No. 19-510

# In the Supreme Court of the United States

JOSE JAVIER BANEGAS GOMEZ, PETITIONER

*v.*

WILLIAM P. BARR, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the immigration court lacked jurisdiction over petitioner's removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing.

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-21a) is reported at 922 F.3d 101. The decisions of the Board of Immigration Appeals (Pet. App. 22a-25a) and the immigration judge (Pet. App. 26a-33a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 23, 2019. A petition for rehearing was denied on July 23, 2019 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for a removal proceeding before an immigration judge (IJ) to determine whether an alien should be removed from the United States.

8 U.S.C. 1229a(a)(1). IJs "are attorneys whom the Attorney General appoints as administrative judges" to conduct removal proceedings. 8 C.F.R. 1003.10(a). Pursuant to authority vested in him by the INA, see 8 U.S.C. 1101(g), the Attorney General has promulgated regulations "to assist in the expeditious, fair, and proper resolution of matters coming before [IJs]," 8 C.F.R. 1003.12.

The Attorney General's regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document is filed with the Immigration Court." 8 C.F.R. 1003.14(a). Under the regulations, a "[c]harging document means the written instrument which initiates a proceeding before an [IJ]," such as "a Notice to Appear." 8 C.F.R. 1003.13 (emphasis omitted). The regulations provide that "the Notice to Appear" shall contain "the time, place and date of the initial removal hearing, where practicable." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.15(b)-(c) (listing the information to be provided to the immigration court in a "Notice to Appear"). The regulations further provide 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." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.18(a) ("The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.").

b. The INA independently requires that an alien placed in removal proceedings be served with "written notice" of certain information. 8 U.S.C. 1229(a)(1). Section 1229 refers to that "written notice" as a "'notice to

appear.'" *Ibid.* Under paragraph (1) of Section 1229(a), such written notice must specify, among other things, the "time and place at which the proceedings will be held," and the "consequences under section 1229a(b)(5)" of failing to appear. 8 U.S.C. 1229(a)(1)(G)(i)-(ii). Paragraph (2) of Section 1229(a) provides that, "in the case of any change or postponement in the time and place of [the removal] proceedings," "written notice shall be given" specifying "the new time or place of the proceedings," and the "consequences under section 1229a(b)(5)" of failing to attend such proceedings. 8 U.S.C. 1229(a)(2)(A).

Section 1229a(b)(5), in turn, provides that "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided * * * does not attend a proceeding under this section, shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An alien may not be removed in absentia, however, unless the Department of Homeland Security (DHS) "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." *Ibid.* An order of removal entered in absentia may be rescinded "if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Petitioner is a native and citizen of Honduras. Administrative Record (A.R.) 331. In 2004, he was admitted to the United States as a lawful permanent resident. *Ibid.* In 2011, following guilty pleas in Connecticut state court, petitioner was convicted on one count of first-degree assault with intent to cause serious physical injury, in violation of Conn. Gen. Stat. § 53a-59(a)(1) (2010), and one count of conspiracy to commit the same,

in violation of Conn. Gen. Stat. §§ 53a-48 and 53a-59(a)(1) (2010). A.R. 155-168.

In 2013, DHS served petitioner with a notice to appear for removal proceedings "on a date to be set at a time to be set." A.R. 329; see A.R. 330. The notice to appear charged that petitioner was subject to removal because his 2011 convictions qualified as convictions for aggravated felonies. A.R. 331; see 8 U.S.C. 1101(a)(43)(F) and (U), 1227(a)(2)(A)(iii). DHS filed the notice to appear with the immigration court. A.R. 329.

The immigration court later served petitioner with a notice of hearing, informing him that it had scheduled his removal hearing for August 1, 2013, at 8:30 a.m. A.R. 328. Petitioner appeared at that hearing and subsequent hearings before the IJ. Pet. App. 20a; see A.R. 313-317, 325-327 (providing petitioner notice of the time, place, and date of each subsequent hearing).

The IJ ordered petitioner removed to Honduras. Pet. App. 26a-33a. The IJ determined that the Connecticut offense of first-degree assault that petitioner had committed qualified as a "crime of violence" under 18 U.S.C. 16(b) and thus satisfied the INA's definition of an "aggravated felony." Pet. App. 27a. The IJ therefore found petitioner removable as charged. *Ibid.* The IJ also denied petitioner's application for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, see Pet. App. 33a, finding that petitioner had not met his burden of demonstrating that "it is more likely than not" that "he would be tortured in Honduras," *id.* at 31a.

The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 22a-25a. Before

the Board, petitioner challenged only the IJ's denial of deferral of removal under the CAT. A.R. 9-20. The Board "affirm[ed] the [IJ's] conclusion that [petitioner] did not present sufficient evidence to establish that it is 'more likely than not'" that he would be "tortured upon his removal either at the hands of the government of Honduras, or with its acquiescence." Pet. App. 23a (citation omitted).

3. Petitioner filed a petition for review of the Board's decision. C.A. Doc. 1 (Oct. 13, 2015). After the parties filed their briefs in the court of appeals, this Court issued its decision in *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, this Court held that 18 U.S.C. 16(b) is unconstitutionally vague. 138 S. Ct. at 1223. Following that decision, the court of appeals directed the parties to file supplemental briefs addressing whether petitioner "remains removable" in light of *Dimaya*. C.A. Doc. 88, at 1 (Aug. 3, 2018).

In his supplemental brief, petitioner argued that his removal "was based on an unconstitutionally vague statute." Pet. C.A. Supp. Br. 4. He also argued, for the first time, that the immigration court lacked jurisdiction over his removal proceedings in light of this Court's decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018). Pet. C.A. Supp. Br. 4-8. In *Pereira*, the Court was presented with the "narrow question," 138 S. Ct. at 2110, whether a notice to appear that does not specify the time or place of an alien's removal proceedings is a "notice to appear under section 1229(a)" that triggers the so-called stop-time rule governing the calculation of the alien's continuous physical presence in the United States for purposes of cancellation of removal, 8 U.S.C. 1229b(d)(1). The Court answered no, holding 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)' and therefore does not trigger the stop-time rule." *Pereira*, 138 S. Ct. at 2110. Petitioner argued that because the notice to appear in his case did not specify the date and time of his initial removal hearing, it did not satisfy the requirements of Section 1229(a) and therefore did not vest the immigration court with jurisdiction over his removal proceedings. Pet. C.A. Supp. Br. 5-8.

4. The court of appeals denied the petition for review. Pet. App. 2a-21a.

The court of appeals determined that petitioner's prior conviction for first-degree assault still qualified as a conviction for an "aggravated felony" that rendered him removable. Pet. App. 8a-13a. The court acknowledged that "the agency [had] relied solely on § 16(b)"—which *Dimaya* had found "impermissibly vague"—in concluding that petitioner's "conviction for first-degree assault constitutes a crime of violence." *Id.* at 9a. The court explained, however, that "post-*Dimaya*," an offense may still qualify as a "crime of violence"—and thus an "aggravated felony"—if it satisfies the "elements clause" of 18 U.S.C. 16(a). Pet. App. 9a. Finding a remand "unnecessary" because "the agency's interpretations of federal and state criminal laws" are reviewed de novo, *id.* at 10a, the court determined that petitioner's prior conviction for first-degree assault qualified as a conviction for a "crime of violence" under Section 16(a) because "first-degree assault under Connecticut law has as an element the use of force," *id.* at 13a.

Having determined that petitioner was removable by reason of having committed an aggravated felony, the court of appeals held that its jurisdiction under 8 U.S.C. 1252(a)(2)(C) and (D) was "limited to constitutional

claims and questions of law." Pet. App. 14a. The court concluded that the Board committed no legal error in denying deferral of removal under the CAT. *Id.* at 14a-15a. The court further concluded that it lacked jurisdiction to review the agency's "factual determination" that petitioner "did not establish that he would more likely than not be tortured" in Honduras. *Id.* at 15a-16a.

Finally, the court of appeals rejected petitioner's argument that the notice to appear "was inadequate to vest jurisdiction in the Immigration Court." Pet. App. 16a. The court of appeals explained that the "jurisdiction" of the immigration court is governed not by the INA, but by regulations promulgated by the Attorney General. *Id.* at 17a. The court of appeals further explained that, although those regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document," such as a notice to appear, "is filed with the Immigration Court," *ibid.* (quoting 8 C.F.R. 1003.14(a)) (first set of brackets in original), "the regulations require that a[] [notice to appear] contain the time, date, and place of a hearing only 'where practicable,'" *ibid.* (quoting 8 C.F.R. 1003.18(b)). The court of appeals therefore held that a notice to appear "that omits information regarding the time and date of the initial removal hearing is nevertheless adequate to vest jurisdiction in the Immigration Court, at least so long as a notice of hearing specifying this information is later sent to the alien," as it was in petitioner's case. *Id.* at 20a. Finding petitioner's reliance on *Pereira* misplaced, the court of appeals explained that, unlike the stop-time rule at issue in that case, the Attorney General's regulations "do not refer to § 1229(a)(1)'s requirements when defining what a[] [notice to appear] is

for purposes of vesting jurisdiction in the Immigration Court." *Id.* at 18a.

**ARGUMENT**

Petitioner contends (Pet. 12-15) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court, and the outcome of this case would not be different in any other court of appeals that has addressed the question presented. The petition for a writ of certiorari should be denied.[*]

1. a. Petitioner contends (Pet. 12-15) that the immigration court lacked jurisdiction over his removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of his initial removal hearing. That contention lacks merit, for three independent reasons.

First, a notice to appear need not specify the date and time of the initial removal hearing in order for "[j]urisdiction" to "vest[]" under the pertinent regulations, 8 C.F.R. 1003.14(a). The regulations provide that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging document is filed with the Immigration Court." *Ibid.* A "[c]harging document means the written instrument which initiates a proceeding before an [IJ]," such as "a Notice to Appear."

[*] Other pending petitions for writs of certiorari raise similar issues. See, *e.g.*, *Deocampo* v. *Barr*, No. 19-44 (filed July 3, 2019); *Perez-Cazun* v. *Barr*, No. 19-358 (filed Sept. 13, 2019); *Karingithi* v. *Barr*, No. 19-475 (filed Oct. 7, 2019); *Kadria* v. *Barr*, No. 19-534 (filed Oct. 21, 2019).

8 C.F.R. 1003.13 (emphasis omitted). And the regulations make clear that, in order to serve as a "[c]harging document" that commences removal proceedings, "a Notice to Appear" need not specify the date and time of the initial removal hearing, *ibid.*: The regulations specifically provide that "the Notice to Appear" shall contain "the time, place and date of the initial removal hearing" only "where practicable." 8 C.F.R. 1003.18(b); see 8 C.F.R. 1003.15(b)-(c) (omitting date and time information from the list of information to be provided to the immigration court in a "Notice to Appear"). And far from depriving the immigration court of jurisdiction when a "Notice to Appear" filed by DHS in the immigration court does not contain "the time, place and date of the initial removal hearing," the regulations expressly authorize the immigration court to provide that information to the government and the alien once the hearing has been scheduled. 8 C.F.R. 1003.18(b). That provision for the immigration court to schedule a hearing necessarily presupposes that the immigration court has jurisdiction and proceedings have commenced. Thus, a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ." *Karingithi* v. *Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019), petition for cert. pending, No. 19-475 (filed Oct. 7, 2019); see *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 445 (B.I.A. 2018) (explaining that 8 C.F.R. 1003.14(a) "does not specify what information must be contained in a 'charging document' at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest").

Second, even if the notice to appear alone did not suffice to "vest[]" "[j]urisdiction" in the immigration court,

8 C.F.R. 1003.14(a), the notice to appear together with the subsequent notice of hearing did. As noted, the regulations expressly authorize the immigration court to "provid[e] notice to the government and the alien of the time, place, and date of hearing" when "that information is not contained in the Notice to Appear." 8 C.F.R. 1003.18(b). That is what the immigration court did here: It served petitioner with a notice of hearing informing him that his initial removal hearing was scheduled for August 1, 2013, at 8:30 a.m. A.R. 328. Thus, even if the regulations required notice of the date and time of the hearing for "[j]urisdiction" to "vest[]," 8 C.F.R. 1003.14(a), that requirement was satisfied when petitioner was served with a notice of hearing containing that information. See *Bermudez-Cota*, 27 I. & N. Dec. at 447 ("Because the [alien] 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.").

Third, any requirement that the notice to appear contain the date and time of the initial removal hearing is not a strictly "jurisdictional" requirement, but a mere "claim-processing rule"; accordingly, petitioner forfeited any objection to the contents of the notice to appear by not raising that issue before the IJ. *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 963 (7th Cir. 2019). To be sure, 8 C.F.R. 1003.14(a) speaks in terms of the immigration court's "[j]urisdiction." But "[j]urisdiction" is "a word of many, too many, meanings." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1848 (2019) (citations omitted). And here, context makes clear that Section 1003.14(a) does not use the term in its strict sense. As 8 C.F.R. 1003.12 confirms, the Attorney General promulgated Section 1003.14(a) "to assist in the expeditious,

fair, and proper resolution of matters coming before [IJs]," 8 C.F.R. 1003.12—the very description of a claim-processing rule. See *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011) (explaining that "claim-processing rules" are "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times"). Thus, "as with every other claim-processing rule," failure to comply with Section 1003.14(a) may be "waived or forfeited." *Ortiz-Santiago*, 924 F.3d at 963. Here, petitioner appeared at his initial removal hearing before the IJ on August 1, 2013, without raising any objection to the lack of date and time information in the notice to appear. A.R. 65-68. Given the absence of a timely objection, petitioner forfeited any contention that the notice to appear was defective. See *Pierre-Paul* v. *Barr*, 930 F.3d 684, 693 (5th Cir. 2019), petition for cert. pending, No. 19-779 (filed Dec. 16, 2019); *Ortiz-Santiago*, 924 F.3d at 964-965.

b. This Court's decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), is not to the contrary. In *Pereira*, the Court 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)' and therefore does not trigger the stop-time rule" governing the calculation of the alien's continuous physical presence in the United States for purposes of cancellation of removal. *Id.* at 2110. "*Pereira*'s narrow holding does not govern the jurisdictional question" presented here. *Karingithi*, 913 F.3d at 1160 n.1. That is because, unlike in *Pereira*, the question presented here does not depend on what qualifies as a "notice to appear under section 1229(a)." 138 S. Ct. at 2110; cf. 8 U.S.C. 1229b(d)(1)(A). The INA, including Section 1229(a), "is

silent as to the jurisdiction of the Immigration Court." *Karingithi*, 913 F.3d at 1160; see *Ortiz-Santiago*, 924 F.3d at 963 (explaining that the statute "says nothing about the agency's jurisdiction"). Indeed, the statute does not even require that the notice to appear be filed with the immigration court. Rather, it requires only that "written notice" of certain information—"referred to as a 'notice to appear'"—"be given * * * to the alien." 8 U.S.C. 1229(a)(1); see *United States* v. *Cortez*, 930 F.3d 350, 366 (4th Cir. 2019) (explaining that "the regulations in question and § 1229(a) speak to different issues—filings in the immigration court to initiate proceedings, on the one hand, and notice to noncitizens of removal hearings, on the other").

To the extent that the commencement of proceedings in (or the "[j]urisdiction" of) the immigration court is addressed at all, it is addressed only by the Attorney General's regulations. 8 C.F.R. 1003.14(a). And in describing the various "[c]harging document[s]" that may "initiate[] a proceeding before an [IJ]," 8 C.F.R. 1003.13 (emphasis omitted), the regulations make no cross-reference to Section 1229(a) or its list of information to be given to the alien, see 8 C.F.R. 1003.15, 1003.18. Rather, the regulations specify their own lists of information to be provided to the immigration court in a "Notice to Appear," *ibid.*, and those regulations do not require that a notice to appear specify the date and time of the initial removal hearing in order to qualify as a "charging document" filed with the immigration court, 8 C.F.R. 1003.14(a); see *Nkomo* v. *Attorney Gen. of the U.S.*, 930 F.3d 129, 134 (3d Cir. 2019) (explaining that the fact that Section 1003.14(a) "describes the relevant filing as a 'charging document' * * * suggests § 1003.14's filing requirement serves a different purpose than the

'notice to appear under section 1229(a)' in the stop-time rule") (citations omitted). Petitioner's reliance (Pet. 12-15) on *Pereira* and Section 1229(a) therefore is misplaced.

In any event, petitioner was given the notice required under Section 1229(a) in this case. Section 1229(a) requires that an alien placed in removal proceedings be given "written notice" containing, among other information, "[t]he time * * * at which the proceedings will be held." 8 U.S.C. 1229(a)(1)(G)(i). Section 1229(a), however, does not mandate service of all the specified information in a single document. Thus, if the government serves an alien with a notice to appear that does not specify the date and time of his removal proceedings, it can complete the "written notice" required under Section 1229(a) by later serving the alien with a notice of hearing that does specify the date and time. 8 U.S.C. 1229(a)(1); see *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I. & N. Dec. 520, 531 (B.I.A. 2019) (en banc) (holding that the "'written notice'" required under Section 1229(a)(1) "may be provided in one or more documents"). The government did that here. After DHS served petitioner with a notice to appear providing all of the specified information except the date and time of his removal proceedings, the immigration court served petitioner with a notice of hearing providing the date and time, A.R. 328, and petitioner appeared at that hearing, A.R. 65-68.

2. a. Petitioner has not identified any court of appeals in which the outcome of this case would be different. Like the Second Circuit in this case, Pet. App. 16a-20a, seven other courts of appeals have rejected arguments like petitioner's on the ground that a "notice to appear need not include time and date information to

satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ," at least where the alien is later served with a notice of hearing that provides that information. *Karingithi*, 913 F.3d at 1160 (9th Cir.); see *Goncalves Pontes* v. *Barr*, 938 F.3d 1, 3-7 (1st Cir. 2019); *Nkomo*, 930 F.3d at 132-134 (3d Cir.); *Cortez*, 930 F.3d at 362-364 (4th Cir.); *Pierre-Paul*, 930 F.3d at 689-691 (5th Cir.); *Santos-Santos* v. *Barr*, 917 F.3d 486, 489-491 (6th Cir. 2019); *Ali* v. *Barr*, 924 F.3d 983, 986 (8th Cir. 2019).

Five courts of appeals have held that any requirement that a notice to appear contain the date and time of the initial removal hearing is not a jurisdictional requirement, but a mere claim-processing rule. See *Cortez*, 930 F.3d at 358-362 (4th Cir.); *Pierre-Paul*, 930 F.3d at 691-693 (5th Cir.); *Ortiz-Santiago*, 924 F.3d at 962-965 (7th Cir.); *Lopez-Munoz* v. *Barr*, 941 F.3d 1013, 1015-1017 (10th Cir. 2019); *Perez-Sanchez* v. *U.S. Attorney Gen.*, 935 F.3d 1148, 1154-1157 (11th Cir. 2019). Each of those courts of appeals would have rejected petitioner's challenge to his removal proceedings on the ground that he forfeited any reliance on such a claim-processing rule. See pp. 10-11, *supra*. Thus, in every court of appeals that has addressed the question presented, petitioner's challenge would have failed.

b. Petitioner's assertions of various circuit conflicts do not suggest otherwise. Petitioner contends (Pet. 10-12) that, whereas some circuits have deemed any requirement that a notice to appear contain the date and time of the initial removal hearing to be a mere claim-processing rule, the First, Second, Third, Sixth, Eighth, and Ninth Circuits have deemed any such requirement to be "jurisdictional" in the strict sense of the term.

That contention is incorrect. Those six circuits have repeated 8 C.F.R. 1003.14(a)'s use of the word "jurisdiction" in holding that a "notice to appear need not include time and date information to satisfy" the applicable "regulatory requirements." *Karingithi*, 913 F.3d at 1160 (9th Cir.); see Pet. App. 17a; *Goncalves Pontes*, 938 F.3d at 6 (1st Cir.); *Nkomo*, 930 F.3d at 133 (3d Cir.); *Santos-Santos*, 917 F.3d at 490-491 (6th Cir.); *Ali*, 924 F.3d at 986 (8th Cir.). But because each of those circuits found those requirements satisfied, none had occasion to address whether the regulations set forth a strictly jurisdictional, as opposed to mere claim-processing, rule. See, *e.g.*, *Goncalves Pontes*, 938 F.3d at 7 n.3 (1st Cir.) (declining to address whether the regulations "must be understood as claim-processing rules" after concluding that the notice to appear "was not defective under the regulations").

Petitioner also contends (Pet. 12) that the Seventh and Eleventh Circuits disagree with other circuits on whether a notice to appear that does not specify the date and time of the removal proceedings satisfies the requirements of Section 1229(a). In *Perez-Sanchez*, however, the Eleventh Circuit stated only that such a notice to appear, by itself, would be deficient under Section 1229(a), while leaving open the possibility that "a notice of hearing sent later might be relevant to a harmlessness inquiry." 935 F.3d at 1154. The court declined to decide whether such a notice to appear, by itself, would be "deficient under the regulations." *Id.* at 1156; see *id.* at 1156 n.5 (reserving judgment on whether a notice to appear under the regulations is "the same" as a notice to appear under Section 1229(a)). And the court went on to hold that neither Section 1229(a) nor the regulations set forth a strictly "jurisdictional" rule. *Id.* at

1154-1155. Rather, the court held that "8 C.F.R. § 1003.14, like 8 U.S.C. § 1229(a), sets forth only a claim-processing rule." *Id.* at 1155. Thus, petitioner's challenge to his removal proceedings would have likewise failed in the Eleventh Circuit. See pp. 10-11, *supra* (explaining that petitioner forfeited any violation of a claim-processing rule here).

Petitioner's challenge would have likewise failed in the Seventh Circuit. In *Ortiz-Santiago*, the Seventh Circuit stated that a notice to appear that does not specify the date and time of the initial removal hearing is "defective" under both the statute and the regulations, 924 F.3d at 961, and that it was "not so sure" that the government could complete the required notice by later serving a notice of hearing, *id.* at 962. But because the Seventh Circuit held that any defect in the notice to appear was not "an error of jurisdictional significance," *ibid.*, but rather an error that could be "waived or forfeited," *id.* at 963, it would have reached the same outcome as the Second Circuit here. See pp. 10-11, *supra* (explaining that petitioner forfeited any error here).

Finally, petitioner asserts (Pet. 10) the existence of a circuit conflict on whether the Board's interpretation of the applicable regulations in *Bermudez-Cota* is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). Petitioner argues (Pet. 10) that the Seventh and Eleventh Circuits have rejected the Board's reasoning in *Bermudez-Cota*, which held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an [IJ] with jurisdiction over the removal proceedings * * * , so long as a notice of hearing specifying this information is later sent to the alien." 27 I. & N. Dec. at 447. As explained above, however, the Eleventh Circuit in *Perez-Sanchez* declined to

decide whether a notice to appear that does not specify the date and time of the removal proceedings would be "deficient under the regulations." 935 F.3d at 1156. And although the Seventh Circuit in *Ortiz-Santiago* stated that such a notice to appear would be "defective" under both the statute and the regulations, 924 F.3d at 961, the court held that such a defect could be forfeited, *id.* at 963—as it was here, see pp. 10-11, *supra*. Thus, the outcome of this case would be the same in every court of appeals that has addressed the question presented.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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