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PEREIRA'S AFTERSHOCKS

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INTRODUCTION

At the end of the 2017 term, the Supreme Court decided not to stop time. Nonpermanent residents who have been placed in removal proceedings may apply for a discretionary form of relief from the Attorney General known as “cancellation of removal.”¹ To be eligible, an applicant must show (in addition to meeting other requirements) that she has been in the United States for at least ten consecutive years.² The period of continuous physical presence is interrupted when the government serves the noncitizen with a notice to appear at a removal hearing.³ However, in *Pereira v. Sessions*, the Court held that if the notice does not list the time and place of the hearing, which a separate provision—8 U.S.C. § 1229(a)—requires be included,⁴ the continuous presence clock continues to run.⁵

While *Pereira* has generated immediate upheaval for cancellation of removal eligibility,⁶ the case’s aftershocks are already proving to be far greater. Since the decision was announced, there has been a feverous debate about whether the case applies not just when cancellation of removal is sought, but to *all* immigration removal proceedings, since notices to appear are issued in every judicial proceeding. It is a debate that reaches beyond immigration law circles. Coverage in the popular press has been notable.⁷

1. 8 U.S.C. § 1229b (2012).

2. *Id.* § 1229b(b)(1)(A). Lawful permanent residents must have been in the country for at least seven years continuously. *Id.* § 1229b(a)(2).

3. *Id.* § 1229b(d)(1).

4. *Id.* § 1229(a)(1)(G)(i).

5. 138 S. Ct. 2105, 2110 (2018).

6. After *Pereira*, many courts reversed prior findings of ineligibility for cancellation of removal based on the decision, including the Supreme Court itself. *See, e.g.*, *Saldana Castillo v. Sessions*, 138 S. Ct. 2709, 2709 (2018) (granting certiorari petition, vacating judgment, and remanding for further consideration in light of *Pereira*).

7. *See* Robin Abcarian, *New Supreme Court Decision Could Upend Thousands of Deportation Cases in Setback for Immigration Hard-Liners*, L.A. TIMES (July 13, 2018, 3:00 AM), <https://www.latimes.com/local/abcarian/la-me-abcarian-pereira-deportation-20180713-story.html> [<https://perma.cc/96VU-Z253>]; Joel Rose, *Supreme Court Ruling Means Thousands of Deportation Cases May Be Tossed Out*, NPR (Sept. 17, 2018, 4:20 PM), <https://www.npr.org/2018/09/17/648832694/supreme-court-ruling-means-thousands-of-deportation-cases-may-be-tossed-out> [<https://perma.cc/F3YC-LYSA>]; Amy Taxin, *Immigration Cases Tossed in Fallout from Supreme Court Ruling*, CHI. SUN-TIMES (Aug. 13, 2018, 4:27 PM), <https://chicago.sun>

Less than a year later, hundreds of federal court opinions, inclusive of both published and unpublished decisions, have wrestled with *Pereira's* application. Although it is harder to track decisions by immigration judges,⁸ the number of rulings on *Pereira* challenges brought by noncitizens is surely in the thousands.⁹

The volume of cases has not helped to settle the debate. To the contrary, in *Pereira's* aftermath the courts have taken wildly divergent positions on the case's meaning and are struggling to understand the difficult issues raised by the decision.¹⁰ With *Pereira* challenges being routinely raised by immigration lawyers across the country,¹¹ and the Supreme Court unlikely to weigh in again anytime soon, the need for clarity is pressing and consequential.

The government maintains that *Pereira* bears no relevance beyond the narrow context in which the case arose.¹² By contrast, immigration advocates insist not only that *Pereira* applies to all adversarial removal proceedings but that the Court's decision necessarily means that immigration courts lack subject matter jurisdiction in any case commenced with a notice to appear that did not include the time and place of the proceedings.¹³ That argument

times.com/news/immigration-deportation-cases-tossed-supreme-court-ruling/ [https://perma.cc/NP73-6KJ7].

8. Most decisions by immigration judges are not publicly available. Precedential decisions of the Board of Immigration Appeals, the highest administrative appeals court for immigration cases, are available (as are some unpublished decisions, via subscription services), but all actions and proceedings "relating to an order of removal, to relief from removal, or to immigration benefits or detention" are not accessible through electronic databases. FED. R. CIV. P. 5.2(c).

9. See Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, REUTERS (Oct. 17, 2018, 7:06 AM), <https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK> [https://perma.cc/8ZCU-AF2A]; see also Reade Levinson, *Case Dismissals in U.S. Immigration Court*, REUTERS, <http://fingfx.thomsonreuters.com/gfx/editorcharts/USA-IMMIGRATION-TERMINATIONS/0H0014BZ42J3/index.html> [https://perma.cc/HF3Q-GEPN].

10. See *infra* text accompanying notes 85-92.

11. See DAN KESSELBRENNER ET AL., PRACTICE ADVISORY: CHALLENGING THE VALIDITY OF NOTICES TO APPEAR LACKING TIME-AND-PLACE INFORMATION 3 (2018), https://www.immigantdefenseproject.org/wp-content/uploads/FINAL_Pereira_Advisory_updated_July_16th_2018.pdf [https://perma.cc/HX3S-W5MW].

12. See *infra* text accompanying notes 131-34.

13. See Kit Johnson, *Pereira v. Sessions: A Jurisdictional Surprise for Immigration Courts*, 3 COLUM. HUM. RTS. L. REV. ONLINE 1, 2-3 (2018); Jeffrey S. Chase, *The BIA vs. the Supreme Court?*, OPINIONS/ANALYSIS ON IMMIGR. L. (Sept. 1, 2018), <https://www.jeffreyschase.com/blog/2018/9/1/the-bia-vs-the-supreme-court> [https://perma.cc/G9AU-FLAA]; Merle Kahn,

is hinged to this regulatory language that governs removal proceedings: “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the [Immigration and Naturalization] Service.”¹⁴ Since 1996, the notice to appear has been the primary charging document that the government serves on noncitizens who face removal in adversarial proceedings.¹⁵

It follows, according to this view, that proceedings commenced with a defective notice to appear—defective, that is, according to *Pereira*, for not including the information required by § 1229(a)—must be treated as void ab initio and retried because they were commenced without subject matter jurisdiction.¹⁶ To put it mildly, that interpretation of *Pereira* would implicate a whole lot of cases. As of February 2019, there were more than 850,000 active proceedings in the nation’s immigration courts.¹⁷ What is more, the government admits that for at least the last three years, “almost 100 percent” of the notices to appear that it served did not include the statutorily required time-and-place information.¹⁸ If the courts were to reopen even finalized proceedings because they were tried without subject matter jurisdiction, the number of cases affected could be in the millions.

Beyond its impact on immigration law, what is also remarkable about the debate over *Pereira* is that it more broadly invites us to consider a number of difficult jurisprudential questions. For starters, in deciding the threshold inquiry into whether *Pereira* applies only to cancellation of removal cases, we confront a fundamental problem about judicial decision-making. How do lower courts determine the controlling scope of precedent? More precisely, the

Top of the Ninth: Aug. 31, 2018 Part One, DANIEL SHANFIELD IMMIGR. DEF. (Aug. 31, 2018), <https://www.immigration-defense.com/our-blog/2018/august/top-of-the-ninth-Aug-31-2018-part-one/> [<https://perma.cc/7UW6-B49Y>]; KESSELBRENNER ET AL., *supra* note 11, at 14-15.

14. 8 C.F.R. § 1003.14(a) (2018).

15. *See id.* § 1003.13 (defining the notice to appear as a charging document).

16. *See Johnson*, *supra* note 13, at 2-3.

17. *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/BZF3-PLW8>].

18. *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018). As we will see, the government’s standard practice was to issue notices with a “TBA” placeholder; thereafter, it is up to the clerk of the immigration court to send a notification telling the noncitizen when and where to appear for the removal hearing. *See infra* text accompanying notes 34-36.

debate over how broadly or narrowly to read *Pereira* helps shed light on an important, but underexamined, aspect of the problem: what is the proper treatment of limiting language in a judicial decision? Appellate courts sometimes say that their judgments are “limited by the facts” or should be “narrowly drawn.” In *Pereira*, Justice Sotomayor twice repeated that the Court’s decision was “narrow.”¹⁹ What are lower courts to do with this kind of limiting language? How do they figure out the precedential reach of a decision that a higher court consciously drew narrowly?

Even if we conclude that *Pereira* applies to all notices to appear at judicial removal proceedings (and I will show that the case must be read to apply to all such notices), it is still necessary to consider how this reading of the decision matters. That is, in what cases does it matter, and under what circumstances? Unfortunately, the predominant approach among courts and advocates has been to examine *Pereira* challenges solely in jurisdictional terms. This is unfortunate because courts have ended up conflating the conclusion (a correct one, as I will explain) that a *Pereira* defect does not have any jurisdictional significance with whether it has any consequences at all.²⁰ There may still be consequences if the government serves a notice that is defective under *Pereira*, even if those consequences are not jurisdictional. As I will show, whether a *Pereira* challenge can be successfully made, and how, turns on three doctrinal considerations that, to date, courts and advocates have largely ignored.

The first consideration is whether the Court’s decision in *Pereira* applies retroactively and, if so, to what cases. When an appellate court decides a civil case, the starting presumption is that the decision applies to all pending cases; correspondingly, retroactivity usually does not extend to fully resolved cases.²¹ Notwithstanding these general presumptions, legislatures sometimes enact laws that permit parties to seek relief far into the future. In immigration law there are several statutes that permit noncitizens to ask a court to reopen closed proceedings.²² *Pereira* provides us with a valuable opportunity to consider how a broad statutory grant of authority to

19. *Pereira*, 138 S. Ct. at 2110, 2113.

20. See *infra* Part III.A.

21. See *infra* Part III.B.1.

22. See *infra* Part III.C.4.a.i.

reopen a case after it has been decided can be reconciled with presumptive retroactivity norms.

This initial inquiry into retroactivity links to a second question that also must be confronted whenever a *Pereira* challenge is made. Even when a decision is applied in a backward-looking way, what if the legal issue was not previously raised in the prior cases? Forfeiture rules normally require that parties make arguments to preserve them,²³ but should an argument be deemed forfeited if it was not viable until after the law-changing decision was announced?

Finally, beyond these initial issues, there is a third doctrinal problem—probably the most significant of the three—that a *Pereira* challenge poses. Not every legal error is equally consequential. In other contexts, the law excuses some errors as harmless.²⁴ But how do we distinguish between the kinds of errors that require correction and those that we acknowledge to be errors but, for prudential reasons, allow to remain uncorrected?

The Article proceeds as follows. Part I frames the issues in dispute, providing historical context leading up to the Court's decision in *Pereira*. Part II then considers *Pereira*'s reach and meaning. I argue that the Court's construction of § 1229(a) is necessarily applicable to all notices to appear. Part III then considers the consequences of service of a defective notice. Part III.A begins by taking up the argument that a *Pereira* defect has jurisdictional implications. After concluding that defective notice has no bearing on an immigration court's jurisdiction, Part III.B argues that *Pereira* challenges should turn on the three factors, outlined above, of retroactivity, forfeiture, and harmless error. Finally, in Part III.C, I consider all of the different case types in which a *Pereira* challenge might arise. I demonstrate that the three critical factors that control whether a *Pereira* challenge can be made vary in each of these case types.

23. See *infra* Part III.B.2.

24. See *infra* Part III.B.3.

I. FRAMING THE ISSUES IN DISPUTE

A. *Removal Proceedings*

The current procedures for removing a noncitizen were adopted in 1996 when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and merged what had been two separate types of expulsion proceedings (then known as “exclusion” and “deportation” proceedings) into a single type that we now call “removal” proceedings.²⁵ Under the pre-1996 practice, the government initiated both deportation and exclusion proceedings by an order to show cause.²⁶ Under current law, when the government seeks to begin removal proceedings, it must serve a written notice, known as a “notice to appear,” on the noncitizen.²⁷ The Attorney General has promulgated regulations governing removal proceedings. Most relevant to our current inquiry, 8 C.F.R. § 1003.14, provides that removal proceedings “commence” when the Immigration and Naturalization Service (INS) files a charging document with the Immigration Court.²⁸ According to § 1003.14(a): “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration

25. See Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); *Vartelas v. Holder*, 566 U.S. 257, 262 (2012) (noting that with IIRIRA’s passage “Congress abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as ‘removal’”). Before 1996, a noncitizen could obtain “suspension” from deportation. See *Arenas-Yepes v. Gonzales*, 421 F.3d 111, 115 (2d Cir. 2005). IIRIRA eliminated that option to obtain relief from removal, though suspension is still possible for certain types of cases. See *id.* at 115-16; *Baltazar-Alcazar v. INS*, 386 F.3d 940, 943 n.1 (9th Cir. 2004). Additionally, IIRIRA repealed section 106 of the Immigration and Nationality Act (previously codified at 8 U.S.C. § 1105a), which had allowed for judicial review of deportation and exclusion orders. § 306(b), 110 Stat. at 3009-612. This part of the 1996 law is regarded as a jurisdiction-stripping provision. *Zhao v. U.S. Dep’t of Justice*, 265 F.3d 83, 89 (2d Cir. 2001).

26. See *Tablie v. Gonzales*, 471 F.3d 60, 62 (2d Cir. 2006); *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1333 (11th Cir. 2001); see also 5 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 64.02 (rev. ed. 2019).

27. 8 U.S.C. § 1229(a)(1) (2012).

28. 8 C.F.R. § 1003.14(a) (2018).

Court by [INS].”²⁹ The regulations separately define a “Notice to Appear” as a charging document.³⁰

In § 1229(a), Congress set forth a list of requirements that a notice to appear must include.³¹ Among the requirements, the one centrally at issue in *Pereira* was the requirement to include the “time and place at which the [removal] proceedings will be held.”³² However, for a number of years the government has ignored that statutory directive. As it conceded in *Pereira*, since 2015 it has almost never included the time and place for the removal proceedings in the notices to appear it served.³³

Beyond § 1003.14(a), a separate regulatory section contemplates that the time and place of the hearing only need to be included in the notice to appear “where practicable” and that “[i]f that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing.”³⁴ The government apparently never makes individualized determinations of “practicality,” however.³⁵ Instead, the government’s regular practice pre-*Pereira* was to indicate in the notice to appear that was served on the noncitizen that the actual hearing date was “to be determined.”³⁶ Thereafter, the immigration court separately mailed to the nonresident another document, known as the notice of hearing, which included the exact time and place of the hearing.³⁷ This two-step notice process remains the current practice post-*Pereira*, with one notable, if stupefying, exception that I discuss below involving the service of notices to appear with “fake dates”—a superficial, if utterly indefensible and

29. *Id.*

30. *Id.* § 1003.13. For proceedings initiated after April 1, 1997, the only other documents that the regulations recognize as a charging document are a “Notice of Referral to Immigration Judge,” and a “Notice of Intention to Rescind and Request for Hearing by Alien.” *Id.*

31. 8 U.S.C. § 1229(a)(1).

32. *Id.* § 1229(a)(1)(G)(i).

33. *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018).

34. 8 C.F.R. § 1003.18(b).

35. *See Pereira*, 138 S. Ct. at 2111.

36. *Id.*; *see also Haider v. Gonzales*, 438 F.3d 902, 903-04 (8th Cir. 2006) (discussing two-step notice procedure).

37. *See Haider*, 438 F.3d at 904.

inadequate, attempt by the government to comply with the Court's decision.³⁸

Although there is no public data that comprehensively tracks how long it usually takes the immigration court to send the notice of hearing after service of the notice to appear, anecdotal evidence suggests that, at least for the non-detained docket, there is usually a significant delay. In *Pereira*, for instance, the Department of Homeland Security initially served Pereira with the notice to appear in May 2006. Fifteen months later, the immigration court clerk sent a notice of hearing that included a specific hearing date—still another three months later.³⁹ Thus, the initial removal hearing in *Pereira* was not scheduled until almost a year and a half after the government first served Pereira with notice to appear at removal proceedings.⁴⁰

B. Facts and Legal Dispute in Pereira

Under § 1229b(b) of Title 8 of the United States Code, the Attorney General has discretion to “cancel removal” and adjust the status of a nonpermanent resident if, among other requirements, the nonpermanent resident has been physically present in the United States for at least ten years.⁴¹ (There is a comparable provision governing lawful permanent residents, which requires continuous physical presence for at least seven years.⁴²) However, according to § 1229b(d)(1), which is known as the “stop-time” rule, the period of continuous physical presence that could make a noncitizen eligible for cancellation of removal is interrupted when the noncitizen is served with a notice to appear.⁴³ More precisely, the stop-time rule provides: “For purposes of this section, 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 § 1229(a) of this title.”⁴⁴ The recognized

38. See *infra* text accompanying notes 324-28.

39. *Pereira*, 138 S. Ct. at 2112.

40. *Id.*

41. 8 U.S.C. § 1229b(b)(1) (2012).

42. *Id.* § 1229b(a)(2).

43. *Id.* § 1229b(d)(1).

44. *Id.*

reason for the stop-time rule is that Congress did not want to keep the continuous clock running until the removal hearing because that could incentivize the noncitizen to drag out the process to “buy time” if they are just shy of the ten years when they receive the notice to appear at the hearing.⁴⁵

The precise legal question in *Pereira* was this: is the stop-time rule triggered even if the notice to appear does not include the removal proceeding’s time and place as § 1229(a) requires?⁴⁶

C. Prior Judicial and Administrative Treatment of the Effect of a Defective Notice to Appear

Before *Pereira*, a number of courts and the Board of Immigration Appeals (BIA) had considered the effect of a notice to appear that lacked the time and place of the removal proceedings. One of the first appellate courts to do so was the Ninth Circuit in *Garcia-Ramirez v. Gonzales*.⁴⁷ As it turns out, the issue in *Garcia-Ramirez* did not centrally concern the notice to appear. Instead, the principal question in *Garcia-Ramirez* was whether the noncitizen’s five-month absence from the country interrupted her accrual of continuous presence time in the United States.⁴⁸ What makes *Garcia-Ramirez* interesting, for present purposes, is that before addressing the effect of her temporary absence from the country, the court first concluded that the initial notice to appear did not interrupt the continuous presence period.⁴⁹ The court reasoned that the notice did not trigger the stop-time rule because it failed to specify the date or

45. See *Pereira*, 138 S. Ct. at 2119 (citing Brief for Petitioner at 37-38, *Pereira*, 138 S. Ct. 2105 (2018) (No. 17-459)) (“Congress enacted the stop-time rule to prevent noncitizens from exploiting administrative delays to ‘buy time’ during which they accumulate periods of continuous presence.”).

46. See *id.* at 2110.

47. 423 F.3d 935 (9th Cir. 2005).

48. See *id.* The answer to that question, in turn, depended on the governing law. At the time she was absent from the country, the relevant law did not treat a temporary departure as a break in continuous presence. That law was later amended to treat even a temporary absence as sufficient to interrupt continuous presence. If the later-enacted law was applied retroactively, then the noncitizen’s period of continuous presence was interrupted and she would have been ineligible for cancellation of removal. The court ultimately concluded that the new law did apply retroactively, barring her from eligibility to apply for removal. See *id.* at 938-41.

49. *Id.* at 937 n.3.

location of the hearing, as § 1229(a) requires.⁵⁰ Of equal note, even the government agreed that only after service of a second notice to appear that did include the time and place of the hearing—what the court referred to as a “proper hearing notice”—was the noncitizen’s accrual of physical presence finally interrupted.⁵¹

But *Garcia-Ramirez*’s view would not hold sway for very long. Only a year later, without even discussing the Ninth Circuit’s decision, the Eighth Circuit denied a petition for review to reopen in absentia removal proceedings.⁵² In doing so, *Haider v. Gonzales* rejected the noncitizen’s argument that the notice to appear did not interrupt the period of continuous physical presence because it failed to include the time and place of the removal hearing.⁵³ The court also rejected the noncitizen’s related argument that the incomplete notice to appear was insufficient to vest jurisdiction under § 1003.14.⁵⁴

As to the stop-time rule, the court reasoned that the statute “simply requires that an alien be provided written notice of his hearing; it does not require that the [notice to appear] ... satisfy all of § 1229(a)(1)’s notice requirements.”⁵⁵ While the notice to appear did not include time and place of the removal hearing, the subsequent notice of hearing mailed by the immigration court did.⁵⁶ For the Eighth Circuit, that was enough: “Our reading of the [Immigration and Nationality Act] and the regulations compels the conclusion that the [notice to appear] and the [notice of hearing], which were properly served on Haider, combined to provide the requisite notice.”⁵⁷ Because the notice was sufficient, the court also summarily rejected, without elaboration, the noncitizen’s argument that the notice to appear failed to vest jurisdiction with the immigration court.⁵⁸

50. *Id.*

51. *Id.*

52. *Haider v. Gonzales*, 438 F.3d 902, 903 (8th Cir. 2006).

53. *See id.* at 907-08.

54. *Id.* at 909-10.

55. *Id.* at 907.

56. *Id.* at 908.

57. *Id.* at 907.

58. *Id.* at 909-10.

Later that same year, a panel of the Seventh Circuit, following *Haider*, similarly rejected a noncitizen's identical arguments.⁵⁹ *Dababneh v. Gonzales* followed the Eighth Circuit's reasoning in *Haider*, rejecting both the argument that the notice to appear failed to interrupt the period of continuous physical presence because it lacked time and place information and that it deprived the immigration court of jurisdiction.⁶⁰ As to the latter, the court noted, "The fact that the government fulfilled its obligations under [§ 1229(a)] in two documents—rather than one—did not deprive the [Immigration Court] of jurisdiction to initiate removal proceedings."⁶¹ *Dababneh* also appeared to weigh as significant the government's assertion that circumstances often make it impracticable to provide the actual hearing date and time in the notice to appear.⁶² In this same connection, the court rejected the noncitizen's argument that the government was required to demonstrate under § 1003.18 why it was impracticable to include the hearing time and place in the notice to appear, reasoning that the noncitizen suffered no actual prejudice.⁶³

Thereafter, a number of other courts followed *Haider* and *Dababneh* to hold that a notice to appear lacking the time and place of the hearing is nevertheless valid.⁶⁴ In one of them, *Guamanrrigra v. Holder*, the Second Circuit quoted the stop-time rule (albeit only in part), emphasizing that § 1229b(d)(1)(A) "specifies that the time of accrual of physical presence 'shall be deemed to end ... when the alien is served with a notice to appear,'" omitting the last six words of the subsection ("under section 1229(a) of this title") that *Pereira* would later find to be critical.⁶⁵

Although *Guamanrrigra* did not mention it, in 2011 the BIA also weighed in on the effect of a defective notice. In *Camarillo*, the BIA

59. *Dababneh v. Gonzales*, 471 F.3d 806, 807 (7th Cir. 2006).

60. *Id.* at 808-10 (noting that the language of the stop-time rule "is clear: if an alien has received a [notice to appear], the period of continuous presence is deemed to end").

61. *Id.* at 809.

62. *Id.* (noting that the Department of Homeland Security "frequently serves [notices to appear] where there is no immediate access to docketing information").

63. *Id.* at 809-10.

64. *See, e.g.,* *Popa v. Holder*, 571 F.3d 890, 895-96 (9th Cir. 2009); *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009).

65. 670 F.3d 404, 410 (2d Cir. 2012) (quoting 8 U.S.C. § 1229b(d)(1) (2012)); *see also* *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) (quoting 8 U.S.C. § 1229b(d)(1)).

began by making the determination that the language of the stop-time rule was ambiguous.⁶⁶ It reasoned that the rule could be read to require that the notice to appear include the time and place of the hearing, but that it also could be read as “simply definitional.”⁶⁷ By this the BIA meant that the rule could be read only to “indicate[] what the words ‘notice to appear’ refer to” and that, read this way, the subsection “merely specifies the document the [Department of Homeland Security] 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.”⁶⁸ The BIA then stated that the key phrase in the statute was “served a notice to appear” and so concluded that the better way to read the statute was that Congress only included the words “under section [1229](a) ... to specify the document the [Department of Homeland Security] must serve on the alien to trigger the ‘stop-time’ rule.”⁶⁹

Camarillo also concluded that the statute’s legislative history supported the court’s interpretation of the statutory text.⁷⁰ The BIA noted that Congress’s recognized intent in adopting the stop-time rule was to prevent noncitizens who were close to accumulating ten continuous years of physical presence from “buy[ing] time” by delaying removal proceedings instituted just before they reached the full ten years.⁷¹ The BIA reasoned that the stop-time rule was meant to interrupt the period of continuous service as soon as the government indicated its intent on having the noncitizen removed from the country; therefore, “the inclusion of the date and time of the hearing is not necessary for the Government’s intention in this regard to be conveyed.”⁷²

Most courts followed *Camarillo*. Indeed, with only one exception, the courts before *Pereira* deferred to the BIA’s judgment that the statutory language is ambiguous and that the better construction does not require the time and place of the hearing to be included in

66. 25 I. & N. Dec. 644, 647 (B.I.A. 2011).

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* at 649-50.

71. *Id.* at 649; *see also supra* note 45 and accompanying text.

72. *Camarillo*, 25 I. & N. Dec. at 650.

the notice to appear to trigger the stop-time rule.⁷³ Each of these courts concluded that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* requires deference to the BIA's interpretation of the statute, reasoning that its interpretation of the statutory text was reasonable.⁷⁴ The only exception is *Orozco-Velasquez v. Attorney General U.S.*, in which the Third Circuit held that *Camarillo's* construction of the statutory text was not entitled to deference under *Chevron* because it conflicted with § 1229(a)'s plain text.⁷⁵ Disagreeing with all of the prior decisions, *Orozco-Velasquez* concluded that § 1229(a) unmistakably requires that the notice to appear includes time and place information and, therefore, only a notice to appear that satisfies § 1229(a)'s requirements can effectively stop time under § 1229b(d)(1).⁷⁶

D. The Supreme Court's Decision in Pereira and Its Aftermath

This, then, was the state of the law when the Court granted certiorari in *Pereira*. All circuits but one had held, or deferred to the BIA's judgment, that the better reading of § 1229(a) was that it does not require the time and place of the hearing to be included in the notice to appear—either to vest jurisdiction with the immigration court or to trigger the stop-time rule. Nevertheless, in an 8-1 decision, *Pereira* rejected this prior statutory construction.⁷⁷ The Court held that a notice to appear that does not include the time and place of the removal proceedings is not a valid notice for purposes of the stop-time rule.⁷⁸

73. See *Pereira v. Sessions*, 866 F.3d 1, 5-6 (1st Cir. 2017); *Moscoco-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015); *O'Garro v. U.S. Att'y Gen.*, No. 14-13080, 2015 WL 2436963, at *3-4 (11th Cir. May 22, 2015) (per curiam); *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (per curiam); *Gonzalez-Garcia v. Holder*, 770 F.3d 431, 434-35 (6th Cir. 2014); *Yi Di Wang v. Holder*, 759 F.3d 670, 674-75 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014).

74. See 467 U.S. 837, 844 (1984).

75. 817 F.3d 78, 81-82 (3d Cir. 2016).

76. *Id.*

77. *Pereira v. Sessions*, 138 S. Ct. 2105, 2109-10 (2018).

78. *Id.* at 2113-14 ("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 so does not trigger the stop-time rule.")

In Part II, below, I walk through the Court's reasoning in detail. For now, two brief points about the Court's decision are worth making. First, it bears noting that the noncitizen in *Pereira* did not argue that a defective notice is insufficient to vest the court with jurisdiction under § 1003.14 and the court never addressed this jurisdictional issue. More on this in a moment.⁷⁹ Second, it is also important to say—because this too will become relevant later⁸⁰—that the noncitizen in *Pereira* did not seek to dismiss or terminate the removal proceedings. His only application to the court was for cancellation of removal on the basis that the stop-time rule was not triggered by the initial notice to appear. As we will see, both of these points about the limits of the argument that *Pereira* made have figured prominently in the subsequent debate over how broadly the Court's decision reaches.

As impactful as *Pereira* has been for cancellation of removal eligibility, the case's aftershocks are already proving to be even more significant.⁸¹ Even in cases not involving applications for cancellation of removal, immigration advocates across the country have been routinely raising *Pereira* challenges to the sufficiency of the notices to appear that the government served on their clients.⁸²

79. See *infra* Part II.C.3.

80. See *infra* text accompanying notes 148-65.

81. *Pereira* may also herald further upheaval, especially with regard to the long-honored deference to agency interpretations of ambiguous statutes owed under *Chevron*. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984). A concurrence by Justice Kennedy in *Pereira* (one of his very last published opinions before he retired) provocatively suggests that it may be time to revisit *Chevron* deference. *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring) (noting that “it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision”). For more on Kennedy's concurrence, see Geoffrey A. Hoffman, *Why Pereira v. Sessions Bodes Well for Overturning Matter of A-B-*, IMMIGRATIONPROF BLOG (July 2, 2018), <https://lawprofessors.typepad.com/immigration/2018/07/why-pereira-v-sessions-bodes-well-for-overturning-matter-of-a-b-by-geoffrey-a-hoffman.html> [<https://perma.cc/6TGY-CQE7>] (discussing *Chevron* and Kennedy's concurrence), and Ian Millhiser, *Justice Kennedy Just Gave Steve Bannon a Big Reason to Smile*, THINKPROGRESS (June 21, 2018), <https://thinkprogress.org/supreme-court-pereira-sessions-chevron-45c22b26631f/> [<https://perma.cc/37XA-53EA>] (noting that “*Pereira v. Sessions* is, at least on the surface, a minor case” but that Justice Kennedy “wrote a brief concurring opinion suggesting that the Court should upend the balance of power between elected presidents and unelected judges that has existed since the Supreme Court's [*Chevron*] decision”).

82. See, e.g., KESSELBRENNER ET AL., *supra* note 11, at 9-17.

The government's position is that *Pereira* applies only to the narrow context in which the case arose. Adopting the government's view, a number of immigration judges initially held that *Pereira* only decided when a notice to appear is sufficient to stop the continuous presence clock for purposes of cancellation of removal eligibility.⁸³ On this view, the Court's decision should not be read to require that all notices to appear include the time-and-place information required by § 1229(a).⁸⁴ Many other immigration judges, though, have applied *Pereira* expansively to find that dismissal is warranted whenever the government serves a notice to appear that lacks the time and place of the proceedings.⁸⁵ Indeed, in the first couple of months after the decision was announced, immigration judges terminated a record 9000 removal proceedings.⁸⁶ By comparison, less than half as many were terminated during this same period the year before, strongly suggesting that *Pereira* challenges were at least originally successful in many of these cases.⁸⁷

Among federal courts, *Pereira* has also had a mixed reception. Some federal district judges have thrown out criminal indictments for illegal reentry based on a *Pereira* challenge to the underlying final order of removal;⁸⁸ others have refused to apply *Pereira* as broadly.⁸⁹ The federal appellate courts have only just begun to weigh in on the merits, but there are already signs of a developing circuit

83. See, e.g., [Redacted], (Miami Immigration Ct. July 23, 2018) (on file with author).

84. See *id.*

85. See, e.g., Motion to Dismiss at 9, Ex. C, *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wash. 2018) (No. 2:10-CR-00092) (citing two decisions from immigration judges in Seattle and Phoenix).

86. See Levinson & Cooke, *supra* note 9.

87. See Levinson, *supra* note 9.

88. See, e.g., *United States v. Zapata-Cortinas*, No. SA-18-CR-00343-OLG, 2018 WL 4770868, at *5 (W.D. Tex. Oct. 2, 2018) (granting detained alien's motion to dismiss indictment on basis that, under *Pereira*, the immigration court lacked jurisdiction over removal proceedings initiated by a notice to appear that did not include the date and time of the removal proceedings); *Virgen-Ponce*, 320 F. Supp. 3d at 1165-66 (decided on the same grounds).

89. See, e.g., *United States v. Ibarra-Rodriguez*, No. CR-18-190-M, 2018 WL 4608503, at *2-3 (W.D. Okla. Sept. 25, 2018) (agreeing that notice to appear was defective under *Pereira*, but concluding that "such statutory defect does not automatically make the removal order fundamentally unfair"); *United States v. Morales-Hernandez*, No. CR-18-00365-TUC-RCC, 2018 WL 4492377, at *1 (D. Ariz. Sept. 18, 2018) (distinguishing *Pereira* because defendant "was present and participated in the proceedings resulting in his removal").

split.⁹⁰ As of this writing, the Second, Sixth, Seventh, and Ninth Circuits have reached the most definitive conclusion, squarely rejecting the noncitizen's argument that a notice lacking the time and place of the proceedings is insufficient to vest the immigration court with jurisdiction.⁹¹ Complicating the picture, in September 2018 the BIA, in an important precedential decision, read *Pereira* as applicable only to cancellation of removal cases.⁹² Given the divisions among the lower courts that emerged before the BIA decision, it is no surprise that the courts are also divided over whether its decision in *Bermudez-Cota* should be followed.⁹³ And in a subsequent precedential decision, the BIA—over a strenuous dissent—ruled that a notice of hearing that contains time-and-place information perfects a deficient notice to appear and triggers the stop-time rule.⁹⁴ The BIA's second decision concerning *Pereira* similarly has not been followed by several federal courts.⁹⁵ In short, the courts have been all over the map about what *Pereira* means.

90. Compare, e.g., *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018) (reading *Pereira* narrowly), with *Duran-Ortega v. U.S. Att'y Gen.*, No. 18-14563-D, 2018 U.S. App. LEXIS 33531, at *5-7 (11th Cir. Nov. 29, 2018) (Martin, J., concurring) (signaling willingness to read *Pereira* broadly).

91. See *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) (“The regulatory definition, not the one set forth in § 1229(a), governs the Immigration Court’s jurisdiction. A notice to appear need not include time and date information to satisfy this standard. [The petitioner’s] notice to appear met the regulatory requirements and therefore vested jurisdiction in the IJ.”); *Santos-Santos v. Barr*, 917 F.3d 486, 490 (6th Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, (2d Cir. 2019) (following *Karingithi* and *Hernandez-Perez*); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) (partially refusing to follow reasoning in *Karingithi* and *Hernandez-Perez* but concluding that “failure to comply with the statute dictating the content of a Notice to Appear is not one of those fundamental flaws that divests a tribunal of adjudicatory authority. Instead, just as with every other claim-processing rule, failure to comply with that rule may be grounds for dismissal of the case”); *Hernandez-Perez*, 911 F.3d at 314-15 (holding that “jurisdiction vests with the immigration court where ... the mandatory information about the time of the hearing is provided in a Notice of Hearing issued after the NTA”) (internal citation omitted).

92. See *Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (B.I.A. 2018).

93. Compare, e.g., *Karingithi*, 913 F.3d at 1159 (following *Bermudez-Cota*), and *Hernandez-Perez*, 911 F.3d at 314 (same), with *Zapata-Cortinas*, 2018 WL 4770868 at *2, *5 n.6 (holding that a “plain reading” of § 1229(a) demonstrates that a notice to appear that fails to include the time and date of the hearing “fails to vest jurisdiction for a removal proceeding in an immigration court”).

94. *Mendoza-Hernandez*, 27 I. & N. Dec. 520, 529 (B.I.A. 2019) (en banc).

95. See, e.g., *Lopez v. Barr*, 925 F.3d 396, 402 (9th Cir. 2019) (rejecting *Mendoza-Hernandez*'s construction of § 1229(a)).

II. READING *PEREIRA* CORRECTLY

Post-*Pereira*, the initial pressing question should be whether the Court's decision is limited only to cancellation of removal cases. Unfortunately, as we will see, some courts have conflated this initial inquiry with whether *Pereira* has jurisdictional implications. But the question of how broadly the case applies logically has to come first—if *Pereira* only applies to cancellation of removal cases, then the case's jurisdictional implications, if any, will be similarly limited only to cancellation of removal proceedings.

In this Part, I consider the arguments that have been advanced for reading *Pereira* as controlling only for cancellation of removal cases. But before I get to those arguments, it is necessary to place the more specific question of *Pereira*'s reach into a larger jurisprudential framework.

A. Precedent and the Use of Limiting Language

The threshold question that must be considered in grappling with *Pereira*'s reach can be situated within the broader theoretical inquiry into how lower courts determine the controlling scope of precedent. What it means to say that a precedent is controlling is the subject of a rich academic literature, reflecting the difficulties of determining the extent to which a higher court's judgment is binding.⁹⁶

96. See Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 606-07 (1990); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3-4 (1989); Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 127-28 (2009); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1998-99 (1994); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 165 (1930); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 181-83 (2014); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1257-59 (2006); Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661, 662, 664-65, 667 (2017); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634-35, 641-42 (1995) [hereinafter Schauer, *Giving Reasons*]; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572-73 (1987) [hereinafter Schauer, *Precedent*]; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372, 1394-95 (1995).

An important, but underexamined, aspect of the problem of ascertaining precedential reach is how lower courts should take account of limiting language in a judicial decision. It is an important issue because appellate courts often use restrictive language in describing their decisions. Courts say things such as our opinion “is limited by the particular facts before us”⁹⁷ or the judgment in this case is meant to be “narrowly construed.”⁹⁸ In *Pereira*, Justice Sotomayor twice repeated that the Court’s decision was “narrow.”⁹⁹ What are lower courts to do with this kind of limiting language? How do they figure out the precedential reach of a decision cast as “limited” or “narrow” by a higher court?

1. Precedent Is Not Supposed to Be Confined to Complete Factual Identity

To try to gain a more coherent understanding of what meaning we are to ascribe to limiting words, it is helpful to begin by describing what they are not supposed to mean. Although legal decisions necessarily must be made in relation to the facts in a case,¹⁰⁰ few would subscribe to the view that a case is binding on a lower court only when an identical set of facts are presented in a future case. There will almost always be *some* variance in the facts of different cases.¹⁰¹

97. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 893 (2011) (Breyer, J., concurring in judgment) (“I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court.”); *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (noting that “the reach of our opinion here is limited by the particular facts before us”); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 92 (1947) (“We proceed to consider the controversy over constitutional power at issue ... as defined by the charge and preliminary [evidence].... Our determination is limited to those facts.”).

98. See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (“We emphasize the narrowness of our holding.”); *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015) (“Finally, we underscore the narrow nature of our holding.”); *Snyder*, 562 U.S. at 460 (“Our holding today is narrow.”).

99. See *Pereira v. Sessions*, 138 St. Ct. 2105, 2113 (2018).

100. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.”).

101. See Schauer, *Precedent*, *supra* note 96, at 577 (“No two events are exactly alike. For a decision to be a precedent for another decision does not require that the facts of the earlier and the later cases be absolutely identical. Were that required, nothing would be a precedent for anything else.”).

Complete identity of fact has never been regarded as a requirement of precedent.¹⁰²

Moreover, in our common law system, it is conceptually inaccurate to treat a judicial decision as strictly confined to its facts. Every legal rule that comes out of a judicial decision, as Larry Alexander has noted, “by virtue of being a rule, decides issues that are broader than the particular facts of the cases in which they are announced.”¹⁰³ And to insist on complete identity of fact could be destabilizing to the hierarchical structure of our system by making it far too easy for a subordinate court to ignore a higher court’s judgments.¹⁰⁴

2. The Exceptional Case of Limiting Language as a Nullification Effort

But if a self-described “narrow” or “limited” opinion should not be read only to control in cases of complete factual identity, we nevertheless expect lower courts to pay close attention to and carefully parse the words that appellate judges use. Among other considerations, the language used by the author of an opinion may reflect necessary compromises to gain the support of other judges. Thus, in *Pereira*, the linguistic choice to call its decision “narrow” may have been necessary to secure an eight-person majority.¹⁰⁵ But, even if it was, a narrow holding still has some precedential force, does it not? What are lower courts to do, then, with such limiting language?

102. See Aldisert, *supra* note 96, at 621 (“In examining the cases, as a scientist in a laboratory, the judge should not look for the rigid fixity of facts. Seldom are there perfectly identical experiences in human affairs.”).

103. Alexander, *supra* note 96, at 25 (emphasis omitted).

104. See *id.* at 20 (“[I]f a constrained court could escape the constraint of a precedent rule by citing *any* factual distinctions between the precedent case and the constrained case—whether or not those factual distinctions are relevant under the rule announced in the precedent case or are relevant under any plausible moral principle—a precedent case and its rule could never constrain, and the distinction between distinguishing a case and overruling it would collapse.”).

105. *Pereira v. Sessions*, 138 St. Ct. 2105, 2110 (2018); see Wald, *supra* note 96, at 1377-78 (“Opinion writing among judges of widely disparate views and temperaments is, like governing, the art of the possible.... If alternative rationales are available to support a result, the one that can garner a majority of judges will be chosen, even if it is not the writer’s preferred one.”).

A helpful starting place is to recognize that not all uses of limiting language are equivalent. In one of the few pieces that carefully considers judicial use of limiting language, the author of a thoughtful, if brief, student comment points out that one extreme use of limiting language can be for the purpose of marginalizing—“nullifying”—the decision it just enacted.¹⁰⁶ This obviously does not happen often, since courts usually are not in the business of disavowing the precedential effect of their own decisions.¹⁰⁷

There is, however, an infamous example in which the Supreme Court tried to do just that. In *Bush v. Gore*, having waded into the middle of a closely contested presidential election to announce a new rule of equal protection, the per curiam opinion for the majority insisted that its decision would have no precedential effect in future cases: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”¹⁰⁸

Among academic commentators, a widely held critique of the *Bush v. Gore* opinion centrally emphasized the Court’s attempt to annul any precedential effect of its decision. Pamela Karlan, for instance, offered this trenchant criticism:

[P]recisely to the extent that the Supreme Court announces that it, and the lower courts, should feel free to decide future equal protection challenges without considering *Bush v. Gore*, it creates suspicion that its decision was result-oriented. That the Court felt free to announce this entirely new rule in a case with such tremendous stakes, and then immediately to repudiate the precedential value of its decision, marks a staggering rejection of precedent’s constraining force.¹⁰⁹

106. Chad Flanders, Comment, *Bush v. Gore and the Uses of “Limiting,”* 116 YALE L.J. 1159, 1161 (2007).

107. *Id.* (“When the Court decides a case and offers reasons for its decisions, the very act of giving reasons will suggest that the same reasons could be applied to similar circumstances.”).

108. 531 U.S. 98, 109 (2000) (per curiam).

109. Pamela S. Karlan, *When Freedom Isn’t Free: The Costs of Judicial Independence in Bush v. Gore*, 64 OHIO ST. L.J. 265, 281-82 (2003) (footnote omitted); see also Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (decrying the majority’s attempt to limit the binding effect of its decision as a “disingenuous limiting instruction”).

This critique underscores a key point: In our hierarchical common law system, courts do not get to limit the precedential reach of their decisions. By their very nature, the decisions of higher courts are supposed to bind lower courts to the extent that the precedent case and the subsequent case are materially similar.¹¹⁰ This is a matter of basic fairness—like cases should be treated the same. Moreover, the expectation that all cases have some precedential value also effectively forces higher courts to think more carefully about their decisions. Frederick Schauer has pointed out that

the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand. If the future must treat what we do now as presumptively binding, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of other and future assimilable cases.¹¹¹

Given that *Bush v. Gore* is antithetical to our common law tradition insofar as it purports to limit its own precedential effect, it offers an important insight for understanding the far more common use of limiting language in a judicial decision. There is a critical difference between a court purporting to negate any future effect of its own decision and other uses of limiting language. That is, outside of this exceptional circumstance, even a decision that is characterized as narrow or limited is still meant to have some precedential force.¹¹²

Once we recognize *Bush v. Gore*'s use of limiting language to be anomalous, it becomes clear that for all other cases the question is not whether an opinion that uses limiting language has any precedential effect. Instead, the relevant inquiry is to ask how far a court's self-described "narrow" decision reaches. Framed in this way, determining what meaning to ascribe to limiting language in a judicial decision is ultimately no different than the basic task that

110. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 112-17 (1991) (arguing that a precedent court is not able to preordain its precedential reach); cf. Schauer, *Precedent*, *supra* note 96, at 589.

111. Schauer, *Precedent*, *supra* note 96, at 589.

112. See *supra* notes 105-08 and accompanying text.

lower courts routinely perform in determining precedential reach. The question is whether some later set of facts and circumstances are similar enough to come within the parameters, however broadly or narrowly defined, of the precedent decision.¹¹³

3. *Ascertaining Precedential Reach*

One approach that lower courts take in evaluating the degree of similarity across cases is to consider the words used in the precedent decision.¹¹⁴ Sometimes, explicit language makes it easy to see the limits of precedent's reach—and that is especially true when it comes to the limiting language in a decision. For instance, the court in the precedent case might say, “We do not reach Issue X and express no opinion about it because the record has not been adequately developed to address it on direct appeal.”¹¹⁵ These express words of limitation reflect that the court did not intend to announce any rule that would bind a future court as to that specific issue.

Even with words of express limitation, however, lower courts will still feel compelled to fully parse the language in a higher court's decision to ascertain whether any parts of the court's reasoning on issues that it did resolve bear relevance to the new facts and issues to be considered.¹¹⁶ And the predominant approach among lower courts is to read appellate decisions—and decisions by the Supreme Court, in particular—in a “broadly inclusive” manner, as Randy Kozel has noted.¹¹⁷ This explains, in good measure, why the

113. See Schauer, *Precedent*, *supra* note 96, at 577, 579 (“In order to assess what is a precedent for what, we must engage in some determination of the relevant similarities between the two events.... The task of a theory of precedent is to explain, in a world in which a single event may fit into many different categories, how and why some assimilations are plausible and others are not.”).

114. See Bayern, *supra* note 96, at 137 (noting that in determining precedent, the lower court must consider, *inter alia*, “what the court said” and “the context in which the court said it”); Schauer, *Precedent*, *supra* note 96, at 573 (“Dealing with the use of past precedents thus requires dealing with the presence of the previous decisionmaker's *words*.”).

115. See, e.g., *United States v. Beauchamp*, No. 06-30119, 2006 WL 2854456, at *1 (5th Cir. Oct. 5, 2006) (*per curiam*) (“We do not reach that claim ... because the record has not been adequately developed to address it.”).

116. Kozel, *supra* note 96, at 203 (“The principles that define a precedent's scope of applicability will determine its vertical, or hierarchical, power to constrain inferior courts. The effect is especially pronounced in legal systems, such as the American federal system, that treat vertical precedent as absolutely binding.” (footnote omitted)).

117. *Id.* at 199.

distinction between holdings and dictum has been shown to be far less significant for Supreme Court decisions.¹¹⁸

At the same time, while linguistic choices matter, it is also necessary for lower courts to keep in mind that a precedent court's word choice may not be dispositive.¹¹⁹ Something does not become a holding merely because the court labels it that way.¹²⁰ Similarly, precedential scope cannot turn on a mechanical distinction between holding and dictum any more than it does on the labeling of an opinion as broad or narrow. A decision self-described as "broad" is necessarily limited by the same constraints that apply to all judicial decisions, just as a decision characterized as "narrow" still has some precedential force.¹²¹

What matters far more than labels is taking account of the rationales that the precedent court articulated to reach its conclusions.¹²² As Frederick Schauer put it, the reasoning (or *ratio decidendi*) of a decision will go beyond the case because "to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.... transcend[ing] the very particularity of the case."¹²³

The Supreme Court itself has made clear that subsequent courts must consider both the outcome of a higher court's decision and the

118. See David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2026 (2013) ("Lower courts often mention the distinction between holding and dictum but hardly ever invoke it in consequential ways."); Kozel, *supra* note 96, at 198-99.

119. See H.L.A. HART, *THE CONCEPT OF LAW* 123 (1961) ("In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.")

120. See Dorf, *supra* note 96, at 2059 ("The precedential force of an earlier case ultimately rests upon the reasons underlying the court's decision. This is true both because absent a consideration of reasons, namely, abstract principles, there is no such thing as precedent, and because precedents derive their legitimacy from their reasoning."); Leval, *supra* note 96, at 1257 ("A dictum is not converted into holding by ... preceding it with the words 'We hold that.'").

121. Cf. Dorf, *supra* note 96, at 2060 (suggesting that stare decisis "limit[s] the freedom of modern courts to reconfigure past decisions").

122. See *id.* at 2059; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746-47 (1993) ("We cannot fully describe the outcome in case X if we do not know something about the reasons that count in its favor. We cannot say whether decided case X has anything to do with undecided case Y unless we are able to abstract, a bit, from the facts and holding of case X. The key point is that analogical reasoning involves a process in which principles are developed with constant reference to particular cases.")

123. Schauer, *Giving Reasons*, *supra* note 96, at 641 (emphasis omitted).

rationale for that outcome. In *Seminole Tribe of Florida v. Florida*, Chief Justice Rehnquist observed that the Court adheres to the “well-established rationale” upon which prior decisions were based and that “it is not only the result but also those portions of the opinion necessary to that result by which [the Court is] bound.”¹²⁴ Justice Kennedy made the same point in his separate opinion in *County of Allegheny v. American Civil Liberties Union*: “As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.”¹²⁵

It follows from these general approaches to ascertaining precedential reach that a self-described “narrow” or “limited” opinion should not be read to control only in cases of complete factual identity. With the exception of nullifying decisions such as *Bush v. Gore* that are, by their nature, out of place in our common law tradition,¹²⁶ we ascertain the precedential reach of a judicial decision that uses limiting language in the same way that we determine the binding effect of any decision.¹²⁷ However broadly or narrowly a decision is characterized, the relevant inquiry is whether some later set of facts and circumstances are similar enough to justify following the precedent decision.¹²⁸ That inquiry requires consideration of the decision’s text and the context in which the case arose, along with the reasoning that the higher court employed to reach its conclusions.¹²⁹ As we have seen, these are the same considerations that lower courts must always take into account when ascertaining precedent’s reach.¹³⁰ We can now apply these broader insights into precedent to *Pereira*.

B. The Arguments for Reading Pereira Narrowly

Those who maintain that the Court’s decision has no precedential application beyond cancellation of removal cases advance two main

124. 517 U.S. 44, 66-67 (1996).

125. 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

126. See Flanders, *supra* note 106, at 1161.

127. See *supra* Parts II.A.1-2.

128. See *supra* note 113 and accompanying text.

129. See *supra* Part II.A.2.

130. See *supra* Part II.A.2.

arguments. The first argument is what we might call the *dog that did not bark* argument. This argument finds great meaning in what *Pereira* did not say—likening the importance of the Court’s silence to the crime-revealing significance in the dog’s failure to bark the night the racehorse was stolen in Sir Arthur Conan Doyle’s story.¹³¹

Proponents of this view insist that it is significant that the Court said nothing about the effect of its decision beyond cancellation of removal cases. Because the Court did not hold that all proceedings involving notices to appear should be invalidated or terminated if they lack the necessary time and place information, proponents of this view say the case cannot be read so broadly.¹³² In this same connection, the government, as well as some courts, have been quick to point out that the Court in *Pereira* seemed to go out of its way to characterize the decision as reaching only a “narrow” question.¹³³

Relatedly, both the government and some lower courts have emphasized that the Court did not invalidate the underlying removal order in *Pereira* for lack of jurisdiction.¹³⁴ On this view, because the *Pereira* case itself was remanded for further proceedings,¹³⁵ the Court must not have thought that there was any underlying jurisdictional defect in the case to warrant its outright dismissal.¹³⁶ *Pereira*, it is said, answered one question and one question only: it told us only that a notice to appear that does not include the time and place of the proceeding is ineffective to stop the continuous

131. See SIR ARTHUR CONAN DOYLE, *THE COMPLETE SHERLOCK HOLMES* 400 (1953).

132. See *Bermudez-Cota*, 27 I. & N. Dec. 441, 444 (B.I.A. 2018) (“While the Court held that such a notice to appear is insufficient to trigger the ‘stop-time’ rule, it did not indicate that proceedings involving similar notices to appear ... should be invalidated or that the proceedings should be terminated.”).

133. See *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018) (following *Bermudez-Cota* in noting that “*Pereira*’s emphatically ‘narrow’ framing ... counsels in favor of distinguishing” cancellation of removal cases from all other contexts); *Bermudez-Cota*, 27 I. & N. Dec. at 443 (“Had the Court intended to issue a holding as expansive as the one advanced ... presumably it would not have specifically referred to the question before it as being ‘narrow.’”).

134. See *Hernandez-Perez*, 911 F.3d at 314; *Bermudez-Cota*, 27 I. & N. Dec. at 443 (“Significantly, the Court did not purport to invalidate the alien’s underlying removal proceedings or suggest that proceedings should be terminated. In fact, the Court remanded the matter for ‘further proceedings.’”).

135. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018).

136. See *Hernandez-Perez*, 911 F.3d at 314.

physical presence clock.¹³⁷ As Edgar Allen Poe would say, “Only this and nothing more.”¹³⁸

The other primary argument that some have advanced for limiting the Court’s decision is what we can call the *actual notice* objection. This argument posits that *Pereira* has no application where the noncitizen receives actual notice of when and where the hearing will be held.¹³⁹ Proponents of this view point out that the noncitizen in *Pereira* did not receive notice of the time and place of the hearing.¹⁴⁰ The notice to appear that was served on him lacked that information—and he never received the notice of hearing that was subsequently sent because the immigration court mailed it to an old address.¹⁴¹ (*Pereira* had provided a more current address to the government, but the immigration court failed to send it there.¹⁴²) Those who support a narrow reading of *Pereira* argue that if a noncitizen receives actual notice of the hearing, then the concerns that the Court expressed about improper notice are inapplicable.¹⁴³

In essence, this reading of *Pereira* concludes that what the Court really cared about was not strict compliance with § 1229(a) but whether the noncitizen was actually apprised of when the hearing would be. In support of this actual notice argument, proponents cite to all of the pre-*Pereira* cases that upheld the two-step notice process the government has been using—that is, service of the initial notice to appear, followed by mailing of the notice of hearing that includes the specific time and place of the removal proceedings.¹⁴⁴ Implicit in this argument is the assumption that, with the sole exception of the stop-time rule, *Pereira* does not disapprove of using this two-step notification procedure, a procedure that almost all pre-*Pereira* courts upheld. In effect, these courts are saying that

137. *See id.*

138. EDGAR ALLEN POE, *The Raven*, in COMPLETE POEMS AND SELECTED ESSAYS 71 (Richard Gray ed., 1993).

139. *See Bermudez-Cota*, 27 I. & N. Dec. at 447 (“Because the respondent received proper notice of the time and place of his proceeding when he received the notice of hearing, his notice to appear was not defective.”).

140. *See id.* at 443 (“*Pereira* involved a distinct set of facts. Unlike the alien in that case, the respondent here was properly served with both a notice to appear *and* a subsequent notice of hearing.”).

141. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2112 (2018).

142. *See id.*

143. *See Bermudez-Cota*, 27 I. & N. Dec. at 447.

144. *See id.* at 445-47 (citing cases).

what matters is function, not form. As long as the noncitizen receives some kind of actual notice, there is nothing to complain about.¹⁴⁵

C. Responding to the Arguments for Restricting Pereira's Precedential Reach

Unquestionably, Justice Sotomayor's opinion emphasized the textual interplay between the stop-time rule and § 1229(a). Focusing on the cross-reference in § 1229b(d)(1) to a notice served "under section 1229(a) of this title," the Court concluded that only a notice served in compliance with § 1229(a)—i.e., one that specifies the time and place of the removal proceedings—is sufficient to stop the continuous presence clock.¹⁴⁶ But it does not follow that *Pereira* has nothing to teach us about the sufficiency of notices in other contexts.

1. Pereira Construed § 1229(a) Independent of the Stop-Time Rule

By trying to find meaning in what the Court did not say, proponents of the *dog that did not bark* argument baldly ignore what it did say. A close read of the decision shows that *Pereira* necessarily construed § 1229(a) independently of its construction of the stop-time rule.¹⁴⁷ Consider this critical passage in which the Court spoke directly about § 1229(a)'s requirements. Rejecting the view advanced by the government and the dissent that the statute is not worded in the form of a definition, the Court observed:

Section 1229(a), however, does speak in definitional terms, at least with respect to the "time and place at which the proceedings will be held": It specifically provides that the notice described under paragraph (1) is "referred to as a 'notice to appear,'" which in context is quintessential definitional language. It then defines that term as a "written notice" that, as relevant here, "specif[ies] ... [t]he time and place at which the [removal] proceedings will be held." Thus, when the term "notice

145. *Cf. Bermudez-Cota*, 27 I. & N. Dec. at 447 (holding that actual notice is sufficient).

146. *See Pereira*, 138 S. Ct. at 2110, 2118.

147. *See id.* at 2116.

to appear” is used elsewhere in the statutory section, including as the trigger for the stop-time rule, it carries with it the substantive time-and-place criteria required by § 1229(a).¹⁴⁸

The entirety of the excerpted passage, and perhaps especially that last line—“when the term ‘notice to appear’ is used elsewhere in the statutory section, including as the trigger for the stop-time rule, it carries with it the substantive time-and-place criteria required by § 1229(a)”¹⁴⁹—plainly is discussing the requirements of § 1229(a), untethered to the stop-time rule.

Again later, when responding to another argument that Justice Alito made in dissent, the majority opinion also plainly construed § 1229(a)’s general requirements as applicable to all notices to appear.¹⁵⁰ Justice Alito argued that the statute is better understood as defining what makes a notice to appear “complete,” rather than as providing that a defective notice “deprive[s] it of its essential character as a ‘notice to appear.’”¹⁵¹ Even if incomplete, the notice to appear is still a notice to appear—“much like a three-wheeled Chevy is still a car.”¹⁵² To this, the Court responded:

Section 1229(a)(1) does not say a “notice to appear” is “complete” when it specifies the time and place of the removal proceedings. Rather, it defines a “notice to appear” as a “written notice” that “specif[ies],” at a minimum, the time and place of the removal proceedings.... Failing to specify integral information like the time and place of removal proceedings unquestionably would “deprive [the notice to appear] of its essential character.”¹⁵³

Once again, this passage plainly construes § 1229(a)’s requirements on their own terms—requirements that are applicable to all notices to appear. Nothing in the passage depends on how those requirements interface with the stop-time rule.

148. *Id.* (alteration in original) (footnote omitted) (citations omitted).

149. *Id.*

150. *Id.* at 2114.

151. *Id.* at 2127 n.5 (Alito, J., dissenting).

152. *Id.* at 2116.

153. *Id.* at 2116-17 (alterations in original) (citations omitted) (quoting *id.* at 2127 n.5 (Alito, J., dissenting)).

There is still further evidence from *Pereira* itself that the Court's construction of § 1229(a) should not be confined to cancellation cases. Justice Sotomayor's opinion also expressly highlighted the need to treat identical words similarly throughout the same statutory scheme.¹⁵⁴ The opinion noted that "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."¹⁵⁵ The question in *Taniguchi v. Kan Pacific Saipan, Ltd.*, a case *Pereira* cited, was whether a statute that authorized prevailing parties to recover the "compensation of interpreters" included the cost of translating documents.¹⁵⁶ In holding that it did not, *Taniguchi* pointed out that the word "interpreter" was used elsewhere in the same statute to refer only to oral translations of court testimony.¹⁵⁷ Reasoning that identical words used in different parts of the same statute should normally be construed identically, *Taniguchi* concluded that prevailing parties could recover only for the costs of oral translations, not for translations of writings.¹⁵⁸ Numerous other cases are to the same effect.¹⁵⁹

Those who insist that *Pereira* only has precedential force for cancellation cases cannot defend the inconsistency that their approach necessarily entails: that a notice would be insufficient solely for purposes of triggering the stop-time rule but satisfactory for every other purpose. That approach defies reason. As it turns out, even some courts that have rejected applying *Pereira* broadly acknowledge the inherent difficulty with defending such a cramped reading of the decision. In *Hernandez-Perez*, the Sixth Circuit pointed out that there is "common-sense discomfort in adopting the position that a single document labeled 'Notice to Appear' must comply with a certain set of requirements for some purposes, like triggering the stop-time rule, but with a different set of requirements for others."¹⁶⁰ Oddly, the court nevertheless rejected the

154. *See id.* at 2115.

155. *Id.* (quoting *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012)).

156. 566 U.S. at 562.

157. *See id.* at 572 n.7.

158. *See id.* at 571, 575.

159. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995); *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994); *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

160. *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018).

noncitizen's *Pereira* challenge.¹⁶¹ It did so because it assumed that a defective notice has jurisdictional consequences; on that assumption alone, it worried that to uphold the noncitizen's challenge "would have unusually broad implications."¹⁶² But that view conflates the threshold question of *Pereira*'s reach with the secondary issue of whether a defective notice implicates jurisdiction.¹⁶³ This is the same fundamental infirmity that plagues the Ninth Circuit's decision in *Karingithi v. Whitaker*, the leading appellate court decision applying *Pereira*, as of this writing.¹⁶⁴ Logically, the first question has to be applicability, not jurisdiction. If *Pereira* only applies to cancellation of removal proceedings, then the case's jurisdictional significance, if any, will only matter for cancellation of removal proceedings.

But, as I have shown, the Court's decision cannot be so narrowly confined. To maintain that *Pereira* has nothing to say about § 1229(a) beyond its relevance to cancellation of removal cases requires ignoring multiple passages in the opinion that are plainly construing § 1229(a) directly.¹⁶⁵ Unlike *Karingithi* and *Hernandez-Perez*, other federal appellate courts have correctly recognized the breadth of *Pereira*'s reading of § 1229(a).¹⁶⁶

It is even more absurd to insist that the Court held that a notice lacking time-and-place information will not interrupt cancellation eligibility, but will be satisfactory for every other purpose. That reading violates the firmly established statutory construction principle of consistency that *Pereira* itself relied upon.¹⁶⁷ Because no other statutory provision delineates the requirements for notices to appear, it makes no sense to say that a notice lacking the time-and-place information required by § 1229(a) is insufficient only for purposes of the stop-time rule, but is otherwise sufficient for all other purposes.

161. *See id.* at 314-15.

162. *Id.* at 314.

163. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1159 (9th Cir. 2019).

164. *See id.*

165. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2114-16 (2018).

166. *See, e.g., Ortiz-Santiago v. Barr*, 924 F.3d 956, 961 (7th Cir. 2019) (stating that "*Pereira* is not a one-way, one-day train ticket" and noting that the Court described § 1229(a) "in definitional terms" when referring to time-and-place information required by the statute).

167. *See Pereira*, 138 S. Ct. at 2115.

Certainly, nothing turns on the Court's characterization of its decision as narrow. As we have seen, except for outlier decisions such as *Bush v. Gore* that many think should be bracketed as *sui generis*, even self-described "narrow" decisions have some precedential reach; the question, as always, is ascertaining how far that reach extends. To do so, what matters more than labels and self-characterizations are the words and supporting rationales that a higher court uses to reach its conclusions. Using these well-established and familiar means for ascertaining precedential effect, it is clear that both the words of the Court's opinion and its rationales support the conclusion that the Court's construction of § 1229(a) applies to all notices to appear.

2. *Pereira's Holding Did Not Turn on Lack of Actual Notice*

For similar reasons, the *actual notice* objection—that *Pereira* has no application if the noncitizen is actually made aware of when the hearing will be through some method of notification, even if that method has not been authorized by Congress—is equally wrong-headed. Admittedly, the Court did make it sound as if what matters is that the noncitizen receives actual notice of the proceedings.¹⁶⁸ But the assumption that its decision was hinged to the government's efforts to provide actual notice ignores the Court's careful parsing of the statutory language and structure of § 1229(a).¹⁶⁹ Put another way, *Pereira* recognized two straightforward facts about the statutory scheme: (1) all judicial removal proceedings¹⁷⁰ start with service of a notice to appear; and (2) all notices to appear must include the time and place of the hearing.¹⁷¹ Thus, any notice to appear that does not include the time and date of the proceedings

168. *See id.* ("Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings.")

169. *See id.* at 2114-18.

170. There are some proceedings that may be broadly categorized as "removal proceedings" that are not initiated with a notice to appear. This did not come up in *Pereira* because the noncitizen in that case was summoned to a judicial removal proceeding under § 1229a, *id.* at 2117-18, which is far and away the most common type of removal proceeding. These other proceedings include expedited removal proceedings, 8 U.S.C. § 1225(c)(1), reinstated removal proceedings, *id.* § 1231(a)(5), and administrative removal proceedings, *id.* § 1228(b)(1), all of which use something other than a notice to appear under § 1229(a) to initiate the proceedings.

171. *Pereira*, 138 S. Ct. at 2117-18.

fails to satisfy the statute.¹⁷² So, yes, giving notice is an essential function of the notice to appear.¹⁷³ But the Court is also just as plainly saying that with § 1229, Congress unambiguously required that that essential function be performed by a specific document: the notice to appear.¹⁷⁴

Moreover, the problem with insisting that a *Pereira* defect should always be excused if the noncitizen actually received notice of the removal proceedings is that it fails to recognize circumstances when we should not ignore a notice-giver's failure to comply with all legal requirements—separate and apart from whether actual notice was received. That will especially be true when the societal values furthered by insisting on compliance with the law heavily outweigh the administrative costs of full compliance with all technical legal requirements. Those societal values are most compelling in the first and second case types discussed below.¹⁷⁵

Finally, and perhaps most self-evidently, the Court in *Pereira* expressly rejected prior judicial construction of § 1229 as turning on whether the noncitizen actually received notice. Recall that, before *Pereira*, a number of courts read § 1229 exactly as the government did; even after *Pereira*, some courts, including the BIA, insist it can be read that way.¹⁷⁶ That is, these courts have held that § 1229's notice requirements can be satisfied in two documents: a notice to appear and a subsequently issued notice of hearing that includes the actual hearing date.¹⁷⁷ Post-*Pereira*, the BIA¹⁷⁸ and at least one federal appellate court¹⁷⁹ have reached the same conclusion. But this is exactly the construction of § 1229 that *Pereira* rejected.¹⁸⁰ Both the majority opinion and Justice Kennedy's concurrence specifically call out these earlier cases for having interpreted the statute differently than the Court was construing it.¹⁸¹ Obviously, in light

172. *See id.*

173. *Id.* at 2114.

174. *See id.*

175. *See infra* Parts III.C.1-2.

176. *See* Bermudez-Cota, 27 I. & N. Dec. 441, 443 (B.I.A. 2018).

177. *Id.* at 447.

178. Mendoza-Hernandez, 27 I. & N. Dec. 520, 523 (B.I.A. 2019) (en banc).

179. Santos-Santos v. Barr, 917 F.3d 486, 492 (6th Cir. 2019).

180. *Pereira*, 138 S. Ct. at 2113-14.

181. *See id.* at 2113 n.4 (citing the Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits as compared to the Third Circuit in *Orozco-Velasquez*, the only circuit court pre-*Pereira* to have held that the stop-time rule was only triggered by a notice to appear that

of *Pereira*'s rejection of their reasoning, these cases are no longer good law.¹⁸²

3. *Pereira's Silence on Jurisdiction Does Not Reveal Its Acknowledgement that Jurisdiction Existed*

That leaves one remaining loose thread to consider. Recall that some proponents of reading *Pereira* narrowly point to the fact that the Court did not invalidate the underlying removal proceedings.¹⁸³ This is said to be proof that it did not regard a defective notice as insufficient to vest jurisdiction.¹⁸⁴ There are two responses to this line of thinking.

First, because the question of jurisdiction under § 1003.14 was not raised by either party in *Pereira*, the Court's decision does not tell us anything about what the Justices might have thought if the question had been raised. For more than two centuries, the Court has made it clear that no precedential effect can be read into the possibility of "unaddressed jurisdictional defects."¹⁸⁵ Far more recently, it has repeated the admonition that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."¹⁸⁶ As the Court further noted in *Winn*, "When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."¹⁸⁷ "Even as to our own judicial power or jurisdiction," the Court observed in yet another case, "this Court has followed the lead of Mr.

satisfied all of § 1229(a)'s requirements); *id.* at 2120 (Kennedy, J., concurring) (citing pre-*Pereira* decisions that, following the BIA's decision in *Camarillo*, construed § 1229 as allowing a two-step notice process, and noting that the Court "correctly concludes today that those holdings were wrong because the BIA's interpretation finds little support in the statute's text").

182. See *Lopez v. Barr*, 925 F.3d 396, 339-400 (9th Cir. 2019) (recognizing that pre-*Pereira* cases approving a two-step notice procedure have been "effectively overruled").

183. See *Bermudez-Cota*, 27 I. & N. Dec. at 443.

184. See *id.* at 444-45.

185. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); accord *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) ("No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.").

186. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).

187. *Id.* (quoting *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974)).

Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.¹⁸⁸

The second response, perhaps even more straightforward, is that a defective notice has no relevance to the immigration court's subject matter jurisdiction—or, for that matter, to its territorial jurisdiction over noncitizens—as Part III.A explains.

III. CONSEQUENCES OF A DEFECTIVE NOTICE

Having concluded that *Pereira's* construction of § 1229(a) applies to all notices to appear, it is still necessary to consider how this conclusion matters. I begin by considering, but ultimately rejecting, the predominant view that a defect in notice constitutes a non-waivable defect in the immigration court's subject matter jurisdiction or, alternatively, that a defective notice is relevant to its territorial jurisdiction over noncitizens. Thereafter, I show that *Pereira* challenges should turn on three doctrinal considerations: retroactivity, forfeiture, and harmless error.

A. Defective Notice and Jurisdiction

Many immigration advocates have argued, and some lower courts have agreed, that a notice without the time and date of the removal proceedings is insufficient to confer subject matter jurisdiction on the immigration court.¹⁸⁹ It is perhaps not surprising that *Pereira's* holding has been thought to have jurisdictional implications, given the language of the regulation in § 1003.14: “Jurisdiction vests, and

188. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *accord Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

189. *See United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164, 1166 (E.D. Wash. 2018) (granting detained alien's motion to dismiss indictment on basis that, under *Pereira*, immigration court lacked jurisdiction over removal proceedings initiated by notice to appear that did not include the date and time of the removal proceedings); *Motion to Dismiss at 9, Ex. C., Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wash. 2018) (No. 2:10-CR-00092) (citing two decisions by immigration judges in Seattle and Phoenix); *Johnson, supra* note 13, at 6; *see also United States v. Zapata-Cortinas*, No. SA-18-CR-00343-OLG, 2018 WL 4770868, at *5 (W.D. Tex. Oct. 2, 2018); *United States v. Pedroza-Rocha*, No. EP-18-CR-1286-DB, 2018 WL 6629649, at *5 (W.D. Tex. Sept. 21, 2018).

proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the [INS].”¹⁹⁰

It makes some sense that advocates for an expansive reading would want *Pereira* to have subject matter jurisdiction implications. At least for Article III courts, a defect in subject matter jurisdiction is considered non-waivable, meaning that it can be raised at any time during the trial of the case, or even afterwards on direct appeal.¹⁹¹ Moreover, federal courts are obligated to confirm the existence of their subject matter jurisdiction and, if they find it lacking, dismiss *sua sponte*, regardless of whether the parties raise it on their own.¹⁹²

It bears saying, however, that treating *Pereira* as a subject matter jurisdiction problem overlooks that defects in subject matter jurisdiction cannot be attacked collaterally, either as to Article III¹⁹³ or Article I courts.¹⁹⁴ As a result, the intended benefits of framing a *Pereira* challenge as implicating the immigration court’s subject matter jurisdiction—even if it had such implications—could only be enjoyed by noncitizens in currently pending or future proceedings. An alternative framing that would treat a defective notice as going to the immigration court’s *personal* jurisdiction might permit collateral attacks on final judgments (assuming that we graft our settled conceptions of state and federal court territorial jurisdiction on immigration courts) but, at bottom, that argument is predicated on the same assumption that a defective notice to appear implicates some form of jurisdiction. As I will show, this fundamental assumption is wrong.

190. 8 C.F.R. § 1003.14(a) (2019).

191. *See, e.g., Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

192. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

193. *Kontrick v. Ryan*, 540 U.S. 443, 455 n.9 (2004).

194. *See, e.g., Nekoba v. Haw. Nat’l Bancshares, Inc. (In re Sunra Coffee, LLC)*, BAP No. HI-11-1635-PaJuH, 2012 WL 3590754, at *4 (B.A.P. 9th Cir. Aug. 21, 2012) (holding that subject matter attack on bankruptcy court judgment could not be made collaterally).

1. *A Defective Notice Does Not Bear on the Immigration Court's Subject Matter Jurisdiction*

As intuitive as it might seem at first blush, it does not follow that because the agency regulation uses the word “jurisdiction,” a notice that lacks the time and place of the proceedings constitutes a jurisdictional defect. The primary difficulty with this view is that a defective notice bears no relevance to the immigration court’s subject matter jurisdiction over the proceedings.

Subject matter jurisdiction for any court—whether for an Article III court, an Article I “legislative court,” or even an administrative tribunal—refers to the adjudicatory authority, or competence, of the court to act.¹⁹⁵ That authority is always derived from, and dependent on, the enabling legislation that the legislature has promulgated “delineating the classes of cases” that the court can hear.¹⁹⁶ Just as Congress set the parameters of the authority it vested in Article III courts in various statutory grants of original jurisdiction,¹⁹⁷ it did the same for immigration courts. But the relevant statute is not § 1229. It is § 1229a. And the language of § 1229a(a)(1) is clear in delineating the classes of cases that an immigration court can hear: “An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”¹⁹⁸ This is the entire scope of an immigration court’s subject matter jurisdictional authority.

But what about the fact that the regulation links jurisdiction to proper notice?¹⁹⁹ Whatever the agency meant when it adopted that regulation (and it is very unlikely that it meant to link the notice to appear to the immigration court’s subject matter jurisdiction), nothing turns on the regulation’s use of the word “jurisdiction.”²⁰⁰

195. See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (“‘Jurisdiction’ refers to ‘a court’s adjudicatory authority.’”) (quoting *Kontrick*, 540 U.S. at 455); *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (noting that “the notion of ‘subject-matter’ jurisdiction obviously extends to ‘classes of cases ... falling within a court’s adjudicatory authority’”) (internal citations omitted).

196. *Reed Elsevier*, 559 U.S. at 160.

197. See, e.g., 28 U.S.C. §§ 1331-1332 (2012). Of course, all such enabling legislation for federal district courts, in turn, derives from the constitutional grant of authority in Article III. See U.S. CONST. art. III, § 1.

198. 8 U.S.C. § 1229a(a)(1) (2012).

199. See 8 C.F.R. § 1003.14(a) (2019).

200. Although the authority citation in the Federal Register for § 1003.14 references three

What matters is not the agency's intent; it is Congress's.²⁰¹ Indeed, even if the agency wanted to treat a defective notice as divesting the immigration court of subject matter jurisdiction, it could not do so if Congress has not predicated subject matter jurisdiction on proper notice.

In *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment*, the Supreme Court held that administrative agencies (in *Union Pacific* the agency was the National Railroad Adjustment Board) cannot curtail their own jurisdiction by regulations or by judicial decision.²⁰² Congress vested the Board with subject matter jurisdiction to adjudicate grievances of railroad employees that remain unresolved after internal dispute resolution procedures.²⁰³ A separate statute imposed a settlement conference requirement on the parties.²⁰⁴ *Union Pacific* rejected the Board's view that the failure to satisfy the conference requirement divested the Board of jurisdiction: "By presuming authority to declare procedural rules 'jurisdictional,' the panel failed 'to conform, or confine itself, to matters [Congress

statutory sections (8 U.S.C. §§ 1103, 1229, 1229a), see 68 Fed. Reg. 9830, 9832 (Feb. 28, 2003), § 1229 is unquestionably the most direct authority on which the relevant regulatory subsection, § 1003.14(a), is based. No other statutory provision defines or further delineates the notice to appear requirement; § 1229(a) does so expressly. Indeed, the title of the section—"Initiation of Removal Proceedings," which was the heading Congress used in section 239 of the Immigration and Nationality Act—Pub. L. No. 104-208, 110 Stat. 3009-587 (1996) underscores that it is the central authority on which § 1003.14, which itself is captioned "Jurisdiction and commencement of proceedings," is based. 8 C.F.R. § 1003.14; see also *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("[A]ny possible ambiguity is resolved against respondents by the title of [the statute]."). In other words, the agency almost certainly meant to mirror Congress's intent in treating the notice to appear as a charging document, akin to the summons that is issued in civil cases by which a civil defendant is notified of the action and directed to file its answer to the plaintiff's petition or complaint.

201. See *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("We must also reject any suggestion that the [agency] may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress."); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 819 (10th Cir. 2012) (en banc); *Prestol Espinal v. Att'y Gen. of the U.S.*, 653 F.3d 213, 218 (3d Cir. 2011); *Schneider v. Chertoff*, 450 F.3d 944, 954-55 (9th Cir. 2006); *Scheerer v. U.S. Att'y Gen.*, 445 F.3d 1311, 1318-19 (11th Cir. 2006).

202. 558 U.S. 67, 71-72 (2009).

203. See *id.* at 71.

204. See *id.* at 72.

placed] within the scope of [the Board's] jurisdiction.”²⁰⁵ Thus, just as in *Union Pacific*, § 1003.14 cannot predicate subject matter jurisdiction on proper notice if Congress has not done so.

And it is clear that Congress has not done so. As we have seen, in § 1229a Congress placed certain matters within the scope of the immigration court's jurisdiction.²⁰⁶ Notably, however, it has not expressly tethered the exercise of jurisdiction to satisfaction of the separate statutory requirements for notices to appear. It is hardly surprising that Congress did not explicitly link the notice to appear to the immigration court's jurisdiction. The notice to appear is akin to a summons or citation that is used in state and federal civil cases to notify civil defendants that they have been sued, or to the type of charging document that is used in criminal proceedings. Indeed, the characterization of a notice to appear as a “charging document” was accepted, at least *arguendo*, by both the majority and the dissent in *Pereira*.²⁰⁷

The Court has frequently wrestled with distinguishing between jurisdictional rules and “claim-processing” rules.²⁰⁸ In many of these cases, claim-processing rules referred to substantive elements of the relevant claim for relief.²⁰⁹ For instance, in *Arbaugh*, the question was whether the “fifteen or more employees” limitation for Title VII claims was jurisdictional.²¹⁰ The Court held that it was not.²¹¹ In other cases, such as *Union Pacific*, the Court drew a line between jurisdiction and rules governing “the presentation and processing of claims.”²¹² In all of the cases, the dividing line was drawn by looking to whether Congress expressly treated the rule as jurisdictional.²¹³

205. *Id.* at 71 (quoting 45 U.S.C. § 153 (2012)).

206. *See generally* 8 U.S.C. §§ 1229-1229(b).

207. *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 n.7 (2018); *id.* at 2128 (Alito, J., dissenting).

208. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (noting that “the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice” and that “[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations”).

209. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006).

210. *Id.*

211. *Id.* at 504.

212. *Union Pacific R.R. v. Bd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 61, 71 (2009).

213. *See, e.g., Arbaugh*, 546 U.S. at 515-16 (“If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not

There certainly are situations when the immigration court will lack subject matter jurisdiction. For instance, § 1229a does not give authority to the immigration courts to decide cases involving United States citizens; the statute only extends jurisdiction to decide cases involving *an alien*.²¹⁴ As the Supreme Court has observed, “alienage is a jurisdictional fact.”²¹⁵ And an assertion of U.S. citizenship “is thus a denial of an essential jurisdictional fact.”²¹⁶ Note also that § 1229a limits the subject matter jurisdiction of the immigration courts to deciding questions of “inadmissibility or deportability.”²¹⁷ Cases that involve any other questions would be outside the scope of this grant of jurisdiction. To use an outlandish example, imagine that someone tried to file a breach of contract civil action with the immigration court. If the clerk did not outright reject it, as we would expect, the immigration judge certainly should dismiss it on subject matter grounds. Immigration courts cannot resolve contract disputes any more than they can declare the validity of a patent or probate a will. These cases concern issues other than the *inadmissibility* and *deportability* of *aliens*, which is the extent of the subject matter jurisdiction that Congress has given to the immigration courts.²¹⁸ If the courts tried to do anything else, they would be acting *ultra vires*.

For present purposes, there is no difficulty in distinguishing between Congress’s grant of subject matter jurisdiction to the immigration courts, and the separate statutory requirements for notices to appear, which indisputably are not expressly treated as jurisdictional requirements. This is exactly what the Seventh Circuit had in mind in *Ortiz-Santiago* when it pointed to *Arbaugh* and its progeny and concluded that § 1229(a) “says nothing about the agency’s jurisdiction.”²¹⁹ And as for the fact that the administrative

rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” (footnote omitted) (citations omitted)).

214. See 8 U.S.C. § 1229a(a)(1) (2012).

215. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923); see also Gonzalez-Alarcon v. Macias, 884 F.3d 1266, 1280 (10th Cir. 2018) (“[A]lienage is also a jurisdictional prerequisite ... because immigration judges and the Board do not have subject-matter jurisdiction over United States citizens.”) (emphasis omitted) (citing *Iasu v. Smith*, 511 F.3d 881, 893 (9th Cir. 2007)).

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

217. 8 U.S.C. § 1229a(a)(1).

218. See *id.*

219. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019).

regulation in § 1003.14 describes when jurisdiction vests? Irrelevant, the Seventh Circuit correctly concluded. “While an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases.... [W]hen the agency creates the rules for its adjudicatory proceedings, it must act within the limits that Congress gave it.”²²⁰

Finally, the conclusion that § 1229(a)'s requirements are more like claims-processing rules, and are not jurisdictional, is further bolstered by a decision the Court handed down almost a year to the day after *Pereira*. The question in *Fort Bend County v. Davis* was whether Title VII's charge-filing precondition to suit is a jurisdictional requirement.²²¹ Certainly, the statute is clear that in order to maintain a Title VII employment discrimination action in court, a complainant must first file an administrative charge with the Equal Employment Opportunity Commission.²²² But that charge-filing requirement, while mandatory, does not have any effect on the court's jurisdiction, as the Court explained in *Fort Bend County*, further elaborating on its earlier decisions.²²³

Jurisdictional requirements are “generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction).”²²⁴ Congress can enact jurisdictional requirements, the Court recognized, “by incorporating them into a jurisdictional provision,” such as Congress has done with the amount-in-controversy requirement for federal court diversity jurisdiction.²²⁵ The Court will also treat a requirement as jurisdictional when a “long line” of prior Supreme Court decisions have treated it that way.²²⁶ In short, only when Congress “clearly states” that a requirement is jurisdictional should courts treat it as such. But “when Congress does not rank a [prescription] as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”²²⁷

220. *Id.*

221. 139 S. Ct. 1843, 1846 (2019).

222. *Id.* (citing 42 U.S.C. § 2000e-5(c)).

223. *Id.* at 1849-51.

224. *Id.* at 1846.

225. *Id.* at 1849 (citing 28 U.S.C. § 1332(a)).

226. *Id.* (citing cases).

227. *Id.* at 1850 (alteration in original).

Having recited its familiar framework for distinguishing jurisdictional from nonjurisdictional rules, the Court in *Fort Bend County* concluded that prerequisites to suit “like Title VII’s charge-filing instruction are not of that character; they are properly ranked among the array of claim-processing rules that must be timely raised to come into play.”²²⁸ A claim-processing rule may be “mandatory” in the sense that a court must enforce the rule if a party “properly raise[s] it. But an objection based on a mandatory claim-processing rule may be forfeited ‘if the party asserting the rule waits too long to raise the point.’”²²⁹

Fort Bend County, then, makes even clearer what should already have been apparent to anyone wading into the debate over *Pereira*’s jurisdictional import. The government’s failure to satisfy all of § 1229(a)’s requirements in the notice to appear may provide a basis to challenge the propriety of notice, but that failure does not implicate the immigration court’s subject matter jurisdiction.²³⁰

2. A Defective Notice Also Does Not Implicate the Immigration Court’s Personal Jurisdiction

That a defective notice to appear also does not implicate the immigration court’s personal jurisdiction is equally plain. While it is possible for a legislative body to link the issuance of notice to the exercise of territorial jurisdiction, Congress has not done so here. Section 1229(a) requires that a notice to appear be used to commence removal proceedings, as both its title—“Initiation of removal proceedings”—and its text reflect.²³¹ Notably, the section does not make issuance of the notice a requirement to establish territorial jurisdiction.²³²

228. *Id.* at 1846.

229. *Id.* at 1849 (internal citations omitted).

230. *See Kohli v. Gonzales*, 473 F.3d 1061, 1069 (9th Cir. 2007) (rejecting the argument that an alleged defect in the notice to appear deprived the immigration court of jurisdiction); 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 4.02[3] (Matthew Bender ed., 3d ed. 2019) (noting that service under Rule 4 relates to personal, not subject matter, jurisdiction).

231. 8 U.S.C. § 1229(a)(1) (2012) (“In removal proceedings under section 1229a of this title, written notice (in this section referred to as a ‘notice to appear’) shall be given.”).

232. *See id.*

And the reason that Congress did not make the immigration court's territorial jurisdiction dependent on issuance of the notice is that no such linkage is necessary. Because immigration judges decide whether to admit or deport noncitizens, the physical presence of noncitizens in the country (or their consent, when it comes to applications for admission) is all that is needed to confer power over them.²³³ In *INS v. Lopez-Mendoza*, the Court held that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest ... occurred."²³⁴ The noncitizen in *Lopez-Mendoza* objected to being summoned to appear at a deportation hearing on the grounds that he was unlawfully arrested.²³⁵ But the Court rejected his objection, noting that the "mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding."²³⁶ Although *Lopez-Mendoza* has generated a great deal of confusion regarding whether it created an evidentiary rule that insulated certain identity-based evidence from suppression,²³⁷ courts and commentators have long accepted that it does articulate a rule of personal jurisdiction for the immigration courts.²³⁸ *Lopez-Mendoza*, thus, can be read to foreclose any argument that a defect in the notice to appear impacts the personal jurisdictional authority of the immigration court over the non-citizen.²³⁹

233. See *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 199 (E.D. Pa. 1974) ("[T]he United States is deemed to have personal jurisdiction over any defendant within the United States."); 4 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1068.1 n.21 (4th ed. 2018) ("Despite the almost complete abandonment of territoriality as a limitation on state jurisdictional powers, the holding of *Pennoyer v. Neff* that a state may exercise personal jurisdiction over anyone found within its territory remains good law." (citation omitted)). See generally Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1204 n.249 (2014).

234. 468 U.S. 1032, 1039 (1984).

235. *Id.* at 1034.

236. *Id.* at 1040 (quoting *Lopez-Mendoza*, No. AZZ 45Z 208 (B.I.A. 1979)).

237. See, e.g., *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007) (noting that *Lopez-Mendoza's* identity statement "has bedeviled and divided our sister circuits").

238. See, e.g., *Pretzantzin v. Holder*, 736 F.3d 641, 646-47 (2d Cir. 2013); see also David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 553, 573 n.125 (2012).

239. Even if the minimum contacts analysis that applies to state and federal courts is appropriate to use to determine the territorial jurisdiction of immigration courts, because they are created by Congress, not the states, the relevant sovereign for territorial jurisdiction

B. Retroactivity, Forfeiture, and Prejudice

We have seen that a notice to appear that lacks the proceeding's time and place does not implicate either the subject matter or personal jurisdictional authority of the immigration court. Unfortunately, the predominant approach among courts and advocates has been to examine *Pereira* challenges solely in terms of whether a defective notice has jurisdictional consequences.²⁴⁰ This is unfortunate because courts have conflated the question of whether a *Pereira* defect implicates jurisdiction with whether it has any consequences at all. Cases such as the Ninth Circuit's decision in *Karingithi* illustrate the kind of tunnel vision courts have shown in applying *Pereira*.²⁴¹

It does not follow, however, from the (correct) conclusion that *Pereira* is irrelevant to jurisdiction that there are no consequences if the government has served a defective notice. In the following Sections, I show that whether a *Pereira* challenge can be successfully made, and how, turns on three factors: *Pereira*'s applicability, either prospectively or retrospectively;²⁴² the possibility of forfeiture;²⁴³ and, finally, the noncitizen's ability to demonstrate prejudice (i.e., harmful error), resulting from service of a defective notice.²⁴⁴

1. Retroactivity

The first factor that will sometimes govern whether a *Pereira* challenge can be successfully made is whether the Court's decision can be applied retroactively. Although this was not always the case,²⁴⁵ today the general starting presumption is that new judicial

purposes is the United States. *See Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 946 n.21 (11th Cir. 1997). Thus, the relevant inquiry would be whether the noncitizen has contacts with the country as a whole. *See id.* Because § 1229(a) operates as a nationwide service of process statute, personal jurisdiction may be said to obtain over any noncitizen who has minimum contacts with the United States as a whole. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

240. *See, e.g., Karingithi v. Whitaker*, 913 F.3d 1158, 1160-61 (9th Cir. 2019).

241. *See id.*

242. *See infra* Part III.B.1.

243. *See infra* Part III.B.2.

244. *See infra* Part III.B.3.

245. *See* Charles W. "Rocky" Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 390

decisions apply retroactively to all pending cases.²⁴⁶ In *Teague v. Lane* and its progeny, the Court made clear that under certain circumstances judicial decisions can apply retroactively in criminal cases that are still on direct appeal.²⁴⁷ Thereafter, with regard to civil retroactivity, in *Harper v. Virginia Department of Taxation*, the Court observed:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.²⁴⁸

Correlatively, the general rule against retroactivity for fully closed cases is quite clear, both as to criminal²⁴⁹ and civil²⁵⁰ cases. As Justice Harlan noted in his concurrence in *United States v. Estate of Donnelly*, a judicial decision is not applied retroactively to any case that has reached

(2018) (“Before the twentieth century, the concept of adjudicative retroactivity ... was essentially unknown.”).

246. See Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 211 (2011) (noting that “the general rule is that new decisions apply retroactively, at least to all cases that are still pending on appeal”).

247. See 489 U.S. 288, 300-01 (1989). *Teague* distinguished between new rules, which are not applied retroactively, and the application of settled rules, which are. See *id.* That distinction has often proven vexing. See, e.g., *Chaidez v. United States*, 568 U.S. 342, 347-49, 353-55 (2013). It poses no obstacle for present purposes because *Pereira* construed statutory language, it did not announce a new rule. See Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1076 (1999) (referring to the retroactivity of judicial interpretations of statutes and noting that “[s]ince an unchanging statute backs the judicial interpretations, it makes sense to say that while decisions may change, the law remains the same. An overruled decision is simply wrong; it is not and was never the law”).

248. 509 U.S. 86, 97 (1993).

249. See *Schiro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (“When a decision of this Court results in a ‘new rule,’ that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances.” (citation omitted)); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (“[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.”).

250. See, e.g., *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) (refusing to retroactively apply decision that subsequently declared applicable federal statute unconstitutional).

such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final ... so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*.²⁵¹

The Court put it likewise in *Federated Department Stores, Inc. v. Moitie*: “[T]he *res judicata* consequences of a final, unappealed judgment on the merits [cannot be] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”²⁵² Quoting its earlier decision in *Reed v. Allen*, *Moitie* recognized that “[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.”²⁵³ In short, as we saw above, the general rule is that judicial retroactivity extends no further than to “cases still open on direct review.”²⁵⁴

251. 397 U.S. 286, 296 (1970) (Harlan, J., concurring).

252. 452 U.S. 394, 398 (1981) (emphasis added).

253. *Id.* at 398-99 (alteration in original) (quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932)).

254. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993). It might be noted that the courts, on some occasions, do apply subsequent changes in decisional law retroactively even as to closed cases. Perhaps the most prominent recent example that can be cited is *Lugo-Resendez v. Lynch*. See 831 F.3d 337, 344 (5th Cir. 2016). In that case, a noncitizen pleaded guilty in state court to a felony possession of less than one gram of a controlled substance. *Id.* at 339. Thereafter, the government commenced removal proceedings against him on the basis that his state conviction qualified as an aggravated felony. *Id.* The noncitizen did not challenge the basis for his removal and a removal order was entered. *Id.* More than a decade later, the noncitizen filed a motion to reopen under § 1229a(c)(7), citing as grounds a Supreme Court decision that came out several years after the noncitizen was removed. *Id.* In it, the Court held that simple possession does not qualify as aggravated felony for immigration purposes. *Id.*

The Fifth Circuit’s primary holding in *Lugo-Resendez* was that the noncitizen’s motion to reopen was not untimely because equitable tolling applied to the ninety-day deadline for filing a motion to reopen under § 1229a(c)(7)—joining the majority of courts that similarly have recognized that the deadline for filing a statutory motion to reopen can be extended by equitable tolling. *Id.* at 343-44. Ultimately, *Lugo-Resendez* did not decide whether the deadline should be equitably tolled in the case. *Id.* at 344. However, by remanding the case to the BIA to decide whether the deadline should be equitably tolled, the Fifth Circuit appeared to implicitly recognize that the subsequent changes in decisional law could apply retroactively, even though the effect of doing so would be to reopen a removal order entered

Notwithstanding the general rule against retroactivity as to fully resolved cases, there are two statutory sections applicable to certain removal proceedings that arguably authorize courts to retroactively apply subsequent judicial decisions to fully resolved cases. Rather than discuss those here, I will address the two statutory exceptions when we consider the last case type in which a *Pereira* challenge may arise, in Part III.C, below.

2. Forfeiture

A second factor that will sometimes be relevant in deciding whether a *Pereira* challenge can succeed is whether the noncitizen timely raised a challenge to the notice. A generally recognized principle of law is that litigants must timely raise legal points or they are forfeited.²⁵⁵ Forfeiture is “the failure to make timely assertion of the right.”²⁵⁶

The tricky question is whether to regard an argument as forfeited if it was not then available to be made under the existing law. On the one hand, it seems intuitively right to say that a party cannot be said to have forfeited an argument if the governing cases previously rejected it and there was no good faith basis for asserting

thirteen years earlier. *See id.*

While *Lugo-Resendez* indicates that courts sometimes will retroactively apply subsequent decisions that change the law to fully final cases, *id.* at 339, 343-44, it is reasonable to read the Fifth Circuit’s decision narrowly. At most, the case may stand for the proposition that a change in criminal status, resulting from subsequent judicial classification of a crime, must be applied retroactively as a matter of constitutional due process. *See id.* Even under the standard *Teague* analysis, new substantive rules do apply retroactively even to closed cases. *See Schriro*, 542 U.S. at 351-52. It is new procedural rules that do not apply after a case is closed. *See id.* at 352. A substantive rule would be something like a rule that the state cannot criminalize flag burning or cannot execute minors. (Admittedly, *Teague* is about criminal cases. *See Teague v. Lane*, 489 U.S. 288, 299-301 (1989)).

255. *Yakus v. United States*, 321 U.S. 414, 444 (1944) (“No procedural principle is more familiar to this Court than that a ... right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” (citations omitted)). Forfeiture is related to but said to be distinct from waiver, which involves the “intentional relinquishment or abandonment of a known right.” *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Of course, a litigant’s failure to timely assert a right may have been intentional, so there is much overlap between the two and the Supreme Court has pointed out that the words are often used interchangeably. *See id.* That said, for purposes of this Article, I will continue to use the word forfeiture for consistency’s sake.

256. *Yakus*, 321 U.S. at 444.

otherwise.²⁵⁷ And, indeed, there is a doctrine referred to as the intervening law exception (it is sometimes also called the supervening decision exception) that captures this intuition.²⁵⁸ However named, the exception finds support in the Supreme Court's decision in *Curtis Publishing Co. v. Butts*, which held that the failure to raise a constitutional defense did not amount to forfeiture because the basis for the defense came from a later decision.²⁵⁹ The animating idea seems entirely sensible: we do not want to incentivize lawyers to make groundless arguments that are foreclosed by existing law.²⁶⁰ Note though, that the intervening law exception to forfeiture readily accommodates nonfrivolous arguments that existing law is wrong and should be changed.²⁶¹ That is especially important, of course, when it comes to fundamental rights. Think of arguments that lawyers had to make to convince the Court to overturn its imprimatur of the loathsome separate-but-equal doctrine.²⁶²

Somewhat surprisingly, the intervening law exception is not universally accepted. Numerous courts, especially in civil cases, use the plain error standard of review to refuse to consider arguments not previously raised, even when the argument is based on a subsequent judicial change in the law.²⁶³ However, even among those courts that consider unraised issues to be forfeited, there usually is recognition, following *Butts*, that forfeiture should not be found if “there was strong precedent’ prior to the change ... such that the failure to raise the issue was not unreasonable and the opposing

257. *Cf., e.g.*, FED. R. CIV. P. 12(g)(2) (“[A] party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.”); FED. R. CRIM. P. 12(f) advisory committee’s note to 1974 amendment (“[F]ailure [by a party] to raise the objections or make the requests [which must be made prior to trial] constitutes a waiver thereof.”).

258. *See Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, 254 F. Supp. 3d 836, 838 (E.D. Va. 2017).

259. 388 U.S. 130, 143 (1967).

260. *See Bruhl, supra* note 246, at 213 (“[I]t does not seem fruitful to encourage attorneys to raise a raft of futile arguments that the district judge has no choice but to reject.”).

261. *Cf., e.g.*, FED. R. CIV. P. 11(b)(2) (approving the assertion of claims, defenses, and other legal contentions that “are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”).

262. For an excellent discussion of the litigation strategy that led to *Brown v. Board of Education of Topeka*, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004).

263. *See, e.g.*, *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999).

party was not prejudiced by the failure to raise the issue sooner.”²⁶⁴ Still others recognize that there should be no forfeiture when the law “was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless” prior to the subsequent judicial change in the law.²⁶⁵ Courts have also accepted that when there has been an intervening adjudicative change in the law, there has been no forfeiture when the issues that were not raised “are questions of law, the proper resolution of which are beyond reasonable doubt, and the failure to address the issues would result in a miscarriage of justice.”²⁶⁶

Because the law of forfeiture is not as well settled as it should be, a number of courts have been willing to find arguments forfeited even when they are based on subsequent adjudicative changes to the law. Thus, even though *Ortiz-Santiago* correctly recognized that *Pereira*'s construction of § 1229(a) applies to all notices to appear and that the immigration court's subsequent mailing of a notice of hearing does not cure a defect in the original notice to appear, the Seventh Circuit nevertheless concluded that the noncitizen forfeited his right to raise a *Pereira* challenge.²⁶⁷ The court's analysis is hard to defend. After all, *Pereira*'s construction of § 1229 was previously rejected by almost every other intermediate appellate court, including the Seventh Circuit itself.²⁶⁸ The court candidly acknowledged that “[w]e had rejected the exact argument *Ortiz-Santiago* sought to make about section 1229(a)'s time-and-place information requirement” and that “*Pereira* thus represented a genuine change in circumstances,” normally sufficient to avoid forfeiture.²⁶⁹ But the court nevertheless concluded that in *Ortiz-Santiago*'s case “there were signs that a meritorious argument could be raised [before *Pereira*].”²⁷⁰

What were these signs? The primary one, apparently, was that he could have noted “the clear statutory text,” even though the court

264. *Id.* at 605-06 (quoting *Curtiz Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967)).

265. *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994); *see also, e.g.*, *Brown v. M&M/Mars*, 883 F.2d 505, 512-13 (7th Cir. 1989).

266. *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990) (per curiam).

267. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961, 964 (7th Cir. 2019).

268. *See, e.g.*, *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006); *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2005).

269. *Ortiz-Santiago*, 924 F.3d at 964.

270. *Id.*

just got through reminding readers that its own prior construction of the language in § 1229(a) rejected the noncitizen's argument that the government's failure to provide time-and-place information in the notice to appear failed to interrupt the period of continuous presence for cancellation of removal eligibility.²⁷¹ Indeed, back then, when it rejected the noncitizen's argument that Congress did not intend a defective notice to appear to interrupt the continuous presence clock, *Dababneh* concluded that § 1229(a)'s language was "clear."²⁷²

The only other "sign" the Seventh Circuit said that the noncitizen in *Ortiz-Santiago* should have seen is equally suspect. According to the court, although every other appellate court had firmly rejected the argument that a notice lacking time-and-place information was insufficient, *Ortiz-Santiago* "could have noted" that the Third Circuit disagreed.²⁷³ Yet, the Seventh Circuit had previously said, "Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits."²⁷⁴ To be sure, in a nonprecedential decision the Court refused to impose sanctions when a litigant, citing other circuit authorities that contradict Seventh Circuit controlling precedent, argued for a modification of the law.²⁷⁵ But that is an awfully thin reed to expect other litigants to hang on to, especially when the circuit consistently rejected all prior efforts to reject *Dababneh*.²⁷⁶ Indeed, although the Seventh Circuit thought it important that the Third Circuit's decision in *Orozco-Velasquez* was decided before *Ortiz-Santiago*'s case, it made no mention that it repeatedly relied on its decision in *Dababneh* to reject arguments challenging the sufficiency of a defective notice to appear.²⁷⁷

271. *Id.* at 960, 964 (citing *Dababneh*, 471 F.3d at 810).

272. *Dababneh*, 471 F.3d at 810.

273. *Ortiz-Santiago*, 924 F.3d at 964.

274. *Atchison, Topeka & Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 443 (7th Cir. 1994).

275. *Perfection Bakeries, Inc. v. Chauffeurs, Teamsters and Helpers, Local Union No. 414*, No. 03-3392, 2004 WL 1662253, at *3-4 (7th Cir. July 14, 2004).

276. *See, e.g., Yi Di Wang v. Holder*, 759 F.3d 670, 673-74 (7th Cir. 2014); *Mozdzen v. Holder*, 622 F.3d 680, 685 (7th Cir. 2010).

277. *See, e.g., Gutierrez-Berdin v. Holder*, 618 F.3d 647, 653 (7th Cir. 2010) ("The fact that the NTA left the time and date of a deportation hearing to be determined at a future date did not render it defective because subsequent documents set out the requisite information." (citing *Dababneh*, 471 F.3d at 809)); *Mozdzen*, 622 F.3d at 685 ("The argument that the stop-time rule does not apply here is contrary to the plain language of the statute and

As I have said, in my view cases such as *Ortiz-Santiago* are not well reasoned as they would seem to encourage the assertion of arguments not viable under existing law. At the very least, it is encouraging that numerous other courts appear to recognize, following *Butts*, that forfeiture should not be found when the law was so well settled as to foreclose any argument to the contrary.

3. Prejudice

Finally, even assuming that the first two hurdles have been crossed, for any case in which a merits hearing has already been held, courts should also insist that the noncitizen demonstrate prejudice to successfully make a *Pereira* challenge. To be more precise, as I explain below, by saying that a showing of prejudice must be made I mean to refer to a particular type of harm—namely, that courts should only allow a *Pereira* challenge as a basis for reopening proceedings if the noncitizen can show that the outcome of the removal proceedings might be different if the proceeding is retried.

To be sure, it is not immediately clear from the cases that this type of prejudice requirement exists when the government fails to comply with statutory or regulatory requirements applicable to notices to appear. A primary reason that the law is unclear is that nearly all of the prior challenges to notices have been unable to show proof of noncompliance with an express statutory or regulatory requirement.²⁷⁸ For instance, in *Faiz v. Holder*, the noncitizen argued that the notice was defective because it was not written in her native language.²⁷⁹ The court rejected her complaint, noting that the statute did not require that notice be given in any particular language.²⁸⁰ For the same reason, in *Parra-Morela v. Holder*, the court found that the alleged defect in the notice—that the officer who issued it failed to personally sign it—was acceptable because no

precedent, and we reject it." (internal citations omitted)); *Yi Di Wang*, 759 F.3d at 674-75 (extending *Dababneh* and deferring to the BIA's decision in *Camarillo*, 25 I. & N. Dec. 644, 647 (B.I.A. 2011)).

278. See *Parra-Morela v. Holder*, No. 11-4064, 2012 WL 5439992, at *1-2 (6th Cir. Nov. 8, 2012) (per curiam); *Faiz v. Holder*, No. 08-6173-dg, 2010 WL 445506, at *1-2 (2d Cir. Feb. 8, 2010); *Lazaro v. Mukasey*, 527 F.3d 977, 978, 980 (9th Cir. 2008).

279. 2010 WL 445506, at *1.

280. *Id.*

statute or regulation imposes a personal signature requirement.²⁸¹ And in *Lazaro v. Mukasey*, the alleged defect was that the notice failed to fully specify the noncitizen's violations that subjected them to removal, as § 1229(a)(1)(D) requires.²⁸² However, the court rejected that argument finding that the notice, while poorly done, satisfied § 1229(a)(1)(D) ("albeit minimally") by giving some sense of the reasons why the noncitizen was removable.²⁸³

Because the noncitizens in these cases failed to show a lack of compliance with an express statutory or regulatory requirement, it is hardly surprising that most of the cases do not discuss any further requirement to show prejudice. But while the challenges to the notices in these cases all floundered on the noncitizen's failure to show that the government violated some express legal requirement, one of the most commonly cited cases in this area does suggest that it is not enough merely to show lack of compliance with a statutory notice requirement.²⁸⁴

In *Kohli v. Gonzales*, the noncitizen argued that the removal order should be set aside because the name and title of the officer who issued the notice to appear were not legible.²⁸⁵ As in the prior cases cited above, the court found that there was no legibility requirement.²⁸⁶ However, the court in *Kohli* went on to say that the noncitizen also separately failed to show that she suffered any prejudice by the alleged defect.²⁸⁷ The court cited some of its earlier decisions in which it insisted that a violation of an INS regulation does not justify invalidating a deportation proceeding unless the violation "prejudiced the interests of the alien ... that it was intended to protect."²⁸⁸ In *Kohli*, the court reasoned that even if the notice to appear should have included a legible version of the issuing officer's name and title, the notice "fully informed Kohli of

281. 2012 WL 5439992, at *1-2.

282. 527 F.3d 977, 980 (9th Cir. 2008).

283. *Id.*

284. *See Kohli v. Gonzales*, 473 F.3d 1061, 1066-68 (9th Cir. 2007).

285. *Id.* at 1065.

286. *Id.* at 1068 ("As Kohli has not shown that any statute or regulation requires the inclusion of the name and title of the issuing officer on the [notice to appear], it follows that she has not shown that the fact that the name and title on her [notice to appear] are illegible constitutes a violation of a regulation.").

287. *Id.* at 1066-67.

288. *Id.* at 1067 (citing *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980)).

the charges against her” and told her when and where to appear at the hearing to contest the government’s bid to remove her.²⁸⁹

Note that *Kohli*’s concern about prejudice is a specific type of concern. It is most closely analogous to the rationale invoked by cases on the civil side that refuse to dismiss or quash service of process on a defendant under Rule 12(b)(4) of the Federal Rules of Civil Procedure absent a showing of prejudice.²⁹⁰ The prejudice that these cases usually talk about is that the defendant did not receive actual and adequate notice.²⁹¹ As one district court put it in denying a civil defendant’s motion to dismiss for insufficient process, “Noncompliance with Rule 4 does not mandate dismissal where the necessary parties have received actual notice of a suit and where they have not been prejudiced by the technical defect in service.”²⁹² This is entirely consistent with *Kohli*’s dicta that because she was “fully informed” of the charges against her and given notice of the removal hearing, any technical error in the form of the notice could be excused.²⁹³

To be sure, the kind of prejudice that results when defective notice deprives the defending party of actual, adequate notice is one kind of significant harm that we should care about. But it is not the only type of harm that matters. Indeed, it bears noting that non-citizens do not need to insist on this sort of prejudice showing to support a *Pereira* challenge. A lack of actual notice, combined with a failure to take steps reasonably calculated to ensure that notice is given, would be an independent basis for relief, one that is firmly grounded in the due process protections of the Constitution.²⁹⁴ In

289. *Id.*

290. 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1353 & n.28 (3d ed. 2018)

291. *Id.*

292. *Simmons v. Stokes*, No. 8:11-cv-00175-RMG-JDA, 2011 WL 2198298, at *1 (D.S.C. May 11, 2011).

293. *Kohli*, 473 F.3d at 1067.

294. *See The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903) (“[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.”); *see also Nazarova v. INS*, 171 F.3d 478, 482 (7th Cir. 1999) (noting that due process is only

other words, if a noncitizen can show that he did not receive actual notice when he should have and that reasonable steps were not taken to provide him with notice, then invocation of a *Pereira* challenge is unnecessary.

By contrast, the kind of prejudice showing that courts should require before allowing a *Pereira* challenge in a case that has had a merits hearing is separate and distinct from the prejudice requirement that results when there has not been actual, adequate notice or any reasonable attempt to provide it. When we are dealing with a case that has already been tried on the merits, it surely makes sense to insist that the party who received defective notice must show that the outcome of the case might be different if we invalidate the proceedings on the basis of faulty notice and force the complaining party to retry its case again. If the defending party cannot show the outcome might be different, it is very hard to justify starting over. Without a prejudice requirement, courts would have to invalidate cases based solely on a technical defect in the form of notice, even when reopening all of these proceedings would not change their outcomes. Because of the tremendous burdens on the administration of the law that would result, the courts should not invalidate prior decisions solely to correct technical errors if there is no plausible possibility of a different outcome. In this regard, requiring the party who receives defective notice to show a potentially different outcome before invalidating the previous proceedings is consistent with the Court's expressed unwillingness to apply new decisional law retroactively if the administrative burdens of doing so would be too great.²⁹⁵

This conception of a prejudicial-error requirement for any case in which a merits hearing has been held is also consistent with the legal principle embodied in § 706 of the Administrative Procedure Act that agencies' errors are only subject to correction if they cause

satisfied if notice is accorded in a manner "reasonably calculated" to ensure that notice reaches the alien).

295. *Cf. Ryder v. United States*, 515 U.S. 177, 184-85 (1995) (rejecting the government's argument against retroactive application of the judicial decision relating to the appointment of civilian judges to a military court, noting that "the defective appointments of the civilian judges affect only between 7 to 10 cases pending on direct review" and that "[a]s for the Government's concern that a flood of habeas corpus petitions will ensue, precedent provides little basis for such fears").

harm.²⁹⁶ As the First Circuit once explained, “[a]gency missteps ... may be disregarded where it is clear that a remand ‘would accomplish nothing beyond further expense and delay.’”²⁹⁷ The case that occasioned that comment is illustrative. In *Save Our Heritage, Inc. v. FAA*, the question was whether to set aside an agency decision authorizing air passenger service from a general aviation airport over objections from preservationist groups concerned about the adverse effects of the additional flights on historic and natural resources near the airport.²⁹⁸ On appeal, the groups argued that the agency violated several statutory and regulatory requirements in conducting their environmental assessment of the impact of authorizing the new flights.²⁹⁹ The First Circuit held that even if the groups were right that the agency failed to follow all legal requirements, they were unable to show that the agency’s factual findings, on which its ultimate decision was based, might have been altered.³⁰⁰ Recognizing that some failures to comply with the law are “too fundamental to disregard,” the court nevertheless concluded:

We will assume that an environmental assessment and finding of no significant impact might look somewhat different in form and follow somewhat more complicated procedures than the study and findings by the FAA in this case. But this case does not involve a simple refusal to study environmentally problematic consequences. On the contrary, even though only seven to

296. 5 U.S.C. § 706(2) (2012) (“[D]ue account shall be taken of the rule of prejudicial error.”); *see* *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (finding the rule of prejudicial error applicable to the Veterans Court, noting identical use of language as the APA’s prejudicial-error rule in § 706, and noting that “the APA’s reference to ‘prejudicial error’ [in § 706] is intended to ‘su[m] up in succinct fashion the ‘harmless error’ rule applied by the courts *in the review of lower court decisions as well as of administrative bodies*”) (alteration in original) (quoting U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 110 (1947)); *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (“If the agency’s mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.”). *But see* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 259-60 (2017) (noting that the significance of the prejudicial-error rule for agencies has been “downplayed or ignored” by the Supreme Court and academic commentators, but noting that it has been more robustly applied by the lower courts).

297. *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 61-62 (1st Cir. 2001) (quoting *Kerner v. Celebrezze*, 340 F.2d 736, 740 (2d Cir. 1965)).

298. *Id.* at 53-54.

299. *Id.* at 54.

300. *Id.* at 61-63.

ten flights a day are realistically at issue, the FAA examined each of the three principal possible negative effects and found each to be *de minimis*, and petitioners have provided no basis for serious doubt about those findings.³⁰¹

In short, “[r]emanding for a differently named assessment, where the project’s negative consequences have already been analyzed and found to be absent and the findings have been disclosed to interested parties, is a waste of time,” the court held.³⁰²

In excusing the agency error as harmless, the First Circuit relied on Judge Friendly’s decision in *Kerner v. Celebrezze* that similarly rejected a procedural error by the agency. The error in *Kerner* was that the statute required the initial administrative fact-finder who heard evidence to record their impressions of the witnesses for the benefit of later administrative and judicial decision makers.³⁰³ That did not happen. But while accepting that this procedural error had occurred and an objection was timely raised, the court refused to reverse the agency’s determination because there was no prejudice.³⁰⁴ Once again, the problem was that the complaining party failed to show that if the agency error had not occurred, the ultimate result would have been different.³⁰⁵ As Judge Friendly put it, “It would be fatuous to suppose that if the hearing officer had recommended a decision in Kerner’s favor, the ultimate result would have been different or that a remand to obtain a recommendation from him now would accomplish anything save further expense and delay.”³⁰⁶

The principle behind the prejudicial-error rule of § 706, in turn, mirrors Rule 61 of the Federal Rules of Civil Procedure, which applies in all civil cases in federal court.³⁰⁷ As noted above, the federal courts routinely refuse to dismiss or quash service of process on a defendant for insufficient process if actual notice was received.³⁰⁸

301. *Id.* at 61-62 (internal citation omitted).

302. *Id.* at 62.

303. *Kerner v. Celebrezze*, 340 F.2d 736, 739-40 (2d Cir. 1965).

304. *Id.* at 740.

305. *Id.*

306. *Id.* (internal citation omitted); *see also* *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (noting that “a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency’s determination”).

307. FED. R. CIV. P. 61 (“At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”).

308. *See supra* notes 290-92 and accompanying text.

But a showing of prejudice under Rule 61 also cannot be established if the service “error is harmless in that it does not change the ruling in the case by affecting a substantial right of one of the parties.”³⁰⁹

To sum up: courts should insist that the noncitizen demonstrate prejudice to successfully make a *Pereira* challenge. By prejudice, I do not mean the type of prejudice showing that can be made when the defending party does not receive actual and adequate notice and attempts at providing notice were not reasonably calculated to do so. The entitlement to relief in that circumstance already exists. The prejudice showing that must be made by a noncitizen when a merits hearing has already been held is, instead, to show that the outcome of the removal proceedings might be different if the government is forced to start over by issuing a notice that fully complies with § 1229(a). This requirement will ensure that the courts are not overwhelmed by motions to reopen removal proceedings based solely on a technical defect in the form of notice if there is no colorable chance that retrying all of those cases would change their outcomes.

C. *The Four Case Types*

Thus far, I have shown that whether a *Pereira* challenge can be successfully made should involve consideration of three factors: *Pereira*'s applicability, either prospectively or retrospectively;³¹⁰ the possibility of forfeiture;³¹¹ and, finally, the noncitizen's ability to demonstrate prejudice resulting from service of a defective notice.³¹² But not all of these three factors will apply in every instance.

In this final Part of the Article, I discuss the four different case types in which a *Pereira* challenge might possibly arise. These are: (1) proceedings commenced after the Court's decision was announced; (2) proceedings commenced before *Pereira*, but in which no

309. *Allied Semi-Conductors Int'l, Ltd. v. Pulsar Components, Int'l, Inc.*, 907 F. Supp. 618, 623 (E.D.N.Y. 1995). See generally WRIGHT ET AL., *supra* note 290, § 1353. Appellate courts, of course, also review trial court decisions in accordance with the policy reflected in Rule 61. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (“While in a narrow sense Rule 61 applies only to the district courts ... it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61.” (internal citations omitted)).

310. See *supra* Part III.B.1.

311. See *supra* Part III.B.2.

312. See *supra* Part III.B.3.

merits hearing has yet taken place; (3) proceedings commenced before *Pereira* that are currently on appeal; and, lastly, (4) proceedings commenced before *Pereira* that are final and for which all appeals already have been exhausted. As we will see, the three critical factors that control whether a *Pereira* challenge can be made—retroactivity, forfeiture, and prejudice—vary by case type.

1. Proceedings Commenced After Pereira in Which No Merits Hearing Has Been Held

This is perhaps the easiest case type. Retroactivity is not an issue; application of forfeiture doctrine is straightforward; and there should be no additional requirement to show prejudice.

a. Retroactivity

Retroactivity is not an issue for this case type. There can be no dispute that *Pereira* applies prospectively to all removal proceedings commenced after the Court's decision was announced.³¹³ Because *Pereira* confirms that proceedings are not properly commenced if based on a defective notice to appear, as Part II demonstrated, if a noncitizen timely challenges the notice as defective for lacking the time and place of the proceedings, then the court must apply *Pereira* to require the government to reissue a proper notice or terminate the proceeding.

b. Forfeiture

The possibility of forfeiture must be considered in any proceeding commenced after June 2018, but there is nothing particularly difficult about the inquiry. As noted above, litigants must timely raise legal points or they are forfeited.³¹⁴ The only interesting question is when a *Pereira* challenge must be raised.

313. See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 816 (2003) ("Rules of law have traditionally been applied to the parties to the case in which those rules were announced as well as in later cases, without regard to the date of the disputed events or the nature of the rule.").

314. See *supra* text accompanying note 255.

That answer is also straightforward. A motion challenging the notice should be timely in most cases if it is filed by the master calendar hearing.³¹⁵ A master calendar hearing is the noncitizen's first appearance before an immigration judge in removal proceedings.³¹⁶ It is the hearing, usually quite short, in which the court considers pleadings, scheduling, and other similar preliminary matters.³¹⁷ By contrast, an "individual calendar hearing[]" is the merits hearing where evidence is offered and the immigration judge decides whether the noncitizen is subject to removal or is otherwise eligible for any form of relief from removal.³¹⁸ Although challenges to the notice should usually be brought by the master calendar hearing, in some instances, a challenge might still be preserved if it is raised at least fifteen days before the individual calendar hearing.³¹⁹

c. Prejudice

Finally, for this case type, there should be no additional prejudice requirement, though admittedly it takes a little bit more work to understand why.

We said above that the primary reason for imposing an added prejudice requirement in any case that has had a merits hearing is that it serves no salutary purpose to force the government to reissue notice if the result of the new proceedings would almost certainly be the same.³²⁰ However, it is both reasonable and appropriate that there should be no additional prejudice requirement if there has not been a prior merits hearing.³²¹ In this circumstance, the burden on immigration officials to issue notices in compliance with § 1229(a) is modest, as the *Pereira* court itself emphasized.³²² It is

315. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 3.1(b)(i)(A) (2016), <https://www.justice.gov/eoir/page/file/1084851/download> [<https://perma.cc/D38U-ZKML>].

316. *Id.* § 4.15(a).

317. *Id.*

318. *Id.* § 4.16(a).

319. *Id.* § 3.1(b)(ii)(A).

320. See *supra* Part III.B.3.

321. See *supra* Part III.B.3.

322. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2119 (2018) ("The dissent's argument wrongly assumes 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. The Court does not embrace

also appropriate to allow a *Pereira* challenge without any showing of prejudice for any proceeding commenced after June 2018. Once the government has been made aware that the time and place information must be included in the notice to appear, to require a separate showing of prejudice in any new case would effectively excuse noncompliance with the statute. The law should not encourage knowing lawlessness by the government.³²³

Against the modest burden of insisting that the government comply with § 1229(a), we must weigh the considerable societal values that are furthered by insisting that the government comply with the law. As if there were any doubt about the importance of ensuring compliance with the law, it is worth noting that a few months after the *Pereira* opinion came down, the government started intentionally including incorrect hearing dates—“fake dates” as they have been termed—in the notices to appear that it issues.³²⁴ Reports indicate that Immigration and Customs Enforcement has been serving noncitizens with notices to appear directing them to appear at removal hearings on dates that had not been cleared or in any way coordinated with the immigration court.³²⁵ The government apparently has been so careless as to order them to appear at midnight, on weekends, and even on dates that do not exist (like one notice that apparently referred to September 31st as the hearing

those unsupported assumptions. As the Government concedes, ‘a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases.’ Given 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.” (citations omitted).

323. See *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting) (“At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man’s sense of decency and fair play.”); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1083 (2010) (“[I]t is almost always reprehensible for government officials—including judges—to engage in law-breaking”).

324. Dianne Solis, *ICE Is Ordering Immigrants to Appear in Court, but the Judges Aren’t Expecting Them*, DALL. NEWS (Sept. 16, 2018, 6:30 AM), <https://www.dallasnews.com/news/immigration/2018/09/16/ice-ordering-immigrants-appear-court-judges-expecting> [<https://perma.cc/C4K4-N9NF>].

325. *Id.*

date).³²⁶ This practice is an apparent—if contemptuous and utterly indefensible—attempt to seemingly comply with the Court's decision.³²⁷ Yet, as of this writing, the government apparently still continues to knowingly issue notices to appear with incorrect times and dates.³²⁸

2. Cases Commenced Before Pereira that Have Not Yet Had a Merits Hearing

For this case type, retroactivity is now at issue, but is straightforward. Application of forfeiture doctrine is also easy. Finally, as with cases commenced after *Pereira*, there should also be no additional requirement to show prejudice for this case type.

a. Retroactivity

As discussed above, for all proceedings commenced before June 2018 that are still pending, but in which no individual calendar merits hearing has yet been held, it is clear that the Court's decision in *Pereria* applies retroactively.³²⁹ In addition to the authorities cited above, it can be added that in immigration proceedings, the courts commonly recognize that a subsequent judicial decision that changes the law can provide a basis for reconsideration or reopening of cases still pending on appeal. The courts consistently recognize, expressly³³⁰ or implicitly,³³¹ that reconsideration or reopening of

326. *Id.*

327. *See id.*

328. *See Practice Alert: DHS Issuing NTAs with Fake Times and Dates*, AM. IMMIGR. LAW. ASS'N (Nov. 5, 2018), <https://www.dild.org/infonet/practice-alert-dhs-issuing-ntds-with-fake-times> [<https://perma.cc/E7M7-NJ4N>].

329. *See supra* text accompanying note 246.

330. *See Dominguez v. Sessions*, No. 16-60067, 2017 WL 4231083, at *5 n.4 (5th Cir. Sept. 22, 2017) (per curiam) (recognizing that “fundamental legal change may merit the granting of a regulatory motion to reopen”); *Montoya de Soto v. Sessions*, No. 13-70564, 2017 WL 992515, at *1 (9th Cir. Mar. 15, 2017) (mem.) (noting that the BIA determined that one of its precedential decisions “applied retroactively” to render the noncitizen ineligible to adjust status but noting further that “the BIA did not have the benefit of this court’s decision” in a subsequent case that permitted adjustment of status and remanding to the BIA for reconsideration); *Mata v. Sessions*, No. 13-60253, 2017 U.S. App. LEXIS 3436, at *4-5 (5th Cir. Feb. 24, 2017) (per curiam) (recognizing that “intervening changes in law have undermined the BIA’s first basis underlying its denial of Mata’s motion to reopen” but refusing to reopen case because of inadequate briefing); *Nevarez v. Holder*, 572 F.3d 605, 609-

removal proceedings can be based on a subsequent judicial decision that changes the law. Indeed, it is often said that judges are not just permitted to apply current law to their review of immigration judge decisions, they are required to do so.³³² The Ninth Circuit has noted that “when the law is changed before a decision is handed down by an administrative agency, the agency must apply the new law.”³³³ As to still pending cases, the understanding that immigration judges must apply existing decisional law has been explained not as a question of applying the law retroactively, but of simply applying existing law to cases “still the subject of administrative adjudication.”³³⁴ In sum, *Pereira* should be held to apply to any case that was still pending as of June 2018.

10 (9th Cir. 2009) (noting that the government was relying on a Supreme Court case that “was decided while this petition for review was pending” and remanding to BIA to determine whether the Court’s decision “applies retroactively to aliens like petitioners”); *Arce-Vences v. Mukasey*, 512 F.3d 167, 171 (5th Cir. 2007) (“In the light of the Supreme Court’s decision in *Lopez v. Gonzales*, which was announced three years after the noncitizen’s removal order and held that marijuana possession is not an aggravated felony, we hold that Arce’s offense of possession of marijuana is not an aggravated felony.”); *Zhao v. Gonzales*, 404 F.3d 295, 301 (5th Cir. 2005) (noting that motion for reconsideration can be based on “a change in the law, a misapplication of the law, or an aspect of the case that the BIA overlooked”).

331. See *Avila-Perez v. Lynch*, No. 15-60833, 2016 WL 7478505, at *2 (5th Cir. Dec. 28, 2016) (per curiam) (implicitly recognizing that noncitizen could rely on judicial decision that resulted in “a change in the law” after removal order but refusing to reopen on basis that noncitizen waited too long to request reopening); *Silerio-Nunez v. Holder*, No. 08-9556, 2009 WL 4755726, at *1 (10th Cir. Dec. 14, 2009) (implicitly recognizing that motion to reopen could be based on “the retroactive application of the Supreme Court’s decision” in a case but refusing to reopen on basis of departure bar); *Mendiola v. Mukasey*, No. 07-9548, 2008 WL 2222018, at *2 (10th Cir. May 30, 2008) (finding that noncitizen had waived opportunity to bring motion to reopen removal order based on his second conviction for possession of a controlled substance, but noting that “[e]ven if we were to consider [the noncitizen’s] motion, his argument based on the Supreme Court’s decision [issued after his removal order] in *Lopez v. Gonzales*, ... which held that a drug possession offense must be a felony under federal law to qualify as a drug trafficking crime, does not assist him” because he was convicted for possession after a prior possession conviction).

332. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981).

333. *Talanoa v. INS*, 397 F.2d 196, 200 (9th Cir. 1968); *accord Valdiviezo-Galdamez v. Att’y Gen. of the U.S.*, 663 F.3d 582, 602-03 (3d Cir. 2011) (“[T]he BIA is required to apply new law to its review.”); *Ortiz v. INS*, 179 F.3d 1148, 1156 (9th Cir. 1999) (“[T]he BIA was required to apply the law existing at the time of its review, even if different from the law applied by the [immigration judge].”).

334. *Ortiz*, 179 F.3d at 1156 (quoting U-M-, 20 I & N Dec. 327, 333 (B.I.A. 1991), *aff’d*, 989 F.2d 1085 (9th Cir. 1993)).

b. Forfeiture

For all proceedings commenced before June 2018 in which no merits hearing has yet been held, it is similarly appropriate to require the noncitizen to timely raise a *Pereira* challenge. The same principle that applied to post-*Pereira* cases applies here as well: arguments available to a litigant that are not timely made are waived. As was true for proceedings commenced after June 2018, for cases that were commenced before *Pereira*, a motion challenging the notice is certainly timely if it is filed by the master calendar hearing; in some circumstances, it may be sufficient if raised by the individual calendar hearing.³³⁵

c. Prejudice

Finally, there should be no added prejudice requirement imposed for any proceedings commenced before June 2018 in which no merits hearing has yet been held. Just as with cases commenced after *Pereira*, requiring the government to reissue a proper notice before beginning the removal hearing imposes only a modest burden on the government and ensures that § 1229(a)'s mandates are honored.

3. Cases Commenced Before Pereira that Are Still Pending on Appeal

This is the most challenging case type. Retroactivity is straightforward. Forfeiture raises some hard issues, but the most difficult issue is application of the prejudice requirement.

a. Retroactivity

As was true with cases commenced before *Pereira* in which there had not yet been a removal hearing, *Pereira* should also apply retroactively to any case that is still pending on appeal, either before the BIA or on petition for review to a federal appellate court.³³⁶ One recent federal appellate court decision squarely supports this view

335. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 315, § 3.1(b)(i)(A).

336. *See supra* text accompanying notes 329-34.

as to retroactivity, a case that I discuss in more detail at the end of the next Section.³³⁷

b. Forfeiture

For proceedings commenced before June 2018 that are still pending on appeal, it would be unfair to conclude that the noncitizen forfeited making a challenge to the notice since the Court's subsequent decision in *Pereira* is the basis for the challenge. As noted above, the better view is that an argument should not be said to have been forfeited if it was foreclosed under the existing law.³³⁸ Before *Pereira*, the courts were virtually unanimous in holding that a notice was not defective if it failed to include the time and place of the removal proceedings.³³⁹ Thus, noncitizens were foreclosed from challenging the sufficiency of the notice and so cannot be said to have forfeited an argument not available to them.³⁴⁰

As I just noted above, the Seventh Circuit's recent decision in *Plaza-Ramirez v. Sessions* squarely supports the view expressed here.³⁴¹ Years before the Supreme Court's decision in *Pereira*, the noncitizen in *Plaza-Ramirez* conceded his removability but argued for asylum, withholding of removal, and protection under the Convention Against Torture.³⁴² The immigration judge denied relief on all counts.³⁴³ He appealed to the BIA solely on the basis of withholding, but the BIA upheld the immigration judge's ruling.³⁴⁴

337. See *Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018).

338. See *supra* text accompanying notes 255-66.

339. See *supra* Part I.C.

340. The only possible exception would be for noncitizens in the Third Circuit since that was the only court pre-*Pereira* to read § 1229(a)'s requirements as mandatory. See *Orozco-Velasquez v. Att'y Gen. U.S.*, 817 F.3d 78, 81-82 (3d Cir. 2016). That is to say that a reasonable argument can certainly be made that noncitizens in the Third Circuit forfeited a challenge to the sufficiency of the notice if they failed to timely make that challenge. Cf. *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1241 (10th Cir. 2016) (holding that a jurisdictional defense was available to the defendant when it filed its answer because the defense could be asserted under existing circuit precedent that was consistent with the Supreme Court's subsequent clarification of the defense).

341. 908 F.3d at 286.

342. *Id.* at 284.

343. *Id.* at 285.

344. *Id.* at 286.

While his petition for review was pending with the Seventh Circuit, *Pereira* came out.³⁴⁵ He then sought remand to the BIA on the basis that the Court's decision makes him eligible for cancellation of removal.³⁴⁶ The Seventh Circuit denied the motion to remand, but that was simply because he had filed the wrong motion.³⁴⁷ Instead, the court said that he should—and still could—seek administrative relief by moving to reopen proceedings with the BIA under § 1229a(c)(7).³⁴⁸ The noncitizen then did so and the Seventh Circuit indicated that the issue was now properly before the BIA.³⁴⁹

The court did not expressly address either the question of *Pereira*'s retroactivity or the question of whether the noncitizen had forfeited the right to raise an issue he had not raised below. However, by directing him back to the BIA to consider his new claim for eligibility for cancellation of removal based on *Pereira*, *Plaza-Ramirez* implicitly and strongly signals that for any proceeding commenced before June 2018 that remains pending on appeal (i) *Pereira* retroactively applies and (ii) a *Pereira* challenge has not been forfeited.³⁵⁰ Finally, although *Plaza-Ramirez* also does not expressly address the question of the prejudice showing necessary in such a case, the Seventh Circuit's decision again is consistent with the approach outlined here, as explained further in the next Section.

c. Prejudice

i. Why Prejudice Is Required

Unlike the first two case types, there is a strong argument for mandating a prejudice requirement for any case filed before *Pereira* that is still on appeal. That is, for this case type it should not be enough to show merely that the notice was defective. As discussed above, unless the noncitizen can show that the defect had some impact on her rights—which is to say that the result of the proceedings

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *See id.*

might be different if the government is forced to reissue proper notice and start again—then there is no point in reopening a case.³⁵¹ If there is no possibility of a different outcome, then there is no justifiable basis for treating the removal order as void solely because the notice to appear did not include the time and place of the proceedings.³⁵² Requiring noncitizens to show that the error in the notice was harmful to the noncitizen's rights in the underlying proceeding balances the administrative burden of reopening cases that have already been tried with the enforcement and effectuation of statutory requirements.

ii. Demonstrating Prejudice

In what circumstances, then, could a noncitizen show prejudice in the underlying case as a result of a defective notice? One such possibility is with cancellation of removal, just as it was in *Pereira*. If, as in *Pereira*, the noncitizen can show that she is now eligible for cancellation of removal because the original notice to appear did not stop the period of continuous physical presence, then that is relief to which she might now be entitled.³⁵³ The Seventh Circuit's recent decision in *Plaza-Ramirez* is expressly on point here, consistent with the view I have articulated.³⁵⁴

Another possibility in which a *Pereira* challenge should be successful is as to voluntary departure applications made at the conclusion of the removal proceedings. Section 1229c(b)(1) authorizes immigration judges to grant a noncitizen's application for voluntary departure.³⁵⁵ To be eligible for conclusion of voluntary departure proceedings, the noncitizen has to have been "physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a)."³⁵⁶ Thus, if a noncitizen had less than a year of physical presence when they were served with a defective notice to appear (making them ineligible for voluntary departure), they may now be

351. See *supra* Part III.B.3.

352. See *supra* Part III.B.3.

353. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2109-10 (2018).

354. See *Plaza-Ramirez*, 908 F.3d at 286.

355. 8 U.S.C. § 1229c(b)(1) (2012).

356. *Id.* § 1229c(b)(1)(A).

eligible, assuming of course that they satisfy all other statutory criteria. Thus, this circumstance would also satisfy the prejudice requirement to warrant remanding or reopening the removal proceedings.

It should also be possible for a noncitizen to raise a *Pereira* challenge if she can also show a change in circumstances has occurred while her case has been pending on appeal. For instance, a noncitizen may seek to adjust status based on a marriage.³⁵⁷ But if the application is sought while the noncitizen is in removal proceedings, the burden on the noncitizen is higher than it is if the application were sought before removal proceedings commenced.³⁵⁸ While showing a defect in the notice to appear is not strictly necessary, it may aid the noncitizen's application to adjust status in this circumstance. The same reasoning could apply as to changed country circumstances.

In sum, for any case filed before *Pereira* that is still on appeal, it should not be enough to show that the notice was defective. Unless the noncitizen can also demonstrate that the result of the proceedings might be different if the government is forced to reissue proper notice and start again, then a *Pereira* challenge should not be sustained.

4. Cases Commenced Before Pereira that Have Reached Final Judgment and All Appeals Have Been Exhausted

This leaves one last case category: proceedings commenced before *Pereira* that have reached final judgment and in which all appeals have been exhausted.

a. Retroactivity

As noted, normally there is no judicial retroactivity for fully closed cases.³⁵⁹ However, there are—arguably—two statutory exceptions to the general rule against retroactivity for fully resolved cases that apply in certain immigration removal proceedings. One

357. *Id.* § 1255(e).

358. *See id.*

359. *See supra* notes 249-50 and accompanying text.

exception is discretionary; the other (and more significant) exception is mandatory.

i. The Discretionary Exception: Regulatory Motions to Reopen

There are several sources of statutory authority that allow a motion to reopen a closed case. A noncitizen who wishes to reopen removal proceedings has two options. First, she can file a statutory motion to reopen under 8 U.S.C. § 1229a(c)(7).³⁶⁰ The noncitizen's other option is to ask an immigration court to use its regulatory power to open proceedings. To be even more precise, there are actually two kinds of regulatory motions that are recognized—one applies to immigration judges (under 8 C.F.R. § 1003.23(b)(1));³⁶¹ the other applies to the BIA (under 8 C.F.R. § 1003.2(a)).³⁶² Both of these regulatory motions can be triggered either by a motion to reopen or pursuant to the court's *sua sponte* authority.³⁶³

Courts have held that in exercising their regulatory authority to reopen proceedings, immigration judges and the BIA may, but are not required to, apply new decisions retroactively. For instance, in *Shah v. Holder*, the noncitizen was convicted of aggravated criminal sexual abuse and, on that basis, was subsequently ordered removed from the country.³⁶⁴ More than six years later, he filed a regulatory motion to reopen with the BIA on the basis of a Supreme Court decision handed down after his removal order.³⁶⁵ In *Shah*, the Seventh Circuit affirmed the BIA's order denying the noncitizen's regulatory motion to reopen, but it was careful to note that while the BIA was certainly not obligated to reopen the proceedings to apply the Supreme Court's new decision, it had the power to do so if it wanted to.³⁶⁶ *Shah* is consistent with other authority recognizing the broad powers that immigration judges and the BIA possess to reopen proceedings pursuant to a regulatory motion to reopen.³⁶⁷

360. 8 U.S.C. § 1229a(c)(7).

361. 8 C.F.R. § 1003.23(b)(1) (2018).

362. *Id.* § 1003.2(a).

363. *See id.* § 1003.2(a); *id.* § 1003.23(b)(1).

364. 736 F.3d 1125, 1125 (7th Cir. 2013).

365. *Id.* at 1125-26.

366. *Id.* at 1127.

367. *See, e.g.,* *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593-95 (7th Cir. 2010) (noting,

In sum, notwithstanding the general rule against retroactive application of new decisions to closed cases, immigration judges and the BIA may, but are not required to, apply new decisions retroactively to closed cases.

ii. The Mandatory Exception: In Absentia Orders

More importantly, there also appears to be a mandatory statutory exception to the general rule against retroactivity for closed cases that applies to removal orders entered in absentia. An in absentia order is entered whenever it is established that the noncitizen received notice of the removal proceeding but did not attend.³⁶⁸ The view that courts must apply at least some new judicial decisions retroactively finds its strongest support in the specific language in § 1229a(b)(5)(C)(ii).³⁶⁹ According to its sister provision, § 1229a(b)(5)(C)(i), a noncitizen has 180 days after the removal order entered in absentia to file a statutory motion to reopen when the basis for reopening is that the noncitizen's failure to appear was "because of exceptional circumstances," defined elsewhere in the statute.³⁷⁰

By contrast, § 1229a(b)(5)(C)(ii) authorizes the noncitizen to file a statutory motion to reopen a removal order entered in absentia "at any time."³⁷¹ A motion under this subsection must be based on a showing that the noncitizen did not receive notice "in accordance with paragraph (1) or (2) of section 1229(a)."³⁷² Note the striking contrast between § 1229a(b)(5)(C) subsections (i) and (ii) in the time limit that Congress has prescribed for filing a statutory motion to reopen an in absentia order. The former is expressly limited to 180 days, but in the latter Congress has authorized a motion to reopen

inter alia, the broad discretion the Board retains in deciding regulatory motions to reopen).

368. 8 U.S.C. § 1229a(b)(5)(A) (2012).

369. *Id.* § 1229a(b)(5)(C)(ii).

370. *Id.* § 1229a(b)(5)(C)(i); *see also id.* § 1229a(e)(1) (defining exceptional circumstances as referring to "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien" that is "beyond the control" of the noncitizen).

371. *Id.* § 1229a(b)(5)(C)(ii).

372. *Id.* To be precise, a motion under this subsection can be based either on a showing that the noncitizen did not receive notice "in accordance with paragraph (1) or (2) of section 1229(a)," or that the noncitizen was "in Federal or State custody" and the failure to appear was not the noncitizen's fault. *Id.*

based on improper notice to be filed “at any time.”³⁷³ Given this expressly unlimited scope, a strong argument can be made that § 1229a(b)(5)(C)(ii) permits retroactive application of any new judicial decision that relates to whether the noncitizen received proper notice.

In sum, while normally there is no judicial retroactivity for fully closed cases, there are arguably two statutory exceptions to the general rule against retroactivity that could justify applying *Pereira* even in cases that have been fully resolved and in which all appeals have been exhausted. Since the first of the exceptions is entirely discretionary with the immigration courts, the more significant exception is the mandatory exception in § 1229a(b)(5)(C)(ii) for any removal order entered in absentia.

b. Forfeiture

With the possible exception of proceedings where the appeal goes to the Third Circuit,³⁷⁴ there should be no forfeiture for all other cases that closed before June 2018. The no-forfeiture rationale is the same as it is for noncitizens whose cases are still pending on appeal: they should not be said to have forfeited an argument that was not available to them at the time.³⁷⁵

c. Prejudice

The remaining factor—whether a prejudice requirement should be imposed—is arguably the hardest issue to resolve for this last case type. On the one hand, the same rationale that informed our thinking as to cases still on appeal would seem equally applicable to cases that have been fully and finally resolved. That is, if there would be no change in the outcome of the underlying case, then there is no justifiable basis for treating the removal order as void solely because the notice to appeal did not include the time and place of the proceedings. On this view, unless the noncitizen can also demonstrate that the result of the proceedings might be different

373. Compare *id.*, with *id.* § 1229a(b)(5)(C)(i).

374. See *supra* note 340 and accompanying text.

375. See *supra* notes 339-40 and accompanying text.

if the government is forced to reissue proper notice and start again, then a *Pereira* challenge should not be sustained. Finally, allowing a *Pereira* challenge to be made without an accompanying showing of prejudice for this case type would perversely reward those who did not even bother to show up for their removal proceedings over those who did. That seems like an anomalous result that should be avoided.

However, against these sound, prudential considerations are the literal words of § 1229a(b)(5)(C)(ii), which expressly permits a motion to rescind a removal order entered in absentia if the alien “did not receive notice in accordance with paragraph (1) or (2) of section 1229(a).”³⁷⁶ This language is indistinguishable from the language that the Court construed in *Pereira*.³⁷⁷ Recall that the stop-time rule (§ 1229b(d)(1)) provides that the period of continuous physical presence ends “when the alien is served a notice to appear under section 1229(a).”³⁷⁸ And remember that the *Pereira* majority refused to accept the government’s and the dissent’s argument that the word “under” in § 1229b(d)(1) was ambiguous because it could just as readily mean “authorized by” or “subject to”³⁷⁹: “[W]e think it obvious that the word ‘under,’ as used in the stop-time rule, can only mean ‘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).”³⁸⁰

Given the Court’s construction of the phrase in the stop-time rule, “when the alien is served a notice to appear under section 1229(a),” along with its treatment of “under” as equivalent to “in accordance with,”³⁸¹ a strong argument can be made that the phrase in § 1229a(b)(5)(C)(ii) “did not receive notice in accordance with paragraph (1) or (2) of section 1229(a),”³⁸² must be similarly construed. Thus, the plain language of § 1229a(b)(5)(C)(ii), along with *Pereira*’s construction of identical language in the stop-time rule,

376. 8 U.S.C. § 1229a(b)(5)(C)(ii).

377. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018).

378. 8 U.S.C. § 1229b(d)(1).

379. *Pereira*, 138 S. Ct. at 2117.

380. *Id.*

381. *Id.*

382. 8 U.S.C. § 1229a(b)(5)(C)(ii).

makes clear that courts must permit a motion to rescind an in absentia order even if it is solely based on a *Pereira* defect, without any accompanying prejudice showing.

Any fear that the floodgates would open if *Pereira* challenges are permitted for this case type without an accompanying prejudice requirement should be minimal, given practical realities. Few non-citizens who have been ordered removed in absentia are likely to know they may have the right to rescind their removal orders; fewer still will have the wherewithal to hire a lawyer to help them through the process. And, even for those few who are sufficiently informed and determined to challenge their prior removal order, there would be little practical reason for them to seek to do so if on rehearing the result would be the same. Thus, we can reasonably anticipate that only a very small fraction of noncitizens who were ordered removed in absentia will have sufficient incentive to seek to rescind the order.³⁸³

Of course, if it turns out that this estimate is wrong, and the courts do see a deluge of motions to rescind in absentia orders, Congress is always free to amend § 1229a(b)(5)(C)(ii). That is as it should be. After all, it is the literal language of the statutory section that provides the strongest basis on which a *Pereira* challenge can be made as to an in absentia order entered after a defective notice. And no one should have much sympathy for the government, which has chosen for years to ignore the plain mandate of § 1229(a).

383. There is one important circumstance in which a *Pereira* challenge should not succeed even as to an in absentia order. Noncitizens who reenter the country after a removal order are subject to criminal prosecution under 8 U.S.C. § 1326. *See id.* § 1326(a). Criminal reentry under § 1326 is a federal felony punishable by up to twenty years in prison. *Id.* § 1326(b). If the removal order was entered in absentia and the noncitizen attempts to get that order rescinded on the basis of *Pereira* (and thereby try to invalidate the predicate removal order on which the felony criminal reentry charge is based), the courts should reject such an argument. In § 1326(d), Congress has specifically limited the grounds on which a noncitizen may collaterally attack the underlying deportation order. *See id.* § 1326(d). Without belaboring the point, suffice it to say that none of the grounds listed in § 1326(d) could be satisfied if the only error was the government's failure to include the time and place of the proceedings in the notice to appear. *See id.*

CONCLUSION

The Court's decision in *Pereira* has generated an intense debate about whether the case applies not just when cancellation of removal is sought, but to all immigration removal proceedings. I have shown that it is wrong to assert that *Pereira* bears no relevance beyond the specific and narrow context addressed by the case. *Pereira*'s construction of the notice requirements in § 1229(a) is necessarily applicable to all notices to appear.

At the same time, immigration advocates are also wrong that a *Pereira* defect constitutes a non-waivable defect in the immigration court's subject matter jurisdiction. A faulty notice bears no relevance either to the immigration court's subject matter jurisdiction or, for that matter, to its personal jurisdiction over noncitizens.

But while defective notice is irrelevant to an immigration court's jurisdiction, a *Pereira* challenge can still be made in certain cases. Whether there are consequences to a defective notice turns on three factors: (1) *Pereira*'s applicability, either prospectively or retroactively; (2) the possibility of forfeiture; and (3) the noncitizen's ability to demonstrate prejudice. For cases commenced after *Pereira*, as well as for cases commenced before the Court's decision that have not yet had a merits hearing, the holding in *Pereira* should control. And in these two case types, as long as the noncitizen timely raises an objection to the notice, the courts should require the government to reissue proper notice, on penalty of dismissal if it does not. No additional prejudice showing should be required for these two case types. This result imposes only a modest burden on the government to require immigration officials to issue proper notices. Balanced against that modest burden, there is a compelling interest in ensuring governmental compliance with the law.

For proceedings commenced before *Pereira* that are still on appeal, the Court's decision should also be found to apply retroactively to them as well. Forfeiture should not be an issue for most of these cases since the argument was unavailable to most noncitizens before June 2018. However, for any case filed before *Pereira* that is still on appeal, it should not be enough to show that the notice was defective. Unless the noncitizen can also demonstrate that the result of the proceedings might be different if the government is

forced to reissue proper notice and start again, then a *Pereira* challenge should not be sustained.

Finally, *Pereira* does not apply retroactively to most proceedings in which all appeals already have been exhausted, but there are some exceptions to this general rule. The primary exception is for cases in which an order of removal was issued in absentia. For these cases, the literal language of § 1229a(b)(5)(C)(ii), paired with *Pereira's* construction of the indistinguishable language in the stop-time rule, means that courts should permit a motion to rescind an in absentia order even if it is solely based on a *Pereira* defect, without any accompanying showing of prejudice.

Now, more than a year after *Pereira*, immigration advocates should be able to see more clearly that the lower courts have rejected (properly in my view) their untenable arguments for reading *Pereira* to void on jurisdictional grounds any and all cases commenced without a proper notice to appear. The alternative approach that I have laid out in this Article more carefully and faithfully applies the Court's decision in reasoned and defensible ways. To be sure, this approach limits *Pereira's* reach to a much smaller universe of past and future cases. But, after having had their unrestrained jurisdictional arguments rejected again and again, immigration advocates may come to see that a more measured and supportable reading of *Pereira* has a much greater chance of success.