No. 19-44

In the Supreme Court of the United States

RAUL MOLINA DEOCAMPO, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 opinions of the court of appeals (Pet. App. 1a-4a, 5a-12a) are unreported. The decisions of the Board of Immigration Appeals (Pet. App. 13a-16a, 17a-26a) and the immigration judge (Pet. App. 27a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2019. The petition for a writ of certiorari was filed on July 3, 2019. 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. 1101(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. 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). 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 the Philippines. Administrative Record (A.R.) 566. In 1972, he was admitted to the United States as a lawful permanent resident. *Ibid.*; Pet. App. 28a. Following a 2001 conviction for misconduct involving a controlled substance in the fourth degree, in violation of Alaska law, A.R. 433, petitioner was placed in removal proceedings, but the IJ granted him cancellation of removal, a form of discretionary relief, A.R. 498. In 2010, petitioner was

convicted of misconduct involving a controlled substance in the fifth degree, in violation of Alaska law. Pet. App. 28a. And in 2014, he was again convicted of misconduct involving a controlled substance in the fourth degree, in violation of Alaska law. *Ibid.*

In 2015, DHS served petitioner with a notice to appear for removal proceedings on a date "[t]o be set" and at a time "[t]o be set." A.R. 564. The notice to appear charged that petitioner was subject to removal because of his 2010 and 2014 convictions for controlled-substance offenses. A.R. 566; see 8 U.S.C. 1227(a)(2)(B)(i). DHS filed the notice to appear with the immigration court. See A.R. 564.

The immigration court later served petitioner with a notice of hearing, informing him that it had scheduled his removal hearing for March 31, 2015, at 8:30 a.m. A.R. 560. Respondent appeared at that hearing and subsequent hearings before the IJ. Pet. App. 29a-31a; see A.R. 557-559 (providing petitioner notice of the time, place, and date of each subsequent hearing). The IJ found petitioner removable based on his 2010 and 2014 convictions and denied his applications for asylum, withholding of removal, and other relief. Pet. App. 27a-62a. The IJ thus ordered petitioner removed to the Philippines. *Id.* at 62a.

The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 17a-26a. The Board affirmed the IJ's determination that petitioner's 2014 conviction rendered him removable. *Id.* at 18a-20a. The Board also upheld the IJ's denial of relief. *Id.* at 22a-24a. Petitioner filed a petition for review of the Board's decision. 16-72298 C.A. Doc. 1 (July 7, 2016).

3. While the petition for review was 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 this Court's decision in *Pereira*, petitioner filed a motion to reopen his removal proceedings with the Board. A.R. 7-18. In his motion, petitioner argued that because the notice to appear in his case did not specify the time of his removal hearing, A.R. 9, the notice was not a notice to appear under Section 1229(a) and therefore did not vest the immigration court with jurisdiction over the proceedings, A.R. 8. Petitioner argued that the order of removal should be vacated and the removal proceedings terminated for lack of jurisdiction. A.R. 17.

The Board denied petitioner's motion to reopen. Pet. App. 13a-16a. The Board determined that petitioner's motion was untimely because petitioner had filed it nearly two years after the 90-day statutory deadline for seeking reopening had expired. *Id.* at 14a; see 8 U.S.C. 1229a(c)(7)(C)(i). The Board further determined that, to the extent petitioner was urging it to reopen proceedings sua sponte beyond the statutory deadline, the circumstances did not warrant the exercise of its "limited

discretion" to do so. Pet. App. 14a. The Board explained that, following this Court's decision in *Pereira*, the Board had held in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (2018), 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 and meets the requirements of section [1229(a)], so long as a notice of hearing specifying this information is later sent to the alien." Pet. App. 15a-16a (quoting *Bermudez-Cota*, 27 I. & N. Dec. at 447). Relying on *Bermudez-Cota*, the Board determined that, because the immigration court had served petitioner with a notice of hearing specifying the time of his initial removal hearing, "his notice to appear was not defective." *Id.* at 16a (citation omitted). Petitioner filed a petition for review of the Board's decision. 19-70091 C.A. Doc. 1 (Jan. 10, 2019).

4. The court of appeals consolidated petitioner's petitions for review, 16-72298 C.A. Docket entry No. 40 (Mar. 1, 2019), and denied the petitions in separate unpublished opinions, Pet. App. 1a-12a.

a. In denying the first petition for review, the court of appeals upheld the Board's determination that petitioner's 2014 conviction for a controlled-substance offense rendered him removable. Pet. App. 7a-9a. The court also determined that substantial evidence supported the denial of petitioner's applications for asylum and withholding of removal, *id.* at 9a-10a, and that the IJ had not violated petitioner's procedural due process rights, *id.* at 10a-12a.

b. In denying the second petition for review, the court of appeals rejected petitioner's argument that the notice to appear in this case "was insufficiently detailed to vest jurisdiction" in the immigration court. Pet. App.

3a. The court of appeals found petitioner's argument foreclosed by its post-*Pereira* decision in *Karingithi* v. *Whitaker*, 913 F.3d 1158 (9th Cir. 2019), petition for cert. pending, No. 19-475 (filed Oct. 7, 2019). Pet. App. 3a. The court explained that, in *Karingithi*, it had held that the applicable regulations do "'not require that the time and date of proceedings appear in the initial notice'" in order for "jurisdiction" to "vest[]" in the immigration court. *Ibid.* (quoting *Karingithi*, 913 F.3d at 1160). The court also rejected petitioner's argument that *Karingithi* had "misread[]" this Court's decision in *Pereira*. *Id.* at 4a. The court of appeals emphasized that this Court in *Pereira* had been "extremely careful to confine its holding to the very narrow statutory intersection between [the] stop-time rule and 8 U.S.C. § 1229(a)'s definition of [a notice to appear]." *Ibid.* (citing *Pereira*, 138 S. Ct. at 2110). The court of appeals therefore found *Pereira* "inapplicable to the petition for review at issue." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 3-4) 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 be different in any other court of appeals that has addressed the question presented. The petition for a writ of certiorari should be denied.[1]

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[1] Other pending petitions for writs of certiorari raise similar issues. See *Perez-Cazun* v. *Barr*, No. 19-358 (filed Sept. 13, 2019); *Karingithi* v. *Barr*, No. 19-475 (filed Oct. 7, 2019); *Banegas Gomez*

1. a. Petitioner contends (Pet. 3-4) 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[]" 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.* 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. And the regulations make clear that "a Notice to Appear" need not specify the date and time of the removal proceedings in order to serve as a "[c]harging document." *Ibid.* Indeed, 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"). And 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 expressly authorize the immigration court to provide that information to the government and the alien when the

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v. *Barr*, No. 19-510 (filed Oct. 16, 2019); *Kadria* v. *Barr*, No. 19-534 (filed Oct. 21, 2019).

hearing is scheduled. 8 C.F.R. 1003.18(b). 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), petition for cert. pending, No. 19-475 (filed Oct. 7, 2019); 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 served petitioner with a notice of hearing informing him that his initial removal hearing was scheduled for March 31, 2015, at 8:30 a.m. A.R. 560. 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 served 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 "jurisdictional" requirement, but a mere "claim-processing rule," reliance on which petitioner forfeited by not raising any error before the IJ. *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 963 (7th Cir. 2019). To be sure, 8 C.F.R. 1003.14(a) speaks in terms of the immigration court's "[j]urisdiction." But "[j]urisdiction" is "a word of many, too many, meanings." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1848 (2019) (citation omitted). And here, context makes clear that Section 1003.14(a) does not use the term in its strict sense. 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 ex rel. 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 March 31, 2015, at 8:30 a.m., without raising any objection to the lack of date and time information in the notice to appear. A.R. 126-151. 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); *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," however, "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 in person 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 "[j]urisdiction" of the immigration court 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, 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 the 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, 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"). Petitioner's reliance (Pet. 4, 14, 27) 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 time of his removal proceedings, it can complete the "written notice" required under Section 1229(a) by later serving the alien with a notice of hearing that does specify the 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 time of his removal proceedings, the immigration court served petitioner with a notice of hearing providing the time, A.R. 560, and petitioner appeared at that hearing, A.R. 126-151.

2. 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 served with a notice of hearing that provides that information. *Karingithi*, 913 F.3d at 1160; 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), petition for cert. pending, No. 19-510 (filed Oct. 16, 2019); *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 courts of appeals have rejected arguments like petitioner's on the ground that any requirement that a notice to appear contain the date and time of the initial removal hearing is not a jurisdictional requirement, but a mere 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*, No. 19-9510, 2019 WL 5691870, at *1-*4 (10th Cir. Nov. 4, 2019); *Perez-Sanchez* v. *United States Att'y Gen.*, 935 F.3d 1148, 1154-1157 (11th Cir. 2019). In its decision adopting that reasoning, the Seventh Circuit stated that a notice to appear that does not specify the date and time of the hearing is "defective," *Ortiz-*

Santiago, 924 F.3d at 961, and that it was "not so sure" that the government could complete the required notice by later serving 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 as the Ninth Circuit here. See p. 10, *supra* (explaining that petitioner forfeited any error here). Thus, in every court of appeals that has addressed the question presented, petitioner's petition for review would have been denied.[2]

[2] The Board in this case addressed the question presented in the course of declining to exercise its discretion to reopen petitioner's removal proceedings sua sponte. Pet. App. 14a-16a. The court of appeals denied petitioner's petition for review of that decision on the merits, without addressing whether the decision was judicially reviewable. *Id.* at 1a-4a. Although the government did not raise the issue in the court of appeals, it is the government's position that the Board's exercise of its discretion to decline to reopen removal proceedings sua sponte is judicially unreviewable. See Gov't Br. in Opp. at 9-28, *Velasquez* v. *Barr*, No. 18-813 (Mar. 29, 2019).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

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