No. 19-863

IN THE
Supreme Court of the United States

AGUSTO NIZ-CHAVEZ,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

BRIEF OF THIRTY-THREE FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are thirty-three former immigration judges and members of the Board of Immigration Appeals ("BIA" or "Board").[2]

Amici curiae have dedicated their careers to the immigration court system and to upholding the immigration laws of the United States. Each is intimately familiar with the functioning of immigration courts and is invested in improving the fairness and efficiency of the United States immigration scheme. *Amici curiae*'s extensive experience adjudicating immigration cases provides a unique perspective on the procedures and practicalities of immigration proceedings.

SUMMARY OF ARGUMENT

The straightforward question this case presents is one of enormous practical significance: Must the initial written notice served on noncitizens to commence their removal proceedings provide—*in one document*—the "time and place at which the proceedings will be held" (along with charges and other specified information) in order to satisfy the requirements of 8 U.S.C. § 1229(a), or does the statute allow the government to cobble together the required elements of a "notice to appear" from multiple documents, issued at different times, some containing misinformation, and

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[1] All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The appendix provides a complete list of signatories.

none of which alone contains all of the statutorily required information?

Reversing the Sixth Circuit and holding that § 1229(a)'s requirements must be included in a *single* document will greatly reduce the procedural and bureaucratic errors attendant in a two-step process that detrimentally impact thousands of noncitizens lawfully seeking to remain in this country.

I. For noncitizens applying for cancellation of removal, service of a valid "notice to appear" under § 1229(a) triggers the so-called "stop-time" rule, which terminates the period of continuous presence required for cancellation eligibility. *See* 8 U.S.C. §§ 1229b(d)(1), 1229b(a)(2), 1229b(b)(1)(A). Separately but relatedly, for noncitizens ordered removed *in absentia*, whether that "severe" penalty, *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018), is proper depends on whether the notice served on the noncitizen satisfied the requirements of § 1229(a). 8 U.S.C. § 1229a(b)(5)(A). This Court's decision will thus touch not only those like Petitioner who are seeking cancellation of removal, but also those who may not even have been provided sufficient notice to appear for their removal hearings—and potentially severely punished as a result.

II. The Sixth Circuit's ruling approves a two-step notice process that involves: (i) the Department of Homeland Security ("DHS") serving on a noncitizen a putative notice to appear lacking time-and-place information (or, perhaps worse, that includes fake time-and-place information), and (ii) only after that notice to appear is filed and docketed with the immigration court, the immigration court separately sending a "notice of hearing" supplying the time-and-place information to the noncitizen.

Under this two-step process an initial notice lacking § 1229(a)'s time-and-place information languishes in a proverbial "No Man's Land" until the notice is filed with an immigration court and entered into the court's computer systems—a process that can take *years*. This delay increases the risk of procedural errors and lost filings, such as crucial Change of Address forms, which can result in noncitizens never receiving time-and-place information at all—potentially resulting in wholly unjustified *in absentia* removal orders.

Sorting through those issues adds to immigration judges' fact-finding burdens by requiring them to divert attention from the merits of a case to investigate collateral issues like whether time-and-place information was provided in a second document; whether that document was properly served; and whether a filing like a Change of Address form was submitted but ultimately lost in "No Man's Land." When coupled with the pressure to complete cases—even if it means churning out *in absentia* removal orders without fully considering whether the noncitizen received adequate time-and-place notice—the result may be an increase in unwarranted removal orders.

These problems would be ameliorated if the government simply provided the actual time-and-place information in a *single* document as required by § 1229(a).

III. Requiring DHS to work with the Executive Office of Immigration Review ("EOIR") to obtain time-and-place information *before* serving a notice to appear—and including such information in that document, as § 1229(a) and *Pereira* require—is practical and within the government's capabilities.

A single-step notice process, consistent with this Court's ruling in *Pereira*, furthers the due process axiom that a party charged to defend against a legal proceeding must receive notice of the time and place of the proceeding and an opportunity to be heard.

ARGUMENT

I. THE QUESTION PRESENTED IMPACTS NONCITIZENS SEEKING CANCELLATION OF REMOVAL AND THOSE ORDERED REMOVED IN ABSENTIA ALIKE.

Whether "a notice to appear" must contain in a single document the time-and-place information § 1229(a) requires is a question of profound importance for many thousands of individuals and their families. Procedurally, a notice to appear initiates removal proceedings against a noncitizen, *see* 8 C.F.R. § 1003.14(a); but it also substantively impacts the noncitizen's rights in several other potentially life-altering ways.

In addition to triggering the so-called "stop-time rule," which terminates the period of continuous presence required for cancellation of removal, *see* 8 U.S.C. §§ 1229b(d)(1), 1229b(a)(2), 1229b(b)(1)(A), service of a valid notice to appear also directly impacts whether a noncitizen can be removed *in absentia*. If a noncitizen is served with the "written notice required under paragraph (1) or (2) of section 1229(a)" but does not appear at the removal proceeding, the noncitizen "shall be ordered removed in absentia." 8 U.S.C. § 1229a(b)(5)(A). Whether this "severe" penalty is meted out, *Pereira*, 138 S. Ct. at 2111, flows ineluctably from a determination of whether the putative notice is valid "under . . . section 1229(a)." *See* 8 U.S.C. § 1229a(b)(5)(A) (removal *in absentia* requires the

government to establish that "written notice was so provided"); § 1229a(b)(5)(C)(ii) (removal order *in absentia* may be rescinded when the noncitizen "demonstrates that [she] did not receive notice in accordance with . . . section 1229(a)").

The question presented thus affects many more noncitizens than those, like Petitioner here, who seek cancellation of removal. *See, e.g.*, *Statistics Yearbook: Fiscal Year 2018*, EOIR ("EOIR Yearbook") at 33, https://www.justice.gov/eoir/file/1198896/download (reporting 46,480 removal orders issued *in absentia* in fiscal year 2018). Rather, whether the notice required under § 1229(a) must contain in a single document the statutorily-required time-and-place information will also determine the validity of removals *in absentia*, where that penalty was predicated on a putative "notice to appear" that did not contain such information.[3]

As this Court explained in *Pereira*, "[if] a noncitizen who has been properly served with the 'written notice required under paragraph (1) or (2) of section 1229(a)' fails to appear at a removal proceeding, he 'shall be ordered removed in absentia'" (provided the

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[3] Whether DHS has served a valid notice to appear under § 1229(a) can also determine whether a noncitizen requesting voluntary departure—which avoids the harsh consequences for future reentry that flow from a removal order—has met the one-year presence requirement of 8 U.S.C. § 1229c(b). Under that provision, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense" under certain conditions, including that "the alien has been physically present in the United States for a period *of at least one year immediately preceding the date the notice to appear was served under section 1229(a)* of this title[.]" 8 U.S.C. § 1229c(b)(1)(A) (emphasis added). A noncitizen who is denied voluntary departure may be ordered removed. *See Tovar v. U.S. Atty. Gen.*, 646 F.3d 1300, 1306 (11th Cir. 2011).

government establishes, *inter alia*, that the noncitizen is removable). 138 S. Ct. at 2118 (quoting § 1229a(b)(5)(A)). That additional written notice may be provided pursuant to § 1229(a)(2) in the *in absentia* context does not alter the impact that a notice deficient under § 1229(a)(1) has on noncitizens in both the cancellation and *in absentia* contexts. Section 1229(a)(2) provides that "in the case of any change or postponement in the time and place of [removal] proceedings," the government shall give the noncitizen "written notice . . . specifying . . . the new time or place of the proceedings." § 1229(a)(2)(A)(i) (emphasis added). As this Court explained in *Pereira*, "paragraph (2) [of § 1229(a)] 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]." 138 S. Ct. at 2114. A notice to appear that meets § 1229(a)(1)'s requirements is thus a pre-requisite to providing notice to a noncitizen under § 1229(a)(2). Accordingly, both the stop-time rule and removal *in absentia* statutes require notice satisfying the time-and-place criteria defined in § 1229(a)(1).

Moreover, the government has effectively conceded, as it must in light of *Pereira*, that a decision here determining the requirements of a notice to appear under § 1229(a) for purposes of the stop-time rule will also decide what constitutes valid notice for purposes of removals *in absentia*. *See* Memorandum of Respondent at 1, *Yanez-Pena v. Barr*, No. 19-1208 (2020) (requesting that this Court hold pending a petition for writ of certiorari in Yanez-Pena on the ground that the issues in that case—which involved both the stop-time rule and removal in absentia—

could be "disposed of" in light of the decision in the present case).[4]

For many thousands of individuals, the basic right to remain in this country thus depends on this Court reversing the Sixth Circuit and giving effect to the text and history of § 1229(a) by holding that the statute means what it says: "a notice to appear" under § 1229(a) requires a *single* document containing the time-and-place information that statute prescribes.

II. PERMITTING A NOTICE TO APPEAR THAT LACKS ACCURATE TIME-AND-PLACE INFORMATION TO BE "CURED" BY A SUBSEQUENT NOTICE OF HEARING IMPOSES UNDUE STRAIN ON THE IMMIGRATION SYSTEM.

The Sixth Circuit's decision approves a two-step notice process in which § 1229(a)'s notice requirements are delivered piecemeal to a noncitizen. At the first step, DHS serves the initial "notice to appear," but often without any time-and-place information—

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[4] The BIA has previously interpreted notice under § 1229(a)(2) as being satisfied so long as *any* notice with time-and-place information, including a notice of hearing from an immigration court—nowhere referenced in § 1229(a)(2)—is eventually sent to the noncitizen. *See In Matter of Pena-Mejia*, 27 I. & N. Dec. 546 (2019); *Matter of Miranda-Cordiero*, 27 I. & N. Dec. 551 (2019). That reading is plainly contrary to the unambiguous text of § 1229(a)(2). As explained above, § 1229(a)(2) does not eliminate the underlying requirement that a noncitizen must first be served with time-and-place information under § 1229(a)(1). It merely allows the government to change or postpone otherwise accurate time-and-place information under § 1229(a)(1) with *new* time-and-place information. *Pereira*, 138 S. Ct. at 2118. The BIA's decisions to the contrary are entitled to no weight because they run afoul of Congress's unequivocal definition of notice under § 1229(a)(2), which presupposes prior service of a notice that complies with § 1229(a)(1). *See Pereira*, 138 S. Ct. at 2114.

or, indeed, *fabricated* time-and-place information, as described below. At the second step, EOIR's immigration courts mail a separate "notice of hearing" that is to supply *actual* time-and-place information. This two-step notice process has saddled over-burdened immigration courts with having to resolve questions collateral to the merits. A one-step notice process, with accurate time-and-place information provided in a single document, would mitigate these concerns.

A. A two-step notice process facilitates delay and procedural error, increasing the likelihood that a noncitizen will never receive adequate notice of her hearing.

Bifurcating the administration of § 1229(a)'s notice requirement between DHS and the immigration courts delays removal proceedings because it injects an unnecessary step into the notice process. This additional step also increases the likelihood of procedural errors and the risk that noncitizens never receive accurate time-and-place information at all.

When DHS's initial notice to appear *lacks* § 1229(a)'s time-and-place information, nothing further happens until the notice to appear is filed with an immigration court and entered into the court's computer systems. At that point, the case gets calendared and a notice for the noncitizen is generated stating time-and-place information for the hearing. *See* 8 C.F.R. §§ 1003.14(a), 1003.18(a).[5] That later-generated notice is sent to inform the noncitizen of the actual hearing date.

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[5] *See also Uniform Docketing System Manual*, U.S. DEP'T OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE, at Intro-6 (Rev. Sept. 2018),

This docketing process can eat up a lot of time. Indeed, the processing gap between serving a noncitizen with an initial notice to appear and finally serving a notice of the actual hearing date after docketing amounts to what undersigned former BIA Chairman and immigration judge Paul W. Schmidt has called a "No Man's Land." *See* Brief for Former BIA Chairman and Immigration Judge Paul Wickham Schmidt as *Amicus Curiae* in Support of Petitioner at 3, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459) ("Schmidt Brief"). In *Pereira*, for example, more than a year passed between the time the noncitizen was served with his (defective) notice to appear and when it was filed, 138 S. Ct. at 2112—a phenomenon that has occurred in other cases. *See, e.g.*, *Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1002 (9th Cir. 2014) (two-year delay); *Le Bin Zhu v. Holder*, 622 F.3d 87, 89 (1st Cir. 2010) (same). The delays can hardly be surprising in light of the extraordinary caseload that the immigration courts must bear. *See Immigration Court Backlog Tool*, TRAC IMMIGRATION (June 2020), https://trac.syr.edu/phptools/immigration/court_backlog/ (noting 1,218,737 cases pending before immigration courts across the country).

If time in "No Man's Land" only slowed the start of proceedings, noncitizens and immigration judges might be indifferent to the circumstance. But DHS's bureaucratic approach has consequences, resulting in real prejudice to noncitizens and imposing burdens on

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https://www.justice.gov/eoir/file/1153561/download ("Docketing Manual") ("When the immigration court receives a charging document, the support staff enters the case information into the EOIR computer data base" which then "schedules the case for a Master Calendar Hearing . . . and generates a hearing notice informing the parties of the date, time and place for the hearing.").

the immigration court system. This is why the Court should stop this desultory and illegal practice.

Because the notice to appear must escape this "No Man's Land" before any time-and-place information can be set and served, the two-step notice process inevitably leads to errors in recordkeeping and faulty service by the government that can end with a removal order *through no fault of the noncitizen*. For example, a noncitizen's mailing address may change after she is served with the initial notice to appear, including in situations where the noncitizen is served while detained and subsequently released. A noncitizen is obligated to notify the immigration court within five days of any change of address using a "Change of Address Form." 8 C.F.R. § 1003.15(d)(2). But if the noncitizen duly files this government-required form before the notice to appear has been filed with the immigration court, there will be no record of proceeding to which her form can attach because no notice to appear has been docketed—the case falls into limbo. *See* Schmidt Brief at 3.[6] And as Judge Schmidt has noted, "documents that were not immediately posted to the [record of proceeding] were frequently lost and not readily retrievable." *Id.* at 4. As a consequence, the notice of hearing, when finally generated, may never get updated with fresh address information and so it will be misdirected to the wrong address. *See id.* at 4-6; *see also* Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal In Immigration Court*, 168 U. PENN. L. REV. 817, 869-70 (2020) (describing a 2017 Department of Justice report of an on-site review of the immigration court in Baltimore, Maryland, which

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[6] A "record of proceeding" is the case file containing all case-related information. Docketing Manual at Intro-6, II-1. It is created after the initiating document is filed. *Id.*

found that the court's administrators were unable to enter change-of-address paperwork into their systems due to being understaffed).

The described bureaucratic failing is no hypothetical: undersigned former immigration judges Rebecca Jamil and Ilyce Shugall recall the phenomenon occurring during their time on the bench, in addition to other clerical errors in which documents forming part of a noncitizen's case file were not timely or correctly filed. *Cf.* Kristina Cooke & Mica Rosenberg, *No 'Day in Court': U.S. Deportation Orders Blindside Some Families*, REUTERS (July 26, 2019), https://www.reuters.com/article/us-usa-immigration-deportations/no-day-in-court-u-s-deportation-orders-blindside-some-families-idUSKCN1UL16I (describing error in a noncitizen's case file purportedly reflecting that the noncitizen was served with a notice of hearing the day *before* the date the notice was issued). Indeed, in *Pereira*, the petitioner never received notice of the time and date of his hearing because the second notice containing that information was sent to the wrong address. *Pereira*, 138 S. Ct. at 2112. He was ordered removed *in absentia* as a result. *Id.*

DHS's two-notice practice presents a particular problem for noncitizens who receive an initial notice to appear at the border but have not yet found a stable residence. *Most Released Families Attend Immigration Court Hearings*, TRAC IMMIGRATION (June 18, 2019), https://trac.syr.edu/immigration/reports/562/. These families may not know where they will reside at the time of the initial notice, which would prevent them from providing address information, and would hinder their ability to receive that second notice with the actual date and time of the hearing. Similarly, as

former immigration judge Alison Daw recalls, noncitizens who receive a notice to appear while detained, and who are thereafter released by an immigration court on bond, may provide inaccurate address information to the immigration court due to language barriers, preventing these noncitizens from receiving a subsequent notice of hearing at their correct address.

The problem may be even more severe for those noncitizens who are ordered to return to Mexico while their case is pending. In January 2019, DHS promulgated the Migrant Protection Protocols ("MPP"), informally known as the "Remain in Mexico Policy," under which certain asylum seekers arriving at the country's southern border are "given a 'Notice to Appear' for their immigration court hearing" and then "returned to Mexico until their hearing date." *Migrant Protection Protocols*, DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. These asylum seekers face the obvious difficulty of finding a permanent address at which they can receive a notice of hearing with accurate time-and-place information. It is no surprise, then, that asylum seekers under the MPP program appear at hearings at far lower rates than their non-MPP counterparts, often resulting in those MPP noncitizens being removed *in absentia*. *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRAC IMMIGRATION (Dec. 19, 2019), https://trac.syr.edu/immigration/reports/587/#f2 (reporting that noncitizens who were permitted to remain in the country pending their initial hearing appeared at those hearings 89 percent of the time, whereas noncitizens who were required to remain in Mexico pursuant to the MPP program appeared only 50 percent of the time); *see also id.* (noting that "without a permanent address," there is "no mechanism" for

immigration courts to notify immigrants of the date, time, and location of their hearings).

Even for noncitizens whose addresses do not change after being served with a notice to appear, the two-step notice process can still increase the likelihood that a noncitizen will not receive notice of her hearing due to other bureaucratic failings. For example, when a noncitizen is served with a notice to appear that lacks time-and-place information, the DHS officer effecting service may inaccurately record the noncitizen's address. Again, this is no hypothetical: Judge Jamil recalls this occurring in many cases over which she presided; in one such case, the DHS officer wrote "oak town" on the notice to appear instead of "Oakland." When such a faulty notice to appear is finally filed with an immigration court, EOIR's notice of hearing may be sent to the wrong or nonexistent address. This can lead to a noncitizen being ordered removed *in absentia* through no fault of her own. If the initially-served notice to appear had included time-and-place information in a single document, at least any mistake in transcribing the noncitizen's address information would not risk depriving the noncitizen of notice of when and where to appear for the hearing. The lesson from this experience is simple: the more steps (especially manual ones) to a process, the more opportunities there are for error.

Reversing the Sixth Circuit and holding that § 1229(a)'s time-and-place notice requirements must be included in a single, initial document will greatly reduce the procedural and bureaucratic failings attendant in a two-step process.

B. A two-step notice process needlessly imposes additional burdens on immigration judges, heightening the risk that they will forgo the rigorous assessment necessary to ensure a noncitizen receives adequate notice of her hearing.

The risk that a noncitizen may be unjustly punished for the government's incomplete and defective notice to appear is amplified by the practical burdens a two-step notice process imposes on immigration judges themselves.

Permitting a defective notice to appear to be "cured" by a subsequent notice of hearing increases the fact-finding burdens on already stretched immigration judges. Under the Sixth Circuit's rule, immigration judges will inevitably have to divert attention away from the merits of a case to investigate whether time-and-place information was provided in a second document; whether that document was properly served; and whether a filing like a Change of Address form was submitted but left to linger in "No Man's Land." This kind of inquiry can take significant time. Judge Jamil recalls once spending over thirty minutes in court merely trying to make a record of the appearing noncitizen's address (an indigenous language speaker from Guatemala) in an effort to confirm whether notice had been properly served.

The ability of immigration judges to conduct this kind of time-consuming record-making and factual analysis is constrained by increasing pressure to adjudicate cases at faster rates. EOIR's recent "Performance Plan" requires immigration judges to complete at least 700 cases per year and maintain a remand rate of lower than 15 percent per year, among other

"benchmarks," in order to receive a "satisfactory" review. *See EOIR Performance Plan, Adjudicative Employees*, EOIR (Dec. 12, 2019), https://www.aila.org/File/Related/18082203i.pdf.

When, for example, a noncitizen does not appear at the scheduled hearing date—which, as discussed above, could be due to a variety of reasons engendered by the two-step notice process and entirely beyond the noncitizen's control—one of the potential consequences of this pressure to complete cases is that the immigration judge may forgo the time-consuming factual inquiry over whether the respondent has received adequate notice in favor of simply issuing a removal order *in absentia*. As Judge Jamil has observed, issuing a removal order *in absentia* can serve as a low-pressure way for immigration judges to meet quotas and for the immigration court system to chug along, hoping that due process failures in *in absentia* cases will not actually be challenged or exposed.

Indeed, "immigration judges have publicly stated that they are under pressure to issue *in absentia* removal orders in every instance" in which a noncitizen in the MPP program does not appear. House Homeland Security Committee, *Amnesty Int'l Statement for Hearing on "Examining the Human Rights and Legal Implications of DHS's 'Remain in Mexico' Policy*," (Nov. 18, 2019), https://www.amnestyusa.org/wp-content/uploads/2019/11/11.18.2019-Amnesty-International-Statement-for-House-HSC-Border-Security-Subcommittee-Hearing-on-RIM-1.pdf. Some judges have even reportedly "instruct[ed] court clerks to preprint in absentia removal orders for all such cases." *Human Rights Fiasco: The Trump Administration's Dangerous Asylum Returns Continue*, HUMAN RIGHTS

FIRST (Dec. 2019), https://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf (emphasis added). Judge Shugall recalled that in a week of observing MPP *in absentia* hearings in San Antonio, no inquiry was made at all to determine why noncitizens were not appearing—the immigration judges simply issued the removal orders.

In one particularly egregious example of this dynamic, as recounted to Congress by the undersigned former immigration judge Jeffrey S. Chase, an immigration judge in Philadelphia who continued the hearing of a minor who failed to appear in order to ensure the minor had received notice of the hearing was reportedly reprimanded by the Attorney General. EOIR management ultimately assigned the case to another judge for the sole purpose of issuing an *in absentia* removal order against the minor. *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on* Immigration and Citizenship, 116th Cong. (2020) (statement of the Round Table of Former Immigration Judges).

In this production-driven work environment, it is not surprising that the volume of removals *in absentia* are on the rise. In fiscal year 2018, *46,480* removal orders were issued *in absentia*, reflecting a sharp upward trend from 2014, when EOIR issued 26,234 such orders. *See* EOIR Yearbook at 33.

But removing *en masse* noncitizens who do not appear for their scheduled hearings because they never received an accurate notice inflicts a grave injustice on those who actually "wish to appear . . . but lack adequate information." Denise Gilman, *To Loose the*

Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention, 92 IND. L.J. 157, 224 (2016). Judge Jamil recalls finding that many of the noncitizens who did not appear at their first hearings before her simply had not received proper notice. She would thus decline to issue *in absentia* removal orders at such hearings. After ensuring that any incorrect address information was corrected, Judge Jamil found that noncitizens *would* typically appear for their second hearing. Consistent with Judge Jamil's experience, a recent empirical study covering an 11-year period found that, when immigration judges adjourned initial hearings of non-detained noncitizens due to notice issues, 54% of those noncitizens appeared in court at the next hearing. Eagly, *supra* p. 9 at 853.

If judges under pressure to complete cases do not inquire into whether lack of notice is the cause of a noncitizen's absence and simply issue an *in absentia* removal order, a large proportion of noncitizens (54% by one study, as noted above) would be deprived of an opportunity to appear on the basis of DHS's preferred bureaucratic approach of issuing notices to appear in two-steps (or more).

A one-step notice regime would not only minimize the notice deficiencies leading to such circumstances, *see supra* Part II.A, it would also streamline the fact-finding role of the immigration judge and allow a quick and efficient determination of whether the noncitizen received adequate notice. If accurate time-and-place information is required to be included in a *single*, *complete* notice to appear as an initial matter—without having to worry about No Man's Land, changes of address, or the content and service of an entirely separate notice of hearing—then the inquiry

is simple and straightforward: either the notice to appear is complete or it is not. An immigration judge need only then determine that the one notice to appear was properly served on the noncitizen in order to be satisfied that the noncitizen received the statutorily-required time-and-place information.

C. A two-step notice process permits DHS to use "dummy" time-and-place information in a notice to appear.

This Court in *Pereira* could not have been clearer that the "post-IIRIRA statutory regime" created a "*document* called a 'notice to appear,' which, by statute, *must specify the time and place* of removal proceedings." 138 S. Ct. at 2117 n.9 (emphasis added). Yet DHS, in continuing to adhere to a two-step notice process, has reportedly contravened *Pereira* through a practice that beggars belief.

Post-*Pereira*, DHS would include dates and locations of initial hearings on notices to appear, but would often insert "dummy" dates and locations for hearings that had not actually been scheduled. *See, e.g.*, Catherine E. Shoichet, *100+ immigrants waited in line in 10 cities for court dates that didn't exist*, CNN (Nov. 2, 2018), https://www.cnn.com/2018/10/31/us/immigration-court-fake-dates/index.html. Even more egregiously, some of DHS's "dummy" dates have reportedly included dates and times that are literally impossible—dates such as September 31 and November 31, and hearing times at midnight. *See id.*; Monique O. Madan, *Fake Court Dates Are Being Issued in Immigration Court. Here's Why*, SEATTLE TIMES (Sept. 22, 2019), https://www.seattletimes.com/nation-world/fake-court-dates-are-being-issued-in-immigration-court-heres-why/.

DHS's "dummy" date practice was widespread. Instances of "dummy" dates were reported across jurisdictions, including Dallas, Los Angeles, San Diego, Chicago, Atlanta, and Miami. *See* Dianne Solis*, ICE is ordering immigrants to appear in court, but the judges aren't expecting them*, DALLAS MORNING NEWS (Sep. 16, 2018), https://www.dallasnews.com/news/immigration/2018/09/16/ice-is-ordering-immigrants-to-appear-in-court-but-the-judges-arent-expecting-them/. In January 2019, the American Immigration Lawyers Association received in one week reports of more than 1,000 "dummy" dates being issued to noncitizens in Arlington, Atlanta, Dallas, Miami, Omaha, San Diego and San Francisco. *See* Maria Sacchetti & Francisco Alvarado, *Hundreds show up for immigration-court hearings that turn out not to exist*, WASHINGTON POST (Jan. 31, 2019), https://www.washingtonpost.com/local/immigration/hundreds-show-up-for-immigration-court-hearings-that-turn-out-not-to-exist/2019/01/31/e82cc61c-2566-11e9-90cd-dedb0c92dc17_story.html.

The harm done to both noncitizens and the immigration courts by DHS's "dummy" date practice cannot be overstated. When a noncitizen receives a notice to appear, she has no way of knowing whether the time-and-place information on the notice is real or fake (impossible dates aside). As a result, the noncitizen is obligated to appear at the specified time-and-place on the notice to appear, often necessitating taking time off from work, traveling long distances to the courthouse, and waiting in line for hours—only to learn that the court has no record of her case on the docket and that she will have to show up again if and when she finally receives accurate time-and-place information.

Consequently, DHS's use of "dummy" dates has resulted in immigration courts across the country being flooded with noncitizens they were not expecting, overwhelming courts with masses of noncitizens and their families arriving on days they were not supposed to. *See* Monivette Cordeiro, *Roughly 100 People Gather at Orlando Immigration Court Because ICE Agents Gave Them Fake Hearing Dates*, ORLANDO WEEKLY (Nov. 1, 2018), https://www.orlandoweekly.com/Blogs/archives/2018/11/01/roughly-100-people-gather-at-orlando-immigration-court-because-ice-agents-gave-them-fake-hearing-dates; Alia Malik, *More than 100 show up at San Antonio immigration court for artificial hearing date*, SAN ANTONIO EXPRESS NEWS (Nov. 30 2019), https://www.express-news.com/news/local/amp/More-than-100-show-at-San-Antonio-immigration-14870967.php.

Long waits at immigration courthouses' doors, exacerbated by the presence of noncitizens who were there for no reason other than diligently responding to a fabricated "dummy" date, has kept at least one noncitizen with a *real* scheduled hearing from being able to timely appear, resulting in a removal *in absentia* order—issued *while she was waiting in line*. *See* Madan, *supra* p. 16 (reporting that in July 2019, a noncitizen was ordered removed while waiting in line, despite having arrived at the courthouse 90 minutes before her scheduled hearing). Similarly troubling, the undersigned Judge Shugall, who personally witnessed DHS's "dummy" date practice as an immigration judge, recalls that it created mass confusion at the courts, with some noncitizens receiving "dummy" dates on their notices to appear *later* in time than the "real" time of their scheduled hearing. This would result in the noncitizen appearing for her hearing at the

"dummy" time, only to learn that she had already been ordered removed *in absentia*.

Even prior to *Pereira*, Judge Daw witnessed first-hand another shocking DHS practice, not unlike the practice of using "dummy" dates—using a "dummy" court. Judge Daw recalls that between 2017 and 2018, she saw many notices to appear that had been served on noncitizens arrested at the southern border, who were then flown to San Francisco, California (where detention space was available) providing that the noncitizen's initial master calendar hearing would take place at an immigration court *in the Midwest*. DHS would nonetheless file these notices to appear in the San Francisco immigration court, which would then have to revise the address for the noncitizen's hearing in a subsequent notice. Judge Daw believes that this practice was the result of DHS using old notices to appear as templates and simply changing the name of the noncitizen, without changing § 1229(a)'s "place" information to the court where the notice to appear was actually filed. The anxiety engendered on a noncitizen served with a notice to appear for a removal proceeding on the other side of the country—who must then decide whether and how to arrange for the requisite travel, if he or she even has the means to do so, or to simply ignore the notice in the hope that it was issued in error—is immense. And it is compounded by the fact that the noncitizen may not receive a subsequent, corrective notice from the immigration court without undue delay.

The two-step notice regime facilitates these practices. The only way that issuing "dummy" dates (or a "dummy" court) could at all be viable is if a subsequent notice of hearing fills in the "real" date (or place) later. And in the case of "dummy" dates, as Judge

Shugall's experience illustrates, confusion can follow over which of the two dates is the "real" date. But from DHS's perspective, if it knows that EOIR will subsequently serve a notice of hearing with the "real" time-and-place information, then it does not matter what DHS writes on the initial notice to appear. *See* Madan, *supra* p. 16 ("Immigrants who receive a notice to appear . . . with a fake date have to wait for a follow-up notice from their respective immigration court to find out their actual hearing date—a process that can take several months: 'I'm still waiting on my real court date,' [a] Key West woman said.").

If, on the other hand, this Court makes clear that the law requires time-and-place notice in a *single* document, and that no "curative" notice of hearing will be coming from EOIR, the government will be discouraged from including "dummy" time-and-place information in the notice to appear. Writing a "dummy" time-and-place is tantamount to including *no* time-and-place at all (or simply writing "TBD"). In a single notice-regime, then, if the government were to include "dummy" time-and-place information in the notice to appear, the notice to appear would be invalid. *See Pereira*, 138 S. Ct. at 2115-18. By removing the ability of the government to rely on a subsequent, "curative" notice of hearing from EOIR, the government will have to take seriously its obligation to accurately schedule hearings in advance of serving a notice to appear and providing *actual* time-and-place information on the document.[7]

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[7] Of course, nothing would prevent DHS from issuing a subsequent notice to the noncitizen if there is a legitimate "change or postponement" of actually scheduled proceedings. *See* 8 U.S.C. § 1229(a)(2).

Indeed, that is what the government eventually came around to doing. Belying any claim that it is impractical for DHS and EOIR to work together to schedule hearings in advance of serving notices to appear, the Washington Post reported on January 31, 2019 that EOIR issued a statement "saying that DHS now has access to the court's electronic case-scheduling system and that 'EOIR does not expect any further recurrence'" of the "dummy" date situation. Sacchetti, *supra* p. 17; *see also infra* Part III.

Although the government has thus apparently curbed the "dummy" date practice, holding that § 1229(a) *requires* a *single* notice should ensure its demise. If § 1229(a)'s time-and-place information must be included in a single document, DHS and EOIR will be incentivized to actually schedule hearings prior to serving notices to appear and to include that hearing information on the notice—just as the government has confirmed it is perfectly capable of doing.

III. REQUIRING A NOTICE TO APPEAR TO INCLUDE TIME-AND-PLACE INFORMATION WITHIN A SINGLE DOCUMENT IS WITHIN THE GOVERNMENT'S CAPABILITIES.

As mentioned above, requiring DHS to serve a single notice that provides the information—*accurate* information—required by § 1229(a) is within the government's capabilities, and is consistent with *Pereira* and Congressional intent in passing IIRIRA. *See* H.R. Rep. 104-469(I), 1996 WL 168955 at *159 ("[Section 1229] also will simplify procedures for initiating removal proceedings against an alien. *There will be a single form of notice*. . . .") (emphasis added).

This Court has already rejected any contention that this is impractical. *See Pereira*, 138 S. Ct. at 2118

(deeming the government's "practical considerations" to be "meritless" and otherwise failing to "justify departing from the statute's clear text"). The Court stated that DHS and immigration courts had worked together previously to coordinate setting hearing dates, and that, in light of "today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear." *Id.*[8]

Moreover, as the Washington Post reported in January 2019, DHS and EOIR did in fact work together after *Pereira* to set hearing dates in advance of serving notices to appear. *See supra* p. 17. And in a December 2018 memo, EOIR Director James R. McHenry III stated that, following this Court's decision in *Pereira*, EOIR was "provid[ing] hearing dates directly to DHS for use on NTAs for detained cases and will continue to do so." Memorandum from James R. McHenry III. EOIR Director, to All of EOIR, at 1 n.1 (Dec. 21, 2018), https://www.justice.gov/eoir/file/1122771/download ("McHenry Memo").

As for non-detained cases, EOIR had begun "providing dates and times directly to DHS to use on NTAs for some . . . cases," and was working to "provide access to DHS to its Interactive Scheduling System (ISS)." *Id.* at 1-2. ISS was a system that enabled DHS "to access [EOIR's] data base to enter case data and to

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[8] *See also Guadalupe v. Atty. Gen.*, 951 F.3d 161, 167 (3d Cir. 2020) (recognizing that requiring "one complete" notice to appear does not prevent DHS from waiting to serve it until after the Department has compiled all of the information set forth in § 1229(a)); *Lopez v. Barr*, 925 F.3d 396, 404 (9th Cir. 2019) (noting that "the Attorney General conceded at oral argument that DHS can reissue complete Notices to Appear to those who have been served defective ones").

schedule the initial master calendar hearing." Docketing Manual at I-2. Thus, as Director McHenry instructed in his memo, "DHS may utilize ISS in order to schedule hearings for specific dates and to reflect those scheduled hearings on NTAs." McHenry Memo at 2.

ISS is not newfangled software that could not be developed until after *Pereira*. It had long been used between the agencies, until approximately May 2014, when it ceased to be active. *See* Schmidt Brief at 6-7 (stating that cases scheduled through ISS proceeded "much more smoothly"); Brief for the National Immigrant Justice Center as *Amicus Curiae* in Support of Petitioner, *Pereira v. Sessions*, 138 S. Ct. 2105 (No. 17-459) at 30-31.

The fact that EOIR, post-*Pereira*, revived ISS and otherwise provided time-and-place information to DHS to include in notices to appear demonstrates both that the government understood *Pereira* to require including such information in *one* document, and that the two concerned agencies are capable of coordinating scheduling proceedings and generating a notice with the complete information required.

Continuing technological developments should make cooperation even easier, foreclosing any argument that a single-step notice regime is too difficult for DHS to implement. The EOIR Courts & Appeals System initiative, which seeks to phase out paper filings from immigration courts entirely, has created a "DHS Portal," which allows DHS users to electronically upload case initiation data and view case detail and other information. *See Welcome to the EOIR Courts & Appeals System (ECAS) Information Page*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/ECAS; *DHS Portal Overview*, U.S. DEP'T

OF JUSTICE (Aug. 7, 2018), https://www.justice.gov/eoir/video/dhs-portal-overview. Effective June 2019, the ISS functionality was to transition to the DHS Portal. *See ECAS DHS Portal Registration Overview*, U.S. DEP'T OF JUSTICE, (June 19, 2019), https://www.justice.gov/eoir/video/ecas-dhs-portal-registration-overview. And indeed, as the Acting Deputy Director of EOIR has noted, as of January 31, 2020, DHS is utilizing "an interactive scheduling portal" to "schedule[] the initial master calendar hearing" for "many" non-detained removal cases. Memorandum from Sirce E. Owen, EOIR Acting Deputy Director to All of EOIR (Jan. 31, 2020), https://www.justice.gov/eoir/page/file/1242501/download. DHS is thus perfectly able to coordinate with EOIR and obtain the necessary time-and-place information to be included on a single notice to appear.

Serving a noncitizen with one document that contains the statutorily required information, as mandated by § 1229(a) and *Pereira*, is well within the government's capabilities and reflects axiomatic due process principles. The right to "notice and opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *See id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Reading § 1229(a) to allow for multiple purported notices, issued at different times, and some containing dummy information that DHS later corrects hinders meaningful notice.

This Court should hold that § 1229(a)'s requirements must be satisfied in a single document.

CONCLUSION

For the reasons stated above, the Sixth Circuit's decision below should be reversed.

Respectfully submitted,

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APPENDIX

AMICI CURIAE SIGNATORIES

Hon. Steven Abrams

Immigration Judge, New York (Varick Street) and Queens Wackenhut, 1997-2013

Hon. Terry A. Bain

Immigration Judge, New York, 1994-2019

Hon. Sarah Burr

Immigration Judge, New York, 1994-2012

Hon. Teofilo Chapa

Immigration Judge, Miami, 1995-2018

Hon. Jeffrey S. Chase

Immigration Judge, New York, 1995-2007

Hon. George T. Chew

Immigration Judge, New York, 1995-2017

Hon. Joan V. Churchill

Immigration Judge, Washington D.C and Arlington, 1980-2005

Hon. Alison Daw

Immigration Judge, Los Angeles and San Francisco, 2006-2010

Hon. Bruce J. Einhorn

Immigration Judge, Los Angeles, 1990-2007

Hon. Cecelia Espenoza

Member, Board of Immigration Appeals, 2000-2003

Hon. James R. Fujimoto

Immigration Judge, Chicago, 1990-2019

Hon. Jennie L. Giambastiani

Immigration Judge, Chicago, 2002-2019

Hon. John Gossart, Jr.

Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf

Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward

Immigration Judge, San Francisco, 1997-2018

Hon. Charles Honeyman

Immigration Judge, Philadelphia and New York, 1995-2020

Hon. Rebecca Jamil

Immigration Judge, San Francisco, 2016-2018

Hon. William F. Joyce

Immigration Judge, Boston, 1996-2002

Hon. Carol King

Immigration Judge, San Francisco, 1995-2017

Hon. Elizabeth Lamb

Immigration Judge, New York, 1995-2018

Hon. Margaret McManus

Immigration Judge, New York, 1991-2018

Hon. Charles Pazar

Immigration Judge, Memphis, 1998-2017

Hon. Laura Ramírez

Immigration Judge, San Francisco, 1997-2018

Hon. John Richardson
Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg
Member, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy
Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt
Chair, Board of Immigration Appeals, 1995-2001
Member, Board of Immigration Appeals, 2001-2003
Immigration Judge, Arlington, 2003-2016

Hon. Ilyce Shugall
Immigration Judge, San Francisco, 2017-2019

Hon. Denise Slavin
Immigration Judge, Miami and Baltimore, 1995-2019

Hon. Andrea Hawkins Sloan
Immigration Judge, Portland, 2010-2016

Robert D. Vinikoor
Immigration Judge, Chicago, 1984-2017

Hon. Polly Webber
Immigration Judge, San Francisco, 1995-2016

Hon. Robert D. Weisel
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