Litigation Post-*Pereira*: Where are We Now?

By Geoffrey A. Hoffman[i]

The Supreme Court's decision in *Pereira v. Sessions* rocked the immigration world in June 2018.[ii] The decision was straightforward in one sense: a putative notice to appear (NTA) lacking the time and place of hearing was insufficient to "stop time" for purposes of cancellation of removal under INA 240A. *Pereira* paved the way for potentially thousands to seek relief if they were issued defective NTAs. However, the full implications were unclear. What is left up to future courts to discern, and ultimately the Supreme Court itself, is how narrowly or broadly to construe *Pereira*.

Questions abound. Whether the decision applies to invalidate all immigration court proceedings with a defect in the charging document (the NTA) due to a lack of subject-matter jurisdiction. Whether a subsequent notice of hearing (NOH) containing the missing time and place of the first hearing "cures" or remedies the defective NTA. Who will be entitled to avail themselves of the benefits of *Pereira*? Only those who are currently in removal proceedings with defective NTAs? Those with final orders of removal? Those within the time period for a motion to reopen or, most expansively of all, anyone who at any time has been the recipient of a defective NTA? Is prejudice required to be shown? This article discusses these issues. Some already have been addressed in a preliminary way by *Pereira*'s progeny. Unfortunately, as will be seen, the answers cobbled together by the Board of Immigration Appeals (BIA) and courts have proven unsatisfying and sometimes contradictory.

The starting place is jurisdiction. Justice Sotomayor, joined by 7 other justices, potentially meant to implicate *all* immigration courts' jurisdiction by defining what counted as a valid NTA. This approach has been the focus of the discussion for at least two commentators.[iii]

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Professor Kit Johnson, for example, early on authored an article, "*Pereira v. Sessions*: A Jurisdictional Surprise for the Immigration Courts," emphasizing that *Pereira*'s majority clearly held that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a).'" As Johnson noted, "a document isn't a notice to appear if it doesn't have a time and place on it, then it cannot be a charging document. And, without a valid charging document, jurisdiction never vests in the immigration court." This chain of reasoning implicated not personal jurisdiction but rather the courts' subject-matter jurisdiction. Johnson noted that a court should not be permitted to ignore the jurisdictional defect based a theory of "waiver" because this is not an issue of personal jurisdiction but rather of subject matter jurisdiction, which cannot be waived. Johnson also rejected any attempt to limit Pereira's scope to just cancellation of removal cases, stating that since *Pereira* discusses what is and is not a "valid charging document," "courts are without discretion to ignore that lack of jurisdiction."

Professor Lonny Hoffman arrived at a wholly different conclusion in his article, "*Pereira*'s Aftershocks."[iv] Hoffman opines that a defective notice "does not bear on the immigration court's subject matter jurisdiction." He reasons that the intent of Congress controls, and even if Congress had placed certain matters within the scope of the immigration court's jurisdiction, "it has not expressly tethered the exercise of jurisdiction to satisfaction of the separate statutory requirements for notices to appear." For Hoffman, 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." Nevertheless, Hoffman points out that courts unfortunately have examined *Pereira* challenges solely in terms of whether a defective notice has jurisdictional consequences and have thereby

"conflated the question of whether a *Pereira* defect implicates jurisdiction with whether it has any consequences at all." Hoffman rightly concludes that it does not follow "from the (correct) conclusion that *Pereira* is irrelevant to jurisdiction that there are no consequences if the government has served a defective notice." The consequences can be severe and whether there is relief flowing from the application of *Pereira* will depend on concepts of retroactivity, forfeiture and prejudice.

Although scholars disagree with each other, the Board of Immigration Appeals, unsurprisingly, did not hesitate to come down with its own decision on this fundamental issue in *Matter of Bermudez-Cota.*[v] The Board in that case attempted to distinguish *Pereira*, finding that a notice to appear that does not specify the time and place of an alien's initial removal hearing (nonetheless) vests an Immigration Judge with jurisdiction over removal proceedings and meets the requirements of INA 239(a), 8 U.S.C. § 1229(a) (2012), *so long as* a notice of hearing specifying this information is "later sent" to the alien. This conclusion however was based on no statutory or regulatory authority to support an inference that a notice of hearing can vest jurisdiction in place of a notice to appear. Instead, the Board in *Bermudez-Cota* reasoned that *Pereira* involved a "distinct set of facts," which did not include a subsequent notice of hearing. According to the Board this could remedy the defective charging document by providing the time and place of the hearing. The Board found it important that the Supreme Court in *Pereira* did not "invalidate the alien's underlying removal proceedings" or suggest that proceedings "should be terminated." Instead, the Supreme Court remanded the case in *Pereira* for further proceedings. Again, there is no effort made by the Board to ground its decision about jurisdiction in *Pereira* itself or the governing statute.

Bermudez-Cota has been roundly criticized for relying on circuit court decisions embracing a "two-step" notice process which were issued before *Pereira* and for relying on the federal regulation governing NTAs instead of the relevant statute which defines a proper NTA. In making its decision, the Board's reasoning appeared to hinge on the governing regulation and not the statute. See 8 C.F.R. § 1003.15(b) (2018) (noting the regulation does "not mandate that the time and date of the initial hearing must be included in [the charging document].") Despite rejection of the jurisdictional argument by the BIA in *Bermudez-Cota*, some immigration courts had already terminated proceedings based on *Pereira.* In addition, many federal district judges across the nation had dismissed indictments in the context of illegal re-entry cases based on *Pereira*. These judges were persuaded that the expansive language of *Pereira* supported a defense allowed under section 1326 challenging the validity of the prior order of removal or deportation. Id., § 1326(d). At the time, the issue had yet to be considered by the various federal circuit courts of appeals.[vi]

Following *Bermudez-Cota*, the Board next engaged in an extended discussion of *Pereira* in *Matter of Mendoza-Hernandez and Capula-Cortes*.[vii] Interestingly, this was an *en banc* decision that revealed a large split in the Board's understanding of *Pereira.* The majority, 9 members, dismissed the appeal, but 7 members dissented. The issue in that case was whether a deficient NTA (without the time and place of the initial hearing) could be "perfected" by the subsequent service of a notice of hearing which specified the "notice requirements" of INA 239(a), thus triggering the "stop-time" rule in INA 240A(d)(1)(A). The slight majority of the Board held that the subsequent NOH "perfected" the defective NTA. This decision is striking because it examines an issue so closely aligned to *Pereira* because it asks whether the cancellation of removal "stop-time" rule can be applied where, as in *Pereira*, there was no

question an initial defective NTA had been at play. In such a situation, it is not surprising that the majority had to go to great lengths to attempt to distinguish *Pereira.*

The Board began its decision by noting that three (3) circuit courts had deferred to *Bermudez-Cota*'s rejection of the jurisdictional argument.[viii] The Board then went on to discuss its pre-*Pereira* case *Matter of Camillo* and the various pre-*Pereira* circuit court cases affirming it.[ix] In reaching the conclusion that *Pereira* was distinguishable, the majority of the Board found that "no court has adopted the view of our dissenting colleagues in this case that the deficiency in a notice to appear that is missing the time and place of the initial removal proceeding cannot be remedied by a notice of hearing that includes that information." [x]

The dissenting members' conclusion that *Pereira* is not distinguishable and in fact forecloses the majority's holding that the "stop-time" rule can still apply where a defective NTA is somehow "perfected" is supported by the plain language of the statutory text. This was in fact the central theme of Justice Sotomayor's decision in *Pereira.* As noted by the dissent, "Congress provided clear and unambiguous language identifying the event that triggers the "stop-time" rule—that is, service by the DHS of a "notice to appear" under section 239(a)(1) … A subsequent "notice of hearing" generated by the Immigration Court is not a section 239(a)(1) "notice to appear" and, therefore, does not trigger the "stop-time" rule." The government's argument in *Pereira* that it would be too difficult to coordinate the time and place of the hearing with EOIR was rejected in the Supreme Court's own decision, and, for the 7 members dissenting, provided no justification for a rule that would allow a subsequent NOH issued by EOIR to trigger the stop-time rule. [xi] Importantly, the dissent in *Mendoza-Hernandez* cited Justice Alito's dissent in *Pereira* as it acknowledged that "going forward the Government will be forced to include an arbitrary date and time on every notice to appear that it issues."[xii] Justice Sotomayor,

writing for the majority, responds that it trusts the Government will not "engage in [such] 'arbitrary' behavior."[xiii]

The majority's approach in *Mendoza-Hernandez* resurrects the approach of the Third Circuit in a pre-*Pereira* case, *Orozco-Velazquez v. U. S. Attorney General.*[xiv] There, the Third Circuit held that a notice of hearing issued by an immigration court may trigger the "stop-time" rule where DHS has not specified a hearing date in the notice to appear. *Orozco-Velazquez* however relied on section 239(a)(2) to conclude that "Congress's incorporation of [section 239(a)] in its entirety conveys a clear intent: that the government may freely amend and generally supplement its initial [notice to appear]."[xv] However, this rationale and reliance on INA 239(a)(2) was rejected by the Justice Sotomayor in *Pereira* itself in which the Supreme Court found that INA 239(a)(1) which defines an NTA is what is controlling, and not INA 239(a)(2). The latter section concerns merely notice of a change in the time or place of proceedings. The dissenting 7 members in *Mendoza-Hernandez* correctly characterize the majority's decision as conflating two distinct events: service of the NTA with service of a subsequent notice of hearing. "Because the Act provides an explicit definition of a section 239(a)(1) 'notice to appear' and the 'stop-time' rule explicitly refers to that definition, the plain language of the statute controls."[xvi]

Since *Bermudez-Cota* was decided, several circuit courts have also weighed in on the issue of jurisdiction after *Pereira*.[xvii] First, the Eleventh Circuit in *Duran-Ortega* ruled on a motion for stay of removal in the context of a petition for review and appeared to reject the BIA's reasoning.[xviii] The court found explicitly in ruling on the stay that it need <u>*not*</u> defer to *Bermudez-Cota "*if the agency's holding is based on an unreasonable interpretation of the statutes and regulations involved, or if its holding is unambiguously foreclosed by the law." The

Eleventh Circuit noted that some district courts have already held that a notice to appear *"*lacking the requisite time and place of the hearing is legally insufficient to vest an immigration court with jurisdiction." [xix] The Eleventh Circuit cited both *Chevron* and *Auer* deference as being limited to where the agencies act in a reasonable way. The Eleventh Circuit concluded that given the ruling in "*Pereira* and the various regulations and statutes at issue here, it may well be the case that deference is unwarranted."[xx] The Eleventh Circuit however eventually remanded the case for further proceedings but did not rule on the merits of Duran-Ortega's *Pereira* claim.[xxi]

By contrast, in *Karingithi v. Whitaker*, the Ninth Circuit considered whether *Pereira* implicated the immigration court's jurisdiction and found it did not.[xxii] The panel characterized the *Pereira* holding as "narrow" as it dealt with contents of a notice to appear in the context of the stop-time rule and continuous physical presence requirement for cancellation.[xxiii] The panel distinguished *Pereira* in that it did not explicitly consider the jurisdictional issue. The Ninth Circuit's reasoning, as in *Bermudez-Cota,* focused exclusively on the regulations and not the statute, finding that jurisdiction does not hinge on INA 239(a) but rather believed that the issue was governed by the federal regulations, including 8 C.F.R. §§ 1003.13, 1003.14(a), 1003.15(b). In the words of the Ninth Circuit, the regulations did not "require" the charging document to include the time and date of the hearing. Importantly, the Ninth Circuit noted that the respondent Ms. Karingithi had raised a new claim that she was eligible for cancellation of removal in any event due to the application of *Pereira* to her case. However, the panel refused to consider the issue since she raised it in the context of a motion to reconsider to the BIA, and she must await determination by the Board of her motion since it was still pending.[xxiv]

A more recent Ninth Circuit decision, *Lorenzo-Lopez v. Barr*, dealt with the issue of whether a defective NTA under *Pereira* could be "cured" by a subsequent notice of hearing, the same issue found in the BIA's fractured decision in *Mendoza-Hernandez.*[xxv] The Ninth Circuit did not follow the BIA decision, instead holding that the defectiveness *cannot* be cured, contrary to *Matter of Mendoza-Hernandez,* because: "(1) the BIA acknowledged that Pereira could be read to reach a different result, and the courts owe no deference to agency interpretations of Supreme Court opinions; (2) the BIA ignored the plain text of the statute; and (3) the BIA relied on cases that cannot be reconciled with Pereira." Since Lorenzo-Lopez was not subject to the stop-time rule because of the defective NTA he accordingly had resided in the United States for over the requisite seven years and thus was eligible to apply for cancellation of removal.

The *Lorenzo-Lopez* decision is very significant. It departs from the reasoning in *Mendoza-Hernandez* and correctly determines that there cannot be a "two-step" process to determine the proper operation of the stop-time rule. Most essentially is what the decision says about the deference owed to the agency, in this case the BIA. In a telling passage, the Ninth Circuit found that no deference is owed to the agency where the BIA itself "acknowledged that *Pereira* can be . . . read in a literal sense to reach a different result," i.e., a result contrary to the BIA's ultimate holding."[xxvi] The *Lorenzo-Lopez* court relied on circuit courts' precedents to hold that "a reviewing court should defer to an administrative agency only in those areas where that agency has particular expertise." There is no deference owed to the agency where the courts—"the supposed experts in analyzing judicial decisions"—are analyzing agency interpretations of Supreme Court's opinions. The court concluded no they need not accord any *Chevron* deference to the BIA's reading of *Pereira.*[xxvii]

The *Lorenzo-Lopez* decision is crucial for a further reason: it took to task the BIA majority's analysis in *Mendoza-Hernandez,* even characterizing it harshly as "disingenuous."[xxviii] The Ninth Circuit found that there was a lack of ambiguity in the statutory language. The lack of ambiguity provided further reason not to resort to *Chevron* deference, as noted in *Pereira* itself. The Ninth Circuit, in so holding, followed the lead of another recent Supreme Court case, *BNSF Railway Co. v. Loos,* 139 S. Ct. 893, 899 (2019), interpreting a statute by relying on cross-reference to other statutory components, as in *Pereira*, "without any reference to the agency's interpretation of the same provision."[xxix]

The Ninth Circuit further correctly pointed out that the BIA improperly relied on abrogated case law such as the Third Circuit's case, *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016), among other cases. Those cases, however, "cannot be reconciled with *Pereira*."[xxx] According to the panel, the BIA "cannot rely on abrogated decisions in hopes of securing deference from the very courts that issued the now-defunct precedent. Such an approach would be hopelessly circular." (emphasis added). This point about circularity is crucial. It points to an inherent flaw in the BIA's approach which it has exhibited thus far to *Pereira*. In attempting to stake a claim to the primacy of its own "agency interpretation" of *Pereira* it cannot pull itself up by the bootstraps and argue for the its own interpretation by pointing to pre-*Pereira* caselaw and pre-*Pereira* arguments.

Another crucial issue twist to the factual scenarios confronting respondents concerns what happens when an *in absentia* order is issued but it is premised on a previously issued defective NTA under *Pereira*. The rationale for invalidating such orders *ab initio* is strong. The statute governing *in absentia* orders, INA 240(b)(5)(A), specifically references INA 239(a)(1), defining what is a proper NTA for purposes of issuance of an *in absentia* order and requires that

"written notice . . . under paragraph (1) or (2) of [INA 239] has been provided to the alien . . . ." As in *Pereira* itself, because one statutory section is specifically referencing the INA 239(a) definition of a proper NTA, it should not be problematic to conclude that *Pereira's* holding applies to invalidate such orders of removal if they fail to meet that definition.

The Board in two recent cases, however, has ruled against the respondents on this issue. In *Matter of Pena-Mejia*, the respondent had been issued an *in absentia* order based on a defective NTA.[xxxi] The Board held that neither rescission of an *in absentia* order nor termination of the proceedings is required, where an alien did not appear at a scheduled hearing after being served with a notice to appear that did not specify the time and place of the initial removal hearing, so long as a subsequent notice of hearing specifying that information was properly sent to the respondent. The Board distinguished *Pereira* by noting that "the alien in *Pereira* provided a correct address to the DHS and established that he did not receive the notice of hearing, so his motion to reopen was granted. . .[while] the respondent submitted her own statement and those from her family members, claiming that the address she provided to immigration officials was her sister's address, where she lived "for a few months.'" The Board thus found it dispositive that the respondent had "moved" but failed to change her address and noted, that under such circumstances, INA 240(b)(5)(B) provides that no written notice of hearing is required under those circumstances.

The Board's reasoning in *Pena-Mejia* is flawed because it relies on INA 239(a)(2) to cure the lack of information in the NTA as required under 239(a)(1). However, this move is a mistake. It assumes that 239(a)(2) remedies the 239(a)(1) deficiencies. A close look at 239(a)(2) itself reveals the flaw in such reasoning. INA 239(a)(2) relates to a "change" in time or place of proceedings. Although it is true that the section (a)(2) anticipates situations where

written notice of the "change" is later provided to the respondent as a prerequisite for *in absentia* orders, it does *not* follow that this can "cure" a defective NTA. In fact, it is misleading to argue that (a)(2) can be used to constitute a "change" in the notice to appear where the time and place was lacking in the first place. The consistent practice, and as noted by the Supreme Court, was to place "to be determined" in the NTA as placeholders for the missing time and place. The assumption that compliance by DHS with INA(a)(2) where the INA (a)(1) requirements were not met is thus wholly unwarranted.

The decision in *Pena-Mejia* is also flawed because it assumes without proof that the respondent provided the "wrong" address. However, as noted by the Board in its own decision, the respondent had been living with the sister for a short time and thus there is nothing to indicate that the address was a "wrong" address, just that it was a "temporary" address. In addition, the Board also conceded that the evidence showed neither respondent nor her sister ever received the NTA or notice of hearing, thus there appeared to have been no *actual* notice of the proceedings in any event, despite the issuance of a defective NTA. Although the BIA focused exclusively on the failure to update EOIR with a new address once respondent had moved, such reasoning sidesteps the *Pereira* issue. The Supreme Court clearly defined what counts as a valid NTA in the first place. The BIA ignores the fact that the respondent had provided the address where she was living at the time of the issuance of that defective charging document, and as discussed relied on INA (a)(2) as a way to attempt to cure the NTA's deficiency.

In a related case, *Matter of Miranda Cordiero*, the BIA examined a similar issue but this time the respondent had been personally served with the NTA without a date and time appearing on the document.[xxxii] The NTA was therefore defective under *Pereira*. However, the respondent refused to provide an address where she could be contacted during the removal proceedings.

When she did not appear for her hearing the IJ ordered her removed *in absentia.* The Board distinguished *Pereira* because there the respondent provided his correct address, established he did not receive notice of the hearing. Further, according to the BIA, *Pereira* is also distinguishable because Ms. Miranda-Cordiero "did not apply for cancellation of removal in 2005 and she was ordered removed by the Immigration Judge for reasons unrelated to the operation of the "stop-time" rule. The respondent in *Miranda-Cordiero* instead sought reopening years later for a chance to apply for a provisional waiver, based on her marriage to a U.S. citizen and approved I-130.

While the Board's decision in *Miranda-Cordiero* is factually distinguishable from *Pereira* due to the alleged refusal of the respondent to provide her address, it ignores the fact that the underlying NTA was nevertheless still defective. As in *Bermudez-Cota,* the Board has continued to ignore the relevance of the NTA's defectiveness. It thus fails to find that there was any jurisdictional consequence of an invalid NTA under *Pereira*. Furthermore, the decision is in line with the wrongly decided split *en banc* BIA decision in *Matter of Mendoza-Hernandez.* In that case, as discussed, the Board finds it significant that a subsequence notice of hearing was issued, concluding without statutory authority that such a subsequent NOH can "cure" the previous defective NTA. For the reasons in the Ninth Circuit's *Lorenzo-Lopez* and the dissent in *Mendoza-Hernandez* itself, a subsequent notice of hearing should not be permitted to cure or remedy the improper NTA. The Board also errs by appearing to limit the holding of *Pereira* to applying only to cancellation of removal cases. As will be discussed below, the holding should not be so limited.

With respect to the proper timing for a *Pereira* claim, the Seventh Circuit took up that issue in *Herrera-Garcia v. Barr*.[xxxiii] In that case, the respondent had been denied asylum,

withholding and CAT relief, but during the petition for review before the Seventh Circuit, he filed a motion to reconsider before the BIA. His motion before the Board asserted that *Pereira* affected his case. The respondent in *Herrera-Garcia* argued that *Pereira* should be extended outside the context of the stop-time rule to preclude the agency's jurisdiction over his removal proceedings. The Board denied his motion, concluding that it was both untimely and, in any event, failed on the merits. After filing a second petition for review concerning the denied motion to reopen, the Seventh Circuit consolidated the two appeals, and rejected Herrera-Garcia's *Pereira* jurisdictional argument.

The thrust of the respondent's argument for the delay in raising his *Pereira* claim was that he should not have been required to assert the jurisdictional argument while *Pereira* was pending and had yet to be finally decided by the Supreme Court. The Seventh Circuit was unconvinced and found that "Herrera-Garcia ignores the fact that he could have raised the issue under consideration in *Pereira* with the IJ or the Board earlier or at least requested a stay until the case was decided." The court also rejected equitable tolling of the deadline for the 30-day deadline of a motion to reconsider, holding that the respondent had shown no evidence of due diligence in pursuing the issue.

The Seventh Circuit's decision in *Herrera-Garcia* is certainly overly optimistic about the chances of any person pursuing a stay based on a pending case or, more importantly, being able to divine just what the Supreme Court would hold in *Pereira* before the decision actually came down. To say that the respondent could have filed his *Pereira* claim before the Supreme Court ruled ignores the fact that (as noted by Justice Kennedy) at least <u>*six*</u> courts of appeal before *Pereira* had viewed the stop-time rule in a different light, and moreover the Supreme Court interpreted the statutory language in such a way to determine what counted (and thus did not

count) as a proper NTA. To blandly maintain that a respondent in removal proceedings, or his attorneys, should have anticipated the Supreme Court's ruling in *Pereira* seems unfair and unrealistic. Such a rule would be at odds with the normal rule that a change in the law, or new superseding authority can support a motion to reconsider or reopen, so long as done within a reasonable time of the intervening new case.[xxxiv]

Another case from the Seventh Circuit illustrates just how confused the circuit courts of appeals are in their attempts to wrestle with *Pereira* issues. In *Santos-Santos v. Barr*, as in the two recent BIA cases, the respondent argued that his *in absentia* order should be rescinded and reopened since it was premised on a defective NTA.[xxxv] He argued the prior NTA did not include the "date, time, and place" at which he was required to appear, and the IJ therefore had no jurisdiction to enter a removal order. In addition, Santos claimed he did not actually receive the NTA nor subsequent notice of hearing and that "[t]he record is silent as to whether the Service even attempted to provide Respondent with a Notice of Hearing." Despite these facts, the Seventh Circuit rejected his *Pereira* claim and held that *Pereira* was distinguishable purportedly because it "(1) dealt with whether the narrow "stop-time" rule can be triggered by an NTA omitting the time and place of the initial hearing, and (2) addressed two statutory provisions distinct from the regulations at issue here."

The Seventh Circuit's decision in *Santos-Santos* is especially problematic because it is premised on a basic misunderstanding. The panel apparently believed that the differences between the regulation and the statute reveal two "different" NTAs at play.[xxxvi] In the words of the panel, "it bears mentioning that the "Notice to Appear" in 8 C.F.R. §§ 1003.13–14 is *different from* the NTA in 8 U.S.C. § 1229(a)(1)." (emphasis added). The court of appeals' reasoning is misguided. At best it wrongly conceives of two different NTAs when that is not

how it works in immigration court. At worst, it assumes that the authority of statute can be viewed as subservient to its implementing regulation. The mere fact that the regulation does not have a requirement that exists in the statute should not lead to the conclusion that there are two NTAs, but rather that the regulation's failure to provide for the requirements in the INA is ultra vires of the statute to the extent those requirements are left out. The Seventh Circuit as opposed to finding the regulation contradicts the statute instead blithely seems to think there are two different NTAs, one conceived of by statute and one by regulation, a conclusion not supported by any authority whatsoever. The court in *Santos* engages in mental gymnastics to try to reconcile the statutory authority defining what qualifies as an NTA and the regulations which do not explicitly require the time and place to be listed.

As noted at the beginning of this article, questions abound about the proper scope of *Pereira*. As I have written about elsewhere,[xxxvii] at a minimum it should not be controversial that if eligibility for relief depends upon issuance or filing of the NTA then that type of relief should *not* be foreclosed if a defective NTA were issued and that NTA created some impediment for relief. Examples of such types of cases include both non-LPR and LPR cancellation of removal, as well as post-hearing voluntary departure, and even criminal defendants who are now being charged with illegal re-entry after a prior order premised on a defective NTA. In fact, many district courts (although not all) have seen fit to dismiss indictments in the context of criminal cases where the prior order was premised on a defective NTA.[xxxviii]

Voluntary departure has its own time limitation requiring that the "alien has been physically present . . .for a period of at least one year immediately preceding the date the notice to appear was served under [INA 239(a)]." In the case of any statutory provision that specifically references the NTA, then the rationale for the application of *Pereira* should be

obvious. Under INA 240 (b)(5), *in absentia* orders for example require that "written notice under" INA 239(a)(1) or (a)(2) have been provided to the respondent before such an order can issue. The clarity provided by the statute's reference to the definitional section concerning NTAs should leave no doubt that in the event the NTA is defective under INA 239(a)(1) or (a)(2) then the order of removal must be rescinded and new proceedings instituted. In cases of illegal re-entry 8 U.S.C. 1326(d) provides for a defense to the crime in cases where the prior order of removal was *inter alia* "fundamentally unfair."

With respect to the timing of a *Pereira* claim *after* a final order of removal is issued and the time for a motion to reconsider and/or motion to reopen has run, at least as we have seen the Seventh Circuit has not been very welcoming to such a *sua sponte* motion. However, the rule in such cases should not be complicated or unduly burdensome. Rather, the respondent filing such an untimely motion to reconsider or reopen should be entitled to argue equitable tolling and get the case reopened under the proper use of the equitable doctrine. The availability of equitable tolling is not uniform and depends on which circuit one is litigating. In the Fifth Circuit, for example, there is excellent precedent allowing for the exercise of equitable tolling in the immigration context.[xxxix] Despite the rejection of the *Pereira* claim in *Herrera-Garcia*, the court of appeals nonetheless embraced at least the possibility of tolling, but just did not find enough evidence to support application of the equitable doctrine.

Equitable tolling brings up a final issue which deserves mention and has not been adequately addressed nor appreciated: ethics and the duty to pursue *Pereira* claims. Given that the *Pereira* decision clarified in no uncertain terms what is and is not a valid NTA, certain ethical ramifications necessarily follow. Because attorneys were on notice about a possible *Pereira* claim as soon as the decision was issued in June 2018, those who did not make such a

claim during the pendency of a removal proceeding may be subject to *Matter of Lozada*. Even an untimely motion to reopen could be brought seeking *sua sponte* relief provided the respondent is able to meet the *Lozada* requirements and show ineffective assistance. Moreover, on the other side, the government also has an ethical duty not to issue invalid NTAs or ones that mislead respondents into thinking a date and place exists where they do not and no consultation with EOIR has occurred.

The foregoing discussion has distilled the following concluding thoughts about how the courts, and ultimately most likely the Supreme Court itself, will determine the scope of *Pereira*. First, Justice Sotomayor, writing for 7 members of the high court, premised her decision on the plain language of the statute and a straightforward interpretation of the INA. Given that there is no ambiguity in the statute, specifically concerning what counts as a proper NTA, this militates in favor of federal courts exercising their own authority without any deference owed to the agency, in this case the BIA's or DHS's interpretations. Indeed, this point was explicit in Justice Kennedy's concurrence. His point was that *Chevron* deference itself may need to be revisited. However, the Supreme Court in a future case relating to one of the above-discussed *Pereira* issues need not go to such great lengths and dismantle *Chevron*. The way Justice Sotomayor wrote her decision, arguably no deference should be owed to the agency, given the plain language rule and where, as here, statutory construction is specifically within the province of the federal courts not agencies.[xl]

Finally, a word about prejudice. Despite the clear rule in *Pereira* about what counts as a proper NTA, courts have not been receptive to arguments for reopening cases unless a litigant is able to show that they were somehow prejudiced by the defective NTA or counsel's ineffective assistance or for some other reason. Courts will not reopen cases unless there is some reason to

do so. In other words, the respondent must show that there is some relief which is possible now and that for whatever reason was not available previously. If, on the other hand, the NTA which was invalid under *Pereira* divested the courts of their jurisdiction *ab initio*, then the prejudice requirement could become unnecessary. The issue of prejudice is a crucial one. It need not be shown but only if the jurisdictional argument carries the day. This issue as a potential future challenge to the BIA's misguided *Bermudez-Cota* is yet to be decided by the courts.

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[i] Clinical Professor of Law, and Director, University of Houston Law Center Immigration Clinic.
[ii] 138 S.Ct. 2105 (2018).
[iii] See Johnson, Kit, Pereira v. Sessions: A Jurisdictional Surprise for Immigration Courts (March 15, 2019). Columbia Human Rights Law Review, Vol. 50, 2018. Available at SSRN: https://ssrn.com/abstract=3211334; see also Hoffman, Lonny, Pereira's Aftershocks (November 28, 2018). Forthcoming 61 William & Mary Law Review ___ (2019). Available at SSRN: https://ssrn.com/abstract=3289751 or http://dx.doi.org/10.2139/ssrn.3289751.
[iv] Hoffman, Lonny, at ___.
[v] 27 I&N Dec. 441 (BIA 2018).
[vi] In a recent decision, however, the Fourth Circuit rejected a Pereira-style collateral attack on a prior order of removal based on jurisdiction in a section 1326 proceeding. See U.S. v. Cortez, -- F.3d --, 2019 WL 3209956 (4th Cir. July 17, 2019) (finding that the "purported filing defect in his case [did not] deprive[] the immigration court of authority to enter a removal order" and contra Pereira held that allegedly there was "no defect" in the NTA even if it lacked the time and place of initial hearing because the regulations "do not require" that information).
[vii] 27 I&N Dec. 520 (BIA 2019).
[viii] . *See Banegas Gomez v. Barr*, No. 15-3269, 2019 WL 1768914, at *6–8 (2d Cir. Apr. 23, 2019) (holding that jurisdiction vests with the immigration court when the initial notice to appear does not specify the time and place of the proceedings, but notices of hearing served later include that information); *Karingithi v. Whitaker*, 913 F.3d 1158, 1159–62 (9th Cir. 2019) (same); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312–15 (6th Cir. 2018) (same).
[ix] See Matter of Camarillo, 25 I&N Dec. 644, 651 (BIA 2011).
[x] 27 I&N Dec. at 528.
[xi] Id. at 540.
[xii] Id. at 2129.
[xiii] Id. at 2119.
[xiv] 817 F.3d 78 (3d Cir. 2016).
[xv] Id. at 83.
[xvi] 27 I&N Dec. at 543.

[xvii] In addition to the Eleventh and Ninth Circuit cases, discussed *infra*, *see also Leonard v. Whitaker*, 746 Fed.Appx. 269 (4th Cir. Dec. 31, 2018)(Mem. Op.); *Hernandez-Perez v. Att'y Gen.*, 911 F.3d 305 (6th Cir. 2018); *Ali v. Barr*, -- F.3d ---, 2019 WL 2147246 (8th Cir. May 17, 2019); Soriano-Mendosa v. Barr, --- Fed.Appx. ----2019 WL 1531499 (10th Cir. Apr. 9, 2019).
[xviii] Duran-Ortega v. U.S. Attorney General, No. 18-14563-D (11th Cir. 11/29/2018), available at :
https://www.splcenter.org/sites/default/files/documents/duranortega_stay_11thclean.pdf
[xix] Id. at 5 (citing United States v. Zapata-Cortinas, 2018 WL 4770868, at *2–3 (W.D. Tex. 2018); United States v. Virgen-Ponce, 320 F.Supp.3d 1164, 1166 (E.D. Wash. 2018), but noting other district courts have disagreed. See, e.g., United States v. RomeroColindres, 2018 WL 5084877, at *2 (N.D. Ohio 2018)).

[xx] Id. at 6-7.
[xxi] See docket showing grant of remand for further proceedings, at https://www.docketbird.com/court-cases/Manuel-Duran-Ortega-v-U-S-Attorney-General/ca11-2018-14563.
[xxii] Karingithi v. Whitaker, 913 F.3d 1158 (9th Cir. 2019).
[xxiii] In Pierre-Paul v. Barr, -- F.3d --, 2019 WL 3229150 (5th Cir. July 18, 2019), the Fifth Circuit recently addressed Pereira and jurisdiction in a published decision. The decision held that lack of time and place on the NTA does not trigger a jurisdictional defect. The decision unfortunately privileges the regulations over the governing statute. The panel stated explicitly in its decision contra Pereira that "the regulations ... govern what a notice to appear must contain to constitute a valid charging document." The panel then concludes that the "notice to appear was not defective because it included all other information required by the regulations." This is at odds with Justice Sotomayor's majority decision in Pereira and ignores the back and forth between the majority and Justice Alito's dissent in Pereira. The panel then also concluded the NTA is just a "claims-processing" rule and thus not jurisdictional and also that any defect was allegedly "cured" by subsequent notice of hearing. The final point creates a circuit split now on that alternative holding, given precedent, as discussed, in the Ninth Circuit. See Lorenzo-Lopez v. Barr, supra. The Eleventh Circuit recently rejected an argument that a defective NTA under Pereira implicated the immigration court's jurisdiction, and instead characterized the operative regulation, 8 CFR § 1003.14, merely as a "claim processing rule." Perez-Sanchez v. U.S. Atty Gen'l, -- F.3d --, 2019 WL 3940873 (11th Cir. Aug. 21, 2019).

[xxiv] Id. at 1162.
[xxv] Lorenzo-Lopez v. Barr, --- F.3d ---- 2019 WL 2202952 (9th Cir. May 22, 2019).
[xxvi] Id.
[xxvii] Id.
[xxviii] Id., *6.
[xxix] Id., *7.
[xxx] Id.
[xxxi] 27 I&N Dec. 546 (BIA 2019).
[xxxii] 27 I&N Dec. 551 (BIA 2019).

[xxxiii] 918 F.3d 558 (7th Cir. 2019).

[xxxiv] See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997)(holding that the Board's power to reopen or reconsider cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship); see also *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (in order for a change in the law to qualify as an exceptional situation that merits the exercise of discretion by the Board of Immigration Appeals to reopen or reconsider a case sua sponte, the change must be fundamental in nature and not merely an incremental development in the state of the law).

[xxxv] 917 F.3d 486 (7th Cir. 2019).

[xxxvi] Id at 490, n.4.

[xxxvii] Geoffrey A. Hoffman, "Pereira v. Sessions and the Right to Seek Voluntary Departure: Another Reason for the Wide Applicability of Pereira without the Need to Decide the Subject-Matter Jurisdiction Issue" Immig. Prof. Blog (Aug. 27, 2018), at http://lawprofessors.typepad.com/immigration/2018/08/geoffrey-a-hoffmanpereira-v-sessions-and-the-right-to-seek-voluntary-departure-another-reason-for-t.html; see also Geoffrey A. Hoffman, "Why Pereira v. Sessions Bodes Well for Overturning Matter of A-B-," Immig. Prof. Blog (July 2, 2018) at http://lawprofessors.typepad.com/immigration/2018/07/why-pereira-v-sessions-bodes-well-foroverturning-matter-of-a-b-by-geoffrey-a-hoffman.html.

[xxxviii] See the following cases, names withheld, wherein the indictments were dismissed by district courts: 4:18CR521 (S.D. Tex.) ; 3:18CR1286 (W.D. Tex.) ; 2:18CR92 (E.D. Wash.) ; 1:17CR156 (W.D. Tex.) ; 17CR63 (W.D. Tex.) ; 3:18CR71 (D.N.Dakota) ; 1:18CR310 (W.D. Tex.) ; 3:18CR2593 (W.D. Tex.) ; 4:18CR331 (D. Ariz.) ; 2:18CR150 (D. Nev.) ; 3:18CR79 (D. Nev.) ; 3:18CR2906 (W.D. Tex.) ; 2018 WL 6706680 (E.D. Wash.) ; 2019 WL 134571 (N.D. Cal.) ; 2019 WL 453616 (W.D. Tex. 2019); 18CR282 (NDCal 2019) ; 18CR282 (N.D. Cal. 2019) ; 17CR507 (N.D. Cal. 2019) ; 18CR2050 (E.D. Wash. 2018).

[xxxix] Lugo–Resendez v. Lynch, 831 F.3d 337 (5th Cir. 2016) (holding that as a matter of first impression, 90-day deadline for filing motion to reopen removal proceedings is subject to equitable tolling and remand to BIA was necessary for determination as to whether to equitably toll 90-day period for filing motion to reopen.

[xl] See Mellouli v. Lynch, 135 S.Ct. 1980, 1989 (2015) (finding no deference owed to BIA's interpretation that a different rule applied for drug paraphernalia).