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Daniel M. Kowalski, Editor-in-Chief

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Family Reunification Task Force — The Family Reunification Task Force announced a process to reunite separated family members. To use the program, parents, guardians, and children should go to https://www.together.gov/ and register. Registration is the first step in a process involving the International Organization for Migration.

USCIS — On September 3, 2021, USCIS announced that it was extending the time that receipt notices can serve as evidence of status for a CPR to twenty-four months if the CPR has a pending I-751 or I-829. See https://www.uscis.gov/news/alerts/uscis-extends-evidence-of-status-for-conditional-permanent-residents-to-24-months-with-pending-form.

CASE DIGEST

FEDERAL COURT DECISIONS

Supreme Court:

Nestle USA, Inc., 210 L. Ed. 2d 207, 2021 U.S. LEXIS 3120 (June 17, 2021): *Alleged victims of trafficking into the Ivory Coast to work as slaves on a cocoa plantation did not show a sufficient connection between the United States and the alleged aiding and abetting of forced labor to use the Alien Tort Statute.*

Six people from Mali alleged that as children they were trafficked into Ivory Coast/ Côte d'Ivoire to be child slaves producing cocoa that was bought by United-States based companies, which also gave the cocoa farms financial and technical help. The six sued under the Alien Tort Statute, 28 U.S.C. §1350, for

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ON THE COVER: Masthead artwork of Ellis Island, New York Harbor, New York

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Niz-Chavez v. Garland: Turning Square Corners and The Evolving Riddle of Proper Immigration Notice

By Simon Azar-Farr

I. Introduction

In 2018, the Supreme Court issued an opinion in *Pereira v. Sessions*[1] that upset over two decades of established agency practice. The Court's holding threatened to require the agency to reopen many thousands or even millions of immigration proceedings and potentially permit a significant number of noncitizens to remain in or return to the United States.

At its root, *Pereira* concerned how the Department of Homeland Security must fill out a form. The form in question, called "notice to appear" (NTA), is issued by the Department of Homeland Security (DHS) to a noncitizen whom the agency wishes to remove from the United States. It informs the noncitizen that she needs to attend a hearing before an Immigration Judge to defend her right to remain in the United States. In other words, it gives her *notice* that she is *to appear*. *Pereira* held that the Immigration and Naturalization Act requires DHS to fill in three blanks on the form: the *place*, the *date* and the *time* at which a noncitizen must appear before an Immigration Judge—information that's necessary for the noncitizen to attend her first hearing.

The matter arose because the agency had a decades-long practice of marking the date and the time (and sometimes the place) as "TBD" (i.e., to be determined) and then, at some unspecified later time, mailing the noncitizen a separate notice which provided the missing information. Mr. Pereira argued that a notice to appear missing this critical information failed to comply with the statute's requirements. And the Supreme Court in *Pereira* agreed that without that essential information, the DHS had *not* provided the noncitizen with a statutorily compliant notice to appear.

Immigration courts and federal courts reacted swiftly and divergently, but eventually they severely limited *Pereira*'s holding so that it would have minimal practical effects, thus staving off the flood of motions from the many noncitizens who, like Mr. Pereira, had received putative notices to appear lacking information concerning *when* and sometimes *where* to appear.

Before considering how and why these courts so markedly and so vastly constrained the application of *Pereira*, it is important to understand an essential aspect of Mr. Pereira's case: Mr. Pereira had asked the Immigration Judge to grant him a form of relief from removal available to certain noncitizens: *cancellation of removal*. To be eligible for this form of relief under the statute, the noncitizen must have physically resided in the U.S. for at least 10 years, among other requirements. Mr. Pereira had been here for 13 years.

However, he was told that he was not eligible because he had not physically resided in the U.S. for at least ten years *before the notice to appear was issued to him.* This is referred to as the *stop-time rule*, because issuance of a notice to appear stops the clock on the accrual of physical presence for purposes of eligibility. Mr. Pereira countered that because the notice he was issued did not comply with the statute, it had not triggered the stop-time rule. The Court agreed, broadly interpreting what constitutes a valid NTA. Because the Court's conclusion focused on the stop time rule and eligibility for cancellation of removal, however, most courts refused to apply the decision outside of that context.

Furthermore, about half the courts considering how to apply *Pereira* found that any defect caused by a failure to include the *when* and the *where* is "cured" by the subsequent issuance of a notice of hearing (NOH) including the date and time of the removal proceedings (a matter not reached by *Pereira*). The reasoning underlying this conclusion varied among the courts, but the result was the same. Such a holding permitted a few more noncitizens to apply for cancellation of removal — those who hit the ten-year mark *after* the deficient notice to appear was issued but *before* the curing notice of hearing was issued. For most noncitizens, however, this entirely undermined *Pereira*'s

[1] *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

import, even for the purpose of eligibility for cancellation of removal.

Not so fast replied the Court in 2021. In *Niz-Chavez v. Garland*, the Court held that the so-called two-step approach (the NTA followed by a NOH) relied on an impermissible reading of the statute.[2] The Court affirmed *Pereira*'s holding that a notice to appear that lacks the place and the time information is not a notice to appear, and found that consequently the stop-time rule is not triggered by such a notice regardless of whether the place and time information is sent later by way of a notice of hearing.

In this paper, I present a historical overview of the statutory and regulatory language governing removal proceedings and cancellation of removal. This is necessary for understanding how the government was able to issue defective notices to sppear for nearly 25 years. Next, I discuss *Pereira* and the cacophony of cases which followed, including the Supreme Court's recent opinion in *Niz-Chavez*. Ultimately, I conclude with a discussion of what to expect after *Niz-Chavez*.

II. Historical Background

Periodically, the U.S. government seeks to remove a noncitizen from the country. In compliance with the constitutional requirement that such a deprivation of liberty comport with due process, the removal process is governed by a web of statutory and regulatory provisions. Digging into these rules is akin to archeological excavation, requiring an understanding of the historical states of the law to comprehend the current state. Of particular importance are (1) the entire overhaul of the structure of the immigration agency occasioned by the creation of the Department of Homeland Security in 2002 in response to the 9/11 terrorist attacks,[3] and (2) major changes in the laws concerning removal of noncitizens as directed by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), enacted in 1996.[4]

A. The structure of the immigration agency

1. *The Immigration and Naturalization Service*

For decades, the branch of the U.S. government that handled immigration matters was the Immigration and Naturalization Service (INS). The INS was housed in the Department of Justice (DOJ), headed by the Attorney General.[5]

When the government sought to remove a noncitizen from the country, that person would be required to appear before an allegedly neutral arbiter who was an employee of the INS/DOJ. The noncitizen would defend against charges brought by counsel for the INS, who was also an employee of the INS/DOJ. Thus, both the prosecution *and* the adjudication of immigration proceedings were, for many years, handled within the same agency, under the authority of the nation's chief prosecutor.

In response to concerns about the same agency simultaneously playing the roles of prosecutor, judge, and enforcer, the Executive Office for Immigration Review (EOIR) was created in 1983.[6] Its chief function is to conduct removal proceedings and adjudicate appeals arising from the proceedings. Although the creation of this separate agency was intended to build a conceptual wall between the INS and the immigration courts, both the INS and the EOIR remained within the control of the DOJ.[7]

2. *The Department of Homeland Security*

Following the terrorist attacks of 9/11, Congress passed the Homeland Security Act of 2002, which rearranged multiple government agencies with the intent to consolidate the U.S. security apparatus.[8] The act established the Department of Homeland Security (DHS) as an executive branch agency, headed by a cabinet-level secretary.

Much of the apparatus of the former INS was incorporated into the new DHS.[9] Only EOIR remains in the Department of Justice. Thus, the prosecution and

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[2] *Niz-Chavez v. Garland*, 539 U.S. ___ (2021). Slip op. *available at* https://www.supremecourt.gov/opinions20 pdf/19-863_6jgm.pdf.

[3] Pub. L. No. 107-296, 116 Stat. 2135-321 (2002).

[4] Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[5] The INS resided within the Department of Labor for its first few years, then in 1940 moved to the DOJ. Sharon D. Masanz, History of the Immigration and Naturalization Service: A Congressional Research Service Report (Washington, D.C.: GPO, 1980).

[6] 48 Fed. Reg. 8,038 (1983).

[7] *See* "Evolution of the U.S. Immigration Court System: Post-1983," USDOJ, *available at* https://www.justice.gov/eoir/evolution-post-1983.

[8] *See* "National Strategy for Homeland Security," Office of Homeland Security (July 2002), *available at* https://web.archive.org/web/20071114000911/ http://www.dhs.gov/xlibrary/assets/nat_strat_hls.pdf.

[9] *See* "Who Joined DHS," DHS, *available at* https://www.dhs.gov/who-joined-dhs#.

adjudication of immigration violations have been separated since 2002.

One relic of the Homeland Security Act is that reference to "the Service," meaning the Immigration and Naturalization Service, remains scattered throughout the INA. In most cases, this is appropriately read to refer to the DHS.[10] Another relic is reference to the Attorney General in the INA. Here, this sometimes does refer to the Attorney General (or, more accurately, to EOIR) and it sometimes refers *instead* or *also* to the DHS.[11] It is a messy and tousled word soup.

B. IIRIRA

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, pronounced I-Re-Ra or Ira-Ira). This deeply divisive law made widespread changes, including to terminology relevant to the issues before us.

1. *Removal hearings*

For many decades, the rules for removal of a noncitizen from the country differed according to whether the noncitizen had "entered" the United States or not. A noncitizen who had "entered" was subject to deportation hearings, while a noncitizen who had not made an "entry" was subject to exclusion hearings. The term "exclusion" arose from the legal fiction that the noncitizen had not actually *entered* the United States. Although her feet were on American soil, she was legally still on the non-American side of the border. Some commentators explained that it was as if she had walked up to the border, encountered a large rubber band, and just kept walking, keeping that rubber band around her waist as she proceeded about the country's interior. At any time, exclusion proceedings could snap that rubber band back, flinging her back to her home country.

IIRIRA removed the procedural distinction between exclusion and deportation proceedings, consolidating both types of hearings into what we now call removal proceedings.[12] IIRAIRA also created what we now call a "notice to appear", the charging document required to initiate removal proceedings.[13]

2. *Charging documents*

Pre-IIRIRA, exclusion and deportation proceedings were initiated when an immigration officer issued a charging document called an order to show cause (OSC), which informed the noncitizen that she was being *ordered* to appear at the proceedings and to *show cause* as to why she should not be excluded or deported. She had the burden of proof to demonstrate either that she had legal permission to remain in the country, or that she was qualified for (and in some cases merited) one of several forms of relief from exclusion or deportation.

The governing statute required the OSC to provide certain information to the noncitizen, including the law she was charged with violating and the alleged facts that gave rise to this charge.[14] The government was also required to inform the noncitizen of the place and time for the hearing, but the statute did not require that this information appear on the OSC; the statute allowed it to come in some other fashion, such as through a later-issued notice of hearing.[15] The statute also provided that, "in the case of any change or postponement in the time and place of such proceedings, written notice shall be given."[16]

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[10] *See, e.g.*, 8 U.S.C. § 1229a(b)(5)(A) (allowing aliens to be removed *in absentia* "if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable.").

[11] *Compare, e.g.*, 8 U.S.C. § 1229a(c)(7)(C)(iv) (waiving limitations on motions to reopen removal proceedings—which fall within EOIR's purview—for battered spouses, children, and parents "if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General") *with* 8 U.S.C. § 1158(a)(2)(D) (waiving the time and number bars for asylum applications, which may fall into either DHS or EOIR jurisdiction depending on the circumstances, "if the alien demonstrates to the satisfaction of the Attorney General . . . the existence of changed circumstances which materially affect the applicant's eligibility for asylum. . ..") *and* 8 U.S.C. § 1154(a)(1)(A)(i) (permitting a U.S. citizen to petition the Attorney General for immigration status for her noncitizen spouse or child; such a petition must now be filed with U.S. Citizenship and Immigration Services, a branch within DHS, not with the Attorney General or DOJ).

[12] *See generally* 8 U.S.C. §§ 1229, 1230, 8 C.F.R. §§ 1003.12 *et seq*., 1240.1 *et seq*.

[13] 8 U.S.C. § 1229a. The exception is expedited removal hearings, which may be brought in certain circumstances against noncitizens deemed inadmissible, and which bypass the formal removal hearing requirements laid out by 8 U.S.C. § 1229a. 8 U.S.C. § 1225(b)-(c).

[14] 8 U.S.C. § 1252b(a) (1994).

[15] 8 U.S.C. § 1252b(a)(2)(A) (1994) ("In deportation proceedings . . . written notice shall be given in person to the alien . . . in the order to show cause *or otherwise*, of the time and place at which the proceedings will be held. . ..") (emphasis added).

[16] 8 U.S.C. § 1252b(a)(2)(B) (1994).

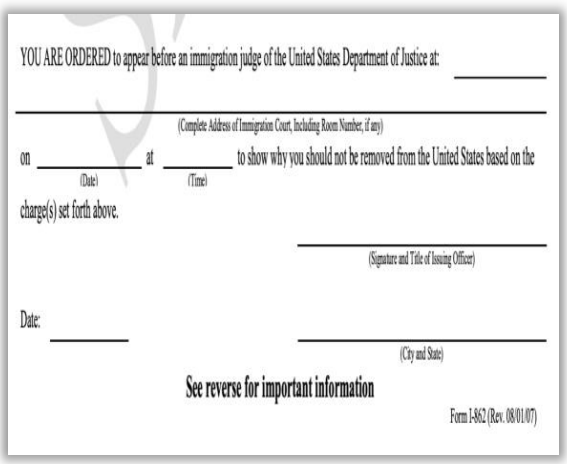
With IIRIRA, Congress sought to streamline the rules and procedures to facilitate the removal process.[17] Congress was "particularly concerned with two problems regarding lack of accurate information on aliens' addresses": their tendency to not leave forwarding addresses, meaning the government could not give them notice of removal proceedings; and the challenge of demonstrating when they had been properly provided notice.[18]

This was important because a noncitizen who did not appear for her immigration hearing could be deported *in absentia* only if notice of the hearing was properly provided.[19] If she could prove that she had not received proper notice, then her deportation order would be overturned, which "impair[ed] the ability of the government to secure" deportations.[20]

Many noncitizens subject to removal tend to move often; live in rental units, often with multiple roommates, some of whom may not read English; and they have landlords or fellow tenants who may not treat mail with particular solicitousness. In such circumstances, it is common for notices to be lost or fail to catch up with the recipient, leading to challenges to *in absentia* removal orders. The Judiciary Committee of the House of Representatives cited a study reporting that a quarter to half of noncitizens failed to appear for immigration proceedings and noted that "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings lead some immigration judges to decline to exercise their authority to order an alien deported in absentia."[21]

To address these concerns, IIRIRA changed the notice requirement. After changing the name of the charging document from an "order to show cause" to a "notice to appear", Congress commanded, in INA §239, that the "time and place" information must be included in the notice to appear, not "or otherwise."[22] However, the statute retained the language allowing the time and place of the hearing to be changed so long as proper notice of the change was given.[23] By requiring the charging document to contain all the information necessary for a noncitizen to know when and where to appear, what charges to defend, and the facts the government intended to prove, Congress believed removal processes would be streamlined, or at the very least less inefficient.

In 1997, the INS proposed a regulation to implement this new process via the creation of a standardized notice to appear, government Form I-862.[24] In the *preamble* to the proposed regulation, the INS explicitly recognized that "the language of the amended Act indicat[es] that *the time and place of the hearing must be on the Notice to Appear*."[25] Accordingly, the NTA form provides room for specifying this information:



YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: _____

_____
(Complete Address of Immigration Court, Including Room Number, if any)

on _____ at _____ to show why you should not be removed from the United States based on the
(Date) (Time)
charge(s) set forth above.

_____
(Signature and Title of Issuing Officer)

Date: _____

_____
(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

Yet the actual proposed regulation, while amending other regulations to accommodate the new form of charging document, did not incorporate these statutory requirements. The final regulation setting out the required contents of the NTA did not even mention

[17] H.R. Rep. 104-469(I) (1996), 1996 W.L. 168955 at *159 (providing that the new law would "simplify procedures for initiating removal proceedings" by providing "a single form of notice. . .").

[18] *Id*.

[19] 8 U.S.C. § 1252b(c)(1) (1995) (allowing a noncitizen to be deported *in absentia* if she failed to attend a hearing "after written notice required under subsection (a)(2) has been provided . . . if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable.").

[20] 8 U.S.C. § 1252b(a)(2)(B) (1995) (permitting an *in absentia* order to be rescinded "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2)"); H.R. Rep. 104-469(I) (1996), 1996 W.L. 168955 at 159.

[21] H.R. Rep. 104-469(I) (1996), 1996 W.L. 168955 at *122.

[22] Immigration provisions are commonly referred to both by their section in the Immigration and Nationality Act (INA) and by their statutory codification, so INA § 239 is also 8 U.S.C. § 1229.

[23] 8 U.S.C. § 1229(a), (b) (1997).

[24] 62 Fed. Reg. 444, 449 (1997).

[25] 62 Fed. Reg. 444, 449 (1997) (emphasis added).

the time, date and place information.[26] And yet another regulation specified that the government "shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, *where practicable*."[27]

Accordingly, agency regulation simply overruled Congress's command to include this information on the Notice to Appear—a legally upside-down situation that upended the reform Congress intended to enact.

There is evidence that this was not the regulation's initial aim. The narrative accompanying the proposed rule explained that it:

> implements the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear. The Department will attempt to implement this requirement as fully as possible by April 1, 1997. Language has been used in this part of the proposed rule recognizing that such automated scheduling will not be possible in every situation (e.g., power outages, computer crashes/downtime.)[28]

In other words, the government believed that providing this information would be the norm, deviated from only in unusual and unavoidable circumstances.

Furthermore, in other contexts, the government argued that the "practicable" language would not lead to the exception swallowing the rule. When justifying the provision allowing for service of the NTA by regular mail rather than certified, the government related,

> . . . commenters were concerned that service of the notice to appear by regular mail would be inadequate. *A few commenters have assumed that because service by certified mail is not required in all cases, it will not be used in any case.* Both the statute and the regulations, however, allow for service by regular mail only when personal service is "not practicable."[29]

This discussion makes clear that the regulation assumed that the word "practicable" had genuine meaning, restraining the government from using the disfavored method unless it had good reason.

Alas, that is not how the government carried out its promises. For years, nearly 100% of NTAs issued by the government failed to follow the command of INA §239 and instead nearly every NTA specified that the hearing was to be held on a date "to be set" and at a time "to be set," or sometimes "TBD" or "TBA."[30] The exception became the rule, and the statutory directive was forced to yield to the more permissive and convenient regulation.

III. *Pereira v. Sessions* and its progeny

A. *Pereira v. Sessions*

In 2018, in *Pereira v. Sessions*, a Brazilian resident of the United States challenged this state of affairs.[31] Mr. Pereira had entered the United States in 2000 on a tourist visa. After his visa expired, he remained in the U.S., married, and fathered two daughters, both U.S. citizens. The Supreme Court characterized him as a well-respected member of his community.

In 2006 he was arrested for driving under the influence, discovered to have overstayed his visa, and served a "Notice to Appear." The notice did not specify the time or date of his initial removal proceedings, instead indicating that these would be set at some point in the future, in compliance with the regulation (8 C.F.R. § 1003.18(b)) but in violation of the statute (INA §239(a)(1)(G)).

More than a year later, in 2007, the Immigration Court mailed Mr. Pereira a notice of hearing (NOH) containing the date, time and place to appear. But the notice was sent to the wrong address and returned as undeliverable. Despite the immigration court's knowledge that the notice had not been received, when Mr. Pereira failed to appear, the IJ conducted his removal hearing in his absence, concluded that Mr. Pereira was removable as charged in the notice

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[26] *Id*.; 62 Fed. Reg. 10312, 10332; 8 C.F.R. § 3.15(c) (1997) (now 8 C.F.R. § 1003.15(c)).

[27] 62 Fed. Reg. at 457, 10332; 8 C.F.R. § 3.18(b) (1997) (now 8 C.F.R. § 1003.18(b)).

[28] 62 Fed. Reg. at 449.

[29] 62 Fed. Reg. at 10322 (emphasis added).

[30] *See Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018) ("Per that regulation, the Department of Homeland Security (DHS), at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information. *See* Brief for Petitioner 14; Brief for Respondent 48-49; Tr. of Oral Arg. 52-53 (Government's admission that 'almost 100 percent' of 'notices to appear omit the time and date of the proceeding over the last three years'). Instead, these notices state that the times, places, or dates of the initial hearings are "to be determined.").

[31] *Pereira*, 138 S. Ct. at 2105.

to appear, and ordered him removed *in absentia*. Mr. Pereira had no idea this had occurred.

Six years later, in 2013, Mr. Pereira was arrested for a minor motor vehicle violation (driving without his headlights on) and was detained by the DHS due to the outstanding order of removal. His removal proceedings were reopened after he demonstrated that he had not received the 2007 notice of hearing.

He applied for cancellation of removal, arguing that he had been continuously in the United States since 2000, which by 2013 was clearly more than the requisite ten years. His application was denied however on the ground that, as he had only lived in the U.S. for six years when the NTA was issued in 2006, the stop-time rule rendered him ineligible (i.e., in other words physical presence stopped accruing).

Mr. Pereira countered that the stop-time rule could not have been triggered by the defective NTA because the document lacked the date, the time, and the place of his removal proceedings. The cancellation of removal statute provides that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 239(a). . .."[32] Because section 239(a) specifies that a notice to appear must include the place and the time of the removal hearing, he argued, the document he received was not a valid "notice to appear under section 239(a)," and so it could not have and did not trigger the stop-time rule.

The Immigration Judge disagreed and ordered him removed. The Board of Immigration Appeals (BIA) upheld this decision, relying on *Matter of Camarillo*, a precedential case from 2011 that held a notice to appear satisfied the stop-time rule even if it did not include the date and place information, because "the reference in section 240A(d)(1) to a notice to appear 'under section 239(a)' . . . merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule and does not impose substantive requirements for a notice to appear to be effective in order for that trigger to occur."[33]

The First Circuit denied Mr. Pereira's petition for review, holding that the statute's stop-time rule is ambiguous, and the BIA's interpretation of the rule was a permissible reading of the statute and thus warranted judicial deference.[34] Mr. Pereira appealed to the Supreme Court where his fortunes changed dramatically.

In an 8-to-1 decision authored by Justice Sotomayor, the Court held that a putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings "is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule. The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion."[35] In other words, the statute means what it says.

B. The agency's initial responses to *Pereira*

The ruling sparked a frenzy of immigration court filings.[36] The challenges were predicated on 8 C.F.R. § 1003.14(a), which provides that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when [DHS files] a charging document . . . with the Immigration Court."

Noncitizens argued that jurisdiction could only vest with the filing of a complete NTA, as defined by INA § 239(a).[37] Though *Pereira* did not address jurisdiction—the case answered what it described as "[t]he narrow question" of whether an incomplete NTA triggered the stop-time rule, cutting off eligibility for cancellation of removal[38]—litigants seized on its recognition that § 239(a)'s time and place requirements are *definitional*, meaning that their omission from the NTA "unquestionably would 'deprive [the notice to appear] of its essential character.'"[39]

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[32] 8 U.S.C. § 1229b(d)(1).

[33] *Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011).

[34] *Pereira v. Sessions*, 866 F.3d 1, 15 (1st Cir. 2017) (relying on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842 (1984)).

[35] *Pereira*, 138 S. Ct. 2110.

[36] Reade Levinson, Kristina Cooke, *U.S. courts abruptly tossed 9,000 deportation cases. Here's why*, Reuters, Oct. 17, 2018, *available at* https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK ("Levinson").

[37] The preceding regulation, 8 C.F.R. § 1003.13, makes clear that post-IIRIRA charging documents are "a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien," of which only the NTA can initiate removal proceedings. 8 U.S.C. § 1229(a)(1); 8 C.F.R. §§ 1003.13, 1239.1(a), 208.2(c), 246.1, 246.5.

[38] *Pereira*, 138 S. Ct. at 2110.

[39] *Pereira*, 138 S. Ct. at 2116-17.

Their argument initially found traction in the immigration courts. During the ten weeks following the issuance of *Pereira*, over 9,000 removal proceedings were terminated as attorneys challenged the immigration courts' jurisdiction over noncitizens who had received incomplete notices to appear—a 160% increase over the same time period a year earlier, and the highest number of terminations per month ever.[40]

Behind the scenes, the government was discreetly scrambling. The Office of the Chief Immigration Judge (OCIJ) dithered on whether to accept NTAs that did not conform with INA §239(a), telling immigration courts first to wait for guidance,[41] then telling immigration courts to reject nonconforming NTAs,[42] and then telling immigration courts to accept them.[43]

At the same time, the OCIJ was privately debating whether to open its electronic scheduling system to the DHS so the DHS could comply with *Pereira* by including the hearing date on the NTA. On June 27, 2018, a week after *Pereira* was issued, OCIJ announced that it would be able to give DHS such access for non-detained cases by July 2, 2018, and for detained cases by July 16, 2018, less than three weeks after the ruling.[44]

Yet the agency did not grant access for months, with no explanations offered. Several commentators have suggested that the agency was concerned that allowing DHS to schedule cases would interfere with the immigration courts' newly imposed case completion quota.[45] Whatever the reason, promises were made by the DOJ, and promises were broken.

In the meantime, another level of absurdity was reached when the DHS began issuing NTAs with false dates, subjecting immigration courts and lawyers to enormous confusion and imposing untold misery and hardship among the immigrant population who were forced to take off work and sometimes travel hundreds of miles for hearings that would not take place—or who panicked upon finding that their hearings were scheduled for dates that did not exist or on dates (i.e., Saturdays, Sundays and federal holidays) when the immigration courts were actually closed.[46]

C. The BIA's response in *Matter of Bermudez-Cota*

Then, at the end of the summer 2018, the Board of Immigration Appeals (BIA) issued an opinion in *Matter of Bermudez-Cota*[47] that suddenly halted the spike of case terminations in immigration courts.[48] *Bermudez-Cota* was published a mere two months after *Pereira*—shockingly fast for the BIA, which typically takes many months, even years, to issue a precedential decision.

Mr. Bermudez-Cota claimed that his NTA, which lacked the time and place information, "was legally defective," since "if the failure to specify this information renders a notice to appear defective under section 239(a)(1) of the Act for the purposes of the 'stop-time' rule, then it renders it defective for all purposes."[49]

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[40] *Id.*

[41] Email from Mary Cheng, Deputy Chief Immigration Judge, to Rodin Rooyani, Assistant Chief Immigration Judge (Jun. 25, 2018 7:50 PM), available at https://cdn.muckrock.com/foia_files/2018/09/19/2018-37357_Doc_02b_redacted_23_pgs.pdf#page=2 (informing IJs to receive incomplete NTAs "and wait for guidance.").

[42] Email from Donna Wilson to OCIJ personnel and all Immigration Court Administrators (Jun. 27, 2018 1:48 PM), available at https://cdn.muckrock.com/foia_files/2018/09/12/2018-37358_Doc_01_2_pgs.pdf ("Effective immediately, NTAs filed at the window that do not specify the time and place of the hearing should be rejected.").

[43] Email from Christopher Santoro, Deputy Chief Immigration Judge, to All OCIJ HDQ and Courts (Jul. 11, 2018 12:45 PM), available at https://cdn.muckrock.com/foia_files/2018/09/12/2018-37358_Doc_01_2_pgs.pdf ("The Department has concluded that, even after *Pereira*, EOIR should accept Notices to Appear that do not contain the time and place of the hearing. Accordingly, effective immediately, courts should begin accepting TBD NTAs.").

[44] Email from Donna Wilson, *supra*.

[45] *See, e.g.,* Kit Johnson, *Pereira v. Sessions: A Jurisdictional Surprise for Immigration Courts*, 50 Colum. Human Rights L. Rev. 1, 6-7 (Winter, 2019).

[46] Kate Smith, *ICE told hundreds of immigrants to show up to court Thursday — for many, those hearings are fake*, CBS News, Jan. 31, 2019; Dianne Solis, *ICE is ordering immigrants to appear in court, but the judges aren't expecting them*, Dallas Morning News, Sep. 16, 2018 (quoting an advocate who described multiple "dummy dates" listed for hearings in Chicago, for which some noncitizens "'traveled as far as Kentucky. . .. The immigration court system is confusing enough on a normal day. . .. But to have an individual who probably does not speak English . . . and receives a document in which DHS has purposely listed a fake date and time is a real different level of confusion and absurdity.'").

[47] *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018).

[48] Levinson, *supra*.

[49] *Bermudez-Cota*, 27 I. & N. Dec. at 442-43.

The BIA found this argument "misguided."[50] It dismissed *Pereira*'s relevance, emphasizing that the Court's holding was "narrow," and claiming that *Pereira* applied only in the context of the stop-time rule.[51] The BIA also noted the Supreme Court did not invalidate Mr. Pereira's underlying removal proceedings (blithely ignoring the obvious fact that Mr. Pereira had not asked the Supreme Court for termination of the removal proceedings, meaning that the issue was never raised).[52]

The BIA also found that "*Pereira* involved a distinct set of facts", noting that, unlike Mr. Pereira, Mr. Bermudez-Cota had received both the putative NTA and the subsequently sent NOH. To the BIA, this meant that the noncitizen before it "was sufficiently informed to attend his hearings", even it should have been clear that carrying through the logic of this purely functionalist approach would imply that an NTA's validity would depend on the vagaries of whether a noncitizen properly received his mail.[53]

The BIA found refuge in the thought that "terminating proceedings where service was proper under 8 C.F.R. § 1003.18(b) (2018) would require us to disregard a regulation that we are compelled to follow," since "[t]he regulation 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."[54] The BIA also relied on 8 C.F.R. § 1003.15(b), which, when outlining "the information that must be contained in a notice to appear, does not mandate that the time and date of the initial hearing must be included in that document."[55] This of course conveniently overlooked the well-established proposition that the BIA is also compelled to follow statutory directives and Supreme Court precedent, and that regulations must faithfully implement the statutes under which they are promulgated.

Finally, the BIA leaned heavily on four pre-*Pereira* circuit court cases that concluded that any defect in an NTA that lacked the date, the time, and the place information could be cured by a notice of hearing, which later did provide the missing information.[56] Referring to this as a "two-step process," the BIA concluded that

> a two-step notice process is sufficient to meet the statutory notice requirements in section

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[50] *Id*. at 443.

[51] *Id*. It is worth noting that, while *Pereira* twice described its opinion as "narrow," it did not thereby confine its understanding of the NTA's requirements to the stop-time rule. Instead, it interpreted the NTA's requirements across the INA, only then turning to the stop-time rule. Further, it used the term "narrow" to make clear that it was investigating the validity of an NTA that was missing the "time and place" information *as contrasted with* an NTA that was missing any *or all* of the other required "items listed" in 8 U.S.C. § 1229(a)(1)—a question the Court said "sweeps more broadly than necessary to resolve the particular case before us." The Court noted that much of the information listed in INA §239(a)(1) did not change and was therefore included in the standardized language on the I-862 notice-to-appear form, and that the NTA issued to Mr. Pereira included all of the information required except for the date and time.

[52] *Id*. The common law system works by letting appellate courts decide the matters before them, and only the matters before them, after thorough briefing by the parties. *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J. concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."); *Latorre v. United States*, 193 F.3d 1035, 1041 (8th Cir. 1999) (Lay, J., concurring) ("The very essence of judicial restraint is not to raise issues that were neither raised by the parties in the district court nor briefed to this court."). This does not mean, however, that their holdings do not apply more broadly. On the contrary, it is the responsibility of subsequent decisions to faithfully apply the earlier cases' reasoning to subsequent issues and different contexts as they arise. Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989) ("[W]hen the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the outcome of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts within that system."); *Clark v. Suarez Martinez*, 543 U.S. 371, 380 (2005) (applying the reasoning of *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) to a new context, even though "the statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present [in this case]."); *MK Hillside Partners v. Comm'r of Internal Revenue*, 826 F.3d 1200, 1206 (9th Cir. 2016) ("[W]e are 'bound not only by the holdings of [the Supreme Court's] decisions but also by their mode of analysis.'"); *Marques v. Lynch*, 834 F.3d 549, 561, 562 n.4 (5th Cir. 2016) (finding that "[w]e find ourselves bound by the reasoning of" a prior case, though the present case dealt with a different statute and different context, and though "[t]he Government argues that this conclusion, if extended to every provision in the INA, would create absurd results.").

[53] *Id.* at 443.

[54] *Id*. at 444-45.

[55] *Id*.

[56] *Id.* at 445-47 (citing *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009); *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009); *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2006)); and *Dababneh v. Gonzales*, 471 F.3d 806, 809-10 (7th Cir. 2006)). Note that the Seventh Circuit itself subsequently disavowed the BIA's reliance on *Dababneh*, saying, "It appears to us that *Bermudez-Cota* brushed too quickly over the Supreme Court's rationale in *Pereira* and tracked the dissenting opinion rather than that of the majority." *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019).

> 239(a) of the Act. Accordingly, a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the alien.[57]

Nine months after *Bermudez-Cota*, the BIA elaborated on its embrace of the two-step process in an *en banc* opinion, *Matter of Mendoza-Hernandez*.[58] After briefly rejecting the same jurisdictional argument it had addressed in *Bermudez-Cota*, the BIA returned to the stop-time rule, assessing the survival of this rule now that *Pereira* had overturned *Matter of Camarillo.*

The BIA observed that two circuit courts had embraced the two-step approach prior to *Matter of Camarillo*, holding that the immigration court's issuance of a notice of hearing "perfected" a defective NTA and triggered the stop-time rule.[59] *Matter of Camarillo* had disrupted the "emerging consensus" at the time with its finding that "no authority supports the contention that a notice of hearing issued by the Immigration Court is a constituent part of a notice to appear, the charging document issued only by the DHS," and that "an Immigration Court's notification of a hearing date does not 'serve' as a notice to appear" because "neither the Immigration Court nor the Immigration Judge has been delegated the authority to serve a notice to appear."[60]

But the Supreme Court overruled *Camarillo* in *Pereira*, while *not* explicitly rejecting the sole circuit court opinion that had declined to follow the BIA's lead in *Camarillo*. In *Orozco-Velasquez v. Attorney General United States*, the Third Circuit had held that "an initial NTA that fails to satisfy § 1229(a)(1)'s [INA §239(a)(1)] various requirements will not stop the continuous residency clock until the combination of notices, properly served on the alien charged as removable, conveys the complete set of information prescribed by § 1229(a)(1) within the alien's first ten years of continuous residence."[61]

The conclusion the BIA drew from these precedents was that *Pereira* had not invalidated the two-step notice process.[62] Dismissing the dissent's position that there can be no way to perfect a defective notice to appear, the majority found:

> in cases where a notice to appear does not specify the time or place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, triggers the "stop-time" rule, and ends the alien's period of continuous residence or physical presence in the United States.[63]

Begrudgingly, the BIA did acknowledge that "*Pereira* can be interpreted more broadly and read in a literal sense to reach a different result, because the opinion includes language stating that a notice lacking the specific time and place of the removal proceedings does not equate to a notice to appear under section 239(a)(1) of the Act."[64] Nevertheless, it chose to follow its three-judge panel decision in *Bermudez-Cota*, finding the approach there best integrated "the legal landscape underlying the circuit split addressed in *Pereira*," while "respond[ing] to the substantive concerns of fundamental fairness inherent in procedural due process"—i.e., providing sufficient information to enable the noncitizen to appear at her removal proceeding.[65]

The *Mendoza-Hernandez* dissent made clear that more than one member of the BIA believed that the Board was on rocky legal ground,[66] an observation that proved prescient when the Supreme Court issued *Niz-Chavez v. Garland*,[67] discussed below.

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[57] *Bermudez-Cota*, 27 I. & N. Dec. at 447.

[58] *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520 (BIA 2019).

[59] *Id*. at (citing *Guamanrrigra v. Holder*, 670 F.3d 404 (2d Cir. 2012) (per curiam) and *Dababneh v. Gonzales*, 471 F.3d 806, 808–09 (7th Cir. 2006)).

[60] *Mendoza-Hernandez*, 27 I. & N. Dec. at 534, 525 (cleaned up) (quoting *Matter of Camarillo*, 25 I. & N. Dec. at 648, 650).

[61] *Orozco-Velasquez v. United States AG*, 817 F.3d 78, 83 (3d Cir. 2016).

[62] *Mendoza-Hernandez*, 27 I. & N. Dec. at 528.

[63] *Id*. at 529.

[64] *Id*. at 529-30.

[65] *Id*. at 530.

[66] *Mendoza-Hernandez*, 27 I. & N. Dec. at 540-541 (Guendelsberger, dissenting) ("The reasoning of the Supreme Court in *Pereira*, when considered in its entirety, leaves little room for doubt that the Court's decision requires us to follow the plain language of the Act that the DHS must serve a section 239(a)(1) 'notice to appear' that includes the date, time, and place of hearing in order to trigger the 'stop-time' rule."). Board Member Guendelsberger was joined by five others in his dissent.

[67] *Niz-Chavez* v. *Garland*, 593 U.S. ___ (2021).

Nevertheless, at the time the BIA seemed unfazed. Subsequent BIA decisions expanded the number of exceptions to the statutory and regulatory requirements that the immigration courts will tolerate in a Notice to Appear: for example permitting an NTA to vest jurisdiction even if it lacks the address of the immigration court where DHS will file the charging document; or if it lacks the section of the NTA specifying whether the noncitizen is an arriving alien, an alien present in the U.S. who has not been admitted or paroled, or is a removable alien.[68] The BIA also found that an NTA could vest jurisdiction despite lacking the Certificate of Service required under 8 C.F.R. § 1003.14(a), shrugging off the regulatory directive as a "claims processing rule" and concluding that "the lack of compliance with this portion of the regulation, standing alone or read with the other regulations, does not provide a reason for terminating proceedings."[69] (This from the same BIA that earlier, in the context of jurisdiction, had thrown its hands in the air and claimed that it had no choice but to follow the regulation.[70]) Finally, the BIA found that the two-step notice process is sufficient to trigger the stop-time rule even for the purpose of qualifying for voluntary departure (a form of relief available only to noncitizens physically present in the U.S. for at least one year).[71]

Thus the BIA quickly and effectively constricted and impeded the legal and practical consequences of *Pereira* by (a) limiting its holding solely to stop-time cases, and (b) even in stop-time cases, permitting the agency to "perfect" or "cure" a defective NTA through the subsequent issuance of a notice of hearing. The BIA declined to provide any guardrails, such as how long after issuance of the NTA a curing notice of hearing must be issued, or whether the information required by INA §239(a) may be delivered by more than two documents.

D. Federal district courts' responses in criminal cases

The first published judicial cases relying on the holding in *Pereira* were criminal cases in the federal district courts. Defendants charged with illegal re-entry following removal moved to have their charges dismissed on the grounds that the underlying orders of removal were void *ab initio* because they had been initiated with defective charging documents: namely, notices to appear lacking the statutorily required date and time information.

Although some district courts held that such NTAs still conferred jurisdiction on the immigration courts (and thus that the order of removal was a proper foundation for the criminal charge of illegal reentry after removal), many district courts did not. The following excerpts provide a sampling of these holdings:

> The Court sides with those courts that have held that an NTA that fails to specify the time and place of a hearing is deficient and deprives the immigration court of jurisdiction. True, the Supreme Court in *Pereira* took care to specifically note that it was limiting the question before it to the "narrow question" of whether a "document that is labeled 'notice to appear,' but [which] fails to specify either the time or place of the removal proceedings . . . trigger[s] the stop-time rule." But the Court reached that conclusion by defining what it means to be a valid "Notice to Appear" by specific reference to Section 1229(a), and then applied that definition to the stop-time rule.[72]

> While the Court in *Pereira* sought to answer the narrow question before it, the Supreme Court stated in no uncertain terms that a notice to appear "that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a).'" Defendant's purported notice to appear lacked a constituent part: "[t]he time and place at which the proceedings will be held." As such, it lacked an essential characteristic required of notices to appear—a literal notice of when and where to appear—rendering the document deficient under section 1229(a). . .. The document served on Defendant did not meet the requirements of a notice to appear and therefore could not act as the "charging document" needed to confer jurisdiction on the Immigration Judge.[73]

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[68] *Matter of Rosales Vargas*, 27 I. & N. Dec. 745 (BIA 2020); *Matter of Herrera-Vasquez*, 27 I. & N. Dec. 825 (BIA 2020).

[69] *Rosales Vargas*, 27 I. & N. Dec. at 753.

[70] *Bermudez-Cota*, 27 I. & N. Dec. at 444 (refusing to enforce INA §239(a)'s time and date requirement in part because because "terminating proceedings where service was proper under 8 C.F.R. § 1003.18(b) (2018) would require us to disregard a regulation that we are compelled to follow.").

[71] *Matter of Viera-Garcia*, 28 I. & N. Dec. 223 (BIA 2021).

[72] *United States v. Cruz-Candela*, 399 F. Supp. 3d 454, 462 (D. Md. 2019) (internal citation omitted).

[73] *United States v. Ortiz*, 347 F. Supp. 3d 402, 406 (D.N.D. 2018).

> The Government is correct that the jurisdictional grant at the center of this case is set forth in regulations referencing a "notice to appear," and not in statutes, as in *Pereira*. This does not mean the regulatory definition can circumvent the statutory requirements. *Pereira*'s language was broad, relying on both statutory interpretation and "common sense." Thus, the Court interprets *Pereira* as requiring that every notice to appear provide the date and place of the hearing, including a notice to appear that serves as a charging document vesting jurisdiction in the immigration court.[74]

> [T]he incomplete Notice to Appear did not vest jurisdiction and therefore Mr. Leon-Gonzalez's underlying removal was void and his indictment for illegal re-entry should be dismissed. A later-sent Notice of Hearing with a date and time does not vest an immigration court with subject matter jurisdiction and complaint about this cannot be waived.[75]

> Pursuant to 8 U.S.C. § 1229(a), 8 C.F.R. § 1003.14(a), and *Pereira*, a valid charging document was not filed in the defendant's removal case and jurisdiction did not vest in the immigration court. Lack of jurisdiction is a defect in the immigration proceedings that caused the hearing to be fundamentally unfair. It violated the defendant's due process rights, and the wrongful deportation prejudiced him.[76]

At least one court relied explicitly on the rulings of some immigration judges which, following early agency guidance, had dismissed cases initiated with defective NTAs for lack of jurisdiction.[77]

But district courts did not universally dismiss criminal charges founded on removal proceedings initiated with defective NTAs. Some required that the defendant first demonstrate that he had been prejudiced by the defective NTA.[78] Others focused on the defendant's waiver,[79] or the fact that neither *Pereira* nor the statutes it interpreted mentioned jurisdiction; only the regulations describe how jurisdiction is established, and they expressly allowed an NTA to omit the date and time.[80] As none of these district court cases provides binding authority on any immigration court or any federal circuit courts, their opinions are most valuable in providing insight into the initial impressions of the significance of *Pereira* of a large number of federal judges.

E. The Fifth Circuit's response in *Pierre-Paul v. Barr*

The Fifth Circuit waited over a year to weigh in on the significance of *Pereira*, rejecting earlier jurisdictional challenges as "unexhausted"[81] (apparently not caring to address the doctrine that subject matter jurisdiction "can never be forfeited or waived"[82]). When it finally did address *Pereira*'s implications, it did so in an opinion that, of all the federal circuit court opinions I have examined, is likely the most scattershot, most poorly written and reasoned, and most transparently panicked at the prospect of undermining the jurisdiction of the millions of immigration proceedings initiated with defective NTAs.

In *Pierre-Paul v. Barr*, the noncitizen argued that the putative NTA used to initiate his removal proceedings was defective and therefore did not vest jurisdiction with the IJ.[83] Like Mr. Bermudez-Cota's argument before the BIA, Mr. Pierre-Paul's reasoning was quite straightforward:

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[74] *United States v. Santiago Tzul*, 345 F. Supp. 3d 785, 790 (S.D. Tex. 2018) (internal citations omitted).

[75] *United States v. Leon-Gonzalez*, 351 F. Supp. 3d 1026, 1030 (W.D. Tex. 2018) (emphasis added).

[76] *United States v. Erazo-Diaz*, 353 F. Supp. 3d 867, 877-78 (D. Ariz. 2018).

[77] *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164, 1166 (E.D. Wash. 2018) ("Immigration judges examining this issue have reached the same conclusion as this Court that lack of a valid charging document as required by § 1229(a) means that the IJ lacks jurisdiction.") (referring to two anonymized decisions from two separate immigration courts, attached).

[78] *United States v. Fernandez*, 350 F. Supp. 3d 457, 467 (E.D. Va. 2018); *United States v. Ordoñez*, 328 F. Supp. 3d 479, 499 (D. Md. 2018); *United States v. Barbosa*, 368 F. Supp. 3d 172, 177 (D. Mass. 2019).

[79] *United States v. Ordoñez*, 328 F. Supp. 3d 479, 499 (D. Md. 2018); *United States v. Porras-Avila*, 383 F. Supp. 3d 707, 717 (S.D. Tex. 2019).

[80] *United States v. Romero-Caceres*, 356 F. Supp. 3d 541, 553 (E.D. Va. 2018); *United States v. Porras-Avila*, 383 F. Supp. 3d 707, 713 (S.D. Tex. 2019); *United States v. Castillo-Martinez*, 378 F. Supp. 3d 46, 53 (D. Mass. 2019); *see also United States v. Pszeniczny*, 384 F. Supp. 3d 353, 365 (E.D.N.Y. 2019) (following the Second Circuit's decision to that effect in *Banegas Gomez v. Barr*, 922 F.3d 101, 110 (2d Cir. 2019)).

[81] *See, e.g., Do Mung v. Barr*, 773 Fed. Appx. 229, 229 (5th Cir. July 16, 2019) (unpublished).

[82] *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 81 (2009) (quoting *Arbaugh v. Y & H Corp*., 546 U.S. 500, 514 (2006)).

[83] *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019).

> Title 8 C.F.R. § 1003.14 states that the immigration court's "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court. . .." In turn, "charging document" is defined as "the written instrument which initiates a proceeding" before the immigration court, including a notice to appear. 8 C.F.R. § 1003.13. The regulations further specify that "[i]n removal proceedings pursuant to [8 U.S.C. § 1229a], the [government] shall provide in the Notice to Appear[] the time, place and date of the initial removal hearing, where practicable." 8 C.F.R. § 1003.18.
>
> Relying on the Supreme Court's holding in *Pereira* that "[a] putative notice to appear that fails to designate the specific time or place . . . is not a 'notice to appear under [8 U.S.C. §] 1229(a),'" [Mr.] Pierre-Paul argues that his notice to appear, which lacked the time and date of his proceeding, was not a valid charging document under 8 C.F.R. § 1003.14.[84]

A three-judge panel rejected Mr. Pierre-Paul's argument on three grounds (plus a seemingly fourth ground, which appeared in a footnote).

First, the Fifth Circuit held that the NTA was not defective.[85] The opinion distinguished *Pereira*'s "narrow" holding by emphasizing the stop-time rule's use of the word "under," as in, a noncitizen's "period of continuous residence" is "deemed to end . . . when the alien is served a notice to appear *under* section 1229(a). . .."[86] Referring to this word as "the glue that bonds the stop-time rule to § 239(a)'s substantive time-and-place requirements," the Fifth Circuit held that "the regulations do not carry such glue and are not textually bonded to [§ 239(a)]."[87] Thus, the court reasoned, DHS was bound only to comply with the regulations, not the statute, which made provision of the date and time necessary only if "practicable."

Ironically, the decision noted that Mr. Pierre-Paul was in ICE detention and was personally served the incomplete NTA on May 11, 2010, and that he received the notice of hearing *on the same date*.[88] It is hard to imagine under these circumstances that including that information on the NTA was not "practicable." But alas, the Fifth Circuit did not address this matter. (In fact, I have not seen any decision challenge the government's blanket claim that it is never practicable to follow the statute.)

Second, citing to *Matter of Bermudez-Cota*, the Fifth Circuit held that even if the NTA had been defective, that defect was cured by the immigration court's subsequent issuance of a notice of hearing.[89] Noting that *Pereira* did not reach this point, the Fifth Circuit asserted that INA §239(a) only requires "written notice," and "does not specify that all the required items must be contained in a single document."[90] Though the statute spoke in the singular, the Dictionary Act provides, "[i]n determining the meaning of any Act of Congress, unless context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things", which the Fifth Circuit reasoned allowed "a" notice to appear to become several piecemeal notices.[91] Finally, the Fifth Circuit concluded that "the two-step process also furthers 'Congress' aim' by ensuring that aliens receive notice of the time and place of the proceedings"—which is quite disingenuous, in light of the fact that Congress specifically sought to further this aim by ensuring notice came in *one* step, not two.[92]

Third, the Fifth Circuit found that any requirement to include the date, the time, and the place information in the NTA rule is at most a claim-processing rule, not a jurisdictional requirement.[93] "A claim-processing rule is a rule that seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[94] It does not render the requirement optional; if a non-citizen raises

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[84] *Id.* at 688 (honorific added; all other alterations in original).

[85] *Id.* at 689-90.

[86] 8 U.S.C. § 1229b(d)(1).

[87] *Pierre-Paul*, 930 F.3d at 689-90. Recall that the jurisdictional provision states only that "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service," 8 C.F.R. § 1003.14(a), and a charging document is defined as "the written instrument which initiates a proceeding before an Immigration Judge, which, after April 1, 1997, includes an NTA." 8 C.F.R. § 1003.13.

[88] *Pierre-Paul*, 930 F.3d at 686-87.

[89] *Id.* at 690-91.

[90] *Id*. at 691.

[91] *Id.* at 691 (quoting 1 U.S.C. § 1).

[92] *Id*.

[93] *Id.* at 691-93.

[94] *Id*. at 692 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

an objection, the court must apply the rule. But if a non-citizen does not raise the issue in a timely manner, she forfeits her objection. This is distinguished from a rule implicating subject matter jurisdiction, which courts must consider regardless of when in the litigation it is raised.[95]

The Fifth Circuit believed 8 C.F.R. § 1003.14 must be a claim-processing rule because "Congress has not 'clearly state[d]' that the immigration court's jurisdiction depends on the content of notices to appear."[96] Though the *regulation* does clearly state just that, the court found that that actually cuts against the notion of jurisdiction, because, "'[w]hile an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases.'"[97]

As a claim-processing rule, any defect (if the court had admitted to any) could still be challenged, but only at the proper time. Since Mr. Pierre-Paul "raised the issue for the first time in his petition for review," the court found that he waived his objection.[98]

Finally, the Fifth Circuit built on this waiver argument in a footnote, finding that the same result would apply even if 8 C.F.R. § 1003.14 were jurisdictional, because "under our case law, an alien who fails to object to the notice to appear and concedes his removability 'waive[s] his challenge to the [immigration judge's] jurisdiction over the removal proceedings."[99] The court did not note the distinction between personal jurisdiction, which can be waived, and subject matter jurisdiction, which according to Supreme Court precedent cannot be waived.[100] The footnoted also appeared to conflate the issue of exhaustion, which affects the *circuit court*'s jurisdiction, with that of waiver.[101]

The Fifth Circuit took pains to point out that each ground for refusing relief stood alone, noting, "In this circuit, alternative holdings are binding and not *obiter dictum*."[102] In a nutshell, the Fifth Circuit mustered every alternative holding it could find to block any interpretation of *Pereira* that would invalidate the removal orders already issued, or require the DHS to coordinate with the immigration courts in the future in order to include the dates, times, and places for all future removal proceedings. It buried any negative ramifications of *Pereira* for the government not six feet deep but sixty feet deep!

F. Multiple installments of notice in *in absentia* cases

The Fifth Circuit also extended its reliance on the two-step method into *in absentia* cases. First, a little background. The INA allows a respondent to be removed even if she does not appear for her proceedings,

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[95] *Id.* at 691-92 (citing *Fort Bend City v. Davis*, 139 S. Ct. 1843, 1849 (2019), *Henderson v. Shinseki*, 562 U.S. 428, 435 (2001)). Resolving the question of whether 8 C.F.R. § 1003.14 is a claim-processing rule or a jurisdictional one is beyond the scope of this paper. I note, however, that although the Fifth Circuit's analysis is weak at best, other cases, including the Seventh Circuit case which *Pierre-Paul* cites, *Ortiz-Santiago v. Barr*, 924 F.3d 956, 966 (7th Cir. 2019), do make a reasonable case for this interpretation and are worthy of serious attention.

[96] *Id*. at 692 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)).

[97] *Id*. (quoting *Ortiz-Santiago*, 924 F.3d at 966).

[98] *Id*. at 693.

[99] *Id.* at 693, n.6 (quoting *Sohani v. Gonzales*, 191 F. App'x 258 (5th Cir. 2006) (unpublished)). At no point in this analysis did the Court address the fact that Mr. Pierre-Paul was found to be "mentally incompetent" by an immigration judge and that an attorney was appointed to protect his rights. *Id*. at 694. It is heartbreaking to read that the court held this concession against him when he was not responsible for it, even if one allows that the appointed attorney may have intended to protect his rights.

[100] *Insurance Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 704 (1982) (personal jurisdiction); *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (subject matter jurisdiction); *Arbaugh v. Y & H Corp*., 546 U.S. 500, 515-16 (2006) (same); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986) 51 (providing that private parties may not waive concerns as to improper exertion of agency authority "for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III").

[101] *Pierre-Paul*, 930 F.3d at 693, n.6 (speaking of a respondent's waiver of *immigration court* jurisdiction over a removal hearing while citing exhaustion cases going to the ability of a circuit court to hear a petition for review). In any case, the application of the doctrine of exhaustion is debatable here. *See Perez-Sanchez v. United States AG*, 935 F.3d 1148, 1153 (11th Cir. 2019) ("Ordinarily, a petitioner's failure to exhaust a claim before the BIA deprives our Court of jurisdiction over that claim. But we are not deprived of jurisdiction here. We always 'have jurisdiction to determine our own jurisdiction.' And our jurisdiction to review removal proceedings extends only to final orders of removal. If, as Mr. Perez-Sanchez argues, the agency never had jurisdiction over his removal proceedings to begin with, the entire proceeding—including the final order of removal—would be invalid, and we would have no jurisdiction to entertain his petition. We therefore cannot remand this question for the BIA to address in the first instance. We must determine for ourselves whether Mr. Perez-Sanchez's removal proceedings resulted in a valid final order of removal.") (internal citations omitted).

[102] *Pierre-Paul*, 930 F.3d at 689, n.2.

but only if she received adequate notice. Two provisions are applicable here:

- INA § 240(b)(5)(A) allows an *in absentia* order to be issued only if the government gave the respondent "written notice required under paragraph (1) or (2) of section 1229(a)," and demonstrated that fact to the IJ by "by clear, unequivocal, and convincing evidence." INA §239(a), 8 U.S.C. § 1229(a), sets out the time, date and place requirements, among others.
- INA § 240(b)(5)(C)(ii) provides for rescission of an *in absentia* order "upon a motion to reopen filed at any time" if "the alien did not receive notice in accordance with paragraph (1) or (2) of section 239(a). . .."[103]

In *Pereira*, recall that the government argued that the stop-time rule for cancellation of removal did not incorporate § 239(a)(1)'s requirement that an NTA include the date, the time, and the place of a hearing. To press this point, the government contrasted the wording of the stop time rule with the two *in absentia* requirements, noting that the *in absentia* provisions "use the distinct phrases 'required under' and 'in accordance with' as shorthand for a notice that satisfies § 1229(a)(1)'s requirements," unlike the stop time rule.[104] In other words, the government *affirmed* that the NTA must list the time and place of the hearing in order to justify issuance of an *in absentia* order under § 240(b)(5)(A), and that the respondent may seek to reopen a case under § 240(b)(5)(C)(ii) if the NTA did not include that information.

The Supreme Court agreed with that proposition, though not with the distinction the government sought to make. Instead, the Court found that all *three* provisions—the two *in absentia* statutes and the stop-time rule—"refer[] to notice satisfying, at a minimum, the time-and-place criteria defined in §1229(a)(1)."[105] This holding would seem to have overruled the Fifth Circuit's prior conclusion that "an NTA need not include the specific time and date of a removal hearing in order for the statutory notice requirements to be satisfied; that information may be provided in a subsequent NOH."[106]

Yet the Fifth Circuit doubled down on its position after *Pereira*, holding that, "[b]ecause we hold that the information in the written notice required under paragraph (1) of section 1229(a), otherwise referred to as an NTA, may be contained in one or more documents, and because Yanez-Pena received all such information, the BIA did not abuse its discretion in declining to reopen and rescind her in absentia order of removal."[107]

A substantially similar case relying on *Yanez-Pena* has just been vacated and remanded by the Supreme Court for further consideration in light of *Niz-Chavez*.[108] Both it and *Yanez-Pena* also relied on the two-step method in the cancellation context, so it is possible the court will only address that matter. However, the court's reliance on the two-step method in the *in absentia* provisions are poised for challenge, as well, as we shall see in the next section.

G. The Supremes return: *Niz-Chavez v. Garland*

This past April 2021, in *Niz-Chavez v. Garland*, the Court re-visited the NTA's requirements. Again, the revisiting was in the context of the INA's stop-time rule.[109]

In *Pereira*, the Court had held that the stop-time rule could not be triggered by issuance of a defective NTA, i.e., an NTA lacking the date, time, and place information. In *Niz-Chavez*, it answered the question whether the stop-time rule could be triggered by delivering all the statutorily required information piecemeal: first with a DHS-issued defective NTA, and then, at some later point, with a DOJ-issued notice of hearing containing the information omitted in the NTA.

The Supreme Court said *No*, explicitly rejecting the two-step method of providing notice.[110] It took a long and winding route to its conclusion, but ultimately the Court ended up with a similar position to that of the

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[103] *See also also* 8 C.F.R. § 1003.23(b)(4)(ii) ("An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act. . ..").

[104] *Pereira v. Sessions*, 138 S. Ct. 2105, 2117-18 (2018).

[105] *Id*. at 2118.

[106] *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009).

[107] *Yanez-Pena v. Barr*, 952 F.3d 239 (5th Cir. 2020).

[108] *Mauricio-Benitez v. Garland*, No. 20-1250, 2021 U.S. LEXIS 3051 (2021).

[109] *Niz-Chavez* v. *Garland*, 593 U.S. ___, 141 S. Ct. 1474 (2021).

[110] The majority opinion was authored by Justice Gorsuch. *Pereira*'s sole dissenter was Justice Alito; in *Niz-Chavez*, he joined the Chief Justice in signing a dissent written by Justice Kavanaugh. The crux of the dissent's position was that the two-step process is not only adequate, but *favorable for the noncitizen*, thereby patronizingly dismissing the statements by the respondent and *amici* representing other noncitizens that the two-step process was harmful to them.

dissent in the BIA's *en banc* decision in *Mendoza-Hernandez.*[111]

Niz-Chavez squarely rejected the legality of issuing notice via "a mishmash of pieces with some assembly required," and instead required that notice be given via "a single document containing the required information."[112]

The Supreme Court also chided the government for its post-*Pereira* behavior, noting that it "could have responded to *Pereira* by issuing notices to appear with all the information § 1229(a)(1) requires," but that "it has chosen instead to continue down the same old path."[113] It explained:

> [I]n IIRIRA, Congress took pains to describe exactly what the government had to include in a notice to appear, and that the time and place of the hearing were among them. The government was not free to short-circuit the stop-time rule by sending notices to appear that omitted statutorily required information.[114]

The government had argued that it needed the flexibility "to provide information in separate mailings (as many as they wish) over time (as long as they find convenient)," since "supplying so much information in a single form is too taxing."[115] The Court rejected this position wholesale, noting that "pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'"[116]

To determine what that text required, the majority observed that INA §239(a) describes "*a* notice to appear," and that "a" is typically singular:

> To an ordinary reader—both in 1996 and today—"a" notice to appear would seem to suggest just that: "a" single document containing the required information, not a mishmash of pieces with some assembly required.[117]

Acknowledging that "a lot here turns on a small word," the Court considered customary usage contrasting countable and non-countable things[118] and the Dictionary Act[119] and concluded that the statutory language's contextual clues point to Congressional intent to use a single document:

> Congress's decision to use the indefinite article "a" thus supplies some evidence that it used the term … as a discrete, countable thing. All of which suggests that the government must issue a single statutorily compliant document to trigger the stop-time rule.[120]

The Court reminded the reader that the NTA "serves as the basis for commencing a grave legal proceeding … like an indictment in a criminal case [or] a complaint in a civil case."[121] And "[n]o one contends those documents may be shattered into bits," so "it is unclear why we should suppose Congress meant for this case-initiating document to be different."[122]

Then the Court turned to IIRIRA's statutory structure and history, examining other places in which the INA discussed "a notice to appear" (sometimes capitalized as "a Notice to Appear") to determine if Congress's vision of the NTA was as a singular document, or a collection of documents. In each context, the Court concluded Congress meant a single document. The Court also recognized that IIRIRA "changed the rules governing the document's contents" from the old

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[111] *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, 528 (BIA 2019).

[112] *Niz-Chavez*, slip op. at 5 (internal quotation marks omitted).

[113] *Id*. at 3.

[114] *Id*.

[115] *Id.* at 1.

[116] *Id*. at 13.

[117] *Id*. at 5.

[118] *Id*. at 6-7 ("Normally, indefinite articles (like 'a' or 'an') precede countable nouns…. By contrast, noncountable nouns … 'almost never take indefinite articles.'… These customs matter because the key term before us (notice) can refer to *either* a countable object ('a notice,' 'three notices') *or* a noncountable abstraction ('sufficient notice,' 'proper notice'). Congress's decision to use the indefinite article 'a' thus supplies some evidence that it used the term in the first of these senses—as a discrete, countable thing.… If IIRIRA had meant to endow the government with the flexibility it supposes, we would have expected the law to use 'notice' in its noncountable sense.") (quoting The Chicago Manual of Style §5.7, at 227) (emphasis in the original).

[119] *Id*. at 8 ("The Dictionary Act does not transform every use of the singular 'a' into the plural 'several.' Instead, it tells us only that a statute using the singular 'a' can apply to multiple persons, parties, or things. So the Act allows the government to send multiple notices to appear to multiple people, but it does not mean a notice to appear can consist of multiple documents.").

[120] *Id*. at 7.

[121] *Id*. (internal quotation marks omitted).

[122] *Id*. at 8.

law, which "authorized the government to specify the place and time for an alien's hearing 'in the order to show cause or otherwise,'" to INA §239(a), which is not permissive.[123] The government acknowledged the change with a proposed rule creating the NTA, the preamble of which "expressly acknowledged that 'the language of the amended Act indicat[es] that the time and place of the hearing must be on the Notice to Appear,'" thereby demonstrating "that even the party now urging otherwise once read the statute just as we do."[124]

Finally, *Niz-Chavez* considered the government's "pleas of administrative inconvenience" and its "self-serving regulations" aimed at easing its burden of "producing compliant notices" which "has proved taxing over time."[125] It swept these concerns away, saying, "If the government finds filling out forms a chore, it has good company. . . . [R]arely do agencies afford individuals the same latitude in completing [forms] that the government seeks for itself today."[126]

The Court concluded somberly:

> At one level, today's dispute may seem semantic, focused on a single word, a small one at that. *But words are how the law constrains power*. In this case, the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him.[127]

After all the shoddy legal maneuverings of the BIA and the federal circuit courts to trim *Pereira* as "narrow," I believe the Supreme Court has made it clear that the appropriate way to read *Pereira* and *Niz-Chavez* is broadly.

IV. Beyond *Niz-Chavez*

A. Cancellation of removal and voluntary departure cases

With *Niz-Chavez*'s new language for support, straightforward challenges will be made by those noncitizens whose applications for cancellation of removal were denied due to the operation of the stop-time rule, when the new rule can meaningfully impact their period of continuous residence in the United States. Indeed, the Court remanded 13 such cases "for further consideration in light of *Niz-Chavez*" the same day it issued that opinion.[128] Active cases before the appellate courts are currently being evaluated in the light of this new holding and some decisions have been handed down already.[129]

Noncitizens who would otherwise have qualified for cancellation of removal but who did not apply due to the issuance of an incomplete NTA may be required to demonstrate that they would have applied but for the courts' interpretation of *Pereira* as permitting DHS to adhere to a two-step process. This is likely to be successful in most cases where the noncitizen was otherwise eligible, but it remains to be seen what test will be crafted to determine whether they would have applied.

A further barrier applies to noncitizens whose removal proceedings have already taken place before the immigration judge: proper preservation. The Seventh Circuit has repeatedly held that it will not entertain arguments on appeal or in motions to reopen claiming eligibility for cancellation based on *Pereira* or *Niz-Chavez*, unless the objection was made during

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[123] *Id*. at 11.

[124] *Id*. at 12.

[125] *Id*. at 13.

[126] *Id*. I note that Justice Gorsuch, with this line, has channeled the frustrations of the immigration attorneys and their diligent staff who have been complying with the Trump Administration's "Kafakaesque" "no blanks" rule for the past many months by repeatedly typing "N/A" on line after line, fingers crossed that they did not inadvertently miss one. Catherine Rampell, "Opinion: The Trump administration's no-blanks policy is the latest Kafkaesque plan designed to curb immigration," Washington Post (Aug. 6, 2020), *available at* https://www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html.

[127] *Pereira,* slip op. at 16 (emphasis added).

[128] *See, e.g., Yanez-Pena v. Garland*, 2021 U.S. LEXIS 2358, *Olvera v. Garland*, 2021 U.S. LEXIS 2295, *Figueroa-Diaz v. Garland*, 2021 U.S. LEXIS 2337, *Navarrete-Lopez v. Garland*, 2021 U.S. LEXIS 2321, *Fuentes-Angel v. Garland*, 2021 U.S. LEXIS 2247 (all cases in which the noncitizen's motion to reopen in order to permit him to apply for cancellation of removal under *Pereira* had been denied based on the Fifth Circuit's precedent).

[129] *See, e.g., Paz-Avalos v. Garland*, No. 19-2301, 2021 U.S. App. LEXIS 17214, at *1 (4th Cir. Jun. 9, 2021); *Earahona v. Garland*, No. 19-4087, 2021 U.S. App. LEXIS 16354, at *2 (6th Cir. Jun. 1, 2021); *Lin v. AG United States*, 2021 U.S. App. LEXIS 14175 (3d Cir. May 13, 2021) (noting that "The Government's argument that Lin failed to accrue ten years of physical presence is foreclosed by . . . *Niz-Chavez*").

removal proceedings before the immigration judge.[130] The court did allow for late objections if the noncitizen could "establish excusable delay and prejudice," but held that the fact that *Pereira* came down only *after* the respondent's immigration proceedings concluded did not count as excusable delay, reasoning that "while *Pereira* was not decided until 2018, [the noncitizen] could have relied on the underlying statute, § 1229(a), long before *Pereira*."[131] This assertion by the Seventh Circuit overlooks the fact that noncitizens have been unsuccessfully raising this claim for years without achieving certiorari by the Court. It also will have unfortunate effects on the legal system, as it requires counsel to clutter up future motions with arguments foreclosed by established precedent to protect their clients' interests on the off chance that a future Supreme Court holding will overturn that precedent. This is clearly not any way of "running the railroad", as it were, for it will create more unproductive work for the courts and more expense and hassle for clients, with no payoff for most of them.

In any case, I also expect immediate challenges to the BIA's holding in *Matter of Viera-Garcia* that the two-step notice process is sufficient to trigger the stop-time rule in voluntary departure cases, as this holding is based entirely on the reasoning in *Bermudez-Cota*.[132] The success of such non-cancellation challenges remains to be seen, but early signs are not promising. The circuit courts appear to be again circling the wagons, limiting the reach of the Supreme Court decisions to the letter of their holdings, as the next section makes clear.

B. Challenges to jurisdiction

More difficult and more engrossing, I believe, are those cases in which a jurisdictional challenge is the noncitizen's best bet. The language of *Niz-Chavez* is ripe for making jurisdictional arguments.

Niz-Chavez's actual legal analysis dismissing the two-step process did not touch on the nature of cancellation of removal at all. Instead, it focused entirely on the plain language of INA §239(a)(1), and the clear list of information that must be included on a NTA. Would that analysis apply also to the provision stating that jurisdiction vests when a notice to appear is filed with the immigration court? Although an NTA's relationship to the stop-time rule is defined in the cancellation *statute*, while its power to vest authority in an immigration judge is conveyed solely in a *regulation*, it is difficult to imagine that the Court would hold the NTA to a higher standard when determining a residency period for a minor form of immigration relief than it would when beginning an adjudicatory process for the most consequential purposes. Recall *Niz-Chavez*'s understanding of the seriousness of this moment:

> A notice to appear serves as the basis for commencing a grave legal proceeding. As the government has acknowledged, it is "like an indictment in a criminal case [or] a complaint in a civil case."... No one contends those documents may be shattered into bits, so that the government might, for example, charge a defendant in "an indictment" issued piece by piece over months or years. And it is unclear why we should suppose Congress meant for this case-initiating document to be different.[133]

The Court's emphasis on a notice to appear as "the basis for commencing a grave legal proceeding" and a "case-initiating document" acknowledges its importance well outside the context of the stop-time rule.

Still, the Fifth Circuit has already dismissed a post-*Niz-Chavez* jurisdictional challenge in a published decision, *Maniar v. Garland.*[134] The case offers very little in the way of analysis, simply noting "Maniar argues that neither the IJ nor the BIA ever acquired jurisdiction over his removal proceedings because his notice to appear was defective" and then summarily dismissing the argument, saying, "We have already 'join[ed] the overwhelming chorus of our sister circuits' in rejecting attempts to 'extend *Pereira*'s narrow holding beyond the stop-time rule context.'"[135]

In a footnote, the Fifth Circuit even dismissed the relevance of *Niz-Chavez*. The court asserted that, while it "undermines one of our rationales," it "does not dislodge our ultimate holding in *Pierre-Paul* that it is 'the regulations, not 8 U.S.C. §1229(a), [that] govern what a notice to appear must contain to constitute a valid charging document,'" or "alter our conclusion that '*Pereira* does not extend outside the stop-time

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[130] *Zhu v. Garland*, No. 19-3346, 2021 U.S. App. LEXIS 17977 (7th Cir. 2021); *Chen v. Barr*, 960 F.3d 448, 451-52 (7th Cir. 2020).

[131] *Meraz-Saucedo v. Rosen*, 986 F.3d 676, 683 (7th Cir. 2021).

[132] *Matter of Viera-Garcia*, 28 I. & N. Dec. 223 (BIA 2021).

[133] *Niz-Chavez*, slip op. at 7-8.

[134] *Maniar v. Garland*, ___ F.3d ___, 2021 U.S. App. LEXIS 15099 (May 20, 2021).

[135] *Id.* at *9 (quoting *Pierre-Paul*, 903 F.3d at 689).

rule context,'" in part because "*Niz-Chavez* itself described its decision as 'the next chapter' of the *Pereira* saga."[136]

Perhaps the good judges of the Fifth Circuit have not read enough literature, or even enough Harry Potter, to know that "the next chapter" of a saga can take the reader to worlds well beyond the current chapter's narrow perspective. On a less fanciful plane, the Fifth Circuit judges ought to know that the Supreme Court rarely grants certiorari in order to finesse a narrow holding, and instead typically exercises its awesome power when it has something important and of broad significance to contribute to the legal landscape. I should point out again to the closing language of *Niz-Chavez* as an indicator of what six members of the Court intended for the American judiciary to understand:

> [W]ords are how the law constrains power. In this case, the law's terms ensure that, *when the federal government seeks a procedural advantage against an individual*, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.[137]

Under *Maniar*, are we to believe that the Supreme Court is truly this deeply vested in limiting the "procedural advantage" the DHS obtains by triggering the stop-time rule in cancellation of removal—a form of relief available, by statute, to no more than 4,000 noncitizens a year? Or is the Supreme Court repeatedly clarifying the meaning of "a notice to appear" in the context of the "procedural advantage" the government exercises when "commencing a grave legal proceeding" against the noncitizen, a proceeding that threatens to deprive an individual "of all that makes life worth living"?[138] The Supreme Court informed us nearly a century ago:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness.[139]

The Fifth Circuit did not have the benefit of full briefing in *Maniar*, as the noncitizen did not argue the relevance of *Niz-Chavez*, which had issued less than a month before.[140] The breadth of *Niz-Chavez*'s reach should be properly argued before, and seriously considered by, the Fifth Circuit *en banc*. The panel's dismissive footnote in *Maniar v. Garland* does a disservice to *Niz-Chavez* and to such an important issue.

Still, there is little question that noncitizens in the Fifth Circuit seeking to challenge jurisdiction using the language of *Niz-Chavez* are likely to face considerably demanding (indeed crushing) barriers—not because *Niz-Chavez* fails to provide strong support for these arguments, but because the Fifth Circuit is particularly motivated to avoid coming to any conclusion that could permit the thousands or millions of orders of removal to be subject to reopening or potentially a worse scenario—that those orders of removal are null and void as they were issued by immigration courts who did not have jurisdiction to issue them. Similar resistance should be expected from the BIA.

Other circuits, too, are limiting *Niz-Chavez*'s reach. For instance, the Ninth Circuit had held in a 2020 case that the time, date *and place* requirements had no jurisdictional significance—despite the place of the hearing appearing in the regulations as a requirement of the NTA[141]—because "an omission of some of

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[136] *Id.* at *10, n.2 (quoting *Niz-Chavez*, slip op. at 3).

[137] *Niz-Chavez*, slip op. at 16 (emphasis added).

[138] *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

[139] *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

[140] According to the Fifth Circuit, the respondent argued only "that his notice's failure to name the time and place of future removal proceedings constitutes a fatal defect under 8 U.S.C. § 1229(a)(1)(G)(i) and the Supreme Court's decision in *Pereira*." *Maniar*, ___ F.3d ___, at *10, n.2.

[141] This is a surprising and a baffling conclusion because, as I explain more fully in the next section, the Ninth Circuit, following the BIA, had previously relied upon the fact that the regulations did not require date and time information for its conclusion and that their omission did not deprive the IJ of jurisdiction. *Aguilar Fermin v. Barr*, 958 F.3d 887, 893 (9th Cir. 2020) ("In *Karingithi*, we observed that 'the regulation does not require that the time and date of proceedings appear in the initial notice.' 'Rather, the regulation compels inclusion of such information "where practicable."' We concluded that '[a] notice to appear need not include time and date information to satisfy [the regulations].'") (quoting *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019)) (internal citations omitted). Finding, on the basis of that case, that a violation was not jurisdictional despite the omission of information that *was* included in the regulations would seem to take self-justifying rationalization to a new level.

the information required by § 1003.14(a) and § 1003.15(b)(6) can be cured and is not fatal."[142] The remedy the court proposed for "when the address is omitted from the NTA" was "providing the alien and the government with the complete notice at a later time."[143] This would seem to violate *Niz-Chavez*'s directive, and yet the Ninth Circuit recently held that "*Niz-Chavez* did not overrule" its decision.[144]

Finally, a district court in the Second Circuit has held, in the context of an illegal reentry conviction, that *Niz-Chavez* does not undermine the Second Circuit's decision in *Banegas Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019), which "distinguished the stop-time rule line of cases from cases involving an Immigration Court's jurisdictional authority. Thus, because *Niz Chavez* falls under the stop-time rule line of cases, it does not impact the outcome of this motion."[145]

Accordingly, it seems evident that courts are still reluctant to apply the Supreme Court's reasoning in *Pereira* and *Niz-Chavez* to anything beyond the cases' immediate holding even though the Court's reasoning and language in the two cases would seem to require exactly that.

C. The claims-processing barrier to jurisdictional challenges

In several federal circuits, the conclusion that the jurisdictional regulation (8 C.F.R. §1003.14) is a claims-processing rule places on noncitizens and their counsel a special burden: they must object to the sufficiency of the NTA in a timely fashion or waive that objection.[146]

The BIA has now extended the claim-processing conclusion into another arena: whether the NTA must specify the place of the hearing. Though this might seem a small addition to the doctrine, it is significant because many of the cases distinguishing *Pereira* stress the fact that *Pereira* interpreted the statute, which requires the NTA to include the date and time, while the jurisdictional provision appears in the regulations, which have no such requirement.[147] The regulations do, however, require the NTA to include the place of the hearing (as does the statute).[148] Yet, in *Matter of Rosales Vargas*,[149] the BIA essentially found that this requirement did not need to be followed.

The respondents had "argued that the court was without jurisdiction because their notices to appear did not include the address of the Immigration Court."[150] The IJ "agreed that the address of the Immigration Court is "one of the required items" under 8 C.F.R. § 1003.15(b), 'the regulation which governs the Immigration Court's jurisdiction,'" and so terminated the case.[151] On appeal, the BIA stated it was "unpersuaded" by this argument because, "while the first sentence of 8 C.F.R. § 1003.14(a) states that jurisdiction vests when a charging document is filed, it provides no other specifications regarding the scope of the document."[152] It is unclear why the BIA's attention could not be sustained long enough to read the *second* sentence, which clarifies that "[t]he charging document

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[142] *Aguilar Fermin*, 958 F.3d at 895.

[143] *Id*.

[144] *United States v. Gonzalez-Urena*, No. 20-50044, 2021 U.S. App. LEXIS 17715 (9th Cir. 2021).

[145] *United States v. Dominguez-Bido*, 2021 U.S. Dist. LEXIS 102821, at *4 n.3 (S.D.N.Y. 2021) (internal citation omitted).

[146] *Pierre-Paul* 903 F.3d at 693; *United States v. Cortez*, 930 F.3d 350, 358 (4th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) ("That does not mean that the statute is unimportant or can be ignored. It simply means that an aggrieved party can forfeit any objection she has by failing to raise it at the right time."); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015 (10th Cir. 2019) ("Because the alleged defect in the notice to appear was not jurisdictional, Ms. Lopez lacks any grounds to avoid the 90-day deadline and prohibition on second motions to reopen."); *Perez-Sanchez v. United States AG*, 935 F.3d 1148, 1154-55 (11th Cir. 2019) ("To the extent Mr. Perez-Sanchez argues he is nonetheless entitled to a remand because his NTA violated the agency's claim-processing rules, we dismiss this part of his petition for lack of jurisdiction because he failed to exhaust the claim before the agency.").

[147] *See, e.g.*, *Cortez*, 930 F.3d at 362-64.

[148] 8 U.S.C. § 1229(a)(1)(G)(i) ("In removal proceedings under section 1229a of this title, written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien . . . specifying the following: . . . The time and place at which the proceedings will be held."); 8 C.F.R. § 1003.15(b)(6) ("The Order to Show Cause and Notice to Appear must also include the following information: . . . The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear. . .."); 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 by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed.").

[149] *Matter of Rosales Vargas*, 27 I. & N. Dec. 745 (BIA 2020).

[150] *Id*. at 746.

[151] *Id*.

[152] *Id*. at 748.

must include a certificate showing service on the opposing party pursuant to § 1003.32 *which indicates the Immigration Court in which the charging document is filed*."[153]

In any case, according to the BIA, both the jurisdictional provision in 8 C.F.R. §1003.14(a) and the address requirement in 8 C.F.R. §1003.15(b)(6) are only claim-processing rules, despite §1003.14(a)'s liberal use of the term "jurisdiction." Citing the circuit court case law limiting *Pereira*'s reach, the Board noted that the term "is not limited to subject matter jurisdiction, and we have never specifically considered whether this regulation implicates the subject matter jurisdiction of the Immigration Courts."[154] Despite quoting 8 C.F.R. §1003.12's instruction that "[t]hese rules are promulgated to assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges," the BIA instead zeroed in on regulatory history supporting the notion that the provisions helped the immigration courts to manage their dockets; the BIA did not bother considering the fact that the regulations also protected the concomitant needs of the noncitizens to have notice of the time, date, and place of perhaps the most life-altering procedures in their lives.[155]

This decision also renders the government's failure to abide by the requirements essentially unreviewable. As a claim-processing rule, the address requirement may only be challenged in a timely manner. The noncitizens in *Rosales Vargas* did so. Yet the BIA still dismissed these claims based on a lack of prejudice, because the respondents eventually were told when and where to appear and they did so. In short, if a respondent appears and challenges the faulty NTA, the fact that she is there to do so in itself undermines her challenge. This Catch-22 ensures that there is no way to enforce the regulatory requirements.

Of course, this analysis relies upon a later-sent notice of hearing, and it remains to be seen whether this version of the two-step process can survive *Niz-Chavez*.[156] I suspect the government will argue that *Niz-Chavez* does not apply because it interpreted the statute, while the Board's analysis in *Rosales Vargas* is limited to the regulations. The Court's language sweeps broadly, however, likening the NTA to other case-initiating documents such as civil complaints or criminal indictments, neither of which has been held to exist in multiple pieces.[157] That discussion, which focuses on the function of the document, would appear to leave no room for the agency to protest that a case-initiating document under the regulations should be treated differently than one under the statute. But the courts and the Board have proved delinquently inventive at ducking the Supreme Court's reach before.

The Board's apparent compartmentalization of what the statute requires versus what the regulations require makes little sense in the context of an actual removal proceeding. One may speak of a statutory or regulatory NTA, but in the end, the noncitizen receives one document, called a notice to appear, that is meant to inform her that the government challenges her right to remain in this country. If the statute requires that that document contain certain information, then it should do so, regardless of whether the regulations are more lenient. Although the cases generally do not approach it this way, it is often a matter of basic fairness. NTAs are usually served in person, so if they are complete, then the noncitizen is guaranteed to know where and when to appear for her initial removal hearing. If the date, the time and the place are not included, then she cannot appear unless and until she receives a notice of hearing.

The notice of hearing is a poor stand-in for actual statutory notice. Many noncitizens either have no fixed address, or live in busy, even chaotic circumstances, with landlords and roommates who might fail to hand over the mail. By law, respondents are considered to have been notified if a court paper is delivered to the

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[153] 8 C.F.R. § 1003.14(a) (emphasis added). The Board later did acknowledge this provision, but dismissed it cursorily, stating that it "does not refer to jurisdiction" (again ignoring the fact that the sentence comes right after, and appears to modify, the jurisdictional statement of § 1003.14(a)), and then declaring that it is simply a claim-processing or internal docketing rule. *Id*. at 753.

[154] *Id.* at 751.

[155] *Id.* at 750, 752 ("The regulatory history shows that 8 C.F.R. § 1003.14 and the related regulations, including § 1003.15, were promulgated as procedural rules for the Immigration Courts. They serve to outline the steps needed to docket a case in a particular Immigration Court and to ensure the efficient administrative handling of cases within the Executive Office for Immigration Review. We interpret this regulatory history in light of the DHS's need to have control over when charging documents are filed with the Immigration Court to manage its resources.") (internal citations omitted).

[156] The decision was upheld by the Ninth Circuit in *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 n.4 (9th Cir. 2020), which the Ninth Circuit has recently declared survived *Niz-Chavez*. *United States v. Gonzalez-Urena*, No. 20-50044, 2021 U.S. App. LEXIS 17715 (9th Cir. 2021) ("contrary to Gonzalez-Urena's assertion, *Niz-Chavez* did not overrule *Aguilar Fermin v. Barr*. . .")

[157] *Niz-Chavez*, slip op. at 7-8.

proper address, but there is no assurance that the noncitizen will ever see it. And if the NTA fails to identify the immigration court in which the removal case will be filed, the noncitizen cannot even know which court to call to find out when the case has been scheduled. In such cases, a later-sent notice of hearing is not just as good as initial notice. It is no notice at all.

D. The *Ultra Vires* Doctrine

One means of challenging the claim-processing holdings is to tackle the regulatory language head-on.

Section 706(2)(C) of the APA expressly permits a court to determine whether an agency action is within the limits set by the enabling act. One such action which can be reviewed is the promulgation of regulations.

Relevant here is the promulgation of 8 C.F.R. § 1003.18, which states:

> In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If 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.[158]

As noted repeatedly above, the INA (the enabling act) specifies that the time, place, and date of the initial removal hearing *shall be* included in the Notice to Appear *issued by DHS*. This regulation modifies the statute not only by changing what information must be included, but also by transferring the authority to provide that information to the Immigration Judge, which is under the auspices of the Department of Justice, *an entirely separate* cabinet agency.

Was the promulgation of this regulation *ultra vires*? One way to answer that is to ask, "If the regulations could permit the scheduling information in an NTA to be issued by the immigration judge instead of by the DHS, what other information could be re-assigned to the immigration judge from the DHS?" Could the immigration judge identify the legal authority under which the proceedings are conducted, as required by INA §239(a)(1)(B)? That the alien may be represented by counsel, as required by INA §239(a)(1)(E)? Even the charges against the alien, as required by INA §239(a)(1)(D)? Could the Immigration Judge issue the *entire* NTA, thus extirpating the barrier between the prosecutorial and adjudicatory functions that Congress established and progressively strengthened over the years?

If these modifications to the statute's terms are not permissible, the obvious conclusion is that it is *ultra vires* for the regulations to modify *any* of the statute's terms, including by transferring responsibility for specifying the information in INA §239(a)(1)(G) from the DHS to the immigration judge.

Niz-Chavez noted that, with other case-initiating documents such as civil complaints or criminal indictments, "No one contends those documents may be shattered into bits, so that the government might, for example, charge a defendant in 'an indictment' issued piece by piece over months or years. And it is unclear why we should suppose Congress meant for this case-initiating document to be different."[159]

Presumably, the Supreme Court would be even less likely to approve a reading of the law which permits the charging document to be issued not only piece by piece over months or years but also *by multiple parties*, *including the presiding court itself*. But this will need to be decided by a later case.

V. Conclusion

Congress's decision to require the date, the time, and the place location in the newly created notice to appear has been buried in a flurry of self-serving justifications by the agencies tasked with providing due process to noncitizens living in the United States. After *Pereira* rolled back a few of those practices, the federal circuit courts and the BIA united in limiting the decision to the point that the noncitizen still has no guarantee of receiving critical information in her charging document *despite* the statutory *and* regulatory guarantees.

Niz-Chavez is indeed "the next chapter" in the *Pereira* saga. I trust that the following chapters open the door to many applications for cancellation of removal, and ultimately to a clear holding from the Supreme Court 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)'" *or for any other purpose.* This, it seems to

[158] 8 C.F.R. § 1003.18 (emphasis added).

[159] *Niz-Chavez*, slip op. at 7-8.

me, is the only logically consistent holding; any other reading of the law creates two or more "notices to appear" which vary in their required content according to context: a regulatory NTA, which does not comply with INA §239, and a statutory one, which does. This expressly flouts *Niz-Chavez*'s directive, as well as Congress's objective in creating NTAs to simplify and streamline the process.

There is one statutory definition. There is one form. There are many uses. How clear it would be if the form did not morph depending on its use, and thus a putative NTA either *is* or *is not* an NTA based upon whether it complies with a simple list of requirements—requirements Congress set out in 1996.

There is not much in IIRIRA for immigration attorneys and their clients to like. This one thing, though, is quite likeable. I hope that someday the Supreme Court sees it as plainly as many of us do.

As this article goes to publication, the United States Court of Appeals for the Fifth Circuit has issued a precedent decision that deserves mention. In Rodriguez v. Garland, *No. 20-60008 (5th Cir. Sept. 27, 2021), the Fifth Circuit addressed the question of whether a respondent who had been removed in absentia could reopen his case under 8 U.S.C. § 1229a(b)(5)(C)(ii). That provision allows an in absentia order to be rescinded "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." Section 1229(a), of course, requires that the NTA provide the date, time and place of the first removal hearing. Rodriguez's NTA omitted this information, which was later provided by a Notice of Hearing (NOH).*

The BIA ruled against Rodriguez on the grounds "that the NTA combined with the subsequent NOH containing the time and place of Rodriguez's hearing 'satisfied the written notice requirements of [8 U.S.C. § 1229(a)].'" The Fifth Circuit disagreed. It noted that § 1229a(b)(5)(C)(ii), like the stop-time provision, "textually references § 1229(a)," which both Pereira *and* Niz-Chavez *found significant. While the Fifth Circuit stood by its earlier determination that* Pereira *was limited to the stop-time context, it found that* Niz-Chavez *was not so limited. It seemed to concede that* Niz-Chavez *also overruled the Fifth Circuit's prior holding that notice "could be provided in multiple documents." Accordingly, in § 1229a, as in the stop-time rule, notice must be provided in one document that fulfilled all the requirements of § 1229(a). But the court took pains to distinguish (and thus affirm) its prior ruling in* Maniar v. Garland, *998 F.3d 235, 238 (5th Cir. 2021), that an NTA that omits the time, date or place information does not undermine an immigration court's jurisdiction. — S A-F*

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