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**DETAINED**

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**BOARD OF IMMIGRATION APPEALS**
**FALLS CHURCH, VIRGINIA**

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| In the Matter of<br><br>**Alexandre Ricardo Marcelo FERNANDES**<br><br>In Removal Proceedings | A040-213-633 |

# MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE AND BRIEF AMICI CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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## I. Introduction

The National Immigrant Justice Center ("NIJC") and the American Immigration Lawyers Association ("AILA) hereby request permission from the Board to appear as Amici Curiae in the above-captioned matter. The Board may grant such permission, on a case-by-case basis, if the public interest will be served thereby. 8 C.F.R. § 1292.1(d).

This is a case concerning the failure of the Department of Homeland Security to abide by the procedure set forth in the INA for initiating removal proceedings. When setting the case for oral argument, the Board requested supplemental briefing touching on four issues related to that governmental violation. Letter from B. Williams to J. Rubin at 1 (Jan. 28, 2022). Amici agree in full with the positions taken by the Respondent—that (1) a respondent need demonstrate prejudice caused

by a defective NTA in order to secure termination because INA § 239(a)(1) is a mandatory claim processing rule,[1] without any textual basis for equitable tolling, and no basis for harmless error review; (2) a respondent's objection is timely if made prior to, or at, the pleading stage; (3) the Department is always free to "cure" its violation by serving a compliant charging document following termination; and (4) receipt of a hearing notice can never fix the violation of the mandatory claim processing rule, which requires service of a single document.

Amici do not repeat the well-reasoned arguments of the Respondent. Instead, drawing upon their practical experience in the direct representation of individuals in removal proceedings, they venture beyond the boundaries of this particular matter and highlight three issues that lend further support for the Respondent's positions. Those issues are: (1) the ways in which the INA emphasize the importance of the right to counsel, and how the Department's violation of the case-initiation rules impact that right; (2) the Department's decision to ignore these rules on a widespread basis; and (3) the reasons why the Department's only "cure" for a deficient NTA is to issue a new, compliant NTA, while these proceedings are terminated without prejudice. The Amici are well-known to the Board:

Amicus NIJC, a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to low-income immigrants, refugees and asylum-seekers. Each year, NIJC represents hundreds of immigrants and asylum-seekers

[1] Amici have argued that the statute is jurisdictional, but for purposes of this brief, Amici assume *arguendo* that it is non-jurisdictional, as the Board has previously held.

before the immigration courts, the BIA, the Courts of Appeals and the Supreme Court of the United States through its legal staff and a network of over 1,5000 pro bono attorneys. NIJC represents both detained and nondetained individuals, and fields many more requests for assistance than it can possibly accept. NIJC writes not only to protect the interests of noncitizens in removal proceedings, but also to speak to the effects of DHS failure to implement the NTA statute as written.

Amicus AILA is a national, nonpartisan, and nonprofit organization comprised of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent numerous noncitizens placed into removal proceedings with NTAs that are statutorily deficient for not including the place and time of the initial removal proceeding.

## II. INA § 239 and the Right to Counsel

The NTA date-and-time requirement is intimately intertwined with a Respondent's statutory right to counsel. This is evident when reading the NTA date-and-time requirement in conjunction with the other requirements of § 239.

INA § 239 contains three references to the time / date of a removal hearing. First, INA § 239(a)(1)(G)(i) provides that the time and place of the hearing must be included in the NTA. Second, § 239(a)(2)(A) governs any change or postponement in the initial hearing. Third, § 239(b)(1) provides "[i]n order that an alien be permitted the opportunity to secure counsel before the first hearing date," the noncitizen's first hearing date "shall not be scheduled earlier than 10 days after the service of the

notice to appear." *Id.* Further, § 239(a)(1)(E) makes a second reference to the rule and purpose of § 239(a)(2)(A), reemphasizing the importance of giving noncitizens an opportunity to find counsel.

These four provisions should be considered *in pari materia*, as pertaining to the same subject, and may thus be construed "as if they were one law." *United States v. Freeman*, 3 How. 556, 564 (1845); *United States v. Stewart*, 311 U. S. 60, 64 (1940). In particular, the twin requirements that DHS schedule an initial hearing date at least 10 days into the future, and give a noncitizen advance warning of that hearing date, are interrelated. If DHS did not need to include notice of the hearing date on the NTA, then DHS could serve an NTA on day 1, but not schedule a hearing; on day 9, the IJ could schedule a hearing date for day 11, sending notice by U.S. Mail. Under DHS's theory, it would satisfy INA § 239(b)(1) for a noncitizen to have their first hearing 11 days after service of the NTA, but only 2 days after the notice of hearing was put in the mail.

Giving a noncitizen no advance notice of the initial hearing would undermine the clearly stated purpose of Congress in mandating a 10-day wait for removal proceedings to begin. There is no requirement that Immigration Court scheduling notices impose a 10-day delay between the notice being sent out and the hearing date itself. In fact, Amici are acutely aware that Immigration Courts frequently schedule hearings within 10 days of the Notice of Hearing; for instance, some Immigration Courts routinely grant only one week extensions in detained cases.

In the experience of Amici, including the actual hearing date on the NTA serves at least four goals: (a) it increases the chances the noncitizen will know of, and attend, her removal hearing; (b) it increases the chance that the noncitizen can secure counsel in advance of that hearing; (c) it gives the noncitizen a greater opportunity to prepare for the hearing, preferably with counsel; and (d) it increases the information available to the noncitizen in advance of her hearing, which facilitates better and more efficient decision-making. Also, assigning an actual time and date to the proceedings yields an intangible benefit of conveying to unsophisticated or unrepresented litigants that the removal proceeding is a true legal proceeding, is actually underway, and will give the noncitizen an opportunity to be heard. Stated in the converse, without an initial hearing date, the NTA can have an air of unreality. This is especially true when there is a pronounced gap between service of the NTA on the noncitizen and the filing of the charging document with the Immigration Court. For example, in *Pereira v. Sessions*, it took the government over a year to file the NTA with the Immigration Court, on August 9, 2007, after having served Mr. Pereira with the document on May 31, 2006. 138 S. Ct. 2105, 2112 (2018). Delays this long are not the rule, but they are also, regrettably, not unusual.

The statute is clear that one of the purposes of telling the noncitizen the date and time of her first hearing was to facilitate the securing of counsel, who would then be present and prepared for that first hearing. When Congress established the ten-day waiting rule, it was explicit about its goals for the pause: the 10-day wait is

designed "[i]n order that an alien be permitted the opportunity to secure counsel before the first hearing date." INA § 239(b)(1). This goal is plainly undermined when the noncitizen is given time to prepare, but is not told how much time she is being given.

The undercutting of this Congressional objective not only impacts a noncitizen's ability to find counsel, but prejudices those attorneys who might consider representing a person in removal proceedings. For a noncitizen, their removal proceedings may be the most important thing in their lives. But attorneys who represent noncitizens generally have many clients, all with their separate deadlines and timing considerations. Attorneys must frequently juggle multiple commitments. Congress intended a delay in the scheduling of the first hearing to increase representation of noncitizens. Failing to communicate the actual schedule of the hearing undermines that objective. Where an attorney cannot know whether a hearing will be scheduled in one week or four weeks, this naturally affects their ability and willingness to take on the case. Moreover, even if an attorney agrees to take the case without knowing the initial hearing date, this gap tends to undermine the attorney's ability to adequately prepare for the first hearing.

Nor is it sufficient for a notice of hearing to be sent out by the Immigration Courts separate from the NTA. This is not merely a function of that second notice potentially being lost or mislaid or delayed. Immigration Court files can be difficult to access, so attorneys almost always face an information deficit when considering

whether to take on a case. More efficient and comprehensive notice helps to reduce information gaps, facilitating a decision whether to take on a case.

Because the NTA date-and-time requirement relates back to the statutory scheduling rules, and to the purpose for those rules, which is to maximize the opportunity for a noncitizen to secure counsel, then it becomes even more evident that the Congressional claim-processing rule must be mandatory. It becomes clear why Congress chose to write INA § 239(a) in mandatory terms. The statute provides that service of the NTA "**shall be given** in person to the alien (or, if personal service is not practicable, through service by mail…)." INA § 239(a)(1)(G) (emphasis added). Nothing in the statute suggests that the text is exhortatory or advisory in nature.

Given the importance that Congress placed on the right for a noncitizen to have counsel in proceedings, the only way to properly interpret the statute related to the initiation of proceedings is as a mandatory rule that "assure[s] relief to a party properly raising" a violation of that rule. *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam); *see also Hamer v. Neighborhood Housing Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) ("If properly invoked, mandatory claim-processing rules must be enforced . . . ."). In other words, a claim-processing rule that is expressed in mandatory terms is "unalterable, so long as the opposing party raises the issue," and the rule's violation cannot be "overlooked as harmless error" if the opposing party is not prejudiced. *Manrique v. United States*, 137 S. Ct. 1266, 1273–74 (2017); *see also Nutraceutical v. Lambert*, 139 S. Ct. 710, 715 (2019) (finding mandatory claim-processing rule was "mandatory," a label that meant it was "not susceptible

[to an] equitable approach"); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (when procedural rule is framed in mandatory terms, it is "unalterable on a party's application" but "nonetheless [could] be forfeited if the party asserting the rule waits too long to raise the point").

## III. The Department's Continuing, Willful Failure to Follow the Statute

In *Pereira*, the government admitted that over the course of the three prior years, "almost 100 percent" of NTAs "omit the time and date of the proceedings." *Pereira*, 138 S. Ct. at 2111. One would have thought that the embarrassment of having to admit to such a flagrant, widespread, and intentional violation of the statute would have caused the Department to change its ways, and devise a method for finally including date and time information on its charging documents. Alas, it has been nearly four years since the *Pereira* decision, and Amici can report that the Department is still violating INA § 239(a)(1) with frequency and impunity.

The Department's intransigence on this score colors the discussion about prejudice and equitable considerations.

### *A. Prejudice*

Respondent has explained that the Supreme Court does not require a showing of prejudice for mandatory claims-processing rules. Amici agree, and do not write separately on this point. Further, as Respondent points out, it is indisputable that if the literal statutory text were applied, his particular removal proceeding

would have ended in termination without prejudice, rather than with a removal order, and that fact alone should be sufficient to answer the question posed by the Board.

Still, the Department might have more of a good-faith argument about the need for a demonstration of prejudice if its failure in Mr. Fernandes' case were an isolated incident—a mere clerical error that caused a single NTA to omit date and time information, against a background of near complete compliance with the statute. But the Department's actual practice, post-*Pereira*, of continuing to ignore the statutory command in thousands of cases annually, reveals the thinness of its argument. Congress mandated that certain information be included on an NTA, and it has become apparent that the only way the Department will be forced to follow that rule will be through the termination of proceedings that were started without that compliance. As the Supreme Court has noted, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

Anything less, including proceeding forward with thousands of removal proceedings that violate INA § 239, could become exceedingly inefficient. Two circuits—and the two circuits with the most removal proceedings within their boundaries—have already found that improper NTAs render *in absentia* removal orders amenable to rescission, contrary to this Board's decision in *Matter of Laparra*, 28 I&N Dec. 425 (BIA 2022). *See Rodriguez v. Garland*, 15 F.4th 351, 354–

56 (5th Cir. 2021); *Singh v. Garland*, 24 F.4th 1315, 1317 (9th Cir. 2022). Applying the Supreme Court's approach to claim-processing rules, and terminating proceedings without prejudice for NTA violations, would likely lead the relevant agencies to *finally* solve this problem quickly and to begin following the Congressional command. Continued resistance to the plain statutory meaning might seem easiest in the short term, but it will not be efficient if thousands of removal orders are amenable to rescission. As in life, honesty—faithfully following the statute as written—is also the best policy.

Apart from harm to the immigration system as a whole, people in removal proceedings experience prejudice on an individual level when the government doesn't follow the rules. And determining which demonstration of individual prejudice meets the threshold for termination, and which doesn't, could become an onerous and unworkable task for EOIR—especially when nearly every single NTA could trigger a prejudice inquiry.

The government has appeared at times to argue that a noncitizen who receives a deficient NTA is only prejudiced if she misses a hearing and is removed *in absentia*. This is a cramped view of prejudice. A noncitizen is harmed when she is hindered in securing counsel at the earliest point possible in the hearing. If delayed in retaining counsel, a pro se noncitizen may make concessions and strategic choices that she would not make if effectively represented. Time is of the essence in any removal proceedings, but particularly in detained cases. Many forms of relief require substantial investigation in order to prepare an application and

accompanying documents. Some forms of relief require adjudications by USCIS of partly-collateral matters such as family visa petitions, VAWA self-petitions, or applications for protection under the U visa. And it is always beneficial for a noncitizen to understand their rights and their potential legal challenges.

Every noncitizen benefits from being advised, at the very outset of a case, of the timing of the initial hearing. Conversely, every noncitizen is harmed in some manner by being deprived of that mandatory information. True, for some noncitizens, the end result of a removal hearing may be preordained. But it would exceedingly difficult for the Board to assess on appeal *which* cases would fit into that category, precisely because the violation would hinder the noncitizen from discovering plausible legal theories or from applying for relief. Even an IJ would face a complicated factfinding task, and the Board does not engage in factfinding on appeal. 8 C.F.R. § 1003.1(d)(3)(iv).

Thus, even if the Board were authorized to adopt an approach to mandatory claim-processing rules that diverged from the Supreme Court's bright line rule that "[a] claim-processing rule is mandatory to the extent a court must enforce the rule if a party properly raises it," the Board ought to decline to do so. Attempting to assess prejudice or harm would be complicated and time-consuming. This is especially true given the large number of violations caused by the Department's ongoing refusal to comply with the statute. By contrast, the Supreme Court's bright-line approach to mandatory claim-processing rules, refusing to consider whether error might be harmless, is both fair and administratively efficient.

### B. Equitable Considerations

The Department's systemic and purposeful refusal to comply with the Congressional rules on case initiation also impact any claim that equitable considerations should be taken into account.

The party arguing for an equitable exception "bears the burden of demonstrating entitlement to it." *Young v. SEC*, 956 F.3d 650, 655–57 (D.C. Cir. 2020). Without an equitable exception, the procedural rule must be enforced, even if "non-mandatory." *Id.* at 657; *see also, e.g.*, *Guerra v. Consolidated Rail Corp.*, 936 F.3d 124, 136 n.6 (3d Cir. 2019) (similar). As the Supreme Court has explained, "[p]rocedural requirements established by Congress . . . are not to be disregarded . . . out of a vague sympathy for particular litigants." *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

Furthermore, to establish eligibility for an equitable exception, DHS would have to demonstrate that it had acted diligently, as "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Id.* at 151. DHS would need to show not only that it could not properly file the NTA in the first instance, but that it also was somehow prevented from correcting its initial error by issuing a new or superseding NTA.

The Department could not meet these standards for equitable considerations where Mr. Fernandes' situation was not an isolated clerical mistake, but the fruit of a systemwide decision not to comply with the case initiation rules put in place by

Congress. Amici is aware that the Department became accustomed to the practice of not including time and date information on its charging documents, especially after various courts deferred to that practice, and that changing its procedures could present bureaucratic difficulties. Amici are not entirely unsympathetic to those considerations. Nevertheless, it has had nearly four years since *Pereira* to adapt, and it has chosen not to. As the government conceded in *Pereira*, "a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases." *Pereira*, 138 S. Ct. at 2119. It went on to opine that "it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear." *Id.* Simply put, equitable considerations, even if applicable, would be inapplicable to the Department's purposeful decision to not follow the rules.

### C. The Regulations Do Not Displace the Statute, Which Should be the Board's Focus.

The Department appears to believe that it need only address the regulations as a potential claims-processing rule. Amici vehemently disagree, and briefly explain why the statute should be the focus of the inquiry.

It is notable what regulation the Department does not cite: namely, 8 C.F.R. § 1239.1. That regulation, entitled "Notice to Appear," far from adopting a rule different from the statute, provides explicitly: "Service of the notice to appear ***shall be in accordance with section 239 of the Act***." (Emphasis added.) That is, the only regulation that explicitly governs NTAs enjoins compliance with the statute written

by Congress. To the extent that the Board limits review to its regulations, those regulations direct it onwards to the statute.

No other regulation displaces this obvious fact. It is true that 8 C.F.R. § 1003.18(b) provides that "the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable." But that regulation is entitled "Scheduling of Cases." Id. That says nothing about whether an NTA lacking time and place information is proper, nor of the proper remedy when it is found improper. Indeed, insofar as an NTA deficiency does not strip jurisdiction (as the Board has already held), it seems uncontroversial that proceedings should be scheduled even as to a deficient NTA. That an Immigration Court must *schedule* a hearing on a deficient NTA says nothing about the definition of an NTA nor about what to do with deficiencies.

Other regulations are likewise unhelpful. DHS may cite 8 C.F.R. § 1003.13, but that regulation simply defines an NTA to be a charging document. It does not displace the statutory definition. Another regulation, 8 C.F.R. § 1003.14, purports to govern "jurisdiction" of the Immigration Court (though the Board has held that the regulation does not in fact govern jurisdiction). Nothing in § 1003.14 specifies that an NTA is sufficient if it fails to include what Congress mandates it to include.

It should go without saying that regulations cannot trump a statute written by Congress. But even if the Board were to consider its authority limited to regulations, the only directly pertinent regulation redirects review to the statute. The Board should thus consider *only* whether the NTA complies with INA § 239.

## IV. "Curing" a Deficient NTA

The Board's question suggests that DHS may be permitted to "cure" its earlier mistake. There is only one potential cure: to issue a new, non-defective NTA. Remand to allow DHS to "cure" its error would be inappropriate.

Amici do not doubt that as a general matter, DHS has prosecutorial discretion to issue a new NTA whenever it wishes to do so. But the Board should decline to order remand, because DHS has sat on its rights, because DHS did not diligently seek to amend its earlier filings, and because remand would be inefficient.

First, in terms of remanding for that a new NTA, DHS has not shown that the possibility of filing a new or superseding NTA "was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(b)(1). DHS had ample opportunity to "cure" any problems when this case was before the IJ. DHS was clearly placed on notice that Respondent objected to the NTA. It knew that the NTA was not compliant with INA § 239, and it was or should have been aware that some federal courts had stated that a timely objection to the NTA must be upheld. *See Ortiz-Santiago v. Barr*, 924 F. 3d 956 (7th Cir. 2019); *Martinez-Perez v. Barr*, 947 F.3d 1273, 1279 (10th Cir. 2020). In short, this problem was known or at least discoverable from the beginning of these proceedings. But DHS took no steps to "cure" its mistake.

Second, a party filing a motion to reopen or remand must attach the relevant documentation to the motion. 8 C.F.R. § 1003.2(b)(1). As far as Amici know, DHS

has not offered any documentation, such as a copy of whatever it might seek to file on remand.

Third, A motion to remand is analyzed under the same standards as a motion to reopen. *Matter of Rivas*, 26 I&N Dec. 130, 135 (BIA 2013). Motions to reopen are "strongly disfavored," *Selimi v. Ashcroft*, 360 F.3d 736, 739 (7th Cir. 2004), because there is a "strong public interest in bringing litigation to a close [after] … giving the adversaries a fair opportunity to develop and present their respective cases." *I.N.S. v. Abudu*, 485 U.S. 94, 107 (1988). Normally, a party seeking remand for a purpose must show why that party did not make that filing earlier. 8 C.F.R. § 1003.2(b)(1). DHS has not even attempted to make such a showing. As the Supreme Court has said, "[t]he appropriate analogy is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." *Id.* at 110. The BIA should deny remand in the exercise of discretion, if it finds the motion not otherwise precluded. *INS v. Phinpathya*, 464 U.S. 183, 188, n. 6 (1984).

Finally, termination without prejudice would be more efficient than remand to the IJ. If DHS wishes to pursue removal in this case, the quickest and most efficient way to do so would be to accept the dismissal or termination these proceedings without prejudice, and to then initiate new proceedings before an Immigration Court. Remand would only waste administrative time, encumbering an already overworked court system with unnecessary additional filings and complexities.

## V. Waiver

To the extent that DHS suggests that Respondent waived his rights by not objecting earlier, Amici makes two points. First, it appears that Respondent first made an oral objection, then the IJ, exercising authority to control proceedings, scheduled a filing date for written argument on the objections. A noncitizen can scarcely be blamed for complying with a schedule set by the IJ. Where a noncitizen raises an oral objection and files a timely written memorandum supporting the motion, the objections cannot be found untimely.

Second, this noncitizen did not waive his rights while he was still *pro se*. It is true that a mandatory claim-processing rule is subject to waiver. *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17-18; *Eberhart v. United States*, 546 U.S. 12, 19 (2005). A waiver is "an intentional relinquishment or abandonment of a *known* right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). There is a presumption, in both criminal and civil cases, against an abandonment of rights. *See Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972). There is no indication that the IJ ever explained to the Respondent while he was *pro se* that DHS had filed a deficient NTA. Thus, he could have made no knowing relinquishment of objections. *See Edwards v. Arizona*, 451 U.S. 477, 489 (1981) (Powell, J., concurring in the result) ("the standard for waiver is whether the actor fully understands the right in question and voluntarily intends to relinquish it"). Nor did the IJ take pleadings from the Respondent while he was *pro se*.

In sum, there was clearly no waiver on these facts.

## VI. Conclusion

The Board is obliged to terminate or dismiss these proceedings. "Congress created these requirements, and it is not for us or the Department to pick and choose when or how to alter them…. 'no amount of policy-talk can overcome a plain statutory command.'" *De La Rosa v. Garland*, 2 F.4th 685, 688 (quoting *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021)). Termination without prejudice should follow forthwith.

Dated: February 21, 2022

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I, Charles Roth, hereby certify that on February 21, 2022, a true and correct copy of the foregoing motion and brief was served by Federal Express on the following individuals:

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