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 FORTY-TWO FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER CAMPOS-CHAVES AND RESPONDENT SINGH

RICHARD W. MARK
Counsel of Record
TIMOTHY SUN
ANN C. MOTTO
ADRIENNE LIU
ERIC M. HORNBECK
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000
rmark@gibsondunn.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are forty-two 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

In *Pereira v. Sessions*, this Court described in absentia removal as a "severe" penalty. 138 S. Ct. 2105, 2111 (2018). Not only is removal in absentia life-altering to the noncitizen because of the removal itself, such an order also bars a noncitizen from seeking certain types of immigration relief for a period of ten years. Given the significant consequences associated with an in absentia removal order, Congress spelled out certain minimum procedural predicates that must be satisfied before such an order can issue. Specifically, Congress provided that removal in absentia could only be ordered if the government has provided written notice with content that would be familiar to any law student in a first-year civil procedure class.

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[1] *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.

As to the notice to appear—the first document a noncitizen charged with being removable must receive—the required content must provide the noncitizen with the time and place of the hearing, and the charges made, in a single document. 8 U.S.C. § 1229(a). Congress did not give the executive discretion or authority over what would constitute sufficient notice: the statute spells out the required form and substance. This Court's decisions in *Pereira* and *Niz-Chavez v. Garland* confirm that point. *See Pereira*, 138 S. Ct. at 2113–14 (finding that "[a] putative notice to appear that fails to designate the specific time or place of a noncitizen's removal proceedings is not a 'notice to appear under section 1229(a)'"); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (finding that "'a' notice [under section 1229(a)] would seem to suggest just that: 'a' single document containing the required information, not a mishmash of pieces with some assembly required.").

Because a noncitizen is necessarily absent when an in absentia order is entered, Congress adopted a corollary provision, 8 U.S.C. § 1229a(b)(5)(C)(ii), which allows noncitizens to move to reopen such an order if they did not receive notice of the hearing in accordance with section 1229(a). Yet, in the government's view, a noncitizen is not entitled to have an in absentia order rescinded if she only received a "TBD" notice to appear (i.e., one failing to give information as to when, and in many cases even where, she should appear), so long as some subsequent notice of hearing with that information is later sent to her last known address.

The government's position distorts the plain language of section 1229a(b)(5)(C)(ii) and conflicts with the Court's prior interpretations of section 1229(a).

Not only that, the government's reading of section 1229a(b)(5)(C)(ii) takes no account of the reality that procedural and bureaucratic errors inherent to a "notice-by-installment" process can, and often do, preclude many noncitizens from receiving their notices of hearing. "Notice-by-installment" can send over-burdened immigration courts on a procedural detour from the merits to comb through numerous documents and conduct additional fact-finding to determine if the noncitizen did or did not "receive notice in accordance with" section 1229(a). This Court should affirm the Ninth Circuit and reverse the Fifth Circuit to ensure that noncitizens are not removed in absentia based on a confusing and burdensome process that is not what Congress wrote into law or even contemplated.

I. This Court has twice confirmed that the plain text of section 1229(a) means what it says with respect to the information that must be included in a valid notice to appear. In *Pereira*, the Court held that a notice to appear that lacked information about the time and place of the hearing where the noncitizen was supposed to appear was patently deficient, and thus could not trigger the stop-time rule in the cancellation of removal context. 138 S. Ct. at 2110. Just three years later in *Niz-Chavez*, the Court rejected the government's contention that it could deliver this critical time-and-place and other statutorily-required information over a series of documents, rather than in the single initial notice as stated in section 1229(a). 141 S. Ct. at 1485–86. The answer to the question presented in this case—whether the government can nevertheless follow this "notice-by-installment" approach to satisfy section 1229(a)'s requirements for purposes of removing noncitizens in absentia and precluding their ability to challenge that removal order—follows ineluctably from these precedents. And the answer,

once again, should be that a notice to appear must provide the noncitizen with the time and place of the hearing. Anything short of that does not comply with the statute.

II. The government relies on a faulty factual assumption to argue that section 1229a(b)(5)(C)(ii) precludes a noncitizen from moving to reopen an in absentia order where the initial notice to appear she was served was irrefutably deficient under section 1229(a)(1), so long as a later notice with the time and place of the hearing was eventually mailed to the noncitizen's last known address. The government's argument assumes that issuing a notice of hearing to a noncitizen's last known address renders her attendance at that hearing entirely within her control, notwithstanding the initial, deficient notice to appear. That is incorrect.

As the undersigned former immigration judges readily attest, a notice to appear that lacks the required time-and-place information creates a host of problems that increase the risk that noncitizens never actually receive accurate information about their hearings at all.

For starters, the administrative process to docket cases makes it impossible for some noncitizens to change their addresses to receive notice. The temporal gap between serving a noncitizen with an initial notice to appear and finally docketing the case to obtain the actual hearing date may leave the noncitizen's case in an administrative limbo for months or even years, during which time critical case documents cannot be properly recorded. That critical material includes information like notices of address changes. For those noncitizens whose notices to appear did not even identify the court where their hearing would

eventually be scheduled, there are virtually no means of ensuring a later notice of hearing can be delivered. Unsurprisingly, these bureaucratic hurdles exacerbate the negative impact on noncitizens served notices to appear at the border, as well as those noncitizens who are unable to remain in the United States while waiting for their hearing date (i.e., those with generally the least stable residences). The contact address supplied at entry or at another initial encounter frequently changes. But if a later-submitted change of address form is not associated with the immigration court's "Record of Proceeding" for the noncitizen, a notice of hearing providing the first notice for the actual time, place, and location of the hearing will not get to the noncitizen.[3]

Other administrative and bureaucratic errors can result in misdirecting later-mailed notices of hearing, including errors in the transcription of a noncitizen's address—particularly at the border with language barriers and incredible volume. Put simply, an initial notice to appear that omits telling the noncitizen where and when she can be heard does not comply with the statute and frequently denies a noncitizen notice of her hearing altogether. Because the government's inaccurate assumption as to its own record-keeping does not align with the real world, its statutory interpretation premised on that assumption is also wrong.

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[3] A "Record of Proceeding" ("ROP") is the case file containing all case-related information. *Uniform Docketing System Manual*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE, at Intro-6, II-1 (Rev. Sept. 2018), https://www.justice.gov/eoir/file/1153561/download ("Docketing Manual"). It is created after the initiating document is filed. *Id.*

III. Adopting the noncitizens' proffered reading of section 1229a(b)(5)(C)(ii) would avoid inconsistency and confusion within the immigration court system.

First, the noncitizens' reading ensures that the definition of section 1229(a)'s "notice to appear" has a consistent meaning throughout the statutory scheme. Under the government's reading, the term would hold one meaning in the context of the stop-time rule of section 1229b(d)(1) and something different in the context of the in absentia provision of section 1229a(b)(5)(C)(ii). That is untenable and illogical.

Second, a bright-line rule that a notice to appear lacking time-and-place information does not constitute "written notice required under paragraph (1) or (2) of section 1229(a)" is necessary to avoid burdening immigration courts with determining, in the context of a motion to reopen, whether a noncitizen received a later-generated notice of hearing. An investigation into whether a subsequent notice of hearing was delivered to an incorrect address, for example, would needlessly saddle already-overburdened immigration courts with further fact-finding. Additionally, a bright-line rule precludes incentivizing immigration courts keen on clearing their dockets to push through in absentia hearings.

Third, the immigration judge's ability to meaningfully and accurately determine whether the noncitizen actually received notice of the hearing is hamstrung by the government's convoluted process. The Department of Homeland Security ("DHS") creates and maintains an "A File" (short for "Alien File") for each noncitizen—a file that purportedly contains all records of a noncitizen as they pass through the

United States immigration process.[4] As a rich source of biographical, personal and other information about the noncitizen,[5] the A File often contains information that would demonstrate that the initial notice to appear was defective, such as other paperwork showing that the noncitizen's address was incorrectly copied onto the notice to appear by the border officer. However, because the government's own trial attorneys are often not given the noncitizen's A File prior to the initial master calendar hearing, they have no means to bring such facts to the immigration court's attention.

IV. The government offers a number of policy justifications for its proposed reading of the statute; namely, that any alternative reading would (1) result in an influx of motions to reopen and (2) leave the government with no viable path to compliance. Both arguments are wrong.

Critically, Congress expressly provided that noncitizens could move to reopen an in absentia order "at any time." Any temporary influx in motions to reopen is the product of the government's apparent policy of not implementing the statute and this Court's prior decisions explaining the law. Noncitizens should hardly see their statutory rights curbed as a result. Moreover, this hypothetical influx assumes that individuals with an in absentia order are both

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[4] National Archives, Alien Files (A-Files) for Genealogical Research, *available at* https://www.archives.gov/files/dc-metro/know-your-records/genealogy-fair/2012/handouts/alien-files.pdf.

[5] National Archives, Alien Files (A Files), *available at* https://www.archives.gov/research/immigration/aliens#:~:text=A%20rich%20source%20of%20biographical,National%20Archives%20at%20Kansas%20City.

(1) aware of the existence of the order and (2) have the means and ability to file a motion to reopen.

Nor is the government without means to rectify the problem it created. As to ongoing proceedings, the government could simply serve a new, compliant notice to appear if a noncitizen with an in absentia order appears in court to reopen on the grounds that the notice was defective. And, going forward, there is no reason why the government cannot issue notices to appear with the time and place of the hearing, as it was once able to routinely do by providing DHS access to the immigration court's calendaring system.

ARGUMENT

I. THE COURT'S PRIOR INTERPRETATIONS OF SECTION 1229(A) CONFIRM THAT TWO-PART NOTICE IS DEFICIENT IN THE IN ABSENTIA CONTEXT.

The question of what constitutes a proper notice to appear under 8 U.S.C. § 1229(a) is not a new question for this Court. The Court has interpreted the same statutory language twice in the last five years: both times it has confirmed that Congress, in enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, plainly required the government to supply noncitizens in removal proceedings "with a ***single*** and reasonably comprehensive statement of the nature of the proceedings against him." *Niz-Chavez*, 141 S. Ct. at 1486 (emphasis added); *accord Pereira*, 138 S. Ct. at 2113–16. Any other result would conflict with the statute's ordinary meaning, structure, and history, and would allow the government to burden noncitizens "unfamiliar with English and the habits of American bureaucracies" with having to keep track of a series of letters over months or

even years just to be able to piece together critical information regarding their removal hearing. *Niz-Chavez*, 141 S. Ct. at 1485. And that assumes that the noncitizen received the subsequent notice of hearing which, as we explain below, frequently does not occur as a result of the government's tortuous process.

The first chapter in this story is *Pereira*. There, this Court considered whether documents designated as "notices to appear" but that failed to include the time and place of the noncitizen's removal hearing could stop the clock on the noncitizen's accrual of continuous presence in the United States in the cancellation of removal context. *Pereira,* 138 S. Ct. at 2113. The statute that set forth the continuous presence requirement, 8 U.S.C. § 1229b, provided that service of a valid notice to appear under section 1229(a) would end any period of continuous presence, i.e., the "stop-time rule." *Id.* at 2114. The Court determined that the "answer [was] as obvious as it seems"—a notice that did not include the statutorily-required time or place of the proceedings *was not a notice to appear* and thus did not trigger the stop-time rule. *Id.* at 2110. The Court also observed that any notice of "change or postponement" of removal proceedings, as permitted by section 1229(a)(2), "presumes" service of a valid notice to appear. *Id.* at 2114. Permitting the government to issue notices missing time-and-place information would not only "confuse and confound" noncitizens, *id.* at 2119, it would also vitiate "an essential function of a notice to appear," *id.* at 2115.

In 2021, the Court was once again asked to construe section 1229(a). In the intervening years, the government failed to implement *Pereira*'s single-document rule and had "chosen instead to continue down the same old path." *Niz-Chavez*, 141 S. Ct. at 1479.

As a result, the government urged the Court in *Niz-Chavez* to allow it to fulfill section 1229(a)'s requirements and trigger the stop-time rule through multiple documents—even if the first notice was indisputably deficient under *Pereira*. The Court rejected the government's "notice-by-installment" theory, reiterating that section 1229(a) plainly requires "'a' single document containing the required information, not a mishmash of pieces with some assembly required." *Id.* at 1480. As in *Pereira*, the Court recognized that the government's proposed interpretation would unfairly saddle noncitizens with having to piece together each "new morsel of vital information" regarding their hearing—an imposition that the clear language of the statute did not contemplate. *Id.* at 1485.

These concerns were echoed by *amici curiae* in *Niz-Chavez*, along with the related burden the government's interpretation would foist on immigration judges to have to engage in lengthy fact-finding wholly collateral to the merits to evaluate the adequacy of any number of follow-on notices. *See generally* Brief of Thirty-Three Former Immigration Judges and Members of the Board of Immigration Appeals as *Amici Curiae* in Support of Petitioner, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (No. 19-863) at 7–23.

Nothing in *Pereira* or *Niz-Chavez* suggests that their respective (and consistent) interpretations of section 1229(a) are tied to circumstances unique to the stop-time provision, section 1229b(d)(1). Indeed, *Pereira* confirmed that section 1229(a) "speak[s] in definitional terms," such that when "written notice" under section 1229(a) is referred to "***elsewhere in the statutory section*** . . . it carries with it the substantive time-and-place criteria required by § 1229(a)." 138 S.

Ct. at 2116 (emphasis added). Just as section 1229b(d)(1) expressly incorporates section 1229(a)'s notice requirements, so too does the in absentia provision, section 1229a(b)(5)(A).

There is no reason, in statute or doctrine, to ascribe, as the government urges, one interpretation to section 1229(a) in the in absentia context and another vis-à-vis the stop-time rule. If anything, the need for the government to deliver statutorily-compliant notice is all the more salient when the possibility of in absentia removal is at stake. Whereas the stop-time rule is a "procedural advantage" for the government, *Niz-Chavez*, 141 S. Ct. at 1486, in absentia removal is a "severe" penalty which further renders noncitizens ineligible for various forms of discretionary relief for ten years absent "exceptional circumstances," *Pereira*, 138 S. Ct. at 2111. The Court's precedents, the plain meaning of section 1229(a), and sound policy therefore collectively compel the same conclusion—a noncitizen who did not receive "a single and reasonably comprehensive statement of the nature of the proceedings against him," *Niz-Chavez*, 141 S. Ct. at 1486, may move to rescind an in absentia removal order for failure to receive proper notice.

II. THE GOVERNMENT MAKES A FAULTY ASSUMPTION ABOUT ITS OWN RECORDKEEPING TO SUPPORT ITS UNDERSTANDING OF SECTION 1229A(B)(5)(C)(II).

Congress provided noncitizens the opportunity to move to reopen an in absentia order "at any time" if they "demonstrate[] that [they] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(C)(ii). The government's position is that a noncitizen who indisputably "did not receive notice in accordance with paragraph

(1)" of section 1229(a) is nevertheless precluded from moving to reopen an in absentia removal order if a notice of hearing with time-and-place information is later issued to the same address. In its view, there can be only ***one*** form of notice (a notice to appear under paragraph (1)) ***or*** a notice of hearing ostensibly under paragraph (2)) that is dispositive to the notice inquiry under section 1229a(b)(5)(C)(ii). Specifically, the government invites the Court to ignore the deficient notice to appear the noncitizen received and conclude that the government's subsequent notice of hearing satisfies the government's notice obligations because that later notice "corresponds with the hearing missed by the noncitizen." Gov't Brief at 40. The government argues that if a noncitizen misses a removal hearing and is ordered removed in absentia after being issued a notice of hearing with the date and time information, that attendance (or nonattendance) was "within their control" and thus section 1229a(b)(5)(C)(ii) does not permit rescission of the order even if her notice to appear was deficient. Gov't Brief at 42.

The government's statutory interpretation is not founded on the text of section 1229a(b)(5)(C)(ii), as explained above. Rather, its strained reading of the statute assumes that a deficient notice to appear is "entirely irrelevant to the noncitizen's failure to attend the hearing at which he was ordered removed in absentia." Gov't Brief at 40. And it is this assumption that allows the government to proclaim that the "speculation that the government will seek to remove noncitizens who have never been informed of the charges against them is baseless." Gov't Brief at 21.

The government's premise—that a deficient notice to appear is wholly irrelevant to a noncitizen's

ability to attend a removal hearing after being issued a notice of hearing with the time and place of the hearing—is wrong. Noncitizens overwhelmingly attend their court appearances. *Most Released Families Attend Immigration Court Hearings*, TRAC Immigration (June 18, 2019), https://trac.syr.edu/immigration/reports/562/.

Additionally, a notice to appear that lacks the required time-and-place information can, and does, create a host of problems that increase the risk that noncitizens never receive accurate information about their hearings.

When a DHS officer gives an initial notice to appear to the noncitizen that lists the date and time of a removal hearing as "TBD" (i.e., without information about the time and/or place of the hearing), nothing further happens until that notice to appear is filed with an immigration court and entered into the court's ROP that the court creates at that time. Only then is a formal record of the case created, only then can a notice of hearing be generated, and only then can information a noncitizen provides to the immigration court after the initial "TBD" notice (e.g., a change in address) be properly associated with the noncitizen's ROP. *See* 8 C.F.R. §§ 1003.14(a), 1003.18(a).[6]

This gap between DHS serving a noncitizen with an initial notice to appear and finally serving—after docketing in the ROP—a notice of the actual hearing

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6 *See* Docketing Manual at Intro-6 ("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 support staff also creates a case file called the Record of Proceeding (ROP).").

date leaves the noncitizen in 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 finally filed with the immigration court. 138 S. Ct. at 2112. *Pereira* was hardly an outlier. Noncitizens can face delays of several years before their case formally exists within the immigration system in light of the extraordinary caseload that immigration courts bear. *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); Immigration Court Backlog, TRAC Immigration (last visited October 23, 2023), https://trac.syr.edu/phptools/immigration/backlog/ (noting 2,620,591 cases pending before immigration courts across the country as of August 2023).

As the undersigned former Immigration Judge Susan Roy noted, after she left the bench, the Newark Immigration Court at one point had several thousand notices to appear that sat, waiting to be processed in an ROP, *for years*. And she understood that this backlog was not unique to the Newark Immigration Court due to understaffing issues. Unless and until the noncitizens' case is docketed in the immigration court's ROP, the immigration court will have no record of DHS's "TBD" notice to appear given to the noncitizen. As former Judge Roy explained, by the time a notice to appear had been docketed in the ROP,

the noncitizen may have moved multiple times, but with no way of updating her change of address.

As former Judge Roy's statements convey, the time a deficient notice to appear spends in "No Man's Land" can, and does, hinder a noncitizen's ability to receive the later-generated notice of hearing. Any attempts to file documents in the case by a noncitizen before the "TBD" notice is docketed will be rejected by the immigration court. This includes "Change of Address" forms as required by 8 C.F.R. § 1003.15(d)(2). If a noncitizen dutifully attempts to notify the court of a recent move (including in situations where the noncitizen is served while detained and subsequently released) while her case is in this limbo, the form simply cannot be processed by court personnel. *See* Schmidt Brief at 3.

Of course, the ability to notify the court of a change in address presumes that the noncitizen was at least told in the notice to appear the court where the proceeding would occur. Many "TBD" notices to appear, however, omit this critical information, making it all but impossible for the noncitizen to obtain information about her hearing and to keep the court apprised of her whereabouts.

As former Judge Schmidt recounted, even when the noncitizen is able to file a notice of a change in address, "documents that were not immediately posted to the ROP were frequently lost and not readily retrievable." *Id.* at 4. As a result, the notice of hearing, when finally generated, can easily be misdirected to an address that once was correct, but is now wrong.

The downstream impact of deficient notices to appear on noncitizens' ability to receive their notice of

hearing is not merely hypothetical. Undersigned former Immigration Judge Carol King recalls how correctly filed "Change of Address" forms and other documents forming part of a noncitizen's case file were not timely or correctly processed because of this "No Man's Land" status. 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.*

The impact of deficient notices to appear is an even graver problem for noncitizens who receive an initial notice to appear at the border. More often than not, they will not know where they will be residing in months' or years' time when the notice of hearing is finally generated. This inability to provide address information significantly increases the chances that noncitizens will not receive their notices of hearing with the actual date and time information. And even for those who are able to provide then-current address information, they might still not receive a notice of hearing through no fault of their own if they move and notify the immigration court while their cases languish in limbo.

Language barriers can further compound these issues. For example, as former Judge King recalls, noncitizens may be served a notice to appear by a border officer with whom they cannot communicate, or may be given a notice to appear not in their native language, potentially preventing them from understanding their obligation to notify the government of a change in address. A noncitizen in either of those situations thus may never receive notice of their hear-

ing. Had the noncitizen received a statutorily compliant notice to appear in the first instance, however, she would have been equipped with the basic information needed to attend her hearing.

For those noncitizens who are unable to remain in the United States while waiting for their hearing date to be set, their chances of receiving a notice of hearing are even more slim. In fact, this was the government's own policy when DHS launched the Migrant Protection Protocols ("MPP") (informally known as the "Remain in Mexico Policy") in 2019. Under MPP, certain asylum seekers entering at the southern border were given notices to appear but 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. Naturally, many of these asylum seekers faced immense challenges finding a permanent address at which they could receive a notice of hearing with the actual time-and-place information of their hearing. It is no surprise, then, that the in absentia rate for asylum seekers under the MPP program significantly exceeds the rate for their non-MPP counterparts. *Explanation of the Decision to Terminate the Migrant Protection Protocols*, Dep't of Homeland Sec., at 18-19 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf (observing that 32 percent of all individuals enrolled in MPP were subject to an in absentia removal order compared to 13 percent of similarly situated individual not enrolled in MPP); Jasmine Aguilera, *The 'Remain in Mexico' Policy Is Officially Over. But Hundreds of Migrants Are Still Stuck in Mexico*, TIME (Aug. 29, 2022),

https://time.com/6208555/remain-in-mexico-mpp-program-unwind/ (noting that of the individuals enrolled in MPP who lost their immigration cases and were ordered removed from the United States, 85 percent of those removal orders were the result of missed court dates).

Changes in address are not the only reason a deficient notice to appear may hinder a noncitizen's ability to learn the time and place of her hearing. Bureaucratic and other mistakes outside of noncitizens' control can also divert a later-generated notice of hearing. For example, a DHS officer effecting service of a "TBD" notice to appear may inaccurately record the noncitizen's address, preventing the subsequent notice of hearing from making its way to the noncitizen. Former Judge Roy recalls several instances where DHS officers at the border transcribed a noncitizen's address incorrectly, and only after they filed motions to reopen the in absentia removal orders was the error discovered. Undersigned former Judge Eliza Klein also remembers similar occurrences caused by difficulties noncitizens had with accurately spelling street and other address information due to language barriers. As another example, juveniles who may reside with different family members at different times are often wholly reliant on their adult family to ensure the juvenile is made aware of the notice of hearing in a timely manner. But as former Judge Roy recollects, this was not always the case. In one matter she presided over, a juvenile noncitizen had provided the government the address of his uncle but was not living with him when the notice of hearing was delivered. The uncle did not give the juvenile the notice for another three months, at which time the hearing had already passed.

In these cases, the omission of time and/or place information in the initial notice to appear makes it effectively impossible for the noncitizen to attend her hearing. But if the notice to appear contained the statutorily-required information, 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.

Any later issuance of a notice of hearing thus does not correct the negative impact of a "TBD" notice to appear on a noncitizen's ability to attend their removal hearing. As a result of these deficient notices to appear and the procedural limbo that occurs before notices are docketed, noncitizens may never receive their hearing information through no fault of their own. And yet they will nevertheless face the severe consequence of in absentia removal. The government is therefore wrong to assume that attendance at a hearing is entirely within the control of a noncitizen who was issued a defective notice to appear.

Put simply, a notice of hearing—often mailed months or years after the initial "TBD" notice to appear was given to the noncitizen—is frequently not something that a noncitizen will actually receive. Providing a valid notice to appear with time-and-place information at the outset, however, obviates the problem. That is why Congress drafted section 1229a(b)(5)(C)(ii) the way it did—to allow noncitizens who did not receive notice in accordance with the statute's terms to move to reopen an in absentia order at any time. The Court should reject the government's strained statutory interpretation.

III. ONLY A BRIGHT-LINE RULE GIVES CONSISTENT MEANING TO THE STATUTORY SCHEME AND AVOIDS IMPOSING MORE BURDENS ON ALREADY OVERBURDENED IMMIGRATION COURTS.

Given all of the factual issues that can arise in the in absentia context when the government relies on a defective notice, a clear rule is not only statutorily required but practically necessary. Having a section 1229(a) "notice to appear" mean one thing in the context of the stop-time rule of section 1229b(d)(1) and something different in the context of the in absentia provision of section 1229a(b)(5)(A) would leave immigration courts in a confusing and illogical conundrum.

During a hearing on a motion to reopen under section 1229a(b)(5)(C)(ii), the noncitizen must "demonstrate[] that" he or she "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) . . . ." A bright-line rule that a notice to appear lacking time-and-place information is insufficient under section 1229(a) to warrant in absentia removal would give immigration judges clarity when they are tasked with determining whether "notice" conformed to the requirements of section 1229(a).

Without such a conforming notice and instead faced with two or more notice documents sent to the noncitizen, the judge's task becomes considerably harder and longer. For example, as explained *supra*, an immigration judge could have to make a number of factual findings, including, for example, whether the noncitizen's notice had been lost in the "No Man's Land" of administrative address changes. Or whether an immigration officer had incorrectly recorded the address. Or whether the information about what happened to the noncitizen (for example, if they entered with or without inspection) in the notice is accurate.

Under the government's interpretation, faced with a notice defective on its face, the court has little choice but to engage in this time-consuming fact-finding. A clear rule makes this inquiry far more straightforward.

A clear rule serves another important function: it blunts perverse incentives for overburdened judges and court personnel to succumb to the temptation to misuse this state of affairs to clear cases off their dockets. For example, one immigration court set up a special docket specifically to push through in absentia removal orders after it received returned mail from the hearing notices it sent out. *See* Tal Kopan, "S.F. Immigration Court fast-tracking cases in what critics call a deportation conveyor belt," *San Francisco Chronicle* (Oct. 31, 2021). As explained *supra*, noncitizens in the "No Man's Land" who received defective "TBD" notices and were unable to change their addresses before the San Francisco court sent the later hearing notices would never have received the later hearing notices sent to them. Had their notice to appear included actual hearing information as required, they would have known the time and place for the initial hearing and could have appeared.

Further, the government's own errors can make it impossible for any subsequent notice with the necessary time-and-place information to reach the noncitizen, yet the government's trial attorney is not able to uncover those errors before the hearing in order to bring them to the attention of the immigration court. Specifically, DHS creates an "A File," or case file, for every noncitizen not yet naturalized as they pass through the United States immigration process.[7] A

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[7] National Archives, *supra* note 3.

Files contain biographical information about noncitizens and may include visas, photographs, affidavits, correspondence, and other documents containing the noncitizen's address—records that the immigration judge could use to corroborate whether the border officer made errors in transcribing the address onto the notice to appear docketed with the immigration court.

Yet not all of the information contained in DHS's A File is provided to the immigration court with the charging documents. Nor is the government's trial attorney always provided with the A File prior to the hearing. In other words, if the noncitizen does not appear at the hearing because the notice of hearing was sent to the wrong address, it is often the case that neither the government's trial attorney nor the immigration judge have real means to determine whether the address listed on the notice to appear (and, subsequently, the notice of hearing) was, in fact, correct.

Again, this is not just a theoretical concern. In private practice, the undersigned former Immigration Judge Roy represented a client who did not receive a hearing notice at the address the client provided—and where the client had lived continuously after being handed a notice to appear without the hearing information. Only through a Freedom of Information Act request of the noncitizen's A File did former Judge Roy discover that the officer had written that address incorrectly. But when she was a judge faced with a government request for an in absentia order following a defective notice with no hearing information, sometimes the trial attorney's case file would not include the information necessary to allow former Judge Roy to make that determination. Again, if a noncitizen is served with a complete notice to appear in the first instance with correct time and hearing information—

as the statute requires—the noncitizen could show up to court even if the noncitizen's address information is incorrect or changes.

Of course, such situations are now precluded in the stop-time context because, in the wake of *Pereira* and *Niz-Chavez*, the immigration court can see on the face of a single notice to appear whether it meets all of the statutory requirements. Having "notice" in section 1229(a) mean the same thing in section 1229b(d)(1) and section 1229a(b)(5)(A) obviates the need for any time-consuming fact finding and makes the section 1229a(b)(5)(A) determination more straightforward.

IV. THE GOVERNMENT'S HYPOTHETICAL PARADE OF HORRIBLES IS UNFOUNDED.

A. The Mere Possibility of an Influx of Motions to Reopen Is not a Reason to Adopt the Government's Reading of the Statute.

As support for its reading of the statute, the government warns the Court that adopting the contrary position could result in "potentially hundreds of thousands of noncitizens to seek rescission of removal orders that may be decades old." Gov't Brief at 20. This contention is misguided on two fronts.

First, the government's true quarrel is with Congress. Congress granted noncitizens the right to file a motion to reopen "at any time" if the noncitizen can demonstrate that she did not receive notice in accordance with section 1229(a). *See* 8 U.S.C. § 1229a(b)(5)(C)(ii). That Congress granted noncitizens this right shows that Congress understood the importance of notice and basic due process when a

noncitizen may be ordered removed from the United States in her absence.

Moreover, the government's argument implicitly assumes that most noncitizens—many of whom lack legal representation—will not only be aware of the Court's decision but will also have the means and ability to file a motion to reopen. As former Judges Roy and Klein have observed, many individuals with an in absentia order are simply not aware of the existence of the order in the first instance. They only later learn of it when they seek to apply for affirmative relief. Still, even if immigration courts were marked with a *temporary* increase in motions to reopen, that a decision from this Court could lead to a rise in new administrative proceedings has never been a reason to avoid clear statutory commands.

Second, the government cannot artificially narrow section 1229a(b)(5)(C)(ii) based on the fear that noncitizens may exercise a right that Congress granted to them (the right to file a motion to reopen "at any time") when the government's own actions (serving deficient "TBD" notices to appear) led to that motion. Since this Court decided *Pereira*, the government cannot claim that it did not know how to make its notices to appear comply with the statute. If *Pereira* wasn't clear enough, *Niz-Chavez* followed. And there the Court made clear that a notice to appear lacking time-and-place information is deficient, notwithstanding a later-issued notice of hearing.

Still, even after *Niz-Chavez*, the government has continued to issue defective notices to appear. *E.g.*, *Lazo-Gavidia v. Garland*, 73 F.4th 244, 246 (4th Cir. 2023). And it is this insistence on continuing to ignore the statutory requirements for notices to appear that has created the possibility of an influx of motions to

reopen. The government cannot then turn around and use that possibility as reason to deprive noncitizens of the ability to challenge life-altering removal orders entered against them often *resulting from* the deficient notices to appear. *See supra*, Section II. The government argues that the noncitizens' reading of the relevant statutory language creates "perverse incentive[s]." Gov't Brief at 49. But it is the government's position that does so, insulating in absentia removal orders from challenge because of the scale of the government's years-long flouting of the statute.

B. The Government Has Options to Address the Problem it Has Created.

Perhaps wisely, the government does not now argue that it is *incapable* of issuing proper notices. The Court has repeatedly rejected the government's protestations that it cannot issue a single notice. In *Pereira*, the Court explained that "[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." 138 S. Ct. at 2119. Five years later, it is no easier to understand why the government cannot do what the statute requires and what the government has *done in the past*. *See infra* at 26–27. Nevertheless, in *Niz-Chavez* three years later, the government again argued "that producing compliant notices has proved taxing over time." 141 S. Ct. at 1485. "But as th[e] Court has long made plain, pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'" *Id.* at 1485 (quoting *Pereira*, 138 S.Ct. at 2118).

This time the government ostensibly disavows any policy arguments. Gov't Brief at 52. But it nevertheless frets that if the noncitizens' position is

adopted, then removal orders will be "subject, indefinitely, to rescission." *Id.* at 22.

Unfortunately for the government, as explained *supra* at 23–25, permitting noncitizens to file a motion to rescind the in absentia removal order "*at any time*" if the noncitizen can demonstrate that she did not receive the statutorily-required notice is precisely what Congress wrote into law. 8 U.S.C. § 1229a(b)(5)(C)(ii)) (emphasis added).

But this does not leave the government with no options. The government has several paths to compliance.

First, if a noncitizen with an in absentia order appears in court seeking to reopen on the grounds that the notice is defective, the government could serve a new notice on them at that time. As former Judge King experienced, this sequence of events is not uncommon. A notice could be defective for any number of reasons, such as misstating the facts of the noncitizen's circumstances or using an outdated template. With the defective notice withdrawn, the government can then immediately serve a conforming notice on the noncitizen during the court appearance if it desires to do so and pursue the case from there.

Second, there is no reason why the government cannot resume issuing notices to appear with the date and time of the hearing.

As former Judge Roy recalled, for years DHS had the ability to access the immigration court's calendaring system. This system, called the "Interactive Scheduling System," enabled DHS to find an open date for a hearing at the immigration court and include specific time-and-place information (down to the courtroom) into the section 1229(a) notice, while also

marking the time as occupied on the court's calendar. Schmidt Brief at 6. It is unclear why the government ceased this practice in favor of the two-step process. But that past practice shows that the government is completely capable of complying with this Court's decisions in *Pereira* and *Niz-Chavez*.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decision below should be affirmed and the Fifth Circuit's decision below should be reversed.

Respectfully submitted,

RICHARD W. MARK
Counsel of Record
TIMOTHY SUN
ANN C. MOTTO
ADRIENNE LIU
ERIC M. HORNBECK
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000
rmark@gibsondunn.com

Counsel for Amici Curiae

October 25, 2023

APPENDIX

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AMICI CURIAE SIGNATORIES

Hon. Steven Abrams,

Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997-2013

Hon. Terry A. Bain,

Immigration Judge, New York, 1994-2019

Hon. Dayna M. Beamer,

Immigration Judge, Honolulu, 1997-2021

Hon. Sarah M. Burr,

Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

Hon. Esmerelda Cabrera,

Immigration Judge, New York, Newark, and Elizabeth, NJ, 1994 - 2005

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./ Arlington, VA - 1980 - 2005

Hon. Bruce J. Einhorn,

Immigration Judge, Los Angeles, 1990-2007

Hon. Cecelia M. Espenoza,

Appellate Immigration Judge, Board of Immigration Appeals, 2000-2003

Hon. Noel A. Ferris,

Immigration Judge, New York, 1994-2013

Hon. James R. Fujimoto,

Immigration Judge, Chicago, 1990-2019

Hon. Gilbert Gembacz,

Immigration Judge, Los Angeles, 1996-2008.

Hon. Jennie Giambastiani,

Immigration Judge, Chicago, 2002-2019

Hon. Alberto E. Gonzalez,

Immigration Judge, San Francisco, 1995 - 2005

Hon. John F. Gossart, Jr.,

Immigration Judge, Baltimore, 1982-2013

Hon. Miriam Hayward,

Immigration Judge, San Francisco, 1997-2018

Hon Sandy Hom,

Immigration Judge, New York, 1993-2018

Hon. Charles M. Honeyman,

Immigration Judge, New York and Philadelphia, 1995-2020

Hon. Rebecca Jamil,

Immigration Judge, San Francisco, 2016-2018

Hon. William P. Joyce,

Immigration Judge, Boston, 1996-2002

Hon. Samuel Kim,

Immigration Judge, San Francisco, 2020-2022

Hon. Carol King,

Immigration Judge, San Francisco, 1995-2017

Hon. Eliza C. Klein,

Immigration Judge, Miami, Boston, Chicago, 1994-2015; Senior Immigration Judge, Chicago, 2019-2023

Hon. Elizabeth A. Lamb,

Immigration Judge, New York, 1995 - 2018

Hon. Donn L. Livingston,

Immigration Judge, Denver, New York, 1995 - 2018

Hon. Dana Leigh Marks,

Immigration Judge, San Francisco, 1987-2021

Hon. Margaret McManus,

Immigration Judge, New York, 1991-2018

Hon. Steven Morley,

Immigration Judge, Philadelphia, 2010-2022

Hon. Robin Paulino,

Immigration Judge, San Francisco, 2016-2020

Hon. Charles Pazar,

Immigration Judge, Memphis, 1998-2017

Hon. Laura L. Ramirez,

Immigration Judge, San Francisco, 1997-2018

Hon. John W. Richardson,

Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg,

Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy,

Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt,

Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Arlington, VA, 2003-2016

Hon. Patricia M. B. Sheppard,

Immigration Judge, Boston, 1993-2006

Hon. Helen Sichel,

Immigration Judge, New York, 1997-2020

Hon. Andrea Hawkins Sloan,

Immigration Judge, Portland, 2010-2017

Hon. Robert D. Vinikoor,

Immigration Judge, Chicago, 1984-2017

Hon. Polly A. Webber,

Immigration Judge, San Francisco, 1995-2016

Hon. Robert D. Weisel,

Assistant Chief Immigration Judge, Immigration Judge, New York, 1989-2016