No. 19-1869

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GIUSEPPE GIUDICE,
Petitioner,

v.

ATTORNEY GENERAL, UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR REVIEW

BRIEF OF *AMICI CURIAE* FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS

IN SUPPORT OF PETITIONER AND
IN SUPPORT OF A STAY OF REMOVAL

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INTEREST OF AMICI CURIAE

Amici curiae are retired Immigration Judges and former members of the Board of Immigration Appeals ("BIA") with substantial combined years of service and intimate knowledge of the U.S. immigration system.[1] This case raises a question of fundamental importance to the integrity of immigration court proceedings: whether Immigration Judges have jurisdiction to hear cases commenced with documents that were not Notices to Appear ("NTAs") as defined by statute. We write as *amici curiae* to answer the question in the negative. As we explain below, the law allows only a valid NTA to vest jurisdiction in the immigration court, and the real-life implications of a contrary ruling support strict adherence to the law.

ARGUMENT

I. Strict Adherence to Statutory Requirements for Notices to Appear Is Required to Vest Subject-Matter Jurisdiction in the Immigration Court.

A. The Text and Purpose of the INA's Notice to Appear Provision Require DHS to Provide A Valid Time and Place.

A "Notice to Appear" is defined as "specifying . . . [t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(I)(G)(i). In *Pereira v.*

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

Sessions, the Supreme Court confirmed that the statute *definitionally* requires time and place information in order for a notice to be an NTA. 138 S. Ct. 2105, 2110 (2018) ("[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."). As the Court explained, the "plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion." *Id.*

This plain reading comports with the statute's legislative history and the critical role that "time and place" play in the functioning of the immigration court system. The requirement to provide notice of deportation proceedings originates in the 1952 Immigration and Nationality Act, which required the Attorney General to promulgate a regulation to ensure that "the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held." Pub. L. No. 82-414, § 242(b)(1), 66 Stat. 163, 208 (1952). But the regulatory efforts were not sufficient to cure the incidence of missed hearings and in absentia deportation orders, in part because the INS had adopted a two-step process to ensure notice.

As Deputy INS Commissioner Chris Sale described the two-step process in 1994, the INS issued notices without a time and place, leaving Immigration Judges in the difficult position of issuing their own notices without "a basis to determine

that the alien ha[d] been properly notified of the hearing." *Criminal Aliens: Hearing Before the H. Subcomm. on Int'l Law, Imm., and Refugees*, 103d Congress 231 (1994). Sale described the need to change the two-step process, citing an ongoing pilot program that provided automatic notice of time and place to individuals referred to the immigration court. "The results of this program to date," Sale stated, "ha[d] indicated a higher rate of hearing attendance by aliens who are given a date to appear at the time of issuance of the charging documents . . . ." *Id.* at 229.

It was in this context that Congress then legislated the present-day § 1229(a), defining NTAs in the statute itself to specify time and place. The history of the time and place requirement, thus, demonstrates an enduring concern for preventing the "confus[ion] and confound[ment]" that would result from nonetheless "authorizing the Government to serve notices that lack any information about the time and place of the removal proceedings." *Pereira*, 138 S. Ct. at 2119.

B. A Notice That Lacks A Valid Time and Place Cannot Vest an Immigration Court with Subject-Matter Jurisdiction.

Read together, the statute, regulations, and the Court's interpretation in *Pereira* all demonstrate that only a valid Notice to Appear can vest an Immigration Judge with subject-matter jurisdiction. *Cf. K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (counseling consideration of the statute as a whole). Yet DHS now

incorrectly argues, even on the heels of *Pereira*, that it may circumvent these requirements by returning to its two-step process of filing a defective notice.

The statute defines the Immigration Judge's subject-matter jurisdiction, stating that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility and deportability of an alien[,]" and "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses[; . . . to] issue subpoenas for the attendance of witnesses and presentation of evidence[; . . . and] to sanction by civil penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act." 8 U.S.C. §§ 1229a(a)(1), 1229a(b)(1); *see also Hernandez v. Gonzales*, 221 Fed. Appx. 588, 589 (9th Cir. 2007) ("Immigration courts have subject matter jurisdiction over removal proceedings." (citing 8 U.S.C. § 1229a(a))).

This subject-matter jurisdiction vests upon filing of an NTA. *Matter of Sanchez-Herbert*, 26 I. & N. Dec. 43, 44 (BIA 2012) ("Once a notice to appear has been properly filed with the Immigration Court, jurisdiction vests."); 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court."); 8 C.F.R. § 1003.13 (defining the relevant charging document as a "notice to appear"); *United States v. Pedroza-Rocha*, 2018 WL 6629649 at *4 (W.D. Tex.

Sept. 21, 2018) (regulation refers to subject matter jurisdiction); *United States v. Gonzalez-Leal*, 2019 WL 310145 at *5 (E.D.N.C. Jan. 3, 2019) (same).

Because subject-matter jurisdiction "is inflexible and without exception," *see, e.g.*, *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884), a defective NTA cannot vest Immigration Judge with the authority to cure the defect by issuing a notice of its own. *See, e.g.*, *United States v. Chavez-Flores*, --- F. Supp.3d ---, 2019 WL 453616 at *4–5 (W.D. Tex. Feb. 5, 2019) (finding removal order void because the Immigration Judge lacked subject-matter jurisdiction and noting that Government's argument "would require the court to blind itself from clear and unambiguous statutory requirements"); *United States v. Tzul*, 345 F. Supp.3d 785, 792 (S.D. Tex. Dec. 4, 2018) (same); *United States v. Bastide-Hernandez*, --- F. Supp.3d ---, 2018 WL 7106977 at *8 (E.D. Wa. Dec. 20, 2018) (same); *United States v. Leon-Gonzales*, 351 F. Supp.3d 1026, 1028–29 (W.D. Tex. 2018); *United States v. Zapata-Cortinas*, 2018 WL 4770868 at *4 (W.D. Tex. Oct. 2, 2018) (same).

C. The BIA's Contrary Decision is Erroneous.

Despite this plain language, the BIA holds that DHS's filing of a defective notice can still vest the Immigration Judge with jurisdiction so long as the immigration court files a notice of hearing specifying the time and place. *Matter of*

Bermudez Cota, 27 I. & N. Dec. 441, 445 (2018).[2] Its position is erroneous in several respects.

As an initial matter, the BIA's "two-step procedure" is foreclosed by *Pereira* and the Supreme Court's interpretation of the plain meaning of "Notice to Appear." *See Pereira*, 138 S.Ct. at 2116 ("[W]hen the term 'notice to appear' is used elsewhere in the statutory section . . . it carries with it the substantive time-and-place criteria required by § 1229(a)."); *United States v. Zapata-Cortinas*, 351 F. Supp.3d 1006, 1017 (W.D. Tex. 2018) (explaining how the Supreme Court already rejected DHS's position).

The BIA attempts to limit *Pereira* to "[t]he narrow question" it described. 138 S.Ct. at 2110. But the "narrow question" in *Pereira*, however, is foundational to the issue here. "[I]dentical words used in different parts of the same act are intended to have the same meaning." *Pereira*, 138 S. Ct. at 2115; *United States v. Rangel-Rodriguez*, Case No. 18 CR 581 at *9, 2019 WL 556725 (N.D. Ill. Feb. 12,

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[2] On May 1, 2019, the BIA issued an erroneous *en banc* decision further restricting the application of *Pereira*. *See Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520 (BIA 2019). Over the dissent of six members, the BIA found that a putative NTA satisfies the requirement notice *even in* the case of the "stop-time" rule. *Id.* at 527-535. This rule directly contradicts not only *Pereira* (and therefore the plain language of the statute), but also the several circuit decisions affirming *Bermudez-Cota*. As the dissent in *Mendoza-Hernandez* stated, "[t]he plain language of the [INA] leaves no room for the majority's conclusion that a subsequent notice of hearing can cure a notice to appear that fails to specify the time and place of the initial removal hearing." *Id.* at 545.

2019) (describing government's argument as a "hyper-narrow application" foreclosed by *Pereira* itself). Numerous courts have agreed that *Pereira* applies to the context here. *See, e.g.*, *United States v. Rojas Osorio*, 2019 WL 235042 at *9 (N.D. Cal. Jan. 16, 2019); *United States v. Castro-Gomez*, 2019 WL 503434 at *4–5 (W.D. Tex. Feb. 8, 2019); *United States v. Zapata-Cortinas*, 351 F. Supp.3d 1006, 1017 (W.D. Tex. 2018); *United States v. Soto-Mejia*, --- F. Supp.3d ---, 2018 WL 6435882 (D. Nev. Dec. 7, 2018); *see also Duran-Ortega v. U.S. Attorney General*, No. 18-14563-D (11th Cir. 2018) (slip op., concurrence, at 4).

The BIA then cites 8 C.F.R. § 1003.18(b), which provides that "the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, *where practicable*." (emphasis added). But any reliance on this regulation to excuse time and place cannot be reconciled with the strict statutory definition in *Pereira*. *See K Mart Corp.*, 486 U.S. at 291 ("[A] reviewing court must first determine if the regulation is consistent with the language of the statute."); *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 486–90 (2012) (finding agency regulation invalid where its interpretation of statute was foreclosed by a prior Supreme Court opinion); *Borrejo v. Aljets*, 325 F.3d 1003, 1006 (8th Cir. 2003) ("If the agency interpretation conflicts with a decision of the Supreme Court . . . , we are bound by the Court's interpretation."). Nor does the BIA's reliance on the regulation to excuse this defect distinguish between personal

and subject-matter jurisdiction, the latter of which cannot be waived or cured in this manner. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009).

Because the BIA's reading of the regulation explicitly conflicts with the definition of NTA under 8 U.S.C. § 1229(a), the "attempted revision is inconsistent with the INA and with the separation of powers more generally, and it is without effect." *United States v. Rivera Lopez*, 355 F. Supp. 3d 428, at *7 (E.D. Va. 2018); *see also United States v. Bastide-Hernandez*, No. 1:18-CR-02050-SAB, 2018 WL 7106977, at *5 (E.D. Wash. Dec. 20, 2018) ("[8 C.F.R. § 1003.18(b)] is in clear contrast with the requirement of 8 U.S.C. § 1229(a)(1)(g)."). Only a valid NTA may vest an Immigration Judge with subject-matter jurisdiction over a removal proceeding.

II. By Flouting the INA's Notice-To-Appear Requirements, DHS Is Violating the Law and Undermining the Legitimacy of the Immigration Court System.

DHS's position here has led to serious harms that underscore why this Court should require strict adherence to the statute. First, DHS responded to *Pereira* by issuing so-called "dummy dates," notices for hearings that do not exist. *See* Catherine E. Shoichet, Angela Barajas, & Priscilla Alvarez, *New Wave of 'Fake Dates' Cause Chaos in Immigration Courts Thursday*, CNN (Jan. 31, 2019), https://www.cnn.com/2019/01/31/politics/immigration-court-fake-dates/index.html ("More than 1,000 immigrants showed up at courts across the United States on

Thursday for hearings they'd been told were scheduled but didn't exist . . . ."). The false dates have caused mass confusion to immigrants who have had to take time off of work, make child care arrangements, and in some cases drive for hours, in order to appear at an immigration court hearing that does not exist. *See* Stephanie Francis Ward, *Some Immigrants Picked Up by ICE Given 'Fake Dates' to Appear in Court*, ABA Journal (Sep. 17, 2018), www.abajournal.com/news/article/some_immigrants_picked_up_by_ice_given_fake_dates_to_appear_in_court; Monivette Cordeiro, *Roughly 100 People Gather at Orlando Immigration Court Because ICE Agents Gave Them Fake Hearing Dates*, Orlando Weekly (Nov. 1, 2018), https://www.orlandoweekly.com/Blogs/archives/2018/11/01/roughly-100-people-gather-at-orlando-immigration-court-because-ice-agents-gave-them-fake-hearing-dates; Maria Gabriella Pezzo & Roberto Daza, *ICE is Sending out Fake Court Dates to Immigrants. Here's Why.*, VICE (Nov. 1, 2018), https://news.vice.com/en_us/article/gyez33/ice-is-sending-out-fake-court-dates-to-immigrants-heres-why/.

Second, DHS has continued to file notices with no time or place, relying on immigration courts to ensure proper notice. But the ability of immigration courts to ensure proper notice is limited. The Attorney General has, for example, curtailed the authority of an Immigration Judge to grant a continuance even when a respondent does not appear. *See Matter of Castro Tum*, 27 I. & N. Dec. 271 (A.G.

2018). When the Immigration Judge in Mr. Castro Tum's case then attempted to continue the proceedings to ensure that he received proper notice, the Department of Justice took the Immigration Judge off the case and substituted a different Immigration Judge who ordered the respondent removed in his absence. Tal Kopan, *Immigrant Ordered Deported After Justice Department Replaces Judge*, CNN (Aug. 7, 2018), https://www.cnn.com/2018/08/07/politics/immigration-judge-replaced-deportation-case-justice-department/index.html.

These serious harms that come from permitting removal cases to begin with a defective filing—either by confusing the respondent and the court about a false time and place, or by providing no time and place at all—far outweigh any administrative burden that will be placed on the system by strict compliance with the statute. When the stakes are as high as they are in deportation cases, as we have seen in the thousands of cases we have presided over in our tenure, it is better for those charged with the responsibilities of the INA to adhere faithfully to the law.

CONCLUSION

Amici urge this Court to recognize the likelihood of success on the merits of Petitioner's argument regarding the proper definition of an NTA and its implications for the proceedings in his case. Requiring strict adherence to the statute will ensure a fairer system and avoid the numerous harms of DHS's current approach.

Dated: May 13, 2019
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), I hereby certify that the attached Brief of Amici Curiae is proportionately spaced, has a typeface of 14 points or more and, according to computerized count on Microsoft Word, contains 2,373 words.

Dated: May 13, 2019
New York, NY

/s/ Alina Das
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Alina Das, Esq.

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CERTIFICATE OF SERVICE

I, Alina Das, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Appellate CM/ECF System on May 13, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System.

Dated: May 13, 2019
New York, NY

/s/ Alina Das
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