No. 19-908

In the Supreme Court of the United States

MARIA ELENA ARAUJO BULEJE, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH 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 her initial removal hearing.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 733 Fed. Appx. 412. The decision of the Board of Immigration Appeals (Pet. App. 3a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2019. The petition for a writ of certiorari was filed on January 17, 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 independently 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 Peru. Administrative Record (A.R.) 509. In 2002, she was admitted to the United States as a temporary nonimmigrant visitor for six months. *Ibid.*

In 2012, 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. 509. The notice to appear charged that petitioner was subject to removal because she had remained in the United States for a time longer than

permitted. A.R. 511; see 8 U.S.C. 1227(a)(1)(B). DHS filed the notice to appear with the immigration court. A.R. 509.

Two weeks after DHS served the notice to appear, see A.R. 510, the immigration court provided petitioner with a notice of hearing, informing her that it had scheduled her removal hearing for July 11, 2012, at 10 a.m., A.R. 507. Petitioner appeared at that hearing and subsequent hearings before the IJ. A.R. 202, 208, 212, 217; see A.R. 483, 502-506 (providing petitioner with notice of the time, place, and date of subsequent hearings).

The IJ found petitioner removable as charged, A.R. 189-190; denied her applications for asylum, withholding of removal, and related protection, A.R. 193-199; and granted her request for voluntary departure, A.R. 199-200. The Board of Immigration Appeals (Board) dismissed petitioner's appeal, finding no basis to disturb the IJ's decision. A.R. 108-111. The court of appeals denied in part and dismissed in part petitioner's petition for review, finding that petitioner had either waived or failed to exhaust her challenges to the Board's decision. 733 Fed. Appx. 412, 413.

3. While petitioner's petition for review was still pending in the court of appeals, 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.

Following the court of appeals' disposition of her petition for review, petitioner filed a motion to reconsider with the Board in light of *Pereira*. A.R. 36-46; see Pet. App. 3a n.1. In that motion, petitioner argued that because the notice to appear in her case did not specify the date and time of her initial removal hearing, the IJ lacked jurisdiction to order her removed, and that her removal proceedings should therefore be reopened and terminated. A.R. 40-43.

The Board denied the motion to reconsider. Pet. App. 3a-6a. The Board determined that the motion was untimely because petitioner had filed it more than two years after the 30-day deadline for seeking reconsideration had expired. *Id.* at 4a (citing 8 C.F.R. 1003.2(b)(2)). The Board further determined that the "motion would not be successful even if addressed on the merits." *Id.* at 5a. Relying on *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (B.I.A. 2018)—a decision the Board had issued following *Pereira*—the Board explained that, "[w]hile the Notice to Appear issued to [petitioner] did not identify the date and time of her removal hearing, it vested the [IJ] with jurisdiction over the proceedings because the Immigration Court sent a Notice of Hearing to [petitioner] which identified the time and place of her removal hearing." Pet. App. 6a. The Board also emphasized that petitioner "did not allege that jurisdiction was not proper in her case at any time before the [IJ], the Board, or in her petition to the [court of appeals]." *Ibid.* Finally, the Board determined that, to the extent that petitioner was seeking "*sua sponte* reconsideration

or reopening, she ha[d] not established an exceptional situation required for *sua sponte* relief." *Ibid.* Petitioner filed a petition for review of the Board's decision denying her motion. *Id.* at 1a.

4. The court of appeals denied in part and dismissed in part the petition for review. Pet. App. 1a-2a. The court determined that the Board "did not abuse its discretion in denying the motion to reconsider as untimely where it was filed over two years after a final order of removal." *Ibid.* (citing 8 U.S.C. 1229a(c)(6)(B)). The court further found petitioner's contention that the immigration court lacked jurisdiction over her proceedings to be foreclosed by *Karingithi* v. *Whitaker*, 913 F.3d 1158 (9th Cir. 2019), cert. denied, No. 19-475 (Feb. 24, 2020), in which the court of appeals had held that a "notice to appear need not include [the] time and date of [the] hearing to vest jurisdiction in the immigration court." Pet. App. 2a. The court of appeals also held that it "lack[ed] jurisdiction to review the [Board's] decision not to reopen or reconsider proceedings sua sponte." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-8) that the immigration court lacked jurisdiction over her removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of her 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 be different in any other court of appeals that has addressed the question presented. The Court has recently 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.[*] In any event, this case would be a poor vehicle for this Court's review, because the outcome would be the same regardless of this Court's resolution of the question presented.

1. a. Petitioner contends (Pet. 6-8) that the immigration court lacked jurisdiction over her removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of her 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

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[*] 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); *Mora-Galindo* v. *United States*, No. 19-7410 (filed Jan. 21, 2020); *Gonzalez-De Leon* v. *Barr*, No. 19-940 (filed Jan. 22, 2020); *Nkomo* 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).

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 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 her that her initial removal hearing had been scheduled for July 11, 2012, at 10 a.m. A.R. 507. 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); see Pet. App. 6a. 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 her initial removal hearing before the IJ on July 11, 2012, without raising any objection to the lack of date-and-time information in the notice to appear. A.R. 202-206; Pet. App. 6a. 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), is not to the contrary. 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 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 a notice to appear 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) 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 her removal proceedings, the immigration court provided petitioner with a notice of hearing containing the date and time, A.R. 507, and petitioner appeared at that hearing, A.R. 202.

2. a. Petitioner has not identified any court of appeals in which the outcome of this case would be different. Like the Ninth Circuit, 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* v. *Barr*, 938 F.3d 1, 3-7 (1st Cir. 2019); *Banegas Gomez* v. *Barr*, 922 F.3d 101, 110-112 (2d Cir. 2019), cert. denied, No. 19-510 (Jan. 27, 2020); *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.); *Santos-Santos* v. *Barr*, 917 F.3d 486, 489-491 (6th Cir. 2019); *Ali* v. *Barr*, 924 F.3d 983, 986 (8th Cir. 2019).

Five other 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 her removal proceedings on the ground that she forfeited any reliance on such a claim-processing rule. See Pet. App. 6a; 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 assertion of a circuit conflict does not suggest otherwise. Petitioner contends (Pet. 3) 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 is defective. 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 her notice objection in the immigration court means that her challenge to her removal proceedings would have failed in the Eleventh Circuit. See Pet. App. 6a; 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 held 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 here as the Ninth Circuit did. See Pet. App. 6a; pp. 9-10, *supra* (explaining that petitioner forfeited any error here). Thus, the outcome of this case would be the same in every court of appeals that has addressed the question presented.

3. In any event, this case would be a poor vehicle for this Court's review, because the outcome would be the same regardless of this Court's resolution of the question presented. The court of appeals determined that the Board did not abuse its discretion in denying petitioner's motion to reconsider as untimely. Pet. App. 1a-2a (citing 8 U.S.C. 1229a(c)(6)(B)). The court further determined that it lacked jurisdiction to review the Board's decision not to reconsider or reopen proceedings sua sponte. *Id.* at 2a. Thus, regardless of the merits of the question presented, the petition for review would be denied as untimely or dismissed for lack of jurisdiction. *Id.* at 1a-2a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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