No. 19-863

IN THE
Supreme Court of the United States

AUGUSTO 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 AMERICAN IMMIGRATION LAWYERS ASSOCIATION, THE AMERICAN IMMIGRATION COUNCIL AND LEGAL SERVICES PROVIDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. §§ 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* §§ 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," the government can end those periods of continuous residence by serving "a notice to appear under section 1229(a)," which, in turn, defines "a 'notice to appear'" as "written notice . . . specifying" specific information related to the initiation of a removal proceeding. *Id.* §§ 1229b(d)(1), 1229(a)(1). In *Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018), this Court held that only notice "in accordance with" section 1229(a)'s definition triggers the stop-time rule.

The question presented in this case is:

Whether, to serve notice in accordance with section 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are nonprofit organizations established to serve immigrants, many of whom have experienced challenges arising from the government's two-step notice practices related to removal proceedings, to increase public understanding of immigration law and policy, to advocate for the just and fair administration of immigration laws, and to protect the legal rights of noncitizens. *Amici* represent and advocate for the legal rights of tens of thousands of applicants seeking protection and relief under the immigration laws of the United States. *Amici* have a strong interest in ensuring that these applicants receive fair and effective notice of the time and place of their removal proceedings so that they are able to adequately defend themselves at those proceedings. *Amici* have a further interest in ensuring that the United States government lives up to its statutory notice obligations in administering removal proceedings, particularly in circumstances where the consequences are so severe, including deportation. *Amici* believe their extensive experience working within the immigration system will help the Court in considering this case.

Additional information about *Amici* may be found in the Appendix. Many of the narratives in this brief involve individuals affiliated with *Amici's* organizations.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or *(cont'd)*

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States immigration system is burdened by inefficiency and an increasingly byzantine set of procedures. In 1996, Congress sought to streamline and simplify one aspect of the system—the removal process—by, among other things, requiring the government to provide noncitizens with a single notice containing certain relevant information, including the date and time of their forthcoming removal hearing. But despite its efforts, Congress's attempt at improvement has been stymied. Refusing to adhere to Congress's commands, the government has instituted a different practice, involving multiple notices doled out over an indefinite time-frame, thereby introducing unnecessary inefficiency and complexity into the system—the very issues that Congress sought to mitigate. The end result has been a removal process plagued by increasing delays and wrongful removals.

The government's refusal to comply with the statute as written has had disastrous consequences for noncitizens, including those seeking a discretionary form of relief known as cancellation of removal. After ten years of continuous physical presence in the United States (or seven years of continues residence in the case of permanent residents), as well as compliance with other stringent requirements, a nonpermanent resident may be eligible for cancellation of

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submission of this brief. Timely notice under Rule 37.2(a) of intent to file this brief was provided to the Petitioner and the Respondent, and both have consented in writing to the filing of this brief.

removal, a form of relief available to only the most deserving noncitizens. Critically, the accrual of that seven- or ten-year period may be "stopped" by the government's issuance of a "notice to appear." Noncitizens ability to even apply for this critical form of discretionary relief often hinges on whether they can meet the required periods of continuous physical presence or residence in the United States.

The case at bar hinges upon what qualifies as a "notice to appear" under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. With IIRIRA, Congress mandated that noncitizens who are subject to removal proceedings must be given ***one*** "notice to appear" containing certain critical information, including the time and place at which their removal proceedings will be held. When amending the statutory scheme, Congress intentionally replaced legislation authorizing a two-step notice process, which allowed for time-and-place information to be provided at a later time in a separate document. Congress had clear reasons for this: a two-step notice process created serious and endemic fairness concerns, on the one hand, and a confusing, complicated and inefficient process, on the other. The one-step notice that Congress prescribed through 8 U.S.C. § 1229(a) was meant to correct these shortcomings. It would ameliorate notice and fairness concerns for noncitizens and promote efficiency in removal proceedings.

In *Niz-Chavez*, the Board of Immigration Appeals ("BIA") rejected this straightforward interpretation of the statute. (Pet. App. 22a.) Instead, the agency interpreted section 1229(a) as allowing a

collection of documents to be served on a noncitizen, over an unspecific span of time, rather than just one "notice to appear" containing all the statutorily required information. (*Id.*) Taken together, the BIA surmised, those combined documents satisfy the statutory mandate of section 1229(a). *(Id.*) The Sixth Circuit below adopted the Board's position, holding that multiple notices doled out at the government's convenience may constitute "a" notice to appear under the statute. (*Id.* 13a-15a.) That decision is patently incorrect. *Amici* write to this Court to emphasize three points.

First, the text, structure, history, and purpose of IIRIRA unequivocally confirm that a single notice to appear is required. Congress expressly mandated "a 'notice to appear'"—not an incomplete placeholder notice supplemented by a later notice of hearing or amended notice to appear. 8 U.S.C. § 1229(a)(1). Congress recognized the morass a two-step process creates and sought to ensure expeditious but fair removal proceedings by, among other things, requiring a single notice that includes time-and-place information. And in fact, the government has itself recognized this one-step requirement in post-IIRIRA rulemaking. *See* 62 Fed. Reg. 444, 449 (proposed Jan. 3, 1997) (codified at various parts of 8 C.F.R.).

Second, the two-step notice practice promotes unfairness and inefficiency and reintroduces complexity into the removal process. The government's insistence on this practice—and its outright refusal to comply with the statutory mandate—frustrates Congressional intent and raises fundamental fairness concerns that are particularly acute in the context of removal, which is often the only form of relief that can

keep immigrant families together. Moreover, the practice ignores the confusion and systemic inefficiency that results from failing to provide time-and-place information in the notice to appear, a point this Court has recognized. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2119 (2018). The solution here requires no creative, uncertain or novel approach—instead, it merely requires implementing the one-step notice Congress has already legislated. The risks to noncitizens are dire, the alternative clear, and the burden on the government negligible—and indeed, this Court has already considered and rejected the government's argument that providing time-and-place information is too burdensome. *Id.* at 2118-2119.

Third, *Amici* write to provide case examples that illustrate how the government's two-step notice practice distorts the Congressional scheme and undermines fundamental fairness. These examples show how the U.S. Department of Homeland Security's ("DHS") use of fake dates for removal hearings as a solution to this Court's mandate in *Pereira* has bred chaos and confusion in the immigration system and led to significant noncitizen expenditures in traveling to and preparing for nonexistent proceedings, including by obtaining counsel. These cases also demonstrate the effects of long delays between the original incomplete notice document and the subsequent notice of hearing. The two-step notice process can take years to complete. Dolling out critical information over such a protracted timeframe unnecessarily elevates the risk that noncitizens will not receive time-and-place information since many lack permanent mailing addresses and stable living arrangements. Finally, case examples show that the two-step notice process generates high numbers of *in absentia* removal orders,

highlighting how the two-step notice process ultimately may result in no notice at all. Piecemeal notice practices mean that notices are often (1) sent to different, incorrect addresses; (2) received only after the hearing has occurred; or (3) contain incorrect dates or locations, including hearings scheduled earlier than noticed. The government's persistent refusal to comply with Congress's directive inflicts severe consequences indiscriminately. This is patently inefficient and intolerable as a matter of fundamental fairness.

ARGUMENT

I. CONGRESS REQUIRED ONE-STEP NOTICE TO STREAMLINE REMOVAL PROCEEDINGS AND ENSURE FUNDAMENTAL FAIRNESS AND NOTICE FOR NONCITIZENS

A. The Legal History of IIRIRA Shows that One-Step Notice Is Required

Under the Immigration and Nationality Act of 1965 ("INA"), as subsequently amended, certain noncitizens facing removal from the United States may seek cancellation of their removal order if, immediately prior to removal proceedings, they have lived in the United States for a continuous seven or ten-year period. *See* 8 U. S. C. §§ 1229b(a)(2) and (b)(1). Where a noncitizen meets the relevant physical presence or residency requirement, among other statutory criteria, the Attorney General has discretion to "cancel removal" and, in the case of non-legal permanent residents, adjust the individual's immigration status. Under the statute's stop-time rule, the noncitizen's period of physical presence or continuous residence ends on, among other things, service of a "notice to appear under section 1229(a)." *Id.* § 1229b(d)(1).

Section 1229(a) defines "a 'notice to appear'" as a "written notice . . . specifying" certain information, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1). When a noncitizen receives a statutorily compliant notice to appear, it terminates his period of continuous physical presence or residence for purposes of cancellation of removal.

The text of section 1229b(d)(1) is clear: the government can only effectively trigger the stop-time rule by serving "a notice to appear under section 1229(a)." *Id.* § 1229b(d)(1). And section 1229(a) defines "a 'notice to appear'" as a document that "shall" contain every piece of information Congress deemed relevant to the initiation of removal proceedings, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1); (*see also* Br. of Pet. Niz-Chavez 24-27). A document that does not inform a noncitizen of the "time and place at which the proceedings will be held" is not a "notice to appear under section 1229(a)." It cannot be, since it fails to convey the very information a noncitizen needs to "appear"—namely, essential details on when and where they need to appear.

In addition to the statutory text, the one-step notice requirement is further supported by the statute's history and purpose. Pre-IIRIRA, the government already employed a two-step notice practice under which a notice of the "time and place of proceedings" would issue separately from an initial "order to show cause." (*See* Br. of Pet. Niz-Chavez 10-12 ("Consistent with the [Pre-IIRIRA] statute's flexibility regarding time-and-place information, INS retained its regulations specifying that such information would be separately provided by the immigration court.").)

The 1996 enactment of IIRIRA replaced the previously-sanctioned two-step notice process with a single document: the "notice to appear." The amended statute required that the "time and place at which the proceedings will be held" be included *in the single notice to appear*. *Id.* § 1229(a)(1). Indeed, this was the ***only*** change made in an otherwise identical section. (*See* Br. of Pet. Niz-Chavez 37.) Courts have

recognized this historical change in the statutory scheme. *See Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019); *see also Banuelos v. Barr*, 953 F.3d 1176, 1182 (10th Cir. 2020). "The government [likewise] immediately recognized that IIRIRA required it to provide a specific document—'a "notice to appear"'—that included . . . time-and-place information." (*See* Br. of Pet. Niz-Chavez 13-14.)

The legislative history of IIRIRA also evidences Congress's concern with unnecessary complexity in the notice process. By enacting IIRIRA, Congress intended to streamline and simplify removal proceedings. *See, e.g.*, H.R. Rep. 104-469(I), 1996 WL 168955 at *157 (describing reform of removal procedures as "streamlin[ing] rules and procedures . . . to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens").

IIRIRA also aimed to reduce administrative inefficiency and delay. During a hearing concerning potential reforms, Representative Lamar Smith voiced the need to "encourage changes that need to be made at the INS and EOIR to make our removal system credible" and "look at legislative reforms to streamline the removal process." *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims*, 104th Cong. 1, 3 (1995) (statement of Chairman Lamar Smith); *see also Providing for Consideration of H.R. 2202, Immigration in the National Interest Act of 1995*, 142 Cong. Rec. 38, H2374 (1996) (statement of Rep. Dreier) (stressing the need to "[s]treamline [the] deportation process to reduce time to process cases").

In order to address these concerns, Congress replaced the preexisting dual-notice system with a

single notice to appear. The House Judiciary Committee Report described the proposed legislative reforms as follows: "[Section 1229] also will simplify procedures for initiating removal proceedings against an alien. ***There will be a single form of notice*** . . . ." H.R. Rep. 104-469(I), 1996 WL 168955 at *159 (emphasis added). Congress's concern over procedural delays thus motivated its choice to require single-document notice.

But notice and fairness concerns also animated Congress's decision to eliminate the two-step notice process. As a report of the Judiciary Committee of the House of Representatives explained, IIRIRA was designed to address "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [which have led] some immigration judges to decline to exercise their authority to order an alien deported in absentia." H.R. Rep. 104-469(I), 1996 WL 168955 at *122. Such lapses were caused, at least in part, by the pre-IIRIRA piecemeal notice system.

Section 1229(a)'s enactment directly combatted Congressional concerns about procedural lapses in the removal process caused by a dysfunctional two-step notice system. *See* H.R. Rep. 104-469(I), 1996 WL 168955 at *159 ("[T]here often are protracted disputes concerning whether an alien has been provided proper notice[, which] impairs the ability of the government to secure in absentia deportation orders."). While Congress clearly sought to avoid delay, it also sought to ensure notice and fundamental fairness in removal proceedings. For example, the consequences of failing to appear at removal proceedings were intentionally made severe under IIRIRA to prevent noncitizens from "reopen[ing] their hearings on the grounds that

they never received proper notice." H.R. Rep. 104-469(I), 1996 WL 168955 at *159. However, IIRIRA counterbalanced this severity with certain procedural safeguards. Thus, a noncitizen may seek to rescind an *in absentia* removal order if they never received notice under section 1229(a). *See id.*; 8 U.S.C. § 1229a(b)(5)(C)(ii). That notice ***must include*** the "time and place at which the [removal] proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i); *accord Pereira*, 138 S. Ct. at 2111. The one-step notice rule thus ensures that noncitizens receive proper notice of their removal proceedings, affording them an opportunity to be heard.

Despite this history and overarching purpose, the Government continues to ignore the statute and *Pereira*, upsetting the delicate balance Congress struck between notice, process, and fairness, on the one hand, and streamlined, efficient removal proceedings, on the other.

B. The Government's Two-Step Notice Practice Frustrates Fundamental Fairness Objectives and Reintroduces Complexity and Confusion Into the Notice Requirement

The government's atextual two-step notice practice fails to reliably notify noncitizens of the time and place of their removal proceedings, hampering their ability to engage with—or even appear at—those proceedings. In this way, the two-step process puts at risk the most basic precepts of any adjudicative system: notice, fairness, and process. These shortcomings are all the more pronounced given the specific challenges facing the immigrant communities to

which the notices are directed. They are often unfamiliar with the U.S. legal system, which can be difficult for trained professionals to navigate—let alone recent immigrants with limited English language skills and uncertain access to legal counsel or other resources.[2] Given these challenges, Congress designed a system that mandates straightforward notice of when and where removal proceedings will take place. After all, as this Court observed in *Pereira*, it would "'confuse and confound' noncitizens" to allow "the Government to serve notices that lack any information about the time and place of the removal proceedings." 138 S. Ct. at 2119 (citation omitted).

But that is precisely what the government continues to do. Defying Congress, the government's two-step notice practice ensures noncitizens will wait weeks, months, ***or even years*** for the most critical piece of information they need to defend themselves from removal—the time and place of their hearing. This two-step process serves to keep noncitizens in a state of limbo and elevates the risk that noncitizens will never receive the requisite notice. Common sense supports the view that the greater the lag-time between when a noncitizen is ordered to appear for proceedings and when that same individual is informed when and where to appear, the less likely the

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[2] Furthermore, many immigrants have escaped horrific conditions, abuse, or oppression in their home countries and carry the lasting scars of those experiences. For these individuals, who might be dealing on a daily basis with physical disabilities or emotional trauma, navigating our complex immigration bureaucracy becomes all the more difficult.

noncitizen is to receive the critical time-and-place information needed to appear at their hearing and present a defense. Providing a noncitizen with this critical information in piecemeal fashion unnecessarily amplifies the risk that the time-and-place information will not be received, even where a noncitizen diligently notifies the government of a change in address, as illustrated in Section II, below. Fundamental fairness requires DHS to provide an initial time and place for a noncitizen's hearing in the notice to appear, as Congress mandated.

At bottom, the government's refusal to implement the one-step notice process required by Congress has resulted in serious concerns regarding fundamental fairness and sufficient notice. As this Court has held, "[a]n elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The government's two-step practice has resulted in DHS consciously misinforming noncitizens about the time and place of their removal proceedings, requiring this already vulnerable population to expend significant time, energy, and valuable resources to follow the government's instructions and appear in immigration court at "fake" dates and times. And it has impeded the ability of noncitizens to adequately defend themselves in their removal proceedings. "But when notice is a person's due, process which is a mere gesture is not due process." *Id.* 339 at 315. Intentionally inaccurate notice certainly is not "reasonably calculated" to provide notice and cannot comport with the

intrinsic values of fundamental fairness and due process in removal proceedings.

Under the statutory scheme, Congress paired a rigid substantive notice requirement with harsh penalties for non-appearance. In refusing to adopt the one-step notice process envisaged and required by Congress, the government upsets that careful balance, creating an untenably high risk that noncitizens will never learn when and where their removal proceedings are to occur, leaving them unable to mount any defense against their removal. Those cases lead to one of the harshest results available in our immigration system—an *in absentia* removal order without any consideration of the merits of the noncitizen's case.

The stakes are clear. Removal proceedings determine a noncitizen's ability to remain in the United States and access certain forms of discretionary relief. Often, they decide whether a noncitizen may continue to live with or near close family. At bottom, removal proceedings impact the life that a noncitizen has built and her ability to continue that life. The risk is especially significant for those noncitizens eligible for cancellation of removal—they have by definition built a life in the United States for many years.

There is no valid reason, by contrast, for maintaining the flawed two-step notice system already rejected by Congress. As discussed on pp. 8-9, *supra*, in passing IIRIRA, Congress directed the government to replace a problematic two-step system with a streamlined and effective one-step notice process. This Court has already explicitly rejected the government's argument that it is too burdensome to include time-and-place information in a notice to appear, stating, "[g]iven 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." *Pereira*, 138 S. Ct. at 2119.

As the following real-world stories demonstrate, the current two-step notice practice ***has already*** led to concerns regarding fundamental fairness and adequate notice. It will continue to do so if left unchecked. But, as demonstrated below, these risks would be virtually eliminated by adopting the one-step notice system envisaged and required by Congress.

II. EXPERIENCES OF NONCITIZENS BEAR OUT THE CONFUSION AND FUNDAMENTAL FAIRNESS CONCERNS CREATED BY THE TWO-STEP NOTICE PRACTICE

The fundamental fairness concerns inherent in the two-step notice practice are borne out in a number of harmful ways for noncitizens in removal proceedings.

The first is the misleading practice of issuing notices to appear with fake dates and times. These fake dates, which are sometimes scheduled for the middle of the night or on the weekend, represent DHS's bad faith attempt to comply with *Pereira*. The result has been chaos for noncitizens as well as court staff, who find themselves overwhelmed with an influx of respondents who were not supposed to be at the court. Moreover, long delays between the issuance of the initial placeholder notice to appear and the later hearing notice further exacerbate the initial notice's insufficiency. Finally, the government's two-step notice practice heightens the risk that noncitizens will

miss their actual hearings and be removed *in absentia*, simply because the government failed to provide adequate notice as required by law or, worse still, provides inaccurate or deceptive notice. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require . . . notice and opportunity for hearing appropriate to the nature of the case." *Mullane*, 339 U.S. at 313.

Consider the following case examples.

In the weeks following *Pereira*, DHS began issuing notices containing fake hearing dates and times—meaning that the dates and times provided in the notices were inaccurate and the hearing contained in the notice was either scheduled for a different date and time or had not been scheduled altogether. In some instances, hearings were scheduled for dates and times when the courthouses were not even open. *See* Catherine E. Shoichet, et al., *New wave of 'fake dates' cause chaos in immigration courts Thursday*, CNN (Jan. 31, 2019), https://www.cnn.com/2019/01/31/politics/immigration-court-fake-dates/index.html. The fake date notices illustrate the fundamental unfairness of the government's preferred approach to notice and its deceptive attempts to comply with the Court's dictates in *Pereira*.

Recognizing the severe consequences of non-appearance, *supra* at p. 14, in 2019 noncitizens travelled to courthouses throughout the United States for their presumed hearings after receiving notices to appear. *See* Monique O. Madan, *Fake court dates are being issued in immigration court. Here's why*, Miami Herald (Sept. 18, 2019),

https://www.miamiherald.com/news/local/immigration/article234396892.html. On arrival, they discovered the truth—they had no hearing that day. *See* Shoichet et al., *supra* at p. 16. The noncitizens who were misled into attendance expended considerable resources travelling, obtaining counsel, and waiting in line at the courthouses. *See* Madan. Even more troubling, many individuals left these "fake" date hearings without ***any*** notice of when their actual removal hearings would proceed. *See* Dianne Solis, *ICE is ordering immigrants to appear in court, but the judges aren't expecting them*, Dallas Morning News, (Sept. 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/. Thousands of noncitizens have been affected by fake dates.

For example, in one case, a client was issued a notice to appear dated January 27, 2019, for a hearing at the Denver Immigration Court at 12:00 p.m. on March 15, 2019.[3] The client's attorney was rightfully skeptical of the hearing notice because, in the attorney's experience, the Denver Immigration Court is closed between the hours of 12:00 p.m. and 1:00 p.m. The attorney attempted to verify the time and date of the hearing by calling the clerk of the court, who confirmed that the hearing was not in the court's system. Nevertheless, because of the severe consequences for failing to appear, the attorney advised the client to attend the hearing. The client lived across the Rocky Mountains and drove five hours through a blizzard to the Denver Immigration Court. When the client and

[3] Attorney declarations supporting the client stories represented here are on file with Counsel of Record for *Amici*.

attorney appeared at the hearing on the provided date and time, they were informed by the clerk that the case was not in the system and that the hearing would not take place. The case was classified as a "failure to prosecute" and the clerk was unable to provide any documentation regarding the client's attempt to attend the court hearing. The client remains fearful that DHS will re-initiate removal efforts. The client has abstained from travelling to Mexico—even to visit sick family members—because of fears that the case is in "limbo."

Another client of the same attorney received a notice to appear for a hearing at the Denver Immigration Court on July 24, 2019, at ***1:00 a.m.*** Despite the clearly implausible time of appearance, the attorney attempted to confirm the hearing with the Executive Office for Immigration Review's ("EOIR") 1-800 number. Not surprisingly, the attorney discovered that the hearing was not in the court system. The client later received a notice of hearing with a different hearing date and time. This client had an attorney who knew how to confirm the information provided in the notice to appear with EOIR's 1-800 number and who could explain the subsequently issued notice of hearing. But, for the many noncitizens without legal representation, these fake date notices to appear logically create substantial confusion and distress.

Additional examples from another attorney confirm that many noncitizens have travelled several hours for hearings that were never going to take place.

One client received a notice to appear for a hearing on August 2, 2019. When the attorney followed-up with the EOIR's 1-800 number, she was provided with a different date for the hearing, which she then

confirmed with the court. But when the client met with U.S. Immigration and Customs Enforcement ("ICE") officers for a routine check-in, an officer insisted that the client show up on the original date provided in the notice to appear (despite it conflicting with the date provided by the 1-800 number and the court). According to the attorney, "[t]he ICE officer intimidated and threatened [the] client that if she did not attend, she would receive a removal order for not showing up [to the hearing]."

In another example, a client received a hearing notice scheduled for midnight. When the attorney and the client followed up with an ICE officer, they were told that the time was a "typo" and the hearing was at noon rather than midnight. But when the attorney checked the EOIR's 1-800 number, EOIR confirmed the original midnight hearing time, contradicting the officer.

These stories highlight fundamental fairness concerns inherent in the two-step notice practice, particularly where the government acts in bad faith in issuing initial notices. Because of the fake dates, noncitizens have been obstructed from attending their hearings and defending themselves before a judge—two fundamental aspects of due process and fair proceedings.

The two-step notice practice often involves a long and harmful delay between the issuance of the initial, incomplete notice to appear and the subsequent notice providing date-and-time information. The delay can be months or even years long. Worse still, in some instances, the incomplete notices to appear are never filed with the immigration court at all. Noncitizens who experience long delays between the

issuance of the notices are more likely to miss their hearings, be detained for inordinate periods of time, or find themselves in an unsettling state of limbo.

For example, another attorney's client was issued a notice to appear for a hearing at the Chicago Immigration Court at 8:00 a.m. on July 23, 2019. The client's attorney suspected that the notice to appear contained a fake date and time because hearings at the Chicago Immigration Court do not begin until 9:00 a.m. When the attorney and client appeared at the courthouse on the provided hearing date, they were notified that "the date was not real" and that a different hearing notice would be sent. One year later, the client still has not received a new notice to appear. The client has been in great emotional distress over the uncertainty of when she will be reissued a notice to appear and possibly be removed from the United States.

Two other clients—a husband and wife—received notices to appear with a court date of August 14, 2019, at 1:00 p.m. When the attorney arrived at court with the clients, they were not on a master docket and were informed by the court that the case was not yet in the system. Nearly one year later, the clients received new notices. Their uncertain status has caused them significant distress—especially the husband, who is in the early stages of dementia.

Additionally, when proceedings are significantly delayed, noncitizen children who are qualifying relatives for cancellation of removal can age out because they have turned 21, losing their eligibility for relief. *See Matter of Isidro*, 25 I&N Dec. 829 (BIA 2012).

Yet another harmful consequence of the two-step notice practice is an increase in the risk of *in absentia* removal of noncitizens. The ability of noncitizens to attend hearings and avoid *in absentia* removal is directly dependent on the reliable delivery of time-and-place information. But the two-step notice process increases the likelihood that noncitizens will not receive sufficient notice at all, undermining the INA's clear mandate that such notice is required before cutting off an individual's accrual of time for cancellation of removal relief, and resulting in the harshest consequence of lack of notice: an *in absentia* removal order.

In recognizing that "the opportunity to be heard" is a "fundamental requisite of due process of law," this Court found that the "right to be heard has little reality or worth unless one is informed that the matter is pending and ***can choose for himself whether to appear or default***, acquiesce or contest." *Mullane*, 339 U.S at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)) (emphasis added). In many cases, noncitizens received *in absentia* orders because they never received a subsequent hearing notice or their hearing notice contained incorrect hearing information—an inherent byproduct of the two-step notice process. *See* Asylum Seeker Advocacy Project & Catholic Legal Immigration Network Inc., *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum* 16.

Consider Adriana, who managed to receive a subsequent hearing notice on time (after receiving an incomplete notice to appear)—but whose notice provided the wrong hearing date, causing her to miss her hearing. Adriana received the later-issued hearing notice on June 10, 2015 listing a July 2016 hearing

date. When she scheduled a consultation with an attorney in January 2016, six months before her presumed hearing date, Adriana was informed by the attorney that the notice she received included an incorrect date and that her hearing had already been held in August 2015. Because Adriana did not attend her hearing, an *in absentia* removal order was entered against her.

Paula, a Guatemalan citizen, received an initial notice to appear with no time-and-place information, but then received a notice of hearing at her mailing address ***too late***. After checking her mail on a regular basis for months, Paula received two pieces of mail in one day—a notice for an immigration hearing with a date that had already passed, and an *in absentia* removal order. Paula's story underscores the disfunction of a two-step notice practice, which divorces the notice to appear from the critical time-and-place information a noncitizen needs to actually learn of—and appear at—their removal proceedings.

Sofia's story also highlights the fundamental fairness concerns that arise under the government's two-step notice process. Sofia provided ICE with her mailing address after receiving a placeholder notice to appear without time-and-place information. But Sofia never received any subsequent hearing notices at the address she provided. When Sofia checked in with ICE, she discovered that she had missed her hearing and an immigration judge had ordered her removal *in absentia*. The failure to include time-and-place information on the initial notice to appear unnecessarily elevates the risk that the later-sent notice of hearing will never be received, particularly where a long span of time separates the two documents.

Ultimately, the government's two-step notice practice is deeply flawed and creates endemic issues of unfairness, lack of notice, and denial of process. And it is directly at odds with Congress's overarching intent in simplifying an arcane and complex notice process. The government's atextual approach does nothing to serve Congressional intent, but instead subverts it, threatening core legal values in the process. By flatly refusing to comply with Congress's mandate, the government reintroduces complexity and confusion into removal proceedings—with harmful results for noncitizens and the courts. In the context of cancellation of removal, that unfairness is particularly acute. The system penalizes deserving immigrants for ***the government's delay in scheduling removal proceedings*** and its own failure to provide the unified, adequate notice required by the statute—and it does so by stopping the accrual of their time of physical presence or continuous residence based on inadequate notice. The consequence is in complete disregard for Congress's clear directive. If the government were to follow the plain command of the statute, that in and of itself would expedite the removal process while also ensuring fundamental fairness and notice for noncitizens.

CONCLUSION

For the foregoing reasons, and those stated in Petitioner's Brief, *Amici* respectfully urge this Court to reverse the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

Appendix

List of *Amici*

American Immigration Council ("the Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the due process rights of noncitizens and the interpretation of the Immigration and Nationality Act.

American Immigration Lawyers Association ("AILA") is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the United States District Courts, Courts of Appeals, and this Court.

Americans for Immigrant Justice ("AI Justice") is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since its founding in 1996, AI Justice has served over 140,000 immigrants from all over the world. AI Justice clients include unaccompanied immigrant children; survivors of domestic violence, sexual assault, and human trafficking and their children; immigrants who are detained and facing removal proceedings; as well as immigrants seeking assistance with legal permanent residence, asylum and citizenship. In Florida and on the national level, AI Justice champions the rights of immigrants; serves as a watchdog on immigration detention practices and policies; and speaks for immigrant groups that have particular and compelling claims to justice. AI Justice's extensive experience with clients who it directly represents in immigration matters would be instructive to the Court's consideration of this significant issue.

Asylum Seeker Advocacy Project (ASAP) sees a future where the United States welcomes individuals who come to our borders fleeing violence. ASAP has worked with asylum seekers in over 40 states to achieve this vision. ASAP provides its membership with online community support and emergency legal aid, and provides technical assistance to attorneys representing asylum seekers across the country.

Capital Area Immigrant's Rights Coalition (CAIR Coalition) is the only nonprofit, legal services organization dedicated to providing legal services to immigrant adults and children detained and facing removal proceedings throughout Virginia and

Maryland. CAIR Coalition strives to ensure equal justice for all immigrants at risk of detention and deportation in the Fourth Circuit and beyond through know your rights presentations, pro se assistance, direct legal representation, impact and advocacy work, and the training of attorneys representing immigrants. CAIR Coalition also secures pro bono legal counsel and provides in-house pro bono representation for detained adults and children. CAIR Coalition has a strong interest in ensuring that immigrants, especially those without counsel, receive adequate and proper notice.

Florence Immigrant and Refugee Rights Project Lawyers for Civil Rights ("Florence Project") provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. The Florence Project believes that all people facing deportation should have access to counsel, understand their rights under the law, and be treated fairly and humanely. Annually, the Florence Projects provides free legal and social services to over 10,000 non-citizens facing removal in Arizona. The Florence Project is one of a network of organizations across the country providing free legal information to detained men and women and unaccompanied minors in removal proceedings who do not have attorneys, many of whom may be eligible for cancellation of removal.

National Immigration Project of the National Lawyers Guild (NIP-NLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair

administration of the immigration and nationality laws. It has a direct interest in assuring that the rules governing removal proceedings comport with due process.

Northwest Immigrant Rights Project (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings.

Lawyers for Civil Rights (LCR) is a non-profit, non-partisan organization that fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. LCR handles major law reform cases as well as legal actions on behalf of individuals. LCR has a long history of advocating on behalf of immigrant communities, and is particularly concerned with ensuring due process rights are upheld for noncitizens. LCR has expertise in advocating for immigrants' rights and has close contact with client communities who will be deeply affected by a decision in the instant case.

The Refugee and Immigrant Center for Education and Legal Services (RAICES) is a BIA-recognized, non-profit, legal services agency with eleven offices throughout Texas. RAICES envisions a compassionate society where all people have the right to migrate and human rights are guaranteed.

RAICES defends the rights of immigrants and refugees, empowers individuals, families, and communities, and advocates for liberty and justice. In 2019, RAICES closed nearly 29,000 cases. RAICES regularly challenges faulty Notices to Appear in relevant cases before immigration courts in Texas and the outcome of this case will have a significant impact on our clients and the communities that we serve.