Nos. 22-674, 22-884

In the Supreme Court of the United States

MORIS ESMELIS CAMPOS-CHAVES,
Petitioner,
v.
MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,
v.
VARINDER SINGH,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Ninth Circuits

BRIEF OF *AMICUS CURIAE* THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF THE ATTORNEY GENERAL

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INTEREST OF *AMICUS CURIAE*[1]

IRLI is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed amicus curiae briefs in a wide variety of cases, including: *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022), *petition for cert. filed,* No. 22-1071 (S. Ct. May 1, 2023); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") requires that aliens be provided written notice of their removal hearings, known as a notice to appear ("NTA"). An NTA must contain certain information, including the date and time of the alien's upcoming hearing and the consequences for failing to attend such hearing. Aliens who are properly notified and fail to attend their removal hearing are required to be ordered removed *in absentia*. An alien may file a motion to reopen his case and have the *in absentia* order rescinded if he can establish either that his failure to appear was due to exceptional circumstances or that he did not receive written notice of the hearing.

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[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting this brief.

This is not the first time this Court has addressed questions regarding the sufficiency of an NTA. The issues in the current case stem from *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Prior to those cases, it was a common practice of the Department of Homeland Security ("DHS") to provide the statutorily required written notice in multiple documents—an initial notice to appear with the time and date listed as "TBD" ("to be determined") and a subsequent notice of hearing ("NOH") changing the TBD to the hearing date and time. Together, *Pereira* and *Niz-Chavez* require that, for the stop-time rule to be triggered (ending the alien's accrual of continuous physical presence for cancellation of removal purposes) DHS must provide all of the statutorily required information to the alien in a single-document notice to appear.

Neither *Pereira* nor *Niz-Chavez* addressed the sufficiency of written notice in the context of the *in absentia* rescission statute. The case currently before this Court reflects a split between the circuit courts regarding written notice and the single-document rule in the context of *in absentia* orders of removal. Under the Ninth Circuit's erroneous application of *Pereira* and *Niz-Chavez*, aliens who not only received notice but, in some cases, even attended at least one hearing before failing to attend subsequent proceedings can have their removal orders rescinded if they did not receive a single-document NTA. This interpretation of the statute would lead to potential reopening and rescission of tens of thousands of *in absentia* removal orders. The Fifth Circuit, which aligns with the Sixth and Eleventh Circuits, held that an NOH is valid

written notice under the second paragraph of the *in absentia* removal provision where it changes a hearing time from TBD to a specific date and time.

This Court should resolve the split in favor of the Fifth Circuit's interpretation. Statutory NTA requirements are best read as non-jurisdictional claim-processing rules, and the *in absentia* removal provision, by its plain terms, puts the burden on an alien to show that he did not receive time and place information in either an NTA *or* an NOH.

ARGUMENT

I. A NONCOMPLIANT NOTICE TO APPEAR DOES NOT INVALIDATE A SUBSEQUENT NOTICE OF HEARING NOR DOES IT REQUIRE RESCISSION OF AN *IN ABSENTIA* ORDER OF REMOVAL.

The INA provides that removal proceedings are initiated when an alien is served an NTA. 8 U.S.C. § 1229. The NTA must contain certain information, including the reasons the alien is inadmissible, the time and place of the pending removal proceeding, and the consequences, under section 240(b)(5) of the INA, of failing to appear at that proceeding. 8 U.S.C. § 1229(a)(1). Written notice is also required "in the case of any change or postponement in the time and place of [the] proceedings." 8 U.S.C. § 1229(a)(2)(A) ("notice of hearing" or "NOH"). Like the NTA, the NOH must explain that failing to appear at such proceedings triggers the consequences of section 240(b)(5). Absent exceptional circumstances, aliens who receive either an NTA or an NOH and fail to appear at their removal

proceedings "shall be removed in absentia." 8 U.S.C. § 1229a(b)(5)(A).

Rescission of an *in absentia* order of removal is only permitted (1) in "exceptional circumstances," or (2) if "the alien did not receive notice in accordance with paragraph (1) or (2) of section 239(a)[.]" 8 U.S.C. § 1229a(b)(5)(C). This provision states that "[t]he written notice . . . shall be considered sufficient for purposes of [8 U.S.C. § 1229a(b)(5)(A)] if provided at the most recent address provided under [8 U.S.C. § 1229(a)(1)(F)]." *Id*. The proper interpretation of the statute requires finding that failure to receive a single-document NTA does not invalidate properly served NOHs.

According to the relevant regulations, "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]. The charging document must include a certificate showing service on the opposing party . . . which indicates the Immigration Court in which the charging document is filed." 8 C.F.R. § 1003.14(a). This charging document is often the §1229(a) NTA. As with the INA, the implementing regulations explicitly address the contents of an NTA. Importantly, the regulations recognize that time and place information may not have been provided initially and instruct DHS how to remedy this situation:

> [DHS] shall provide in the Notice to Appear, the time, place[,] and date of the initial removal hearing, *where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for*

> *scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing.* In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences . . . of failing, except under exceptional circumstances . . . to attend such proceeding.

8 C.F.R. § 1003.18(b) (emphasis added). Because DHS is clearly permitted to cure an allegedly noncompliant NTA by issuing an NOH, an alien who receives such noncompliant NTA followed by a subsequent NOH has received written notification of his hearing under 8 U.S.C. § 1229(a)(2).

Both the Board of Immigration Appeals and federal courts have recognized that the implementing regulations work in conjunction with "section 239(a)(1) [8 U.S.C. § 1229(a)(1), which] sets forth a *non-mandatory* claim-processing rule that allows for flexible enforcement." *Matter of Fernandes*, 28 I.&N. Dec. 605, 619 (BIA 2022) (Grant, AIJ, dissenting) (emphasis original). *See also United States v. Gayatn-Reyes*, No. 22-11891, 2023 U.S. App. LEXIS 3501, at *4 (11th Cir. Feb. 14, 2023) ("After *Niz-Chavez*, we reiterated that the NTA requirements in 8 U.S.C. § 1229(a) are not jurisdictional and, instead, 'set[] forth only a claim-processing rule.'") (quoting *Farah v. United States AG*, 12 F.4th 1312, 1322 (11th Cir. 2021)). As AIJ Grant explained in his *Fernandes* dissent:

> The specific claim-processing rule at issue in this case is properly viewed as an instantiation of fundamental due process—the right to know when and where one's hearing shall take place. In every other context involving a claim of violation of due process, the Board, with the approbation of the Federal courts, requires a showing of prejudice. By setting aside this requirement, the majority opens up a potential hornets' nest of due process and claim-processing litigation in circumstances where parties have suffered no prejudice.

Id. at 617 (Grant, AIJ, dissenting) (internal citations omitted). Accordingly, neither the INA nor the regulations should be interpreted to require rescission of an *in absentia* order of removal where the alien was not prejudiced and received a statutorily compliant NOH.

Justice Kavanaugh, dissenting in *Niz-Chavez*, explained that "a notice to appear is akin to a charging document *plus* a calendaring document." *Niz-Chavez*, 141 S. Ct. at 1492 (Kavanaugh, J., dissenting) (emphasis original). On one hand, it is like an "indictment [which] generally provides charging information[,]" and on the other it "tell[s] a noncitizen when and where to appear." *Id*. An alien who receives an NTA without time and place information thus has the benefit of knowing the charges against him and being able to prepare his defense, even if the time and date of his hearing have not yet been provided. *See Chavez-Chilel v. AG United States*, 20 F.4th 138, 144 (3d Cir. 2021) ("The purpose of an NTA is to notify a

noncitizen that she is removable and provide the basis for that allegation."). There is no prejudice to the alien because her "opportunity to contest the charge against her, present evidence, and receive CAT relief," *id*., is not impacted by missing time and date information. Accordingly, such "harmless error" does not equate to an alien's not receiving any written notice of his removal hearing and is not grounds for rescission of an *in absentia* order of removal. *Id*. *See also Matter of Fernandes*, 28 I.&N. Dec. at 614 ("A noncompliant notice to appear is not equivalent to a lack of a notice to appear altogether.").

Thus, although an immigration judge can neither "ignore [n]or overlook" the procedural error, he is not required to "treat the notice to appear as never having been served or filed." *Matter of Fernandes*, 28 I&N Dec. at 614 (citations omitted). Accordingly, numerous circuit courts have rejected the application of *Niz-Chavez's* single-document rule to the jurisdiction of the immigration court. *See, e.g., United States v. Bastide-Hernandez*, 39 F.4th 1187, 1191 (9th Cir. 2022) ("We join the emerging consensus of our sister circuits in holding that it does not [implicate jurisdiction]. Section 1003.14(a) is a claim-processing rule not implicating the court's adjudicatory authority, and we read its reference to 'jurisdiction' in a purely colloquial sense."); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1017 (10th Cir. 2019) ("Section 1229(a) does not refer to 'jurisdiction' or 'the courts' statutory or constitutional *power* to adjudicate the case.' Thus, § 1229(a) is non-jurisdictional.") (emphasis original); *Pierre-Paul v. Barr*, 930 F.3d 684, 691 (5th Cir. 2019), *abrogated in part on other grounds by Niz-Chavez v. Garland*, 141

S. Ct. 1474 (2021) ("Even if Pierre-Paul's notice to appear were defective, and even if that defect could not be cured, 8 C.F.R. § 1003.14 is not jurisdictional but is a claim-processing rule."). Courts have also permitted DHS to cure defective service of an NTA. *See B.R. v. Garland*, 26 F.4th 827, 838 (9th Cir. 2022) ("holding that DHS may cure defective service to avoid violating § 1229 and related regulations"). As the Ninth Circuit explained:

> We see no reason to burden the government's efforts in enforcing immigration laws by judicially mandating service of charging documents on all aliens be perfect on the very first attempt absent statutory or regulatory language so requiring. As written, the function of the service requirement is to provide notice to the alien of his removal proceedings, not to delay interminably proceedings with unnecessary, do-or-die procedural hurdles. The service requirement performs that function so long as the government properly served notice on the alien before a hearing on substantive matters, regardless whether service occurs on the first attempt or by subsequent cure.

Id.

Indeed, "the immigration courts' adjudicatory authority over removal proceedings comes not from the agency regulation codified at 8 C.F.R. § 1003.14(a), but from Congress. It is the INA that 'explicitly and directly grants that authority[.]' [*United States v.*] *Arroyo*, 356 F. Supp. 3d [619, 624 (W.D. Tex. 2018)]." *United States v. Cortez*, 930 F.3d 350, 360 (4th Cir.

2019). Thus, "'[t]hat statutory grant of authority is the immigration judges' subject matter jurisdiction, and it preexisted'—by decades—§ 1003.14(a)'s reference to the vesting of jurisdiction in immigration court.'" *Id*. It follows that "nothing about that broad and mandatory grant of adjudicatory authority is made contingent on compliance with rules governing notices to appear, whether statutory or regulatory." *Id*. (citations omitted). Therefore, rescission is not appropriate in the case of an alien who receives a statutorily compliant NOH and fails to appear.

II. THE RESCISSION STATUTE CONTEMPLATES TWO TYPES OF WRITTEN NOTICE AND THE RECEIPT OF EITHER PRECLUDES AN *IN ABSENTIA* ORDER FROM BEING RESCINDED.

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute. It is well established that, when the statutory language is plain, we must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118, 129 S. Ct. 681, 685 (2009). *See also Ardestani v. INS*, 502 U.S. 129, 135 (1991). ("The starting point in statutory interpretation is the language [of the statute] itself.") (alteration original) (internal quotation marks and citation omitted). Accordingly, courts are bound to apply a statute's plain meaning when it is clearly discernible. *Pereira v. Sessions*, 138 S. Ct. 2105, 2119-20 (2018) ("At the end of the day, given the clarity of the plain language, we apply the statute as it is written.") (internal quotation marks and citation omitted). Where, as here, Congress's meaning is

explicit in the statutory language, that meaning must be given its full effect.

The *in absentia* rescission provision explicitly contemplates two types of written notice—an NTA and an NOH. 8 U.S.C. § 1229a(b)(5)(C). *Santos-Santos v. Barr*, 917 F.3d 486, 492 (6th Cir. 2019) ("As noted in § 1229(a), there are two different types of written notices."). Paragraph (1) of section 1229(a) "defines the 'notice to appear' and requires the government to specify seven enumerated categories of information including the 'time and place at which the proceedings will be held' in that Notice to Appear." *Singh v. Garland*, 24 F.4th 1315, 1317 (9th Cir. 2022) (citing 8 U.S.C. § 1229(a)(1)). Paragraph (2) contemplates the second type of notice, the NOH, and provides that "'in the case of any change or postponement in the time and place of such proceedings . . . a written notice shall be given in person to the alien . . . specifying [] the new time or place of the proceedings' and describ[ing] the consequences of failing to appear. [8 U.S.C.] § 1229(a)(2)(A)." *Id.* at 1318. Thus, "an alien who seeks to rescind the *in absentia* removal order, bears the burden to prove that there was no notice under *either* paragraph (1) or paragraph (2) of section 1229(a)." *Santos-Santos*, 917 F.3d at 492. (emphasis added). Accordingly, a deficient NTA does not negate the valid service of subsequent compliant NOHs.

Both the Ninth and Fifth Circuits have applied *Niz-Chavez*'s single-document holding for the stop-time rule to the INA's *in absentia* provision because "in *Niz-Chavez*, the Supreme Court conducted a statutory analysis of § 1229(a) separate from its analysis of the

stop-time rule." *Singh v. Garland*, 24 F.4th 1315, 1318 (9th Cir. 2022)) (citing *Niz-Chavez*, 141 S. Ct. at 1480-82). *See also Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021) ("Both the rescission of an *in absentia* order provision and the stop-time rule provision specifically reference the [8 U.S.C.] § 1229(a) notice requirements. The Court's separate interpretation of the [8 U.S.C.] § 1229(a) notice requirements *in Niz-Chavez* thus applies in the *in absentia* context."). Although *Niz-Chavez* requires a single-document NTA under § 1229(a)(1), a deficient NTA does not preclude a subsequent NOH from providing adequate notice.

Under the Ninth Circuit's erroneous application of *Niz-Chavez*, failure to receive a compliant NTA under paragraph (1) of the *in absentia* rescission statute makes the NOH under paragraph (2) invalid. This error "seriously misconstrues the text of the Immigration and Nationality Act" and allows for an "*in absentia* removal order [to be] set aside based on irrelevant errors in paperwork at the outset of the removal process." *Singh v. Garland*, 51 F.4th 371, 371-72 (9th Cir. 2022) (Collins, C.J., dissenting from denial of reh'g en banc). The result of "[t]he panel's erroneous decision" is to "cast doubt on the validity of potentially tens of thousands of *in absentia* removal orders that have been issued in this circuit over the last two decades." *Id.*

The dissenting judges on the Ninth Circuit panel analyzed the language of the rescission statute and explained that "the reference is obviously to the *particular* notice, either an NTA (which is a notice 'under paragraph (1)') or an NOH (which is a notice

'under paragraph . . . (2)') that notified the alien of the *particular* hearing that the alien missed." *Id.* at 377 (emphasis and alteration original). It follows that "where . . . the alien failed to attend a hearing that was the subject of a properly served NOH that correctly stated the date, time, and place of that hearing, it is irrelevant whether the earlier NTA did or did not provide such information." *Id.*

The Fifth Circuit's analysis in *Rodriguez v. Garland* reflects a similar interpretation of the *in absentia* statute. There, the court explained that the alien did not receive written notice under paragraph (1) or (2) because his NTA lacked time and place information and it was not cured by sending an NOH, and because the subsequent NOH was not received by the alien. *Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021). *Rodriguez* reflects the correct interpretation of the *in absentia* rescission statute, *viz.*, that there are in fact two separate notices, and an alien must show he did not receive either in order to be eligible for rescission. As the Fifth Circuit below explained, "[i]f an alien forfeits his right to a *Rodriguez* remand by not giving the Government a good address, then *a fortiori* the alien forfeits his right to a *Rodriguez* remand when he in fact receives the NOH (or does not dispute receiving it)." *Campos-Chaves v. Garland*, 43 F.4th 447, 448 (5th Cir. 2022).

Other circuit courts have followed similar reasoning in finding that there are two types of notice under the *in absentia* rescission statute. In *Santos-Santos v. Barr*, the Sixth Circuit denied the motion for rescission because the alien did not meet his "burden to prove

there was no notice under *either* paragraph (1) *or* paragraph (2) of section 1229(a)." 917 F.3d 486, 492 (6th Cir. 2019) (emphasis added). Although the court agreed with Santos-Santos that he had not received notice under paragraph (1) because his NTA was missing time and place information, it explained that "Santos-Santos must also show that he did not receive notice in accordance with paragraph (2) of [8 U.S.C.] § 1229(a)." *Id.* The court rejected his motion for rescission, explaining that "[b]ecause Santos-Santos's Notice of Hearing [] meets the requirements of paragraph (2), Santos-Santos must rebut the presumption" that he received the NOH "by showing that he did not actually receive this notice, as the notice was purportedly mailed to his listed address." *Id.*

As the Eleventh Circuit explained, "by picking 'or,' Congress did not treat these notices as a complete set, where each needed to be received to support an *in absentia* removal order." *Dacostagomez-Aguilar v. United States AG*, 40 F.4th 1312, 1316 (11th Cir. 2022) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 120 (2012)). The panel recognized that use of "or" means that

> the government must show that one notice or the other was provided—not both—to support an *in absentia* removal order. From there, it follows that an alien need receive only one form of notice to justify maintaining the *in absentia* removal order. It would be nonsensical to invalidate an *in absentia* removal order because two kinds of notice were not received when only one was required in the first place.

Id. at 1316-17 (emphasis added). Accordingly, "[w]e . . . know that one notice can be enough for *in absentia* removal." *Id.* at 1317.

This interpretation is supported by Justice Gorsuch's analysis of the NTA statute in *Niz-Chavez*. Like these circuit courts, Justice Gorsuch recognized the importance of grammar and usage in statutory interpretation. *Niz-Chavez*, 141 S. Ct. at 1481. As he explained, "indefinite articles . . . precede *countable* nouns." *Id.* (emphasis original). Therefore, much like its decision to refer to "the" notice under paragraph (1) "or" (2) for rescission of an *in absentia* removal order, "Congress's decision to use the indefinite article "a"" in the notice to appear context "supplies some evidence that it used that term . . . as a discrete, countable thing." *Id.*

This interpretation also follows prior cases in which this court has interpreted Congress's use of "the" in other statutes. For example, in *Nielsen v. Preap*, Justice Alito explained that

> grammar and usage establish that "the" is "a function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context." Merriam-Webster's Collegiate Dictionary 1294 (11th ed. 2005). *See also Work v. United States ex rel. McAlester-Edwards Co.*, 262 U. S. 200, 208, 43 S. Ct. 580, 67 L. Ed. 949 (1923) (Congress's "use of the definite article [in a reference to "the appraisement"] means an appraisement specifically provided for"). For "the alien"—in the clause "when the alien is released"—to have

> been previously specified, its scope must have been settled by the time the "when . . . released" clause appears at the tail end of paragraph (1).

Nielsen v. Preap, 139 S. Ct. 954, 965 (2019). *See also Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."); *Slack Techs., LLC v. Pirani*, 143 S. Ct. 1433, 1440 (2023) ("For one thing, the statute imposes liability for false statements or misleading omissions in *the* registration statement. Not just a registration statement or any registration statement. The statute uses the definite article to reference the particular registration statement alleged to be misleading, and in this way seems to suggest the plaintiff must acquir[e] such security under that [particular] document's terms.") (internal quotation marks and citations omitted); *Percoco v. United States*, 143 S. Ct. 1130, 1136-37 (2023) ("Noting §1346's use of [t]he definite article 'the' in the phrase '*the* intangible right of honest services,' we held that §1346 covers the core of pre-*McNally* honest-services case law and did not apply to *all* intangible rights of honest services whatever they might be thought to be.").

Therefore, this Court should apply the interpretation of the Fifth Circuit below and hold that an alien who is properly served an NOH under paragraph (2) of section 1229(a) and fails to attend that hearing may not have his *in absentia* removal order rescinded for failure to receive written notice.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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