No. 19-534

In the Supreme Court of the United States

LAHIM KADRIA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND 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.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

Kadria v. *Holder*, No. 10-3920 (Dec. 1, 2011)

Kadria v. *Holder*, No. 12-1882 (July 22, 2013), petition for reh'g denied, Oct. 16, 2013

Kadria v. *Lynch*, No. 13-4617 (May 28, 2015), petition for reh'g denied, Aug. 27, 2015

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the Federal Reporter but is reprinted at 779 Fed. Appx. 799. The decisions of the Board of Immigration Appeals (Pet. App. 9-11, 12-16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2019. The petition for a writ of certiorari was filed on October 21, 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 (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 Albania. Pet. App. 17. In 2000, petitioner entered the United States without inspection or admission by an immigration officer. *Id.* at 17-18. The Immigration and Naturalization Service (INS) served petitioner with a notice to appear for removal proceedings "on a date to be set at a time to be set." *Id.* at 18. The notice to appear charged that petitioner was subject to removal because he was an alien present in the United States without being admitted

or paroled. *Ibid.*; see 8 U.S.C. 1182(a)(6)(A)(i). INS filed the notice to appear with the immigration court. Administrative Record (A.R.) 960.

The immigration court in Harlingen, Texas, later provided petitioner with a notice of hearing, informing him that it had scheduled his removal hearing for October 20, 2000, at 9 a.m., in Harlingen. A.R. 952. Following that notice, petitioner moved for a change of venue to the immigration court in New York, New York. A.R. 927. An IJ granted the motion, A.R. 939, and the immigration court in New York subsequently provided petitioner with a notice of hearing, informing him that it had scheduled his removal hearing for January 26, 2001, at 8:30 a.m., in New York, A.R. 936, 940. Petitioner appeared at that hearing and a subsequent hearing before an IJ in New York. Pet. App. 7, 10; see A.R. 934 (providing petitioner notice of the time, place, and date of the subsequent hearing).

The IJ found petitioner removable as charged, A.R. 706-707, and denied his applications for asylum, withholding of removal, and other protection, A.R. 705. The IJ thus ordered petitioner removed to Albania. *Ibid.* The Board of Immigration Appeals (Board) affirmed without opinion, A.R. 681, and petitioner did not seek review in the court of appeals.

3. In 2010, petitioner filed with the Board a motion to reopen, seeking a "new asylum hearing" in light of "changed country conditions" in Albania. A.R. 598. The Board determined that the motion was untimely because it was filed beyond the 90-day statutory time limit for filing a motion to reopen. A.R. 580; see 8 U.S.C. 1229a(c)(7)(C)(i). The Board further determined that petitioner had not established changed country conditions material to his asylum claim, so the motion did not

fall within the exception to the time limit for such situations. A.R. 580-581; see 8 U.S.C. 1229a(c)(7)(C)(ii). The Board therefore denied petitioner's motion, A.R. 580-581, and the court of appeals denied his petition for review of that decision, 449 Fed. Appx. 62.

In 2011, petitioner filed with the Board a second motion to reopen, again asserting "changed country conditions in Albania." A.R. 472; see A.R. 470. The Board again determined that the motion was untimely, A.R. 463, and that petitioner had not established "changed country conditions" to justify an exception to the time limit, A.R. 464. The Board further determined that the motion was "number-barred," *ibid.*, under the INA's rule against filing more than one motion to reopen, A.R. 463; see 8 U.S.C. 1229a(c)(7)(A). The court of appeals denied petitioner's petition for review. 530 Fed. Appx. 58.

In 2013, petitioner filed with the Board a third motion to reopen, based on "changed country conditions in Albania." A.R. 313; see A.R. 310. The Board denied the motion as "untimely and number-barred." A.R. 275. It also determined that petitioner had not established a "material" change in country conditions. *Ibid.* The court of appeals denied petitioner's petition for review. 611 Fed. Appx. 41.

In March 2017, petitioner filed with the Board a fourth motion to reopen, likewise asserting "changed country conditions in Albania." A.R. 175; see A.R. 172. The Board denied the motion. A.R. 152-153. The Board explained that, "[e]ven assuming that [petitioner] has made a showing of changed circumstances in Albania, a motion to reopen must still establish prima facie eligibility for the underlying substantive relief sought." A.R. 153. The Board determined that petitioner had "made no such showing" because his proffered evidence

did not "show[] that [he] himself may face persecution or torture upon his repatriation." *Ibid.* Petitioner did not file a petition for review of that decision.

In September 2017, petitioner filed with the Board a motion to reconsider the denial of his fourth motion to reopen. A.R. 104. The Board denied the motion to reconsider, finding no "material error" in its prior decision. Pet. App. 13; see *id.* at 12-16. The Board further determined that, to the extent petitioner's motion should be construed as a motion to reopen based on additional evidence, petitioner had still "not ma[d]e a prima facie showing that [he] himself may face harm rising to the level of persecution or torture upon his repatriation." *Id.* at 15. Petitioner filed a petition for review of the Board's decision. 18-454 C.A. Doc. 1-2 (Feb. 16, 2018).

4. 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 another motion to reopen with the Board. A.R. 31. Petitioner argued that because the notice to appear in his case did not specify the date and time of his removal

hearing, the notice to appear was "defective," and he "was not properly placed in removal proceedings." A.R. 35. Petitioner argued that his removal proceedings should therefore be reopened and terminated. A.R. 34. He also argued that the INA's "time and number" bars should not stand in the way, A.R. 6 (capitalization and emphasis omitted), because, in his view, *Pereira* constituted a "truly exceptional situation" warranting the Board's exercise of its discretion to reopen his proceedings sua sponte, *ibid.*

The Board denied the motion to reopen. Pet. App. 9-11. The Board noted that petitioner did "not dispute that his motion [wa]s untimely and number-barred." *Id.* at 9. The Board then found no "exceptional circumstances" warranting the exercise of its authority to reopen the proceedings "sua sponte." *Id.* at 11. 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 or 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. 10. Relying on *Bermudez-Cota*, the Board determined that, because the immigration court had provided petitioner with notices of hearing specifying "the dates, times, and locations of his scheduled hearings," "the requirements of section [1229(a)] were satisfied in this case and termination is unwarranted." *Id.* at 10-11.

Petitioner filed a petition for review of the Board's decision. 19-954 C.A. Doc. 1-2 (Apr. 12, 2019). Petitioner also filed an opening brief in support of his other pending petition for review, making the same argument

that the notice to appear in his case was defective in light of *Pereira*. 18-454 Pet. C.A. Br. 10-17.

5. The court of appeals denied the two pending petitions for review in a single unpublished opinion. Pet. App. 1-8.

The court of appeals held that the Board did not abuse its discretion in denying petitioner's motion to reconsider the denial of his fourth motion to reopen. Pet. App. 3-5. The court explained that petitioner had not "establish[ed] any error in the [Board's] conclusion that he did not demonstrate his prima facie eligibility for relief." *Id.* at 5. The court further held that the Board "properly construed" petitioner's motion as a "motion to reopen" to the extent that it relied on additional evidence. *Id.* at 6. The court then determined that the additional evidence likewise "did not establish [petitioner's] prima facie eligibility for relief." *Ibid.*

The court of appeals also rejected petitioner's argument that "the agency lacked jurisdiction to commence removal proceedings against him because his Notice to Appear * * * did not provide a hearing date or time." Pet. App. 7. The court explained that petitioner's argument was foreclosed by its prior decision in *Banegas Gomez* v. *Barr*, 922 F.3d 101 (2d Cir. 2019), petition for cert. pending, No. 19-510 (filed Oct. 16, 2019), which had "agree[d]" with the Board's decision in *Bermudez-Cota* that the regulation governing the immigration court's "jurisdiction" does not require that a notice to appear "specify the time and date of the initial hearing, 'so long as a notice of hearing specifying this information is later sent to the alien.'" Pet. App. 7 (citation and emphasis omitted). The court noted that, although petitioner's notice to appear "did not specify the date and time of his hearing in immigration court, he subsequently received

adequate notice of his hearings, at which he in fact appeared." *Ibid.*[1]

ARGUMENT

Petitioner contends (Pet. 15-18) 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.[2]

1. a. Petitioner contends (Pet. 15-18) 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

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[1] In October 2019, following the court of appeals' decision, petitioner filed yet another motion to reopen with the Board, arguing that he should be permitted to apply for cancellation of removal in light of *Pereira*. A078-280-103 Mot. to Reopen & Mot. for Stay of Removal (B.I.A. Oct. 2, 2019). That motion remains pending.

[2] Other pending petitions for writs of certiorari raise similar issues. See, *e.g.*, *Deocampo* v. *Barr*, No. 19-44 (filed July 3, 2019); *Perez-Cazun* v. *Barr*, No. 19-358 (filed Sept. 13, 2019); *Karingithi* v. *Barr*, No. 19-475 (filed Oct. 7, 2019); *Banegas Gomez* v. *Barr*, No. 19-510 (filed Oct. 16, 2019); *Pierre-Paul* v. *Barr*, No. 19-779 (filed Dec. 16, 2019).

"[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 (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 the government 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 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 presupposes 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), 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 provided petitioner with a notice of hearing informing him that his initial removal hearing had been scheduled for October 20, 2000, at 9 a.m., in Harlingen, Texas. A.R. 952. Following the change of venue, the immigration court provided petitioner with another notice of hearing informing him that his initial removal hearing had been rescheduled for January 26, 2001, at 8:30 a.m., in New York, New York. A.R. 936, 940. 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 a mere "claim-processing rule"; accordingly, petitioner for-

feited 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). 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) (citations 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 January 26, 2001, without raising any objection to the lack of date and time information in the notice to appear. A.R. 722-729. 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 that the commencement of proceedings in (or 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 (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). Petitioner's reliance (Pet. 15-18) 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 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 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 INS 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 furnished petitioner with notices of hearing providing the date and time, A.R. 936, 940, 952, and petitioner appeared at the hearing, A.R. 722-729.

2. a. Petitioner has not identified any court of appeals in which the outcome of this case would be different. Like the Second Circuit in this case, Pet. App. 6-7, 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 provides that information. *Karingithi*, 913 F.3d at 1160 (9th Cir.); see *Goncalves Pontes* v. *Barr*, 938 F.3d 1, 3-7 (1st Cir. 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 held 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*, 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. 11-12, *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. 13-14) that, whereas some circuits have deemed any requirement that a notice to appear contain the date and time of the initial removal hearing to be a mere 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 holding that a "notice to appear need not include time and date information to satisfy" the applicable "regulatory requirements." *Karingithi*, 913 F.3d at 1160 (9th Cir.); see *Goncalves Pontes*, 938 F.3d at 6 (1st Cir.); *Banegas Gomez* v. *Barr*, 922 F.3d 101, 111-112 (2d Cir. 2019), petition for cert. pending, No. 19-510 (filed Oct. 16, 2019); *Nkomo*, 930 F.3d at 133 (3d Cir.); *Santos-Santos*, 917 F.3d at 490-491 (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 mere 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 concluding that the notice to appear "was not defective under the regulations").

Petitioner also contends (Pet. 14-15) that the Seventh and Eleventh Circuits disagree with other 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, by itself, 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. The court declined to decide whether such a notice to appear, by itself, would be "deficient under the regulations." *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)). And the court went on to hold that neither Section 1229(a) nor the regulations set forth a strictly "jurisdictional" rule. *Id.* at 1154-1155. Rather, the court held 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 challenge to his removal proceedings would have likewise failed in the Eleventh Circuit. See pp. 11-12, *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 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 Second Circuit here. See pp. 11-12, *supra* (explaining that petitioner forfeited any error here).

Finally, petitioner asserts (Pet. 12-13) the existence of a circuit conflict on whether the Board's interpretation of the applicable regulations in *Bermudez-Cota* is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). Petitioner argues (Pet. 12-13) 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. 11-12, *supra*. Thus, the outcome of this case would be the same in every court of appeals that has addressed the question presented.[3]

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[3] 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. 10-11. 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 7. Although the government did not raise the issue of reviewability in the court of appeals—which denied that petition for review without briefing, following its decision in *Banegas Gomez*—it is the government's position that the Board's exercise of its discretion to decline to reopen removal proceedings sua sponte

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2019

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is judicially unreviewable. See Br. in Opp. at 9-28, *Velasquez* v. *Barr*, No. 18-813 (filed Mar. 29, 2019).