No. 19-475

In the Supreme Court of the United States

SERAH NJOKI KARINGITHI, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH 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 her initial removal hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 913 F.3d 1158. A separate memorandum opinion of the court of appeals (Pet. App. 13-15) is not published in the Federal Reporter but is reprinted at 749 Fed. Appx. 653. The decisions of the Board of Immigration Appeals (Pet. App. 16-23) and the immigration judge (Pet. App. 27-56) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2019. A petition for rehearing was denied on May 8, 2019 (Pet. App. 58-59). On July 25, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 7, 2019, and the petition was filed on that date. 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. 1103(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 responsi-

ble 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 Kenya. Administrative Record (A.R.) 978. In 2006, she was admitted to the United States as a temporary nonimmigrant visitor for six months. *Ibid.*; Pet. App. 33.

In 2009, DHS served petitioner with a notice to appear for removal proceedings on a date "[t]o [b]e [s]et" at a time "[t]o [b]e [s]et." A.R. 978. The notice to appear charged that petitioner was subject to removal because she had remained in the United States for a time longer than permitted. *Ibid.*; see 8 U.S.C. 1227(a)(1)(B). DHS filed the notice to appear with the immigration court. A.R. 978.

The day after DHS served the notice to appear, see A.R. 979, the immigration court provided petitioner with a notice of hearing, informing her that it had scheduled her removal hearing for July 8, 2009, at 9 a.m., A.R. 975. Petitioner appeared at that hearing and subsequent hearings before the IJ. A.R. 117-266; see A.R. 940, 948-949, 960-964, 968, 970 (providing petitioner with notice of the time, place, and date of each subsequent hearing).

The IJ found petitioner removable as charged, Pet. App. 28, and denied her applications for asylum, withholding of removal, and other protection, *id.* at 55-56. The IJ therefore ordered petitioner removed to Kenya. *Id.* at 56. The Board of Immigration Appeals (Board) dismissed petitioner's appeal, finding no basis to disturb the IJ's decision. *Id.* at 16-23.

3. Petitioner filed a petition for review of the Board's decision. C.A. Doc. 1-2 (Mar. 31, 2016). After the parties filed their briefs in the court of appeals, this Court issued its decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018). In *Pereira*, the Court was presented with the "narrow question," *id.* 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.

Following this Court's decision in *Pereira*, the Board in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (2018), addressed whether an immigration court lacks jurisdiction over an alien's removal proceedings when the notice to appear filed with the immigration court does not specify the date and time of the alien's initial removal hearing. The Board in that case 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 and meets the requirements of section [1229(a)], so long as a notice of hearing specifying this information is later sent to the alien." *Id.* at 447.

The court of appeals in this case directed the parties to file supplemental briefs addressing the effect of *Pereira* and *Bermudez-Cota* on the petition for review. C.A. Doc. 52, at 1 (Oct. 12, 2018). In her supplemental brief, petitioner noted that she had filed a motion to reconsider with the Board following *Pereira*, seeking to apply for cancellation of removal in light of that decision. Pet. Supp. C.A. Br. 2, 12. Petitioner stated that her motion was still pending, *id.* at 2, and urged the court to remand her case to the agency so that she could proceed with her application for cancellation of removal,

id. at 14. In the alternative, petitioner argued that because the notice to appear in her case did not specify the date and time of her initial removal hearing, "neither the IJ nor the [Board] had subject matter jurisdiction over her when she was found removable," and that her removal proceedings should be terminated. *Id.* at 20.

4. The court of appeals denied the petition for review. Pet. App. 1-12, 13-15.

The court of appeals rejected petitioner's contention that the immigration court lacked jurisdiction over her removal proceedings. Pet. App. 1-12. The court explained that the "jurisdiction" of the immigration court is governed not by the INA, but by regulations promulgated by the Attorney General. *Id.* at 8; see *id.* at 6-9. 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," *id.* at 7 (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 and date of the initial removal hearing only "*where practicable*," *ibid.* (quoting 8 C.F.R. 1003.18(b)). The court of appeals therefore held that a "notice to appear need not include time and date information to satisfy" the "regulatory requirements" and "vest[] jurisdiction in the IJ," *id.* at 9, at least where, as in petitioner's case, that information is subsequently provided in a notice of hearing, *id.* at 4-5, 12. 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 reference § 1229(a), which itself makes no mention of the IJ's jurisdiction." *Id.* at 10.

The court of appeals observed that its reading of the applicable regulations was "consistent with the recent interpretation" of those regulations by the Board in *Bermudez-Cota*. Pet. App. 5. The court stated that the Board's "interpretations of its regulations are due 'substantial deference,' and should be upheld 'so long as the interpretation sensibly conforms to the purpose and wording of the regulations.'" *Id.* at 11 (citation omitted). The court stated that it "therefore defer[s] to the Board's interpretations of ambiguous regulations unless they are 'plainly erroneous,' 'inconsistent with the regulation,' or do 'not reflect the agency's fair and considered judgment.'" *Ibid.* (citation omitted). The court concluded that "*Bermudez-Cota* easily meets this standard and is consistent with [the court's] analysis." *Ibid.*

The court of appeals declined to address petitioner's claim that "*Pereira* renders her eligible for cancellation of removal." Pet. App. 12. The court observed that "cancellation is a new claim that is not part of this petition for review." *Ibid.* And the court explained that although petitioner had "raised her cancellation claim in a motion to reconsider" before the Board, "she must await its determination" there. *Ibid.*[1] In a separate memorandum disposition, the court also rejected petitioner's challenges to the denial of her applications for asylum and withholding of removal. *Id.* at 13-15.

5. The court of appeals denied rehearing en banc. Pet. App. 58-59.

ARGUMENT

Petitioner contends (Pet. 10-23) that the immigration court lacked jurisdiction over her removal proceedings

[1] As of January 13, 2020, petitioner's motion to reconsider remains pending before the Board.

because the notice to appear filed with the immigration court did not specify the date and time of her 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 Court has recently denied petitions for writs of certiorari raising the same issue, see *Perez-Cazun* v. *Barr*, No. 19-358 (Jan. 13, 2020); *Deocampo* v. *Barr*, No. 19-44 (Jan. 13, 2020), and the same result is warranted here.[2]

1. a. Petitioner contends (Pet. 10-23) that the immigration court lacked jurisdiction over her removal proceedings because the notice to appear filed with the immigration court did not specify the date and time of her 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[]" in the immigration court 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." 8 C.F.R. 1003.13 (emphasis omitted). And the regulations make clear that, in order to serve as a charging document that commences removal proceedings, a "Notice to Appear" need not specify the date

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[2] Other pending petitions for writs of certiorari raise the same issue. See, *e.g.*, *Banegas Gomez* v. *Barr*, No. 19-510 (filed Oct. 16, 2019); *Kadria* v. *Barr*, No. 19-534 (filed Oct. 21, 2019); *Pierre-Paul* v. *Barr*, No. 19-779 (filed Dec. 16, 2019).

and time of the initial removal hearing: 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").

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 schedule the hearing and to provide "notice to the government and the alien of the time, place, and date of [the] hearing." 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." Pet. App. 9; 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 provided petitioner with a notice of hearing informing her that her initial removal hearing had been scheduled for July 8, 2009, at 9 a.m. A.R. 975. 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 provided 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* 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 her initial removal hearing before the IJ on July 8, 2009, without raising any objection to the lack of date and time information in the notice to appear. A.R. 117-124. 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. Pet. App. 8 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." Pet. App. 8; 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 the issue of what must be filed in the immigration court for proceedings there to commence (or for "[j]urisdiction" there to "vest[]") 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 to commence proceedings, 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. 10-11) 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 the alien's removal proceedings, it can complete the "written notice" required under Section 1229(a) by later providing 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 her removal proceedings, the immigration court provided petitioner with a notice of hearing containing the date and time, A.R. 975, and petitioner appeared at the hearing, A.R. 118.

c. Petitioner errs in contending (Pet. 10-11) that the decision below conflicts with *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). The question presented in *Kisor* was whether to overrule the agency-deference doctrine applied in *Auer* v. *Robbins*, 519 U.S. 452 (1997). *Kisor*, 139 S. Ct. at 2408. In *Kisor*, the Court explained certain limits on *Auer* deference, but on stare decisis grounds

declined to overrule *Auer*. See *id.* at 2422-2423; see also *id.* at 2424 (Roberts, C.J., concurring in part).

Petitioner contends (Pet. 11) that the court of appeals in this case contravened one of the limits on *Auer* deference by finding "ambiguity" in the applicable regulations "without exhausting the traditional tools of construction." The court, however, did not find the regulations ambiguous. See *ibid.* (acknowledging that "the court did not even discuss whether the regulation was ambiguous"). Rather, the court found that the regulations contain a "plain, exhaustive list of requirements" that does "not include the time of the hearing." Pet. App. 9; see *id.* at 8 (explaining that the court might have construed the regulations differently if they "did not clearly enumerate requirements for the contents of a notice to appear for jurisdictional purposes"). The court therefore concluded that a "notice to appear need not include time and date information to satisfy" the "regulatory requirements." *Id.* at 9. And because the Board's interpretation of the regulations in *Bermudez-Cota* was "consistent with" that conclusion, the court found the standard for upholding that interpretation "easily me[t]." *Id.* at 11.

Petitioner likewise errs in contending that the applicable regulations "simply 'parrot[] the statutory text.'" Pet. 10 (quoting *Kisor*, 139 S. Ct. at 2417 n.5). As explained above, the statutory text does not address what must be filed in the immigration court for proceedings in the immigration court to commence; that issue is addressed only by the regulations. See pp. 11-13, *supra*. There is thus no relevant statutory text for the regulations to parrot.

Contrary to petitioner's contention (Pet. 11-12), *Kisor* provides no basis to grant the petition for a writ of

certiorari, vacate the judgment below, and remand to the court of appeals for further consideration. *Auer* deference had no effect on the outcome below. The court found the "list of requirements in the jurisdictional regulations" "plain," and it concluded that petitioner's "notice to appear met the regulatory requirements" even before considering the Board's decision in *Bermudez-Cota*. Pet. App. 9. Petitioner therefore errs in asserting (Pet. 3) that "*Auer* deference tipped the scales in the government's favor." Although the court observed that *Bermudez-Cota* was "consistent with" its reading of the regulations, it arrived at that reading based on its own "analysis" of the regulations. Pet. App. 11. Other courts of appeals have likewise adopted the same reading, without relying on *Auer* deference. See *Goncalves Pontes* v. *Barr*, 938 F.3d 1, 7 (1st Cir. 2019) (addressing the Board's interpretation only as "a coda" to the court's own analysis); *Banegas Gomez* v. *Barr*, 922 F.3d 101, 111-112 (2d Cir. 2019) (similar), petition for cert. pending, No. 19-510 (filed Oct. 16, 2019); *Nkomo*, 930 F.3d at 132-134 (3d Cir.) (deciding the question presented without mentioning deference to the Board's interpretation); *Cortez*, 930 F.3d at 362-364 (4th Cir.) (same); *Pierre-Paul*, 930 F.3d at 689-691 (5th Cir.) (same); *Santos-Santos* v. *Barr*, 917 F.3d 486, 489-491 (6th Cir. 2019) (same); *Ali* v. *Barr*, 924 F.3d 983, 986 (8th Cir. 2019) (same). Granting, vacating, and remanding in light of *Kisor* is thus unwarranted.[3]

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[3] Contrary to petitioner's contention (Pet. 12), the government did not concede in a different case that *Auer* deference is unwarranted or that the decision below cannot be reconciled with *Kisor*. Rather, the government argued in that case that resort to *Auer* deference is unnecessary because—as the decision below concluded, see Pet. App. 9—the applicable regulations are plain. See Gov't Opp. to Pet.

2. a. Petitioner has not identified any court of appeals in which the outcome of this case would be different. Like the Ninth Circuit in this case, 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 provided with a notice of hearing that contains that information. Pet. App. 9; see *Goncalves Pontes*, 938 F.3d at 3-7 (1st Cir.); *Banegas Gomez*, 922 F.3d at 110-112 (2d Cir.); *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*, 917 F.3d at 489-491 (6th Cir.); *Ali*, 924 F.3d at 986 (8th Cir.).

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 her removal proceedings on the ground that she 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. 14-

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for Reh'g En Banc at 6, *Aguilar-Galdamez* v. *Barr*, No. 18-4122 (6th Cir. July 30, 2019).

18) 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." Pet. App. 9; see *Goncalves Pontes*, 938 F.3d at 6 (1st Cir.); *Banegas Gomez*, 922 F.3d at 111-112 (2d Cir. 2019); *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. 19-20) 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 her 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 providing 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 Ninth Circuit here. See pp. 10-11, *supra* (explaining that petitioner forfeited any error here).

Finally, petitioner asserts (Pet. 13-14) the existence of a circuit conflict on whether the Board's interpretation of the applicable regulations in *Bermudez-Cota* is entitled to *Auer* deference. Petitioner argues (Pet. 14) 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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