No. 19-____

IN THE
Supreme Court of the United States

JORDANY PIERRE-PAUL,

Petitioner,

v.

WILLIAM P. BARR, U.S. ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a notice to appear must specify the time and place of a noncitizen's removal proceedings.

2. Whether, assuming that a notice to appear must include the time and place of a noncitizen's removal proceedings, serving the noncitizen with a subsequent notice of hearing containing the time-and-place information can cure a defective notice to appear that lacked that information.

3. Whether filing a valid notice to appear or other charging document in the immigration court is a prerequisite to that court's obtaining subject-matter jurisdiction over a noncitizen's removal proceedings.

PARTIES TO THE PROCEEDINGS BELOW

Jordany Pierre-Paul was the applicant in the proceedings before the immigration court and the Board of Immigration Appeals. He was the petitioner in the court of appeals. William P. Barr was the respondent in the court of appeals.

RELATED PROCEEDINGS

There are no proceedings directly related to the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jordany Pierre-Paul respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals denying in part and dismissing in part the petition for review (App., *infra*, at 1a-21a) is reported at 930 F.3d 684. The Board of Immigration Appeals' opinion (C.A. Rec. 18-60275.7-15) is unreported. The immigration court's opinion (*id.* at 97-134) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 18, 2019. App., *infra*, at 1a-21a. On October 8, 2019, Justice Alito granted petitioner's timely request for an extension of time to file the petition for a writ of certiora-

ri to and including December 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

8 U.S.C. § 1229(a)(1) provides:

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

PRELIMINARY STATEMENT

The decision below adds to the discord among the circuits on three distinct questions of immigration law that has followed in the wake of *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018). In *Pereira*, this Court held that a "notice to appear" is not valid for purposes of the statutory stop-time rule unless it contains both the time and place for the initial removal hearing. In the short period since *Pereira*, courts of appeals have irreparably fractured over whether and how *Pereira*'s time-and-place requirement applies in the context of initiating removal proceedings in immigration courts. There are now entrenched splits on (1) whether a notice to appear (NTA) in this context must include the time and place of the initial removal hearing; (2) whether a subsequent notice of hearing (NOH) with the time-and-place information can cure a deficient NTA; and (3) whether filing a valid NTA or other charging document is necessary for the immigration court to obtain subject-matter jurisdiction over the removal proceeding. Each split is deep and well-developed; multiple circuits have taken either side of every split. And each of these splits has important implications across immigration and criminal law. This case presents a unique opportunity for the Court to resolve them all in one stroke, providing invaluable guidance to lower courts and the immigration-enforcement system.

STATEMENT

I. BACKGROUND

A. Proceedings in the immigration court and Board of Immigration Appeals

Petitioner is a citizen of Haiti who was admitted to the United States as a derivative refugee when his mother

received asylum in 2001. App., *infra*, at 2a. In 2010, the Government purportedly initiated removal proceedings against petitioner by filing an NTA with the immigration court and serving that NTA on him. *Ibid.* The NTA did not specify the time and date of petitioner's initial hearing. *Ibid.* The immigration court later sent petitioner an NOH that included the time-and-date information. *Ibid.*

The Government sought removal on various grounds related to petitioner's criminal convictions. *Id.* at 2a-3a. The immigration judge found petitioner removable under 8 U.S.C. § 1227(a)(2)(B)(i) based on his two cocaine-possession convictions. *Id.* at 3a-4a. The immigration judge also rejected petitioner's arguments that he was eligible for asylum, withholding of removal, and relief under the Convention Against Torture. *Id.* at 4a.

The Board of Immigration Appeals (BIA) upheld the immigration court's ruling and dismissed petitioner's appeal. *Id.* at 5a.

B. Proceedings in the court of appeals

On petition for review to the Fifth Circuit, petitioner principally argued that the immigration court lacked subject-matter jurisdiction over his removal proceedings because of his defective NTA. *Ibid.* Petitioner noted that under 8 C.F.R. § 1003.14(a) a valid NTA is necessary for "[j]urisdiction [to] vest[]" in the immigration court. *Id.* at 5a-6a. The NTA served on him was defective, he explained, because it lacked the information that 8 U.S.C. § 1229(a)(1)(G)(i) requires—"[t]he time and place at which the proceedings will be held." *Id.* at 6a. Petitioner further maintained that the later NOH containing that information could not cure this jurisdictional defect. See *id.* at 9a-10a.

The Fifth Circuit rejected all of petitioner's arguments. First, the court of appeals held that an NTA need not list the time and place of the initial hearing. *Id.* at 7a-

9a. Acknowledging that the circuits are divided on this issue, *id.* at 8a & n.3, the court of appeals began its analysis with *Pereira*. *Ibid.* *Pereira* involved the stop-time rule codified in 8 U.S.C. § 1229b(d)(1), which provides that "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 1229(a) of this title." 8 U.S.C. § 1229b(d)(1). This Court explained that "Section 1229(a) * * * clarifies that the type of notice 'referred to as a "notice to appear"' throughout the statutory section is a 'written notice . . . specifying,' as relevant here, '[t]he time and place at which the [removal] proceedings will be held.'" *Pereira*, 138 S. Ct. at 2114. Accordingly, the *Pereira* Court concluded that an NTA 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 2110.

The court of appeals held that *Pereira* does not control whether petitioner's NTA was valid. It reasoned that although 8 C.F.R. §§ 1003.13-1003.14 establishes that a "[n]otice to [a]ppear" is a "charging document" that vests the immigration court with jurisdiction, those provisions do not expressly reference § 1229(a)'s requirements for a notice to appear. App., *infra*, at 7a-9a. Having declined to apply § 1229(a)'s time-and-place requirements, the court of appeals held instead that 8 C.F.R. § 1003.18 supplies the requirements for an NTA for these purposes. *Id.* at 9a. That regulation differs from the statutory requirements because it mandates the NTA to include "the time, place and date of the initial removal hearing, *where practicable*." 8 C.F.R. § 1003.18(b) (emphasis added). The court of appeals concluded that "[e]ven though [petitioner's] notice to appear did not include the time and date of his initial hearing, the regulations do not require this information," and "[t]hus, [petitioner's] notice to ap-

pear was not defective." App., *infra*, at 9a.

Second, the Fifth Circuit held that even if the omission of time-and-place information rendered the NTA defective, "the immigration court cured the defect by subsequently mailing a notice of hearing." *Ibid.* After noting the developed circuit split on this issue, *id.* at 10a, the court of appeals reasoned that § 1229(a) "does not specify that all the required items must be contained in a single document." *Id.* at 11a. Thus, the Fifth Circuit joined the majority approach, holding that a subsequent NOH can cure omissions in an NTA. *Ibid.*

Finally, the court of appeals held that even if petitioner were correct on the first two issues, he still could not prevail because "8 C.F.R. § 1003.14 is not jurisdictional but is a claim-processing rule." *Id.* at 11a-12a. Although that regulation explicitly defines when "[j]urisdiction vests," the Fifth Circuit concluded that the regulation does not delimit the immigration court's subject-matter jurisdiction because Congress did not explicitly make the NTA a jurisdictional requirement or delegate authority to the Attorney General to promulgate jurisdictional rules. *Id.* at 11a-14a. Having defined the NTA as a waivable claim-processing rule, the court of appeals held that petitioner forfeited his challenges to the NTA by not raising them earlier. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' JUDGMENT DEEPENS ENTRENCHED SPLITS AMONG THE CIRCUITS ON THREE IMPORTANT QUESTIONS OF IMMIGRATION LAW

A. The circuits are divided over whether a Notice to Appear must include the time and place of the noncitizen's removal proceedings

The circuits have divided over the choice between the statutory and regulatory requirements for an NTA. Statutorily, 8 U.S.C. § 1229(a) mandates that a "notice to

appear" must "specify[] * * * [t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). The regulations, by contrast, provide that a "[n]otice to [a]ppear" need include "the time, place and date of the initial removal hearing" only "*where practicable*." 8 C.F.R. § 1003.18(b) (emphasis added). The circuits have recognized their disagreement over which provision controls. See, *e.g.*, App., *infra*, at 8a & n.3; *United States* v. *Cortez*, 930 F.3d 350, 363 (4th Cir. 2019).

1. The Seventh and Eleventh Circuits have held that the statute controls, and they therefore require NTAs to list the time-and-place information demanded by the statute. *Perez-Sanchez* v. *U.S. Attorney Gen.*, 935 F.3d 1148, 1153-1154 (11th Cir. 2019); *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 961 (7th Cir. 2019).[1] The Seventh Circuit rooted its holding in "the uncontroversial proposition that an agency has no power to rewrite the text of a statute." *Ortiz-Santiago*, 924 F.3d at 961. When "Congress has defined a term, then an implementing regulation cannot re-define that term in a conflicting way." *Ibid.* Here, "Congress defined a 'Notice to Appear' as a document containing a specific list of required information, including '[t]he time and place at which the proceedings will be held.'" *Ibid.* (quoting 8 U.S.C. § 1229(a)(1)(G)(i)). The Seventh Circuit also relied heavily on *Pereira*'s holdings that this "language was 'definitional,' and time-and-place information was 'unquestionably' part of a Notice's 'essential character.'" *Ibid.* (quoting *Pereira*, 138 S. Ct. at 2116-2117). The Seventh Circuit thus concluded that an NTA that omits the required time-and-place information is defective. *Ibid.*

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[1] The Eleventh Circuit issued *Perez-Sanchez* after the decision below, which explains why the Fourth Circuit and the decision below do not include *Perez-Sanchez* in their summaries of the circuit split.

The Eleventh Circuit took a similar tack. Focusing on the unambiguous language of the statute and this Court's reasoning in *Pereira*, the Eleventh Circuit held that the statute "clearly requires that an NTA include the time and place of a noncitizen's removal proceedings." *Perez-Sanchez*, 935 F.3d at 1153. The court thus concluded that the noncitizen's "NTA was unquestionably deficient under the statute—although his NTA listed the location, it left off both the time and date of the hearing." *Ibid.*

2. In the opinion below, the Fifth Circuit joined the First, Second, Fourth, Sixth, and Ninth Circuits in holding that the regulatory requirements for an NTA control, and thus—notwithstanding the statutory language and this Court's decision in *Pereira*—NTAs need not specify the time and place of the initial removal hearing. App., *infra*, at 7a-10a; see *Goncalves Pontes* v. *Barr*, 938 F.3d 1, 3-7 (1st Cir. 2019); *Cortez*, 930 F.3d at 362-366; *Banegas Gomez* v. *Barr*, 922 F.3d 101, 110-112 (2d Cir. 2019); *Santos-Santos* v. *Barr*, 917 F.3d 486, 490-491 (6th Cir. 2019); *Karingithi* v. *Whitaker*, 913 F.3d 1158, 1159-1162 (9th Cir. 2019).

As in the decision below, these cases principally reason that *Pereira* is a narrow decision with no bearing on whether an NTA must include the time-and-place information. See, *e.g.*, *Goncalves Pontes*, 938 F.3d at 5 ("[T]he *Pereira* Court repeatedly emphasized the isthmian nature of its holding, making pellucid that it addressed only the 'narrow question' before it.") (quoting *Pereira*, 138 S. Ct. at 2110); *Cortez*, 930 F.3d at 365 (reasoning that *Pereira* "has no application here" because "the regulatory definition of 'notice to appear' in § 1003.14(a), unlike the stop-time provision at 8 U.S.C. § 1229b(d)(1), does not cross-reference 'a notice to appear *under section 1229(a)*'").

Some courts on this side of the split also find support in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (B.I.A.

2018). These courts read *Bermudez-Cota* to hold that "an NTA that is served without specification of the time and place of the initial hearing may be sufficient." *Goncalves Pontes*, 938 F.3d at 7. They thus defer to the BIA's interpretation of its regulations under *Auer* v. *Robbins*, 519 U.S. 452 (1997). See, *e.g.*, *Karingithi*, 913 F.3d at 1161 (holding that "[t]he BIA's interpretations of its regulations are due 'substantial deference'"); *Goncalves Pontes*, 938 F.3d at 7 (applying "the general rule that 'an agency's interpretation of its own regulations is entitled to great deference'").

Finally, some of these courts attempt to reconcile the statute and regulation by reasoning that the Attorney General was "free to define qualifying charging documents differently than the document described in § 1229(a)." *Cortez*, 930 F.3d at 366; see, *e.g.*, *Goncalves Pontes*, 938 F.3d at 6 ("[T]he challenged regulations and section 1229(a) speak to different audiences. On the one hand, the regulations deal with the commencement of proceedings in the immigration court. The statute, on the other hand, deals with notice to aliens of removal hearings."). Thus, even in the absence of deference to the BIA, these courts would have reached the same result.

B. The circuits are divided over whether a subsequent Notice of Hearing that specifies the time and place of the initial removal hearing can cure a defective Notice to Appear that lacked that information

The second issue that has deeply divided the circuits is whether a defective NTA that omits the time and place of the initial hearing can be cured by a subsequent NOH containing that information. The courts of appeals have acknowledged this disagreement as well. See, *e.g.*, App., *infra*, at 10a; *Goncalves Pontes*, 938 F.3d at 7 n.2.

1. The Seventh and Eleventh Circuits have held that a subsequent NOH cannot cure deficiencies in the original NTA. *Perez-Sanchez*, 935 F.3d at 1153-1154; *Ortiz-Santiago*, 924 F.3d at 962. Although these courts acknowledged that the BIA reached an opposite conclusion in *Bermudez-Cota*, they declined to defer in light of the statute's unambiguous language and this Court's holding in *Pereira*. The Eleventh Circuit refused to accept the so-called "two-step procedure" because the "omission of th[e] [time-and-place] information, as the Supreme Court saw it [in *Pereira*], was not 'some trivial, ministerial defect' that could be cured later." *Perez-Sanchez*, 935 F.3d at 1154. Similarly, the Seventh Circuit thought that "*Bermudez-Cota* brushed too quickly over the Supreme Court's rationale in *Pereira* and tracked the dissenting opinion rather than that of the majority," and thus the court declined to find that the "two-step procedure * * * was compatible with the statute." *Ortiz-Santiago*, 924 F.3d at 962.

2. The Fifth Circuit joined the Second and Sixth Circuits on the other side of this split, holding that the two-step procedure can cure defects in the original NTA. App., *infra*, at 9a-11a; *Banegas Gomez*, 922 F.3d at 111-112; *Hernandez-Perez* v. *Whitaker*, 911 F.3d 305, 312-315 (6th Cir. 2018). The Second and Sixth Circuits deferred to the BIA's endorsement of the two-step procedure in *Bermudez-Cota*. See *Banegas Gomez*, 922 F.3d at 112 (deferring to the BIA because its two-step "interpretation does not conflict with the INA and is consistent with the regulations"); *Hernandez-Perez*, 911 F.3d at 313 (deferring to the BIA because its "conclusion that 'a two-step notice process is sufficient to meet the statutory notice requirements' is not inconsistent with the text of the INA") (quoting *Bermudez-Cota*, 27 I. & N. Dec. at 447). In these circuits, "an NTA 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." *Banegas Gomez*, 922 F.3d at 112; see *Hernandez-Perez*, 911 F.3d at 314-315 ("[J]urisdiction vests with the immigration court where, as here, the mandatory information about the time of the hearing, *see* 8 U.S.C. § 1229(a), is provided in a Notice of Hearing issued after the NTA."). Interestingly, the Fifth Circuit appears to be the only court to reach this conclusion without resort to agency deference.

C. The circuits are divided over whether a valid Notice to Appear is a prerequisite to the immigration court's obtaining subject-matter jurisdiction over removal proceedings

Finally, the circuits disagree regarding whether a valid NTA is required for the immigration court to obtain subject-matter jurisdiction over removal proceedings. Once again, the circuits have openly acknowledged their divergent views. See, *e.g.*, *Perez-Sanchez*, 935 F.3d at 1155; *Cortez*, 930 F.3d at 359.

1. "Many * * * circuits have accepted the proposition that 8 C.F.R. § 1003.14 sets forth a jurisdictional rule." *Perez-Sanchez*, 935 F.3d at 1155. Indeed, the Second, Sixth, Eighth, and Ninth Circuits hold that a valid NTA is a jurisdictional requirement. *Ali* v. *Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Banegas Gomez*, 922 F.3d at 111-112; *Karingithi*, 913 F.3d at 1160-1161; *Hernandez-Perez*, 911 F.3d at 313-315. These courts diverge on precisely what is required for an NTA to be valid. But they all agree "that the regulations, not § 1229(a), define when jurisdiction vests" in the immigration court. *Karingithi*, 913 F.3d at 1160. The cases on this side of the split cite the plain text of the regulations, "explain[ing] that '[j]urisdiction vests, and proceedings before an Immigra-

tion Judge commence, when a charging document,' including a notice to appear, 'is filed with the Immigration Court.'" *Ali*, 924 F.3d at 986 (quoting 8 C.F.R. § 1003.14(a)). These courts also note the BIA's conclusion in *Bermudez-Cota* that "a notice to appear * * * vests an Immigration Judge with jurisdiction over the removal proceedings." *Banegas Gomez*, 922 F.3d at 112 (quoting *Bermudez-Cota*, 27 I. & N. Dec. at 447).

2. In the opinion below, the Fifth Circuit joined the Fourth, Tenth, and Eleventh Circuits in holding that the filing of a valid NTA is a claim-processing requirement that does not implicate the immigration court's subject-matter jurisdiction. App., *infra*, at 11a-15a; *Lopez-Munoz* v. *Barr*, 941 F.3d 1013, 1015-1016 (10th Cir. 2019); *Perez-Sanchez*, 935 F.3d at 1155-1157; *Cortez*, 930 F.3d at 359-362. These courts view "the regulatory mention of 'jurisdiction' [a]s colloquial." *Lopez-Munoz*, 941 F.3d at 1015. They reason further that "an agency cannot fashion a procedural rule to limit jurisdiction bestowed upon it by Congress." *Perez-Sanchez*, 935 F.3d at 1155. Accordingly, these circuits view the regulatory requirement of an NTA as a waivable "claim-processing rule rather than a 'genuine jurisdictional requirement.'" *Cortez*, 930 F.3d at 361 (quoting *United States* v. *Rivera Lopez*, 355 F. Supp. 3d 428, 439 (E.D. Va. 2018)).

II. THE DECISION BELOW DEPARTS FROM THE PLAIN TEXT OF THE STATUTE AND REGULATIONS

The court of appeals ruled against petitioner on each of the issues presented only by contravening the text of 8 U.S.C. § 1229(a) and 8 C.F.R. § 1003.14. These two provisions combine to make an NTA that includes the statutorily required information a jurisdictional prerequisite for the immigration court. The broader web of other related statutory and regulatory provisions confirms this conclusion.

A. Two separate but related strands of immigration statutes and regulations inform the questions presented here. That is because two separate Executive agencies perform distinct roles when the Government desires to initiate removal proceedings against someone suspected of being unlawfully present in the United States. The first is the Department of Homeland Security (DHS).[2] DHS has been "charged with the administration and enforcement of [the immigration laws]." 8 U.S.C. § 1103(a)(1). DHS officers generally take the first step in initiating removal proceedings by issuing an NTA to the noncitizen and then later filing that NTA in the immigration courts. See 8 C.F.R. § 239 ("Initiation of Removal Proceedings"). At that point, the second agency comes into play. Immigration judges within the Department of Justice's Executive Office for Immigration Review (EOIR) "conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). The result is that there are two bodies of immigration law—one for DHS and one for EOIR—that meet at the critical juncture when the NTA is filed.

Because there is only one NTA throughout the entire removal process, the statutes and regulations must speak with one voice regarding its requirements and effects. Section 1229(a) requires that DHS provide the noncitizen with an NTA "specifying * * * [t]he time and place at which the [removal] proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i); see also 8 C.F.R. § 239.1(b) ("Service of the notice to appear shall be in accordance with

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[2] Although the text of the regulations often references the Immigration and Naturalization Service (INS), the Homeland Security Act of 2002 created DHS and transferred "the enforcement, services, and administrative functions of the INS to [DHS]." Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824-01, 9824 (February 28, 2003).

[§ 1229].”). The EOIR regulations, in turn, allow the NTA to be filed in the immigration court as a “charging document” that initiates removal proceedings. See 8 C.F.R. §§ 1003.13-1003.14. That NTA is not some new and different document, but rather the same one that must be served on the noncitizen under § 1229. Indeed, the regulations require that the “charging document must include a certificate showing service” on the noncitizen. 8 C.F.R. § 1003.14(a). Since that is the same NTA § 1229(a) addresses, it necessarily must include the same mandatory information.

Other regulatory provisions appear to muddy this issue because they either omit or dilute the time-and-place requirement. See 8 C.F.R. § 1003.15(b) (omitting time and place from a list of what must be included in an NTA); 8 C.F.R. § 1003.18(b) (providing that an NTA should provide “the time, place and date of the initial removal hearing, where practicable”). At best, however, those provisions create a conflict between the statutory and regulatory text, in which case the statutory text requiring the time-and-place information would control. See *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 842-843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

Thus, the result remains that an NTA must “specify[] * * * [t]he time and place at which the [removal] proceedings will be held.” 8 U.S.C. § 1229(a)(1)(G)(i). Indeed, “[f]ailing to specify integral information like the time and place of removal proceedings unquestionably would deprive [the notice to appear] of its essential character.” *Pereira*, 138 S. Ct. at 2116-2117 (internal quotation marks omitted). Congress plainly did not intend to permit the Government to use “a barebones document labeled ‘Notice to Appear,’ with no mention of the time and

place of the removal proceedings" to initiate those proceedings, as that "Notice to Appear" "would do little if anything to facilitate appearance at those proceedings." *Id.* at 2115. Accordingly, courts that have elevated the regulatory definition over the one Congress prescribed in § 1229(a) erred by ignoring the governing statutory text and by misreading *Pereira* to allow the contents of the singular NTA to differ depending on the context in which it is considered.

B. Because the statute mandates that *the NTA* contain the time and place (and other) information, and because it is an NTA—not any other document—that triggers proceedings in immigration court, defects in an NTA cannot be papered over by sending out a subsequent NOH. As this Court has explained, § 1229(a) contains "quintessential definitional language" that must be honored. *Id.* at 2116. "[I]t defines a 'notice to appear' as a 'written notice' that 'specif[ies],' at a minimum, the time and place of the removal proceedings." *Ibid.* (quoting 8 U.S.C. § 1229(a)(1)(G)(i)). Any document that lacks that or any of the other mandatory categories of information does not qualify as an NTA and thus cannot serve as an NTA under either § 1229(a) or 8 C.F.R. § 1003.14. To be sure, a defective NTA can be remedied, but the way to do that is by issuing a new NTA to the noncitizen and restarting the removal proceedings by filing that new NTA in the immigration court.

That rule makes good sense. The information that § 1229(a) requires in an NTA is critical for the noncitizen's preparation of his defense. A noncitizen needs to know, for example, "[t]he acts or conduct alleged to be in violation of the law" and "[t]he charges against [him] and the statutory provisions alleged to have been violated." 8 U.S.C. §§ 1229(a)(1)(C)-(D). Equally important is informing the noncitizen that he "may be represented by counsel." *Id.* § 1229(a)(1)(E). Early notice of these foun-

dational facts is vital if the noncitizen is to have a fair chance at contesting removal. That is why Congress did not allow the Government to issue patently defective NTAs on the front end and then only later—perhaps as late as ten days before the removal hearing, as occurred here, App., *infra*, at 2a; C.A. Rec. 18-60275.1549—issue an NOH that finally provides the noncitizen with these critical categories of information.

C. Filing a valid NTA is a matter of jurisdiction. The regulations that set up the basic structure and rules for the immigration courts repeatedly emphasize that a valid NTA or other charging document is a jurisdictional requirement. Most relevant here is 8 C.F.R. § 1003.14(a)'s statement that "[j]urisdiction vests and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]." 8 C.F.R. § 1003.14(a). But that is far from the only statement of that jurisdictional rule in the regulations. See *id.* § 239.2(a) (permitting a DHS officer to cancel an issued NTA prior to "jurisdiction vesting with the immigration judge pursuant to § [100]3.14"); *id.* § 1239.2 (providing that 8 C.F.R. § 239.2(a) and (b) are "provisions relating to the authority of an immigration officer to cancel a notice to appear prior to vesting of jurisdiction with the immigration judge"); *id.* § 1240.20(b) (precluding a noncitizen from filing an application for cancellation of removal with the immigration court until "after jurisdiction has vested pursuant to § 1003.14").

Although it may be unusual for regulations to establish jurisdictional rules for an *Article III* court, it makes sense here given the statute's silence on the issue and its broad grant of authority to EOIR to set up an entire *Executive Branch* court system for processing immigration cases. See 6 U.S.C. § 521; 8 U.S.C. § 1103(g); *Hernandez-Perez*, 911 F.3d at 313 ("Because Congress did not address th[e] [jurisdictional] question, the agency had

some discretion in fashioning a set of jurisdictional requirements."). The immigration courts must have jurisdictional rules like any other court system, and one of them is that a valid NTA must be filed before "[j]urisdiction vests." 8 C.F.R. § 1003.14(a).

That jurisdictional characterization finds further support in this Court's case law. Jurisdictional rules "govern[] a court's adjudicatory capacity," whereas claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified time." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011). The filing of an NTA is fundamentally different than a time limitation instituted to ensure that proceedings continue apace. It is instead the very act by which the immigration court gains its "adjudicatory capacity." *Ibid.* That is why the regulations reasonably determined that only upon filing a valid NTA does "[j]urisdiction vest[]" in the immigration court. 8 C.F.R. § 1003.14(a).

III. THE ISSUES ARE IMPORTANT AND PRESENTED IN A CLEAN VEHICLE

A. Each of the three questions presented involve consequential questions of immigration law

The three questions presented each have important implications for immigration law, with ramifications beyond the specific context of this case.

First, the confusion about whether the statute or the regulations set the requirements for an NTA has far-reaching consequences. The time-and-place requirement at issue here is a significant matter given the Government's apparent custom of omitting that information from NTAs. See *Pereira*, 138 S. Ct. at 2111 (explaining that the Government, "at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings when-

ever the agency deems it impracticable to include such information"). Whether an NTA is defective because it lacks this statutorily required information turns on the statute-versus-regulation choice presented here. Either the statutory requirements apply to NTAs used as charging documents or they do not.

As it stands now, whether a noncitizen can challenge an NTA as defective for omitting statutorily required information—and thereby win at least a preliminary victory in the removal proceedings—depends entirely on geographical happenstance. The Government and BIA are likewise confronted with the challenge of operating a nationwide immigration system despite conflicting guidance on these basic questions from the courts of appeals. A decision from this Court would bring much-needed clarity to the Government and noncitizens alike.

Second, the propriety of the two-step procedure is an equally significant issue. Again, this question affects not merely time-and-place defects, but also whether a whole range of NTA defects can be "cured" by a subsequent NOH. Omitting time and place and other critical information from the NTA, only to provide it days before the hearing in an NOH, hampers noncitizens' ability to appear and present a defense. Yet the majority of lower courts have blessed this practice, creating perverse incentives for the Government. This case provides the Court with an opportunity to resolve this important disagreement about the propriety of the two-step procedure.

Finally, whether a valid NTA is a jurisdictional matter or a claim-processing rule affects countless cases. If a valid NTA is a jurisdictional requirement, then a noncitizen may raise defects in the NTA at any time. *Hernandez-Perez*, 911 F.3d at 310. But if the NTA requirement is only a claim-processing rule, then a noncitizen must preserve arguments concerning an NTA's defects. *Perez-Sanchez*, 935 F.3d at 1157.

That dichotomy affects not only petitioner's situation—where a noncitizen raises NTA defects for the first time on petition for review in the court of appeals—but it may have broader implications as well. For example, in circuits that regard a valid NTA as jurisdictional, criminal defendants have successfully moved to dismiss indictments for illegal reentry based on NTA defects in their original removal proceedings. See, *e.g.*, *United States* v. *Ortiz*, 347 F. Supp. 3d 402, 407 (D.N.D. 2018) (dismissing illegal-reentry indictment because "[f]ailure to comply with section 1229(a) makes Defendant's notice to appear defective and, therefore, deprived the Immigration Judge of the jurisdiction necessary to enter an order of removal"); *United States* v. *Muniz-Sanchez*, 388 F. Supp. 3d 1284, 1288 (E.D. Wash. 2019) (dismissing illegal-reentry indictment and "disregard[ing] the removal order" as void because "the NTA was * * * deficient under the regulatory requirements and [therefore] * * * jurisdiction never vested with the immigration court"). The Court's resolution of the jurisdictional question would thus provide important guidance bearing upon both criminal and immigration enforcement.

B. The case arises in an ideal vehicle that squarely presents all three issues that have divided the circuits

This case presents a perfect vehicle for providing invaluable clarity on these important and frequently recurring questions. Nothing stands between this Court and deciding the three questions presented.

Indeed, unlike other similar cases, this case squarely presents all three key issues that plague the circuits. Most cases address only one or two of these issues. See, *e.g.*, *Cortez*, 930 F.3d at 364 n.6 (declining to reach the two-step question); *Goncalves Pontes*, 938 F.3d at 7 n.3 (declining to reach the jurisdictional question). But the

Fifth Circuit issued binding holdings on each issue in a published opinion. See App., *infra*, at 6a n.2. Accordingly, this case presents the Court with the unique opportunity to resolve all three splits at once, or depending on the outcome, to select which issue or issues it wishes to address.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60275

JORDANY PIERRE-PAUL, ALSO KNOWN AS
YVES PIERRE, ALSO KNOWN AS YVES PAUL,
Petitioner,

v.

WILLIAM P. BARR, U.S. ATTORNEY GENERAL,
Respondent.

(July 18, 2019)

Petitions for Review of Order
of the Board of Immigration Appeals
BIA No. A076 459 138

Before SMITH, WIENER, and ELROD, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Jordany Pierre-Paul petitions for review of the order of the Board of Immigration Appeals (BIA), arguing that the immigration court lacked jurisdiction, that the BIA erred in denying his application for asylum, withholding of removal, and cancellation of removal, and that the immigration judge violated his due process rights. Because we reject Pierre-Paul's jurisdictional and due process arguments, we deny his petition in part. Because we lack

jurisdiction to review the denial of asylum, withholding of removal, and cancellation of removal, we dismiss his petition in part.

I.

Pierre-Paul is a citizen of Haiti who was admitted to the United States on May 14, 2001, based on his mother's asylum. Since his arrival to the United States, Pierre-Paul acquired a lengthy criminal record with nine convictions. Before the initiation of his removal proceedings, Pierre-Paul had four criminal convictions: a 2005 conviction for criminal trespass, a 2007 conviction for evidence tampering, a 2007 conviction for making a terroristic threat, and a 2009 conviction for assault causing bodily injury.

On May 11, 2010, the government initiated removal proceedings against Pierre-Paul by filing a notice to appear with the immigration court. In the initial notice to appear, the government included a charge for being an alien convicted of a crime involving moral turpitude within five years of admission to the United States, under 8 U.S.C. § 1227(a)(2)(A)(i). The initial notice to appear was personally served on Pierre-Paul, but it did not specify the time and date of the initial hearing. The immigration court subsequently sent a notice of hearing on May 11, 2010 that specified that Pierre-Paul's initial proceeding was scheduled for 8:30 AM on May 21, 2010. The notice of the initial hearing was served both in person and by mail. Pierre-Paul, who was detained in ICE custody, attended his initial hearing on May 21, 2010 "via televideo."

While his removal proceedings were pending between October 2011 and December 2015, Pierre-Paul acquired four more criminal convictions: a 2011 conviction for driving without a license, a 2012 conviction for cocaine possession, a 2012 conviction for making a terroristic threat, and a 2015 conviction for cocaine possession. For this reason,

Pierre-Paul was in and out of jail and prison, and his removal proceedings were not re-calendared until August 2016. In June 2010, the government added a charge for being an alien convicted of multiple crimes involving moral turpitude, under 8 U.S.C. § 1227(a)(2)(A)(ii), based on Pierre-Paul's 2007 convictions for evidence tampering and making a terroristic threat. In December 2016, the government also added charges, under 8 U.S.C. § 1227(a)(2)(B)(i), for being an alien convicted of a crime related to a controlled substance based on his convictions for cocaine possession.

After a competency hearing held on October 6, 2016, an immigration judge found Pierre-Paul mentally incompetent. At the hearing, the immigration judge ordered that an attorney be appointed to represent Pierre- Paul to protect his rights and facilitate his participation in subsequent hearings. In March 2017, Pierre-Paul's case was transferred to a different immigration judge who ultimately ordered Pierre-Paul removed and denied his application for asylum, withholding of removal, relief under the Convention Against Torture (CAT), and cancellation of removal.

On September 22, 2017, the immigration judge issued her order. In her order, the immigration judge noted the fact that a previous immigration judge had found Pierre-Paul incompetent and appointed counsel. The immigration judge also observed that, as the proceedings continued, additional procedural safeguards were placed: Namely, Pierre-Paul's narrations of facts in his asylum application and testimony and subjective fear of returning to Haiti had been credited as true. The immigration judge then found Pierre-Paul removable under 8 U.S.C.

§ 1227(a)(2)(B)(i) based on his concession of removability and his two cocaine-possession convictions.[1]

The immigration judge also denied Pierre-Paul's application for asylum and withholding of removal for two reasons. First, the immigration judge concluded that Pierre-Paul's proposed particularized social group—mentally ill Haitians who suffer from schizophrenia—was not legally cognizable. Alternatively, the immigration judge concluded that Pierre-Paul failed to demonstrate that he would be persecuted on account of being a mentally ill Haitian suffering from schizophrenia. As to Pierre-Paul's application for CAT relief, the immigration judge found that Pierre-Paul failed to demonstrate that he would be tortured by, or with the acquiescence of, the Haitian government.

The immigration judge then denied cancellation of removal for two reasons. First, the immigration judge concluded that Pierre-Paul was statutorily ineligible. *See* 8 U.S.C. § 1229b(a)(2) (requiring seven years of continuous residence in the United States); *Matter of Perez*, 22 I. & N. Dec. 689 (BIA 1999) (holding that continuous residence terminates on the date a qualifying offense is committed). Second, the immigration judge declined to cancel Pierre-Paul's removal as a matter of discretion after weighing the favorable and adverse factors. The immigration judge concluded that "the seriousness of [Pierre-Paul's] criminal

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[1] The government had withdrawn the charge under 8 U.S.C. § 1227(a)(2)(A)(i) (committing a crime involving moral turpitude within 5 years of admission). The government did not withdraw the charge under 8 U.S.C. § 1227(a)(2)(A)(ii) (committing multiple crimes involving moral turpitude); however, the immigration judge ultimately dismissed the charge on the ground that the record was "inconclusive" as to whether evidence tampering is a crime involving moral turpitude under the modified categorical approach.

history and violent tendencies" outweighed his "long-term residency, family ties, . . . employment history, . . . [and] his mental illness."

The BIA dismissed Pierre-Paul's appeal on March 16, 2018. The BIA held that Pierre-Paul did not adequately appeal the CAT issue. The BIA affirmed the denial of asylum and withholding of removal because Pierre-Paul failed to establish a nexus between persecution and his proposed particular social group. The BIA did not decide whether Pierre-Paul's group was legally cognizable. Finally, as to the denial of cancellation of removal, the BIA expressly declined to address Pierre-Paul's statutory eligibility. Instead, the BIA conducted a *de novo* review, balanced the equities, and concluded that, as a matter of discretion, cancellation of removal was not warranted. In the BIA's view, Pierre-Paul's lengthy criminal history outweighed the positive factors.

Pierre-Paul now petitions for our review on various grounds. First, he argues that the immigration court lacked jurisdiction because his original notice to appear was defective. He also challenges the denial of asylum, withholding of removal, and cancellation of removal. Finally, Pierre-Paul argues that the immigration judge violated his due process rights by failing to adhere to the procedural safeguards that were put in place after the competency hearing. We consider each of these issues in turn.

II.

We first turn to Pierre-Paul's argument that the immigration court lacked jurisdiction because his original notice to appear did not include the time and date of the initial hearing. Title 8 C.F.R. § 1003.14 states that the immigration court's "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court . . . ." In

turn, "charging document" is defined as "the written instrument which initiates a proceeding" before the immigration court, including a notice to appear. 8 C.F.R. § 1003.13. The regulations further specify that "[i]n removal proceedings pursuant to [8 U.S.C. § 1229a], the [government] shall provide in the Notice to Appear[] the time, place and date of the initial removal hearing, where practicable." 8 C.F.R. § 1003.18.

Relying on the Supreme Court's holding in *Pereira* that "[a] putative notice to appear that fails to designate the specific time or place . . . is not a 'notice to appear under [8 U.S.C. §] 1229(a),'" Pierre-Paul argues that his notice to appear, which lacked the time and date of his proceeding, was not a valid charging document under 8 C.F.R. § 1003.14. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113-14 (2018). In response, the government answers that the notice to appear was not defective under the regulations. Alternatively, the government relies on the BIA's post-*Pereira* decision in *Bermudez-Cota* to argue that, even if Pierre-Paul's notice to appear were defective, the immigration court complied with 8 U.S.C. § 1229(a) by adhering to a two-step process and sending a subsequent notice of hearing containing the time and date of the hearing. *See Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 445-46 (BIA 2018).

We reject Pierre-Paul's argument for three independent reasons.[2] First, Pierre-Paul's notice to appear was not defective. Second, assuming *arguendo* that the notice to appear were defective, the immigration court cured the

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[2] In this circuit, alternative holdings are binding and not *obiter dictum*. *Luna-Garcia v. Barr*, 924 F.3d 198, 204 n.3 (5th Cir. 2019); *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015), *aff'd by an equally divided court sub nom.*, *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (Mem.).

defect by subsequently sending a notice of hearing that included the time and date of the hearing. Third, assuming *arguendo* that the notice to appear were defective and the defect could not be cured, 8 C.F.R. § 1003.14 is not jurisdictional. Rather, it is a claim-processing rule, and Pierre-Paul failed to raise the issue in a timely manner.

A.

Pierre-Paul's notice to appear was not defective. We have already observed that the Supreme Court in *Pereira* addressed a "narrow question" of whether a notice to appear that omits the time or place of the initial hearing triggers the statutory stop-time rule for cancellation of removal. *Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 n.1 (5th Cir. 2018); *see also Pereira*, 138 S. Ct. at 2110. The key to the *Pereira* decision was the stop-time rule's reference to "under," which was "the glue that bonds the stop-time rule to [8 U.S.C. § 1229(a)'s] substantive time-and-place requirements." 138 S. Ct. at 2117. The stop-time rule states that an alien's "period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear *under* [8 U.S.C. § 1229(a)]." 8 U.S.C. § 1229b(d)(1) (emphasis added). 8 U.S.C. § 1229(a) specifies that a notice to appear must include the time and place of the initial hearing. 8 U.S.C. § 1229(a)(1)(G)(i). Looking to "the intersection of those statutory provisions," the Supreme Court held that "[a] putative notice to appear that fails to designate the specific time or place . . . is not a 'notice to appear under [8 U.S.C. §] 1229(a).'" *Pereira*, 138 S. Ct. at 2110, 2113-14.

Pierre-Paul seeks to extend *Pereira*'s narrow holding beyond the stop-time rule context: Because his notice to appear omitted the time and date of his initial hearing, he argues that it was defective and could not constitute a charging document. The government responds by

pointing us to our sister circuits' cases holding that *Pereira* does not extend outside the stop-time rule context and by arguing that, to serve as a charging document, the notice to appear needs to satisfy the regulations, not 8 U.S.C. § 1229(a).

We reject Pierre-Paul's argument and join the overwhelming chorus of our sister circuits that have already rejected similar *Pereira*-based challenges. *See Nkomo v. Attorney Gen.*, No. 18-3109, 2019 WL 3048577, at *2-3 (3d Cir. July 12, 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110-12 (2d Cir. 2019); *Soriano-Mendosa v. Barr*, 768 F. App'x 796, 801-02 (10th Cir. 2019); *Santos-Santos v. Barr*, 917 F.3d 486, 490-91 (6th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161-62 (9th Cir. 2019); *Leonard v. Whitaker*, 746 F. App'x 269, 269-70 (4th Cir. 2018) (citing *Mauricio-Benitez*, 908 F.3d at 148 n.1); *see also Ortiz-Santiago v. Barr*, 924 F.3d 956, 966 (7th Cir. 2019).[3] *Pereira* turned on the intersection of two statutory texts and the word "under" that glued the stop-time rule to the time-and-place requirement. 138 S. Ct. at 2110; *see also* 8 U.S.C. §§ 1229(a), 1229b(d)(1). However, the regulations do not carry such glue and are not textually bonded to 8 U.S.C. § 1229(a). *See Banegas Gomez*, 922 F.3d at 111; *Karingithi*, 913 F.3d at 1161 ("There is no 'glue' to bind § 1229(a) and [these] regulations [.]").

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[3] Among our sister circuits, so far, the Seventh Circuit stands alone in partially accepting the *Pereira*-based argument that a notice to appear that does not contain the time or place is defective. *Ortiz-Santiago*, 924 F.3d at 966. Ultimately, however, the Seventh Circuit concluded that the immigration court's jurisdiction was not affected because 8 C.F.R. § 1003.14 is a claim-processing rule. *Ortiz-Santiago*, 924 F.3d at 966. We agree with this second holding and discuss it below in Part II.C.

As noted above, under 8 C.F.R. § 1003.14, proceedings before an immigration judge commence when a charging document is filed. To constitute a valid charging document, the regulations require that a notice to appear list the nature of the proceedings, the legal authority for the proceedings, and the warning about the possibility of *in absentia* removal, *etc.* 8 C.F.R. §§ 1003.15, 1003.26; *see also Santos-Santos*, 917 F.3d at 490 (cataloguing required items under the regulations). The government must include the time, date, and place of the initial hearing only "where practicable." 8 C.F.R. § 1003.18(b). Conflicts between the regulations and 8 U.S.C. § 1229(a) arise and implicate *Pereira* only when the government attempts to use a notice to appear that omits the time or place to satisfy one of the statutorily defined functions that are textually glued to 8 U.S.C. § 1229(a).

Here, Pierre-Paul's initial notice to appear complied with all of the regulatory requirements. Even though his notice to appear did not include the time and date of his initial hearing, the regulations do not require this information. Thus, Pierre-Paul's notice to appear was not defective.

B.

Alternatively, assuming *arguendo* that Pierre-Paul's notice to appear were defective under 8 U.S.C. § 1229(a), the immigration court cured the defect by subsequently mailing a notice of hearing that contained the time and date of the initial hearing.

The government relies on the BIA's precedential opinion concluding that a defective notice to appear can be cured "so long as a notice of hearing specifying this information is later sent to the alien." *Bermudez-Cota*, 27 I. & N. Dec. at 447. The BIA also observed that "[t]he regulation does not specify what information must be contained

in a 'charging document' at the time it is filed with an Immigration Court" and that the regulation does not "mandate that the document specify the time and date of the initial hearing." *Id.* at 445. Several of our sister circuits have held that "[t]he BIA's interpretation does not conflict with the [Immigration and Nationality Act] and is consistent with the regulations." *Banegas Gomez*, 922 F.3d at 112; *see also Molina-Guillen v. U.S. Attorney Gen.*, 758 F. App'x 893, 898-99 (11th Cir. 2019); *Karingithi*, 913 F.3d at 1161-62; *Hernandez-Perez*, 911 F.3d at 314-15; *but see Lopez v. Barr*, 925 F.3d 396,405 (9th Cir. 2019) (holding that a defective notice to appear cannot be cured); *Ortiz-Santiago*, 924 F.3d at 962 (same).

We agree with the government, the BIA, and some of our sister circuits that a defective notice to appear may be cured with a subsequent notice of hearing. As a threshold matter, *Pereira* did not directly address whether a defective notice to appear may be cured by a subsequent notice of hearing. Pereira was served with a notice to appear that omitted the date and time of his initial hearing, but he was never served with a subsequent notice of hearing because the immigration court mailed the notice of hearing to a wrong address. *Pereira*, 138 S. Ct. at 2112. "Because [the government] failed to serve Pereira with a supplemental notice . . . , the Supreme Court was not called upon to, and did not, address whether all the requirements of a notice to appear listed in [8 U.S.C.] § 1229(a) must be contained in a single document." *Lopez*, 925 F.3d at 406 (Callahan, J., dissenting).

The two-step process comports with relevant statutory language. Title 8 U.S.C. § 1229(a) states that "written notice (in this section referred to as a 'notice to appear') shall be given . . . to the alien . . . specifying" the required items including the time and place of the initial proceedings.

8 U.S.C. § 1229(a)(1)(G)(i). The noun "written notice" as used in § 1229(a) alone does not specify that all the required items must be contained in a single document. *Matter of Hernandez*, 27 I. & N. Dec. 520, 531 (BIA 2019) (declining to interpret § 1229(a) as requiring a single document). Although "written notice" is referred to as "a 'notice to appear'" in 8 U.S.C. § 1229, the fact that "the notice to appear is *generally* issued in a single document" does not mean that "all the criteria listed in § 1229(a) *must* be contained in a single document." *Lopez*, 925 F.3d at 407 (Callahan, J., dissenting). Indeed, 1 U.S.C. § 1 informs us that "[i]n determining the meaning of any Act of Congress, unless context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things."

Moreover, the two-step process also furthers "Congress' aim" by ensuring that aliens receive notice of the time and place of the proceedings. *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009); *see also Pereira*, 138 S. Ct. at 2115 (observing that "an essential function of a notice to appear" is to "facilitate appearance at [removal] proceedings"). The two-step process allows the government to fulfill this aim by furnishing the alien with the time and place of his hearing. Thus, even if Pierre-Paul's notice to appear were defective, the immigration court cured the defect by mailing a notice of hearing containing the date and time of the initial hearing.

C.

Even if Pierre-Paul's notice to appear were defective, and even if that defect could not be cured, 8 C.F.R. § 1003.14 is not jurisdictional but is a claim-processing

rule.[4] Pierre-Paul argues that the regulation is jurisdictional based on its language. In its 28(j) letter, the government cites to Chief Judge Wood's opinion from the Seventh Circuit that concluded that 8 C.F.R. § 1003.14 is not jurisdictional but is instead a claim-processing rule. *Ortiz-Santiago*, 924 F.3d at 963-64. In *Ortiz-Santiago*, the Seventh Circuit concluded that, although the alien's notice to appear was defective and the defect could not be cured, the alien could not prevail because he waited too long and did not raise the claim-processing rule until his appeal was pending before the BIA. *Id.* at 964.

We agree with the Seventh Circuit's treatment of 8 C.F.R. § 1003.14 as a claim-processing rule. "Characterizing a rule as a limit on subject-matter jurisdiction 'renders it unique in our adversarial system.'" *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). "Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant 'at any point in the litigation,' and courts must consider them *sua sponte*." *Id.* (quoting *Gonzales v. Thaler*, 565 U.S. 134, 141 (2012)). While "harsh consequences" follow a failure to comply with jurisdictional rules, less harsh consequences follow a failure to comply with non-jurisdictional claim-processing rules. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015). A claim-processing rule is a rule that "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). A claim-processing rule is mandatory to the extent

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[4] Having concluded that the notices to appear omitting the time, date, or place are not defective, none of our sister circuits except the Seventh Circuit needed to address whether 8 C.F.R. § 1003.14 was jurisdictional.

a court must enforce the rule if a party properly raises it. *Fort Bend Cty.*, 139 S. Ct. at 1849. "But an objection based on a mandatory claim-processing rule may be forfeited 'if the party asserting the rule waits too long to raise the point.'" *Id.* (quoting *Eberhart v. United States*, 546 U.S. 12, 15 (2005)).

Congress has not "clearly state[d]" that the immigration court's jurisdiction depends on the content of notices to appear. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). Congress has delineated the subject matter of the immigration court's purview by providing that "[a]n immigration judge shall . . . decid[e] the inadmissibility or deportability of an alien," but it has not made the immigration court's jurisdiction dependent upon notices to appear. 8 U.S.C. § 1229a(a)(1); *Banegas Gomez*, 922 F.3d at 110. This congressional silence heavily weighs against treating the requirements relating to notices to appear as jurisdictional. *See Arbaugh*, 546 U.S. at 516 ("[W]hen Congress does not rank a [requirement] as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

Furthermore, the fact that the Attorney General promulgated 8 C.F.R. § 1003.14 also weighs against treating it as a jurisdictional rule. "While an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases." *Ortiz-Santiago*, 924 F.3d at 963. The Supreme Court's opinion in *Union Pacific Railroad Company*, which rejected the argument that a National Railroad Adjustment Board regulation was jurisdictional, is instructive. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 83-84 (2009). The Board's regulation provided that, in railroad labor disputes cases, "[n]o petition shall be considered by any division of the Board unless the subject matter has been [first

discussed in a settlement conference]." 29 C.F.R. § 301.2(b). Observing that "Congress gave the Board no authority to adopt rules of jurisdictional dimension," the Court held that the Board's regulation was a claim-processing rule. *Union Pac. R.R. Co.*, 558 U.S. at 83-84. Likewise, there is no congressional grant of authority to the Attorney General to adopt jurisdictional rules regarding removal proceedings.[5] Title 8 C.F.R. § 1003.14 is, therefore, a claim-processing rule.

Because 8 C.F.R. § 1003.14 is a non-jurisdictional, claim-processing rule, any alleged defect with the charging document must be raised properly and can be forfeited if the alien waits too long to raise it. *Ortiz-Santiago*, 924 F.3d at 963; *see also Fort Bend Cty.*, 139 S. Ct. at 1849. Pierre-Paul never challenged the validity of his notice to appear before the immigration judge or the BIA. He has raised the issue for the first time in his petition for review. Assuming *arguendo* that Pierre-Paul's notice to appear were defective, and the defect could not be cured, Pierre-Paul waited too long to raise this issue.[6]

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[5] Although 6 U.S.C. § 521(a) places the Executive Office of Immigration Review "subject to the direction and regulation of the Attorney General under [8 U.S.C. § 1103(g)]," these statutory provisions do not clearly authorize the Attorney General to adopt jurisdictional rules.

[6] Ultimately, whether we call 8 C.F.R. § 1003.14 jurisdictional or non-jurisdictional matters little because the outcome would be the same. Even if the requirement to include the time and date of the initial hearing were somehow jurisdictional, under our case law, an alien who fails to object to the notice to appear and concedes his removability "waive[s] his challenge to the [immigration judge's] jurisdiction over the removal proceedings." *Sohani v. Gonzales*, 191 F. App'x 258 (5th Cir. 2006); *Nunez v. Sessions*, 882 F.3d 449, 505 n.2 (5th Cir. 2018) (applying the administrative exhaustion requirement to arguments relating to an allegedly defective notice to appear); *see also Qureshi v. Gonzales*, 442 F.3d 985, 990 (7th Cir. 2006) ("When a petitioner expressly concedes removability as charged in the [notice to appear], he

To summarize, the regulations, not 8 U.S.C. § 1229(a), govern what a notice to appear must contain to constitute a valid charging document. Under the regulations, a notice to appear is sufficient to commence proceedings even if it does not include the time, date, or place of the initial hearing. Pierre-Paul's notice to appear was not defective because it included all other information required by the regulations. Even assuming that Pierre-Paul's notice to appear were defective, the immigration court cured that defect by subsequently mailing a notice of hearing that contained all pertinent information. Finally, even assuming that Pierre-Paul's notice to appear were defective and the defect could not be cured, Pierre-Paul's challenge fails because 8 C.F.R. § 1003.14 is not jurisdictional. Instead, 8 C.F.R. § 1003.14 is a claim-processing rule. An alien must properly raise the issue or risk forfeiting it. Here, Pierre-Paul forfeited the issue by waiting too long.

III.

We now turn to Pierre-Paul's challenge to the denial of asylum, withholding of removal, and cancellation of removal. The government argues that we lack jurisdiction to review these issues, and we agree.

The government raises two jurisdictional bars. As to the denial of asylum and withholding of removal, the government argues that the criminal alien bar in 8 U.S.C. § 1252(a)(2)(C) prevents our review. Under

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waives any objection to the [immigration judge's] finding of removability, including the argument that the [immigration judge] lacked jurisdiction to find him removable."); *United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242, 1245 (D.C. Cir. 1997) ("Arguments as to agency jurisdiction, however, cannot be raised for the first time on appeal except in the very limited case[.]"). Pierre-Paul cannot prevail because he waived his challenge by failing to object to the notice to appear and conceding his removability.

§ 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered [by, *inter alia*, 8 U.S.C. § 1227(a)(2)]." Because Pierre-Paul was removed under § 1227(a)(2)(B)(i), we lack jurisdiction to review the denial of asylum and withholding of removal, except to the extent Pierre-Paul raises legal or constitutional questions. *See* 8 U.S.C. § 1252(a)(2)(D); *Iruegas-Valdez v. Yates*, 846 F.3d 806, 810 (5th Cir. 2017).

Pierre-Paul has failed to present a question of law for which our jurisdiction is preserved under 8 U.S.C. § 1252(a)(2)(D). Pierre-Paul challenges the BIA's finding that he could not prove the nexus. The nexus issue, however, is a factual question reviewed under the substantial evidence standard, and, thus, an issue which this court lacks jurisdiction to entertain. *See Iruegas-Valdez*, 846 F.3d at 810; *see also Thuri v. Ashcroft*, 380 F.3d 788, 791 (5th Cir. 2004) (observing that whether an alien demonstrated the requisite nexus is a factual question).

As to the denial of cancellation of removal, the government argues that the discretionary act bar in 8 U.S.C. § 1252(a)(2)(B) precludes our review. Under 8 U.S.C. § 1252(a)(2)(B)(i), "no court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under . . . [8 U.S.C. § 1229b]." *See also* 8 U.S.C. § 1229b (cancellation of removal); *Sattani v. Holder*, 749 F.3d 368, 372 (5th Cir. 2014) ("We lack jurisdiction to review any judgment regarding the granting or denying of discretionary relief in the form of cancellation of removal, unless the appeal involves constitutional questions or questions of law."). Here, the BIA declined to cancel removal as a matter of discretion. Therefore, Pierre-Paul's challenge to the

BIA's denial of cancellation of removal falls squarely within the jurisdictional bar under § 1252(a)(2)(B)(i).[7]

IV.

Pierre-Paul's final argument is that the immigration judge violated his due process rights by failing to adhere to the procedural safeguards that a previous immigration judge put in place because Pierre-Paul was mentally incompetent. Pierre-Paul does not challenge the adequacy of the procedural safeguards but alleges that the immigration judge failed to abide by those safeguards. The BIA held that the immigration judge properly handled the procedural safeguards.[8] We agree with the BIA that the immigration judge did not violate Pierre-Paul's due process rights.

"If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien." 8 U.S.C. § 1229a(b)(3). "If an Immigration Judge determines that [an alien] lacks sufficient competency to proceed with the

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[7] Pierre-Paul also challenges the immigration judge's conclusion that Pierre-Paul was statutorily ineligible for cancellation of removal and that his group was not a cognizable particular social group for asylum and withholding of removal. However, we review only the BIA's order and review the immigration judge's order only if the BIA's reasoning rests on the immigration judge's reasoning. *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 204 (5th Cir. 2017). Because the BIA declined to reach these issues, they are not properly before us.

[8] Although Pierre-Paul failed to raise the issue before the BIA, because the BIA *sua sponte* reached the issue, we have jurisdiction to review it. *Lopez-Dubon v. Holder*, 609 F.3d 642, 644 (5th Cir. 2010) ("[I]f the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all that [8 U.S.C.] § 1252(d)(1) requires to confer our jurisdiction.").

hearing, . . . [then the immigration judge] ha[s] discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them." *Matter of M-A-M-*, 25 I. & N. Dec. 474, 481-82 (BIA 2011); *see also Diop v. Lynch*, 807 F.3d 70, 75 (4th Cir. 2015) ("Inherent in this process is a high degree of flexibility and discretion for the fact-finder to tailor his approach to the case at hand."). In *M-A-M-*, 25 I. & N. Dec. at 483, the BIA observed that examples of appropriate safeguards include, but are not limited to:

> [R]efusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case to facilitate the respondent's ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public; waiving the respondent's appearance; actively aiding in the development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the respondent.

However, as the BIA has explained, these procedural safeguards are not a license for a mentally incompetent alien to fabricate narratives that are contrary to objective facts. "A situation could arise in which an applicant who is deemed incompetent by the immigration judge sincerely believes his account of events, although they are highly implausible to an outside observer." *Matter of J-R-R-A-*, 26 I. & N. Dec. 609, 611 (BIA 2015). In such cases, the BIA has instructed immigration judges to assess the situation

on a case-by-case basis and to generally bifurcate the analysis between subjective beliefs and objective facts. *Id.* After accepting the alien's subjective belief as true, "[t]he Immigration Judge should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record and other relevant issues." *Id.* at 612.

Here, the procedural safeguards for Pierre-Paul included crediting Pierre-Paul's narrations of fact, as contained in his application for asylum and withholding of removal, as true; assuming the subjectivity of his fear of returning to Haiti as true; and allowing his counsel to ask leading questions during the hearing. Pierre-Paul argues that the immigration judge failed to credit his testimony as true on three occasions, and he points to three statements made by the immigration judge in discussing Pierre-Paul's application for cancellation of removal.

In response, the government argues that the immigration judge did not diverge from the procedural safeguards, and we agree. The immigration judge agreed to, and did in fact, accept Pierre-Paul's narration of facts as contained in his application for asylum and withholding of removal as true. The immigration judge, however, did not commit to accepting all of Pierre-Paul's narrative as true with regard to cancellation of removal.

The government also argues that even if the immigration judge had promised to accept *all* of Pierre-Paul's statements as true, the immigration judge in fact treated Pierre-Paul's narrative as "credible." We agree with the government, and the immigration judge properly concluded that Pierre-Paul fell short because "the objective evidence of record" did not warrant cancelling removal. *J-R-R-A-*, 26 I. & N. Dec. at 612. Pierre-Paul first argues that the immigration judge contradicted Pierre-Paul's testimony that he would make an effort to control his mental

illness by observing that it was "highly questionable that [Pierre-Paul] will maintain his medication regime." The immigration judge understandably based this statement on the fact that Pierre-Paul "failed to continue with his recommended treatment plans" and that he "was convicted of four additional offenses after he was initially released on bond from immigration detention."

Pierre-Paul also argues that the immigration judge refused to accept his explanation of the events preceding his 2010 assault conviction. Pierre-Paul testified that he and his two friends attacked a man only because the man, without provocation, pointed a gun at them first. However, the immigration judge observed that Pierre-Paul's account was "in stark contrast to the victim and investigating officer's explanations" that the man confronted Pierre-Paul and his friends for selling drugs in his apartment complex and that they shot him. However, despite finding the discrepancy "concerning," the immigration judge continued to treat Pierre-Paul as "credible." Finally, Pierre-Paul alleges that the immigration judge believed the statements of the detention center's physicians who questioned whether Pierre-Paul fabricated a mental illness. This allegation is meritless as the immigration judge accepted that Pierre-Paul was schizophrenic based on his "extensive medical history."

In declining to cancel removal, the immigration judge properly weighed the totality of facts and circumstances—including both Pierre-Paul's statements as well as other evidence about Pierre-Paul's past crimes and failures to continue with mental treatment. We see no variance from the procedural safeguards that amounts to due process violations.

V.

We DENY IN PART Pierre-Paul's petition for review as it relates to the immigration court's jurisdiction and its handling of procedural safeguards for Pierre-Paul. We DISMISS IN PART for lack of jurisdiction as to the denial of asylum, withholding of removal, and cancellation of removal.