No. 15-72406

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ISAIAS LORENZO LOPEZ,

Petitioner,

v.

WILLIAM P. BARR, United States Attorney General,

Respondent.

RESPONDENT'S PETITION FOR REHEARING EN BANC

JOSEPH H. HUNT
Assistant Attorney General

JOHN W. BLAKELEY
Assistant Director

PATRICK J. GLEN
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-7232

Counsel for Respondent

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MISCELLANEOUS

I. INTRODUCTION

This Court should grant rehearing en banc to resolve an important question of law that divided the three-judge panel in this case and has profound ramifications for thousands of immigration cases.

Under the Immigration and Nationality Act, a lawful permanent resident may be eligible for discretionary relief from removal if he can establish, *inter alia*, that he has "resided in the United States continuously for 7 years after having been admitted." Under the "stop-time rule," any period of continuous residence ceases when an alien is served with a "notice to appear under section 1229(a)." To be effective for stop-time purposes, the Notice to Appear (NTA) must contain, at a minimum, "[t]he time and place at which the [removal] proceedings will be held." *Pereira v. Sessions*, 138 S. Ct. 2105, 2116 (2018). The issue presented is whether an NTA that omits the "time and place" of the alien's initial hearing may be completed by later service of a Notice of Hearing containing that information, such that the stop-time rule is triggered when the alien receives a Notice of Hearing.

Over Judge Callahan's forceful dissent, the panel majority held that the answer is no—such an NTA cannot be completed by a Notice of Hearing that contains time-and-place information, and the stop-time rule can be triggered only upon service of a single document containing all information required by 8 U.S.C. § 1229(a)(1). *Lorenzo-Lopez v. Barr*, 925 F.3d 396, 399-402 (9th Cir. 2019).

Rehearing en banc is warranted. The panel majority misinterpreted the statute. The statute requires that an alien be served with all information required in a "notice to appear," but it nowhere requires—as the panel did—that all information be contained in a single document. On top of that legal error, the panel improperly overruled prior Circuit precedent upholding a two-step notice procedure, deeming that precedent irreconcilable with *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). But the panel had no authority to do so, because prior Circuit precedent is not clearly irreconcilable with *Pereira*. Rehearing en banc is necessary to resolve an important issue of statutory interpretation and to address the panel's improper overruling of Circuit precedent.

II. BACKGROUND

Petitioner was admitted as a lawful permanent resident on February 12, 2002. On March 14, 2008, he was detained by U.S. Customs and Border Protection after attempting to smuggle an alien into the United States. That day, he was personally served with an NTA that omitted the time and date of his initial removal proceeding. That NTA was filed with the immigration court, and, on June 27, 2008, a Notice of Hearing was mailed setting the date of his hearing as October 23, 2008. He appeared before the immigration court on that date, conceded removability, and applied for cancellation of removal. The immigration judge denied that relief on the ground that Petitioner could not establish 7 years of continuous residence after admission,

because service of the NTA stopped his accrual of residence short of the statutory standard. The Board of Immigration Appeals dismissed Petitioner's administrative appeal. Petitioner filed a petition for review with this Court.

While that petition for review was pending, the Supreme Court decided *Pereira*. The question presented in *Pereira* was whether an NTA that omits the "time and place" of the alien's removal hearing is sufficient to trigger the stop-time rule. Rejecting this Court's (and other courts of appeals') conclusion on that issue, *see Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015), the Supreme Court held that a statutorily deficient NTA is ineffective for stop-time purposes. 138 S. Ct. at 2110. The stop-time rule's express reference to Section 1229(a) "specifies where to look to find out what 'notice to appear' means." *Ibid.* Section 1229(a) in turn provides that "[i]n 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" specifying certain information. *See* 8 U.S.C. § 1229(a)(1). Among the information required to be provided to the alien is "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). Given that explicit cross-reference, the Supreme Court concluded "it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, 'specif[ies] the time and place' of the removal proceedings." *Pereira*, 138 S. Ct. at 2110. Beyond statutory text and context, the Court held that its

conclusion was "compel[led]" by common sense. *Id.* at 2215. "If the three words 'notice to appear' mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, *i.e.*, the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place." *Ibid.*

The Court granted the petition for review. The panel majority rejected the government's reliance on *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009), which held that the government was permitted to use a two-step process in providing the information required by the statute. The panel majority concluded that "[t]he plain language of the statute foreclose[d]" *Popa*'s reasoning, *Lorenzo-Lopez*, 925 F.3d at 399, and that *Popa*'s reasoning had been "'undercut' by *Pereira* such that 'the cases are clearly irreconcilable.'" *Id.* at 400 (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). Thus, it deemed *Popa* "effectively overruled" and no longer binding. *Ibid.*

Turning to the statute, the majority focused on the phrase "*a notice* to appear" as used in the stop-time rule. *Lorenzo-Lopez*, 925 F.3d at 402. According to the majority, use of the singular indicated that the statute requires service of a single document that complies with the requirements of Section 1229(a)(1). *Ibid.* The majority distinguished cases where the Supreme Court had concluded that an initially deficient document or filing could be "cured" by a later act, *e.g.*, *Becker v.*

Montgomery, 532 U.S. 757, 760 (2001), on the ground that those cases involved "trivial or ministerial errors," whereas the "time and place" information of the NTA is substantive. *Lorenzo-Lopez*, 925 F.3d at 404. Since time thus never stopped in Petitioner's case, the majority concluded he met the continuous residency requirement and was therefore statutorily eligible for cancellation of removal. *Id.* at 405.

Dissenting, Judge Callahan wrote that neither *Pereira* nor the plain text of the statute prohibited the two-step process contemplated in *Popa*. *Lorenzo-Lopez*, 925 F.3d at 406-08 (Callahan, J., dissenting). Judge Callahan emphasized that *Pereira*'s own holding was explicitly narrow and did not reach the issue presented here, and that the statute focuses on the provision of specified *information* without mandating specifically how that information should or could be provided. *See ibid.* Judge Callahan concluded that the majority's decision "is a windfall for noncitizens and necessarily interferes with Congress's intent." *Id.* at 410.

III. ARGUMENT

In this case, the panel interpreted the INA as mandating that a single document, including all information required by Section 1229(a)(1), must be provided before the stop-time rule would apply to cut off the accrual of continuous residence. That interpretation is erroneous, it conflicts with Circuit precedent permitting compliance with Section 1229(a)(1) through a two-step process, and

Pereira did not abrogate that precedent. En banc consideration is necessary to rectify the panel majority's erroneous holding and "to secure or maintain uniformity of the court's decisions." Fed. R. App. 35(a)(1).

A. Rehearing En Banc Is Warranted Because the Panel Reached an Erroneous Holding on an Important Question of Statutory Interpretation

The better interpretation of the stop-time rule and the statutory notice provision is that time stops when the alien has been provided with all the information to which he is entitled under Section 1229(a)(1), whether that notice has been provided in a single document or through subsequent service of the Notice of Hearing. This interpretation follows from the text of Section 1229(a)(1) and the structure of the notice-to-appear statute as a whole, it is consistent with the text of the stop-time rule, and it is in accord with the statutory aims.

Starting with text: Section 1229(a)(1) directs that an alien shall be provided with "written notice" of certain information, but it does not specify further the manner in which that information must be provided—*i.e.*, in a single or multiple documents. The phrase "written notice" is itself general, and does not mandate a particular form of notice or preclude the use of multiple documents. And although Congress specified that the information contemplated by Section 1229(a)(1) would be "referred to as a 'notice to appear,'" that language does not require a single document to convey the statutory information. This phrase occurs only in a parenthetical after Congress's textual directive that "written notice" be provided to

the alien. The phrase "notice to appear" is thus best read to serve as shorthand for the constellation of information required by Section 1229(a)(1). In this context, then, "notice to appear" stands collectively for those discrete pieces of information required by Section 1229(a)(1). It leaves open the form of the relevant information, including whether that information is conveyed in multiple documents, each specifying important pieces of the information required by Section 1229(a)(1).

This conclusion is bolstered by the statutory structure. In contrast to Section 1229(a)(1), which directs the government to provide "written notice" of certain information, Section 1229(a)(2)(A) directs the government to provide "*a* written notice" specifying "the new time or place of the proceedings in the event of "any change or postponement" to the original hearing date. Congress understood how to use the singular when it wanted to direct compliance through a single document, and it did so in Section 1229(a)(2)(A). Its failure to use the singular in specifying the "written notice" required by Section 1229(a)(1) thus supports the contention that compliance with that section may occur through more than one document. *See*, *e.g.*, *United States v. Bean*, 537 U.S. 71, 76 n.4 (2002) ("The use of different terms within related statutes generally implies that different meanings were intended.") (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 46.06, at 194 (6th ed. 2000)).

This interpretation is also consistent with the stop-time rule's language. The stop-time rule is triggered "when the alien is served *a notice to appear* under section 1229(a)." 8 U.S.C. § 1229b(d)(1) (emphasis added). Contrary to the panel majority's view, the singular here does not mean a single document. Rather, as explained above, "notice to appear" is only short-hand for the constellation of information required by Section 1229(a)(1). "A notice to appear" simply denotes the information required to be given the alien, but the statute does not limit the manner in which it may be provided. In one sense, the reference is singular; an alien will only receive the full information contemplated by the statute once. But it is not singular in the sense used by the panel to denote a single document including all the information required by statute. In this context, the Dictionary Act's rule that "words importing the singular include and apply to several persons, parties, or things," 1 U.S.C. § 1, has particular force. When Section 1229(a)'s language is properly understood as applying to information, rather than to a particular document, the reference to "*a* notice to appear" in the stop-time rule is best understood as also applying to information and not to the manner in which it is provided—*i.e.*, as not limiting the government to a single document in order to comply with the statute. The panel erred when it did not meaningfully analyze what the phrase "notice to appear" means in the first place.

The government's interpretation also promotes the aims of the stop-time rule. In establishing that rule, Congress sought to mark a line beyond which continuous residence could not accrue, and it did so in a fashion that would render *every* alien's period of residence stopped once the government had served them with a charging document. Congress specifically sought to forestall accrual of additional time while the proceeding itself unfolded. *See* H.R. Rept. No. 469, at 122, 104th Cong., 2d Sess. Pt. 1 (1996). Concluding that the Notice of Hearing may stop time serves that aim. Once the government serves the alien with notice of the "time and place" of the hearing, it has demonstrated its intent to place him into proceedings. At that point, the clearly expressed intent of Congress should dictate that the alien may no longer accrue time towards the fulfillment of the continuous residence requirement.

Finally, the panel majority's decision has significant ramifications for thousands of cases. As the government noted before the Supreme Court in *Pereira*, date and time information has been omitted in virtually every NTA served in the years preceding that decision. *See Pereira*, 138 S. Ct. at 2111 (citation omitted). This means that every case in which an alien sought or will seek cancellation of removal is potentially affected by the panel majority's holding. The effect of that decision will be to render more aliens statutorily eligible for relief, placing strains on immigration judges and the annual statutory cap on relief, *see* 8 U.S.C. 1229b(e), while also placing an additional burden on DHS to serve a superseding NTA to stop

time (assuming that the alien has not yet met the requisite period of continuous residence). The result is, as accurately described by Judge Callahan in dissent, "a windfall for noncitizens," *Lorenzo-Lopez*, 925 F.3d at 410, who get to pursue discretionary relief despite receiving all the information Congress required that they be provided.

B. Rehearing En Banc Is Warranted Because the Panel Decision Conflicts with Binding Circuit Precedent

The panel majority wrongly overruled prior precedent that can be overruled—if at all—only by the en banc Court.

The rule that governs in this Circuit is that the government may provide the information required by Section 1229(a)(1) through service of multiple documents. In *Garcia-Ramirez v. Gonzales*, this Court confronted a distinct issue regarding the accumulation of continuous physical presence and the applicability of statutory amendments to the INA to occurrences that pre-dated enactment. 423 F.3d 935 (9th Cir. 2005). In addressing that issue, the Court noted that even if the initial NTA that had been served in that case was incomplete, on account of its failure to include the "time and place" of the initial hearing, the stop-time rule could still be triggered upon service of the Notice of Hearing. 423 F.3d at 937 n.3. In other words, the stop-time rule was triggered when the alien received all information required to be conveyed pursuant to the statute. The Court reiterated this conclusion in *Popa v. Holder*, a case dealing with the notice requirements in the context of an *in absentia* order of

removal. 571 F.3d 890 (9th Cir. 2009). The Court held that "a Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of the hearing is in fact later sent to the alien." *Id.* at 896. Thus, "the NTA and the hearing notice combined" was a permissible way to provide the statutory notice required by Section 1229(a)(1).[1] *Ibid.*

Under this precedent, the petition for review should have been denied. The Notice of Hearing, which provided the only information that was missing from the NTA and was served within the seven-year period during which Petitioner had to establish continuous residence, stopped the accrual of residence short of the statutory standard. Petitioner is thus unable to establish statutory eligibility for cancellation of removal.

[1] This precedent enjoyed the unanimous approval of those courts of appeals that addressed various permutations of the notice issue. *See Guamanrrigra v. Holder*, 670 F.3d 404, 409-10 (2d Cir. 2012) (approving two-step process in the context of the stop-time rule); *Dababneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006) (same); *see also Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009) (approving two-step process in the context of *in absentia* orders); *Haider v. Gonzales*, 438 F.3d 902, 907-08 (8th Cir. 2006) (same). No court had rejected the permissibility of this two-step approach prior to the Board's decision in *Matter of Camarillo*, which rendered further development of this line of cases moot given the Board's conclusion that an NTA that lacks "time and place" information is sufficient to trigger the stop-time rule. *See* 25 I. & N. Dec. 644, 650-52 (BIA 2011)*;see also Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (describing the pre-*Camarillo* case law as an "emerging consensus").

The panel majority declined to apply the rationale of these cases, concluding that these decisions had been effectively overruled by *Pereira*. *Lorenzo-Lopez*, 925 F.3d at 399-400. The panel majority was wrong. In narrow circumstances, a three-judge panel may deem a prior decision overruled even if it has not been explicitly abrogated by the en banc Court or Supreme Court. *See Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002). Under this "pragmatic" approach, the panel must assess whether "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Gammie*, 335 F.3d at 900. If the Court can apply its precedent without "running afoul" of the intervening precedent, the cases are not clearly irreconcilable. *See United States v. Orm Hieng*, 679 F.3d 1131, 1140-41 (9th Cir. 2012).

Applying the rule of *Garcia-Ramirez* and *Popa* does *not* run afoul of *Pereira*'s holding or logic. First, *Pereira* said nothing at all about the issue resolved in either case—whether the information required by Section 1229(a)(1) may be provided through service of multiple documents. The "narrow" issue resolved by the Supreme Court in *Pereira* involved only the question of whether an NTA that lacks the "time and place" of the initial removal hearing, standing alone, is sufficient to trigger the stop-time rule. *See Pereira*, 138 S. Ct. at 2110, 2113. The Court said no, but it explicitly declined to address whether the failure to provide *other* statutorily required

information would be fatal to operation of the stop-time rule, and said nothing at all about when time should be deemed to stop if the initial NTA lacks required information. *See id.* at 2113-14 & n.5.

Second, the question presented in this case was not even presented on the facts of *Pereira*. In *Pereira*, unlike in this and other cases, the Notice of Hearing was served well outside the period during which continuous physical presence was required, meaning that even if that Notice completed the statutory requirements, the alien had already accrued sufficient presence. In fact, before the First Circuit, the alien himself argued that time ran through the service of the *Notice of Hearing*, and at that point, when time finally "stopped," he had accrued the requisite period of presence. *See Pereira v. Sessions*, 866 F.3d 1, 3 (1st Cir. 2017). And before the Supreme Court, Petitioner argued that time would stop when the alien received all of the information that, combined, would satisfy the statutory requirements. *See* Petr.'s Br. 42, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459) ("When the government *does* serve all the notice that together constitutes 'a notice to appear under section 1229(a),' then the immigrant's continuous residence is 'deemed to end.'"); *accord* Petr.'s Reply Br. 19, *Pereira*, *supra* ("The government can, whenever it wants, stop an immigrant from accruing time by serving notice of the information specified in section 1229(a). Even if the government omits service of the 'time and place' information from its initial notice, there is nothing an immigrant

could do to delay service of notice that provides such information."). Given the distinct factual contexts presented by the cases, then, the resolution of the narrow (and discrete) question presented to the Supreme Court in *Pereira* does not abrogate the holdings in *Popa* and *Garcia-Ramirez*.

Third, the analysis of *Pereira* has not significantly "undercut" the reasoning of *Popa* or the conclusion of *Garcia-Ramirez*. In *Pereira*, the Supreme Court held that the requirements of Section 1229(a)(1) are effectively definitional, and that a "notice to appear under section 1229(a)(1)" must convey all the statutory requirements for time to stop. *See Pereira*, 138 S. Ct. at 2116. But its assessment of the statutory language was confined to the question whether a single notice that *lacks* required information is sufficient to trigger the stop-time rule. Its reading of the statute provided a clear answer—no—but the basis for that holding would not necessarily resolve whether the statutory information may be conveyed in multiple documents. As more fully addressed above, the better interpretation of the statute is that its plain text permits a two-step process, and none of the reasoning on which that determination depends has been foreclosed by the Supreme Court's analysis in *Pereira*.

IV. CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Patrick J. Glen
PATRICK J. GLEN
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-7232
Patrick.Glen@usdoj.gov

Dated: August 7, 2019

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-1 and 40-1, the foregoing Petition for Rehearing En Banc is proportionally spaced in a 14-point Times New Roman typeface, and is in compliance with Fed. R. App. P. 32(c) and Circuit Rule 40-1(a), in that it contains 3,485 words.

/s/ Patrick J. Glen
PATRICK J. GLEN
Counsel for Respondent

Attachment

Lorenzo Lopez v. Barr, 925 F.3d 396 (9th Cir. 2019)

925 F.3d 396
United States Court of Appeals, Ninth Circuit.

Isaias Lorenzo LOPEZ, Petitioner,
v.
William P. BARR, Attorney General, Respondent.

No. 15-72406
|
Argued and Submitted February 12, 2019
Pasadena, California
|
Filed May 22, 2019

Synopsis

Background: Alien filed petition for review of Board of Immigration Appeals' (BIA) order affirming immigration judge's (IJ) determination that he was ineligible for cancellation of removal.

Holdings: The Court of Appeals, Korman, District Judge, sitting by designation, held that:

[1] notice to appear that alien received did not terminate his residence, for purposes of Immigration and Nationality Act's (INA) stop-time rule, and

[2] notice of hearing did not cure notice to appear's omission of time and place of removal hearing.

Petition granted.

Callahan, Circuit Judge dissented and filed opinion.

West Headnotes (7)

[1] **Administrative Law and Procedure**
Aliens, Immigration, and Citizenship
Aliens, Immigration, and Citizenship
Law questions

In reviewing Board of Immigration Appeals (BIA) order, Court of Appeals reviews questions of law, such as interpretation and construction of statutes, de novo, except to extent that deference is owed to BIA's determination of governing statutes and regulations.

Cases that cite this headnote

[2] **Administrative Law and Procedure**
Construction, interpretation, or application of law in general

Questions of law that can be answered with traditional tools of statutory construction are within special expertise of courts, not agencies, and are therefore answered by court de novo.

Cases that cite this headnote

[3] **Administrative Law and Procedure**
Plain, literal, or clear meaning; ambiguity or silence

If intent of Congress is clear, that is end of matter; for court, as well as agency, must give effect to unambiguously expressed intent of Congress.

Cases that cite this headnote

[4] **Aliens, Immigration, and Citizenship**
Stop time rule
Aliens, Immigration, and Citizenship
Notice; order to show cause

To trigger Immigration and Nationality Act's (INA) stop-time rule, which stops continuous-presence clock once nonresident seeking cancellation of removal is served with notice to appear, notice to appear must contain all items listed in statute, including date, time, and place of removal proceeding. Immigration and Nationality Act § 240A, 8 U.S.C.A. § 1229b(d)(1).

3 Cases that cite this headnote

[5] **Aliens, Immigration, and Citizenship**
Stop time rule
Aliens, Immigration, and Citizenship
Notice; order to show cause

Notice to appear that lawful permanent resident received did not terminate his residence, for purposes of Immigration and Nationality Act's (INA) stop-time rule for determining his eligibility for cancellation of removal, where notice to appear did not contain time or place of his removal proceedings. Immigration and Nationality Act § 240A, 8 U.S.C.A. § 1229b(d)(1).

4 Cases that cite this headnote

[6] **Aliens, Immigration, and Citizenship**
Stop time rule
Aliens, Immigration, and Citizenship
Notice; order to show cause

Notice of hearing that lawful permanent resident received from immigration court did not cure notice to appear's omission of time and place of removal hearing, and thus did not trigger Immigration and Nationality Act's (INA) stop-time rule for determining his eligibility for cancellation of removal, even though notice of hearing contained time and place of his removal proceeding, where notice of hearing did not contain other requirements of notice to appear. Immigration and Nationality Act §§ 239, 240A, 8 U.S.C.A. §§ 1229(a)(1), 1229b(d)(1).

5 Cases that cite this headnote

[7] **Administrative Law and Procedure**
Agency expertise in general

Reviewing court should defer to administrative agency only in those areas where that agency has particular expertise.

Cases that cite this headnote

West Codenotes

Recognized as Invalid
8 C.F.R. § 1003.18

Attorneys and Law Firms

***397** Jan Joseph Bejar (argued), Law offices of Jan Joseph Bejar P.L.C., San Diego, California, for Petitioner.

M. Jocelyn Lopez Wright (argued), Senior Litigation Counsel; Briena Strippoli, Trial Attorney; Melissa Neiman-Kelting, Assistant Director; Joseph H. Hunt, Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C., for Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals, Agency No. AXXX-XX2-814

Before: Dorothy W. Nelson and Consuelo M. Callahan, Circuit Judges, and Edward R. Korman,* District Judge.

Dissent by Judge Callahan

OPINION

KORMAN, District Judge:

***398** Isaias Lorenzo Lopez was born in Oaxaca, Mexico in 1984. In September 1998, when he was fourteen years old, he arrived in the United States to be with his father, a lawful permanent resident ("LPR"). Lorenzo was paroled into the United States and, two years later, on February 12, 2002, he became an LPR. While in the United States, Lorenzo graduated from high school, receiving good grades while working to support his family. After graduating, he continued to work six days a week on a farm to support his two U.S. citizen children and their mother.

But his record, which includes two misdemeanor convictions for which he served a total of 10 days in jail, is not unblemished. This case arises out of a separate incident that occurred on March 14, 2008: Lorenzo agreed to help Adriana Lopez Estevez enter the United States illegally by furnishing her with a U.S. citizen's birth certificate and driving to Tijuana to pick her up. When they attempted to return to the United States through the San Ysidro port of entry, border agents discovered that Adriana was not actually a U.S. citizen and had no documents authorizing her entry into the country. The agents arrested Lorenzo, and he confessed to attempting to assist Adriana to enter the United States because he felt pity for her. Immediately following his arrest, the Department of Homeland Security ("DHS") commenced removal proceedings by filing a Notice to Appear and serving it on Lorenzo.

At his removal proceeding, Lorenzo sought cancellation of removal under 8 U.S.C. § 1229b(a) based on his LPR status. To be eligible for cancellation of removal, an LPR must, among other requirements, "reside[ ] in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). The IJ concluded that Lorenzo was admitted in February 2002 when he became an LPR and that the March 2008 Notice to Appear terminated his residence period. Because Lorenzo had resided in the United States for only six years and one month, he was deemed ineligible for cancellation of removal. The Board of Immigration Appeals ("BIA") affirmed the IJ's decision. Lorenzo appealed.

While his appeal was pending, the Supreme Court decided *Pereira v. Sessions*, —— U.S. ——, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018). *Pereira* held that, as defined in 8 U.S.C. § 1229(a), a Notice to Appear must contain "[t]he time and place at which the [removal] proceedings will be held," and that such definition applies wherever the term is used. *Pereira*, 138 S. Ct. at 2116. Because an alien's residence is terminated by service of a "notice to appear under section 1229(a)," 8 U.S.C. § 1229b(d)(1), absent time and place information, a purported Notice to Appear may not trigger the "stop-time" provision. *Id.* at 2110. Because the Notice to Appear issued to Lorenzo did not contain that information, it was defective and did not trigger the stop-time provision. Nevertheless, in April 2008, the Immigration Court advised Lorenzo of the time, date, and location of his proceeding by issuing a separate document labeled "Notice of Hearing." In light of *Pereira*, we ordered supplemental briefing on "[w]hether a Notice of Hearing that contains the time and place at which an alien must appear cures a Notice to Appear that is defective under *Pereira v. Sessions*, —— U.S. ——, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018), such that ***399** the 'stop-time' rule is triggered upon receipt of the Notice of Hearing."

STANDARD OF REVIEW

[1] [2] [3]We review questions of law, such as "the interpretation and construction of statutes," de novo, *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1041 (9th Cir. 2001), "except to the extent that deference is owed to the BIA's determination of the governing statutes and regulations." *Aragon-Salazar v. Holder*, 769 F.3d 699, 703 (9th Cir. 2014). "Questions of law that can be answered with 'traditional tools of statutory construction' are within the special expertise of courts, not agencies, and are therefore answered by the court de novo." *Ayala-Chavez v. INS*, 945 F.2d 288, 294 (9th Cir. 1991) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)), *superseded by statute on other grounds as stated in Urbina-Mauricio v. INS*, 989 F.2d 1085, 1088 n.3 (9th Cir. 1993). 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." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

DISCUSSION

Section 1229b(a) provides for "[c]ancellation of removal for certain permanent residents" who satisfy three prerequisites: "the alien (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a). As to the second requirement, two events may terminate an alien's residence, even if he still lives in the country: service of a Notice to Appear under Section 1229(a), or commission of "an offense referred to in section 1182(a)(2) ... that renders the alien inadmissible ... or removable." *Id.* § 1229b(d)(1) (the "stop-time" rule); *see also Nguyen v. Sessions*, 901 F.3d 1093, 1096 (9th Cir. 2018). Only the former is relevant here.

[4] [5]To trigger the stop-time rule, a Notice to Appear must

contain all items listed in Section 1229(a)(1), including the date, time, and place of the removal proceeding. *Pereira*, 138 S. Ct. at 2113–14. Although "much of the information Section 1229(a)(1) calls for does not change and is therefore included in standardized language on the I-862 notice-to-appear form," "time-and-place information in a notice to appear will vary from case to case." *Id.* at 2113 (quotation marks omitted). Accordingly, *Pereira* focused its analysis on the omission of that information, ultimately holding that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a),' and so does not trigger the stop-time rule." *Id.* at 2113–14 (quoting 8 U.S.C. § 1229b(d)(1)). Under *Pereira*, the Notice to Appear Lorenzo received in March 2008 did not terminate his residence. The Notice of Hearing he subsequently received in April 2008 contained the time and place of his removal proceeding but did not contain many of the other requirements of a Notice to Appear. Nevertheless, relying on our holding in *Popa v. Holder*, 571 F.3d 890, 896 (9th Cir. 2009), the Attorney General argues that this Notice of Hearing cured the defective Notice to Appear and triggered the stop-time provision.

[6]The plain language of the statute forecloses such a result. *Popa*'s holding that "a Notice to Appear that fails to include ***400** the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of the hearing is in fact later sent to the alien" rested on three grounds. *Popa*, 571 F.3d at 896. These grounds have been "undercut" by *Pereira* such that "the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Thus, we reject *Popa* "as having been effectively overruled." *Id.*

First, *Popa* explained that we "silently ... adopted the rule that the time and date of a removal proceeding can be sent after the first notice to appear" because we "never held that the [Notice to Appear] *cannot* state that the time and place of the proceedings will be set at a future time." 571 F.3d at 895 (emphasis added). Putting aside the propriety of adopting rules through judicial silence, *Pereira* resoundingly rejected what *Popa* deemed "silently adopted." *Pereira*, like *Popa*, involved a Notice to Appear ordering the alien to appear at a time and date "to be set." 138 S. Ct. at 2112 (emphasis omitted). But the Supreme Court held that a notice lacking specific time and date information is "not a notice to appear." *Id.* at 2118 (quotation marks omitted).

More precisely—indeed, more compellingly—the Supreme Court held that "when the term 'notice to appear' is used elsewhere in the statutory section, including as the trigger for the stop-time rule, it carries with it the substantive time-and-place criteria required by § 1229(a)." *Id.* at 2116. Unlike *Popa*, this holding relies on unambiguous statutory language. Specifically, 8 U.S.C. § 1229b(d)(1) provides that "any period of continuous residence ... shall be deemed to end ... when the alien is served a notice to appear under section 1229(a)," incorporating the definition of a Notice to Appear found in Section 1229(a), which includes information regarding the "time and place" of the hearing. *Id.* § 1229(a). In other words, 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—and does not terminate an alien's residence. While *Popa* held that a Notice to Appear that states "the time and place of the proceedings will be set at a future time," is "not statutorily defective," 571 F.3d at 894–96, *Pereira* makes clear that it is.

Second, *Popa* relied on now-outmoded out-of-circuit case law in adopting a "two-step notice procedure." *See id.* at 895–96 (citing *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009); *Dababneh v. Gonzales*, 471 F.3d 806, 809–10 (7th Cir. 2006); *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2006)). Each of the three decisions upon which *Popa* relied were issued before *Pereira*, and none binds us today. More importantly, none of these cases comports with the unambiguous statutory text. *Haider* held that the law "simply requires that an alien be provided written notice of his hearing; it does not require that the [Notice to Appear] served on Haider satisfy all of § 1229(a)(1)'s notice requirements." 438 F.3d at 907. This is flatly wrong. As *Pereira* explained, the term "Notice to Appear" carries with it all of Section 1229(a)(1)'s notice requirements wherever it appears. *Pereira*, 138 S. Ct. at 2116. *Dababneh*, in turn, relied on *Haider* and certain inapposite regulations, discussed below, rather than the statute. 471 F.3d at 809. And *Gomez-Palacios* merely concluded "that information may be provided in a subsequent [Notice of Hearing]," primarily relying on *Haider* and *Dababneh*. 560 F.3d at 359. *Popa* likewise hung its hat on *Haider*'s faulty premise. *See Popa*, 571 F.3d at 895–96.

***401** Third, the final ground undergirding *Popa* was a regulation—namely, 8 C.F.R. § 1003.18. That provision requires that DHS

> provide in the Notice to Appear, the time, place and date of the initial removal hearing, *where*

> *practicable*. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice ... of the time, place, and date of hearing.

8 C.F.R. § 1003.18(b) (emphasis added). We reasoned that such a regulation is necessary "[b]ecause circumstances may arise in which it is not feasible ... to state the date, time, and place of a removal hearing at the time the [Notice to Appear] is sent." *Popa*, 571 F.3d at 896. *Pereira* rejected this rationale, *see* 138 S. Ct. at 2118–19, and we have acknowledged that "*Pereira* appears to discount the relevance of 8 C.F.R. § 1003.18 in the ... context of eligibility for cancellation of removal." *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 n.1 (9th Cir. 2019).

In any event, the regulation rewrites the statute. As an initial matter, 8 C.F.R. § 1003.18 does not, on its face, relate to the stop-time rule. It pertains to scheduling cases and providing notice, implicating the stop-time rule only to the extent it purports to alter the requirements of a Notice to Appear. But the statute already enumerates what a Notice to Appear must contain. Even if we agreed with DHS that it makes sense to only issue time and place information "where practicable," neither we nor DHS can override the clear statutory command that time and place information be included in *all* Notices to Appear. *Pereira*, 138 S. Ct. at 2118–19; *see also Comm'r v. Asphalt Prods. Co.*, 482 U.S. 117, 121, 107 S.Ct. 2275, 96 L.Ed.2d 97 (1987) (per curiam) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.").

Moreover, the Supreme Court scrapped the notion that "practical considerations"—namely, that DHS may not be able to access the Immigration Court's calendar and properly schedule proceedings when it issues a Notice to Appear—excuse the failure to provide "specific time, date, and place" information. *Pereira*, 138 S. Ct. at 2118–19. Such "considerations ... do not justify departing from the statute's clear text." *Id.* at 2118. Yet *Popa* did just that. We cannot now rely on those same considerations to advance a policy other than what Congress passed and the President signed. *See Xi v. INS*, 298 F.3d 832, 839 (9th Cir. 2002) ("[A] decision to [rearrange] or rewrite the statute falls within the legislative, not the judicial, prerogative."). Nor may DHS displace legislation with regulation. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002) ("An agency simply may not interpret a regulation in a way that contravenes a statute.").

The Attorney General charts his course around the statute by arguing that a Notice of Hearing may cure a defective Notice to Appear. The phrase "notice of hearing"—or anything resembling it—does not appear in the law. Rather, the statute refers to a "notice to appear" and a "notice of change in time or place of proceedings" and delineates when each document may be issued and what it must contain. *See* 8 U.S.C. § 1229(a); *see also Pereira*, 138 S. Ct. at 2114. Nevertheless, the Attorney General counters that the law is silent on whether the required notice must consist of one document or if it may consist of ***402** multiple documents that collectively contain the necessary information.

Far from silent, the statute speaks clearly: residence is terminated "when the alien is served *a notice* to appear." 8 U.S.C. § 1229b(d)(1) (emphasis added). The use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule. *Cf. United States v. Hayes*, 555 U.S. 415, 421, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) ("We note as an initial matter that [the statute] uses the word 'element' in the singular, which suggests that Congress intended to describe only one required element."); *Delgado v. Holder*, 648 F.3d 1095, 1112 (9th Cir. 2011) (Reinhardt, J., concurring) ("The singular article 'a' could not make any clearer the singular nature of 'a particularly serious crime': the agency must identify *one* offense of conviction ....").

Rather than contending, as the Attorney General does, that the statute is silent, the dissent argues that the Dictionary Act, 1 U.S.C. § 1, requires all references to "a notice" or "the notice" in the statute be read as referring to both the singular and the plural, thus permitting multiple documents to collectively satisfy the requirements of a Notice to Appear. We reject this position for two reasons.

First, the Supreme Court has held that reliance on the Dictionary Act's rule regarding "words importing the singular," 1 U.S.C. § 1, is appropriate only "[o]n the rare occasions when ... doing so [is] 'necessary to carry out the evident intent of the statute.' " *Hayes*, 555 U.S. at 422 n.5, 129 S.Ct. 1079 (quoting *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657, 44 S.Ct. 213, 68 L.Ed. 486 (1924)). The "essential function of a notice to appear" is to "[c]onvey[ ] ... time-and-place information to a noncitizen" and "facilitate appearance at [the]

proceedings." *Pereira*, 138 S. Ct. at 2115. A single, complete Notice to Appear achieves that aim, so resort to the Dictionary Act's singular/plural rule and attendant context-driven guidance is unnecessary. Second, reading Section 1229b as the dissent does, the stop-time provision would be triggered "when the alien is served *notices* to appear under section 1229(a)." Nevertheless, no matter how many documents are sent, none qualifies as a "notice to appear" unless it contains the information Section 1229(a) prescribes. *See Pereira*, 138 S. Ct. at 2110.

The BIA has reached a conclusion contrary to our holding. Over a vigorous dissent, a closely divided BIA held that "where a notice to appear does not specify the time or place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, triggers the 'stop-time' rule, and ends the alien's period of continuous residence or physical presence in the United States." *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, 529 (BIA 2019) (en banc). We do not defer to this conclusion for three reasons.

[7]First, the threshold issue addressed by the BIA was whether *Pereira* definitively resolved whether "subsequent service of a notice of hearing containing [time and place] information perfects the deficient notice to appear, trigger[ing] the 'stop-time' rule." *Id.* The BIA acknowledged that "*Pereira* can be ... read in a literal sense to reach a different result," *i.e.*, a result contrary to the BIA's ultimate holding. *Id.* Nevertheless, the BIA rejected such a "literal reading" and now the Attorney General invites us to defer to the BIA's conclusion. But "a reviewing court should defer to an administrative agency only in those areas where that agency has particular expertise." *Ayala-Chavez*, 945 F.2d at 294. "There is therefore no reason for courts—the supposed experts in analyzing ***403** judicial decisions—to defer to agency interpretations of the Court's opinions." *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds by FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). Accordingly, we do not accord *Chevron* deference to the BIA's reading of *Pereira*.

Second, the BIA's analysis is disingenuous. *Pereira* did not merely "include[ ] language stating that a notice lacking the specific time and place of the removal proceeding does not equate to a notice to appear under [Section 1229(a)(1)]." *Mendoza-Hernandez*, 27 I. & N. Dec. at 529–30. Rather, the Supreme Court held that Section 1229(a)(1) *defines* what a notice to appear is, and that the definition is imported every time the term "notice to appear" is used in the statute—especially when it is used in the stop-time rule, 8 U.S.C. § 1229b(d)(1), which refers to "a notice to appear under section 1229(a)." *Pereira*, 138 S. Ct. at 2116. The BIA ignored the plain text of the statute, violating a fundamental tenet of statutory interpretation: "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (quotation marks omitted). More than that, the BIA disregarded the Supreme Court's holding construing the statute in accordance with its plain language.

As the dissenting opinion in *Mendoza-Hernandez* explained:

> The reasoning of the Supreme Court in *Pereira* ... leaves little room for doubt that the Court's decision requires us to follow the plain language of the Act that the DHS must serve a [8 U.S.C. § 1229(a)(1)] "notice to appear" that includes the date, time, and place of hearing in order to trigger the "stop-time" rule. The Court in *Pereira* repeatedly emphasized the "plain text" of the "stop-time" rule and left no room for agency gap-filling as to whether an Immigration Court can "complete" or "cure" a putative "notice to appear" by subsequent issuance of a "notice of hearing" that would trigger the "stop-time" rule on the date of that event. Quite simply, ... a "notice of hearing" is not a "notice to appear" and, therefore, it does not satisfy the requirement that the DHS serve a [Section 1229(a)(1)] "notice to appear" that specifies the date and time of hearing, in order to trigger the "stop-time" rule.

27 I. & N. Dec. at 540–41 (dissenting opinion) (footnote omitted). This rationale accords with our holding above and the plain language of the statute. The lack of ambiguity in the statutory language provides us with yet another reason to "not resort to *Chevron* deference," *Pereira*, 138 S. Ct. at 2113, and to not accord any deference to the BIA's contrary holding, as it was

unmoored from the text, *see* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). In so holding, we follow the lead of the Supreme Court's recent decision in *BNSF Railway Co. v. Loos*, —— U.S. ——, 139 S. Ct. 893, 899, 203 L.Ed.2d 160 (2019), which interpreted a statute as we do here—relying on cross-references to similar terms across provisions—without any reference to the agency's interpretation of the same provision.

Third, to the extent the BIA relied upon the Third Circuit's holding in *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016), or other similar holdings such as *Popa*, those cases cannot be reconciled with *Pereira*. The BIA cannot rely on abrogated decisions in hopes of securing deference from the very courts that issued the now-defunct precedent. Such an approach ***404** would be hopelessly circular. Moreover, the BIA presumes that because the issue of whether a " 'perfected' notice to appear" may stop time "was not before the Court," prior decisions interpreting the stop-time rule were unaffected by *Pereira*. *Mendoza-Hernandez*, 27 I. & N. Dec. at 530. The BIA reads too much into the Court's judicial restraint and fails to recognize that none of these pre-*Pereira* decisions "take into account the Supreme Court's determination that the 'stop-time' rule contains plain and unambiguous language" that the " 'stop-time' rule is triggered by service of a ... 'notice to appear' that specifies the time and place of a hearing as an essential part of the charging document." *Id.* at 541–43 (dissenting opinion). Thus, we agree with the dissenters in *Mendoza-Hernandez* and accord no deference to the BIA's flawed analysis.

Skirting the statutory text, the Attorney General points to purportedly analogous areas of law where an initial defect may be cured by a litigant's subsequent acts. For instance, *Becker v. Montgomery* held that an unsigned notice of appeal is timely if signed after the time to appeal has expired. 532 U.S. 757, 760, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001). But *Pereira* distinguished *Becker*, explaining that "omission of time-and-place information is not ... some trivial, ministerial defect, akin to an unsigned notice of appeal. Failing 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 2116–17 (citations, quotation marks, and brackets omitted). Similarly, in *Scarborough v. Principi*, the Supreme Court held that amendment of a timely application that failed to include a necessary allegation was permissible because the rule requiring specific allegations was aimed, like the signature requirement in *Becker*, "at stemming the urge to litigate irresponsibly." 541 U.S. 401, 416, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004) (quoting *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 116, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002)). The *Scarborough* Court went on to explain that "the allegation does not serve an essential notice-giving function," and so curative amendment was appropriate. *Id.* at 416–17, 124 S.Ct. 1856.

Conversely, the primary function of a Notice to Appear is to give notice, which is essential to the removal proceeding, *Pereira*, 138 S. Ct. at 2114–15, so the Attorney General's reliance on *Becker*, *Scarborough*, and *Edelman* is misplaced. Each of those cases allowed litigants to correct trivial or ministerial errors. The requirements of a Notice to Appear, however, are "substantive." *Id.* at 2116. Substantive defects may not be cured by a subsequent Notice of Hearing that likewise fails to conform with the substantive requirements of Section 1229(a)(1). As nothing precludes DHS from issuing a Notice to Appear that conforms to the statutory definition, that is the appropriate course of action for the agency to follow in such situations.

DHS's ability to issue a Notice that complies with the statute limits the set of cases affected by our holding. Retrospectively, although nearly all Notices to Appear issued between 2015 and 2018 lacked time and date information, *see* *Pereira*, 138 S. Ct. at 2111, the Attorney General conceded at oral argument that DHS can reissue complete Notices to Appear to those who have been served defective ones. The cases most affected by our holding will be those where a defective Notice to Appear issued so near to when an alien attained the requisite years of residence that DHS cannot reissue a complete Notice to Appear before the statutory period elapses. Prospectively, the Supreme Court noted that software exists that would enable DHS and the Immigration Court to "schedule ***405** hearings before sending notices to appear." *Pereira*, 138 S. Ct. at 2119.

In a final attempt to salvage his argument, the Attorney General suggests that *Karingithi* should inform our decision. But *Karingithi* addressed whether a defective Notice to Appear vests the Immigration Court with jurisdiction. *Karingithi*, 913 F.3d at 1160–61. It did not address whether a Notice of Hearing can cure a defective Notice to Appear. Instead, we held that because a regulation properly governs what a notice must contain to vest jurisdiction, the statutory definition of a Notice to Appear did not control. *Id.* at 1161. As we explained, "*Pereira* simply has no application [to the Immigration Court's jurisdiction]. ... [T]he only question [in *Pereira*] was whether the petitioner was eligible for cancellation of removal." *Id.* But our decision here is based on the statute's text, not a regulation, and we are assessing

eligibility for cancellation of removal.

Finally, the dicta from the Eleventh Circuit's unpublished non-precedential opinion in *Molina-Guillen v. U.S. Attorney General*, 758 Fed.Appx. 893 (11th Cir. 2019), does not alter our conclusion. Not only had the petitioner abandoned the argument that a Notice of Hearing cannot cure a defective Notice to Appear, but *Molina-Guillen* does not engage the statutory text. *Id.* at 898. It merely notes that a subsequent "Notice of Hearing, which contained the date and time of the removal hearing, was served on Molina-Guillen .... Together, the December 2005 Notice to Appear and the March 2006 Notice of Hearing fulfilled the notice requirements in § 1229(a)(1)." *Id.* We are unpersuaded by this cursory analysis.

CONCLUSION

We hold that a Notice to Appear that is defective under *Pereira* cannot be cured by a subsequent Notice of Hearing. The law does not permit multiple documents to collectively satisfy the requirements of a Notice to Appear. Thus, Lorenzo never received a valid Notice to Appear and his residency continued beyond 2008. Accordingly, he has resided in the United States for over seven years and is eligible for cancellation of removal.

Because we hold that Lorenzo's residence was not terminated, there is no need to opine on his other arguments. Moreover, the question presented here is purely legal, so remand to consider the impact of *Pereira* is unwarranted. *See Ceguerra v. Sec'y of Health & Human Servs.*, 933 F.2d 735, 741 (9th Cir. 1991) ("[A] purely legal inquiry ... does not require remand."); *see also Ortiz-Magana v. Mukasey*, 542 F.3d 653, 658 n.1 (9th Cir. 2008) (declining to remand where "no additional information would be available that previously was not" and the panel "can resolve the legal question on the basis of available evidence"). Accordingly, we **GRANT** the petition for review.

CALLAHAN, Circuit Judge dissenting:

I agree with the majority that the United States Supreme Court's opinion in *Pereira v. Sessions*, —— U.S. ——, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018), incontrovertibly establishes that for a notice to appear to trigger the "stop-time rule,"[1] the noncitizen must be provided with the time and ***406** place of the removal proceedings.[2] However, I do not read *Pereira* as holding that the notice of the time and place must be provided in a single document. Rather, I read *Pereira* as not prohibiting the Government from supplementing a deficient notice to appear by subsequently providing notice of the time and place of the removal proceedings, with the consequence that the stop-time rule is triggered upon receipt of the supplemental notice.

Initially, it should be noted that the majority's critical holding—that all items listed in 8 U.S.C. § 1229(a)(1) must be contained in a single Notice to Appear—was not in issue in *Pereira*, and accordingly was not directly addressed by the Supreme Court. Pereira entered the United States as a temporary "non-immigrant visitor" in 2000. *Pereira*, 138 S. Ct. at 2112. He was arrested for operating a vehicle while under the influence of alcohol in 2006. *Id.* In May 2006, the Department of Homeland Security ("DHS") served him with a "Notice to Appear," which stated that removal proceedings were being initiated against him for overstaying his visa, but "the notice did not specify the date and time of Pereira's removal hearing." *Id.* More than a year later, DHS attempted to mail Pereira "a more specific notice setting the date and time for his initial removal hearing." *Id.* "But that second notice was sent to Pereira's street address rather than his post office box (which he had provided to DHS), so it was returned as undeliverable." *Id.* In 2013, Pereira was arrested for driving without his headlights on and was subsequently detained by DHS. *Id.* By this time, if the stop-time rule was not triggered by the 2006 notice, Pereira had long since accrued the necessary years of continuous physical presence in the United States to be eligible for cancellation of removal. *See* 8 U.S.C. § 1229b(b)(1). Because DHS failed to serve Pereira with a supplemental notice prior to Pereira having been in the United States for over a dozen years, the Supreme Court was not called upon to, and did not, address whether all the requirements of a notice to appear listed in § 1229(a) must be contained in a single document.[3]

***407** Instead, the Court first narrowed the dispositive question to whether "a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by § 1229(a)(1)(G)(i), trigger[s] the stop-time rule." *Id.* at 2113. It then held, contrary to the position advocated by the Government, that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's proceeding is not a 'notice to appear under section 1229(a),' and so does not trigger the stop-time rule." *Id.* at 2114.

From the *Pereira* holding, the majority leaps to the conclusion that the notice of hearing that Lorenzo subsequently received—that did provide notice of the time and place of his removal proceeding—did not, as a matter of law, cure the defect in the initial notice to appear, and that the only cure is for DHS to issue, now years later, a new "Notice To Appear." Maj. Op. at 405.

The majority first supports its conclusion not by relying on the Supreme Court's opinion in *Pereira*, but by rejecting the Government's reliance on our opinion in *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009). Maj. Op. at 399–401. But the Supreme Court's rejection of our holding in *Popa* that a notice to appear need not contain the time and place of the proceedings, says nothing about whether all items listed in § 1229(a)(1) need to be contained in a single document.

Similarly, the majority's assertion that the Supreme Court "scrapped the notion that 'practical considerations' ... excuse[d] the failure to provide 'specific time, date and place' information,' " Maj. Op. at 401, again says nothing about whether a notice that fails to provide this information can be cured by a subsequent document that fully provides specific time, date, and place information.

Instead, the majority asserts that § 1229(a) "speaks clearly" in rejecting the position that the requisite notice may be contained in more than one document. The majority reasons that because 8 U.S.C. § 1229b(d)(1) states "when the alien is served *a notice* to appear," the "use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule." Maj. Op. at 402. But even if § 1229b(d)(1)'s use of the singular contemplates that the notice to appear is *generally* issued in a single document, it does not follow that all the criteria listed in § 1229(a) *must* be contained in a single document.[4]

The majority reads too much into the "use of the singular" in § 1229b. Title 1 U.S.C. § 1 states that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise– words importing the singular include and apply to several persons, parties or things. ..." The statutory context provides no indication that the use of the singular in § 1229b(d)(1) imposes a formalistic requirement that the notice be provided within a single document and that a deficiency may not be "cured" by a subsequent notice that includes the previously missing time and place information. Section 1229(a)(2) contemplates that there may be ***408** changes in the time or place of the removal proceedings of which the noncitizen must be notified. Here, Lorenzo was served with an April 11, 2008 notice of hearing setting forth the time and place for his removal proceedings and he appeared, with counsel, before the IJ on June 27, 2018. There can be no doubt that Lorenzo had actual notice of the time and place of his removal proceedings well before his June 27, 2018 hearing. The statute's use of the singular is too slender a reed to support the majority's insistence that all the criteria in § 1229(a)(1) must be contained in a single document.

The majority's cite to *United States v. Hayes*, 555 U.S. 415, 421, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), hardly strengthens the reed because, in my view, the majority's reliance on "a notice" frustrates, rather than furthers, "Congress' aim." *Id.* at 422 n.5, 129 S.Ct. 1079. Furthermore, the Board of Immigration Appeals, sitting en banc, has declined to read the provision as requiring that the "written notice be in a single document." *Matters of Mendoza-Hernandez and Capula-Cortes*, 27 I. & N. Dec. 520, 531 (BIA 2019) (en banc).[5]

The Supreme Court's concern in *Pereira* was with noncitizens receiving notification of the time and place of the removal proceedings and not with whether all the information was contained in a single document, entitled "Notice to Appear." In other words, the court was concerned with the noncitizen receiving the information rather than the form of the notice. Indeed, all the concerns underlying the Supreme Court's ruling in *Pereira* are satisfied by a properly served second document that supplements a deficient initial notice. The second notice then provides noncitizens with notice of the time and place of the proceedings that "is the essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceeding." *Pereira*, 138 S. Ct. at 2115. Similarly, such a notice would assure the noncitizen of the opportunity to secure counsel before the hearing. *See id.* at 2114–15; *see also* 8 U.S.C. § 1229(a)(2)(b)(1) (requiring that in order to allow the noncitizen to secure counsel, the hearing date shall not be scheduled earlier than 10 days after the service of the notice). Also, allowing the Government to furnish time and place information in a second document and triggering the stop-time rule on receipt of that notice make it more difficult for a noncitizen "to manipulate or delay removal proceedings to 'buy time.' " *Id.* at 2119.

My reading of *Pereira* is also the BIA's position. *Mendoza-Hernandez*, 27 I. & N. Dec. 520. In reading *Pereira*, the BIA stressed the Court's restriction of its ruling to a narrow issue, and its choice not to address the two-part notice process. *Id.* at 527–28. The BIA noted that the Court "explained that the fundamental purpose of notice is to convey essential information to the

[noncitizen], such that the notice creates a reasonable expectation of the [noncitizen's] appearance at the removal proceeding." *Id*. at 531. The BIA held:

> We conclude that in cases where a notice to appear does not specify the time or place of [a noncitizen's] initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, triggers the "stop-time" rule, and ***409** ends the [noncitizen's] period of continuous residence or physical presence in the United States.

Id. at 529.[6] *Id*. at 535. The BIA further observed that "[n]one of the courts involved in the circuit split had held that service of a subsequent notice of hearing that included time and place information was insufficient to perfect the notice to appear." *Id*. at 534–35.

The majority declines to defer to *Mendoza-Hernandez*, but the majority's reasoning is not persuasive. It first suggests that we do not defer to an agency's interpretation of a Supreme Court opinion. Maj. Op. at 402–03. True enough, but this does not mean that the position of the agency most effected by a statute does not deserve some consideration. Moreover, as I have explained, my reading of *Pereira*, although consistent with the BIA's reading, is in no way based on the BIA's decision. Second, the majority asserts that the BIA's analysis is disingenuous. Maj. Op. at 402–03. But this is just another way of disagreeing with my perspective and the BIA's perspective, as demonstrated by the majority's reliance on the *dissent* in *Mendoza-Hernandez*. The majority asserts that there is no ambiguity in the statute, but I find the BIA's recognition that *Pereira* can be read in a literal sense to reach a different result to be a fairer description of the overall question. Finally, the majority argues that the BIA may not rely on prior circuit decisions, such as *Popa*, because they were abrogated by *Pereira*. Maj. Op. at 403–04. But *Pereira*'s abrogation of cases such as *Popa* was not a ruling on the two-part notice process at issue in this case.

I continue to read *Pereira* as allowing for a two-part notice process and find this approach to be consistent with our opinion in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). Karingithi, like Lorenzo, had received a notice to appear that did not specify the date and time of the removal hearing.[7] *Id*. at 1159. Karingithi argued "that if a notice to appear does not state the time for her initial removal hearing, it is not only defective under § 1229(a), but also does not vest jurisdiction with the IJ." *Id*. at 1160. We disagreed, holding that the Immigration Court's jurisdiction was governed by regulation, not by § 1229(a), and thus a notice to appear need not include time and date information to vest jurisdiction in the IJ. *Id.* We held that "*Pereira* simply has no application here," noting that the only question in *Pereira* "was whether the petitioner was eligible for cancellation of removal," and the "Court's resolution of that 'narrow question' cannot be recast into a broad jurisdictional rule." *Id*. at 1161.

Although *Karingithi*, as well as *Bermudez-Cota*, 27 I. & N. Dec. 441, concerned the interpretation of regulations that are not applicable to Lorenzo's case, the majority, like Karingithi and Bermudez-Cota, seeks to expand the "narrow question" addressed in *Pereira* into a broad pronouncement. The sounder approach, as reflected in our opinion in *Karingithi*, and in the BIA's en banc opinion in *Mendoza-Hernandez* is to abide by the Supreme ***410** Court's statement that it decided the "much narrower" issue. *Pereira*, 138 S. Ct. at 2113.

Furthermore, we should not frustrate Congressional intent by expanding *Pereira* beyond its narrow holding. Section 1229b sets forth a clear policy that a noncitizen becomes eligible for cancellation of removal only after residing in the country for a certain number of years. Furthermore, § 1229b(d)(1) clearly states that "any period of continuous residence or continuous physical presence" ends "when the alien is served a notice to appear." *Pereira* requires that DHS's misinterpretation of the statute as permitting notices that do not set forth the time and place for removal proceedings be corrected. That misinterpretation and the concerns underlying *Pereira* are resolved by allowing DHS to cure an initial notice to appear with a subsequent notice of hearing setting forth the time and place of the removal proceeding and stopping the clock upon the noncitizen's receipt of the subsequent notice. Requiring DHS to serve new notices to appear on all noncitizens who received deficient notices to appear, rather than allowing for subsequent notices of hearing, is a windfall for noncitizens and unnecessarily interferes with Congress's intent.

I read *Pereira* as allowing DHS to cure a deficient notice to appear by subsequently providing a noncitizen with actual notice of the time and place of the removal proceedings, with the result that the stop-time rule is triggered upon the noncitizen's receipt of the supplemental notice. Accordingly, I dissent from the

majority's opinion.

925 F.3d 396, 19 Cal. Daily Op. Serv. 4685, 2019 Daily Journal D.A.R. 4377

All Citations

Footnotes

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

1 Noncitizens who are subject to removal proceedings but have accrued 10 years of continuous physical presence in the United States may be eligible for cancellation of removal. 8 U.S.C. § 1229(b)(1). The "stop-time rule" set forth in § 1229b(d)(1) provides that the period of continuous physical presence ends when a noncitizen is served with a notice to appear under 8 U.S.C. § 1229(a). *See Pereira*, 138 S. Ct. at 2109.

2 Consistent with the Supreme Court's opinion in *Pereira*, 138 S. Ct. at 2110 n.1, the term "noncitizen" is used to refer to any person who is not a citizen or national of the United States.

3 Title 8 U.S.C. § 1229(a)(1) states:

> (a) Notice to appear
> (1) In general
> 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.

4 A further indication that the Supreme Court in *Pereira* was concerned with the general need for notice of the time and place of the removal proceedings may be gleaned from its discussion of the need for a "notice to appear," rather than a single "Notice to Appear" containing all of the criteria set forth in § 1229(a)(1).

5 The BIA continued:

> Rather, it may be provided in one or more documents—in a single or multiple mailings. And it may be served personally, by mail, or by a combination of both, so long as the essential information is conveyed in writing and fairly informs the alien of the time and place of the proceeding.

Mendoza-Hernandez, 27 I. & N. Dec. at 531.

6 This position was foretold in the BIA's decision in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (BIA 2018). There the BIA held that a notice to appear that did not specify the time and place of a noncitizen's removal hearing nonetheless vests the IJ with jurisdiction over the removal proceedings. The BIA emphasized that unlike Pereira, Bermudez-Cota "was properly served with both a notice to appear *and* a subsequent notice of hearing." *Id*. at 443.

7 Our opinion also noted that Karingithi "had actual notice of the hearings through multiple follow-up notices that provided the date and time of each hearing." *Id*. at 1159.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Patrick J. Glen
PATRICK J. GLEN
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-7232
Patrick.Glen@usdoj.gov

No. 15-72406

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ISAIAS LORENZO-LOPEZ,

Petitioner,

v.

WILLIAM P. BARR, United States Attorney General,

Respondent.

PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

PETITIONER'S RESPONSE TO RESPONDENT'S PETITION FOR REHEARING EN BANC

Jan Joseph Bejar, Esquire

For:
JAN JOSEPH BEJAR,
A Professional Law Corporation
3230 Fifth Avenue, Suite 100
San Diego, CA 92103
Telephone: (619) 291-1112
Facsimile: (619) 291-1102

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INTRODUCTION[1]

The panel correctly rejected the government's attempt to evade the statute's clear text and history, which unambiguously require that the government serve "a 'notice to appear'" as a single document, not through a multi-step process of seriatim notices. This Court should deny the petition for rehearing en banc.

To trigger the stop-time rule, the government must serve "a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). In *Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018), the Supreme Court held that this provision unambiguously requires that the government serve notice "in accordance with" section 1229(a)'s requirements. Section 1229(a), in turn, uses "quintessential definitional language" to define what "a 'notice to appear'" is—specifically, "written notice … specifying" particular information. *Pereira*, 138 S. Ct. at 2116. This definition was created as part of 1996 amendments to the statute that specifically *removed* language authorizing the very multi-step notice process the government now tries to defend.

Thus, the panel in this case correctly held, consistent with decisions from both the Seventh and Eleventh Circuits, that notice is only "in accordance with" section 1229(a)—and hence only triggers the stop-time rule—if it provides *all* of

[1] Petitioner and Counsel would like to thank David J. Zimmer, Esq. for his invaluable contributions to this response.

the required notice in a single notice document, "*a* notice to appear." *See Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1153-54 (11th Cir. 2019). In its holding, the panel articulated the logical corollary of the Supreme Court's statutory analysis in *Pereira* that "[t]he law does not permit multiple documents to collectively satisfy the requirements of a Notice to Appear," 925 F.3d at 405. The panel correctly recognized, consistent with the Seventh Circuit's decision in *Ortiz-Santiago*, that pre-*Pereira* precedent upholding a two-step notice process is no longer viable. *See* 924 F.3d at 958, 961-62.

In asking this Court to revisit the panel's decision—and put this Court in conflict with the Seventh and Eleventh Circuits—the government distorts the Supreme Court's holding in *Pereira*, misconstrues the statute's text, and ignores its history. The crucial reasoning that underlies *Pereira* is its holding that the stop-time rule requires notice "in accordance with" section 1229(a). 138 S. Ct. 2117. And section 1229(a) does *not*, contrary to the government's brief, simply require "written notice" in general. It creates a specific notice document—"*a* 'notice to appear'"—and *defines* that document as "written notice" of the required information. The government recognizes that the word "a" is necessarily singular, arguing (at 7) that when the statute requires "a written notice," it requires a single document. But if "a written notice" is a single document, then so too is "a notice

to appear." The statute's requirement that the government serve "*a* notice to appear" that includes specific information does not allow it to serve that information across *many* different notices.

The government's argument not only flouts the singular nature of the phrase "a notice to appear," it also ignores the statute's history. As discussed in more detail below, the statute used to explicitly authorize the very two-step notice process the government seeks to defend. But in 1996, Congress amended the statute to *reject* that two-step process, and *require* that all the enumerated information be included in a single document: "*a* notice to appear." Indeed, the government recognized, in regulatory preambles from shortly after the 1996 amendments, that the amendments rejected the two-step notice process, *see* 62 Fed. Reg. 449 (Jan. 3, 1997), but the government has simply ignored what it previously recognized as Congress's clear instructions. Tellingly, the government ignores this history entirely.

Ultimately, the government's argument resorts to accusing the panel's decision of creating a "windfall" for immigrants and burdening the immigration system. But any such windfall or burden results not from any error in the panel's interpretation of the statute, but from the government's blatant refusal to adhere to Congress's unambiguous statutory commands. As the panel correctly recognized, this Court should not distort the statute simply to allow the government to avoid

the clear statutory consequences of its own violations of the statute's notice requirements. The Government is attempting to rewrite the law in accordance with its own policy aims and this Court should not allow it.

This Court should deny the rehearing petition.

ARGUMENT

Rehearing en banc is "not favored" and ordinarily available only where en banc determination is "necessary" to "maintain uniformity of the court's decisions" or where "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2). The panel decision does not conflict with any controlling decision of this Court or the Supreme Court. Thus, the Court should deny the Government's petition for rehearing en banc.

A. The Court correctly interpreted 8 U.S.C. § 1229(a) in accordance with the plain text of the statute, the legislative history, and the Supreme Court's statutory analysis in *Pereira v. Sessions*, 138 S. Ct. 2105.

The Government does not aver that this Court's panel decision in *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019) conflicts with any decision of the United States Supreme Court. Instead, the Government claims that the three-member panel majority "misinterpreted the statute," while studiously avoiding any mention of the Supreme Court's decision in *Pereira*. (At 6-10.)

The plain text of 8 U.S.C. § 1229(a) unambiguously precludes the Government's position that a two-step process triggers the stop-time rule. The

statute's instructions are straightforward. To trigger the stop-time rule, the Government must serve a specific document: "a notice to appear under section 1229(a)."[2] 8 U.S.C. § 1229b(d)(1). The Supreme Court held in *Pereira* that the word "under" in this context "can only mean 'in accordance with' or 'according to.'" 138 S. Ct. at 2117. Thus, to trigger the stop-time rule, the Government must serve a notice to appear in accordance with section 1229(a)'s requirements.

Section 1229(a), in turn, uses "quintessential definitional language" to define what "a 'notice to appear'" is. *Pereira*, 138 S. Ct. at 2116. It defines "a 'notice to appear'" as "written notice … specifying" the seven pieces of information listed in the statute, including, for instance, the "charges against the alien," the "acts or conduct alleged to be in violation of law," and the "time and place at which" to appear to defend against those charges. 8 U.S.C. § 1229(a)(1). Notice that does *not* provide the required information does not meet section 1229(a)'s definition, is not "in accordance with" section 1229(a), and does not trigger the stop-time rule.

In its attempt to argue otherwise, the Government resorts to a tortured statutory interpretation of section 1229(a) which has no basis in the text, but which the Government insists this Court should adopt simply because the Government says it is "better." (At 6.) Without citing any authority or acknowledging *Pereira*,

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[2] As the panel majority points out, "[t]he phrase 'notice of hearing' – or anything resembling it – does not appear in the law. Rather, the statute refers to a 'notice to appear.'" *Lopez*, 925 F.3d at 401.

the Government argues that "notice to appear" under section 1229(a) does not refer to a physical document at all but rather it is a "shorthand" for "written notice" of all of the information listed in section 1229(a)(1). (At 6-8.) Never mind that this reading of the statute would render the term "notice to appear" superfluous and ignores the very title of section 1229(a) which is "*Notice to appear*" – not "written notice." 8 U.S.C. § 1229(a) (emphasis added). The Government then argues that when the stop-time rule refers to "*a* notice to appear under section 1229(a)," the singular article "a" does not actually refer to a singular physical document, but rather to "written notice" generally of the information listed in section 1229(a)(1), and the stop-time rule is triggered whenever the Government gets around to serving each piece of that information in some written form on the noncitizen.

The Government essentially argues that it can serve "*a* notice to appear" by providing the seven pieces of information specified in section 1229(a) in one or more documents. If so, the government could serve "a notice to appear" by serving a *series* of notices, potentially served at completely different times, each of which identifies one of the many pieces of information required by section 1229(a)—*i.e.*, one notice specifying the "charges against the alien," 8 U.S.C. § 1229(a)(1)(D), one notice identifying the "legal authority under which the proceedings are conducted," *id.* § 1229(a)(1)(B), one notice identifying the "time and place at which the proceedings will be held," *id.* § 1229(a)(1)(G)(i), etc.

The statute's text unambiguously precludes this piecemeal approach. The statute identifies a single, specific document that triggers the stop-time rule—"*a* notice to appear under section 1229(a)"—and then *defines* that document as "written notice … specifying" the required information.

Had Congress intended to allow the Government to provide the required notice in however many pieces it wanted, it easily could have drafted section 1229(a) to instruct the Government *generally* to provide written notice of the specified information, without creating a specific form of notice that it *defined* to include the required information. That is not, however, what Congress did. As the Supreme Court put it, "[s]ection [1229(a)] does not say a 'notice to appear' is 'complete' when it specifies the time and place of the removal proceedings. Rather, it defines a 'notice to appear' as a 'written notice' that 'specif[ies],' at a minimum, the time and place of the removal proceedings." *Pereira*, 138 S.Ct. at 2116. In other words, Congress used "quintessential definitional language," *Pereira*, 138 S. Ct. at 2116, to create a single notice document—"*a* 'notice to appear'"—that must *itself* contain the required information.

In addition to advocating for a reinterpretation of the statutory text, which the Supreme Court in *Pereira* has determined is clear and unambiguous, 138 S. Ct. at 2114, the Government also argues that the Court should take into account certain policy concerns in its construction of the stop-time rule, namely, the punitive

policy aims of the stop time rule and administrative efficiency concerns. (At 9.) However, the Supreme Court in *Pereira* expressly rejected the notion that any "practical considerations" could excuse the failure to provide "specific time, date, and place information." *Pereira*, 138 S. Ct. at 2118-19. Such "considerations…do not justify departing from the statute's clear text." *Id*. at 2118.

Indeed, if *Pereira* stands for anything, it is that the agency cannot ignore Congress's textual instructions in favor of its own conception of the statute's "fundamental purpose"—*i.e.*, it cannot substitute its own belief as to how the statute *should* work for how Congress instructed that the statute *does* work.

Moreover, there are good reasons to think that the Government's proposed piecemeal approach does *not* actually serve the purposes of the notice to appear. Because the information required by section 1229(a) all relates to the institution of a single removal proceeding, it only makes sense to the notice's recipient when it is received together. Dividing the required notice into multiple documents also increases the likelihood that some pieces of the notice will not actually be properly served.

Indeed, a desire to avoid such confusion was *precisely* the reason Congress amended the statute to *reject* the two-step notice process, and *require* that all of the information listed in section 1229(a) be included in a *single* document—*i.e.*, "a 'notice to appear.'"

Not only does section 1229(a)'s text explicitly preclude the Government's two-step notice process, its history shows that Congress enacted section 1229(a) with the explicit goal of *preventing* the government from using that process. The 1996 Congress that created both the notice to appear and the stop-time rule made a conscious decision to remove language authorizing such a two-step process, instead requiring that all the notice be included in a single document. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019); *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, 539 (BIA 2019) (Guendelsberger, Board Member, dissenting). The statutory construction the Government is urging the Court to adopt would deprive Congress's 1996 amendments of any meaning.

Before Congress enacted IIRIRA in 1996, there were multiple different notices related to initiating different types of immigration hearings. *See Judulang v. Holder*, 565 U.S. 42, 45-46 (2011). What were then called deportation proceedings were initiated by an "order to show cause." The statute imposed many of the same substantive requirements on an order to show cause that it now imposes on a "notice to appear." *See* 8 U.S.C. § 1252b(a)(1) (1994). Notably, however, the statute did *not* require that the "order to show cause" include the time and place of the hearing. Instead, it provided that written notice of "the time and place at which the proceedings will be held" shall be given "in the order to show cause *or otherwise*." 8 U.S.C. § 1252b(a)(2)(A) (1994) (emphasis added). The

regulations provided, consistent with the statutory scheme then in effect, that notice of the time and place of the hearing would be provided by the immigration court, *not* in the order to show cause. *See* 8 C.F.R. § 242.1(b) (1996) and 8 C.F.R. § 3.18 (1996).

The legislative history of IIRIRA shows that Congress sought to simplify the different notices by creating a *single* notice—"a 'notice to appear'"—that included *all* the statutorily-required information. Among other things, Congress was frustrated with the "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings," and the resulting disputes about receipt of notice and inability to carry out in absentia deportation proceedings. H.R. Rep. No. 104-469, at 122, 158-59 (1996).

Among Congress's responses to these concerns was to require that the "time and place" of the initial removal proceedings be included *in the notice to appear itself*, not in a separate document. 8 U.S.C. § 1229(a)(1)(G)(i). Congress combined deportation and exclusion proceedings into a single form of proceeding called "removal," *see Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 349-350 (2005), and created "a 'notice to appear'" as a single form of notice to initiate such a proceeding, 8 U.S.C. § 1229(a). Congress defined "a 'notice to appear'" as notice of particular information. *Id.* § 1229(a)(1). Much of that information was taken from the prior definition of an "order to show cause." *See* 8

U.S.C. § 1229(a)(1)(A)-(F); 8 U.S.C. § 1252b(a)(1) (1994). But Congress made one key change: it specifically added the "time and place at which the proceedings will be held" as information that "shall" be included for notice to qualify as a "notice to appear." 8 U.S.C. § 1229(a)(1)(G)(i). In other words, Congress abandoned the previous flexibility of allowing the government to use multiple notices "to simplify the process for initiating removal proceedings," moving "from the two-step process for initiating deportation proceedings to a one-step 'notice to appear'" that includes *all* the section 1229(a) information. *Mendoza-Hernandez*, 27 I. & N. Dec. at 539 (Guendelsberger, Board Member, dissenting).

The Department of Justice initially recognized the importance of these amendments to the notice process. Shortly after IIRIRA was enacted, the Department issued a proposed rule to implement the new "notice to appear" provision. In a section entitled "The Notice to Appear (Form I-862)," the preamble explained that the rule "implements the language of the amended Act indicating that *the time and place of the hearing must be on the Notice to Appear*." 62 Fed. Reg. 443-517, 449 (1997) (emphasis added). The Government itself thus recognized that IIRIRA changed the law to *reject* the prior two-step notice procedure, replacing it with a single form of notice that *must* include all the information specified in section 1229(a).

Ultimately, though, the Government decided not to carry out what it recognized as Congress's statutory command. The regulation that was eventually adopted, currently codified at 8 C.F.R. § 1003.18(b), only requires that the time-and-place information be included in the notice to appear "where practicable." *See also* 62 Fed. Reg. 10,332 (Mar. 6, 1997). This regulation has now been effectively abrogated by the Supreme Court's decision in *Pereira* because is inconsistent with the statutory text. *See Pereira*, 138 S.Ct. at 2111, 2113-14 (rejecting the agency's approach and reliance on the regulation).

The regulation was initially intended to be a limited exception to the statutory rule: The Government pledged to implement the "requirement" that the notice to appear include time-and-place information "as fully as possible by April 1, 1997," but added the "where practicable" language based on the recognition that the "automated scheduling" necessary to comply with the statute "will not be possible in every situation (e.g. power outages, computer crashes/downtime.)." 62 Fed. Reg. 443-517, 449 (1997) (emphasis added). Over time, however, the Government simply ignored IIRIRA's changes altogether; rather than exclude the time-and-place information only exceptional circumstances, the Government decided to *always* exclude it, and continue with the two-step process the 1996 Congress had explicitly rejected. Indeed, by the time of *Pereira*, "almost 100 percent" of the putative notices to appear the government issued did *not* include the

time-and-place information, and hence did not comply with what the government had previously recognized to be a statutory "requirement" after IIRIRA. *See* 138 S. Ct. at 2111.

Given this history, there can be no serious dispute that Congress intended that all of the information specified in section 1229(a) be served in a single document, and the Government recognized as much, before ultimately deciding not to do what it had recognized that the statute requires.

Thus, because the panel majority's decision correctly gives effect to the plain intent of Congress, en banc rehearing is unwarranted.

B. The Court correctly recognized that this Court's decision in *Popa* was abrogated by the Supreme Court's decision in *Pereira*.

Based on the above, it is clear that this Court in *Lopez*, correctly recognized that *Pereira* "effectively overruled" the Court's holding in *Popa* that a notice to appear without the date and time information is not defective and allowing for a two-step notice procedure. *Lopez*, 925 F.3d at 400. The *Lopez* Court engaged in a thorough analysis of *Popa* in deeming it overruled and thus an en banc rehearing is unwarranted. *Id.* at 399-402.

The *Lopez* panel first pointed out that the holding in *Pereira*, unlike *Popa*, is based on "unambiguous statutory language" and "[t]he plain language of the statute forecloses" the result in *Popa Id*. at 400. The *Lopez* panel next noted that *Popa* "relied on now-outmoded out-of-circuit case law in adopting a 'two-step

notice procedure,'" namely, *Gomez-Palacios v. Holder*, 560 F.3d 354 (5th Cir. 2009), *Dababneh v. Gonzales*, 471 F.3d 806 (7th Cir. 2006), and *Haider v. Gonzales*, 438 F.3d 902 (8th Cir. 2006). The Court explained the reasons why each of the cases fail to comport with the unambiguous statutory text, 925 F.3d at 400, and pointed out that each were decided prior to *Pereira* and therefore necessarily did not take the Supreme Court's statutory analysis into account, *id.* at 404. Yet, the Government still attempts to rely on these same cases in support of its petition for rehearing en banc.[3] (At 11.) Finally, the panel rejected *Popa*'s reliance on 8 C.F.R. § 1003.18, on the basis that "the regulation rewrites the statute" and rejected the proposition that "practical considerations" can "justify departing from the statute's clear text." *Lopez* at 401, *citing Pereira*, 138 S. Ct. at 2118-19.

Contrary to the Government's contention that *Pereira* never reached the issue of whether the information required by Section 1229(a)(1) may be provided through service of multiple documents, the Supreme Court in *Pereira* expressly rejected the notion that a subsequent notice of hearing could cure a defective notice to appear. The fact that the notice of hearing in *Pereira* was served outside the

[3] In addition to relying on *Popa*, the Government also relies on *Garcia-Ramirez v. Gonzales*, 423 F.3d 935 (9th Cir. 2005), (at 10-12), where the Court merely stated in dicta in a footnote that service of the hearing notice triggered the stop-time rule.

period during which continuous physical presence was required is irrelevant because the Court in *Pereira* clearly considered the content of the original notice to appear to be controlling.

The Supreme Court in *Pereira* held that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a),' and so does not trigger the stop-time rule." *Pereira* at 2113-14 (quoting 8 U.S.C. § 1229b(d)(1)). As discussed in the previous section, the *Pereira* Court rejected the proposition that the language of section 1229(a)(1) could be understood to define what makes a notice to appear "*complete*," asserting that "[t]he statutory text proves otherwise." *Pereira*, 138 S.Ct. at 2116 (emphasis in original). Section 1229(a)(1) does not say a 'notice to appear' is complete when it specifies the time and place of the removal proceedings. Rather, it defines a 'notice to appear' as a 'written notice' that 'specif[ies],' at a minimum, the time and place of the removal proceedings." *Pereira* (quoting § 1229(a)(1)(G)(i)).

Also evidencing that the *Pereira* Court considered the content of the original notice to appear to be controlling is its dismissal of the Government's concerns that it would be incapable of specifying an accurate date on a notice to appear, reasoning that, "[g]iven today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not...work together to schedule

hearings *before* sending notices to appear." *Id*. at 2119 (emphasis added).

The Court further cited to surrounding provisions as evidence of Congressional intent. For example, the Court noted the fact that section 1229(a)(2) allows for "change or postponement" to "new time and place" "presumes that the Government has already served a 'notice to appear under section 1229(a)' that specified a time and place as required by § 1229(a)(1)(G)(i). Otherwise, there would be no time or place to 'change or postpon[e].'" *Id*. at 2114.

In addition, the Court cited to section 1229(b)(1), which "gives a noncitizen 'the opportunity to secure counsel before the first [removal] hearing date' by mandating that such 'hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear.'" *Id*. The Court pointed out that "[f]or § 1229(b)(1) to have any meaning, the 'notice to appear' must specify the time and place that the noncitizen, and his counsel, must appear at the removal hearing." *Id*. at 2115. The Court then concluded: "It therefore follows that, if a 'notice to appear' for purposes of § 1229(b)(1) must include the time-and-place information, a 'notice to appear' for purposes of the stop-time rule under section 1229b(d)(1) must as well. After all, it is the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Id*. (internal quotations and citations omitted).

Finally, the *Pereira* Court reasoned that "common sense compels the

conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a 'notice to appear' that triggers the stop-time rule." Id. at 2115. The Court continued:

> If the three words 'notice to appear' mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, i.e., the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings.

Id.

As the above makes clear, the panel majority correctly concluded that *Popa* was effectively overruled by *Pereira*, and therefore its decision in *Lopez* does not conflict with any controlling decision of this Court.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Date: September 30, 2019

Respectfully submitted,

/s/ Jan Joseph Bejar
Jan Joseph Bejar, Esq.
For: JAN JOSEPH BEJAR,
A Professional Law Corp.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-1 and 40-1, the foregoing Petitioner's Response to Respondent's Petition for Rehearing En Banc is proportionally spaced in a 14-point Times New Roman typeface, and is in compliance with Fed. R. App. P. 32(c) and Circuit Rule 40-1(a), in that it contains 3,982 words.

Date: September 30, 2019

/s/ Jan Joseph Bejar
Jan Joseph Bejar, Esq.
For: JAN JOSEPH BEJAR,
A Professional Law Corp.
Attorneys for
Mr. Lorenzo-Lopez

Certificate of Service

I hereby certify that on September 30, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jan Joseph Bejar
Jan Joseph Bejar, Esq.
For: JAN JOSEPH BEJAR,
A Professional Law Corp.
3230 Fifth Avenue, Suite 100
San Diego, CA 92103
(619) 291-1112
jbejar@immigrationlawclinic.com