No. 19-779

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The Government's principal argument against certiorari is that petitioner would have ultimately been denied relief in every circuit on one or the other of the questions presented. Although true, that focus on the final outcome of a single, multi-issue case across the circuits obscures the real factors that the Court should consider in deciding whether to grant review. The petition presents three important legal questions, and, the Government's quibbling aside, there are *recognized* conflicts among the courts of appeals on each of those questions. Nor are petitioner's respective positions outliers, for at least two courts of appeals have adopted petitioner's position on *each* issue. Thus, while the Government correctly trumpets that every circuit has rejected petitioner's position on at least one issue, it is easily conceivable that petitioner could prevail in

this Court on all three issues. Those are the relevant considerations for certiorari purposes.

Indeed, even if this Court granted certiorari and *denied* petitioner ultimate relief, it would nonetheless squarely resolve at least one circuit split and provide invaluable guidance to the lower courts. As importantly, a decision by this Court would bring much-needed clarity to *immigration* courts, which are currently operating in utter confusion under differing regional rules on a foundational issue—when and how their jurisdiction vests to decide removal proceedings. No previous petition cleanly presented this Court with the opportunity to address all three of the entrenched circuit splits that are causing disruption throughout the immigration system. That is why former immigration judges and BIA officials weighed in as *amici* in *this case*. The Court should grant review.

I. This Case Implicates Three Circuit Splits On Important Issues Of Immigration Law

This case squarely presents three questions that have divided the courts of appeals and are causing confusion throughout the Nation's immigration system: (1) whether a Notice to Appear (NTA) must specify the time and place of a noncitizen's removal proceedings; (2) whether, assuming that an NTA must include the time and place of a noncitizen's removal proceedings, a defective NTA can be cured by serving the noncitizen with a subsequent Notice of Hearing (NOH) that does contain the time-and-place information; and (3) whether filing a valid NTA 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. Each of these questions is independently significant for appellate courts and, as importantly, for immigration courts who must understand their jurisdiction before they can responsibly conduct removal proceedings.

A. The Government Quibbles Unsuccessfully With The Three Recognized Conflicts Among The Courts Of Appeals

The Government unconvincingly contests aspects of the three splits among the courts of appeals, but the cases evidence clear disagreement that has been recognized by the courts themselves.

1. The Government does not dispute that there is a split on the first issue. It acknowledges that the Seventh Circuit has held that "a notice to appear that does not specify the date and time of the initial removal hearing is 'defective.'" BIO 15 (quoting *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 961 (7th Cir. 2019)). The courts of appeals have noted the split. See, *e.g.*, Pet. App. 8a & n.3; *United States* v. *Cortez*, 930 F.3d 350, 363 (4th Cir. 2019).

Ceding that key issue, the Government instead questions whether the Eleventh Circuit has joined the Seventh Circuit on petitioner's side of this split. BIO 14-15. Neither the decision below nor *Cortez* discusses *Perez-Sanchez* v. *U.S. Attorney General*, 935 F.3d 1148 (11th Cir. 2019), because it had not yet been decided at the time of those opinions. But *Perez-Sanchez* places the Eleventh Circuit alongside the Seventh Circuit on this issue: "Mr. Perez-Sanchez'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." 935 F.3d at 1153. The Government notes that *Perez-Sanchez* did not reach the issue of whether such an NTA "would be 'deficient under the regulations,' as opposed to the statute." BIO 14 (quoting *Perez-Sanchez*, 935 F.3d at 1156). But that is irrelevant, for the court's ultimate and unqualified "conclusion [was] that the NTA was deficient." *Perez-Sanchez*, 935 F.3d at 1154. Subsequent Eleventh Circuit cases applying *Perez-Sanchez* confirm that understanding. See, *e.g.*, *Anuforo* v. *U.S. Attorney Gen.*, No. 19-

11755, 2020 WL 1623687, at *3 (11th Cir. Apr. 2, 2020) ("[U]nder our precedent, * * * Anuforo's NTA was defective for failing to specify the time and place of the removal hearing * * * ."); *Alvarez* v. *U.S. Attorney Gen.*, No. 19-12038, 2020 WL 1166057, at *2 (11th Cir. Mar. 11, 2020) ("In [*Perez-Sanchez*], we agreed with Perez-Sanchez that the NTA was deficient.").

2. The Government tepidly suggests that there is no split on the second issue, but the full context of the snippets it quotes from *Ortiz-Santiago* and *Perez-Sanchez* leaves no doubt regarding those courts' positions. On *Ortiz-Santiago*, the Government implies that the court was merely "not so sure" about whether a subsequent NOH could cure a defective NTA. BIO 15 (quoting *Ortiz-Santiago*, 924 F.3d at 962). In fact, however, the court soundly rejected the Government's two-step argument: "If we had found that the two-step procedure * * * was compatible with the statute, we could end our opinion here. [But] we do not read the law that way * * * ." *Ortiz-Santiago*, 924 F.3d at 962.

It is a similar story for *Perez-Sanchez*. The Government notes that the court "l[eft] open the possibility that a 'notice of hearing sent later might be relevant to a harmlessness inquiry.'" BIO 14. But here is what the court actually said: "[A] notice of hearing sent later might be relevant to a harmlessness inquiry, *but it does not render the original NTA non-deficient*." *Perez-Sanchez*, 935 F.3d at 1154 (emphasis added).

Moreover, this split has deepened further since the filing of the petition, with the Third and Tenth circuits having now joined petitioner's side of the split. See *Banuelos* v. *Barr*, --- F.3d ---, No. 19-9517, 2020 WL 1443523, at *7 (10th Cir. Mar. 25, 2020) ("Given the unambiguous language of the pertinent statutes, the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing."); *Guadalupe* v. *U.S.*

Attorney Gen., 951 F.3d 161, 164 (3d Cir. 2020) ("We hold that a defective NTA may not be cured by a subsequent Notice of Hearing, containing the omitted information.").

Thus, there is a clear division among the courts of appeals on the second question presented, as the courts themselves have recognized. See, *e.g.*, Pet. App. 10a; *Goncalves Pontes* v. *Barr*, 938 F.3d 1, 7 n.2 (1st Cir. 2019).

3. The Government incorrectly denies the split on the third issue. It argues that the four circuits to have concluded that filing a valid NTA is a prerequisite for the immigration court's subject-matter jurisdiction did so only in dicta. BIO 13-14. The courts of appeals themselves think otherwise: "Many of our sister circuits have accepted the proposition that 8 C.F.R. § 1003.14 sets forth a jurisdictional rule." *Perez-Sanchez*, 935 F.3d at 1155; see also *Cortez*, 930 F.3d at 359 ("[A] substantial majority of courts addressing this issue have * * * treat[ed] § 1003.14(a) as though it implicates an immigration court's adjudicatory authority or 'subject matter jurisdiction.'"). Likewise, district courts in the circuits on petitioner's side of the split have treated their circuits' jurisdictional rulings as binding precedent, not dicta. See, *e.g.*, *United States* v. *Nunez-Romero*, No. 18-CR-00425-LHK-1, 2020 WL 1139642, at *6 (N.D. Cal. Mar. 9, 2020) ("The *Karingithi* court's determination that the regulations set forth jurisdictional requirements for the Immigration Court is * * * not dicta."); *United States* v. *Benitez-Dominguez*, No. 19-CR-99 (NGG), 2020 WL 903008, at *7 (E.D.N.Y. Feb. 24, 2020) ("*Banegas Gomez* held that the regulations at issue are jurisdictional.").

The language of the cases confirms their precedential value. The Eighth Circuit, for example, began its discussion of this issue with the observation that "we must determine whether we have subject-matter jurisdiction over this case." *Ali* v. *Barr*, 924 F.3d 983, 985 (8th Cir. 2019). Then it "explain[ed] that '[j]urisdiction vests, and

proceedings before an Immigration Judge commence, when a charging document,' including a notice to appear, 'is filed with the Immigration Court.'" *Id.* at 986 (quoting 8 C.F.R. § 1003.14(a)). Similarly, the Sixth Circuit considered the NTA issue to implicate "[s]ubject matter jurisdiction" and held that "jurisdiction 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." *Hernandez-Perez* v. *Whitaker*, 911 F.3d 305, 310, 315 (6th Cir. 2018). The other two circuits on this side of the split have stated similarly clear holdings. See *Banegas Gomez* v. *Barr*, 922 F.3d 101, 112 (2d Cir. 2019) ("We conclude that 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."); *Karingithi* v. *Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) ("[T]he regulations * * * define when jurisdiction vests.").

Thus, the courts of appeals are deeply split on this fundamental jurisdictional issue.

B. The Government Does Not Dispute The Importance Of Any Of The Questions Presented

Notably, the Government does not and cannot gainsay the disruption that these splits are inflicting on the ground-level functioning of the Nation's immigration system. Petitioner chronicled the troubling fallout from each split, which transcends immigration law and is beginning to infect criminal cases as well. See Pet. 17-19. But the Court need not rely on petitioner's analysis alone. Nearly two dozen former immigration judges and members of the Board of Immigration Appeals echo petitioner's concerns and add more of their own about this "exceptionally

important" case. See Immigration Judges' Br. 1. *Amici* detail the "circuit splits['] * * * intolerable consequences for the nationwide immigration system," *id.* at 2, identifying concrete examples of how a non-citizen's removal proceedings would be decided differently depending on the geographic location of the immigration court. *Id.* at 1, 9-12. What is more, the conflicts among the courts of appeals incentivize forum shopping and heighten the risk of error for immigration judges who often hear cases from multiple circuits in rapid succession. *Id.* at 4-5.

Only this Court can provide uniform guidance to the immigration courts that process thousands of removal actions under circumstances that are challenging at the best of times. These administrative courts are groping in the dark about questions as fundamental as what documents vest jurisdiction in their tribunals and whether that jurisdiction is non-waivable subject-matter jurisdiction, as the relevant text suggests, or something else. The Court has "recognize[d] * * * the Nation's need to 'speak with one voice' in immigration matters." *Zadvydas* v. *Davis*, 533 U.S. 678, 700 (2001). That need is at its zenith here, where the courts of appeals' fracturing on three separate issues is wreaking havoc on the immigration system.

II. This Case Presents An Ideal Vehicle For Resolving The Three Conflicts Among The Courts Of Appeals

Unable to contest that this case provides an open path for the Court to resolve as many as three critical issues of immigration law, the Government repeats the refrain that "the outcome of this case would be the same in every court of appeals" that has addressed the questions presented. BIO 15. While this sounds like a traditional—and often valid—vehicle argument at first blush, initial appearances are misleading.

This Court often declines to expend its limited resources when a case's outcome on the question presented would be the same under any circuit's test—*i.e.*, when the petition does not truly implicate the circuit split. In such cases, this Court's review is unlikely to clarify the law or to change the outcome below. While the Government seeks to invoke that policy, it does not apply here. The Government conflates the *three* questions presented, mixing and matching circuit outcomes to argue that there is no circuit in which petitioner could ultimately prevail. But it is equally clear that multiple circuits *would* rule for petitioner on *each* of the three questions presented. See *supra* Part I.A. Thus, it is perfectly plausible that petitioner could prevail in this Court at the end of the day, and it is indisputable that the Court's decision would clarify the law on at least one—and perhaps three—important questions.

The Government's ill-conceived vehicle argument might have marginally more weight if this case's importance were limited to providing guidance to the circuit courts. But immigration courts also need this Court's ruling with utmost urgency. See *supra* Part I.B. Nor are other cases likely to reach the Court that would meet the Government's novel vehicle test. All circuits that hear immigration cases have spoken in the two years since this Court decided *Pereira*. If certiorari is denied here, the only plausible route to review would be a Government cert petition after an immigrant (1) timely preserves the NTA/NOH issues in immigration court, thus pretermitting the "jurisdictional" question" and (2) prevails in either the Seventh or Eleventh circuits, which would resolve the NTA and NOH issues in petitioner's favor. Even assuming the Government would seek cert in such a scenario, it would not resolve the third question presented here. Our Nation's immigration judges should not be forced to wait for this perfect storm before receiving essential instruction about how to do their jobs. The time for review is ripe.

Again conflating the three questions presented, the Government claims that the Court has often denied petitions "raising the same issue." BIO 6. Although the Court has rejected petitions that have raised one or two of the questions presented here, it has never confronted a petition that cleanly presents all three of the issues that have divided the courts of appeals in this important area of law. And because this case arises out of a petition for review from the BIA, it lacks the procedural complications of the many cases that have raised these issues in appealing a conviction for illegal reentry. See, *e.g.*, *Mora-Galindo* v. *United States*, No. 19-7410; *Nkomo* v. *Barr*, No. 19-957. Perhaps those reasons, combined with the growing confusion on the front lines, explain why immigration judges weighed in as *amici* in *this* case. This petition presents the Court with a unique opportunity to resolve all three of these troubling splits in one stroke, or, alternatively, to choose among them if the disposition of the case permits.

III. PETITIONER IS CORRECT ON THE MERITS

The Government's merits arguments are overstated and, in any event, largely beside the point at this stage. Regardless of who would prevail on each of the three questions presented, the Court must grant certiorari to end the disruptive discord plaguing the courts of appeals and immigration courts. And petitioner's merits case is far stronger than the hopeless effort that the Government depicts. See Pet. 12-17.

One flaw in the Government's merits arguments bears special mention. Much of the Government's position is built on assuming that it is perfectly normal to have two separate NTAs with entirely different requirements and functions. See BIO 7-12. That is, for example, how the Government attempts to sidestep this Court's ruling in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018). See BIO 10-11. But petitioner has demonstrated that, both in written law

and in practical fact, there is only a single NTA throughout the entire removal process. See Pet. 13-16; see also Hoffman, *Litigation Post*-Pereira, 1 Am. Immigr. Lawyers Assoc. L.J., Oct. 2019, at 143-144 ("[T]he conclusion that there are two different NTAs, * * * one conceived of by statute and one by regulation," is "not supported by any authority whatsoever."). And if there is only one NTA, then the statutory requirements for the NTA enforced in *Pereira* must control if they conflict with the regulations here. Pet. 13-14. Accordingly, the NTA must include the statutorily required time-and-place information to vest the immigration court with jurisdiction. *Id.* at 16-17.

Nor do the regulations contain the only reference to "jurisdiction." Contra BIO 9-10. The transitional statutory provision that governed before § 1229 took effect explains that "the notice of hearing provided to the alien under [§ 1252b] shall be valid as if provided under [§ 1229(a)] (as amended by this subtitle) *to confer jurisdiction on the immigration judge*." Illegal Immigration Reform and Immigrant Responsibility Act, § 309(c)(4), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-626 (emphasis added).

Thus, this Court's reasoning in *Pereira* and the statutory text both point toward relief for petitioner.

Respectfully submitted.

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