UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

In the Matter of	)	**Non-Detained**
	)	
In Removal Proceedings	)	Immigration Judge: Shifra Rubin
	)	Hearing Date: 7/9/2018

THE DEPARTMENT OF HOMELAND SECURITY
OPPOSITION TO THE RESPONDENT'S
MOTION TO TERMINATE IN LIGHT OF *PEREIRA v. SESSIONS*

INTRODUCTION

The Department of Homeland Security ("Department") hereby opposes the respondent's motion to terminate based on *Pereira v. Sessions*, No. 17-459, 2018 WL 3058276 (U.S. June 21, 2018). *Pereira* never once refers to termination and nowhere purports to invalidate the underlying removal proceedings. The question presented and answered by the Supreme Court in *Pereira* is "[w]hether, to trigger the stop-time rule by serving a 'notice to appear,' the government must 'specify' the items listed in the definition of a 'notice to appear,' including '[t]he time and place at which the proceedings will be held.'" Petition for Writ of Certiorari, *Pereira*, 2017 WL 4326325 (No. 17-459). This Court should decline an overbroad and unsupported expansion of *Pereira* in light of the Supreme Court's clear and unmistakable language.

STATEMENT OF FACTS

On September 14, 2009, the Department served a Notice to Appear (NTA) on the

respondent. It did not contain the date and time of hearing. The Department filed the NTA with the Immigration Court in Florence, Arizona. Exh. 1. On September 29, 2009, the Immigration Court in Florence, Arizona issued a notice of hearing containing the date, time and place (October 21, 2009) of the initial master calendar hearing and served it on the respondent and the Department. *See generally* 8 C.F.R. § 1003.18(b).

On September 30, 2009, the Immigration Court in Florence, Arizona issued a notice of custody redetermination containing the date, time, and place which was served on the respondent's counsel and the Department. On October 7, 2009, the Immigration Judge set bond at $5000. The respondent posted bond on October 9, 2009, and was released from custody. Following the respondent's release, the Immigration Court in Florence, Arizona issued a notice of hearing containing the date, time, and place of the master calendar hearing (February 17, 2010). Prior to the scheduled hearing, the respondent's counsel filed a motion to change venue to Newark, New Jersey. In the motion, the respondent's counsel admitted the factual allegations and conceded the charge of removability contained in the NTA. The Immigration Judge in Florence, Arizona granted the motion on February 5, 2010.

On February 22, 2010, the Immigration Court in Newark, New Jersey issued a notice of hearing containing the date, time, and place (March 18, 2010) of the master calendar hearing, which was served on the respondent and the Department. At the March 18, 2010, master calendar hearing, the respondent was present and requested time to find legal representation. The Immigration Court in Newark, New Jersey issued another notice of hearing containing the date, time, and place of the master calendar hearing (August 11, 2010) which was provided to the respondent and the Department.

At the August 11, 2010, master calendar hearing in Newark, New Jersey the respondent failed to appear and the Immigration Judge ordered the respondent removed *in absentia*. In January 2011, the respondent filed a motion to reopen which the Department filed an opposition. On March 7, 2011, the Immigration Judge in Newark, New Jersey granted the respondent's motion and provided a notice of hearing of the date, time, and place (April 6, 2011) of the master calendar hearing. At the April 6, 2011, master calendar hearing, the respondent appeared with counsel. Subsequent hearings occurred on April 14, 2011, August 10, 2016, April 6, 2017, February 28, 2018, and the respondent with counsel was present at each those hearing.

On February 28, 2018, the Immigration Court in Newark, New Jersey issued a notice of hearing containing the date, time, and place (July 9, 2018) of the individual hearing. On July 2, 2018, the respondent's counsel filed a motion to terminate.

ARGUMENT

I. *Pereira v. Sessions* is a Decision About the Stop-Time Rule Applicable to Cancellation of Removal and Provides No Lawful Basis for Terminating Proceedings.

Pereira provides no support for the blanket proposition that termination is warranted whenever the NTA does not contain the time and place of a hearing. The question presented in *Pereira* is "[w]hether, *to trigger the stop-time rule* by serving a 'notice to appear,' the government must 'specify' the items listed in the definition of a 'notice to appear,' including '[t]he time and place at which the proceedings will be held.'" Petition for Writ of Certiorari, *Pereira*, 2017 WL 4326325 (No. 17-459)

(emphasis added).[1] As *Pereira* itself makes clear, "[t]he Court granted certiorari in this case, . . . , to resolve division among the Courts of Appeals on a simple, but important, question of statutory interpretation: Does service of a document styled as a 'notice to appear' that fails to specify 'the items listed' in § 1229(a)(1) *trigger the stop-time rule*?" *Pereira*, 2018 WL 3058276 at *7 (internal citation omitted) (emphasis added). This is a "narrow question." *Id.* at *3. Accordingly, the Supreme Court framed the issue as follows: "If the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, *does it trigger the stop-time rule*?" *Id.* (emphasis added). Later, the Court again specifies that "the dispositive question in this case is much narrower, but no less vital: Does a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by § 1229(a)(1)(G)(i), *trigger the stop-time rule*?" *Id.* at *7 (emphasis added).

The Supreme Court holds that the answer to this question is no. "A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore *does not trigger the stop-time rule*." *Id.* at *3 (emphasis added) (quoting INA § 240A(d)(1)); *accord id.* at *7 ("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*." (quoting INA § 240A(d)(1)) (emphasis added)); *id.* at *11 ("A document that fails to include such information is not a 'notice to appear under section 1229(a)' and thus *does not trigger the stop-time rule*." (quoting INA §

[1] The question presented is also available on the Supreme Court's website at

240A(d)(1)) (emphasis added)). The Supreme Court's constant use of the same phrase—trigger the stop-time rule—cannot be accidental, and it leaves no doubt that *Pereira* is about what triggers the stop-time rule. *Cf. Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016) ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same. . . .").

The stop-time rule is part of section 240A of the Immigration and Nationality Act (INA or Act) and provides that "[f]or 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 section 239(a)" of the Act.[2] INA § 240A(d)(1) (emphasis added). "[T]his section," i.e., section 240A of the Act, authorizes cancellation of removal, a form of relief aliens may seek in removal proceedings. The question resolved by the Supreme Court—i.e., what triggers the stop-time rule—only matters when an alien is in removal proceedings and seeking cancellation of removal. The resolution of this question matters in Pereira's case because he sought to apply for cancellation of removal in his reopened removal proceedings. *Pereira*, 2018 WL 3058276 at *6. This question, however, would be moot if the NTA in his case, which "ordered him to appear before an Immigration Judge in Boston 'on a date to be set at a time to be set[,]'" *id.*, was inadequate for proceedings to occur even after the Immigration Court served him a notice of hearing setting a date and time for the hearing.

The Supreme Court does not give advisory opinions, expressing what the law would be upon a hypothetical state of facts. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013);

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https://www.supremecourt.gov/qp/17-00459qp.pdf.

[2] Service of a NTA is not the only event that stops time under INA § 240A(d)(1), and there is an exception to the stop-time rule for aliens who seek special rule cancellation under INA § 240A(b)(2)(A).

Gonzalez v. Corning, 885 F.3d 186, 192-93 (3d Cir. 2018) (advisory opinions are forbidden by Article III of the Constitution). The prohibition on advisory opinions has been described as "'the oldest and most consistent thread in the federal law of justiciability[.]'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)); *Coffin v. Malvern Federal Sav. Bank*, 90 F.3d 851 (3d Cir. 1996) (same). The "stop-time" ruling the Supreme Court rendered in *Pereira* was not an advisory opinion *because* the respondent is in removal proceedings and seeking relief. If the Court had perceived that *Pereira* might not be properly in proceedings, rendering his application for cancellation of removal and the application of the stop-time rule moot, it would have directly addressed the issue. *See, e.g.*, *North Carolina v. Rice*, 404 U.S. 244 (1971) (declining to reach the underlying question without first resolving the "threshold question" of mootness). That the Court said absolutely nothing about the termination of proceedings reflects that there was nothing to say. *See United States v. Lopez*, 518 U.S. 790, 798 (10th Cir. 2008) (Gorsuch, J.) (recognizing the "logical significance of the dog that didn't bark").

II. The Initial Notice of Hearing Served by the Immigration Court on the Respondent Satisfies INA § 239(a)(1)(G) and in Conjunction with the NTA Provided the Written Notice Required by § 239(a)(1) and *Pereira*.

Under the Supreme Court's analysis in *Pereira*, what qualifies as an NTA is a matter of substance, not form. "If the three words 'notice to appear' mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, *i.e.*, the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place. 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." *Pereira*, 2018 WL 3058276 at *9. Section 239(a)(1) of the Act requires "written notice." "Notice" means "legal notification." Black's Law Dictionary, 1090 (8th ed. 2004).

It is not defined as or limited to a single sheet of paper. *See id.* "The fact that the government fulfilled its obligations under INA § 239(a) in two documents—rather than one—did not deprive the IJ of jurisdiction to initiate removal proceedings." *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006). The second document, the "Notice of Hearing[,] perfected the notice required by § 239(a)(1)[.]" *Guamanrrigra v. Holder*, 670 F.3d 404, 410 (2d Cir. 2012); *see Pereira*, 2018 WL 3058276 at *14 (Kennedy, J., concurring) (citing *Dababneh* and *Guamanrrigra* with approval for the proposition that the stop-time rule is triggered when the written notice required by INA § 239(a)(1) is "perfected").

Likewise, the INA does not require a document labeled as an NTA. Rather, it uses the term "notice to appear" as a shorthand way of referring to the "written notice" that conveys the information required by INA § 239(a)(1). *See Pereira*, 2018 WL 3058276 at *10. "The INA simply requires that an alien be provided written notice of his hearing; it does not require that the NTA . . . satisfy all of § 1229(a)(1)'s notice requirements." *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2006). For example, in *Pereira* the Court observed that an Order to Show Cause (OSC) that specifies the time and place of proceedings may qualify as a "notice to appear" for purposes of the stop-time rule. 2018 WL 3058276 at *10 n.9. Conversely, "a document that is labeled 'notice to appear,' but [that] fails to specify either the time or place of the removal proceedings" is

insufficient to trigger the stop-time rule. *Id.* at *3. Congress intended for the contents of the document, i.e., notice of the time and place and hearing to control, not the title affixed to it. *Id.* at *9 (rejecting the opposite approach as "absurd"). The law eschews "plac[ing] form over substance, and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); *see, e.g.*, *Tokyo Kikai Seisakusho, Ltd. v. TKS (U.S.A.), Inc.*, 529 F.3d 1352, 1360 n.8 (Fed. Cir. 2008) (declining "to exalt form over substance" by limiting an agency's authority "based on how it decided to label its proceedings").

In this case, like many others, the Immigration Court issued and served on both parties a notice of hearing that provided the required notice of the time and place of hearing. This "two-step notice procedure" in which the Department serves a NTA and the Immigration Court serves a notice of hearing that provides written notice of the time and place of hearing, "is permissible" and has been upheld consistently by the circuit courts. *See Ramos-Olivieri v. Att'y General of U.S.* ,624 F.3d 622, 625 (3d Cir. 2010); *Popa v. Holder*, 571 F.3d 890, 895 (9th Cir. 2009) (citing *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir.2009); *Dababneh*, 471 F.3d at 809-10 (7th Cir.2006); and *Haider*, 438 F.3d at 907)); *accord Guamanrrigra*, 670 F.3d at 410. By providing such written notice the Immigration Court fulfilled its responsibility under Department of Justice regulations authorizing the Immigration Courts to "schedul[e] cases and provid[e] notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. § 1003.18(a).[3] These regulations specifically contemplate that "[i]f that information is not

[3] Westlaw, in its "West Codenotes," says 8 C.F.R. § 1003.18 was "held invalid." 2018 WL 3058276 (prefatory material in front of *1). How Westlaw arrived at that supposition is opaque; the majority opinion and concurrence never cite 8 C.F.R. § 1003.18. The dissent cites it twice, without any suggestion that it is no longer valid. *See* 2018 WL 3058276 at *18, *21 (Alito, J.). While Westlaw is a valuable research tool, it is a database, not a source of law.

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." 8 C.F.R. § 1003.18(b). That is exactly what happened in this case. To terminate proceedings where the Executive Office for Immigration Review (EOIR) adhered to 8 C.F.R. § 1003.18(b) would render compliance with the regulation an empty gesture and the substance of the regulation a nullity. "[O]nce a regulation is properly issued by the Attorney General, it is the obligation of this Board and the Immigration Judges to enforce it. Regulations promulgated by the Attorney General have the force and effect of law as to this Board and the Immigration Judges." *Matter of L-H-P-*, 27 I&N Dec. 265, 267 (BIA 2018) (quoting *Matter of H-M-V-*, 22 I&N Dec. 256, 261 (BIA 1998)).

Moreover, this two-step process was approved in the context of challenges to *in absentia* orders, *e.g. Ramos-Olivieri,*624 F.3d at 625-26, and the Supreme Court found that the same requirements for *in absentia* orders, *see* INA § 240(b)(5)(A) & (C), apply to the stop-time rule. *Pereira*, 2018 WL 3058276 at *11. Under *Pereira* the stop-time rule requires "notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1)." *Id.* An *in absentia* order likewise requires that "written notice has been provided to the alien or the alien's counsel of record, either through service of a Notice to Appear containing the hearing date and time, or through service of a subsequent Notice of Hearing." *Matter of M-R-A-*, 24 I&N Dec. 665, 670 (BIA 2008) (citing INA § 239(a)(1)-(2)). Circuit court decisions approving of the two-step process of an NTA followed by a notice of hearing to provide the written notice required under INA § 239(a)(1) have arisen in both contexts—*in absentia* orders and the stop-time rule.

"[C]ourts have often recognized that a failure to give a person a required notice can be harmless—e.g., where the person had actual knowledge of the relevant information or the notice defect was cured by a subsequent notice given in time for the person to act on the matter." *Suntec Industries Co., Ltd. v. United States*, 857 F.3d 1363, 1369 (Fed. Cir. 2017) (citing cases).[4] In *Popa*, the Ninth Circuit held that a "Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of hearing is in fact later sent to that alien." 571 F.3d at 896 (upholding the denial of a motion to reopen following an *in absentia* order). The Eighth Circuit put it more emphatically: "Our reading of the INA and the regulations compels the conclusion that the NTA and the NOH [notice of hearing], which were properly served on Haider, combined to provide the requisite notice." 438 F.3d at 907 (same). The court elaborated:

> The NTA initiated removal proceedings against Haider and informed him that an NOH would be mailed to the address listed on the NTA. . . . As promised, the Immigration Court later mailed the NOH containing the date and time of the hearing to Haider. We see nothing unlawful about this conduct. Indeed, the regulations reasonably authorize the Immigration Court to set the date and time of its own hearings and provide due notice to the alien. . . .
>
> We wish to be clear that the NTA, if it were the only notice served on Haider in this case, would not have authorized *in absentia* removal because Haider would not have been served notice of the date and time of the hearing as required by § 1229(a)(1).

[4] *Suntec* involved an administrative order by the Department of Commerce, which the court upheld. 859 F.3d at 1365. Although the request to initiate "anti-dumping" proceedings was not properly served on Suntec, when Commerce initiated its review it published notice in Federal Register. *See id.* at 1364-65. The court explained that the "crucial fact . . . is that there was an intervening event between" the request and the proceedings themselves, i.e. that the agency conducting the proceedings provided legally sufficient notice. *Id.* at 1368.

Id. at 907-08. The Notice to Appear was not statutorily defective because "the NTA and the hearing notice combined provided [the respondent] with the time and place of her hearing, as required by 8 U.S.C. § 1229(a)(1)(G)(i)." *Popa*, 571 F.3d at 896. *Peirera* does not overturn or abrogate the holdings in *Popa* and *Haider*, but rather is consistent with them.

Finally, over two years ago the Third Circuit held that this two-step procedure is required to trigger the stop-time rule. *Orozco-Velasquez v. Att'y Gen. of the U.S.*, 817 F.3d 78 (3d Cir. 2016). As that court explained, "the government did not comply with § 1229(a)(1)'s directive until April 2010, when it served Orozco-Velasquez with an NTA correcting the address of the Immigration Court and a Notice of Hearing establishing the date and time of removal proceedings." *Id.* at 83. *Pereira* reached the same holding as *Orozco-Velasquez*. *See* 2018 WL 3058276, at *7 n.4. Just as *Orozco-Velasquez* did not result in the termination of proceedings, neither should *Pereira*.

CONCLUSION

Based on the foregoing, the Immigration Court should deny the respondent's motion to terminate.

Respectfully Submitted,

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Dated: July 9, 2018