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Pereira v. Sessions and the Future of Deportation Proceedings

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Pereira v. Sessions and the Future of Deportation Proceedings

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Article 1 section 8 of the United States Constitution give the U.S. government enumerated powers to establish a uniform rule on Naturalization. To carry out these duties, 8 U.S. Code § 1227 gives the government the power to initiate removal proceedings against noncitizens who are undocumented or may have lost their status in the U.S. However, before removal proceedings commence, the government per 8 U.S. Code § 1229 has to send a Notice to Appear (NTA) to the non-citizen.[2] An NTA is a written notice given to the noncitizen about the nature of proceedings against the noncitizen, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of law, the charges against the noncitizen and the statutory provisions alleged to have been violated, etc.[3] Hence the query of whether non-citizens in deportation proceedings have due process rights under the Fifth Amendment has been fairly established by the courts.[4] This provides non-citizens in US immigration courts the assurance that the government would follow due process of the law in its adjudication of removal proceedings. Under the current Trump administration, there has been more efforts by the government to undermine Due Process protections of non-citizens in the adjudication of removal proceedings through unfounded interpretations of the Immigration and Nationality Act.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, grants the Attorney General of the United States the discretion to "cancel

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[2] 8 U.S. Code § 1229
[3] *Id.*
[4] *Id.*

removal" and adjust the status of certain nonpermanent residents.[5] Specifically, the statute provides a stop-time rule wherein a non-citizen who has overstayed their visa, and is subject to removal proceedings, may be eligible for cancellation of removal proceedings if he/she has been physically present and has lived continuously in the U.S. for over 10 years preceding the application of cancellation of removal.[6] For a while, the courts did not have a consensus on whether a putative NTA that fails to list the place and time for a removal proceeding stopped time in favor of the government for the purposes of cancellation of removal. However, in *Pereira v. Sessions,* the United States Supreme Court addressed the issue of whether the stop-time rule is triggered when the government serves a non-citizen a NTA that is defective.[7] First, the Court referred to section 1229(a) of Immigration and Nationality Act (INA) to address the question of what a written notice must state. Section 1229(a) of INA provides that a written NTA should specify the nature of the proceedings, the legal authority under which the proceedings are conducted, and the acts or conduct alleged to be in violation of law among other things. Importantly, §1229(a)(1)(G)(i) states that the NTA must specify the time and date at which the removal proceedings must be held.[8]

The Court ruled that a putative NTA that fails to designate the specific time or place of a noncitizen's removal proceedings is not an NTA under 8 U.S.C.S. § 1229(a) and hence does not trigger the stop-time rule under 8 U.S.C.S § 1229(d)(1)(A) for determining eligibility for cancellation of removal.[9] The Court stated that throughout the statutory section, it is clear that an NTA is a written notice specifying the time and place at which the

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[5] §1229b(b) of IIRIRA. *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018)
[6] *Id.*
[7] *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)
[8] *Id.*
[9] *Id.*

removal proceedings will be held.[10] Therefore according to the Court, the intent of Congress as it relates to a putative NTA specifying the time and place for removal proceedings was plain and specific. In addition, the Court ruled that common sense leads to the conclusion that when it comes to serving NTAs to noncitizens, there is a procedure. If that procedure is not followed, then the government cannot subject the non-citizen to the consequences of failing to appear to his or her removal proceedings because a notice that does not inform a noncitizen when and where to appear for removal proceedings is not a notice to appear.[11]

If it is not obvious why the law regarding why Procedural Due Process for a putative NTA has to be followed, the standard consequence for a non-citizen's failure to appear is severe should suffice. Per law, if a non-citizen who has been properly served with the written notice required under section (2) of [8 U.S.C.S.] §1229(a)" fails to appear at a removal proceedings "he shall be ordered to remove in absentia".[12] But for a non-citizen to be ordered removed in absentia, "the Government must 'establish[] by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable.'"[13] This means that the burden is on the government to show that it followed due process in submitting the NTA but the respondent did not show. And this burden must not be causally overlooked.

In *Pereira*, the Department of Homeland Security listed several concerns about the consequences of sticking to the statutory text of the statute and following the interpretation of the Court. The government tried to show the court why it must defer to its interpretation of the statute. The government posited that the stop-time rule makes broad references to a notice to appear under

[10] *Id*.
[11] *Id*.
[12] *Id.*
[13] *Id* citing §1229a(b)(5)(A)"

"section 1229(a)," which includes paragraph (1), as well as paragraphs (2) and (3). The fact that the notice to appear sections of the statute appeared under these many sections made its meaning as it relates to the stop-time rule of the statute ambiguous.

Firstly, "the Government [argued] that §1229(a) of INA is not worded in the form of a definition and thus cannot circumscribe what type of notice counts as a 'notice to appear' for purposes of the stop-time rule."[14] On this issue, the Court ruled that according to §1229(a)(1)(G)(i), notice to appear is defined as a "written notice" that "specif[ies]," the time and place of the removal proceedings at a minimum.[15] The Court further added that the government's failing to specify integral information, like the time and place of removal proceedings, unquestionably would "deprive [the notice to appear] of its essential character."[16] As the Court finds, applying common sense to the situation would inescapably lead one to the conclusion that a notice to appear losses it function without a specified time and place. In addition, without the time and date specified, the respondent is not informed of where and when to appear. A proceeding cannot proceed without a specific place date and time.

Secondly, the Government contended that Congress' use of the word "under" in the stop-time rule renders the statute ambiguous.[17] The stop-time rule provides that "'any period of . . . continuous physical presence' is 'deemed to end . . . when the [non-citizen] is served a notice to appear under section 1229(a)." [18] The government alluded that, the statute is not explicit as to what "under" means in the statute. The Majority Opinion and the Dissent both focused on the technicality of the wording in the statute and contended whether the word "under" in the stop-time rule provision meant "subject to," "governed by," or "issued under

[14] *Supra 7*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id* §1229b(d)(1)(A).

the authority of."[19] The Dissent went on to add that "under" can also mean "authorized by.[20]" And if "under" means "authorized by or subject to or governed by," then the government would be doing its job and following procedures by sending NTAs without listing the particular time and place for the removal hearing.[21] According to the Majority, this view supports the Board of Immigration's (BIA) view that "the stop-time rule applies so long as DHS serves a notice that is 'authorized by,' or 'subject to or governed by, or issued under the authority of" §1229(a), even if the notice bears none of the time-and-place information required by that provision."[22] On this issue, the Court responded by quoting *Kucana v. Holder*.[23] The Court calls the word 'under' a "chameleon," in that it "must draw its meaning from its context."[24] And that based on the Court's reading of the statute, "under" can only be interpreted as meaning "'in accordance with or according to," for it connects the stop-time trigger in §1229b(d)(1) to a "notice to appear" that contains the enumerated time-and-place information described in §1229(a)(1)(G)(i)."[25] Adhering to the Court's interpretation, the stop-time rule applies only if the government serves an NTA "[i]n accordance with" or "according to" the substantive time-and-place requirements set forth in §1229(a).[26]

Thirdly, the government resorted to more technical arguments contending that the surrounding statutory provisions involving "in absentia removal orders" of U.S.C.A 8 § 1229(a) and

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[19] *Id*

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

[21] *Id.*

[22] *Id.*

[23] *Kucana v. Holder* 558 U.S. 233, 245, (2010) (quoting *Ardestani* v. *INS*, 502 U.S. 129, 135, (1991)).

[24] *Id*. citing *Kucana v. Holder*, 558 U.S. 233, 245, (2010) (quoting *Ardestani* v. *INS*, 502 U.S. 129, 135, (1991))

[25] *Id.*

[26] *Id.*

§1229a(b)(5)(C)(ii) reinforced its statutory interpretation.[27] The government cited an example of two separate provisions relating to in absentia removal orders: §1229a(b)(5)(A) and §1229a(b)(5)(C)(ii). §1229a(b)(5)(A) provides that a noncitizen may be removed in absentia if the Government has provided "written notice required under paragraph (1) or (2) of section 1229(a)".[28] And §1229a(b)(5)(C)(ii) provides that, once an in absentia removal order has been entered, the noncitizen may seek to reopen the proceeding if, *inter alia*, he "demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)."[29] The Court ruled that the logic of the government statutory provisions surrounding in absentia removal orders is unsound.[30] To that end, the Court stated that the government essentially argues that phrase 1 and phrase 2 can refer to the same type of notice even though they use entirely different words, but that phrase 3 cannot refer to that same type of notice because it uses words different from phrases 1 and 2.[31] However, according to the Court, the government offers no compelling evidence as to why that is and so the Court can only provide a simpler explanation that comports with statutory language and context, such that each of these three phrases refers to notice satisfy at a minimum the time and place criteria defined in §1229(a)(1).[32]

The Court did not accept the government's own interpretation of the statute and its contentions based on technicalities and practicalities. The government then resorted to the administrative disposition of immigration law as a basis for why the incomplete NTA must trigger the stop-time rule. It argued that the administrative realities of removal proceedings make it

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[27] *Id.*
[28] Id.
[29] *Id.*
[30] *Id.*
[31] *Id. parenthesis omitted*
[32] *Id.*

difficult to guarantee that each non-citizen a specific time, date, and place for his or [her] removal proceedings.[33] However, this practical concern was misplaced according to the Court. The Court rejected the Dissent's concern that by requiring the government to be specific about the time, date, and place for removal proceedings of non-citizens on their NTA, it might encourage the Department of Homeland Security (DHS) to provide "arbitrary dates and times that are likely to confuse all who receive them."[34] The Court when stated that the Dissent's reasoning makes it appear that the government "is utterly incapable of specifying an accurate date and time on a notice to appear and will instead engage in 'arbitrary' behavior."[35] Moreover, the government of the United States is not incapable of following due process by sending court dates and notices to appear to its respondents.

Now at this point, it appears that *Pereira* was a case about a statutory technicality. The government relied on mechanics of the statute which led to their unfounded and misplaced interpretation of the stop-time rule provision of the IIRIRA. However, the language in the statute §1229b (b)(1)(A) is clear. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Attorney General has discretion to cancel the removal of (1) Certain non-citizens who have continuously lived in the United States for not less 10 years immediately preceding the date of the deportation can apply for cancellation of removal; and (2) the cancellation of removal is halted when the government sends an NTA to the non-citizen.[36] However, the NTA must follow the procedures listed in the statute or it fails to be a valid NTA that halts the stop time rule. Even though *Pereira*'s impact seems little,

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

many deportations orders are tossed because they did not follow the correct procedures.[37]

Moreover, *Pereira* was not just a case about the stop-time rule and whether the stop-time rule is triggered when a putative NTA fails in cancellation of removal. *Pereira* also shed light on the current interpretation of the *Chevron* doctrine by the Court. *Chevron* deference is a judicial administrative action that came out of the U.S. Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[38] In *Chevron*, the Supreme Court set forth a legal test that governs when the court should defer to the agency's answer or interpretation holding that such judicial deference is appropriate where the agency's answer was not unreasonable so long as Congress had not spoken directly to the precise issue at question.[39]

In *Pereira*, Justice Kennedy spoke on the application of *Chevron deference* in his concurring opinion, where he noted some of the Courts of Appeal hastily yielded to the statutory interpretation of the government's agency when they should not have. Yet according to the dissent by Justice Alito, the Court is supposed to defer to the interpretation of the government's agency when it is a reasonable interpretation of the statute under the *Chevron* doctrine. Additionally, the government's agency interpretation need not be "the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."[40] Justice Kennedy retorted, saying that simply yielding to the

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[37] Joel Rose, *Supreme Court Ruling Means Thousands Of Deportation Cases May Be Tossed Out*, NPR (April 23, 2019), https://www.npr.org/2018/09/17/648832694/supreme-court-ruling-means-thousands-of-deportation-cases-may-be-tossed-out.

[38] 468 U.S. 837 (1984). *Chevron Deference*, https://www.law.cornell.edu/wex/chevron_deference.

[39] *Id.*

[40] *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 208, 129 S. Ct. 1498, 1499 (2009)

interpretation of the government when the statute is ambiguous is yielding the Judiciary's role in interpreting federal statutes. According to Justice Kennedy, the Court itself has acknowledged that "[it]does not leave it to the [government] agency to decide when it is charge."[41]The Court stated that the BIA interpretation of section 1229(b)(d)(1) in *Matter of Camarillo* was wrong and unfounded.[42] The Court in *Pereira* rejected the BIA's interpretation that the meaning of 8 U.S.C §1229(b)(d)(1) is ambiguous. It added that the BIA's reasoning had little support in the statute's text.[43] The majority opinion and Justice Kennedy's concurring opinion made it clear that due to the grave consequence of a respondent's failure to appear and the complex nature of immigration law, the ordinary statutory interpretation according the *Chevron* deference doctrine should only apply in the appropriate case. The Court posited that the situation in *Pereira* did not warrant a *Chevron doctrine* application and doing that absent an ambiguous statutory meaning would exhibit a reflexive deference.[44]

The Future of Deportation Proceedings after *Pereira*

In light of this opinion, it is unclear whether *Pereira* should apply retroactively. As previously mentioned, some legal advocates interpreted *Pereira* to have a broad impact on the future of deportation hearings. To some legal advocates, *Pereira* means that legal advocates can work to possibly terminate removal cases based on defective NTAs.[45] Hence, any respondent who may be in

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[41] *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (citing *Arlington v. FCC*, 569 U.S. 290, 327, [**454]

[42] 25 I.&N Dec. 644 (2011).

[43] *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (U.S. June 21, 2018)

[44] *Id.*

[45] Victoria Neilson*, Supreme Court rules on "stop-time" rule for cancellation of removal,* Catholic Legal Immigration Network. Inc.(CLINIC) (March 1, 2019)

removal proceedings served with a defective NTA and removed in absentia may possibly bring a motion to dismiss or reopen their case based on the failure of the government to list the time, date, and/or place for the proceeding and based on no notice pursuant to INA §§ 240(b)(5)(C)(ii) or 242B(c)(3)(B).[46] In a report by *Reuters*, obtained through the Executive Office for Immigration Review (EOIR) in the wake of *Pereira*, there were about 9,000 cases that were dismissed.[47] According to the Catholic Legal Immigration Network (CLINIC), the broad language of *Pereira* might mean that failure of respondents to appear in court would be through no fault of the respondent if the NTA failed to specify the time, place and date for the proceeding. This is because § 240(b)(5)(C)(ii) of the INA provides that an in-absentia deportation order may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice in accordance with paragraph (1) or (2) of INA § 239(a), and the failure to appear was through no fault of his own.[48]

On the other hand, if Pereira is not interpreted narrowly then respondents cannot bring suits to dismiss their deportation proceedings on grounds of a defective NTA. The U.S Court of Appeals for the Ninth Circuit Court in *Andia v. Ashcroft* held that due process jurisprudence indicates that a respondent's rights under the Fifth Amendment are violated if the respondent did not receive an actual or constructive notice of the proceedings.[49]

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https://cliniclegal.org/resources/supreme-court-rules-stop-time-rule-cancellation-removal.

[46] *Id.*

[47] Read Levinson & Kristina Cooke, *U.S. courts abruptly tossed 9,000 deportation cases. Here's why*, REUTERS (April 23, 2019), https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK?feedType=RSS.

[48] *Id.*

[49] *Andia v. Ashcroft*, 359 F.3d 1181, 1185 (9th Cir. 2004)

Furthermore, in *Andia v. Ashcroft,* the Ninth Circuit Appeals court—citing *Farhoud v. INS*—stated that immigrants who are in deportation proceedings are afforded due process for a full and fair hearing under the Fifth Amendment.[50] *Pereira* is an unusual case which shows that it can be unclear when the *Chevron* Doctrine is to be followed. The separation of powers as it relates to the administrative nature of the immigration law is murky in practice though feasible in theory. As Justice Kennedy stated in his concurring opinion in *Pereira,* the courts hastily subscribed to the interpretation of the BIA when it was considered "reasonable" to the BIA. The Dissent in *Pereira* raised an issue, inferring that the majority opinion was requiring the government to put arbitrary time, place and date requirements to subsequent NTAs after the *Pereira* ruling or risk being defective.[51] However, as the Majority contends, these assumptions are unfounded because "a scheduling system previously enabled DHS and the immigration courts to coordinate in setting hearing dates in some cases."[52] The Court further added, "[g]iven today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear."[53]

It seems that the government would rather come up with excuses and unfounded logical reasoning that bears no semblance to Congress's intentions as the statutes applies than a uniformed interpretation of what the law is and should be. The consequences of failing to appear, be it expedited removal or removal in absentia, should only proceed when due process has served its full course. In a completely unrelated case, *Padilla v. Kentucky*, the Supreme

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[50] *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) ("The Due Process Clause protects aliens in deportation proceedings and includes the right to a full and fair hearing as well as notice of that hearing.") *Andia v. Ashcroft,* 359 F.3d 1181, 1185 (9th Cir. 2004)
[51] *Pereira v. Sessions,* 138 S. Ct. 2105, 2119 (2018)
[52] *Id.*
[53] *Id.*

Court of the United States stated that "[a]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[54] Deportation is an expensive penalty to non-citizen defendants. Though the Court in *Padilla* was referring to a criminal defendant, the rationale can also be applied in the deportation court proceedings before Immigration Judges.

Although *Pereira* did not receive as much attention from the media as other high profile immigration cases like *Matter of A-B-*, it made it possible for respondents with illegal re-entry cases to request a dismissal of their deportation orders. *Matter of A-B* was a case where in an unprecedented chain of events, former Attorney General Jeff Sessions certified an unpublished BIA case to himself. The case received so much media coverage because it overruled the *Matter of A-R-C-G-* landmark decision by the BIA, which had recognized that domestic violence survivors may be eligible for asylum protection.[55] Nonetheless, there are dueling interpretations in the courts about *Pereira.* Some courts readily accepted and applied the *Pereira* decision while some courts have distinguished *Pereira* and noted its narrow application. One of the cases that depicts the narrow interpretation of *Pereira* is *United States v. Flores-Mora.*[56] Flores-Mora was a Mexican citizen who first entered the U.S in 1995 without inspection and was served an NTA for removal proceedings in September 2009. The NTA listed the date and time of Flores-Mora's deportation proceeding as "to be

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[54] *Padilla v. Kentucky*, 559 U.S. 356, 356, 130 S. Ct. 1473, 1475 (2010)

[55] *Matter of A-B-: Case Updates, Current Trends, and Suggested Strategies*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (April 18, 2019) https://www.aila.org/infonet/matter-of-a-b-case-updates-current-trends.

[56] *United States v. Flores-Mora, 2018 DNH 228*

set." [57] Flores-Mora signed the NTA, thereby acknowledging his understanding of the NTA. Flores-Mora was released on his own recognizance [without being detained] [58] On February 4, 2010, he was served with a hearing notice, which set the time and date for his removal hearing for June 24 2010 at 9:00am. Flores-Mora appeared at the hearing. After the February hearing, there were four subsequent hearings that Flores-Mora was supposed to appear. He received notices of four subsequent removal hearings and appeared to 3 of these hearings. He failed to appear a hearing scheduled on May 19 and 20, for medical reasons though his counsel attended that hearing.[59] A subsequent hearing followed and was scheduled for June 4, 2010 at 9:00 am.[60]. The immigration court ordered Flores-Mora removed in absentia but Flores-Mora never moved to appeal this decision[61] On February 19, 2013, ICE arrested Flores-Mora in Manchester, New Hampshire and deported him to Mexico. Flores-Mora returned to the U.S. at some point thereafter and Immigration and Customs Enforcement (ICE) arrested him in Manchester, [New Hampshire] on August 28, 2018, leading to his present indictment for illegal reentry.[62] Flores-Mora invoked the *Pereira* ruling and argued that the immigration court lacked subject matter jurisdiction to issue his removal order because the initial NTA failed to designate a specific time or place for his appearance as required by the 8 U.S.C. § 1229(a)(1).[63] Flores-Mora argued the NTA the government sent him was not a "Notice to Appear" for purposes of 8 C.F.R. § 1003.13" [64] Hence he argued that NTA could not "constitute a charging document under 8 C.F.R. § 1003.14(a), because it did not indicate the time

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

and date of the hearing, as required by 8 U.S.C. § 1229(a) under the interpretation in *Pereira*."[65]

In *United States v. Flores-Mora* the United States District Court for New Hampshire distinguished this case from *Pereira.* The court noted that a few other jurisdictions have adopted the *Pereira* interpretation and have granted motions to dismiss on this basis, but the court sided with majority of the courts who have rejected *Pereira*'s interpretation. The court ruled that unlike *Pereira,* the defendant Flores-Mora did receive notice of the time and date of his hearing and appeared."[66] In addition, on the issue of subject matter jurisdiction, the United States District Court of New Hampshire stated that the U.S. Supreme Court's ruling in *Pereira* did not strip the immigration courts of its jurisdiction. The court stated that question at issue in *Pereira* was narrow and addressed the specific question of whether a notice to appear that "fails to specify either the time or place of the removal proceedings . . . trigger[s] the stop-time rule."[67] The United States District Court of New Hampshire, Flores-Mora's situation was different from the respondent in Pereira. The court also pointed out a narrow difference between the stop-time rule and jurisdiction cases. It stated that unlike the stop-time rule, neither the jurisdiction-vesting provision of 8 C.F.R. § 1003.14(a) nor the definition of charging document under § 1003.13 expressly requires that a notice to appear contain the information set forth in § 1229(a). Nor do they cross-reference § 1229(a) when defining the notice to appear, as the stop-time rule does."[68]. Furthermore, the court argued that the initial NTA was defective and ran afoul of § 1229(a). The subsequent NTA that listed the date and time cured any defect that the initial NTA might have had. The court used an analogy of a how "federal district court may lack subject-matter jurisdiction

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[65] *United States v. Flores-Mora,* 2018 DNH 228
[66] *Id.*
[67] *Id.*
[68] *Id.*

under 28 U.S.C. § 1332 where the complaint filed in a federal district court for diversity purposes that fails to state in its complaint the citizenship of the parties or an amount in controversy over § 75,000."[69] In such a situation, a federal district court would normally lack jurisdiction because the complaint fails to seek an amount in controversy that exceeds over $75,000. However, according to the court, that jurisdiction can be restored if the complaint is corrected or amended.[70]

In light of *Pereira*, not only are legal advocates representing immigrants bringing requests to dismiss deportation orders because of defective NTAs, lawyers are also raising issues about the lack of subject-matter jurisdiction. Consequently, respondents are bringing suits for immigration courts to dismiss deportation orders served to them because it lacked subject matter jurisdiction to hear their case. According to 8 CFR § 1003.14, "[j]urisdiction 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."[71]

Similar to *Flores-Mora* is *United States v. Perez-Felex*[72]. In that case, Perez-Felex entered the country without inspection. After being apprehended, an immigration judge granted Perez-Felex's request to voluntarily depart from the United States. Perez-Felex departed the country and entered again without inspection in 2010. In an unrelated charge:

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *United States v. Perez-Felex*, No. 18-178 (FAB), 2018 U.S. Dist. LEXIS 216822 (D.P.R. Dec. 21, 2018)

> Puerto Rico law enforcement officers arrested Pérez for purported violations of the Domestic Violence Act, P.R. Laws Ann. tit 8, sections 601-604, for possession of a firearm, for possession and use of an edged weapon, and for aggravated damages. (Docket No. 35 at p. 2.) The Commonwealth of Puerto Rico Superior Court ultimately dismissed the criminal complaint. Immigration Customs Enforcement ("ICE") officers, then, placed Pérez in federal custody.[73]

One of the arguments that Perez-Felex relied on to move his dismissal of deportation case was that the U.S. Supreme Court's ruling in *Pereira* invalidated the 2010 deportation order against him. The court ruled that Perez-Felex's reliance on *Pereira* was misplaced. The court further added that *Pereira* is not dispositive in the sense that the narrow issue the Court ruled on *Pereira* was about the stop-time rule and whether or not it was triggered if the NTA served did not list the time, place and state for the deportation hearing. Therefore, extrapolating the decision in *Pereira* and applying it to Perez-Felex's case would be unfounded due to *Pereira*'s limited and narrow holding. The court further added that Perez adopted a broad interpretation of *Pereira* by asserting that the "immigration judge lacked jurisdiction over him because the NTA was deficient."[74] A deficient NTA does not out rightly strip the immigration courts of their jurisdiction.

After it became apparent that the BIA no longer holds precedent authority over NTAs as it applies to the stop-time rule for cancellation of removal, the BIA issued a decision that aimed to push back the *Pereira* decision in *Matter of Bermudez-Costa*.[75]

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[73] *Id.*
[74] *Id.*
[75] Daniel M. Kowalski, *BIA Pushes Back Against Pereira: Matter of Bermudez-Cota, 27 I&N Dec. 441 (BIA* 2018) LEXIS NEXIS (April 18, 2019),

In that case, Bermudez-Costa, a Mexican citizen entered the United States without inspection on or about April 30, 1991.[76] Bermudez-Costa was personally served an NTA on August 28, 2013 which ordered him "to appear before an immigration judge of the United States Department of Justice . . . on a date to be set at a time to be set."[77] On September 9, 2013, the Immigration Court in Tucson, Arizona mailed a subsequent NTA to his address. The NTA stated that Bermuda-Costa's hearing was scheduled to take place on May 13, 2014, at 1:00 p.m. at 300 West Congress Street, Suite 300, Tucson, Arizona, 85701. Bermuda-Costa appeared at this hearing as well as numerous subsequent hearings. At Bermuda-Costa's last hearing, he asked for a "continuance or administrative closure based on his potential eligibility for adjustment of status."[78]

The Immigration Judge denied his request and granted him voluntary departure. Bermuda-Costa then filed a motion to terminate while his appeal was pending.[79] Bermuda-Costa relied on the *Pereira* decision and argued that his case should be terminated in light of the *Pereira* decision because, like the respondent in *Pereira*, the initial NTA served to him was defective "under section 239(a)(1) of the Immigration and Nationality Act."[80] The BIA held that *Pereira* involved a different set of facts. It added further that unlike the respondent in *Pereira*, the respondent in *Bermuda-Costa* was properly served with both a

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https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/posts/bia-pushes-back-against-pereira-matter-of-bermudez-cota-27-i-n-dec-441-bia-2018.

[76] *Id.*

[77] *Matter of German BERMUDEZ-COSTA, 27 I&N* Dec. 441 (BIA 2018)

[78] *Id.*

[79] *Id.*

[80] *Id.*

notice to appear and a subsequent notice of hearing.[81] The notice of hearing specified the time and place of Bermuda-Costa's hearing and there is proof that the respondent got the notices because he attended the subsequent hearings. On the issue of serving a valid NTA, the BIA held that it had sufficiently specified the time and place of the hearing in this case and thus had fulfilled the requirements of a valid NTA. One could argue that an NTA is different from notice of hearing, at least for the purposes of the stop-time rule. This is because a notice to appear stops time from accumulating so if qualified, the Attorney General may cancel the respondent's removal. But a notice of hearing just informs the respondent that there is a hearing. However, the BIA emphasized the narrow and dispositive question that was at issue in *Pereira*. To that end the BIA stated that:

> [t]he Court specifically stated multiple times that the issue before it was "narrow" and that the "dispositive question" was whether a notice to appear that does not specify the time and place at which proceedings will be held, as required by section 239(a)(1)(G)(i), triggers the "stop-time" rule for purposes of cancellation of removal. [82]

When one analyzes the BIA's arguments presented in *Matter of Bermuda-Costa*, the BIA seems to think that there is no room for any a broad application of the *Pereira* decision that would dismiss an entire removal case because the court remanded *Pereira* and specifically did not invalidate the removal proceedings of the respondent in *Pereira.* First, the BIA stated that the Court [in *Pereira*] specifically stated multiple times that the issue before it was 'narrow' and that the 'dispositive question' was whether a notice to appear that does not specify the time and place of proceedings will be held, as required by section 239(a)(1)(G)(i), triggers the stop-time rule for purposes of cancellation of removal.

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[81] *Id.*

[82] *Id.*

[83] The BIA sidelined the decision in *Pereira* and resorted to the authority of the United States Court of Appeals for the Ninth Circuit, the court that decided *Matter of Bermuda-Costa*. Unsurprisingly, the Ninth Circuit rejected arguments similar to that of the respondent Bermudez-Costa. The court rejected arguments that purport to dismiss in-absentia removal cases because of a defective initial NTAs.[84]

Popa v. Holder is another case the BIA cited to support its rejection of the decision in *Pereira*. In *Popa v. Holder*, the court ruled that it comes following the procedure for a putative NTA, "[a]lthough [section 239] (a)(1)(G)(i) requires a notice to appear to specify the time and place at which the proceedings will be held, th[e]court has never held that the [NTA] cannot state that the time and place of the proceedings will be set at a future time by the Immigration Court."[85]

Since the BIA challenged the Supreme Court on their interpretation of the requirements of an NTA after its precedent decision in *Matter of Bermudez-Costa*, it is unclear what the future holds as far procedural due process for deportation hearings are concerned. Currently, there are two dueling interpretations of whether an NTA that does not list the time place and date is valid—the Supreme Court *Pereira* decision and the BIA precedent decision in *Matter of Bermudez-Costa*. Although the Executive branch of government is charged with implementing immigration laws, the United States Supreme Court is the highest court and its decisions are supposed to supersede that of the lower courts and administrative agencies. Granted the BIA is the highest administrative body for interpreting and applying immigration laws, the BIA's decisions are binding on all DHS officers and Immigration Judges unless modified or overruled by the Attorney

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[83] *Id.*

[84] *Id.*

[85] *Id.*

General or a Federal court."[86]According to USCIS the U.S. Supreme Court's decisions are binding on all lower courts and administrative adjudicators throughout the country.[87] It follows then that even with a precedent decision by BIA, the U.S. Supreme Court's ruling Pereira should be the binding decision. The BIA's might be persuasive decision but it should not be binding.

Numerous issues follow, such as if the initial NTA served by the DHS to the noncitizen have to follow the procedure for putative NTA verbatim as the U.S. Supreme Court has ruled in *Pereira* or does a subsequent NTA correct the mistakes of the initial NTA for purposes of appearing in court as the BIA has held? To which type of removal proceedings do these decisions apply? Is it first time respondent's removal proceedings or respondents who have made a second attempt in entering, aka illegal reentry? that arose in light of the dueling decisions by the US Supreme Court and the BIA in Pereira and Matter of Bermudez-Costa respectively should now have firm answers.

Even if some immigration judges decide to follow BIA decision, *Matter of Bermudez-Costa* should not overrule *Pereira*, but only narrow its the application of NTA as it relates to stop-time rule for cancellation of removal purposes. This is because the issue in *Pereira* had to do with the stop-time rule as it applies to cancellation of removal where the respondent did not receive the NTA before his removal proceedings. Where the facts are similarly situated like Bermudez-Costa, it would not be surprising for immigration judges to follow the decision by the BIA Bermudez-Costa. However, it should be noted that the court remanded

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[86] *Id.*

[87] REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE (RAIO) Officer Training, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), (Apr. 18, 2019) https://www.uscis.gov/sites/default/files/files/nativedocuments/Reading_and_Using_Case_Law_RAIO_Lesson_Plan.pdf.

Pereira back to the lower courts after determining that the initial NTA sent to the respondent in Pereira was not an NTA under the Immigration and Nationality Act. The Court did not address the lingering question of whether an invalid NTA will give rise to an automatic cancellation of a deportation order. Furthermore, a practice advisory by CLINIC notes that *Bermudez-Costa* did not address motions to reopen [removal cases] and therefore does not foreclose reopening based on a defective NTA, so it encourages practitioners to continues to raise arguments that highlights the narrow difference between *Pereira* and *Bermudez-Costa*.[88]

Even though Immigration law is complex with its particularities, such as *Chevron* deference, the Supreme Court insisted that this is not the type of case that requires *Chevron* deference. With regards to the future of Deportation Proceedings, it is clear from the *Pereira* decision that at least in cases where a putative NTA in removal proceedings fails to list the time or place of the initial hearing, the NTA will not interrupt the mandatory period of 10 years continuous presence for a noncitizen to be eligible for cancellation of removal. Critics have argued that the quickness with which BIA issued its precedent decision should not be left unnoticed.

The government's concerns about noncitizen's violating U.S. immigration laws are legitimate. The U.S. government has a responsibility to keep its borders safe and secure, but the government must follow the rule of law. As the government seeks to exercise its powers, it should strive to follow the due process that the law demands. Though the Executive branch of government oversees the implementation of immigration laws, the U.S. Supreme Court decisions on immigration laws are binding on administrative courts and agencies like the BIA. Therefore, the

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[88] Victoria Neilson, *BIA tries to restrict Supreme Court holding of Pereira*, CATHOLIC LEGAL IMMIGRATION NETWORK INC., https://cliniclegal.org/resources/bia-tries-restrict-supreme-court-holding-pereira.

concept of separation of powers should be adhered to in the Immigration Law realm. At the beginning of this review, it was uncertain what authority was precedent as far as the question of the stop-time rule and its application for the purposes of cancellation of removal, but the Supreme Court's ruling in *Pereira* established that any NTA that does not list the time, place and date cannot serve as an NTA that would stop time and give the government the power to initiate removal proceedings against a non-citizen. Critics argue that Matter of *Bermudez-Costa* would not be the last word on the Pereira ruling. Sooner or later, the Supreme Court will have to resolve the question of jurisdiction in light of a defective NTA.

The Immigration courts are heavily backlogged. It serves no purpose for the BIA or any other administrative agency to continuously contribute to this backlog by serving defective NTAs to the respondents with the aim of correcting them later with a subsequent notice of hearing. If the Immigration courts are not ready to adjudicate removal proceedings the DHS should not be sending NTAs. The *New York Times* reports there are about 800,000 backlogged cases of asylum, illegal entry and overstayed visas.[89] When the government sends defective NTAs to the wrong addresses of respondents as it did in *Pereira* and respondents have no idea if they have been sent an NTA, it serves no purpose for the immigration courts. The government fears that some respondents that may purposely give the government the wrong address so it can accrue more time for the purposes of cancellation of removal. However, those situations are distinguishable from situations where the DHS may have the correct address but still sends a defective NTA. Forestalling due process rights of non-citizens only contributes more to an already heavily backlogged system.

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[89] Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, NY TIMES (Apr. 19, 2019))https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html.

Noncitizens need the full protections that the law affords them. Considering that removal in absentia is a grave consequence that the non-citizen respondent bears for not appearing at a removal proceeding, it is a great injustice if courts remain reflexively deferential to the administrative agencies. Like the Supreme Court said in *Pereira,* when the government insists that the following the due process as required by law for NTAs is a difficult burden to meet it makes the government appear that "is utterly incapable of specifying an accurate date and time on a notice to appear and will instead engage in 'arbitrary' behavior."[90] Arbitrary behavior on the part of the government is when an NTA lists the date and time of a removal proceeding as "to be set." This behavior should not be allowed in the advent of technological advances. The government; DHS, Immigration and Customs Enforcement, Customs and Border Patrol, and the Department of Justice bear a burden to implement ways it can efficiently run its immigration courts. The government should be capable of sending NTAs with the precise place, date, and time just like how the criminal justice court serves defendants notices for their court date.

On the issue of immigrant rights and due process protections, it is apparent that noncitizens who are without status do not have much protections under due process unlike citizens of the U.S. Given that a lot of noncitizens in removal proceedings appear in in immigration courts pro se, it is huge detriment if due process of the law under the immigration and Nationality Act is undermined.[91] According to a *New York Times* article, appeals of removal proceedings takes years and months because there is a significant backlog of cases [92]

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[90] *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)
[91] *Deportation and Due Process, ACLU*, (Apr. 23, 2019) https://www.aclu.org/issues/immigrants-rights/deportation-and-due-process.
[92] Katie Benner & Charlie Savage, *Due Process for Undocumented Immigrants, Explained*, NY Times

There are systems put in place to help with the immigration system. Noncitizens in the U.S have due process rights. It is important that the people's trust and reliance in those systems to work is not wavered. Uniform laws in immigration law is important in ensuring a fair day in court for non-citizens.

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https://www.nytimes.com/2018/06/25/us/politics/due-process-undocumented-immigrants.htm.