CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory[1]

***Pereira v. Sessions*—Updated Strategies and Considerations**

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I. 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 USC § 1229(a) and, therefore, does not cut off a noncitizen's accrual of the time in the United States required to qualify for cancellation of removal. The strong language in *Pereira* regarding the NTA requirements led many practitioners to argue that removal proceedings that had been commenced by defective NTAs should be terminated for lack of jurisdiction. Indeed, in the months following *Pereira,* immigration judges (IJs) terminated approximately 9,000 removal proceedings, a 160% increase over terminations for the same period the year before.[2]

On August 31, 2018, in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), the Board of Immigration Appeals (BIA or Board) concluded that the *Pereira* decision was limited to the cancellation of removal context and held that a defective NTA does not deprive the immigration court of jurisdiction so long as the court serves a subsequent notice of hearing on the noncitizen that includes the time and place of hearing. Since the BIA issued *Bermudez-Cota*, a number of courts of appeals have addressed the jurisdiction question and all have agreed with the BIA's view in *Bermudez-Cota* that the immigration court is not deprived of jurisdiction because an NTA lacks the hearing time or place, despite *Pereira*'s language. As discussed below, however, several federal courts have found the required language to be akin to a claim-processing rule, meaning that the government must comply with the rule, and could face termination of the proceedings if the respondent timely raises an objection to the defects in the notice.[3]

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

[3] This distinction matters because challenges to subject-matter jurisdiction may be raised by a litigant "at any point in the litigation,"' and courts must consider the issue *sua sponte*. *Fort Bend Cty. v. Davi*s, ___ U.S. ___, 139 S.Ct. 1843, 1849 (2019) (quoting *Gonzalez v. Thaler*, 565 U.S. 134 (2012)). However, a court's enforcement of a claim-processing rule is mandatory only if a party properly raises it. *Fort Bend Cty*., 139 S. Ct. at 1849. Thus, unlike

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After *Bermudez-Cota*, the BIA issued three more decisions taking an extremely narrow view of *Pereira*'s holding, in the context of rescission and reopening of *in absentia* removal orders, and whether, in the cancellation of removal stop-time rule context, a subsequent hearing notice can "cure" a defective NTA. Several courts have rejected BIA decisions narrowly interpreting *Pereira*, as discussed below. Where it serves the client's interests, practitioners should continue to argue that *Pereira's* rationale applies more broadly and to a wider variety of contexts than the BIA's narrow interpretations suggest.

Part II of this advisory provides a brief overview of cancellation of removal and the *Pereira* decision. **Part III** provides an overview of BIA and U.S. courts of appeals decisions interpreting *Pereira*. **Part IV** examines legal arguments that may still be made under *Pereira* including: jurisdictional arguments; claim-processing rule arguments; rescission and reopening arguments; stop-time rule arguments for cancellation of removal; stop-time rule arguments for voluntary departure; and defenses to criminal reinstatement of removal charges. This area of the law is evolving rapidly, so it is critical for practitioners to conduct their own research before making any of the suggested arguments in this practice advisory to be sure the arguments are not foreclosed by binding precedent, or, to ensure that the practitioner discloses the precedent and preserves the argument for further appeal.

II. Overview

A. Cancellation of Removal

Cancellation of removal is a form of relief that is available in removal proceedings initiated on or after April 1, 1997. It is available to lawful permanent residents (LPRs) under 8 USC § 1229b(a), to non-lawful permanent residents (non-LPRs)[4] under 8 USC § 1229b(b)(1),[5] and to certain battered spouses and children under 8 USC § 1229b(b)(2).[6] If an IJ determines that an individual meets the statutory requirements and merits a favorable exercise of discretion, the IJ may "cancel" removal and the individual either retains or gains LPR status.[7]

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subject matter jurisdiction the duty to comply with a claim-processing rule can be forfeited if the party asserting the rule waits too long to raise the point.

[4] For more information on non-LPR cancellation, *see* Immigration Legal Resource Center, *Eligibility for Relief: Cancellation of Removal for Permanent Residents, INA § 240A(a)* (Nov. 12, 2019), https://www.ilrc.org/eligibility-relief-cancellation-removal-permanent-residents-ina-§-240aa, and CLINIC, *Practice Advisory: Non-Lawful Permanent Resident Cancellation of Removal Under INA § 240A(b) for DACA Recipients* (Oct. 29, 2018), https://cliniclegal.org/resources/non-lawful-permanent-resident-cancellation-removal-under-ina-ss-240ab-daca-recipients.

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

[6] This advisory does not address the specific requirements for this form of cancellation of removal because applicants for this form of relief are not subject to the NTA stop-time rule and, therefore the Supreme Court's decision in *Pereira* does not affect eligibility for these applications.

[7] 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 CFR § 1240.8(d).

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- **Cancellation of Removal for LPRs**

Under 8 USC § 1229b(a), an individual must demonstrate:
  - admission as an LPR for not fewer 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 USC § 1229b(b)(1), an individual must demonstrate:
  - continuous physical presence in the United States for not fewer 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.

While various forms of cancellation of removal exist, this advisory primarily addresses non-LPR cancellation of removal since the *Pereira* decision focuses on the stop-time rule which can break the continuous presence required for this form of relief. Section 1229b(d) of 8 USC lists three special rules on calculating continuous physical presence for non-LPR cancellation of removal: (1) termination of continuous presence, (2) treatment of certain breaks in presence, and (3) continuity not being required for those who have served honorably in the Armed Forces. Section 1229b(d)(1) of 8 USC, also known as the stop-time rule, governs the calculation of continuous physical presence for accumulating the 10 years of continuous physical presence required for non-LPR cancellation. Subsection (A) of 8 USC § 1229b(d)(1), provides that continuous physical presence begins when the individual physically enters the United States and terminates upon the occurrence of certain specified events, specifically: service of the charging document, Form I-862, Notice to Appear (NTA) or the commission of a criminal offense that makes the individual inadmissible or deportable.[8]

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 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, the Department of Homeland Security (DHS), served him with an NTA that did not include the date, time, and place of his 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, the IJ ordered Mr. Pereira removed *in absentia* in 2007. Mr. Pereira did not learn of this order until 2013. Due to the lack of notice, the immigration court subsequently rescinded the *in absentia* order and reopened proceedings. On

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[8] The application of the stop-time rule to the commission of certain crimes under 8 U.S.C § 1229b(d)(1)(B) is beyond the scope of this practice advisory.

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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,[9] 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."[10] 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.[11] 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 USC § 1229(a)(1) for purposes of the stop-time rule and remanded Mr. Pereira's case for further proceedings.[12] 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:

- 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. At oral argument, Justice Kennedy asked what percentage of NTAs omit the time and date of the hearing and the Assistant to the Solicitor General responded, "almost 100 percent."[13]

- The Court indicated that the case presented a "narrow question" and referred to its holding as applicable to the stop-time rule.[14]

- The Court was cognizant of 8 CFR § 1003.18, which indicates that DHS shall provide NTAs containing "the time, place and date of the initial removal hearing, where practicable."[15] 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.

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[9] Note that, in contrast to the Trump administration's preference for the word "alien," the Court referred to individuals in removal proceedings as noncitizens, *not* aliens, except when quoting the statutes and regulations that use this term. *Pereira,* 138 S. Ct. at 2110 n.1

[10] *Id.* at 2110.

[11] *Id.*

[12] *Id.* at 2113-14, 2120.

[13] *Id*. at 2111 (citing transcript).

[14] *Id*. at 2110, 2113-14.

[15] *Id*. 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)).

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- ➢ The Court based its analysis on the plain language of 8 USC §§ 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 appeals, which had found the language of the stop-time rule ambiguous. Finding the statutory language unambiguous, the Court declined to afford deference to the BIA's position that NTAs without a specific time and place could trigger the stop-time rule.[16]

- ➢ 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.[17]

- ➢ 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."[18]

- ➢ The notice pursuant to 8 USC § 1229(a)(1) referenced in 8 USC § 1229a(b)(5)(A) (authorizing issuance of an *in absentia* order where the government provided "written notice required under" section 1229(a)), 8 USC § 1229a(b)(5)(C)(ii) (allowing for rescission of an *in absentia* order where notice was not received "in accordance with" § 1229(a)), and 8 USC § 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)."[19]

- ➢ 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."[20]

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[16] *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).

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

[18] *Id*. at 2117.

[19] *Id*. at 2117-18.

[20] *Id*. at 2118-19.

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- 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.[21]

III. Developments in Case Law Interpreting *Pereira*

Since the Supreme Court decided *Pereira* in June of 2018, the BIA has issued four precedent decisions considering the impact of *Pereira* on defective NTAs. The decisions apply to three different contexts: (1) the immigration court's jurisdiction; (2) two decisions on motions to rescind and reopen *in absentia* removal orders; and (3) the cancellation of removal stop-time rule when the respondent is served with a subsequent hearing notice containing time and place information. This section will provide an overview of those decisions as well as relevant federal court precedents considering the same issues.

A. Post-*Pereira* Decisions Related to Immigration Court Jurisdiction

1. The BIA's Decision in *Matter of Bermudez-Cota*

Following the *Pereira* decision, and as discussed below, many practitioners made motions to terminate removal proceedings arguing that immigration judges lacked jurisdiction over removal proceedings commenced by the filing of a defective NTA. Practitioners' arguments often referenced 8 CFR § 1003.14(a), which provides that the immigration court's jurisdiction "vests" when a "charging document" is filed with the immigration court. Thus, practitioners have argued, jurisdiction never vested because a putative NTA lacking time or place information was not a proper charging document under 8 CFR § 1003.13, an adjacent regulation defining the term "charging document." Many immigration judges granted these motions, while others denied termination. On August 31, 2018, the BIA issued a precedential decision, *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), which concluded that immigration courts had jurisdiction despite defective NTAs, and that *Pereira*'s "narrow" holding did not address jurisdiction.

Mr. Bermudez-Cota was served with an NTA that did not include the time or place of the hearing. Just over a week later, the immigration court mailed him a notice of hearing that included the date, time, and place of the hearing at which Mr. Bermudez-Cota appeared and conceded service. On his final hearing date, Mr. Bermudez-Cota moved for administrative closure of his proceedings or a continuance to seek adjustment of status, but the IJ denied those motions and granted voluntary departure. Mr. Bermudez-Cota appealed the IJ's decision, and while his appeal before the BIA was pending, the Supreme Court issued *Pereira.* Mr. Bermudez-Cota then filed a motion to terminate proceedings with the BIA arguing lack of jurisdiction based on *Pereira*.[22]

The BIA dismissed the appeal and denied the motion to terminate holding that "a notice to

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[21] *Id*. 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).
[22] *Bermudez-Cota*, 27 I&N Dec. at 442.

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appear that does not specify the time and place of [a noncitizen's] initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of [8 USC § 1229(a)], so long as a notice of hearing specifying this information is later sent to the [noncitizen]."[23] In reaching this conclusion, the BIA emphasized that *Pereira* was distinguishable because Mr. Bermudez-Cota received a subsequent notice of hearing, unlike Mr. Pereira, and because Mr. Bermudez-Cota was "not seeking cancellation of removal, and the 'stop-time rule' [was] not at issue."[24] The BIA also reasoned that because the Supreme Court characterized its ruling as "narrow" and remanded Mr. Pereira's case, rather than dismissing it outright, the Court did not "suggest that proceedings should be terminated" where the noncitizen was initially served with a defective NTA.[25]

The BIA relied on U.S. courts of appeals decisions that pre-date *Pereira* to support its conclusion that an initial defective NTA is cured by service of a later hearing notice that includes the date and place of proceedings. These earlier cases found that the combined NTA and hearing notice vested the immigration court with jurisdiction over removal proceedings.[26] Notably, however, the BIA did not reconcile the holdings of the U.S. courts of appeal cases on which it relied with the statutory analysis in *Pereira*.

2. Federal Court Decisions on Jurisdiction After *Bermudez-Cota*

In December of 2018, the Sixth Circuit became the first U.S. court of appeals to address *Bermudez-Cota.* In *Hernandez-Perez v. Whitaker*, the petitioner raised *Pereira* as a challenge to the immigration court's subject matter jurisdiction over the case.[27] In that case, the NTA was defective but the petitioner subsequently received a hearing notice with the date and place of the hearing. The Sixth Circuit deferred to the BIA's interpretation of the regulations in *Bermudez-Cota*.[28] Although the court acknowledged its "common-sense discomfort" in interpreting the NTA requirements differently for different sections of the INA, in the end, it seemed more concerned by the "unusually broad implications" of finding no subject matter jurisdiction in almost all removal proceedings over the last three years during which the government represented that nearly 100 percent of NTAs lacked time and date information.[29]

As of the date of this advisory's issuance, all U.S. courts of appeals except the D.C. Circuit have considered whether an immigration court has jurisdiction when the NTA is defective in light of *Pereira* and have concluded that, despite *Pereira*, a defective NTA does not deprive the immigration court of jurisdiction.[30] For example, the Ninth Circuit in *Karingithi v. Whitaker*

[23] *Id*. at 447.
[24] *Id*. at 443.
[25] *Id*.
[26] *Id*. at 444-45.
[27] *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018).
[28] *Id.* at 314.
[29] *Id.*
[30] *Karingithi v. Whitaker*, 913 F.3d 1158, 1160-61 (9th Cir. 2019) *petition for cert. pending*, No. 19-475 (filed Oct. 7, 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 112 (2d Cir. 2019) *reh'g denied* (July 18, 2019) *petition for cert. pending* No.19-510 (filed Oct. 16, 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019); *Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019); *Nkomo v. Attorney Gen. of United States*, 930 F.3d 129, 132-134 (3d Cir. 2019); *United*

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emphasized that the immigration court's jurisdiction is governed by regulations, and neither the Supreme Court's decision in *Pereira* nor the statutory definition of an NTA at § 1229(a) address jurisdiction.[31] The Ninth Circuit reasoned that the *Pereira* court relied upon the intersection of the statutory provisions dealing with the stop-time rule and the definition of an NTA. However, it found that the word "under" in the stop-time rule mattered only to the substantive time-and-place requirements mandated by § 1229(a) because that word "provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § 1229(a),"[32] but "no such statutory glue bonds the Immigration Court's jurisdiction to § 1229(a)'s requirements."[33] The petitioner in *Karingithi* received her subsequent notice of hearing shortly after service of the defective NTA.[34] Other circuits have similarly found no statutory basis to hold that immigration courts lack jurisdiction based on a defective NTA.

While rejecting the subject matter jurisdiction argument, in *Ortiz-Santiago v. Barr*, the Seventh Circuit found that the two-step process endorsed in *Bermudez-Cota* was not "compatible with the statute."[35] The court determined that even though a defective NTA did not deprive the immigration court of subject matter jurisdiction, the statutory requirement that the NTA contain time and place information should be seen as a "claim-processing rule."[36] Claim-processing rules are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times whereas a jurisdictional rule "governs a court's adjudicatory capacity."[37] As with other claim-processing rules, the *Ortiz-Santiago* court noted that the government's failure to follow the statutory requirements either could be grounds for dismissal or could be waived or forfeited by the opposing party if not timely raised.[38] The court held that "relief will be available for those who make timely objections, as well as those whose timing is excusable and who can show prejudice."[39] The court rejected Mr. Ortiz-Santiago's argument because he did not timely object and it was "not a case in which the Notice of Hearing never reached him, or it came so quickly that he had trouble preparing for the hearing, or any other discernible prejudice occurred."[40] Significantly, the court found that because he could have raised the jurisdictional argument based on the language of the statute, and because there was a circuit split on the effect of a defective NTA for stop-time purposes at the time Mr. Ortiz-Santiago was litigating his case before the immigration court, he should have raised and preserved the issue before the immigration court.[41]

Several other U.S. courts of appeals have followed the reasoning in *Ortiz-Santiago* and found the

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States v. Cortez, 930 F.3d 350, 359-366 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 688-691 (5th Cir. 2019); *Perez-Sanchez v. U.S. Att'y Gen*., 935 F.3d 1148 (11th Cir. 2019); *Goncalves Pontes v. Barr*, 938 F.3d 1, 5 (1st Cir. 2019); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1018 (10th Cir. 2019).

[31] *Karingithi*, 913 F.3d at 1161.

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

[33] *Karingithi*, 913 F.3d at 1161.

[34] *Id*, at 1159 (notice of hearing received the same day).

[35] *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019), *reh'g denied* (July 18, 2019).

[36] *Id.* at 962-63.

[37] *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, (2011).

[38] *Ortiz-Santiago,* 924 F.3d at 958, 963.

[39] *Id.* at 965.

[40] *Id.* at 964-65.

[41] *Id.* at 964.

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NTA requirements to be a claim-processing rule, though some courts have simultaneously found that an NTA that omitted time and date information was not defective.[42] Therefore, in several circuits, IJs may consider timely filed motions to terminate based on defective NTAs, though making a *Pereira*-based argument that the court lacked subject matter jurisdiction after the case has been decided by the IJ will likely not be successful.[43]

B. Post-*Pereira* Decisions Related to Rescission and Reopening of *In Absentia* Removal Orders

On May 22, 2019, the BIA issued two decisions considering *Pereira's* effect on motions to rescind and reopen *in absentia* removal orders: *Matter of Pena-Mejia* and *Matter of Miranda-Cordiero*.[44] Both decisions concluded that a defective NTA did not require the rescission of an *in absentia* removal order. The BIA reasoned that the statutory text of the *in absentia* provision differs from that of the stop-time provision at issue in *Pereira* because it allows for the time and place information to be provided *either* through the NTA *or* through a subsequent notice of hearing.[45] As a result, the BIA held that in cases where the noncitizen fails to provide or update their address with the immigration court or cannot overcome the presumption that the notice of hearing was delivered, there is no basis to rescind the *in absentia* order.[46]

The BIA's decisions relied in part on U.S courts of appeals decisions issued after *Pereira* that have concluded that a defective NTA does not give rise to a lack-of-notice claim for rescission and reopening of an *in absentia* order.[47] As of the date of this advisory's issuance, no U.S. court of appeals has found rescission and reopening required based on a *Pereira*-style argument related to an NTA that lacked time and place information. However, in a 2019 case discussed below,[48]

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[42] *See Pierre-Paul v. Barr,* 930 F.3d 684, 688-691 (5th Cir. 2019) (agreeing with the Seventh Circuit that 8 CFR § 1003.14 is a claim-processing rule but upholding two-step process); *United States v. Cortez*, 930 F.3d 350, 359-366 (4th Cir. 2019) (stating that the regulation is an "internal docketing rule" rather than "a limit on an immigration court's 'jurisdiction' or authority to act").

[43] Practitioners should also take the lesson from *Ortiz-Santiago* that even those practicing outside the Seventh Circuit should continue to raise the jurisdictional argument at the earliest opportunity to ensure that it is not later deemed waived. The Seventh Circuit in subsequent decisions has concluded that the petitioner forfeited the objection by not timely raising it and has not found prejudice. *See, e.g*., *Hernandez-Garcia v. Barr*, 930 F.3d 915, 919 (7th Cir. 2019); *Vyloha v. Barr*, 929 F.3d 812, 817 (7th Cir. 2019).

[44] *Matter of Pena-Mejia*, 27 I&N Dec. 546, 548 (BIA 2019); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551, 553-54 (BIA 2019).

[45] *Matter of Pena-Mejia*, 27 I&N Dec. 548; *Matter of Miranda-Cordiero*, 27 I&N Dec. at 554.

[46] *Matter of Pena-Mejia*, 27 I&N Dec. at 548-49 n.1; *Matter of Miranda-Cordiero*, 27 I&N Dec. at 553.

[47] *See, e.g.*, *Mauricio-Benitez v. Sessions*, 908 F.3d 144 (5th Cir. 2018), *cert. denied sub nom. Mauricio-Benitez v. Barr,* 139 S. Ct. 2767 (2019) (concluding that *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009) was still good law after *Pereira*); *Fuentes-Pena v. Barr*, 917 F.3d 827, 830 n.2 (5th Cir. 2019); *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019); *Molina-Guillen v. U.S. Att'y Gen.*, 758 F. App'x 893 (11th Cir. 2019) (unpublished). *See also* *Ramos-Portillo v. Barr*, 919 F.3d 955, 960 (5th Cir. 2019) (addressing a defective order to show cause).

[48] *Lopez v. Barr*, 925 F.3d 396, 400 (9th Cir. 2019).

the Ninth Circuit Court of Appeals recognized that its pre-*Pereira* decision on this subject, *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009), did not survive *Pereira*.[49]

C. Post-*Pereira* Decisions Addressing Whether a Subsequent Hearing Notice "Cures" a Defective NTA for Purposes of the Cancellation of Removal Stop-Time Rule

On May 1, 2019, the BIA issued *Matter of Mendoza-Hernandez & Capula-Cortes*, a case about the cancellation of removal stop-time rule in which the Board took an extremely limited view of *Pereira*'s holding.[50] Highlighting the importance of the issue addressed, this decision was the BIA's first *en banc* decision in ten years, with the permanent members splitting 9-6 in favor of the majority decision; the minority filed a vigorous dissent. While the BIA stressed in *Bermudez-Cota* that *Pereira* only addressed the narrow topic of the stop-time rule for cancellation, in *Mendoza-Hernandez*, the BIA flouted the *Pereira* holding, concluding that a subsequent notice of hearing can "cure" a defective NTA and trigger the stop-time rule for purposes of seeking cancellation of removal.[51] The BIA explained that the two-step process "respond[ed] to the substantive concerns of fundamental fairness inherent in procedural due process and to applicants' settled expectations about eligibility for relief" at issue in *Pereira*.[52] In reaching its conclusion, the BIA also distinguished *Pereira* on the ground that Mr. Pereira never received the notice of hearing from the court and so the Supreme Court did not consider the effect of a subsequently received notice of hearing.[53] Finally, the BIA found its holding consistent with "circuit court law that, prior to *Pereira*, held that the 'stop-time' rule is triggered by a two-part process."[54]

The dissent rejected the majority approach. The six dissenting Board members argued that the *Pereira* decision compels the conclusion that an immigration court's hearing notice cannot "cure" a defective NTA for purposes of the stop-time rule.[55] The dissenters noted that a hearing notice is not part of an NTA and is in fact issued by a separate agency. The dissenters stated that the *Pereira* court had rested its holding on the conclusion that the stop-time statute was unambiguous, referring explicitly to the "notice to appear" definition in 8 USC § 1229(a)(1).

As of the date of this advisory's issuance, two U.S. courts of appeals reached contrary conclusions in post-*Pereira* decisions as to whether a subsequent hearing notice can "cure" a defective NTA for stop-time purposes. In *Lopez v. Barr*, the Ninth Circuit rejected the BIA's analysis in *Matter of Mendoza-Hernandez* and held that "[s]ubstantive defects may not be cured by a subsequent Notice of Hearing that likewise fails to conform with the substantive

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[49] This holding is significant because *Matter of Bermudez-Cota* relied on federal courts of appeals decisions which pre-dated the Supreme Court ruling in *Pereira*, including *Popa.*
[50] *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019).
[51] *Id.* at 522.
[52] *Id.* at 530. At issue in *Pereira* was when the stop-time rule was triggered. In *Matter of Camarillo,* the BIA had found that once the court issued a notice of hearing, the date the incomplete NTA was issued stopped time. In *Mendoza-Hernandez*, the BIA again found that the two-step notice process was sufficient, but now held that the date of the notice of hearing stops time for cancellation purposes.
[53] *Mendoza-Hernandez*, 27 I&N Dec. at 528.
[54] *Id*. at 529.
[55] *Id*. at 540.

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requirements of Section 1229(a)(1).”[56] In reaching this conclusion, the Ninth Circuit determined:

> (1) that it need not defer to the BIA’s interpretation of the Supreme Court’s decision;[57]
> (2) that the BIA erroneously failed to acknowledge that *Pereira* “*defines* what a notice to appear is, and that the definition is imported every time the term ‘notice to appear’ is used in the statute”[58] and
> (3) the BIA erroneously relied on abrogated circuit court decisions supporting the two-step process to trigger the stop-time rule.[59]

The court concluded that, “[a]s nothing precludes DHS from issuing a Notice to Appear that conforms to the statutory definition, that is the appropriate course of action for the agency to follow in such situations.”[60]

By way of contrast, the Sixth Circuit rejected the reasoning of the Ninth Circuit’s *Lopez* decision and found that if a noncitizen is served with an NTA that lacked the time and place information, the stop-time rule is invoked at the time of service of a notice of hearing which includes the time and place. In *Garcia-Romo v. Barr*, the Sixth Circuit found that “[n]othing in Pereira majority's reasoning suggests that the government may not supplement the first incomplete communication with an additional communication so that the noncitizen receives all the required information in § 1229(a)(1)(A)-(G).”[61] The *Garcia-Romo* court determined that the INA provisions were unambiguous and thus it did not need to extend *Chevron* deference to *Matter of Mendoza-Hernandez* but went on to find that if the court had accepted Mr. Garcia-Romo’s argument, then there would be two possible interpretations of the statute which would render it ambiguous and the court would therefore have to defer to the BIA’s decision under *Chevron*.[62]

As a result of these cases, within the Ninth Circuit DHS must serve an NTA that includes the date, place, and time of the hearing in order to trigger the stop-time rule whereas in the Sixth Circuit, the stop-time rule is effectuated through a notice of hearing that “supplements” the NTA. Other than in the Ninth Circuit, immigration courts will be bound by the BIA’s holding in *Matter of Mendoza-Hernandez*, but practitioners should preserve the issue for federal appeal. It remains to be seen how this issue will be decided in other circuits and whether the Supreme Court will address the circuit split that has already developed.

IV. Making *Pereira*-Based Arguments

Below is a non-comprehensive list of arguments practitioners may make based on the *Pereira* decision. As discussed above, some of these arguments have already been raised and rejected by the BIA and/or U.S. courts of appeals. Thus the practitioner must disclose the negative precedent and respectfully let the adjudicator know that the issue is being preserved for further appeal.

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[56] *Lopez v. Barr*, 925 F.3d 396, 404 (9th Cir. 2019).
[57] *Id.* at 402-03.
[58] *Id.* at 403 (emphasis added).
[59] *Id.* at 403-04.
[60] *Id.* at 404.
[61] *Garcia-Romo v. Barr*, 940 F.3d 192, 202–03 (6th Cir. 2019).
[62] *Id.* at 204.

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Practitioners will need to discuss with their clients when and whether it is in their clients' interest to raise these arguments. Moreover, practitioners must be aware of ethical rules which require them to disclose negative precedent to the adjudicator.[63]

A. Moving to Terminate Based on the Argument that IJs Lack Subject Matter Jurisdiction over Proceedings Commenced by Defective NTAs

Practitioners may wish to continue to argue that a defective NTA deprives the court of subject matter jurisdiction. However, as discussed above, the BIA and all U.S. courts of appeals, except the D.C. Circuit, have considered and rejected this argument in a published decision. In rejecting the *Pereira* jurisdiction argument generally, courts have noted that the statute at issue in *Pereira*, 8 USC § 1229(a), says nothing about immigration court jurisdiction, and instead the language about immigration court jurisdiction is found in a regulation, 8 CFR § 1003.14(a). Practitioners representing a client within a circuit that has addressed this issue should determine whether there is a good faith argument to distinguish the facts of his or her current case from the facts in the existing precedent. For example, in some of the federal court decisions, the NTA at issue did not include the time and date of the hearing but did include the place.[64] In cases where the NTA does not include the address of the immigration court, practitioners should assess arguments focused on an NTA's lacking the place of the hearing, rather than the time and date.

Some practitioners in the Ninth Circuit have reported successful termination pursuant to *Karingithi v. Whitaker* where the NTA lacked the place of the hearing, as required by the regulations.[65] In *Karingithi*, the Ninth Circuit Court of Appeals emphasized that the regulations describe the NTA requirements that vest the immigration court with jurisdiction. The NTA in *Karingithi* only lacked time and date information; it included the immigration court address as

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[63] Attorneys and fully accredited representatives are subject to 8 CFR § 1003.102(s) which may lead to discipline if a practitioner "[f]ails to disclose to the adjudicator legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel." Additionally, attorneys are subject to the professional conduct rules of the state where he or she is licensed.

[64] Some U.S. courts of appeals decisions do explicitly state that the respondent argued the NTA was defective for not including the time or place of the hearing. *See Banegas Gomez v. Barr*, 922 F.3d 101, 112 (2d Cir. 2019) *reh'g denied* (July 18, 2019) *petition for cert. pending* No.19-510 (filed Oct. 16, 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Nkomo v. Attorney Gen. of United States*, 930 F.3d 129, 131 (3d Cir. 2019). However, none of these cases contains an explicit discussion of the immigration court address requirement in 8 CFR § 1003.15 so it does not appear that the noncitizens in these cases argued that the regulations do require the NTA to list the place of the hearing for jurisdiction to vest even if they do not require the NTA to list the time and date. By way of contrast, other U.S. court of appeals decisions state that the noncitizen argued that the NTA was defective for not including "the time and date" but are silent as to place. For example, *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) *petition for cert. pending*, No. 19-475 (filed Oct. 7, 2019) says, "Importantly, the regulation does not require that the time and date of proceedings appear in the initial notice." *See also Pierre-Paul v. Barr,* 930 F.3d 684, 688-691 (5th Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 359-366 (4th Cir. 2019); *Soriano-Mendosa v. Barr*, 768 F. App'x 796, 802 (10th Cir. 2019). In these circuits practitioners can distinguish the precedent decisions if the noncitizen's NTA does not include the place of the hearing. To date, there is no U.S. court of appeals decision that explicitly considers whether the requirement of 8 CFR § 1003.15 that the NTA includes the place of hearing implicates the immigration court's jurisdiction.

[65] Practitioners have reported that in the summer of 2019, multiple IJs in San Francisco terminated removal cases where the NTA did not include the place of the hearing, citing to the requirements under 8 CFR § 1003.15(b)(6). Decisions on file with the authors; email for copies.

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required by the regulation. So, the *Karingithi* court found, based on the wording of the regulations, that the omission of the time and date of the hearing was not a ground to terminate. While the regulations do not require that the NTA provide time and date, they do require that the NTA provide the immigration court's address.[66] Relying on *Karingithi*'s reasoning that compliance with the regulations is what vests jurisdiction with the immigration court,[67] practitioners in the Ninth Circuit have successfully filed motions to terminate where the NTA lacked the address of the immigration court. It is worth noting, however, that the *Karingithi* court did not address the issue of an NTA that lacks the place of hearing

Although many courts of appeals have considered the argument that a defective NTA deprives the immigration court of subject matter jurisdiction and rejected that argument, practitioners may still raise this argument, while disclosing and distinguishing controlling circuit precedent, to preserve the argument, potentially for the U.S. Supreme Court. Practitioners may continue to raise the regulatory requirement to include the immigration court address in the NTA in the courts of appeals that have not yet issued binding precedent on this issue.

B. Moving to Terminate by Arguing that the Defective NTA Violates a Claim-Processing Rule

As discussed above, some U.S. courts of appeals have held that the regulations at 8 CFR § 1003.14 set forth a claim-processing rule as opposed to a jurisdictional one. The Seventh Circuit's reasoning is most instructive. The Seventh Circuit held in *Ortiz-Santiago v. Barr* that service of a proper NTA is akin to a claim-processing rule,[68] and that "just as with every other claim-processing rule, failure to comply with that rule may be grounds for dismissal of the case."[69] The Seventh Circuit also found that the objection must be timely made or it is forfeited. While Mr. Ortiz-Santiago did not prevail before the Seventh Circuit because he had not timely raised this objection, the decision in the case provides an opening to timely move for termination before the immigration court. Practitioners can argue that *Matter of Bermudez-Cota* addressed only the issue of subject matter jurisdiction and is therefore distinguishable from the argument that the requirement that an NTA include date, time, and place of hearing is a claim-processing

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[66] *See* 8 CFR § 1003.14(a) (providing that jurisdiction vests "when a charging document is filed with the Immigration Court by the Service"); 8 CFR § 1003.15(b)(6) (requiring that the NTA contain "[t]he address of the Immigration Court"); 8 CFR § 1003.14(a) ("The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed.").

[67] *Karingithi*, 913 F.3d at 1158; *see also, e.g.*, *United States v. Cortez*, 930 F.3d 350, 363 (4th Cir. 2019) ("It is the regulatory definition of "notice to appear," and not § 1229(a)'s definition, that controls in determining when a case is properly docketed with the immigration court under 8 CFR § 1003.14(a).").

[68] This argument is similar to an argument that the court lacks personal jurisdiction over the respondent where the NTA is defective. While the authors of this advisory are not aware of any successful *Pereira* arguments based on lack of personal jurisdiction, practitioners could consider making an argument analogizing to the Federal Rules of Civil Procedure. 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). 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).

[69] *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019), *reh'g denied* (July 18, 2019).

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rule. Following *Ortiz-Santiago*, the Fifth, Fourth, and Eleventh Circuits have held that a defective NTA does not deprive the immigration court of jurisdiction, but is a claim-processing issue.[70] The Eleventh Circuit did not reach the issue of whether an NTA lacking time and place of proceedings was defective, but found that such an argument would be a claim-processing rule, not a jurisdictional defect.[71]

If a practitioner determines that his or her client may benefit from having the case before the immigration court terminated,[72] the practitioner should argue, where case law permits, that the statute and regulations governing the required elements of an NTA are akin to a claim-processing rule and failure to follow the rule requires termination. This argument should be made at the earliest opportunity before the immigration judge. If the IJ denies the motion to terminate the practitioner should not concede the point, but rather be sure the argument for termination is preserved in the record for potential appeal. Practitioners can point out that the BIA has not yet addressed this specific issue. The U.S. courts of appeals decisions that have found the NTA requirements to be akin to a claim-processing rule have denied the noncitizens' motions to dismiss for not having timely raised the issue[73] so it is crucial to make this argument as soon as possible, preferably at the first master calendar hearing or via motion before the first master calendar hearing.

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. In some cases this result may change the ultimate outcome of proceedings (for example, if intervening developments render the individual newly eligible for relief), but in other cases, it may simply delay issuance of a removal order or result in the case being assigned to a less favorable judge. While practitioners could challenge issuance of a new NTA after termination, that argument is beyond the scope of this advisory.[74]

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, individuals who are not eligible for cancellation but who have strong asylum claims may not wish to pursue a motion to terminate based on *Pereira*, especially if they are detained, since termination could delay filing and/or adjudication of the asylum application.

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[70] *See Pierre-Paul v. Barr,* 930 F.3d 684, 688-691 (5th Cir. 2019); *Perez-Sanchez v. Att'y Gen. of U.S*, 935 F.3d 1148 (11th Cir. 2019).

[71] *Perez-Sanchez* at 1157. ("We do not say that 8 CFR § 1003.14 regulates nothing at all. We agree with our sister circuits that the regulation sets forth a claim processing rule.").

[72] *See* Zachary Nightingale, *An Attorney's Ethical and Legal Obligations to Pereira-Affected Clients*, American Immigration Lawyers Association, AILA Doc. No. 18091831 (Sept. 18, 2018), https://www.aila.org/practice/ethics/ethics-resources/2016-2019/an-attorneys-ethical-legal-obligations-to-pereira (discussing strategic considerations in the context of attorneys' duties to clients under the Model Rules of Professional Conduct).

[73] *See Ortiz-Santiago*, 924 F.3d at 956; *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019).

[74] *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), *vacated by Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (remanding case to BIA to apply proper claim preclusion test).

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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.

C. Arguing That an IJ May Not Issue an *In Absentia* Order (or Must Rescind and Reopen a Previously Issued Order) in Cases with Defective NTAs

Practitioners have used the reasoning of *Pereira* to argue that the IJ may not proceed *in absentia* in situations where the respondent fails to appear at a hearing, or to argue for rescission and reopening of a previously issued *in absentia* order. Specifically, practitioners have relied on the Supreme Court's opinion addressing the definition of a Notice to Appear under section 1229(a), which is the sole statutory provision that defines the charging document. The Court expressly addresses other statutes that reference 1229(a), including the two *in absentia* statutory provisions at sections 1229a(b)(5)(A) and 1229a(b)(5)(C)(ii). The Court discusses these two *in absentia* statutory provisions to conclude that the stop-time rule phrase "under section 1229(a)" refers to the same notice mandated by the "required under" phrase and the "in accordance with" phrase under section 1229a(b)(5)(A) and section 1229a(b)(5)(C)(ii), respectively: "The 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-place criteria defined in §1229(a)(1)."[75] Therefore, based on the Court's reading of the statute as a whole, there is an argument that the holding in *Pereira* regarding the meaning of a Notice to Appear and the validity of an NTA without a time or place of hearing extends beyond the stop-time rule and into *in absentia* orders of removal.

Relying on *Pereira*, respondents have argued that *in absentia* removal orders should be rescinded and reopened because the immigration court never acquired jurisdiction over the case. In the *in absentia* context, this argument seems more compelling than, for example, the facts in *Bermudez-Cota*, because the noncitizen can show prejudice[76] as a result of the defective notice. Nonetheless, in *Matter of Pena-Mejia* and *Matter of Miranda-Cordiero*, the BIA focused on and rejected the jurisdictional arguments even where the respondent fails to appear.

There is also a *Pereira*-based statutory argument that the respondent's *in absentia* order should be rescinded under 8 USC § 1229a(b)(5)(C)(ii) because the respondent never USC received proper notice "in accordance with paragraph (1) or (2) of section 1229(a)" where the NTA did not provide the time and place of the hearing to the respondent.[77] According to 8 USC §

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[75] *Pereira*, 138 S. Ct. at 2118.

[76] Moreover, if the practitioner wishes to make an argument that the NTA violates a claim-processing rule, where the respondent failed to appear, the motion to rescind and reopen would be the first opportunity for the respondent to raise this argument. *See* discussion of arguments grounded in *Ortiz-Santiago v. Barr* above.

[77] The Ninth Circuit seemingly implied by its analysis in *Martinez v. Barr,* 941 F.3d 907, 920–21 (9th Cir. 2019) that an NTA lacking a time/date/place is not cured by a subsequent hearing notice that replaces the missing time/date/place information noting, "Section 1229(a)(2) further provides that, 'in the case of any *change or postponement* in the time and place of such proceedings,' written notice, by personal service or mail, must be

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1229a(b)(5)(C)(ii), a respondent ordered removed *in absentia* may challenge an *in absentia* order of removal "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title." 8 USC § 1229a(b)(5)(C)(ii).

In *Matter of Pena-Mejia* and *Matter of Miranda-Cordiero*, the BIA briefly reviewed the statutory text and focused only on the language that an IJ may issue an *in absentia* order after finding "written notice required under paragraph (1) or (2) of section 1229(a)" was provided to respondent or their attorney of record, and concluded that "[b]ecause this statute uses the disjunctive term 'or' rather than the conjunctive 'and,' an in absentia order of removal may be entered if a written notice containing the time and place of the hearing was provided *either* in a notice to appear under section 239(a)(1) *or* in a subsequent notice of the time and place of the hearing pursuant to section 239(a)(2)."[78] There is an argument that the BIA's reliance on the disjunctive "or" language of the statute, to deny rescission of an *in absentia* order if the respondent received a proper NTA *or* notice of hearing, not only contradicts the Supreme Court's analysis in *Pereira*, but it also conflicts with the plain language of 8 USC § 1229(a)(2). That provision, titled "Notice of change in time or place of hearing," requires that the respondent be notified of a new time and place of proceedings and consequences of failure to appear. As a matter of logic, the time and place cannot be "changed" if there is no time and place in the first instance. Instead, there is an argument that (a)(2) can only apply after the government has issued a Notice to Appear under (a)(1), which must include the nature of the proceedings; the legal authority under which the proceedings are conducted; the charges; the right to counsel; and the requirement to keep the court updated of address changes; and the time and place where the proceedings will be held. 8 USC § 1229(a)(1)(A)-(G). Moreover, the rescission language of 8 USC § 1229a(b)(5)(C)(ii), requires a showing that the respondent did not receive notice in accordance with paragraph 1229(a)(1), which by its plain language requires an NTA to include "the time and date at which the proceedings will be held" or that respondent did not receive notice in accordance with paragraph 1229(a)(2). Thus, practitioners could argue that only a Notice to Appear with time and place information can meet the notice requirements found at 8 USC § 1229a(b)(5)(C)(ii); where the respondent is only advised of time and place of the initial hearing through a hearing notice rather than the Notice to Appear, there has been no required "notice" under 8 USC § 1229a(b)(5)(C)(ii). However, multiple U.S. courts of appeals have also rejected arguments seeking rescission of *in absentia* orders where the NTA lacked the time and place of proceedings despite *Pereira.*[79]

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provided to an alien with the new time and place of the proceeding and the consequences of failure to attend the hearing." (emphasis added).

[78] *Matter of Pena-Mejia*, 27 I&N Dec. 548.

[79] *See, e.g.*, *Santos-Santos v. Barr*, 917 F.3d 486, 490 (6th Cir. 2019) (holding that where the noncitizen had received notice of the time and place of the hearing through a notice of hearing, the fact that the NTA was defective did not warrant rescission and reopening). *See* further list of cases denying rescission and reopening at note 47, *supra.*

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Practitioners also should raise any available arguments that the individuals did not receive a subsequent notice of hearing or that the notice of hearing lacked information required to be provided under 8 USC § 1229(a)(2).

D. Arguing for Cancellation of Removal Eligibility When the Client Was Served a Subsequent Hearing Notice with Time and Place Information

Practitioners with clients who are otherwise eligible for cancellation of removal but may be barred by the BIA's restrictive interpretation of *Pereira* in *Matter of Mendoza-Hernandez* should preserve the issue for appeal. The *Mendoza-Hernandez* decision held that a subsequent, court-issued hearing notice "cures" a defective NTA and triggers the stop-time rule.[80] Practitioners should argue before the IJ that *Mendoza-Hernandez* was wrongly decided and that the client is cancellation-eligible to preserve the issue for appeal.

In arguing that *Mendoza-Hernandez* was wrongly decided, practitioners should explain that the BIA erroneously relied on pre-*Pereira* court of appeals decisions that are dependent on a contrary interpretation of 8 USC § 1229(a) not consistent with *Pereira*.[81] Prior to *Pereira*, several U.S. courts of appeals held that the requirements of § 1229(a)(1) could be 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.[82] To the extent prior court of appeals case law depends on an interpretation of 8 USC § 1229(a) that is inconsistent with *Pereira*, the case law does not bind the courts in future decisions.[83]

In challenging *Mendoza-Hernandez*, practitioners should also argue that under the plain language of the stop-time rule as interpreted by the Supreme Court in *Pereira* and as recognized by the *Mendoza-Hernandez* dissenters, only a proper NTA, not an immigration court hearing notice, can stop time for cancellation purposes. Practitioners should read the *Mendoza-Hernandez* dissent carefully and use its reasoning as a road map in making these arguments.

The Ninth Circuit has explicitly rejected *Mendoza-Hernandez*'s holding that a subsequent, court-issued hearing notice "cures" a defective NTA and triggers the stop-time rule.[84] In *Lopez v. Barr*,

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[80] *See supra* Part III.C. (discussing *Matter of Mendoza-Hernandez & Capula-Cortes*).
[81] *See Lopez v. Barr,* 925 F.3d 396, 404 (9th Cir. 2019) ("[N]one of these pre-*Pereira* decisions 'take into account the Supreme Court's determination that the "stop-time" rule contains plain and unambiguous language' that the '"stop-time" rule is triggered by service of a ... "notice to appear" that specifies the time and place of a hearing as an essential part of the charging document.'" (internal citation omitted).
[82] *See, e.g.*, *Guamanrrigra v. Holder,* 670 F.3d 404, 410-11 (2d Cir.2012); *Dababneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006).
[83] *See, e.g.*, *Miller v. Gammie*, 335 F. 3d 889, 900 (9th Cir. 2003) (finding intervening Supreme Court authority that is irreconcilable with prior federal court of appeals case law "effectively overrule[s]" the prior opinions of the court of appeals); *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); *Busby v. Crown Supply, Inc.*, 896 F. 2d 833, 840-41 (4th Cir. 1990) (allowing for overturning earlier court of appeals decisions based on a "superseding contrary decision of the Supreme Court"); *White v. Estelle*, 720 F. 2d 415, 417 (5th Cir. 1983) (allowing for overturning earlier court of appeals decisions based on "intervening and overriding Supreme Court decisions").
[84] *Lopez*, 925 F.3d at 402-04. Thus in the Ninth Circuit, practitioners can move forward with cancellation of removal for affected clients; whereas in other circuits IJs will likely take the position that they are bound by *Mendoza-*

the court of appeals concluded that the clock is not stopped until the noncitizen is served with a proper NTA. However, the Court of Appeals for the Sixth Circuit found the opposite in *Garcia-Romo v. Barr*, holding, "the stop-time rule is triggered when a noncitizen has received all of the required categories of information of § 1229(a)(1)(A)-(G) whether sent through a single written communication or in multiple written installments."[85] Practitioners should research circuit precedent in their jurisdiction before making arguments regarding the stop-time rule as this is a developing area of the law.

E. Arguing that a Defective NTA Does Not Satisfy the Post-Conclusion Voluntary Departure Stop-Time Rule

Significantly, a stop-time rule nearly identical to § 1229b(d)(1) exists in 8 USC § 1229c(b)(1)(A), the post conclusion voluntary departure provision. Under that provision, IJs may 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]."

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."[86] 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 to the United States should be eligible for post-conclusion voluntary departure, provided that other statutory criteria are met. *See generally* 8 USC § 1229c(b)(1). Practitioners should continue making these arguments, especially since some practitioners have reported that IJs have agreed with the argument holding that a putative NTA does not satisfy the post-conclusion voluntary departure stop-time rule.

F. Criminal Prosecutions under 8 USC § 1326

Since the *Pereira* decision, there have been a number of federal district courts that have held that a prior removal order that was based on a defective NTA did not support a charge of criminal re-entry under 8 USC § 1326. Several federal district courts have dismissed illegal re-entry charges, finding that the underlying "immigration court proceedings were void" for lack of jurisdiction.[87]

Hernandez so practitioners should preserve the issue for appeal but counsel the client that he or she will very likely be found ineligible for cancellation of removal and need to appeal to the BIA and petition for review in federal court to have a chance at establishing eligibility through a challenge to *Mendoza-Hernandez*.

[85] *Garcia-Romo v. Barr*, 940 F.3d 192, 197 (6th Cir. 2019).

[86] *Pereira* , 138 S. Ct. at 2110.

[87] *See, e.g.*, *United States v. Armando Perez-Gavaldon*, No. EP-19-CR-1740-DB-(1), 2019 WL 3068334 (W.D. Tex. July 11, 2019), *appeal docketed*, No. 19-50745 (5th Cir. Aug. 12, 2019); *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164, 1166 (E.D. Wash. July 26, 2018); *United States v. Rodriguez-Rosa*, No. 3:18-cr-00079-MMD, 2018 WL 6635286 (D. Nev. Dec. 11, 2018) *appeal voluntarily dismissed United States v. Rodriguez-Rosa*, No. 19-10012, 2019 WL 3202193, at *1 (9th Cir. May 6, 2019); *United States v. Soto-Mejia*, 356 F.Supp.3d 1053 (D. Nev. 2018) *appeal voluntarily dismissed United States v. Soto-Mejia*, No. 19-10005, 2019 WL 1522775, at *1 (9th Cir. Apr. 3, 2019); *United States v. Erazo-Diaz*, 353 F.Supp.3d 867 (D. Ariz. 2018); *United States v. Lopez-Urgel*, 351 F. Supp.

However, as U.S. courts of appeals have addressed the subject matter jurisdiction argument in petitions for review, federal district courts have become more reticent to dismiss criminal re-entry charges based on *Pereira* arguments.[88] For example, in *Villa v. Barr*, the criminal defendant argued that he could not be charged with criminal re-entry because the immigration court lacked jurisdiction to issue the removal order that DHS was reinstating.[89] The Seventh Circuit, rejected this argument, however, citing cases in the immigration context that had rejected the *Pereira*-based subject matter jurisdiction argument.[90]

Attorneys who seek to dismiss a § 1326 charge through a *Pereira*-based argument may contact Kristin Kimmelman, Kristin_Kimmelman@fd.org or Brianna Mircheff Brianna_Mircheff@fd.org at the Federal Defenders of San Diego, Inc., for assistance and sample briefing.

V. Conclusion

When the Supreme Court decided *Pereira v. Sessions*, there was broad hope within the immigration advocacy community that the decision would change the removal defense landscape, potentially leading to mass terminations of proceedings, and grants of motions to rescind and reopen *in absentia* removal orders. Unsurprisingly, the BIA quickly issued four precedential decisions taking the narrowest possible reading of *Pereira*. Meanwhile, the U.S. courts of appeals continue to review the BIA's interpretations of *Pereira*-related issues and have issued mixed decisions. There are still myriad issues implicated by *Pereira*, including failure to include the place of hearing on the NTA, claim-processing rules, and the triggering of the stop-time rule. Practitioners are encouraged to continue making *Pereira*-based arguments and advocate for the government to follow the INA and regulations.

3d 978 (W.D. Tex. 2018) *appeal docketed* (Nov. 19, 2018); *United States v. Ortiz*, 347 F. Supp. 3d 402 (D.N.D. 2018) *appeal docketed* (Dec. 3, 2018).

[88] *See United States v. Cortez,* 930 F.3d 350 (4th Cir. 2019); *Villa v. Barr,* 924 F.3d 370, 375 (7th Cir. 2019)*, reh'g denied* (July 2, 2019); *United States v. Tarango-Robles,* No. 19-cr-492 RB, 2019 WL 1557170 (D.N.M. Apr. 10, 2019)*; United States v. Mendez-Vargas,* No. 18-CR-3237-GPC-1, 2019 WL 1259166 (S.D. Cal. Mar. 19, 2019).

[89] *Villa*, 924 F.3d at 371-72.

[90] *Id*. at 375.

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