No. 19-534

In The
Supreme Court of the United States

LAHIM KADRIA,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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INTRODUCTION

This is a straightforward case about a statute and regulation that conflict.

In 1996, Congress enacted legislation to streamline the way the government notifies noncitizens of upcoming removal hearings. This legislation rejected an earlier two-step notification procedure, which generated needless errors and delay.[1] The newer law, 8 U.S.C. § 1229(a)(1), requires the government to provide a single notice that tells the noncitizen when and where to appear.

After Congress enacted this law, an executive agency wrote regulations that conformed to the older, two-step regime that Congress rejected. Accordingly, in nearly 100 percent of cases in the past few years, the Department of Homeland Security issued notices to appear that *didn't* tell noncitizens when and where to appear. *Pereira*, 138 S. Ct. at 2111.

The question presented is therefore simple: does the regulation conflict with the statute? Eight circuits say no; two circuits say yes.

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[1] For example, the one-step notification procedure would have prevented the errors that occurred in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). There, the government sent the first notice to the correct address, waited more than a year, then sent the second notice to the wrong address. *Id.* at 2107; *see also Ba v. Holder*, 561 F.3d 604, 605 (6th Cir. 2009) (noncitizen deported *in absentia* because the government sent the second notice to the wrong address "[m]ore than two years after" the first notice issued).

As the government concedes, this divide has generated myriad petitions for certiorari. (By our count, five petitions are pending; more are likely to follow.) These divisions have also cast doubt on countless criminal convictions. And these fissures have forged a new circuit split on 8 U.S.C. § 1229b(d)(1)'s "stop-time" rule, which could affect thousands of immigration cases every year.

This Court's intervention is badly needed to clear up the confusion.

Tellingly, the government does little to defend the Second Circuit's reasoning on the merits. We would ordinarily be tempted to characterize this silence as a tacit admission that the decision was wrong—except that elsewhere, the government has made this admission explicit. In other courts, the government has maintained that the opinion below—which mirrors the reasoning of five other circuits—is "without analysis" and thus "should be accorded no precedential effect." Government's Brief, *United States v. Ramos-Urias*, 2019 WL 5846601 (9th Cir. Oct. 29, 2019), at *27. In other words, the Petitioner and Respondent now seem to agree that the decision below was incorrect.

Ultimately, the confusion below has created a Balkanized map: for immigration courts in San Francisco and New York, the government's actions are lawful. For immigration courts in Chicago and Miami, however, identical actions are unlawful. "[G]iven this conflict among the circuits," other jurists have concluded, "the time may be ripe for Supreme Court review." *Dable v.*

Barr, Nos. 18-3037, 19-3011, ___ F. App'x ___, 2019 WL 6824856, at *4 n.9 (6th Cir. Dec. 13, 2019).

I. The government concedes that this issue has left the circuits deeply divided.

Since we filed our petition, another circuit (the Tenth) has weighed in on this issue. The decisional chaos below now spans eleven circuits:

- Three circuits apply deference to the agency's interpretation of the regulation; seven do not.
- Five circuits have concluded the regulation is "jurisdictional"; six have rejected that theory.
- Two circuits believe that the regulation conflicts with statute; eight disagree.

Below is an attempt to chart these circuits' splintered reasoning:

Circuit	Deference to the agency?	Jurisdictional?	Agency violated § 1229?
First[2]	Yes	Yes	No
Second[3]	No	Yes	No
Third[4]	No	Yes	No
Fourth[5]	No	No	No

[2] *Goncalves Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019).

[3] Pet. App. 1a–21a.

[4] *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129 (3d Cir. 2019).

[5] *United States v. Cortez*, 930 F.3d 350 (4th Cir. 2019).

Fifth[6]	No	No	No
Sixth[7]	Yes	Yes	No
Seventh[8]	No	No	Yes
Eighth[9]	No	Yes	No
Ninth[10]	Yes	Yes	No
Tenth[11]	Undecided	No	Undecided
Eleventh[12]	No	No	Yes

The government's brief in opposition does little to clear up this muddle.

To begin with, the government mischaracterizes the question presented: Mr. Kadria does not "contend[] . . . that the immigration court lacked jurisdiction over his removal proceedings." *See* BIO 9. Our petition made clear that in the agency context, "jurisdiction" is frequently a misnomer. Pet. 16. Properly understood, the relevant question is "whether the agency has stayed within the bounds of its statutory authority." *City of Arlington, Tex. v. FCC*, 569 U.S. 290 (2013). Here, the answer to that question is no.

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[6] *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019).

[7] *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018).

[8] *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019).

[9] *Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019).

[10] *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019).

[11] *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019).

[12] *Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1153 (11th Cir. 2019).

The government barely addresses the question presented: namely, whether the regulation complies with the statute. The government implicitly recognizes that the statute and the agency give different definitions to the same three words. Yet the government insists that this dissonance shouldn't trigger any alarm bells. Why? Because the statute and the agency "speak to different issues." BIO 13 (citing *Cortez*, 930 F.3d at 366).

The Seventh Circuit rejected this exact same argument as an "unpersuasive" attempt to "salvage" the government's unlawful conduct:

> [The government] wants us to find that 8 C.F.R. § 1239.1, entitled "Notice to Appear," is not talking about the same "Notice to Appear" that is defined in the statute. *See also* 8 C.F.R. §§ 1003.15, 1003.18 (also referring to a "Notice to Appear"). *That is absurd*.

Ortiz-Santiago, 924 F.3d at 961–62 (emphasis added). That court concluded that "the government's position also offends one of the most basic rules of statutory interpretation: 'identical words used in different parts of the same act are intended to have the same meaning.'" *Id.* (citing *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986)).

Perplexingly, the government also argues in favor of both sides of the split. The government contends that § 1229's time-and-place requirement "is not a strictly 'jurisdictional' requirement, but a mere 'claim-processing rule.'" BIO 17. But elsewhere in the same

document, the government insists that "*Pereira*'s narrow holding does not govern the jurisdictional question presented here." BIO 13 (citing *Karingithi*, 913 F.3d at 1160 n.1).

So which is it? Claim-processing or jurisdictional? This distinction isn't "merely semantic": rather, it "alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Because the "jurisdictional brand" carries such "[h]arsh consequences," its misapplication has repeatedly required the Court's intervention. *See Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019) (listing cases).

Next, the BIO attempts to paper over the split. The government recognizes that six circuits believe this issue implicated the agency's "jurisdiction;" but the government somehow insists (at 15) that these courts didn't *really* mean jurisdiction.

This argument is fallacious. The concept of jurisdiction was absolutely central to the decisions below. For example, just take the Sixth Circuit's decision in *Hernandez-Perez*: that opinion used the words "jurisdiction" or "jurisdictional" more than 45 times. That court clearly conceived of "jurisdiction" in the strict sense of a challenge to a tribunal's "[s]ubject matter jurisdiction" that "can never be forfeited or waived." 911 F.3d at 310.

Critically, these circuits employed the "jurisdictional" theory as a way to distinguish *Pereira*. In *Pereira*, the Court rejected an interpretation of § 1229

"that would confuse and confound noncitizens . . . by authorizing the Government to serve notices that lack any information about the time and place of the removal proceedings." 138 S. Ct. at 2119 (citation and quotation marks omitted). But six circuits have rejected *Pereira* on the ground that "*Pereira* is an imperfect fit in the jurisdictional context," *Hernandez-Perez*, 911 F.3d at 314, that "*Pereira*'s narrow holding does not govern the jurisdictional question that we address," *Karingithi*, 913 F.3d at 1160 n.1, and that *Pereira* was "inapplicable" because "the word 'jurisdiction' [is] nowhere to be found in § 1229(a)." *Nkomo*, 930 F.3d at 133.

Elsewhere, the government's assessment of these cases has been more blunt. In the Ninth Circuit, the government has simply maintained that the "jurisdictional" theory adopted by these six circuits is "without analysis" and "should be accorded no precedential effect." Government's Brief, *United States v. Ramos-Urias*, 2019 WL 5846601, at *27. In other words, the government agrees that the decision below was incorrect.

Finally, the government makes no effort to explain away the most important circuit split of all. The government concedes (at 17) that in the Eleventh Circuit's view, DHS's preferred method of giving notice is "deficient under Section 1229(a)." And the government admits (also at 17) that in the Seventh Circuit's view, DHS's actions violate "both the statute and the regulations."

II. This case is an excellent vehicle for resolving the question presented.

This case does not contain any of the features that the government usually lists as reasons to deny review. For example, the government doesn't argue that granting certiorari would be premature; that the question presented is fact-sensitive and unlikely to recur; or that the circuit split is shallow.

Instead, the government insists (at 15–16) that even if this Court resolved the split in Mr. Kadria's favor, the government may invoke a timeliness defense on remand.

The government's argument is irrelevant. This Court routinely grants certiorari despite respondents' assertion that it may ultimately prevail for a different reason on remand. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (leaving for remand alternative grounds).

More importantly, Mr. Kadria's argument is timely because it was triggered by an intervening change in law. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143–44 (1967) (plurality opinion) (defendant could not have waived a constitutional argument before that right was recognized by courts). When Mr. Kadria's agency proceedings were underway, the Second Circuit's caselaw foreclosed his argument. *See Guaman–Yuqui v. Lynch*, 786 F.3d 235, 239–40 (2d Cir. 2015). While briefing was underway in the Second Circuit, *Pereira* abrogated *Guaman-Yuqui*. *See* 138 S. Ct. at 2120 (Kennedy, J., concurring). Shortly after *Pereira* altered the legal

landscape, Mr. Kadria presented his argument to the Second Circuit. He cannot be faulted, therefore, for supposedly "waiving a defense that would have been directly contrary to then-existing circuit precedent." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135–36 (2d Cir. 2014).[13]

At bottom, the government's timeliness argument is beside the point. For vehicle purposes, the relevant inquiry is whether the question presented was "pressed upon or passed upon" below. *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002). Here, Mr. Kadria pressed this issue when arguing his case before the Second Circuit, and the Second Circuit passed upon his argument. Accordingly, no meaningful vehicle concerns stand in the way of this Court's review.

III. The question presented is extraordinarily important.

A. This issue could affect hundreds of thousands of immigration cases.

As this Court observed in *Pereira*, DHS has ignored § 1229 in "almost 100 percent" of cases "over the last three years." 138 S. Ct. at 2111. Thus, the government doesn't contest that this issue could affect "thousands,

[13] In a footnote, the government suggests that this Court lacks jurisdiction to review the decision below. BIO 18 n.3. The government cites no authority for this proposition except for a brief it filed in a separate case. *See id.* At most, it could be said that other courts are divided on this question. But that matters little here—the Second Circuit has already rejected the government's theory. *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009).

if not millions, of removal proceedings," *Ortiz-Santiago*, 924 F.3d at 962. Accordingly, the repercussions of this issue could be tantamount to a "shifting of the tectonic plates." *Goncalves Pontes*, 938 F.3d at 6.

B. This issue has generated multiple petitions for certiorari.

The division between the circuits on this issue has led to multiple petitions for certiorari. *See*, *e.g.*, *Pierre-Paul v. Barr*, No. 19-779 (filed Dec. 16, 2019); *Karingithi v. Barr*, No. 19-475 (filed Oct. 7, 2019);[14] *Kadria v. Barr*, No. 19-534 (filed Oct. 21, 2019); *Perez-Cazun v. Barr*, No. 19-358 (filed Sept. 13, 2019); *Deocampo v. Barr*, No. 19-44 (filed July 3, 2019). More are certain to follow. *E.g.*, *Ferreira v. Barr*, No. 19A669 (filed Dec. 13, 2019) (application for additional time to file petition for certiorari).

C. This issue has deluged immigration courts with motions to terminate the proceedings.

Since *Pereira* was decided, immigration courts have been flooded with motions to terminate the

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[14] *Karingithi* presents a slightly different question: namely, whether the application of *Auer* deference in this area conflicts with this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). If the Court has some question as to whether this case or *Karingithi* is a more appropriate vehicle for review, Mr. Kadria respectfully suggests that the Court hold this petition for writ in abeyance until this Court determines whether to grant certiorari in *Karingithi*.

proceedings. *E.g.*, *Matter of Flores-Aguirre*, 2019 WL 7168785, at *1 (BIA Oct. 29, 2019) (unpublished) ("The Immigration Judge terminated these removal proceedings upon concluding that the Notice to Appear ("NTA") was defective under *Pereira v. Sessions*, . . . as it did not contain the time and place of the respondent's initial removal hearing.").

The circuit split has created a regional impasse. For immigration courts in Chicago and Miami, these motions to terminate will likely be granted. For immigration courts in San Francisco and New York, however, identical motions will likely be denied.

The inability to resolve this recurring issue threatens to clog the docket of an agency that already faces a backlog of more than a million cases. *See* Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, Wall St. J. (Sept. 18, 2019).

D. This issue threatens to invalidate countless criminal convictions.

In a prosecution for illegal reentry under 18 U.S.C. § 1326, the government must prove that the defendant was subject to a valid removal order.

Several district courts have recently dismissed criminal convictions because of perceived "jurisdictional" flaws in the government's notification procedures. *E.g.*, *United States v. Rosas-Ramirez*, No. 18-cr-53, 2019 WL 6327573 (N.D. Cal. Nov. 26, 2019); *United States v. Martinez-Aguilar*, No. 18-cr-300, 2019 WL 2562655, at

*3–6 (C.D. Cal. June 13, 2019). Other courts have disagreed while simultaneously acknowledging that "reasonable minds may differ" on this issue. *United States v. Arteaga-Centeno*, No. 18-cr-332, 2019 WL 3207849, at *1 (N.D. Cal. July 16, 2019) (Breyer, J.) (requesting appellate "guidance").

E. This issue has spawned a new circuit split on the stop-time rule.

The circuit split on the question presented has created a new circuit split on a separate but related question: whether the government's two-step notification process satisfies 8 U.S.C. § 1229b(d)(1)'s "stop-time" rule.

The Ninth Circuit answered that question in the affirmative. In *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019), the court concluded that the relevant regulation "rewrites the statute," that the regulation would allow DHS to "advance a policy other than what Congress passed and the President signed," and that "any document containing less than the full set of requirements listed in Section 1229(a)(1) is not a Notice to Appear within the meaning of the statute—regardless of how it is labeled by DHS." *Id.* at 400–01.

In contrast, the Sixth Circuit has reached the opposite conclusion. *See Garcia-Romo v. Barr*, 940 F.3d 192 (6th Cir. 2019). Shortly afterwards, several members of that court lamented how *Garcia-Romo* was based on "scant textual analysis." *Dable*, 2019 WL 6824856, at *4 n.9. Those judges recognized that the *Garcia-Romo*

panel was effectively forced to reach the incorrect result because it was "bound by our prior decisions interpreting *Pereira* in the jurisdictional context." *Id.* Those judges indicated that if they could write "on a blank slate" on the question presented here, they would be "inclined to follow" the approach of the two circuits that have deemed the regulation unlawful. *Id.*

F. This case squarely implicates the constitutional separation of powers.

This case presents a classic separation-of-powers question: if an executive agency disagrees with the Congressional limits on its authority, can the agency replace those limits with a different set of rules that the agency deems more "practicable"?

The answer is no. As rival branches of government, the Executive will often differ with Legislature's preferred way of achieving certain policy goals. The Executive may disagree with those goals; or it may feel that those goals could be furthered by using other methods that it deems more convenient, more efficient, or more expedient. But even if an agency finds a statute to be "cumbersome and frustrating," it has no power to ignore the Legislative branch—which is the branch most accountable to the people. *See Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting).

The Framers recognized that "while a government of opposite and rival interests may sometimes inhibit

the smooth functioning of administration, . . . structural protections against abuse of power were critical to preserving liberty." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (quotation marks omitted) (citing The Federalist No. 51, at 349). If this Court were to stand by and permit the Department of Homeland Security to exercise "extraconstitutional government," it might be a short-term victory for bureaucratic ease of administration. But in the long term, the ensuing erosion of democratic self-rule would be "far worse." *Id.*

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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