

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

|                          |   |                            |
|--------------------------|---|----------------------------|
| UNITED STATES OF AMERICA | : |                            |
|                          | : |                            |
| v.                       | : | CRIMINAL ACTION NO. 18-408 |
|                          | : |                            |
| MARTIN CASTRO-MOLINA,    | : |                            |
|                          | : |                            |
| Defendant.               | : |                            |

**MEMORANDUM OPINION**

Smith, J. April 9, 2019

The government charged the defendant with reentry after deportation pursuant to 8 U.S.C. § 1326(a). The defendant asks the court to dismiss his indictment because the immigration judge lacked jurisdiction over his removal proceeding. The defendant argues the immigration judge lacked jurisdiction because his initial removal order was based on a “Notice to Appear” (“NTA”) that did not contain the “time and place” of his hearing, as required by 8 U.S.C. § 1229(a). Because the court finds that the NTA requirements are not jurisdictional, the court declines to dismiss the indictment.

**I. PROCEDURAL HISTORY**

On September 20, 2018, a grand jury indicted the defendant, Martin Castro-Molina (a/k/a Jose Noe Galsano-Castellano), for reentry after removal in violation of 8 U.S.C. § 1326(a). Indictment at 1, Doc. No. 1. The Honorable Henry S. Perkin appointed counsel to represent the defendant and, through appointed counsel, the defendant continued his trial date several times pursuant to a Speedy Trial Act waiver. *See* Doc. Nos. 5, 9, 12.

The defendant moved to dismiss his indictment on December 12, 2018. Doc. No. 15. The government filed a response in opposition to the motion on February 7, 2019. Doc. No. 20. The court heard oral argument on the motion to dismiss on February 28, 2019. Doc. No. 22.

After oral argument, the defendant filed a supplemental memorandum of law in support of his motion. Doc. No. 23. In response, the government filed a supplemental response in opposition on March 5, 2019. Doc. No. 26. The motion to dismiss the indictment is ripe for disposition.

## II. DISCUSSION

### A. Standard of Review – Motions to Dismiss an Indictment

“Federal Rule of Criminal Procedure 12(b)(2) authorizes dismissal of an indictment if its allegations do not suffice to charge an offense . . . .” *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000) (citation omitted). “When analyzing a motion to dismiss an indictment, ‘the Court must accept as true the facts alleged in the indictment and determine if those facts constitute a violation of the law under which the defendant is charged.’” *United States v. Sullivan*, No. CR. 00-695, 2002 WL 31819611, at \*2 (E.D. Pa. Dec. 12, 2002) (quoting *United States v. Ward*, No. 00-681, 2001 U.S. Dist. LEXIS 15897, at \*11 (E.D. Pa. Sept. 5, 2001)).

### B. Factual History<sup>1</sup>

Born in Mexico, the defendant has entered the United States and been removed several times.<sup>2</sup> The Department of Homeland Security (“DHS”) first encountered the defendant on August 12, 2008.<sup>3</sup> Def.’s Mem. at 3. DHS served the defendant with an NTA on September 19,

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<sup>1</sup> Because there is no factual record beyond the undisputed attachments to the defendant’s motion, Mem. of L. in Supp. of Def.’s Mot. to Dismiss (“Def.’s Mem.”) at Exs. A and B, Doc. No. 15, the court relies on the defendant’s own recitation of the facts for purposes of drafting the factual history. The court also uses the term “encounter” to describe the defendant’s interactions with immigration officials because it is the term the defendant uses.

<sup>2</sup> According to the government, San Antonio Police arrested the defendant on February 3, 2008, and charged him with theft. Gov’t’s Resp. in Opp. to Def. Martin Castro-Molina’s Mot. to Dismiss the Indictment (“Gov’t’s Resp.”) at 3, Doc. No. 21. The defendant pleaded no contest on April 10, 2008 and the state court sentenced him to six months’ probation (the state court modified the sentence to 20 days’ imprisonment on September 18, 2008). *Id.* The government alleges that the defendant’s first interaction with DHS occurred when Immigration and Customs Enforcement (“ICE”) officials “encountered” the defendant at the Bexar County Jail in San Antonio, Texas while he was serving his sentence on the theft charge. *Id.* ICE served him with the initial NTA. *Id.*

<sup>3</sup> In 2003, Congress “dismantled” the Immigration and Naturalization Service (“INS”) and folded the agency’s responsibilities into the newly established U.S. Citizenship and Immigration Services, a subdivision of the DHS. *Our History*, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/about-us/our-history> (last updated May 25, 2011). ICE and “Customs and Border Protection (CBP), components within DHS, handle immigration enforcement and border security functions.” *Id.* The implementing regulations still reference the “Service[.]”

2008. *Id.* at 3–4. This 2008 NTA did not include the “time and place” of the hearing; rather, it stated that such a hearing would occur ““on a date to be set at a time to be set.”” *Id.* at 4 (quoting NTA).

A hearing occurred on October 9, 2008, which the defendant attended. *Id.* After the hearing, the immigration judge (“IJ”) issued an order directing DHS to deport the defendant (hereinafter, the “October 2008 Order”). *Id.*, Ex. B. DHS deported the defendant on October 10, 2008. *Id.* at 4. DHS “encountered” and removed the defendant two additional times after his initial removal, all based on the October 2008 Order.<sup>4</sup>

The defendant’s most recent encounter, the basis for his current criminal proceeding, occurred on August 28, 2018.<sup>5</sup> *Id.* DHS served the defendant “[o]n August 28, 2018 . . . with a Notice to Reinstate the [allegedly] deficient October 2008 deportation order[,]” and on September 20, 2018, the United States Attorney’s Office for the Eastern District of Pennsylvania filed the indictment against him. *Id.* The indictment charges the defendant under 8 U.S.C. § 1326(a) for reentry after deportation. *Id.*

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however, after March 1, 2003, all references to the “Service” refer to DHS. *See* 8 C.F.R. § 1001.1(c) (“The term Service means the Immigration and Naturalization Service, as it existed prior to March 1, 2003. Unless otherwise specified, references to the Service on or after that date mean the offices of the Department of Homeland Security to which the functions of the former Service were transferred pursuant to the Homeland Security Act, Public Law 107–296 (Nov. 25, 2002), as provided in 8 CFR chapter I.”). The court notes that the defendant’s memorandum states that INS encountered him 2008 (after the INS ceased to exist). Therefore, the court construes references to INS in the defendant’s motion as referring to DHS.

<sup>4</sup> DHS encountered the defendant in the United States post-removal on February 7, 2011 (removed February 24, 2011) and December 12, 2016 (removed January 11, 2017). *Def.’s Mem.* at 4. According to the government, Fort Worth, Texas police arrested the defendant on February 5, 2011, and charged him with “[p]ossession of less than 2 ounces of [m]arijuana within a Drug-Free Zone.” *Gov’t’s Resp.* at 4. While in the Fort Worth City Jail, ICE encountered the defendant “during routine Criminal Alien Program (‘CAP’) operations[.]” on February 7, 2011. *Id.* On February 16, 2011, the defendant pled guilty to the marijuana charge. *Id.* The state court judge sentenced him to twelve days imprisonment. *Id.* On February 18, 2011, ICE transported the defendant to the Dallas ICE field office. *Id.* On February 22, 2011, ICE reinstated the defendant’s October 2008 Order. *Id.* ICE removed the defendant “a foot” on February 22, 2011. *Id.* at 5. On December 11, 2016, Mesquite, Texas Police arrested the defendant for “[d]riving [w]hile [i]ntoxicated/[o]pen [a]lcoholic [c]ontainer.” *Id.* at 6. ICE reinstated his October 2008 Order and removed him from the United States on January 11, 2017. *Id.*

<sup>5</sup> According to the government, Bethlehem Police encountered the defendant “during a traffic stop for driving the wrong way down a one[-]way street.” *Gov’t’s Resp.* at 7. Bethlehem Police alerted ICE on August 24, 2018. *Id.* On August 28, 2018, ICE reinstated the October 2008 Order. *Id.* at 8.

### C. Analysis

The defendant seeks dismissal of his indictment on two grounds. First, the defendant argues the IJ lacked jurisdiction to remove him because his initial NTA (issued in 2008) failed to include the “time and place” of his hearing. *See generally* Def.’s Mem. at 5. Second, the defendant contends that he can collaterally attack his removal order under section 1326(d) because entry of the order was “fundamentally unfair.” *Id.* at 9–15. In response, the government argues that an NTA is not required to include the “time and place” for jurisdictional purposes, and the defendant fails to satisfy the section 1326(d) requirements for a collateral attack. Gov’t’s Resp. at 8–26. The court addresses each of the defendant’s arguments in turn.

#### 1. **NTA Requirements Are Not Jurisdictional Under The Immigration And Nationality Act**

The defendant first argues that the court must dismiss his indictment because the IJ did not properly remove him. Def.’s Mem. at 5–9. Notably, the defendant does not allege that the government failed to provide him with notice of the hearing; instead, he argues the exclusion of “time and place” information in his 2008 NTA deprived the IJ of jurisdiction to hear his case and ultimately remove him. *Id.* at 5–7. As a result, according to the defendant, there was no underlying removal, *i.e.*, no basis for his current criminal proceeding under 8 U.S.C. § 1326(a). *Id.* at 8.

The defendant’s argument hinges entirely upon the court extending the Supreme Court’s “narrow” holding in *Pereira v. Sessions*, 138 S.Ct. 2105, 2110 (2018), to the regulatory jurisdictional provisions—an interpretation all three circuit courts to address the issue declined to adopt. *See United States v. Veloz-Alonzo*, No. 18-3940, 2019 WL 1422897, at \*1 (6th Cir. Mar. 29, 2019) (affirming conviction under 8 U.S.C. § 1326(a) because “no references in the Notice to Appear to the time and place of the hearing are required to vest jurisdiction in the immigration

court[ ]” (alterations in original omitted) (citation and internal quotation marks omitted)); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019) (holding that NTA does not need to include “time and place” of proceeding for purposes of vesting jurisdiction); *Santos-Santos v. Barr*, 917 F.3d 486, 490 (6th Cir. 2019) (“No references to the time and place of the hearing [in an NTA] are required to vest jurisdiction under the regulation.”); *United States v. Perez-Arellano*, No. 18-4301, 2018 WL 6617703, at \*3 (4th Cir. Dec. 17, 2018) (“Simply put, *Pereira* did not address the question of an immigration judge’s jurisdiction to rule on an alien’s removability, and it certainly does not plainly undermine the jurisdiction of the 2004 removal proceeding.”); *Leonard v. Whitaker*, 746 F. App’x 269, 269 (4th Cir. 2018) (“We conclude that the narrow holding of *Pereira* does not apply in this situation.”); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 315 (6th Cir. 2018) (holding that “jurisdiction vests with the immigration court where, as here, the mandatory information about the time of the hearing, *see* 8 U.S.C. § 1229(a), is provided in a Notice of Hearing issued after the NTA[ ]”).<sup>6</sup> The court agrees with the well-reasoned opinions of the Fourth, Sixth, and Ninth Circuits and declines to dismiss the indictment. The court first discusses the general statutory and regulatory framework of the Immigration and Nationality Act (“INA”) and then analyzes the validity of the jurisdictional regulations in light of *Pereira*.

a. Statutory and Regulatory Framework – Jurisdiction of IJs

The INA is “silent as to the jurisdiction of the Immigration Court.” *Karingithi*, 913 F.3d

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<sup>6</sup> The Third Circuit has not yet directly addressed the issue; however, the court recently noted (in dicta) that they view the holding of *Pereira* as “narrow.” *See Cuellar Manzano v. Att’y Gen.*, No. 18-1939, 2019 WL 1313401, at \*4 (3d Cir. Mar. 22, 2019) (non-precedential) (“We decline the invitation to assess the impact of *Pereira*, other than to note the Supreme Court’s decision was a “‘narrow’ one . . .”). Similarly, although the Fifth Circuit has not squarely addressed the issue, the court has held that *Pereira* is inapplicable in the context of reopening an immigration proceeding. *See Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 n.1 (5th Cir. 2018) (“Because the issues in this case pertain only to reopening, *Pereira*’s rule regarding cancellation is inapplicable.”).

at 1160 (citing 8 U.S.C. § 1229).<sup>7</sup> Instead, jurisdiction is discussed in the implementing regulations. 8 C.F.R. § 1003.14(a). The INA's implementing regulations state that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service [or DHS].” *Id.*; *see also* 8 C.F.R. § 1001.1(c) (defining “Service” as DHS after March 1, 2003). For proceedings initiated after April 1, 1997 (such as present here), the regulations define a “charging document” as “includ[ing] a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.” 8 C.F.R. § 1003.13.

Under the regulatory definition, an NTA in a removal proceeding “shall provide the following administrative information to the Immigration Court[:] . . . (1) The alien’s names and any known aliases; (2) The alien’s address; (3) The alien’s registration number, with any lead alien registration number with which the alien is associated; (4) The alien’s alleged nationality and citizenship; and (5) The language that the alien understands.” 8 C.F.R. § 1003.15(c)(1)–(5). The regulations unambiguously indicate the “[f]ailure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.” 8 C.F.R. § 1003.15(c). Missing from the list in section 1003.15(c) is the time and place of the hearing. Instead, such information “shall be provide[d]” in an NTA only “*where practicable*.” 8 C.F.R. § 1003.18(b) (emphasis added). In this regard, the regulatory mandate differs from the statutory text, namely INA section 1229(a) requires an NTA include “[t]he time and place at which the proceedings will be held” without limitation. 8 U.S.C. § 1229(a)(1)(G)(i). Notably, the NTA governed by section 1003.15(c) is provided to the IJ to initiate proceedings, whereas the NTA discussed in section 1229(a) governs what “written notice” the INS must provide to the alien. *Compare*, 8 C.F.R. § 1003.15(c) (“In the Notice to Appear for removal proceedings, the Service [or DHS]

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<sup>7</sup> The INA discusses jurisdiction in other contexts, *see* 8 U.S.C. § 1329 (jurisdiction of district courts).

shall provide the following administrative information to the Immigration Court.”), *with* 8 U.S.C. § 1229(a) (“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 . . .”).

b. Confusion in the Wake of *Pereira v. Sessions*

In the criminal context, the question of whether an NTA which lacks the “time and place” of the removal hearing divests an IJ of jurisdiction was generally not argued prior to *Pereira*. However, post-*Pereira* courts have been asked to address whether the decision should be read as requiring NTAs used as “charging documents” to include the “time and place” of the hearing in order for jurisdiction to vest with the IJ.

*Pereira* addressed a “narrow” question, namely whether an NTA triggers the “stop-time” rule if it does not include the “time and place” of the hearing pursuant to section 1229(a)—a statutory provision expressly cross-referenced by the INA provisions governing cancellation of removal proceedings. *Pereira*, 138 S.Ct. at 2114. The Court held that such an NTA cannot because, for purposes of the “stop-time” rule, an NTA must include the components outlined in section 1229(a). *Id.* at 2113–14. The Court went on to state that “if ‘notice to appear’ mean[s] 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 2115 (emphasis added). The Court did not address jurisdiction or how the holding would impact other provisions of the INA.

c. Post-*Pereira* Application of Section 1003.15

In the present case, the court must decide whether *Pereira*’s requirement that an NTA include the “time and place” information for purposes of cancellation of removal, as required by the statute, impacts the regulatory provisions governing jurisdiction. Congress has not “directly

spoken to the precise question at issue[,]” namely, when jurisdiction vests with an IJ. *Chevron, U.S.A., Inc. v. Nat’l Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984); see *Hernandez-Perez*, 911 F.3d at 313 (“The statutory text does not, however, explain when or how jurisdiction vests with the immigration judge—or, more specifically, denote which of the several requirements for NTAs listed in § 1229(a)(1) are jurisdictional.”). The INA is undisputedly silent in this regard. See, e.g., *Karingithi*, 913 F.3d at 1161 (“There is no ‘glue’ to bind § 1229(a) and the jurisdictional regulations: the regulations do not reference § 1229(a), which itself makes no mention of the IJ’s jurisdiction.”). “Because Congress did not address th[e] question [of when or how jurisdiction vests with the immigration judge], the agency had some discretion in fashioning a set of jurisdictional requirements.” *Hernandez-Perez*, 911 F.3d at 313 (citing *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 543 (1978)). The Attorney General issued jurisdictional regulations, 8 C.F.R. § 1003.14(a), and the Board of Immigration Appeals (“BIA”) issued a binding decision interpreting the regulations governing jurisdiction and section 1229(a) in light of *Pereira*. See *id.* at 312 (“[*Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (B.I.A. 2018)] is the [BIA’s] binding interpretation of regulations promulgated by the Department of Justice.”). Therefore, the court must determine whether the BIA’s interpretation of the regulation is reasonable post-*Pereira*.<sup>8</sup>

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<sup>8</sup> To the extent the defendant also challenges the INA’s implementing regulations in 8 C.F.R. § 1003.14(a), the court finds the regulations are entitled to deference pursuant to *Chevron*. An agency interpretation “qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). If the interpretation was “promulgated in the exercise of that authority[,]” then courts apply the *Chevron*, two-step framework. *Id.* First,

[u]sing all traditional tools of statutory construction, we must determine whether Congress has directly spoken to the precise question at issue. If Congress has done so, our inquiry is at an end; we must give effect to the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the specific issue, we must assess whether the agency’s answer is based on a permissible construction. If so, then we must defer to that construction.

Pursuant to *Auer* deference, the BIA’s “interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation.” *Kaplun v. Att’y Gen.*, 602 F.3d 260, 265 (3d Cir. 2010) (internal quotation marks omitted) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *see also Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (“When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation.” (citations and internal quotation marks omitted)).<sup>9</sup> As described above, the BIA, in a binding opinion, directly addressed whether an NTA must include the requirements in section 1229(a) to vest an IJ with

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*Martinez v. Att’y Gen.*, 693 F.3d 408, 411 (3d Cir. 2012) (alterations in original omitted) (internal citations and quotation marks omitted). At the outset, the regulations qualify under *Mead* for *Chevron* deference because the Attorney General issued the regulations pursuant to his/her rulemaking authority under the INA section 1103(g)(2). *See Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9824, 9824 (Feb. 28, 2003) (reorganizing immigration regulations) (codified at 8 C.F.R. § 1003.14); *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312 and 10,332 (Mar. 6, 1997) (publishing the present-day version of 8 C.F.R. § 1003.14) (also codified at 8 C.F.R. § 1003.14). Thus, the court will address whether the regulations are entitled to deference pursuant to *Chevron*.

Under the first-step of the *Chevron* framework, Congress has not “directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. Instead, Congress merely defined the components of an NTA in section 1229(a) without specifying whether such information was jurisdictional. *Hernandez-Perez*, 911 F.3d at 313. Because Congress did not address this issue, the court moves to *Chevron* step two and asks whether the agency’s “answer is based on a permissible construction of the statute” and warrants deference. *Chevron*, 467 U.S. at 843. Using its delegated authority, the Attorney General determined jurisdiction vests with an IJ upon the filing of a charging document, defined as an NTA without the “time and place” of the hearing. The court finds the Attorney General’s interpretation reasonable because, as described in additional detail in the context of *Auer* deference later in this opinion, (1) it allows an NTA to begin the proceedings, separate from the notice-giving functions of the statutory NTA; (2) the statutory text and structure of the INA does not imply a congressional intent to make NTAs jurisdictional; and (3) it is consistent with judicial review of NTA (*i.e.*, for due process violations, not jurisdictional ones). Therefore, the regulation is entitled to deference pursuant to *Chevron* because “it is a permissible construction of the INA[.]” *Si Min Cen v. Att’y Gen.*, 825 F.3d 177, 186 n.10 (3d Cir. 2016).

<sup>9</sup> The circuit courts to have addressed the issue analyzed whether the regulation itself was appropriate pursuant to *Auer* because the question before those courts of appeals was whether the BIA’s interpretation of the regulation itself is appropriate, not whether the regulation complied with the statute. *See, e.g., Hernandez-Perez*, 911 F.3d at 313 (applying *Auer* deference to BIA’s interpretation of 8 C.F.R. §§ 1003.13–15). This is consistent with the Third Circuit’s application of agency deference principles. *Si Min Cen*, 825 F.3d at 186 n.10. Here, the court applies *Auer* deference because the court must determine whether the BIA’s interpretation of 8 U.S.C. § 1229(a) and 8 C.F.R. § 1003.15(b), *i.e.*, that a “two-step” notification process remedies the disconnect between the statutory and regulation definitions of NTA, is a reasonable interpretation of section 1003.15(b). *See Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (“An administrative rule may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation.” (citation omitted)); *see also Daramy v. Att’y Gen.*, 365 F. App’x 351, 358 (3d Cir. 2010) (upholding BIA’s interpretation of “8 U.S.C. § 1158(a)(2)(B) as implemented by 8 C.F.R. § 1208.4(a)(2)(ii)” because it was “not plainly erroneous or inconsistent with the statute or regulations . . .”). In an abundance of caution, the court analyzes whether the regulation should be upheld pursuant to *Chevron* in *supra* note 8.

jurisdiction. *Hernandez-Perez*, 911 F.3d at 312. In *Matter of Bermudez-Cota*, the BIA interpreted *Pereira* and held that “a notice to appear that does not specify the time and place of an alien’s initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section [1229(a)] of the Act, so long as a notice of hearing specifying this information is later sent to the alien.” 27 I. & N. Dec. at 447. The BIA distinguished *Pereira* because there: (1) the alien did not receive subsequent notice of his hearing; (2) the cancellation of removal provisions cross-referenced the statutory definition of an NTA in section 1229(a); (3) “[h]ad the Court intended to issue a holding as expansive as the one advanced by the respondent, presumably it would not have specifically referred to the question before it as being ‘narrow[;]’” and (4) the Court did not address jurisdiction in its opinion. *Id.* at 443–44.

In the present case, the BIA’s interpretation that the regulations satisfy the statutory requirement if DHS sends written notice of the “time and place” of the hearing to the alien after the initial NTA is filed with the IJ is not “plainly erroneous or inconsistent with the regulation[.]” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). While the interpretation is not perfect,<sup>10</sup> it is deserving of deference under *Auer* for several reasons. See *Hernandez-Perez*, 911 F.3d at 313 (“The agency could not abrogate the requirements of § 1229(a)(1), but the BIA’s conclusion that ‘a two-step notice process is sufficient to meet the statutory notice requirements’ is not inconsistent with the text of the INA.” (citation and internal quotation marks omitted)).

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<sup>10</sup> “There is also some common-sense discomfort in adopting the position that a single document labeled ‘Notice to Appear’ must comply with a certain set of requirements for some purposes, like triggering the stop-time rule, but with a different set of requirements for others, like vesting jurisdiction with the immigration court.” *Hernandez-Perez*, 911 F.3d at 314; see also *Santos-Santos*, 917 F.3d at 491 n.4 (“Even though one might question the agency’s wisdom in referring to the document in 8 C.F.R. §§ 1003.13–15 as a Notice to Appear in an effort to avoid conflating the two types of Notices to Appear, its regulations are consistent with the statute.” (citation omitted)).

First, the BIA's interpretation is harmonious with an ambiguous regulatory provision. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (“*Auer* ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation[.]”). Section 1003.14(a) is ambiguous because it does not specify what information must be included *when* the NTA is filed with the IJ to trigger jurisdiction. It merely states that jurisdiction vests upon the filing of a “charging document.” 8 C.F.R. § 1003.14(a); *see also Hernandez-Perez*, 911 F.3d at 313–14 (“[T]he regulatory language is ambiguous: The regulation does not specify what information must be contained in a charging document at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest.” (citation and internal quotation marks omitted)). Nowhere in section 1003.14(a), or the related provisions defining an NTA or discussing case scheduling, do the regulations state that an imperfect NTA divests jurisdiction. 8 C.F.R. §§ 1003.13, .18. Instead, section 1003.18(b), supports the BIA’s interpretation that an imperfect NTA can trigger jurisdiction without including the “time and place” information required by section 1229(a) because it outlines how notice of the proceeding should be given to an alien when DHS is unable to provide the “time and place” information in the initial NTA. *See* 8 C.F.R. 1003.18(b) (stating that if the “time and place” information “is not contained in the Notice to Appear [provided by DHS to the alien], the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing[.]”). Section 1003.18(b) generally supports the proposition that “[t]he function of the regulatory notice to appear is to vest jurisdiction in the immigration court, not to notify the noncitizen.” *United States v. Garcia-Gonzalez*, Case No. 15-CR-00109-BLF-1, 2019 WL 343473, at \*4 (N.D. Cal. Jan. 28, 2019).

Second, the holding in *Pereira* does not mandate its extension outside of the unique context of the “stop-time” rule. The statutory provisions governing the “stop-time” rule expressly reference section 1229(a)’s definition of an NTA. *See* 8 U.S.C. § 1229b(d)(1) (stating that period of continuous residence ends, in some circumstances, “when the alien is served a notice to appear under section 1229(a) of this title”).<sup>11</sup> Here, the statute itself does not mention when jurisdiction vests and the regulations do not reference the definition in section 1229(a). Accordingly, “[t]here is no ‘glue’ to bind § 1229(a) and the jurisdictional regulations.” *Karingithi*, 913 F.3d at 1161; *cf. Cuellar Manzano*, 2019 WL 1313401, at \*4 (stating in dicta that *Pereira* addressed the “‘stop-time’ rule . . . an issue far afield from the due process violations alleged in Manzano’s petition”).

Third, the statutory text contemplates that, in some contexts, an alien may receive only oral notice of their hearing’s “time and place.” *See* 8 U.S.C. § 1229a(b)(7) (“Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided *oral notice*[.]” (emphasis added)). Notably, this section does not divest the IJ of jurisdiction over the removal proceeding simply because an NTA failed to comply with section 1229(a).

Fourth, courts analyze defects in an NTA to determine whether the alien received defective notice, or their proceeding failed to comply with the INA, not whether the deficient

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<sup>11</sup> “[W]ritten 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) . . . .” 8 U.S.C. § 1229(a)(1). Service is defined as “physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien’s attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien’s attorney of record.” 8 C.F.R. § 1003.13. It is the court’s understanding that DHS (via ICE) effectuates service of the initial NTA whereas the immigration court serves the alien with an updated “Notice of Hearing” if the date of the proceeding changes. 8 C.F.R. § 1003.18(b).

NTA divested jurisdiction of the IJ.<sup>12</sup> This occurred in *Pereira* itself when the Court merely remanded the proceeding instead of dismissing it—a fact that two circuit courts found indicative of the decision’s limited reach. See *Karingithi*, 913 F.3d at 1161 (stating that “nor does the word ‘jurisdiction’ appear in the majority opinion”); *Hernandez-Perez*, 911 F.3d at 314 (“Like the BIA, we find it significant that, in *Pereira*, the Court did not purport to invalidate the alien’s underlying removal proceedings or suggest that proceedings should be terminated.” (citations and internal quotation marks omitted)). Additionally, this approach is consistent with judicial interpretations of NTA-defects in the Third Circuit. For example, in a post-*Pereira* decision, *De Jesus v. Attorney General*, the Third Circuit did not analyze whether the various errors in the alien’s NTA made the noncitizen’s underlying removal order invalid.<sup>13</sup> No. 18-1857, 2018 WL 6267101, at \*2 (Nov. 28, 2018). Instead, the court looked to whether the alien received *actual* notice. *Id.* Historically, the Third Circuit approached such cases similarly and did so when the court held an NTA for purposes of the “stop-time” rule needed to include the “time and place” of the hearing. See *Orozco-Velasquez v. Att’y Gen.*, 817 F.3d 78, 84 n.34 (3d Cir. 2016) (holding pre-*Pereira* that NTA must include “time and place” for “stop-time” rule, but not addressing whether such NTA “would be effective outside the context of the ‘stop-time’ rule”); see also *De Oliveira v. Att’y Gen.*, 508 F. App’x 163, 166 (3d Cir. 2013) (upholding removal in absentia when sent to incorrect address because alien received actual notice); *Ramos-Olivieri v. Att’y*

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<sup>12</sup> Pre-*Pereira*, the Third Circuit also frequently cited section 1229(a) for the requirement that the Attorney General must provide “written notice” of the proceeding to the alien. See, e.g., *Bossert v. Att’y Gen.*, 343 F. App’x 801, 803 (3d Cir. 2009).

<sup>13</sup> The Third Circuit initially described the document containing errors as the noncitizen’s “Notice of Hearing” but later refers to it as an NTA containing the following errors: “listing the wrong name, alien number, and country of citizenship, as well as its bearing a signature that he says is not his.” *De Jesus*, 2018 WL 6267101, at \*3. The court notes that DeJesus’ NTA included the “time and place” of his hearing and the Third Circuit quoted *Pereira* for the proposition 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).” *Id.* at \*2 (quoting *Pereira*, 138 S.Ct. at 2113–14). However, the Third Circuit did not address the question at issue here, namely whether an NTA that does not include the “time and place” impacts jurisdiction of an IJ.

*Gen.*, 624 F.3d 622, 623 (3d Cir. 2010) (discussing only if defects in NTA impacted due process, not whether failure of NTA to include “date and time of the removal hearing” divested IJ of jurisdiction).

Lastly, extending *Pereira*’s definition of an NTA to the jurisdictional provisions in the regulations would have “unusually broad implications” because “‘almost 100 percent’ of NTAs issued during the three years preceding *Pereira* did not include the time and date of the proceeding.” *Hernandez-Perez*, 911 F.3d at 314 (citing *Pereira*, 138 S.Ct. at 2111). These practical implications, while not considered persuasive by the Court in *Pereira*, militate against an interpretation that would upend the immigration system because, unlike *Pereira*, there is no statutory language barring the BIA’s interpretation of the jurisdictional regulations. *Id.* Instead, the BIA merely interpreted procedural regulations promulgated by the Attorney General governing an IJ’s jurisdiction—a topic untouched by Congress in the INA. If Congress intended section 1229(a)’s requirements to be jurisdictional, then they likely would have stated such an intention expressly<sup>14</sup>—“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (citations omitted).

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<sup>14</sup> The defendant argues that the regulation conflicts with congressional intent. While legislative history can be helpful in determining ambiguous statutory language, here there is no statutory language to construe because the statute does not address when an IJ’s jurisdiction vests. The language quoted in the legislative history by the defendant does not support a finding that the regulations conflict with the statute because it merely states that a “notice of hearing” may be provided as if it was an NTA under the new section 1229 during the transitional period. *See Omnibus Consolidated Appropriations Act of 1997*, ch. 5, Pub. L. No. 104–208, 110 Stat 3009 (codified as amended at 8 U.S.C. §§ 1221–1231 (2006)) (“The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.”). Instead, it merely supports that it was proper for the Attorney General to trigger jurisdiction upon the *filing* of an NTA. It does not state that an NTA which lacks information listed in section 1229(a) *cannot* trigger jurisdiction when filed. As a result, the court does not find the legislative history cited by the defendant to be persuasive in this instance. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in looking over a crowd and picking out your friends.” (citation and internal quotation marks omitted)).

Therefore, for the reasons stated above, and consistent with the weight of persuasive appellate authority, the court finds that the BIA’s interpretation of when jurisdiction vests in an IJ is not in conflict the statutory scheme and is entitled to deference.<sup>15</sup>

## **2. Collateral Attack – Section 1326(d)**

The defendant also argues that the court should dismiss the indictment because entry of his removal order was “fundamentally unfair.” Def.’s Mem. at 14. Section 1326(d) limits the ability of a criminal defendant to “collaterally attack” his underlying removal order in a subsequent criminal case. Under section 1326(d),

[i]n a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d).

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<sup>15</sup> This result is consistent with that reached by many federal courts to consider the issue. *See Karingithi*, 913 F.3d at 1161 (holding NTAs are not jurisdictional); *Leonard*, 746 F. App’x at 269 (holding NTA does not need to include “time and place” information for jurisdictional purposes); *Hernandez-Perez*, 911 F.3d at 315 (same); *see also* Order at 1, n.1, *United States v. Jimenez-Diaz*, Crim. A. No. 18-486 (E.D. Pa. Feb. 13, 2019), Doc. No. 19 (denying motion to dismiss indictment even though NTA did not include “time and place” of proceeding); *United States v. Hernandez-Aguilar*, No. 5:18-CR-137-FL-1, 2019 WL 456172, at \*1 (E.D.N.C. Feb. 5, 2019) (finding “that 8 C.F.R. § 1003.14 and § 1003.15—not 8 U.S.C. § 1229(a)(1) and *Pereira’s* interpretation of that statutory provision—control when and how subject matter jurisdiction vests in an immigration court.”); *Garcia-Gonzalez*, 2019 WL 343473, at \*3–4 (“[A] notice to appear that does not include time and place information can vest an immigration judge with jurisdiction over removal proceedings” because NTA, under regulations, is charging document giving information to court and not designed to give notice to alien); *United States v. Lozano*, 355 F. Supp. 3d 554, 561–62 (S.D. Tex. 2019) (stating that *Pereira* is not jurisdictional and 8 C.F.R. § 1003.14(a)’s requirements were satisfied by filing of charging document, even if NTA was statutorily deficient); *United States v. Rosales-Fuentes*, No. SA-18-CR-290-XR, 2019 WL 202820, at \*2 (W.D. Tex. Jan. 14, 2019) (holding “[a] defective NTA can result in a due process challenge, but that does not affect jurisdiction[.]”); *United States v. Rivera Lopez*, 355 F. Supp. 3d 428, 439 (E.D. Va. 2018) (finding NTA requirements are similar to federal court’s local rules and are not jurisdictional). *But see, e.g., United States v. Castro-Gomez*, No. 1:18-CR-187-RP, 2019 WL 503434, at \*7 (W.D. Tex. Feb. 8, 2019) (“*Pereira* was not limited to the stop-time rule. *Pereira* held that the time-and-place requirement is ‘definitional’ for a document that purports to be a notice to appear.”).

To collaterally attack a removal order, the defendant must satisfy all three prongs under section 1326(d). See *United States v. Torres*, 383 F.3d 92, 102 (3d Cir. 2004) (“At any rate, we need not conclusively resolve what suffices to constitute judicial review under section 1326(d). Torres’s collateral challenge suffers from a more obvious defect—he cannot establish that his removal order was ‘fundamentally unfair’ as required by section 1326(d)(3).”). Here, the defendant argues that all three prongs of section 1326(d) are satisfied because the IJ lacked jurisdiction over his removal. Def.’s Mem. at 11. Specifically, the defendant argues that he does not need to “establish that he exhausted administrative remedies or was denied the opportunity for judicial review, as he was functionally deprived of judicial review by the immigration court’s lack of jurisdiction.” *Id.* (citations omitted). The defendant argues that the third prong is met “because the immigration judge lacked jurisdiction to order him removed, the removal order violated his due process rights.” *Id.* at 14 (citations omitted).

As described above, the IJ did not lack jurisdiction over the proceeding. It is also undisputed that the defendant had actual notice of his proceeding and appeared for the proceeding. At bottom, the presence of jurisdiction is fatal to the defendant’s section 1326(d) arguments because he relies on the lack of jurisdiction to satisfy each prong. Consequently, the defendant may not collaterally attack his removal order because the NTA properly vested the IJ with jurisdiction.

### **III. CONCLUSION**

For the reasons stated above, the court finds that the IJ had jurisdiction over the defendant’s underlying removal proceeding and the defendant fails to satisfy the requirements to collaterally attack his removal proceeding under section 1326(d). Therefore, the court denies the motion to dismiss the indictment.

A separate order follows.

BY THE COURT:

/s/ Edward G. Smith  
EDWARD G. SMITH, J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

|                          |   |                            |
|--------------------------|---|----------------------------|
| UNITED STATES OF AMERICA | : |                            |
|                          | : |                            |
| v.                       | : | CRIMINAL ACTION NO. 18-408 |
|                          | : |                            |
| MARTIN CASTRO-MOLINA,    | : |                            |
|                          | : |                            |
| Defendant.               | : |                            |

**ORDER**

**AND NOW**, this 9th day of April, 2019, after considering: (1) the motion to dismiss the indictment filed by the defendant (Doc. No. 15), (2) the government’s response in opposition to the motion (Doc. No. 21), (3) the defendant’s supplemental memorandum of law in support of his motion to dismiss (Doc. No. 23), and (4) the government’s supplemental response in opposition to the defendant’s motion to dismiss the indictment (Doc. No. 24); and after oral argument on February 28, 2019; accordingly, for the reasons stated in the separately filed memorandum opinion, the motion to dismiss the indictment (Doc. No. 15) is **DENIED**.

BY THE COURT:

/s/ Edward G. Smith  
EDWARD G. SMITH, J.