No. 19-940

In the Supreme Court of the United States

RENE ANTONIO GONZALEZ-DE LEON, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the immigration court lacked jurisdiction over petitioner's removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 932 F.3d 489. The decisions of the Board of Immigration Appeals (Pet. App. 12-16) and the immigration judge (Pet. App. 17-36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2019. A petition for rehearing was denied on October 24, 2019 (Pet. App. 37-38). The petition for a writ of certiorari was filed on January 22, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for a removal proceeding before an immigration judge (IJ) to determine whether

an alien should be removed from the United States. 8 U.S.C. 1229a(a)(1). IJs "are attorneys whom the Attorney General appoints as administrative judges" to conduct removal proceedings. 8 C.F.R. 1003.10(a). Pursuant to authority vested in him by the INA, see 8 U.S.C. 1103(g), the Attorney General has promulgated regulations "to assist in the expeditious, fair, and proper resolution of matters coming before [IJs]," 8 C.F.R. 1003.12.

The Attorney General's regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document is filed with the Immigration Court." 8 C.F.R. 1003.14(a). Under the regulations, a "[c]harging document means the written instrument which initiates a proceeding before an [IJ]," such as "a Notice to Appear." 8 C.F.R. 1003.13 (emphasis omitted). The regulations provide that "the Notice to Appear" shall contain "the time, place and date of the initial removal hearing, where practicable." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.15(b)-(c) (listing the information to be provided to the immigration court in a "Notice to Appear"). The regulations further provide that, "[i]f that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.18(a) ("The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.").

b. The INA separately requires that an alien placed in removal proceedings be served with "written notice" of certain information. 8 U.S.C. 1229(a)(1). Section

1229 refers to that "written notice" as a "'notice to appear.'" *Ibid.* Under paragraph (1) of Section 1229(a), such written notice must specify, among other things, the "time and place at which the proceedings will be held," and the "consequences under section 1229a(b)(5)" of failing to appear. 8 U.S.C. 1229(a)(1)(G)(i)-(ii). Paragraph (2) of Section 1229(a) provides that, "in the case of any change or postponement in the time and place of [the removal] proceedings," "written notice shall be given" specifying "the new time or place of the proceedings," and the "consequences under section 1229a(b)(5)" of failing to attend such proceedings. 8 U.S.C. 1229(a)(2)(A).

Section 1229a(b)(5), in turn, provides that "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided * * * , does not attend a proceeding under this section, shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An alien may not be removed in absentia, however, unless the Department of Homeland Security (DHS) "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." *Ibid.* An order of removal entered in absentia may be rescinded "if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Petitioner is a native and citizen of Guatemala. Administrative Record (A.R.) 347. In 2015, petitioner arrived at or near a port of entry in Arizona without a valid visa or other entry document. *Ibid.* After interviewing petitioner, an asylum officer determined that there was a significant possibility that petitioner could establish eligibility for asylum in full removal proceedings before an IJ. A.R. 352.

DHS served petitioner with a notice to appear for removal proceedings on a date "to be set" at a time "to be set." A.R. 347. The notice to appear charged that petitioner was subject to removal because he was not in possession of a valid visa or other entry document. *Ibid.*; see 8 U.S.C. 1182(a)(7)(A)(i)(I). DHS filed the notice to appear with the immigration court. A.R. 347.

On the same day that DHS served and filed the notice to appear, see A.R. 348, the immigration court provided petitioner with a notice of hearing, informing him that it had scheduled his removal hearing for December 7, 2015, at 8:30 a.m., A.R. 322. Petitioner appeared at that hearing and subsequent hearings before the IJ. Pet. App. 3; A.R. 84-92, 94, 99, 108, 150; see A.R. 313-319 (providing petitioner with notice of the time, place, and date of subsequent hearings).

The IJ found petitioner removable as charged, Pet. App. 18, and denied his applications for asylum, withholding of removal, and related protection, *id.* at 26-36. The IJ therefore ordered petitioner removed to Guatemala. *Id.* at 36. The Board of Immigration Appeals (Board) dismissed petitioner's appeal, finding no basis to disturb the IJ's decision. *Id.* at 12-16.

3. Following the Board's decision, this Court issued its decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018). In *Pereira*, the Court was presented with the "narrow question," *id.* at 2110, whether a notice to appear that does not specify the time or place of an alien's removal proceedings is a "notice to appear under section 1229(a)" that triggers the so-called stop-time rule governing the calculation of the alien's continuous physical presence in the United States for purposes of cancellation of removal, 8 U.S.C. 1229b(d)(1). The Court

answered no, holding 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." *Pereira*, 138 S. Ct. at 2110.

On the day after this Court decided *Pereira*, petitioner filed a petition for review of the Board's decision in the court of appeals. C.A. Doc. 1-2 (June 22, 2018). Petitioner later filed a motion to remand his case to the Board in light of *Pereira*. C.A. Doc. 10 (Sept. 19, 2018). In that motion, petitioner argued for the first time that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing. *Id.* at 7. The court of appeals denied the motion "without prejudice to the parties addressing the jurisdictional issue in their briefs." C.A. Doc. 14-2, at 3 (Oct. 29, 2018). Petitioner renewed his jurisdictional argument in his opening brief. Pet. C.A. Br. 30-34.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1-8. As relevant here, the court rejected petitioner's argument that "the IJ and the [Board] did not have the authority to hear [his] case because the Notice to Appear issued to him did not specify the date and time of the hearing." *Id.* at 2. The court found petitioner's argument foreclosed by its post-*Pereira* decisions in *Santos-Santos* v. *Barr*, 917 F.3d 486 (6th Cir. 2019), and *Hernandez-Perez* v. *Whitaker*, 911 F.3d 305 (6th Cir. 2018). Pet. App. 8. The court explained that, in *Hernandez-Perez*, it had "held that 'jurisdiction vests with the immigration court where . . . the mandatory information about the time of the hearing . . . is provided in a Notice of Hearing issued after

the [Notice to Appear].'" *Ibid.* (quoting *Hernandez-Perez*, 911 F.3d at 315) (brackets in original). The court concluded that because petitioner's "Notice to Appear, which omitted the date and time of the hearing, was promptly followed by a Notice of Hearing that provided this information," "both the IJ and the [Board] had jurisdiction over [petitioner's] case." *Ibid.*

5. The court of appeals denied rehearing en banc. Pet. App. 37-38.

ARGUMENT

Petitioner contends (Pet. 18-21) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court, and the outcome of this case would not have been different in any other court of appeals that has addressed the question presented. The Court has recently and repeatedly denied petitions for writs of certiorari raising the same issue, see *Karingithi* v. *Barr*, No. 19-475 (Feb. 24, 2020); *Kadria* v. *Barr*, No. 19-534 (Jan. 27, 2020); *Banegas Gomez* v. *Barr*, No. 19-510 (Jan. 27, 2020); *Perez-Cazun* v. *Barr*, 140 S. Ct. 908 (2020) (No. 19-358); *Deocampo* v. *Barr*, 140 S. Ct. 858 (2020) (No. 19-44), and the same result is warranted here.[1]

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[1] Other pending petitions for writs of certiorari raise similar issues. See, *e.g.*, *Pedroza-Rocha* v. *United States*, No. 19-6588 (filed Nov. 6, 2019); *Pierre-Paul* v. *Barr*, No. 19-779 (filed Dec. 16, 2019); *Callejas Rivera* v. *United States*, No. 19-7052 (filed Dec. 19, 2019); *Araujo Buleje* v. *Barr*, No. 19-908 (filed Jan. 17, 2020); *Mora-Galindo* v. *United States*, No. 19-7410 (filed Jan. 21, 2020); *Nkomo*

1. a. Petitioner contends (Pet. 18-21) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing. That contention lacks merit, for three independent reasons.

First, a notice to appear need not specify the date and time of the initial removal hearing in order for "[j]urisdiction" to "vest[]" in the immigration court under the pertinent regulations, 8 C.F.R. 1003.14(a). The regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document is filed with the Immigration Court." *Ibid.* The regulations further provide that a "[c]harging document means the written instrument which initiates a proceeding before an [IJ]," such as "a Notice to Appear." 8 C.F.R. 1003.13 (emphasis omitted). And the regulations make clear that, in order to serve as a charging document that commences removal proceedings, a "Notice to Appear" need not specify the date and time of the initial removal hearing: the regulations specifically provide that "the Notice to Appear" shall contain "the time, place and date of the initial removal hearing" only "where practicable." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.15(b)-(c) (omitting date-and-time information from the list of information to be provided to the immigration court in a "Notice to Appear").

Far from depriving the immigration court of jurisdiction when a "Notice to Appear" filed by DHS in the immigration court does not contain "the time, place and date of the initial removal hearing," the regulations instead expressly authorize the immigration court to

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v. *Barr*, No. 19-957 (filed Jan. 28, 2020); *Ferreira* v. *Barr*, No. 19-1044 (filed Feb. 18, 2020); *Ramos* v. *Barr*, No. 19-1048 (filed Feb. 20, 2020).

schedule the hearing and to provide "notice to the government and the alien of the time, place, and date of [the] hearing." 8 C.F.R. 1003.18(b). That provision for the immigration court to schedule a hearing necessarily means that the immigration court has jurisdiction and proceedings have commenced. Thus, a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ." *Karingithi* v. *Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019), cert. denied, No. 19-475 (Feb. 24, 2020); see *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 445 (B.I.A. 2018) (explaining that 8 C.F.R. 1003.14(a) "does not specify what information must be contained in a 'charging document' at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest").

Second, even if the notice to appear alone did not suffice to "vest[]" "[j]urisdiction" in the immigration court, 8 C.F.R. 1003.14(a), the notice to appear together with the subsequent notice of hearing did. As noted, the regulations expressly authorize the immigration court to "provid[e] notice to the government and the alien of the time, place, and date of hearing" when "that information is not contained in the Notice to Appear." 8 C.F.R. 1003.18(b). That is what the immigration court did here: it provided petitioner with a notice of hearing informing him that his initial removal hearing had been scheduled for December 7, 2015, at 8:30 a.m. A.R. 322. Thus, even if the regulations required notice of the date and time of the hearing for "[j]urisdiction" to "vest[]," 8 C.F.R. 1003.14(a), that requirement was satisfied when petitioner was provided with a notice of hearing containing that information. See *Bermudez-Cota*, 27 I. & N. Dec.

at 447 ("Because the [alien] received proper notice of the time and place of his proceeding when he received the notice of hearing, his notice to appear was not defective.").

Third, any requirement that the notice to appear contain the date and time of the initial removal hearing is not a strictly "jurisdictional" requirement, but rather is simply a "claim-processing rule"; accordingly, petitioner forfeited any objection to the contents of the notice to appear by not raising that issue before the IJ. *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 963 (7th Cir. 2019). Although 8 C.F.R. 1003.14(a) uses the word "[j]urisdiction," this Court has recognized that "[j]urisdiction" is "a word of many, too many, meanings." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1848 (2019) (citations omitted). And here, context makes clear that Section 1003.14(a) does not use the term in its strict sense. See *Matter of Rosales Vargas & Rosales Rosales*, 27 I. & N. Dec. 745, 753 (B.I.A. 2020) (explaining that Section 1003.14(a) is "an internal docketing or claim-processing rule and does not serve to limit subject matter jurisdiction"). As 8 C.F.R. 1003.12 confirms, the Attorney General promulgated Section 1003.14(a) "to assist in the expeditious, fair, and proper resolution of matters coming before [IJs]," 8 C.F.R. 1003.12—the very description of a claim-processing rule. See *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011) (explaining that "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"). Thus, "as with every other claim-processing rule," failure to comply with Section 1003.14(a) may be "waived or forfeited." *Ortiz-Santiago*, 924 F.3d at 963.

Here, petitioner appeared at his initial removal hearing before the IJ on December 7, 2015, without raising any objection to the lack of date-and-time information in the notice to appear. A.R. 84-92. Given the absence of a timely objection, petitioner forfeited any contention that the notice to appear was defective. See *Pierre-Paul* v. *Barr*, 930 F.3d 684, 693 (5th Cir. 2019), petition for cert. pending, No. 19-779 (filed Dec. 16, 2019); *Ortiz-Santiago*, 924 F.3d at 964-965.

b. This Court's decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), does not suggest any error in the decision below. In *Pereira*, the Court held that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule" governing the calculation of the alien's continuous physical presence in the United States for purposes of cancellation of removal. *Id.* at 2110. "*Pereira*'s narrow holding does not govern the jurisdictional question" presented here. *Karingithi*, 913 F.3d at 1160 n.1. That is because, unlike in *Pereira*, the question presented here does not depend on what qualifies as a "notice to appear under section 1229(a)." 138 S. Ct. at 2110; cf. 8 U.S.C. 1229b(d)(1)(A). The INA, including Section 1229(a), "is silent as to the jurisdiction of the Immigration Court." *Karingithi*, 913 F.3d at 1160; see *Ortiz-Santiago*, 924 F.3d at 963 (explaining that the statute "says nothing about the agency's jurisdiction"). Indeed, the statute does not even require that the notice to appear be filed with the immigration court. Rather, it requires only that "written notice" of certain information—"referred to as a 'notice to appear'"—"be given * * * to the alien." 8 U.S.C. 1229(a)(1); see *United*

States v. *Cortez*, 930 F.3d 350, 366 (4th Cir. 2019) (explaining that "the regulations in question and § 1229(a) speak to different issues—filings in the immigration court to initiate proceedings, on the one hand, and notice to noncitizens of removal hearings, on the other").

To the extent that the issue of what must be filed in the immigration court for proceedings there to commence (or for "[j]urisdiction" there to "vest[]") is addressed at all, it is addressed only by the Attorney General's regulations. 8 C.F.R. 1003.14(a). And in describing the various "[c]harging document[s]" that may "initiate[] a proceeding before an [IJ]," 8 C.F.R. 1003.13 (emphasis omitted), the regulations make no cross-reference to Section 1229(a) or its list of information to be given to the alien, see 8 C.F.R. 1003.15, 1003.18. Rather, the regulations specify their own lists of information to be provided to the immigration court in a "Notice to Appear," *ibid.*, and those regulations do not require that such a notice specify the date and time of the initial removal hearing in order to qualify as a "charging document" filed with the immigration court to commence proceedings, 8 C.F.R. 1003.14(a). See *Nkomo* v. *Attorney Gen. of the U.S.*, 930 F.3d 129, 134 (3d Cir. 2019) (explaining that the fact that Section 1003.14(a) "describes the relevant filing as a 'charging document' * * * suggests § 1003.14's filing requirement serves a different purpose than the 'notice to appear under section 1229(a)' in the stop-time rule") (citations omitted), petition for cert. pending, No. 19-957 (filed Jan. 28, 2020). Petitioner's reliance (Pet. 6-8, 18-21) on *Pereira* and Section 1229(a) therefore is misplaced.

In any event, petitioner was given the notice required under Section 1229(a) in this case. Section 1229(a) requires that an alien placed in removal proceedings be

given "written notice" containing, among other information, "[t]he time * * * at which the proceedings will be held." 8 U.S.C. 1229(a)(1)(G)(i). Section 1229(a), however, does not mandate service of all the specified information in a single document. Thus, if the government serves an alien with a notice to appear that does not specify the date and time of the alien's removal proceedings, it can complete the "written notice" required under Section 1229(a) by later providing the alien with a notice of hearing that does specify the date and time. 8 U.S.C. 1229(a)(1); see *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I. & N. Dec. 520, 531 (B.I.A. 2019) (en banc) (holding that the "'written notice'" required under Section 1229(a)(1) "may be provided in one or more documents"). The government did that here. After DHS served petitioner with a notice to appear providing all of the specified information except the date and time of his removal proceedings, the immigration court provided petitioner with a notice of hearing containing the date and time, A.R. 322, and petitioner appeared at that hearing, A.R. 84-92.

c. Petitioner contends (Pet. 12-15) that the court of appeals' rejection of his jurisdictional challenge is inconsistent with *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). That contention likewise lacks merit and does not warrant this Court's review. This Court recently denied a petition for a writ of certiorari raising a similar issue, see *Karingithi*, *supra* (No. 19-475), and the same result is warranted here.

i. The question presented in *Kisor* was whether to overrule the agency-deference doctrine applied in *Auer* v. *Robbins*, 519 U.S. 452 (1997). *Kisor*, 139 S. Ct. at 2408. In *Kisor*, the Court explained certain limits on *Auer* deference, but on stare decisis grounds declined

to overrule *Auer*. See *id.* at 2422-2423; see also *id.* at 2424 (Roberts, C.J., concurring in part).

Petitioner contends that the court of appeals' decision in *Hernandez-Perez* v. *Whitaker*, 911 F.3d 305 (6th Cir. 2018)—on which the decision below relied, Pet. App. 8—"violates *Kisor*," Pet. 13. That contention is mistaken. In *Hernandez-Perez*, the court rejected a jurisdictional argument like petitioner's for the second reason discussed above, see pp. 8-9, *supra*—namely, that "jurisdiction vests with the immigration court where[] * * * the mandatory information about the time of the hearing is provided in a Notice of Hearing issued after the [notice to appear]," *Hernandez-Perez*, 911 F.3d at 315 (citation omitted). The court explained that such a "two-step notice process," *id.* at 313 (citation omitted), was not inconsistent with the statutory text, the regulatory text, or this Court's decision in *Pereira*, see *id.* at 313-314. The court of appeals therefore deferred to the Board's decision in *Bermudez-Cota* that following such a two-step notice process "vests" the immigration court with "jurisdiction." *Id.* at 312 (citation omitted); see *id.* at 312-315.

Contrary to petitioner's contention (Pet. 13), the court of appeals in *Hernandez-Perez* did not "appl[y] a version of deference that *Kisor* explicitly abrogated." Rather, the court found "the regulatory language * * * ambiguous" and deferred to the Board's reasonable interpretation of it. *Hernandez-Perez*, 911 F.3d at 313-314. Petitioner likewise errs in contending that the regulatory language "simply 'parrots the statutory text.'" Pet. 13-14 (quoting *Kisor*, 139 S. Ct. at 2417 n.5). Because the statutory text does not address what must be filed in the immigration court for proceedings in the im-

migration court to commence, there is no relevant statutory text for the regulations to parrot. See pp. 10-11, *supra*. For the same reason, petitioner's reliance on "the canon that 'identical words used in different parts of the same act are intended to have the same meaning'" is misplaced. Pet. 14 (citation omitted). Because only the regulations address what must be filed in the immigration court for proceedings in the immigration court to commence, see p. 11, *supra*, that canon of statutory interpretation has no application here. See, *e.g.*, *Goncalves Pontes* v. *Barr*, 938 F.3d 1, 6 (1st Cir. 2019) (finding that canon "inapposite" because the regulations "contain their own specification of the substantive requirements that a[] [notice to appear] must satisfy").

Petitioner asserts (Pet. 12-13) that the government conceded in *Aguilar-Galdamez* v. *Barr*, 772 Fed. Appx. 305 (6th Cir. 2019), that *Auer* deference is unwarranted here. Petitioner misapprehends the government's submission. In opposing a petition for rehearing en banc in *Aguilar-Galdamez*, the government argued that resort to *Auer* deference was unnecessary because the applicable regulations unambiguously *support* the government's position. See Gov't Opp. to Pet. for Reh'g En Banc at 6, *Aguilar-Galdamez*, *supra* (No. 18-4122). The government thus argued that the decision in *Hernandez-Perez* was correct, even without resort to *Auer* deference. *Ibid.* Indeed, other courts of appeals have reached the same conclusion as *Hernandez-Perez*, without relying on *Auer* deference. See *Banegas Gomez* v. *Barr*, 922 F.3d 101, 111-112 (2d Cir. 2019) (reaching the same conclusion as *Hernandez-Perez* without invoking deference to the Board), cert. denied, No. 19-510 (Jan. 27, 2020); *Pierre-Paul*, 930 F.3d at 690-691 (5th Cir.) (same); *Karingithi*, 913 F.3d at 1160-1160 (9th Cir.)

(finding the list of requirements in the regulations to be "plain" and then finding the Board's interpretation to be "consistent with" the court's own "analysis").

ii. Contrary to petitioner's contention (Pet. 14-15), this Court's decision in *Kisor* provides no basis to grant the petition for a writ of certiorari, vacate the judgment below, and remand to the court of appeals for further consideration (GVR). A GVR is unwarranted because the court of appeals' decision in *Hernandez-Perez* is consistent with *Kisor*. See pp. 12-15, *supra*. Moreover, *Hernandez-Perez* was not the only decision on which the court in this case relied. The court also relied on its prior decision in *Santos-Santos* v. *Barr*, 917 F.3d 486 (6th Cir. 2019). Pet. App. 8. In *Santos-Santos*, the court rejected a jurisdictional argument like petitioner's for the first reason discussed above, see pp. 7-8, *supra*—namely, that "[n]o references to the time and place of the hearing are required to vest jurisdiction under the regulation," *Santos-Santos*, 917 F.3d at 490. And like other courts of appeals, the court in *Santos-Santos* reached that conclusion without deferring to any decision of the Board. *Id.* at 490-491; see *Goncalves Pontes*, 938 F.3d at 7 (1st Cir.) (reaching the same conclusion and addressing the Board's interpretation only as a "coda" to the court's own analysis); *Nkomo*, 930 F.3d at 132-134 (3d Cir.) (reaching the same conclusion without invoking deference to the Board); *Cortez*, 930 F.3d at 362-364 (4th Cir.) (same); *Pierre-Paul*, 930 F.3d at 689-691 (5th Cir.) (same); *Ali* v. *Barr*, 924 F.3d 983, 986 (8th Cir. 2019) (same). The decision below thus rests on a ground independent of *Auer* deference. For that reason as well, there is no "reasonable probability" of a different outcome in light of *Kisor*. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

2. a. Petitioner has not identified any court of appeals in which the outcome of his case would have been different. Like the Sixth Circuit in this case, Pet. App. 8, seven other courts of appeals have rejected arguments like petitioner's on the ground that a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ," at least where the alien is later provided with a notice of hearing that contains that information. *Karingithi*, 913 F.3d at 1160 (9th Cir.); see *Goncalves Pontes*, 938 F.3d at 3-7 (1st Cir.); *Banegas Gomez*, 922 F.3d at 110-112 (2d Cir.); *Nkomo*, 930 F.3d at 132-134 (3d Cir.); *Cortez*, 930 F.3d at 362-364 (4th Cir.); *Pierre-Paul*, 930 F.3d at 689-691 (5th Cir.); *Ali*, 924 F.3d at 986 (8th Cir.).

Five courts of appeals have recognized that any requirement that a notice to appear contain the date and time of the initial removal hearing is not a jurisdictional requirement, but is simply a claim-processing rule. See *Cortez*, 930 F.3d at 358-362 (4th Cir.); *Pierre-Paul*, 930 F.3d at 691-693 (5th Cir.); *Ortiz-Santiago*, 924 F.3d at 962-965 (7th Cir.); *Lopez-Munoz* v. *Barr*, 941 F.3d 1013, 1015-1017 (10th Cir. 2019); *Perez-Sanchez* v. *U.S. Attorney Gen.*, 935 F.3d 1148, 1154-1157 (11th Cir. 2019). Each of those courts of appeals would have rejected petitioner's challenge to his removal proceedings on the ground that he forfeited any reliance on such a claim-processing rule. See pp. 9-10, *supra*. Thus, in every court of appeals that has addressed the question presented, petitioner's challenge would have failed.

b. Petitioner's assertions of various circuit conflicts do not suggest otherwise. Petitioner contends (Pet. 17-18) that, whereas some circuits have recognized that any requirement that a notice to appear contain the date

and time of the initial removal hearing is simply a claim-processing rule, the First, Second, Third, Sixth, Eighth, and Ninth Circuits have deemed any such requirement to be "jurisdictional" in the strict sense of the term. That contention is incorrect. Those six circuits have repeated 8 C.F.R. 1003.14(a)'s use of the word "jurisdiction" in the course of determining that a "notice to appear need not include time and date information" for the applicable "regulatory requirements" to be satisfied. *Karingithi*, 913 F.3d at 1160 (9th Cir.); see *Goncalves Pontes*, 938 F.3d at 6-7 (1st Cir.); *Banegas Gomez*, 922 F.3d at 111-112 (2d Cir.); *Nkomo*, 930 F.3d at 133 (3d Cir.); *Santos-Santos*, 917 F.3d at 490-491 (6th Cir.); *Hernandez-Perez*, 911 F.3d at 313-315 (6th Cir.); *Ali*, 924 F.3d at 986 (8th Cir.). But because each of those circuits found those requirements satisfied, none had occasion to address whether the regulations set forth a strictly jurisdictional, as opposed to a claim-processing, rule. See, *e.g.*, *Goncalves Pontes*, 938 F.3d at 7 n.3 (1st Cir.) (declining to address whether the regulations "must be understood as claim-processing rules" after determining that the notice to appear "was not defective under the regulations"); *Pierre-Paul*, 930 F.3d at 691 n.4 (5th Cir.) (explaining that other circuits that have "concluded that the notices to appear omitting the time, date, or place are not defective" have not "needed to address whether 8 C.F.R. § 1003.14 was jurisdictional").[2]

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[2] The government's brief in *United States* v. *Ramos-Urias*, No. 19-10138 (9th Cir.) (Oct. 29, 2019), makes the same point, arguing that "nothing" in *Karingithi*, *Banegas Gomez*, *Nkomo*, *Hernandez-Perez*, or *Ali* "turned on describing the regulation as 'jurisdictional.'" *Id.* at 27 n.6. Contrary to petitioner's contention (Pet. 5, 10-11), that brief does not describe any of those decisions or the decision below as incorrect.

Petitioner also contends (Pet. 18) that the decision below conflicts with decisions of the Seventh and Eleventh Circuits on whether a notice to appear that does not specify the date and time of the removal proceedings satisfies the requirements of Section 1229(a). In *Perez-Sanchez*, however, the Eleventh Circuit stated only that such a notice to appear, in the absence of any additional notifications, would be deficient under Section 1229(a), while leaving open the possibility that "a notice of hearing sent later might be relevant to a harmlessness inquiry." 935 F.3d at 1154. And the court declined to decide whether such a notice to appear, by itself, would be "deficient under the regulations," as opposed to the statute. *Id.* at 1156; see *id.* at 1156 n.5 (reserving judgment on whether a notice to appear under the regulations is "the same" as a notice to appear under Section 1229(a)). The court went on to explain that neither Section 1229(a) nor the regulations set forth a strictly "jurisdictional" rule. *Id.* at 1154-1155. Rather, the court recognized that "8 C.F.R. § 1003.14, like 8 U.S.C. § 1229(a), sets forth only a claim-processing rule." *Id.* at 1155. Thus, petitioner's failure to timely raise his notice objection in the immigration court means that his challenge to his removal proceedings would have failed in the Eleventh Circuit. See pp. 9-10, *supra* (explaining that petitioner forfeited any violation of a claim-processing rule here).

Petitioner's challenge would have likewise failed in the Seventh Circuit. In *Ortiz-Santiago*, the Seventh Circuit stated that a notice to appear that does not specify the date and time of the initial removal hearing is "defective" under both the statute and the regulations, 924 F.3d at 961, and that it was "not so sure" that the government could complete the required notice by later

providing a notice of hearing, *id.* at 962. But because the Seventh Circuit recognized that any defect in the notice to appear was not "an error of jurisdictional significance," *ibid.*, but rather an error that could be "waived or forfeited," *id.* at 963, it would have reached the same outcome as the Sixth Circuit did here. See pp. 9-10, *supra* (explaining that petitioner forfeited any error here).

Finally, petitioner asserts (Pet. 17) the existence of a circuit conflict on whether the Board's interpretation of the applicable regulations in *Bermudez-Cota* is entitled to *Auer* deference. Petitioner argues (*ibid.*) that the Seventh and Eleventh Circuits have rejected the Board's reasoning in *Bermudez-Cota*, which held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an [IJ] with jurisdiction over the removal proceedings * * * , so long as a notice of hearing specifying this information is later sent to the alien." 27 I. & N. Dec. at 447. As explained above, however, the Eleventh Circuit in *Perez-Sanchez* declined to decide whether a notice to appear that does not specify the date and time of the removal proceedings would be "deficient under the regulations." 935 F.3d at 1156. And although the Seventh Circuit in *Ortiz-Santiago* stated that such a notice to appear would be "defective" under both the statute and the regulations, 924 F.3d at 961, the court held that such a defect could be forfeited, *id.* at 963—as it was here, see pp. 9-10, *supra*. Thus, the outcome of this case would have been the same in every court of appeals that has addressed the question presented.[3]

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[3] To the extent that petitioner suggests (Pet. 17) that the First Circuit's decision in *Goncalves Pontes* and the Ninth Circuit's deci-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sion in *Karingithi* rested on "*Auer* deference to the [Board's] reasoning," that is incorrect. In *Goncalves Pontes*, the First Circuit addressed the Board's decision in *Bermudez-Cota* only as a "coda" to the court's own analysis. 938 F.3d at 7; see p. 15, *supra*. In *Karingithi*, the Ninth Circuit found the "list of requirements in the jurisdictional regulations" "plain," and it concluded that the alien's "notice to appear met the regulatory requirements" even before considering the Board's decision in *Bermudez-Cota*. 913 F.3d at 1160; see p. 14-15, *supra*.