**DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**OFFICE OF THE IMMIGRATION JUDGE**

**CHARLOTTE, NORTH CAROLINA**

**In the Matter of**

**XXXX**

**In Removal Proceedings**

**File No:**

Immigration Judge:

Hearing Date: July 19, 2018

**MOTION TO TERMINATE REMOVAL PROCEEDINGS**

NOW COMES RESPONDENT, by and through the undersigned counsel, and moves this court to terminate proceedings on the basis that no charging document has been filed in this case which vests this court with jurisdiction pursuant to 8 CFR, Section 1003.14 (a).

**STATEMENT OF FACTS**

XXXX (“Respondent”) appears today before this court for the sole purpose of contesting its jurisdiction over him. He contests any and all jurisdiction, including both the fact that there is no legally valid charging document and the fact of proper service. He specifically waives neither of these contentions by his appearance.

On or about February 5, 2018, a Form I-862, styled as a Notice to Appear (“I-862”) was issued charging him with a violation of 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended. in that he was an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

Said I-862 identified the location of the hearing (under YOU ARE ORDERED to appear before an Immigration Judge of the United States Department of Justice at:) as the Immigration Court 180 Ted Turner Dr, SW Atlanta GA 30303.

The I-862, indicated “on a date to be set”, and “at a time to be set” as designating the Date and Time of Respondent’s hearing.

On June 21, 2018, in *Pereira v. Sessions*, 585 U.S. \_\_\_ (2018), the United States Supreme Court a document that does not contain all the statutorily enumerated information (including time and date of the hearing) is not a “notice to appear” per the statute (in this particular case, for the purpose of stop-time/cancellation of removal; however, the decision contains no language limiting the interpretation of the statute as definitional to cancellation of removal cases).

**ARGUMENT**

DHS bears the burden of establishing jurisdiction for removal proceedings by proper issuance of the NTA under section 239(a)(1) of the INA, and the filing of the NTA with the immigration court. 8 C.F.R. § 1003.14(a). DHS must establish proper service of the NTA on the opposing party. 8 C.F.R. § 1003.32; *Matter of Mejia-Andino*, 23 I&N Dec. at 533; and *Matter of E-S-I-*, 26 I&N Dec. at 136.

Because the Notice to Appear was legally deficient, the Court never had jurisdiction over these proceedings. Pursuant to federal regulations, jurisdiction vests with the Immigration Court, and proceedings before an Immigration Judge commence, upon the filing of the notice to appear with the Immigration Court by the Department of Homeland Security. 8 C.F.R. § 1003.14. A petitioner is entitled to relief from a defective NTA if he “show[s] that the Immigration Court lacked jurisdiction.” *Kohli v. Gonzales*, 473 F.3d 1061, 1067 (9th Cir. 2007) Instead, the Court must terminate.

8 CFR, Section 1003.14 (a), (Jurisdiction and Commencement of Proceedings) establishes that “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.” Section 239 of the Immigration and Nationality Act (as amended), (8 USC sec. 1299(a)) (Initiation of Removal Proceedings) states as follows:

(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) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.

(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.

The NTA filed with the court in this matter was plainly defective in that, while it did list the location of the proceedings under “Date” and “Time” it merely listed “a date to be set” and “a time to be set.” The fact that the NTA specified the place at which the proceedings would be held does not cure the NTA because a plain reading of subsection (G)(i) of the statute above shows that both “time ***and*** place” are required.

An I-862 that fails to include all the statutorily required elements of written notice is simply not a Notice to Appear under §239(a). *Pereira v. Sessions*, 585 U.S. \_\_\_\_ (2018). Because the I-862 that was filed with the Immigration Court was not an NTA, no charging document was ever filed with the Immigration Court. Jurisdiction never vested with the Immigration Court in the first place. A jurisdictional defect cannot be cured and proceedings must therefore be terminated.

Doubtless, Counsel for the Department for Homeland Security will argue that since the I-862 specified at least the ***place*** at which the proceedings will be held, then the I-862 is not defective for purposes of placing the Alien in removal proceedings, and that the filing of the I-862 still vests this Court with jurisdiction.

This argument fails because a “plain reading” of (G)(i) above, notes that it is written in the conjunctive (utilizing the term “and”) and not the disjunctive (utilizing the term “or”). Sec. 239(a) makes clear what must be stated on an NTA.

Counsel for the Department of Homeland Security may also argue, in the alternative, that since the Respondent (with his Counsel) received a subsequent notice of time and date for this hearing, and has appeared for this hearing with this Court that any (ministerial) defects in the Notice to Appear have been “overcome by events”, or “waived by the actions of the Respondent’s Counsel”, on the grounds that Counsel and the Respondent accepted the Court’s jurisdiction and appeared.

However, this argument is without merit. None of Counsel’s actions, and/or none of the Respondents’ actions can serve to vest the Court with jurisdiction that it never had in the first place. As the Board of Immigration Appeals noted in *Matter of Cerda-Reyes*, 26 I&N Dec. 528 (BIA 2015):

Jurisdiction refers to the court’s authority to adjudicate a case. Venue is the place where such authority is to be exercised. *See, e.g.*, *Iselin v. La Coste*, 147 F.2d 791, 795 (5th Cir. 1945) (“**Jurisdiction is the power to adjudicate and is granted by Congress. Litigants may not confer this power on the court by waiver or consent**, but the place where the power to adjudicate is to be exercised is venue, not jurisdiction.”) (emphasis added).

Again, 8 CFR 1003.14 makes clear when jurisdiction vests with the Immigration Court. If jurisdiction was lacking in the first place (which it was) no actions by Counsel, and/or his Respondent can cure the jurisdictional defect. Therefore, if an I-862 is not a Notice to Appear, it doesn’t matter how many times notice of a hearing was served or acted upon by Counsel or Respondent thereafter.

The legal deficiency in the NTA cannot be cured by the Respondent’s receipt of a notice with the time and date of the hearing from the Court either. Court hearing notices are issued by the Department of Justice, not the Department of Homeland Security, and an action by the DOJ cannot cure the legal deficiency of a NTA issued by DHS. The issuance of NTA, moreover, has been exclusively delegated to the Department of Homeland Security pursuant to 8 C.F.R. § 239.1, and not the Department of Justice INA § 239. If the DOJ may not issue an NTA, it may not cure a defective one and in effect do something delegated exclusively to DHS.

The arguments put forward here by Respondent is completely in conformity with the Supreme Court’s decision in *Pereira*. The interpretation of the statute as definitional goes to the heart of the case, as all parties in *Pereira* agreed that if the Notice to Appear was not legally deficient, then the stop-time rule would prevent Mr. Pereira from applying for cancellation of removal. The Supreme Court found that the Notice to Appear in that case was legally deficient under the rules of statutory construction, and as such is not a “Notice to Appear” at all.

The language of the definitional statute at issue, INA § 239(a)(1); 8 U.S.C. § 1229(a)(1), does not limit itself to cancellation of removal. As a result, the deficiency of any Notice to Appear that does not include the time, date and/or location of the hearing is part of the holding as opposed to dictum. *See “obiter dictum,” Black’s Law Dictionary* 1240 (10th ed. 2014) (“A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).”); *c.f. “*holding*,” Black’s Law Dictionary* 849 (10th ed. 2014) (“A court’s determination of a matter of law pivotal to its decision; a principle drawn from such a decision.”)

In the majority opinion, Justice Sotomayor stated that the “dispositive question” in the case was 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), triggers the stop-time rule?” 585 U.S. \_\_\_ (2018) In footnote 5, Justice Sotomayor notes, “The Court leaves for another day whether a putative notice to appear that omits any of the other categories of information enumerated in §1229(a)(1) triggers the stop-time rule.” Justice Sotomayor goes on to explicitly state in the opinion that there is no Chevron deference with regard to this issue because the statute is “clear and unambiguous.”

The Court stated: “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.” *Id*. at 12.

Further support for the Court’s view that the current statutory scheme requires the initial notice to appear to include the time and place of hearing is provided by a review of the statutory history. Before the current statutory scheme was enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the governing statute provided for two separate notices regarding the initiation of removal proceedings. The prior statute first provided for a notice called an “Order to Show Cause,” which was required to include much of the other information in current INA § 239(a), but was not required to include the time and date of proceedings. Instead, in a second, separate subsection, the statute explicitly provided for a second type of notice: a “Notice of time and place of proceedings.” INA § 242B(a)(2) (repealed 1996). That notice was required to convey “the time and place at which the proceedings will be held,” and the consequences of failing to appear. Id. However, when Congress passed IIRIRA, it directly replaced the two separate notices with a single notice, the “notice to appear.” The statute now requires the notice to appear to contain all of the exact same information that was required in an “order to show cause,” compare § 242B(a)(1)(A)-(F) (repealed 1996), with current § 239(a)(1)(A)-(F), but also contains one conspicuous change: IIRIRA deletes the separate subsection providing for a “notice of time and place of proceedings” and instead requires that the “time and place at which the proceedings will be held” be included in the single notice to appear. § 239(a)(1)(G). See *Pereira v. Sessions*, 17-459, Brief for Amici Curiae AILA and IDP in Support of Petitioner at 8-11.

Lastly, Respondent contends that Counsel for the Department of Homeland Security may not attempt to amend the I-862 to transform it into an NTA. 8 C.F.R. § 1240.10(e). provide the Department with a method for amending its charges and allegations during the proceeding:

“additional or substituted charges of inadmissibility and/or deportability and/or factual allegations may be lodged by the Service in writing.”

The regulations simply do not provide the Department with a method to amend the I-862 with regard to the time, date, and location of the removal proceedings. Any attempt by the Department of Homeland Security to amend the I-862 in order to allow these current removal proceedings to continue would be without any statutory or regulatory authority. Tellingly, neither the government’s counsel nor the dissent in *Pereira* suggested any means of amending the Notice to Appear in order to cure the defect in the proceedings.

The Supreme Court’s decision in *Pereira* is binding precedent upon this Court. *See Matter of ELH*, 23 I. & N. Dec. 814 (BIA 2005) (holding that a BIA precedent decision remains controlling unless the Attorney General, Congress, or a federal court modifies or overrules a decision); see also 8 C.F.R. § 1003.1(d)(7). Any other decision than immediate termination of proceedings in this matter is contrary to the ruling of the Supreme Court, as this case should not have been initiated and any actions taken after initiation of the legally deficient Notice to Appear are void ab initio.

The holding in *Pereira* is not limited to triggering the stop-time rule. If the Court does not have a Notice to Appear that limits the stop-time rule (for purposes of seeking relief under INA 240A(b), 8 USC 1229(b), then it does not have an NTA at all. To hold otherwise defies commonsense, as Justice Sotomayor stated.

If this court is concerned about the ‘floodgates’ issue should hundreds of thousands of I-862s be suddenly invalidated, the Supreme Court addressed this issue directly when they said: “These practical considerations are meritless and do not justify departing from the statute’s clear text. See *Burrage v. United States*, 571 U. S. 204, 218 (2014).”

**CONCLUSION**

The Notice to Appear in this matter was defective. A defective notice is incapable of vesting this Court with jurisdiction. The only way jurisdiction is conferred upon this Court is by filing a charging document. If the purported charging document is a defective “NTA” it is no NTA at all and therefore not charging document. Failure to file a charging document means that jurisdiction never vested with the court and no subsequent actions by this Court or either party can overcome the jurisdictional defects. As proceedings cannot continue for lack of jurisdiction, they must be terminated.

The Department of Homeland Security may choose to fix these defects in the charging document and re-serve the Respondent with a Notice to Appear that contains all the required notice elements of Section 239(a), including the place and time of the hearing. It is not prejudiced from doing so by terminating the instant proceedings. Respondent notes, however, that, if the Office of Chief Counsel (“OCC”) attempts to reissue and serve a sufficient Notice to Appear on Respondent, then this Court should require OCC to provide proof that they are authorized to do so. 8 C.F.R. § 239.1, which provides exclusive authority to issue Notices to Appear, states: (46) Other duly authorized officers or employees of the Department of Homeland Security or of the United States who are delegated the authority as provided by 8 § C.F.R. 2.1 to issue notices to appear, and who have successfully completed any required immigration law enforcement training. Cross-referencing to 8 C.F.R. 2.1 we find that: “Such delegation may be made by regulation, directive, memorandum, or other means as deemed appropriate by the Secretary in the exercise of the Secretary’s discretion.”

In light of the burden of proof to establish that a valid charging document vests this court with jurisdiction, Respondent asks this court to require that, in the event OCC seeks to issue an NTA, that they also provide both proof that they have successfully completed any required immigration law enforcement training and that they produce the regulation, directive or memorandum delegating that authority.

Terminating the proceedings is the only appropriate course of action at this time.

Respectfully submitted, this the 5th day of July 2018.

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Attorney