after *Pereira*, the NTA must include this information or the IJ may lack jurisdiction over the proceedings. As mentioned above, IJs may lack subject-matter jurisdiction over proceedings commenced by defective NTAs and IJs may lack personal jurisdiction where DHS did not serve a valid NTA. Absent a valid charging document and jurisdiction over the proceedings, DHS cannot meet its burden in such proceedings, *see* 8 U.S.C. § 1229a(b)(5), and an IJ may not issue an in absentia order. This argument may also support a motion to reconsider/reopen an in absentia order to terminate proceedings.

- **A hearing notice does not "cure" a deficient NTA.** A subsequent hearing notice, properly served on an individual, that provides notice of the time and place of removal proceedings cannot cure a defective NTA because it is not a "charging document" that can "vest jurisdiction" under 8 C.F.R. §§ 1003.13 and 1003.14. Moreover, issuance of NTAs is exclusively delegated to DHS, *see* 8 C.F.R. §§ 239.1 and 1239.1, whereas issuance of hearing notices is delegated to EOIR. Regulations that apply only to DHS do not authorize immigration courts to take action.[32] One could argue that EOIR cannot vest jurisdiction *upon itself* by issuing a subsequent notice of hearing, because the issuance of the notice of hearing depends upon jurisdiction already existing with the immigration court. Consistent with this argument, soon after the *Pereira* decision, some immigration courts posted notices that they would not accept NTAs that do not include time and place information. *See* Addendum B (photo).

- **8 C.F.R. § 1003.18(b), the regulation excusing DHS from including the time and place of a hearing on NTAs, is ultra vires to 8 U.S.C. § 1229(a) and, thus, invalid.** As mentioned above, the *Pereira* Court was aware of 8 C.F.R. § 1003.18(b). *See* Part I.B, *supra*. A regulation is ultra vires to a statute when it contradicts the clear and unambiguous language of a statute.[33] Applying *Chevron*, the *Pereira* Court found that "Congress has supplied a clear and unambiguous answer to the interpretive question at

[31] *Pereira*, 138 S. Ct. at 2118.
[32] *Cf. Matter of Castro-Tum*, 27 I&N Dec. 271, 277 n.3 (A.G. 2018).
[33] *See, e.g.*, *Succar v. Ashcroft*, 394 F.3d 8, 24-25 (1st Cir. 2005); *Prestol Espinal v. Att'y Gen. of the United States*, 653 F.3d 213, 217-18 (3d Cir. 2011); *Schneider v. Chertoff*, 450 F.3d 944, 956 (9th Cir. 2006); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 819 (10th Cir. 2012) (en banc); *Scheerer v. U.S. Att'y Gen.*, 445 F.3d 1311, 1319 (11th Cir. 2006).

hand." 138 S. Ct. at 2113. The *Pereira* Court held that the "statutory text alone is enough to resolve this case" and that a "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) . . .."[34] *Id*. at 2114. The regulation at 8 C.F.R. § 1003.18(b) is invalid because it contradicts the clear and unambiguous language of § 1229(a)(1)(G)(i).

- **The Court's silence as to whether the immigration court had jurisdiction notwithstanding Mr. Pereira's defective NTA cannot be read as limiting the decision's applicability to the stop-time rule context.** As mentioned above, *Pereira*'s rationale, not its holding, supports an argument that IJs lack jurisdiction over removal proceedings initiated by defective NTAs. Although the Supreme Court did not address the implications of its interpretation of § 1229(a) on the immigration court's authority over Mr. Pereira's removal proceedings, the Court's silence cannot be read as an implicit assumption that its interpretation of § 1229(a) is limited to the stop-time rule. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).[35]

- **Prior circuit case law that is dependent on a contrary interpretation of 8 U.S.C. § 1229(a) is not binding.** Prior to *Pereira*, several circuit courts held that immigration courts maintain jurisdiction over removal proceedings even when the requirements of § 1229(a)(1) were met through a two-step notification process—the service of a charging document that did not include time and place information, followed by a notice of hearing that included this information. *See, e.g.*, *Dababneh v. Gonzales*, 471 F. 3d 806, 810 (7th Cir. 2006) ("The fact that the government fulfilled its obligations under INA 239(a) in two documents—rather than one—did not deprive the IJ of jurisdiction to initiate removal proceedings.").[36] As addressed above, attorneys now may wish to argue that a hearing notice cannot cure jurisdictional challenges to a defective NTA. To the extent prior circuit case law depends on an interpretation of 8 U.S.C. § 1229(a) that is inconsistent with *Pereira*, the case law does not bind the courts in future decisions.[37]

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[34] *Pereira*, 138 S. Ct. at 2114.

[35] *See also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("[T]his Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions.").

[36] *See also Moscoso-Castellanos v. Lynch*, 803 F. 3d 1079, 1083 (9th Cir. 2015); *O'Garro v. U. S. Att'y Gen.*, 605 Fed. Appx. 951, 953 (11th Cir. 2015) (per curiam); *Gonzalez-Garcia v. Holder*, 770 F. 3d 431, 434-35 (6th Cir. 2014); *Guamanrrigra v. Holder*, 670 F.3d 404, 409-10 (2d Cir. 2012); *Popa v. Holder*, 571 F.3d 890, 895-96 (9th Cir. 2009); *Haider v. Gonzales*, 438 F.3d 902, 906-07 (8th Cir. 2006). To the extent that these decisions are predicated on the erroneous assumption that the deficient NTA vested the immigration court with jurisdiction, they can no longer be considered good law.

[37] *See, e.g.*, *Busby v. Crown Supply, Inc.*, 896 F. 2d 833, 840-41 (4th Cir. 1990) (allowing for overturning earlier circuit court decisions based on a "superseding contrary decision of the

PART IV

A. Strategic Considerations

Pereira affects at least two groups of individuals who are, or were, in removal proceedings: (1) those who now qualify for cancellation of removal or post conclusion voluntary departure in the wake of the decision; and (2) those who may now benefit from a *Pereira*-based argument seeking termination, reopening, and/or reconsideration. It also may affect individuals who could argue that they have a challenge related to the statutory and regulatory provisions addressed in Part III.A, *supra*.

Whether to raise a *Pereira*-based argument is a case-specific question that requires consideration of several factors. First and foremost, practitioners should consider the immigration options and objectives of any client with a potential *Pereira*-based claim. In some cases, including where *Pereira* renders a client without other relief options eligible for cancellation or post conclusion voluntary departure, *not* raising a *Pereira*-based argument likely constitutes ineffective assistance of counsel.

In other cases, this strategic decision may be more nuanced. For example, with respect to seeking termination of removal proceedings, clients should be aware that, although some IJs already have granted termination, other IJs and/or the BIA may not find that the rationale underlying *Pereira* extends beyond the stop-time context. In this situation, pursuit of a termination strategy may result in protracted litigation unless and until the courts of appeals, and perhaps the Supreme Court, address the relevant issues. Even if termination of existing or reopened removal proceedings based on *Pereira* is successful, clients should understand that DHS may issue a new NTA placing the individual back into removal proceedings. While this result may change the ultimate outcome of proceedings (for example, if intervening developments render the individual newly eligible for relief), in other cases, it may simply delay issuance of a removal order. While practitioners could challenge issuance of a new NTA after termination, that argument is beyond the scope of this advisory.[38]

Practitioners also should consider their clients' present eligibility for relief from removal (including cancellation, asylum, and voluntary departure) and the likelihood of success on each possible relief application. For example, an individual who is not eligible for cancellation but who has a strong asylum claim may not wish to pursue a motion to terminate based on *Pereira*, especially if she is detained, since it could delay filing and/or adjudication of her asylum application.

Supreme Court"); *White v. Estelle*, 720 F. 2d 415, 417 (5th Cir. 1983) (allowing for overturning earlier circuit court decisions based on "intervening and overriding Supreme Court decisions"); *Miller v. Gammie*, 335 F. 3d 889, 900 (9th Cir. 2003) (finding intervening Supreme Court authority that is irreconcilable with prior circuit case law "effectively overrule[s]" the prior opinions of the circuit court); *Dawson v. Scott*, 50 F.3d 884, 892 n.20 (11th Cir. 1995) (finding precedent no longer controlled where there was an intervening Supreme Court decision).

[38] *See generally Matter of Arangure*, 27 I&N Dec. 178, 180-82 (BIA 2017) (recognizing cases applying res judicata principle in administrative law but declining to apply it).

Custody status is another consideration. Individuals who are in detention may improve their chances of ultimately winning their immigration case due to a *Pereira*-based argument but could face extended detention if their claims must be appealed administratively and/or to the appropriate court of appeals. Likewise, individuals who have been released from detention on bond or parole may face re-detention after the government issues a new NTA.

Finally, whether or not an individual already has been issued a final removal order may be an important factor. Individuals whose proceedings are still ongoing may have more opportunities to raise a *Pereira*-based argument (orally, on appeal to the BIA, through a timely motion). Those with final removal orders may find that a *Pereira*-based argument in a motion to reconsider and/or reopen is their best or only hope of defending against deportation.

B. Raising *Pereira*-Based Arguments

- **Removal Cases under 8 U.S.C. § 1229a**

Cases pending before IJs and the BIA. Individuals currently in removal proceedings before an IJ may raise a *Pereira*-based argument orally in court and/or in a brief. Individuals with cases on appeal to the BIA may file a motion to remand to apply for cancellation of removal or post conclusion voluntary departure eligibility, or a motion to terminate. 8 C.F.R. § 1003.2(c)(4). In this situation, the BIA may consolidate the motion with the underlying appeal. In addition to the motion, individuals ordered removed who have not yet filed their appeals should raise *Pereira*-based arguments in notices of appeal (Form EOIR-26), if possible, and in their merits briefing.

Cases with In Absentia Orders. As noted in Part III.B, *Pereira* supports an argument that IJs cannot issue in absentia orders in pending removal cases that were initiated by a defective NTA. Under the same reasoning, individuals who have been issued an in absentia order in proceedings that were initiated by a defective NTA could raise a *Pereira*-based argument in a statutory motion to reopen or reconsider the removal proceedings, seeking either termination (for lack of initial jurisdiction) or based on new eligibility for relief from removal. *See* Cases with Final Orders by IJs or the BIA (discussed below).

Cases with Final Orders by IJs or the BIA. Whether or not an individual appealed a final removal order to the BIA or the court of appeals, Congress afforded all individuals the opportunity to file one motion to reconsider and one motion to reopen removal proceedings. These motions must be filed within 30 or 90 days of the final order, respectively. 8 U.S.C. § 1229a(c)(6) (motions to reconsider); 8 U.S.C. § 1229a(c)(7) (motions to reopen). Practitioners may file a motion to reopen or, in alternative, a motion to reconsider but should be aware of the numerical limitation on motions and filing deadlines for each type of motion. *See* Timing & Geographical Considerations, Part IV.D, *infra* (discussing the availability of tolling). Motions to reconsider are appropriate when the IJ/BIA errs as a matter of law or fact and motions to reopen are appropriate to present new evidence. *Id.* An agency error of fact or law may form the basis of a motion to reconsider. New eligibility for relief from removal (e.g., cancellation or post conclusion voluntary departure) or termination (e.g., based on the initiation of removal proceedings with a defective NTA) may form the basis of a motion to reopen. Motions denied by

IJs are appealable to the BIA. 8 C.F.R. § 1003.1(b). BIA decisions affirming an IJ denial of a motion or BIA decisions denying motions in the first instance are reviewable on petition for review. 8 U.S.C. § 1252(b)(2).

***Cases before the Courts of Appeals*.** Individuals with a pending petition for review (PFR) before a circuit court who preserved a challenge to a defective NTA should consider filing a motion to summarily grant the PFR or a motion to remand to the BIA. If briefing moves forward, *Pereira*'s applicability may be raised in briefing. If briefing is complete, the appropriate way to raise *Pereira* is a letter under Federal Rule of Appellate Procedure (FRAP) 28(j).

In a PFR where the *Pereira*-based argument was not preserved, a practitioner nevertheless could argue that a challenge to subject matter jurisdiction is never waived and need not be exhausted. However, it is advisable to file a *Pereira*-based motion with the BIA. If the PFR is at the briefing stage, file a motion with the circuit court to hold PFR briefing in abeyance pending the BIA's adjudication of the *Pereira* motion. In this situation, attach the *Pereira* motion as an exhibit to the abeyance motion.

Likewise, individuals who filed PFRs already denied by a circuit court can file a *Pereira* motion with the BIA. If the circuit court denied the PFR and there is still time to file, or request an extension of the time to file, a rehearing petition (*see* FRAP 35 and 40 and local rules), practitioners can raise *Pereira* via a petition for rehearing, either by explaining its impact on the case (if the issue was preserved) or by explaining the issue in the first instance and asking the court to delay adjudication of the rehearing petition pending the BIA's adjudication of a *Pereira* motion.

If the circuit court denied the PFR but the mandate has not yet issued (*see* FRAP 41 and local rules), the individual may file a motion to stay the mandate pending the BIA's adjudication of a pending *Pereira* motion. Again, it is advisable to attach the motion to the BIA as an exhibit.

If the circuit court denied the PFR and the mandate has issued (*see* FRAP 41 and local rules), practitioners can consider filing a motion to recall the mandate (*see* FRAP 27 and 41, and local rules), a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment, and/or a *Pereira* motion with the BIA. It may only be worthwhile to consider moving to recall the mandate or filing a petitioner for certiorari in cases where a challenge to a defective NTA was preserved below.

- **Reinstatement Cases under 8 U.S.C. § 1231(a)(5)**

DHS may subject individuals who reenter the United States unlawfully after a prior removal order to a summary removal proceeding under 8 U.S.C. § 1231(a)(5) known as reinstatement of removal. *See also* 8 C.F.R. § 241.8. Where a *Pereira*-based argument may affect the legality of the order underlying a reinstatement order, there are at least three approaches practitioners may take; it is advisable to consider pursuing all three. First, challenge the reinstatement order on the basis that the prior order is illegal. This approach requires filing a petition for review of the reinstatement order either within 30 days of the order itself, or, if the person is referred for

reasonable fear proceedings, at the conclusion of those proceedings.[39] Moreover, for individuals in withholding only proceedings, practitioners can challenge the legality of the prior order orally or through briefing. Second, as discussed above, if the prior order resulted from removal proceedings under 8 U.S.C. § 1229a file a motion to *reconsider* the prior order with the IJ or BIA (depending on which entity last had jurisdiction). The reinstatement statute, 8 U.S.C. § 1231(a)(5), purports to bar reopening of the prior order, but a motion to reconsider is distinct from a motion to reopen. Third, file a motion to reconsider or reopen the reinstatement order under 8 C.F.R. § 103.5. This motion is filed with the DHS office that issued the order. If DHS denies the motion, consider filing a petition for review challenging the denial.[40] If a petition for review challenging the reinstatement order itself is still pending, 8 U.S.C. § 1252(b)(6) requires consolidation of the two petitions.

- **Criminal prosecutions under 8 U.S.C. § 1326**

The federal government may criminally prosecute an individual who reenters the United States unlawfully after a prior removal order under 8 U.S.C. § 1326. A defendant may collaterally attack the predicate removal order and move to dismiss the charge. *See* 8 U.S.C. § 1326(d). In any such motion, the defendant must show exhaustion of any administrative remedies, the deprivation of judicial review in the prior proceeding, and that the order was fundamentally unfair. *Id*. Circuit law varies as to the interpretation of these requirements. Attorneys who seek to dismiss a § 1326 charge through a *Pereira*-based argument may contact Kara Hartzler, at the Federal Defenders of San Diego, Inc., kara_hartzler@fd.org, for assistance and sample briefing.

- **Challenging inadmissibility under 8 U.S.C. § 1182(a)(9)(A) & (a)(9)(C) and related waiver adjudications**

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[39] The court of appeals has jurisdiction over petitions for review of reinstatement orders. If a person indicates a fear of return and DHS refers that person for a reasonable fear interview before an asylum officer, however, some circuits have held that the 30-day petition for review clock does not begin until the conclusion of reasonable fear proceedings. *See, e.g.*, *Ponce-Osorio v. Johnson*, 824 F.3d 502, 507 (5th Cir. 2016); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1186 (10th Cir. 2015); *Jimenez-Morales v. U.S. Att'y. Gen.*, 821 F.3d 1307, 1309 (11th Cir. 2016). Unless and until this issue is resolved by the Supreme Court, which theoretically could disagree with the circuits, attorneys might consider filing a petition for review within 30 days of the reinstatement order and a second petition for review at the conclusion of reasonable fear proceedings to safeguard an individual's right to judicial review. For more information, *see* Reinstatement of Removal (Apr. 29, 2013).

[40] *Compare Perez-Garcia v. Lynch*, 829 F.3d 937, 942 (8th Cir. 2016) (reviewing denial of motion to reopen reinstatement order); *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 342-43 (1st Cir. 2004) (suggesting availability of judicial review of denial of motion to reopen reinstatement order), *with Lemos v. Holder*, 636 F.3d 365, 366-67 (7th Cir. 2011) (finding lack of jurisdiction to review the denial of a motion to reopen a reinstatement order that was a veiled attempt to challenge the validity of the reinstatement order, which was the subject of a prior petition for review that the court previously had dismissed as untimely).

Individuals can be charged with inadmissibility under 8 U.S.C. §§ 1182(a)(9)(A) and (a)(9)(C)(i)(II) for having a prior removal order or for entering or attempting to enter the United States after receiving a prior removal order, respectively. Waivers of these inadmissibility grounds are available. *See* 8 U.S.C. §§ 1182(a)(9)(A)(iii) and (a)(9)(C)(iii). To the extent that a prior order covered by either of these inadmissibility grounds is susceptible to a *Pereira*-based argument, practitioners should consider: (a) contesting charges of inadmissibility under 8 U.S.C. §§ 1182(a)(9)(A) or (a)(9)(C)(i)(II) for individuals in removal proceedings; (b) challenging USCIS or EOIR determinations rendering someone ineligible for relief and/or requiring a waiver of inadmissibility; and/or (c) challenging State Department determinations rendering someone ineligible for a visa and/or requiring a waiver of inadmissibility.

C. Timing & Geographical Considerations

- **Timing Considerations**

In general, arguments that a court lacks subject matter jurisdiction may be raised at any time. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (a challenge to a court's subject matter jurisdiction "can never be forfeited or waived" because courts have an independent duty to determine if it exists) (citations omitted); *see also Kohli v. Gonzales*, 473 F.3d 1061, 1067 (9th Cir. 2007) (concluding that a noncitizen is entitled to relief from a defective NTA if the noncitizen can show that the immigration court lacked jurisdiction). Therefore, it is arguable that a *Pereira*-based argument seeking termination based on lack of subject matter jurisdiction may be raised at any time. As no court has ruled on this argument, however, practitioners are cautioned to comply with applicable motion deadlines whenever possible.

Motions to reconsider or motions to reopen removal proceedings under 8 U.S.C. § 1229a must be filed within 30 or 90 days, respectively, of a final removal order. 8 U.S.C. §§ 1229a(c)(6)(B), 1229a(c)(7)(C)(i). Significantly, however, both the time and numeric limitations on these statutory motions are subject to equitable tolling, a longstanding principle through which courts can excuse failure to comply with non-jurisdictional deadlines that litigants miss despite diligent efforts to comply. Therefore, if more than 30 or 90 days have elapsed since a removal order became final, individuals nevertheless may file a statutory motion if they successfully make—and document with evidence—an argument that the filing deadline should be equitably tolled. In general, to succeed on an equitable tolling argument, an individual must demonstrate an extraordinary circumstance that prevented timely filing and that he or she acted with due diligence in pursuing his or her rights. In *Pereira*-based motions with equitable tolling claims, practitioners may wish to argue that the extraordinary circumstances that prevented timely filing was DHS's error in issuing a defective NTA, EOIR's error in accepting the insufficient charging document, and/or EOIR's erroneous (now rejected) construction of the stop-time rule. It is important to document a noncitizen's diligence in filing a motion within 30 or 90 days of the *Pereira* decision; i.e., by Saturday, July 21, 2018 (30 days) or Wednesday, September 19, 2018 (90 days).[41] Individuals who do not learn of the decision until after September 19, 2018 may argue that tolling is appropriate if they file within 30 or 90 days of discovering the decision.

[41] *See* 8 C.F.R. § 1003.38(b) ("If the final date for filing falls on a Saturday, Sunday, or legal holiday, this appeal time shall be extended to the next business day.").

Equitable tolling claims should be well documented, including through declarations from the noncitizen detailing all efforts made to pursue their claims and/or obstacles that prevented them from timely filing as well as declarations from counsel evidencing how and when the noncitizen learned of *Pereira* and its impact on the case.[42]

Motions to reconsider or reopen reinstatement orders issued by DHS under 8 U.S.C. § 1231(a)(5) also must be filed within 30 days of DHS's decision to issue the order under 8 C.F.R. §103.5.

- **Geographical Considerations**

An additional benefit to filing statutory motions—i.e., motions that are timely filed or successfully toll the statutory deadline—is that IJs and the BIA cannot refuse to adjudicate these motions if the individual is outside the United States (either at the time of filing the motion or during its pendency) based on the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b). To date, all but one court of appeals have held that these regulations do not apply to statutory motions. Although the Eighth Circuit has not specifically addressed the issue, the Office of Immigration Litigation acknowledges that "the clear weight of authority" holds that a departure bar regulation "may not be invoked to preclude the filing of a motion to reopen."[43] In contrast to statutory motions, several courts of appeal have held that IJs and the BIA may apply the departure bar regulation to regulatory sua sponte motions filed under 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(a)[44] and have prohibited,[45] or limited the scope of,[46] judicial review over sua sponte motions. For further information on the departure bar regulations, *see* Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues (Nov. 20, 2013).

With respect to motions to reconsider or reopen reinstatement orders, the regulation at 8 C.F.R. § 103.5 does *not* contain a departure bar provision and, therefore, practitioners can file such motions even if the person is outside the United States.

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[42] For more information on motions to reopen, *see* The Basics of Motions to Reopen EOIR-Issued Removal Orders (Feb. 7, 2018) and Motions to Reopen for DACA Recipients with Removal Orders (Mar. 13, 2018).

[43] Letter from Office of Immigration Litigation, dated Jan. 26, 2018, filed in *Miranda v. Sessions*, No. 17-1430 (8th Cir.). Eighth Circuit practitioners with cases challenging the departure bar regulations may email trealmuto@immcouncil.org.

[44] *See, e.g.*, *Zhang v. Holder*, 617 F.3d 650, 665 (2d Cir. 2010); *Desai v. Att'y Gen. of the United States*, 695 F.3d 267, 271 (3d Cir. 2012); *Ovalles v. Holder*, 577 F.3d 288, 298 (5th Cir. 2009).

[45] *See, e.g.*, *Tamenut v. Mukasey*, 521 F.3d 1000, 1001 (8th Cir. 2008) (per curiam); *Butka v. U.S. Att'y Gen.*, 827 F.3d 1278, 1286 (11th Cir. 2016).

[46] *See, e.g.*, *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009); *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016); *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1271 (10th Cir. 2013).

ADDENDUM A

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DEPARTMENT OF HOMELAND SECURITY

OPPOSITION TO

MOTION TO TERMINATE

The Respondent is seeking to terminate immigration proceedings by relying on *Pereira v. Sessions*, No. 17-459, --- S. Ct. ---, 2018 WL 3058276 (U.S. June 21, 2018), to find that the respondent was not properly in proceedings due to a "defective" Notice to Appear (NTA). *Pereira* never once refers to termination and nowhere purports to invalidate the underlying removal proceedings. The question presented and answered by the Court in *Pereira* is "[w]hether, to trigger the stop-time rule by serving a 'notice to appear,' the government must 'specify' the items listed in the definition of a 'notice to appear,' including '[t]he time and place at which the proceedings will be held.'" Petition for Writ of Certiorari, *Pereira*, 2017 WL 4326325 (No. 17-459).

The Department of Homeland Security ("DHS") believes the respondent is misreading *Pereira,* and if read in a manner most favorable to the respondent, the practical impact would be to terminate virtually all immigration proceedings.

SUMMARY OF THE ARGUMENT

The Immigration Judge would err as a matter of law in terminating proceedings. *Pereira* never once refers to termination and nowhere purports to invalidate the underlying removal proceedings. The "narrow question" presented and resolved by the Court in *Pereira* is "[i]f the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, *does it trigger the stop-time rule*?" *Pereira*, 2018 WL 3058276 at *3 (emphasis added); *accord id.* at *7, *11. The Respondent's misreading of *Pereira* cannot be squared with either the text of the Court's decision or the Court's holding. Pereira, like the respondent here, received a NTA that did not specify the date and time of proceedings. The Court's holding about the stop-time rule has meaning for Pereira *because* he is in removal proceedings and wishes to seek cancellation of removal under INA § 240A(b).

The Notice of Hearing that the Immigration Court served on the respondent satisfies the statutory requirement at INA § 239(a)(1)(G) that the respondent receive notice of the time and place of hearing. *Pereira* makes clear that it is the substance of the notice, not its label, that controls. 2018 WL 3058276 at *10. It is the responsibility of the Immigration Court to schedule hearings and provide the parties with notice of the time, place and date of hearings, including the initial hearing when that information is not contained in the NTA. 8 C.F.R. § 1003.18(a)-(b). The Immigration Court fulfilled that responsibility in this case, and the Immigration Judge lacks authority to treat a Department of Justice regulation as a nullity. As a matter of controlling circuit law, a "Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of hearing is in fact later sent to that alien." *Popa v. Holder*, 571 F.3d 890, 898 (9th Cir. 2009).

STATEMENT OF FACTS

The DHS served a NTA on the respondent. It did not contain the specific date and time of hearing but advised the date was "to be set" and the time was "to be set." The Department filed the NTA with the Immigration Court. The Immigration Court subsequently issued a notice of hearing containing the date, time and place of the initial master calendar hearing and served it on both parties. *See generally* 8 C.F.R. § 1003.18(b). There was, and is, no claim by the respondent that he was not advised of the time, place and location of his immigration court hearing.

On July 11, 2018, The Deputy Chief Immigration Judge distributed the following email:

> **From:** Santoro, Christopher A (EOIR)
> **Sent:** Wednesday, July 11, 2018 11:45 AM
> **To:** All of OCIJ HDQ and Courts (EOIR) <AllofOCIJHDQandCourts@EOIR.USDOJ.GOV>
> **Subject:** Pereira v. Sessions (TBD NTAs) - updated guidance
> **Importance:** High
>
> All,
>
> The Department has concluded that, even after *Pereira*, EOIR should accept Notices to Appear that do not contain the time and place of the hearing. Accordingly, effective immediately, courts should begin accepting TBD NTAs.
>
> The message above supersedes the guidance below.
>
> **Christopher A. Santoro**
> Deputy Chief Immigration Judge

ARGUMENT

I. *Pereira v. Sessions* is a Decision About the Stop-Time Rule Applicable to Cancellation of Removal and Provides No Lawful Basis for Terminating Proceedings.

Pereira v. Sessions provides no support for termination of immigration proceedings. The question presented in *Pereira* is "[w]hether, *to trigger the stop-time rule* by serving a 'notice to appear,' the government must 'specify' the items listed in the definition of a 'notice to appear,' including '[t]he time and place at which the proceedings will be held.'" Petition for Writ of Certiorari, *Pereira*, 2017 WL 4326325 (No. 17-459) (emphasis added).[1] As *Pereira* itself makes clear, "[t]he Court granted certiorari in this case, . . ., to resolve division among the Courts of Appeals on a simple, but important, question of statutory interpretation: Does service of a document styled as a 'notice to appear' that fails to specify 'the items listed' in § 1229(a)(1) *trigger the stop-time rule*?" *Pereira*, 2018 WL 3058276 at *7 (internal citation omitted) (emphasis added). This is a "narrow question." *Id.* at *3. Accordingly, the Supreme Court framed the issue as follows: "If the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, *does it trigger the stop-time rule*?" *Id.* (emphasis added). Later, the Court again specifies that "the dispositive question in this case is much narrower, but no less vital: Does a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by § 1229(a)(1)(G)(i), *trigger the stop-time rule*?" *Id.* at *7 (emphasis added).

[1] The question presented is also available on the Supreme Court's website at https://www.supremecourt.gov/qp/17-00459qp.pdf.

The Supreme Court holds that the answer to this question is no. "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*." *Id.* at *3 (emphasis added) (quoting INA § 240A(d)(1)); *accord id.* at *7 ("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*." (quoting INA § 240A(d)(1)) (emphasis added)); *id.* at *11 ("A document that fails to include such information is not a 'notice to appear under section 1229(a)' and thus *does not trigger the stop-time rule*." (quoting INA § 240A(d)(1)) (emphasis added)). The Supreme Court's constant use of the same phrase—trigger the stop-time rule—cannot be accidental, and it leaves no doubt that *Pereira* is about what triggers the stop-time rule. *Cf. Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016) ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same. . . .").

The stop-time rule is part of section 240A of the Immigration and Nationality Act (INA or Act) and provides that "[f]or purposes *of this section*, any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 239(a)" of the Act.[2] INA § 240A(d)(1) (emphasis added). "[T]his section," i.e., section 240A of the Act, authorizes cancellation of removal, a form of relief aliens may seek in removal proceedings. The question resolved by the Court—i.e., what triggers the stop-time rule—only matters when an alien is in removal proceedings and seeking cancellation of removal. The resolution of this question matters in Pereira's case because he sought to apply for cancellation of removal in his reopened removal proceedings. *Pereira*, 2018 WL 3058276 at *6. This question, however, would be moot if the NTA in his case, which "ordered him to appear before an Immigration Judge in Boston 'on a date to be set at a time to be set[,]'" *id.*, was inadequate for proceedings to occur even after the Immigration Court served him a notice of hearing setting a date and time for the hearing.

The Supreme Court does not give advisory opinions, expressing what the law would be upon a hypothetical state of facts. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *see Thomas v. Anchorage Equal Rights Comm'n.* 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases . . . ."). The prohibition on advisory opinions has been described as "'the oldest and most consistent thread in the federal law of justiciability[.]'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). The "stop-time" ruling the Court rendered in *Pereira* was not an advisory opinion *because* the respondent is in removal proceedings and seeking relief. If the Court had perceived that Pereira might not be properly in proceedings, rendering his application for cancellation of removal and the application of the stop-time rule moot, it would have directly addressed the issue. *See, e.g.*, *North Carolina v. Rice*, 404 U.S. 244 (1971) (declining to reach the underlying question without first resolving the "threshold question" of mootness). That the Court said absolutely nothing about the termination of proceedings reflects that there was nothing to say. *See United States v. Lopez*, 518 U.S. 790, 798 (10th Cir. 2008) (Gorsuch, J.) (recognizing the "logical significance of the dog that didn't bark").[3]

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[2] Service of a NTA is not the only event that stops time under INA § 240A(d)(1), and there is an exception to the stop-time rule for aliens who seek special rule cancellation under INA § 240A(b)(2)(A).

[3] A Sherlock Holmes mystery illuminated the significance of the dog that didn't bark. *See id.* at n.2 (citing Sir Arthur Conan Doyle, *Silver Blaze*, *in* The Memoirs of Sherlock Holmes (1894)).

II. The Initial Notice of Hearing Served by the Immigration Court on the Respondent Satisfies INA § 239(a)(1)(G) and in Conjunction with the NTA Provided the Written Notice Required by § 239(a)(1) and *Pereira*.

Under the Supreme Court's analysis in *Pereira*, what qualifies as a NTA is a matter of substance, not form. "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." *Pereira*, 2018 WL 3058276 at *9. INA section 239(a)(1) requires "written notice." "Notice" means "legal notification." Black's Law Dictionary, 1090 (8th ed. 2004). It is not defined as or limited to a single sheet of paper. *See id.* "The fact that the government fulfilled its obligations under INA § 239(a) in two documents—rather than one—did not deprive the IJ of jurisdiction to initiate removal proceedings." *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006). The second document, the "Notice of Hearing[,] perfected the notice required by § 239(a)(1)[.]" *Guamanrrigra v. Holder*, 670 F.3d 404, 410 (2d Cir. 2012); *see Pereira*, 2018 WL 3058276 at *14 (Kennedy, J., concurring) (citing *Dababneh* and *Guamanrrigra* with approval for the proposition that the stop-time rule is triggered when the written notice required by INA § 239(a)(1) is "perfected").

Likewise, the INA does not require a document labeled as a NTA. Rather, it uses the term "notice to appear" as a shorthand way of referring to the "written notice" that conveys the information required by INA § 239(a)(1). *See Pereira*, 2018 WL 3058276 at *10. "The INA simply requires that an alien be provided written notice of his hearing; it does not require that the NTA . . . satisfy all of § 1229(a)(1)'s notice requirements." *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2006). For example, in *Pereira* the Court observed that an Order to Show Cause (OSC) that specifies the time and place of proceedings may qualify as a "notice to appear" for purposes of the stop-time rule. 2018 WL 3058276 at *10 n.9. Conversely, "a document that is labeled 'notice to appear,' but [that] fails to specify either the time or place of the removal proceedings" is insufficient to trigger the stop-time rule. *Id.* at *3. Congress intended for the contents of the document, i.e., notice of the time and place and hearing to control, not the title affixed to it. *Id.* at *9 (rejecting the opposite approach as "absurd"). The law eschews "plac[ing] form over substance, and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); *see, e.g., Tokyo Kikai Seisakusho, Ltd. v. TKS (U.S.A.), Inc.*, 529 F.3d 1352, 1360 n.8 (Fed. Cir. 2008) (declining "to exalt form over substance" by limiting an agency's authority "based on how it decided to label its proceedings").

In this case, like many others, the Immigration Court issued and served on both parties a notice of hearing that provided the required notice of the time and place of hearing. This "two-step notice procedure" in which the Department serves a NTA and the Immigration Court serves a notice of hearing that provides written notice of the time and place of hearing, "is permissible" and has been upheld consistently by the circuit courts, including the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). *Popa v. Holder*, 571 F.3d 890, 895 (9th Cir. 2009) (citing *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir.2009); *Dababneh*, 471 F.3d at 809-10 (7th Cir.2006); and *Haider*, 438 F.3d at 907)); *accord Guamanrrigra*, 670 F.3d at 410. By providing such written notice the Immigration Court fulfilled its responsibility under Department of Justice regulations authorizing the Immigration Courts to "schedul[e] cases and provid[e]

notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. § 1003.18(a).[4] These regulations specifically contemplate that "[i]f that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. § 1003.18(b). That is exactly what happened in this case. To terminate proceedings where the Executive Office for Immigration Review (EOIR) adhered to 8 C.F.R. § 1003.18(b) would render compliance with the regulation an empty gesture and the substance of the regulation a nullity. "[O]nce a regulation is properly issued by the Attorney General, it is the obligation of this Board and the Immigration Judges to enforce it. Regulations promulgated by the Attorney General have the force and effect of law as to this Board and the Immigration Judges." *Matter of L-H-P-*, 27 I&N Dec. 265, 267 (BIA 2018) (quoting *Matter of H-M-V-*, 22 I&N Dec. 256, 261 (BIA 1998)).

Moreover, this two-step process was approved in the context of challenges to *in absentia* orders, *e.g.*, and the Supreme Court found that the same requirements for *in absentia* orders, *see* INA § 240(b)(5)(A) & (C), apply to the stop-time rule. *Pereira*, 2018 WL 3058276 at *11. Under *Pereira* the stop-time rule requires "notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1)." *Id.* An *in absentia* order likewise requires that "written notice has been provided to the alien or the alien's counsel of record, either through service of a Notice to Appear containing the hearing date and time, or through service of a subsequent Notice of Hearing." *Matter of M-R-A-*, 24 I&N Dec. 665, 670 (BIA 2008) (citing INA § 239(a)(1)-(2)). Circuit court decisions approving of the two-step process of a NTA followed by a notice of hearing to provide the written notice required under INA § 239(a)(1) have arisen in both contexts—*in absentia* orders and the stop-time rule.

"[C]ourts have often recognized that a failure to give a person a required notice can be harmless—e.g., where the person had actual knowledge of the relevant information or the notice defect was cured by a subsequent notice given in time for the person to act on the matter." *Suntec Industries Co., Ltd. v. United States*, 857 F.3d 1363, 1369 (Fed. Cir. 2017) (citing cases).[5] In *Popa* the Ninth Circuit held that a "Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of hearing is in fact later sent to that alien." 571 F.3d at 896 (upholding the denial of a motion to reopen following an *in absentia* order). The Eighth Circuit put it more emphatically: "Our reading of the INA and the regulations compels the conclusion that the NTA and the NOH [notice of hearing], which were properly served on Haider, combined to provide the requisite notice." 438 F.3d at 907 (same). The court elaborated:

> The NTA initiated removal proceedings against Haider and informed him that an NOH would be mailed to the address listed on the NTA. . . . As promised, the Immigration Court later mailed the NOH containing the date and time of the hearing to Haider. We see nothing unlawful about this conduct. Indeed, the regulations

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[4] Westlaw, in its "West Codenotes," says 8 C.F.R. § 1003.18 was "held invalid." 2018 WL 3058276 (prefatory material in front of *1). How Westlaw arrived at that supposition is opaque; the majority opinion and concurrence never cite 8 C.F.R. § 1003.18. The dissent cites it twice, without any suggestion that it is no longer valid. *See* 2018 WL 3058276 at *18, *21 (Alito, J.). While Westlaw is a valuable research tool, it is a database, not a source of law.

[5] *Suntec* involved an administrative order by the Department of Commerce, which the court upheld. 859 F.3d at 1365. Although the request to initiate "anti-dumping" proceedings was not properly served on Suntec, when Commerce initiated its review it published notice in Federal Register. *See id.* at 1364-65. The court explained that the "crucial fact . . . is that there was an intervening event between" the request and the proceedings themselves, i.e. that the agency conducting the proceedings provided legally sufficient notice. *Id.* at 1368.

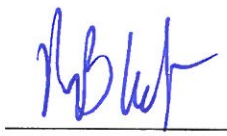
> reasonably authorize the Immigration Court to set the date and time of its own hearings and provide due notice to the alien. . . .
>
> We wish to be clear that the NTA, if it were the only notice served on Haider in this case, would not have authorized *in absentia* removal because Haider would not have been served notice of the date and time of the hearing as required by § 1229(a)(1).

Id. at 907-08. The Notice to Appear was not statutorily defective because "the NTA and the hearing notice combined provided [the respondent] with the time and place of her hearing, as required by 8 U.S.C. § 1229(a)(1)(G)(i)." *Popa*, 571 F.3d at 896. *Peirera* does not overturn or abrogate the holdings in *Popa* and *Haider*, but rather is consistent with them.

Finally, over two years ago the Third Circuit held that this two-step procedure is required to trigger the stop-time rule. *Orozco-Velasquez v. Att'y Gen. of the U.S.*, 817 F.3d 78 (3d Cir. 2016). As that court explained, "the government did not comply with § 1229(a)(1)'s directive until April 2010, when it served Orozco-Velasquez with a NTA correcting the address of the Immigration Court and a Notice of Hearing establishing the date and time of removal proceedings." *Id.* at 83. *Pereira* reached the same holding as *Orozco-Velasquez*. *See* 2018 WL 3058276, at *7 n.4. Just as *Orozco-Velasquez* did not result in the termination of proceedings, neither does *Pereira*.

CONCLUSION

For all the above reasons, the Immigration Judge should dismiss the Motion to Terminate Removal Proceedings and allow this case to proceed forward.



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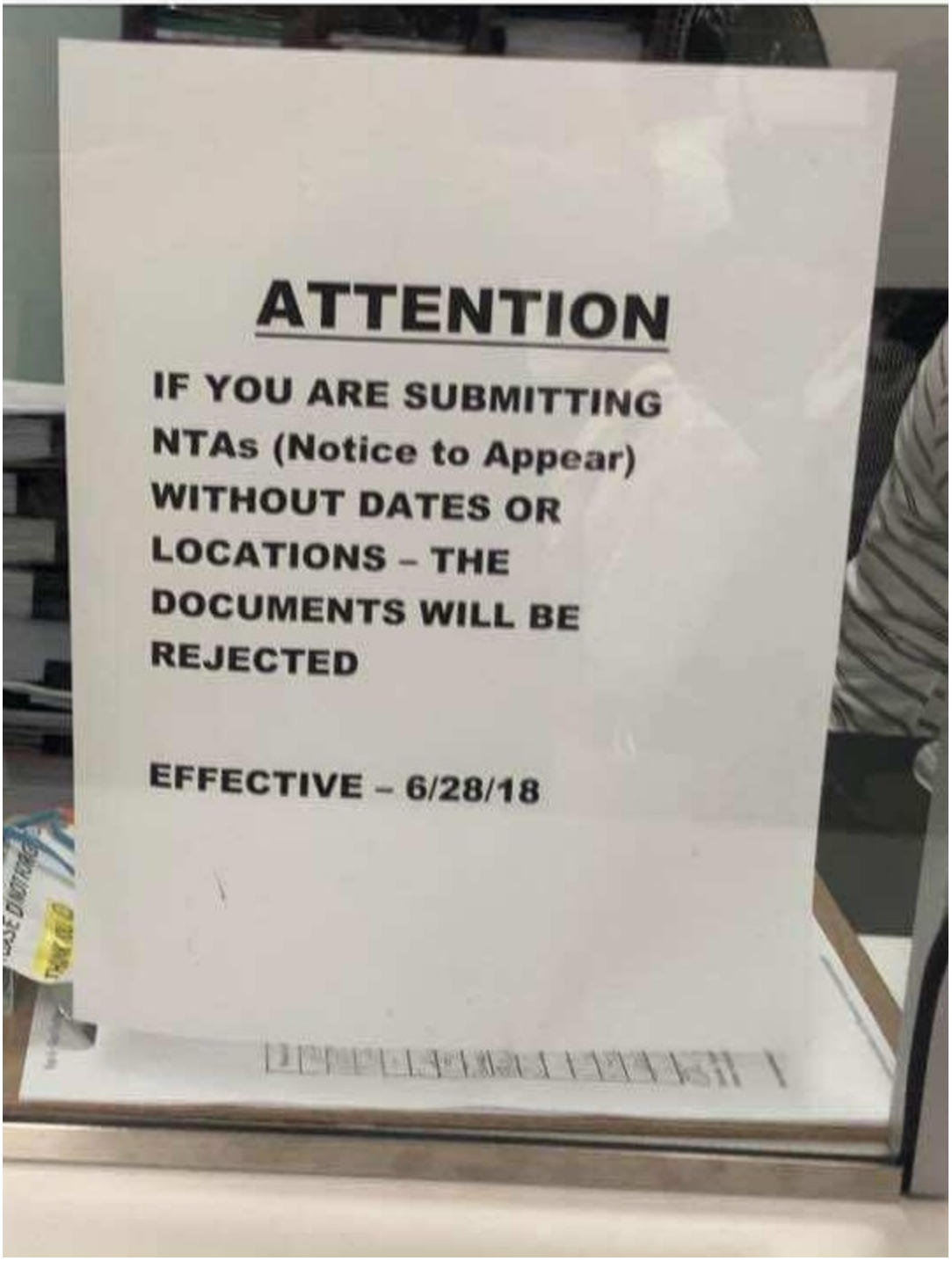
ADDENDUM B


ATTENTION
IF YOU ARE SUBMITTING NTAs (Notice to Appear) WITHOUT DATES OR LOCATIONS – THE DOCUMENTS WILL BE REJECTED
EFFECTIVE – 6/28/18