PRACTICE ADVISORY

Challenging the Validity of Notices to Appear Lacking Time-and-Place Information

How to use *Pereira v. Sessions* to overcome the "stop-time" rule, to challenge Immigration Court jurisdiction, and to reopen old removal orders

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Challenging the Validity of Notices to Appear Lacking Time-and-Place Information[1]

How to use *Pereira v. Sessions* to overcome the "stop-time" rule to challenge Immigration Court jurisdiction, and to reopen old removal orders

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Practice Advisory

I. Overview

On June 21, 2018, the U.S. Supreme Court, in an 8-1 decision, held that the stop-time provision of the cancellation of removal physical presence eligibility requirement is not triggered by service of a document styled as a notice to appear for removal proceedings that does not include the date and time of hearing. *Pereira v. Sessions*, ___ U.S. ___, No. 17-459 (June 21, 2018). The Court's holding extends availability of cancellation of removal relief to many persons in current or past removal proceedings who have been served such deficient notices before acquiring the required ten or seven years of continuous physical presence (ten for nonpermanent residents, seven for lawful permanent residents).

For noncitizens who have received (or will receive) a putative "Notice to Appear" (NTA) that lacks time and date information, the *Pereira* decision has significant implications that go beyond its express holding, including:

- The opportunity to apply for cancellation of removal, for those noncitizens whose applications were improperly pretermitted.
- The ability to file a motion to terminate removal proceedings by using *Pereira* to challenge the Immigration Court's jurisdiction.
- The ability to file a motion to reconsider and terminate or to apply for cancellation of removal.
- The ability to file a motion to reopen an *in absentia* removal order.
- The ability to file a motion to dismiss illegal reentry charges under 8 U.S.C. § 1326.

This practice advisory summarizes the *Pereira* decision, makes suggestions for addressing these issues, and offers ideas to counteract some of DHS's arguments that would limit the *Pereira* holding to the facts of that case. It has been updated to include an expanded discussion of requirements and guidance for filing motions to reconsider and reopen for individuals who are not currently in ongoing removal proceedings before the agency and have already been removed. (*See* § III.A.). It also includes additional guidance on motions to rescind *in absentia* removal orders (*See* § III.D.). **Please note that motions to reconsider or reopen should ideally be filed by July 23, 2018 or September 19, 2018 (*See generally infra* § III).**

II. The *Pereira* Decision

A. Summary of the Case

Wescley Fonseca Pereira is a native and citizen of Brazil who was admitted to the United States on a temporary visitor visa in 2000 and remained after his visa expired. In 2006, the Department of Homeland Security (DHS) served him with a putative[2] (meaning, "so-called" or "supposed") "Notice to Appear" (NTA) that charged him as removable for overstaying his visa, but the putative NTA did not specify the date and time of his removal hearing. Instead, this document ordered him to appear before an Immigration Judge at a date and time to be set in the future. Then, in 2007, more than a year later, DHS filed the putative NTA with an Immigration Court and mailed Pereira a separate notice of hearing setting the date and time for his hearing. This separate notice of the actual hearing date was sent to a street address rather than the post office box address Pereira had provided, and was returned as undeliverable. Then, when Pereira did not appear on the specified hearing date, the Immigration Court ordered him removed *in absentia*.

Subsequently, in 2013, Pereira was arrested for a minor motor vehicle violation and detained by DHS based on the prior *in absentia* removal order. However, the Immigration Court reopened his removal proceedings after Pereira demonstrated that he had not received the Immigration Court's 2007 notice setting out the specific date and time of his hearing. Since Pereira had by then been in the country for more than 10 years, Pereira applied for cancellation of removal under INA § 240A(b)(1) (providing cancellation of removal and adjustment of status for a noncitizen who satisfies certain threshold eligibility criteria, including physical presence in the United States for a continuous period of not less than ten years). He argued that the INA § 240A(d)(1)(A) "stop-time" rule cutting off the clock for counting the required ten years when the noncitizen is served a "notice to appear under section 239(a)" was not triggered by DHS'

[2] We use the descriptor "putative" to distinguish a document that DHS styles as a Notice to Appear and uses to initite removal proceedings but that is deficient, from a properly completed Notice to Appear that has full legal effect under the INA.

2006 putative NTA because that document lacked information about the time and date of his removal hearing as required by INA § 239(a)(1)(G).[3]

The Immigration Court rejected Pereira's argument, finding the law settled that DHS need not put a date certain on the NTA in order to make that document effective, and the BIA dismissed Pereira's appeal citing its prior decision in *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011) (reasoning that the statutory phrase "notice to appear 'under section 239(a)' merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but otherwise imposes no "substantive requirements" as to what information that document must include to trigger the stop-time rule).

On petition for review, the United States Court of Appeals for the First Circuit denied Pereira's appeal. The First Circuit found that the stop-time rule statutory language was ambiguous and then deferred to the BIA, finding that the BIA's interpretation of the stop-time rule in *Matter of Camarillo* was a permissible reading of the statute. *Pereira v. Sessions*, 866 F.3d 1 (1st Cir. 2017).

B. Holding

In its June 21, 2018, decision, the Supreme Court reversed the First Circuit Court of Appeals. Justice Sotomayor, writing for the 8-Justice majority, began her opinion by stating what the majority viewed as the narrow question in the case and the simple answer:

> 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? The answer is as obvious as it seems: 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 [239(a)]" and therefore does not trigger the stop-time rule.

[3] It is important to note that the other provision of the "stop-time" rule—INA § 240A(d)(1)(B)—that is based on convictions that may interrupt the continuous presence or residence requirement, is not affected by the *Pereira* decision.

> The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion.

Slip op. 2.

Addressing the plain text of the statute, the Court stated that the cancellation of removal stop-time rule provides that "any period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section [239(a)]." Slip op. 9. The Court then looked to INA § 239(a) and stated that § 239(a)(1) provides that, in removal proceedings, a "notice to appear" is a "written notice . . . specifying," *inter alia*, "[t]he time and place at which the proceedings will be held." *Id*. The Court concluded: "Thus, based on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, 'specif[ies]' the 'time and place' of the removal proceedings." *Id*.

Moving on to the statutory context, the Court observed that § 239(a)(2) provides that, "in the case of any change or postponement in the time and place of [removal] proceedings," the Government shall give the noncitizen "written notice . . . specifying . . . the new time or place of the proceedings." *Id.* at 10. The Court stated: "By allowing for a 'change or postponement' of the proceedings to a 'new time or place,' paragraph (2) presumes that the government has already served a 'notice to appear under section [239(a)]' that specified a time and place as required by section [239(a)(1)(G)(i)]."[4] *Id.* at 10.

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[4] Further support for the Court's view that the current statutory scheme requires the initial notice to appear to include the time and place of hearing is provided by a review of the statutory history. Before the current statutory scheme was enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the governing statute provided for two separate notices regarding the initiation of removal proceedings. The prior statute first provided for a notice called an "Order to show cause," which was required to include much of the other information in current INA § 239(a), but was not required to include the time and date of proceedings. Instead, in a second, separate subsection, the statute explicitly provided for a second type of notice: a "Notice of time and place of proceedings." INA § 242B(a)(2) (repealed 1996). That notice was required to convey "the time and place at which the proceedings will be held," and the consequences of failing to appear. *Id*. However, when Congress passed IIRIRA, it directly replaced the two separate notices with a single notice, the "notice to appear." The statute now requires the notice to appear to contain all of the exact same information that was required in an "order to show cause," *compare* § 242B(a)(1)(A)-(F) (repealed 1996), *with* current § 239(a)(1)(A)-(F), but also contains one conspicuous change: IIRIRA deletes the separate subsection providing for a "notice of time and place of proceedings" and instead requires that the "time and place at which the proceedings will be held" be included in the single notice to appear. *See* INA § 239(a)(1)(G); *see also Pereira v. Sessions*, No. 17-459, Brief for AILA,

Finally, the Court stated that common sense supported its ruling. The Court stated: "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." *Id.* at 12.

The Court thus found the statute clear and unambiguous and stated that it need not resort to *Chevron* deference as did the court below.[5] *Id.* at 9. In doing so, the Court rejected all the arguments that the government raised that the Court described as "[s]training to inject ambiguity into the statute." *Id.* at 13; *see* discussion of the government arguments at 13-20. For example, the Court rejected the government's contention that Congress' use of the word "under" in the § 240A(d) stop-time rule renders the statute ambiguous. The government had argued that the word "under" in that provision means "subject to," "governed by," or "issued under the authority of" § 239(a) without requiring that a notice to appear necessarily include all the information set forth in § 239(a), e.g., time-and-place information. The Court disagreed based on the plain language and statutory context that the majority opinion had already discussed, stating that "we think it obvious that the word 'under,' as used in the stop-time rule, can only mean "'in accordance with' or 'according to,' for it connects the stop-time trigger in § [240A(d)(1)] to a 'notice to appear' that contains the enumerated time-and-place information described in § [239(a)(1)(G)(i)]. . . . Far from generating any 'degree of ambiguity,' . . . the word 'under' provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § [239(a)]." *Id.* at 16 (citations omitted).

The Court also rejected the government's argument that surrounding statutory provisions that used language such as "written notice required under" or "notice in accordance with" § 239(a) indicated that Congress required something less when it just used the phrase "under" in the stop-time rule. *Id.* at 16-17. The Court stated that "[t]he far simpler explanation, and the one that comports with the actual statutory language and context, is that each of these three phrases refers to notice satisfying, at a minimum, the time-and-

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IDP et al. as Amici Curiae in Support of Petitioner at 8-11.

[5] In a concurring opinion, Justice Kennedy went further and criticized what he viewed as the "cursory analysis" some Courts of Appeals have engaged in of whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned. Kennedy concurring opinion at 2. Justice Kennedy suggested that this represented "an abdication of the Judiciary's proper role in interpreting federal statutes." *Id.*; *see also Pereira v. Sessions,* No. 17-459, Brief for NIJC as Amicus Curiae in Support of Petitioner at 7-19.

place criteria defined in § [239(a)(1)]." *Id.* at 17. **For those wishing to extend the Court's reading of what is required for an NTA to satisfy the notice requirements to justify the issuance of an *in absentia* order, it is noteworthy that the other statutory provisions in this portion of the Court's decision relate to *in absentia* orders.. *See* INA §§ 240(b)(5)(A) & (b)(5)(C)(ii) (discussing procedures and requirements for issuing and rescinding *in absentia* removal orders initiated by notices that comply with § 239(a)(1), the statutory provision at issue in *Pereira*).** Thus, the Court's conclusion that statutory references to notices under § 239(a) must be read as "notice satisfying, at a minimum, the time-and-place criteria defined in § [239(a)]" extends *a fortiori* to these statutory *in absentia* order provisions.[6] *Id.*

In addition, the Court dismissed practical concerns raised by the government that the "administrative realities of removal proceedings" render it difficult to guarantee each noncitizen a specific time, date, and place for his removal proceedings at the time of service of the NTA. *Id.* at 18-19. The Court noted the government's concession that in the past DHS and the Immigration Court had a scheduling system that enabled the agencies to coordinate in setting hearing dates and commented 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." *Id.* at 19.

C. Case Law Overruled

The Supreme Court's holding overrules the BIA's holding in ***Matter of Camarillo***, 25 I&N Dec. 644 (BIA 2012), which had ruled that, under the "stop-time rule" at INA § 240A(d)(1), any period of continuous residence or continuous physical presence of a noncitizen applying for cancellation of removal under § 240A is deemed to end upon the service of a notice to appear on the noncitizen, even if the notice to appear does not include the date and time of the initial hearing. The Court's holding also overruled the following federal circuit court decisions reaching the same conclusion in deference to the BIA:

- ***Moscoso-Castellanos v. Lynch***, 803 F.3d 1079, 1083 (9th Cir. 2015) (finding the statute ambiguous and deferring to the BIA's interpretation);

[6] Notably, the Court had earlier observed the "quite severe" consequences under the INA of a noncitizen's failure to appear at a removal proceeding after having been "properly" served with the written notice required under INA § 239(a). Slip op. 4.

- ***O'Garro v. United States Atty. Gen.***, 605 F. Appx. 951, 953 (11th Cir. 2015) (per curiam) (same);
- ***Guaman-Yuqui v. Lynch***, 786 F.3d 235, 239-240 (2d Cir. 2015) (per curiam) (same);
- ***Gonzalez-Garcia v. Holder***, 770 F.3d 431, 434-435 (6th Cir. 2014) (same);
- ***Yi Di Wang v. Holder***, 759 F.3d 670, 674-675 (7th Cir. 2014) (same);
- ***Urbina v. Holder***, 745 F.3d 736, 740 (4th Cir. 2014) (same).

The Supreme Court's holding is consistent with the Third Circuit ruling in *Orozco-Velasquez v. Attorney General United States*, 817 F.3d 78, 83-84 (3rd Cir. 2016) (holding that the stop-time rule unambiguously requires service of a "notice to appear" that meets § 239(a)(1)'s requirements).

III. Ideas for Utilizing the *Pereira* Decision

This section offers strategies to consider for individuals whose cases are affected by *Pereira*. These include: 1) individuals who have pending removal proceedings before the IJ or BIA; 2) individuals who have been ordered removed by the IJ or BIA, and have either been deported already or are still physically present in the United States; and 3) individuals who have been ordered removed by the BIA and have pending or denied petitions for review from a court of appeals, and have either been deported already or are still physically present in the United States. For those individuals already ordered removed, accompanying this advisory are two sample motions to reconsider that seek either reconsideration and termination of removal proceedings, or reconsideration and remand of removal proceedings for a hearing on an application for cancellation of removal as a result of the *Pereira* decision. *See* Appendices A & B (Sample Motions to Reconsider). Because the *Pereira* decision affects both the proper application of the stop-time rule as a bar to relief, and also the jurisdiction over removal proceedings in the first place, individuals must assess the impact of *Pereira* on their particular case—i.e., whether they can seek termination of removal proceedings, or the ability to apply for discretionary relief from removal. The attached sample motions to reconsider maybe be used to seek termination or a relief hearing. They are prepared for filing with the BIA, but can be adapted for filing with the Immigration Court, and for filing in the slightly distinct cases of motions to reopen and rescind *in absentia* removal orders.

A. Procedures and Deadlines in Cases Involving *Pereira*

1. Individuals in Pending Removal Proceedings

Individuals who are in removal proceedings (either before an IJ or on appeal at the BIA) and whose cases are affected by *Pereira* should promptly bring the decision to the attention of the IJ or BIA, explaining how the decision controls the removability or relief eligibility question at issue. For example, if the putative NTA filed to initiate the person's case did not contain the required time and place information of the first hearing, the person may be able to file a motion to terminate. *See* Section III(C). If the person becomes eligible for cancellation of removal because the issuance of the putative NTA no longer can be found to trigger the stop-time rule, the individual could argue that *Pereira* eliminates the prior bar to relief.

An individual could bring the *Pereira* decision to the attention of the IJ or BIA by filing a notice of supplemental authority, *see* BIA Practice Manual, Ch. 4.6(g), (Supplemental Briefs) 4.9 (New Authorities Subsequent to Appeal); a motion to terminate (if appropriate), or a merits brief. If the case is on appeal at the BIA and the person is eligible for relief as a result of the decision, it is advisable to file a motion to remand, *see* BIA Practice Manual Ch. 5.8 (Motions to Remand), *before* the BIA rules on the appeal to preserve his or her statutory right to later file *one* motion to reconsider and reopen (*see* further below in this section, *Administrative Motion to Reconsider*).

2. Individuals with Final Orders

***Petition for Review*.** Individuals with pending petitions for review should consider filing a motion to summarily grant the petition or a motion to remand the case to the BIA, whichever is appropriate. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, the opening brief and/or the reply brief should address *Pereira*. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure (FRAP) 28(j) ("28(j) Letter") informing the court of the decision and its relevance to the case.

***Denied Petition for Review*.** If the court of appeals already denied a petition for review, and the time for seeking rehearing has not expired (*see* FRAP 35 and 40 and local rules), a person may file a petition for rehearing, explaining *Pereira*'s relevance to the case and its impact on the outcome. If the court has not issued the mandate, a person may file a motion to stay the mandate. *See* FRAP 41 and local rules. If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. *See* FRAP 27 and 41, and local rules. Through the motion, the person should ask the court to reconsider its prior decision in light of *Pereira* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). *See* FRAP 13. The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Pereira*. *See, e.g.*, *Madrigal-Barcenas v. Lynch*, No. 13-697

(2015) (petition granted, judgment vacated, and case remanded for further consideration in light of *Mellouli v. Lynch*, 575 U. S. ___, 135 S.Ct. 1980 (2015)).

***Administrative Motion to Reconsider*.** Regardless whether an individual sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case). There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* 8 U.S.C. §1229a(c)(6)(C).[7] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* 8 U.S.C. §§1229a(c)(6)(B) and 1229a(c)(7)(C)(i). If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of June, 2018, the date the Court issued its decision in *Pereira*, i.e., by **July 23, 2018, or September 19, 2018**, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Pereira* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (establishing the factors for equitable tolling determinations). *See also, e.g., Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000) (applying equitable tolling to the motion to reopen/reconsider deadline in the immigration context); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc) (same).[8] Individuals should label their motions: "Statutory Motion to Reconsider." *Arguably*, the BIA may not deny a statutory motion to reconsider or reopen in the exercise of discretion. [9]

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[7] For technical assistance with filing motions to reconsider, or petitions for review of denial of motions to reconsider, please contact Andrew Wachtenheim (andrew@immdefense.org) at IDP, or Trina Realmuto (TRealmuto@immcouncil.org) or Kristin Macleod-Ball (KMacleod-Ball@immcouncil.org) at the American Immigration Council.

[8] For additional resources regarding equitable tolling of the time and numeric limitations on motions to reconsider, *see* NIP-NLG and AIC, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (2013) *available at* https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_20Nov_departure-bar.pdf.

[9] For additional resources supporting the argument that the BIA lacks discretion to deny a timely-filed statutory motion to reconsider or reopen, s*ee* AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders, §8 Can the IJ or BIA deny statutory motions to reopen in the exercise of discretion?* (2018) *available at*

If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel *might* consider making an *alternative* request for *sua sponte* reconsideration or reopening (i.e., "Statutory Motion to Reconsider or, in the Alternative, Reconsider *Sua Sponte*").

3. Additional Considerations for Individuals Abroad

An individual's physical location outside the United States *arguably* should not present an obstacle to returning to the United States if the Court of Appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the Court of Appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS *should* facilitate the petitioner's return to the United States.[10]

Noncitizens outside the United States may file administrative motions notwithstanding the departure bar regulations, 8 C.F.R. §§1003.2(d) and 1003.23(b), if removal proceedings were conducted within any judicial circuit, with the exception of removal proceedings conducted in the Eighth Circuit.[11] If filing a motion to reconsider or reopen in the Eighth Circuit, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations. It is important to note that the cases invalidating the departure bar regulation involved statutory (not *sua*

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https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf

[10] For more information about returning to the United States after prevailing in court or on an administrative motion, *see* NIP-NLG, NYU Immigrant Rights Clinic, and AIC, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (April 27, 2015) *available at* https://www.americanimmigrationcouncil.org/practice_advisory/return-united-states-after-prevailing-petition-review-or-motion-reopen

[11] Although the BIA interprets the departure bar regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the Courts of Appeals (except the Eighth Circuit, which has not decided the issue) have invalidated the bar. *See Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

sponte) motions to reopen or reconsider. In those cases, the courts found the regulation is unlawful either because it conflicts with the motion to reopen or reconsider statute or because it impermissibly contracts the BIA's jurisdiction. Thus, whenever possible, counsel should make an argument that the motion qualifies under the motion statutes (8 U.S.C. §§1229a(c)(6) or 1229a(c)(7)), i.e., that the motion is timely filed or that the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Counsel should consider arguing that the statutory deadline should be equitably tolled due to errors outside the noncitizen's control that are discovered with diligence or due to ineffective assistance of counsel. If the person did not appeal her or his case to the Board or circuit court, counsel may wish to include a declaration from the person explaining the reason, including lack of knowledge about the petition for review process or inability to afford counsel. Counsel should also review the record to determine whether the immigration judge, DHS counsel, or prior counsel led the noncitizen to believe that any further appeals would be futile.

Significantly for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See*, *e.g.*, *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009). In addition, most Courts of Appeals have held that they lack jurisdiction to review *sua sponte* motions.[12]

B. Terminating Proceedings or Applying for Cancellation Where Stop-Time Rule Improperly Applied,

The Court's direct holding expands availability of cancellation of removal discretionary relief not only to Mr. Pereira but also to the many other persons in current or past removal proceedings who were in the past served notices to appear lacking time and place of hearing information before acquiring the 10 years of continuous physical presence (or, in the case of a lawful permanent resident, 7 years of continuous residence)[13] required for cancellation of removal but who later acquired the 10/7 years.

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[12] For additional information on the departure bar regulations, *see* NIP-NLG and AIC, D*eparture Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (Nov. 20, 2013) *available at* https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_20Nov_departure-bar.pdf.

[13] Although the Supreme Court was faced in this case with application of the stop-time rule to a non-lawful permanent resident applying for INA § 240A(b)(1) cancellation of removal requiring 10 years of continuous physical presence, there is no reason to think that the holding would not also apply to

Any such noncitizen in current proceedings who has since acquired the 10/7 years of continuous physical presence/residence may now move to apply for cancellation of removal in the pending proceeding with no application of the stop-time rule.

And any such noncitizen who has already been ordered removed may be able to move to reconsider/reopen past removal proceedings due to the defective NTA. *See supra* § III.A. "Procedures and Deadlines for Using *Pereira* in Pending and Completed Agency Proceedings." *See also* Appendix A, Sample Motion to Reconsider/Reopen to Terminate Removal Proceedings; Appendix B, Sample Motion to Reconsider/Reopen to Remand for Hearing on an Application for Cancellation of Removal. Note that such motion should be ideally be filed by **July 23, 2018 or September 19, 2018**.

The Court's decision in *Pereira* may also support arguments for termination of removal proceedings based on the deficiencies in a putative NTA that were at issue in *Pereira*, and thus support motions to reconsider and terminate for those already ordered removed. For more guidance on seeking termination in light of *Pereira*, see the following section. *See infra* § III.C.

C. Motions to Terminate Challenging Jurisdiction in Immigration Court More Generally

The Court's decision also supports arguments for challenging the Immigration Court's jurisdiction over a case that was initiated by a putative NTA that lacks the requisite time and place information for it to constitute a NTA as defined at INA § 239(a).[14] An Immigration Judge applying *Pereira*, the INA, and the Attorney General's own regulations should find that no jurisdiction lies when DHS serves a putative NTA without the requisite time and place of the hearing. Here's why. Under 8 C.F.R. § 1003.14(a): "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." The regulations define "Notice to Appear" as a charging document. *See* 8 C.F.R. § 1003.13.

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application of the stop-time rule to a lawful permanent resident applying for INA § 240A(a) cancellation of removal requiring 7 years of continuous residence.

[14] Immediately following the *Pereira* decision, Professor Kit Johnson published a resource regarding the jurisdictional implications of the decision. *See* Kit Johnson, *Pereira v. Sessions: A Jurisdictional Surprise for Immigration Courts*, July 10, 2018, *available* at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211334 (last visited Jul. 12, 2018).

In *Pereira*, the Supreme Court does not treat a putative NTA that lacks the time and place of the hearing as being a valid NTA. Thus if DHS has failed to comply with the statutory statutory and regulatory requirements to "initiate a removal proceeding," DHS has failed to "initiate a removal proceeding" and the Immigration Court never had jurisdiction over the case in the first place.

The EOIR must follow governing regulations, federal statutes, and Supreme Court decisions. A brief that DHS submitted in several immigration courts since *Pereira* cites to language in 8 C.F.R. §§ 1003.18 (a) & (b) to argue that an immigration judge has jurisdiction despite *Pereira*. What DHS ignores is that the Court criticized that *same* regulation because it purported to permit DHS to include date and time information "where practicable," whereas the statute makes time and date information *mandatory*. *Pereira*, slip op. at 5.

The Board, itself, recognizes, as it must, that it should not follow its own decisions or regulations when the Supreme Court rejects them. *See Matter of ELH-*, 23 I&N Dec. 814 (BIA 2005) (holding that a BIA precedent decision remains controlling unless the Attorney General, Congress, or a federal court modifies or overrules a decision). *See also* 8 C.F.R. § 1003.1(d)(7).

Therefore, if you have time, prepare a written motion to terminate arguing the Immigration Court lacks jurisdiction to proceed because the putative NTA that DHS may have served your client and filed with the Immigration Court is not a valid NTA within the meaning of INA § 239(a), which the statute and regulations require for jurisdiction to vest. The sample Motion to Reconsider and Terminate attached at Appendix B can be modified to a motion to terminate for filing with the Immigration Court. As identified in that sample motion, the noncitizen should argue that the statute is "definitional," *Pereira*, slip op. at 13, and even if the noncitizen has appeared already appeared before the Immigration Court, all intervening actions were void *ab initio* because the charging document was invalid and the Court never obtained jurisdiction in the first place. Subsequent hearing notices cannot cure the invalid NTA because EOIR does not have the authority to issue NTAs.

If the noncitizen in your case is currently in removal proceedings and does not have time to file a written motion, you can still orally preserve these arguments. When the Immigration Judge asks how the respondent answers the allegations in the NTA and pleads to the charges, you can respond by saying that the Immigration Court lacks jurisdiction since the putative NTA provided to the respondent and filed with the Immigration Court is not a valid NTA, which the statute and regulations require for jurisdiction to vest. You should then ask the judge for time to submit written argument. For individuals already ordered deported, please see *supra* § III.A. for guidance on filing a motion to reconsider and terminate.

D. Motions Challenging *in absentia* Removal Orders

The *Pereira* Court recognized an *in absentia* order as a potential consequence for a noncitizen who received a putative NTA. *Pereira*, slip op. at 4. In cases where the putative NTA lacked time and place information, it is not a valid NTA under the statute and any *in absentia* removal order entered in those proceedings should be rescinded and removal proceedings reopened and terminated. In such cases, the noncitizen should, as described *supra* § III.A., file a motion to reconsider under *Pereira* within 30 (or 90) days of the removal order and seek equitable tolling. However, the *in absentia* removal order provision of the INA (*see* INA § 240(b)(5)(C)), is distinct from the provisions that deal broadly with motions to reopen and reconsider (*see* INA §§ 240(c)(6), (7)), in that the statutory language of the *in absentia* rescission section contain no specified time limitations for filing. But because *Pereira*'s interaction with these statutory provisions is complex, and the immigration courts and BIA are generally hostile to motions to reopen and reconsider, exercising diligence by filing as close to the 30 and 90 day deadlines as possible is advisable.

As the Board has recognized, an IJ should reopen an *in absentia* order where the immigration court lacked jurisdiction to hear the case in the first instance. *See Matter of Mejia-Andino*, 23 I&N Dec. 533, 535 (BIA 2002) (affirming termination of proceedings where service of NTA did not satisfy regulations). A requisite to a valid *in absentia* order is clear and convincing evidence of deportability. *See Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (addressing whether DHS met its burden of proof).

Whether the purported NTA creates an issue around personal jurisdiction or subject-matter jurisdiction, the IJ has an overarching obligation to determine deportability before entering any removal order, including an *in absentia* order. *See United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact."); *Matter of Tang*, 13 I&N Dec. 691, 692-3 (BIA 1971) (treating alienage as a threshold jurisdictional fact). Where the purported NTA never vested jurisdiction, an IJ lacked the authority to determine deportability and thus should reopen an *in absentia* order.

Moreover, rescission of an *in absentia* order is particularly important because there is a statutory ten-year bar to discretionary relief for a noncitizen who has a final *in absentia* order of removal. *See* INA § 239 (b)(7) (this provision applies to someone who "at the time of the notice described in paragraph 1 or 2 of section 239(a) was provided oral notice… of the consequences under this paragraph). By having the order rescinded, a noncitizen may argue that the bar should not apply to someone who received an *in absentia* order that was based on a putative NTA that lacks time and place information and was rescinded as a result.

E. 8 U.S.C. § 1326(d), INA § 286(d), Challenges to Predicate Removal Orders in Criminal Reentry Proceedings

A noncitizen who reenters the U.S. after deportation faces prosecution under 8 U.S.C § 1326 for "illegal reentry" into the United States. The Supreme Court has held that due process requires that a defendant be able to raise a collateral challenge to the lawfulness of the underlying removal order, which is an element of the illegal reentry offense. *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987). Decisions interpreting *Mendoza-Lopez* require that the defendant establish prejudice,[15] and so a motion to dismiss an illegal reentry charge under *Pereira* would require the defendant to show prejudice by the deficient NTA.

At a minimum, a purported NTA that did not vest jurisdiction would make the underlying removal hearing fundamentally unfair. Although a defendant could argue that prejudice automatically inheres in a facially defective purported NTA, a defendant should be prepared to argue in the alternative how the purported NTA prejudiced the defendant under the governing circuit law.

Unfortunately, there are some circuits that do not consider the denial of the opportunity to apply for relief as prejudice. *U.S. v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015), cert. denied, 136 S. Ct. 1236 (2016); *U.S. v. Alegria-Saldana*, 750 F.3d 638, 642 (7th Cir. 2014); *U.S. v. Torres*, 383 F.3d 92, 105-106 (3d Cir. 2004); *U.S. v. Aguirre-Tello*, 353 F.3d 1199, 1204-1205 (10th Cir. 2004) (en banc)*; U.S. v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003). *But see U.S. v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-1050 (9th Cir. 2004) (holding defendant established prejudice where he was eligible for discretionary relief, but immigration judge failed to inform him of his eligibility); *U.S. v. Copeland*, 376 F.3d 61, 70-73 (2d Cir. 2004). Nothing stops a defendant in the restrictive circuits to argue for a change in the law in order to preserve the issue should the Supreme Court take up the circuit split issue at some point in the future. A defendant who was improperly denied Cancellation of Removal because of the stop-time rule would present a compelling vehicle for the Court to resolve the circuit split.

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[15] *See, e.g., U.S. v. Aguirre-Tello*, 353 F.3d 1199, 1207-10 (10th Cir. 2004) (en banc); *U.S. v. Leon-Paz*, 340 F.3d 1003, 1007 (9th Cir. 2003); *U.S. v. Wilson*, 316 F.3d 506, 509-511 (4th Cir. 2003); *U.S. v. Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003); *U.S. v. Fernandez-Antonia*, 278 F.3d 150, 159 (2d Cir. 2002)*; United States v. Loaisiga*, 104 F.3d 484, 487 (1st Cir. 1997); *United States v. Perez-Ponce*, 62 F.3d 1120, 1122 (8th Cir. 1995); *United States v. Espinoza-Farlo*, 34 F.3d 469, 471 (7th Cir. 1994); *United States v. Holland*, 876 F.2d 1533, 1536 (11th Cir. 1989).

IV. Arguments DHS Has Advanced Since *Pereira*

A. DHS Argues that the Supreme Court in *Pereira* Assumed Jurisdiction

Since *Pereira*, in response to arguments by noncitizens defective NTAs do not vest the Immigration Court with jurisdiction over a case, the government has argued that the Supreme Court would not have decided the question presented in *Pereira* if jurisdiction had never vested in the Immigration Court because the issue would have been moot. But the government ignores that the question of the Court's jurisdiction was not presented or briefed, and that the Court often assumes jurisdiction for purposes of the question presented. An issue that the Supreme Court has never squarely addressed on the merits is insufficient for *stare decisis* purposes. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993).

B. DHS Argues That It Can Solve the Problem by Mailing a New Notice or Amending the Charges

INA § 239(a)(2)(A)(i) states that EOIR may send a new hearing notice in case of a change or postponement of the date and place of hearing. The Court's interpretation of this provision in *Pereira* bolsters the argument that for an NTA to be valid, it must specify the time and place of the hearing as required under § 239(a)(1)(G)(i):

> By allowing for a "change or postponement" of the proceedings to a "new time or place," paragraph (2) presumes that the Government has already served a "notice to appear under section [239](a)" that specified a time and place as required by § [239](a)(1)(G)(i).

Pereira, slip op. at 13. The Court's interpretation of the meaning of § 239(a)(2)(A)(i) provides a strong argument that simply providing a new notice does not convert a putative NTA into a valid one.

DHS may argue that the regulations permitting it to lodge "additional or substituted charges" or "factual allegations" means that DHS can convert a putative NTA into a real one. That argument ignores that where the initial NTA failed to vest jurisdiction because it lacked the requisite date and time of the hearing, it cannot be cured by amendment. *Cf. Mustafa v. Thompson*, 2013 WL 776217 (D.N.J. Feb. 28, 2013) (a pleading that fails to invoke jurisdiction cannot be cured by amendment). By failing to comply with the statute, DHS has failed to "initiate removal proceedings" as contemplated by the INA.

C. DHS Argues that Respondent Has Waived the Defect

DHS may argue that a noncitizen respondent has waived her right to challenge the jurisdiction of the Immigration Court because she has already pled to the charges in the putative NTA or applied for relief. This argument ignores two primary issues.

First, Professor Kit Johnson's theory is that the Immigration Court's jurisdiction in removal proceedings is subject matter jurisdiction rather than personal jurisdiction, and is thus not subject to waiver. *See generally* Johnson, *supra* note 14.

Second, DHS's argument ignores that waiver is treated legally as "the voluntary relinquishment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993); BLACK'S LAW DICTIONARY 1417 (10th ed. 2014). Accordingly, courts have held that waivers in the immigration context must be knowing and intelligent. *See, e.g.*, *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (finding where an immigrant relinquishes rights under the Visa Waiver Program, the "waiver [of] the due process right to which he or she would otherwise be entitled must be done both knowingly and voluntarily"); *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903 (8th Cir. 2005) (holding that when analyzing whether a noncitizen waived his right to a hearing before an Immigration Judge, "the record must contain some evidence that the alien was informed and accepted its terms"); *United States v. Gallardo*, 495 F.3d 982 (8th Cir. 2007) (finding that a noncitizen's waiver of her rights conveyed in *Miranda* warnings must be made "voluntarily, knowingly, and intelligently").