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U. S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:

Amicus Invitation No. 21-20-07

BRIEF FOR THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, KIDS IN NEED OF DEFENSE, AND TAHIRIH JUSTICE CENTER AS *AMICI CURIAE*

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Many of the respondents who appear in immigration court are people who have survived serious, violent trauma. Once served with a Notice to Appear ("NTA") by the Department of Homeland Security ("DHS"), these survivors of trauma must navigate a complicated legal system with unfamiliar rules, and must typically do so in a foreign language. Furthermore, given the scarcity of affordable lawyers qualified to assist trauma survivors and the difficulty that many people—especially those detained by ICE—have in finding any lawyer, many survivors are forced to navigate the system without counsel, especially at the initial stages of proceedings.

Immigration judges, the Board, and DHS have nonetheless expected all respondents, even those proceeding *pro se*, to strictly comply with all applicable procedural obligations. And immigration judges have not shied from ordering respondents removed if they failed to comply with those obligations. At the same time, however, DHS has routinely failed to comply with the very basic obligations concerning NTAs in § 239(a)(1) of the Immigration and Nationality Act ("INA")—and DHS was subject to no sanctions at all for those routine violations.

The situation changed very little even after the Supreme Court made clear in 2018 that the requirements in INA § 239(a)(1) are of paramount importance. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). In the wake of *Pereira*, the Board expressly excused DHS's failures and allowed it to provide the statutorily required information over the course of multiple documents. *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). The Board also placed on respondents the burden—which is all but impossible for *pro se* individuals to comprehend, much less satisfy—of proving prejudice from violations of related regulatory requirements in every case. *Matter of Rosales-Vargas*, 27 I&N Dec. 745 (BIA 2020).

The Supreme Court has now held in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), that DHS must provide all of the specified information in a single document. The Court thus made

clear that *Bermudez-Cota* is inconsistent with the plain text of INA § 239(a)(1). It also made clear that DHS must "turn square corners when it deals with" immigration-court respondents and that "pleas of administrative inconvenience" cannot justify allowing DHS to cut corners. *Niz-Chavez*, 141 S. Ct. at 1485-86. After *Niz-Chavez*, the *status quo ante* of excusing DHS's procedural violations cannot remain, and the (minimal) burden of complying with § 239(a)(1) must be placed on DHS—the party with far more resources in any immigration court case and the one to whom the statutory obligation speaks.

The Board has asked whether the statutory requirements in INA § 239(a)(1) are jurisdictional. But the focus of that question is too narrow. Even if they are not jurisdictional, the requirements in § 239(a)(1) are mandatory claims-processing rules that, under decades of controlling Supreme Court precedent, must be automatically enforced whenever a respondent timely raises their violation. Thus, even if the requirements of § 239(a)(1) are not jurisdictional, the Supreme Court has foreclosed the Board from extending *Rosales-Vargas* to hold that a respondent must both timely raise a violation of § 239(a)(1) *and* show prejudice from the violation. To the contrary, a respondent who timely raises a violation is categorically entitled to relief. Those who raise the objections too late may still receive relief upon a showing of prejudice, and the standard for prejudice here is readily satisfied, given that the NTA is a case-initiating document without which a respondent would not face the imminent threat of a final order of removal. And any respondent who either timely raises the issue or shows prejudice from DHS's non-compliance with the statute is entitled to termination of the proceeding, because termination represents both the correct remedy and the only viable remedy for deficient NTAs.

ARGUMENT

A. The Requirements in INA § 239(a)(1) Are, at a Minimum, Mandatory Claim-Processing Rules That Must Be Enforced Whenever a Respondent Timely Objects to a Non-Compliant NTA

The question whether the requirements in § 239(a)(1) are jurisdictional is too narrow because, even if those requirements are not jurisdictional, they constitute claims-processing rules. Such rules "'seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" *Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). There can be no dispute that § 239(a)(1) at least does that much. It directs the government to "give[ ]" an NTA containing specified information to the respondent "in person" at the outset of a proceeding. INA § 239(a)(1); *see also* INA § 240(b)(5)(A) (failure of respondent to appear excused where NTA not served); *Davis*, 139 S. Ct. at 1849-50 (listing other claim-processing rules). As the Supreme Court put it—and the Department of Justice conceded—in *Niz Chavez*, an NTA is a "case-initiating pleading[ ]." 141 S. Ct. at 1482.

Further, the requirements in § 239(a)(1) are, at a minimum, *mandatory* claim-processing rules. Congress used unambiguously directive language in § 239(a)(1). Under the statute, an NTA "*shall* be given in person to the [respondent] (or, if personal service is not practicable, through service by mail." INA § 239(a)(1) (emphasis added). Moreover, § 239(a)(1) specifies the precise information an NTA must include, and the statute includes no exceptions to its requirements. *Id.* Such mandatory language, standing alone, suffices to show that § 239(a)(1) is "a paradigmatic mandatory claim-processing rule." *United States v. Franco*, 973 F.3d 465, 468 (5th Cir. 2020) (discussing language of 18 U.S.C. § 3821(c)(1)(A)); *accord United States v. Sanford*, 986 F.3d 779, 782 (7th Cir. 2021); *United States v. Alam*, 960 F.3d 831, 833-34 (6th Cir. 2020); *see also, e.g.*, *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam)

(language of Fed. R. Crim. P. 45(b)(2)); *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017) (language of Fed. R. Crim. P. 4(b)); *United States v. DiFalco*, 837 F.3d 1207, 1219 (11th Cir. 2016) (language of 21 U.S.C. § 851).

As a result, the requirements in § 239(a)(1) are "unalterable" even if they are not jurisdictional. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019) (quoting *Manrique*, 137 S. Ct. at 1274). And "a court must enforce" them whenever "a party properly raises" their violation. *Davis*, 139 S. Ct. at 1849 (cleaned up); *accord, e.g.*, *Hamer v. Neighborhood Housing Servs.*, 138 S. Ct. 13, 17-18 (2017); *Eberhart*, 546 U.S. at 19; *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004); *Taylor v. Owens*, 990 F.3d 493, 497 (6th Cir. 2021); *T.B. v. Nw. Indep. Sch. Dist.*, 980 F.3d 1047, 1050 n.2 (5th Cir. 2021); *United States v. Lacerda*, 958 F.3d 196, 222 (3d Cir. 2020); *Auto. Alignment & Body Serv. v. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707, 723 (11th Cir. 2020); *PC Puerto Rico, LLC v. Empresas Martinez Valentin Corp.*, 948 F.3d 448, 452 (1st Cir. 2020); *Malouf v. SEC*, 933 F.3d 1248, 1258 n.10 (10th Cir. 2019).

In particular, because § 239(a)(1) represents a mandatory rule, it must be enforced when a violation is raised even if a respondent does not show prejudice from the government's violation. The Supreme Court has held that, "[b]y definition, mandatory claims-processing rules … are not subject to harmless-error analysis." *Manrique*, 137 S. Ct. at 1274. Thus, "[c]ourts may not disregard a properly raised procedural rule's plain import any more than they may a statute's." *Nutraceutical Corp.*, 139 S. Ct. at 714. The result, as the Seventh Circuit held with respect to § 239(a)(1) itself, is that relief is categorically "available to those who make timely objections" to a deficient NTA. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 965 (7th Cir. 2019).

To be sure, the Board's opinion in *Matter of Rosales-Vargas*, 27 I&N Dec. 745, 753 (BIA 2020), held that a respondent who timely challenges a violation of the related regulatory

requirements pertaining to NTAs must also show prejudice in order to receive relief. That holding does not control here, given that the requirements of the INA itself, rather than the requirements of implementing regulations, are at issue. Further, *Rosales-Vargas* is inconsistent with governing law in the form of *Manrique*, *Nutraceutical Corp.*, and the other Supreme Court opinions making clear that mandatory claims-processing rules must be enforced where a party timely raises their violation. Thus, as the Seventh Circuit recently held in reversing the Board's attempt to impose a universal prejudice requirement, a "noncitizen who raises a timely objection to a non-compliant Notice to Appear … is entitled to relief without also having to show prejudice from the defect." *de la Rosa v. Garland*, 2 F.4th 685, 688 (7th Cir. 2021).[1]

The only exception to the mandatory enforcement of § 239(a)(1) is for situations in which the respondent, as "'the party asserting the rule[,] waits too long to raise the point.'" *Davis*, 139 S. Ct. at 1849 (quoting *Eberhart*, 546 U.S. at 15). Doing so triggers the requirement to show prejudice. Specifically, a respondent who does not timely object to a deficient NTA may object later upon a showing that the delay is excusable and that they suffered "prejudice [from] the noncompliant form." *Ortiz-Santiago*, 924 F.3d at 966; *accord de la Rosa*, 2 F.4th at 687-88.

This timing requirement does not prevent most people who are currently in proceedings from newly raising an argument based on *Niz-Chavez*. A court must generally "'apply the law in effect at the time it renders its decision,'" even if the law changes while a case is on appeal. *Henderson v. United States*, 568 U.S. 266, 276 (2013) (quoting *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281 (1969)). And there can be no doubt that *Niz-Chavez* represents a complete reversal of the law concerning § 239(a)(1). After all, until it was abrogated by *Niz-*

[1] If the Board nevertheless deems itself bound to follow *Rosales-Vargas*, it should take a case en banc, or refer a case to the Attorney General, to overrule *Rosales-Vargas* expressly.

Chavez, the Board's opinion in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), foreclosed any argument that INA § 239(a)(1) required DHS to provide all of the statutory information in a single document.[2] Any attempt to raise the same argument in ongoing proceedings would have been futile—and would have risked being perceived as intransigent. *Bermudez-Cota* therefore compels the conclusion that, as a general matter, respondents who did not raise § 239(a)(1) arguments before *Niz-Chavez* have not waited too long to raise the point and may do so now.

In any event, the opinion in *Bermudez-Cota* means that anyone in proceedings who had not raised an argument based on § 239(a)(1) before *Niz-Chavez* has a good excuse for that delay. And the standard for prejudice in this context is readily satisfied. Any "discernible prejudice" will suffice. *Ortiz-Santiago*, 924 F.3d at 965. Non-receipt of a hearing notice containing the information missing from the original notice satisfies the prejudice requirement, as does "trouble preparing for the hearing" because the notice arrived close to the hearing date. *Id.*

Prejudice that arises from being placed in proceedings on the basis of the deficient NTA will also suffice. The NTA required by § 239(a)(1) is, as the Supreme Court made clear in *Niz-Chavez*, "the basis for commencing a grave legal proceeding." 141 S. Ct. at 1482. Thus, but for the deficient NTA, the respondent would not be in proceedings at all. Any other conclusion would also be inconsistent with the government's responsibility "to turn square corners when it

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[2] Furthermore, the vast majority of circuit courts to consider the issue deferred to *Bermudez-Cota*, at least outside the context of the stop-time rule in cancellation of removal proceedings. *See Pontes v. Barr*, 938 F.3d 1, 7 (1st Cir. 2019); *Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019); *Nkomo v. Att'y Gen.*, 930 F.3d 129, 133 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 364 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 690 (5th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312-14 (6th Cir. 2018); *Yonis Ahmed Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karangithi v. Whitaker*, 913 F.3d 1158, 1161-62 (9th Cir. 2019); *see also Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-18 & n.4 (10th Cir. 2019) (reaching the same conclusion while expressly reserving the question of deference).

deals with" non-citizens and seeks to subject them to final orders of removal. *Id*. at 1486. Where DHS serves or files a deficient NTA, a respondent is forced to shoulder stringent procedural obligations solely because of a document in which DHS failed to adhere to its own procedural obligations. If the government wants to begin removal proceedings against someone, it must file and serve a *compliant* NTA.[3]

B. Termination Is the Proper Remedy for Violations of INA § 239(a)(1)

Irrespective of whether § 239(a)(1) is jurisdictional or a mandatory claims-processing rule, the proper remedy for violations of the statute is termination. Again, the NTA required by § 239(a)(1) is a "case-initiating pleading[ ]." *Niz-Chavez*, 141 S. Ct. at 1482. And the well-established consequence of violating a fundamental, mandatory rule concerning case-initiating pleadings is dismissal. *See, e.g.*, *Manrique*, 137 S. Ct. at 1272; *Eberhart*, 546 U.S. at 16; Fed. R. Civ. P. 12(b). Thus, as the Seventh Circuit held in *Ortiz-Santiago*, "dismissal" (*i.e.*, termination) is the appropriate remedy for a "failure to comply with" § 239(a)(1).

Further support for termination comes from two Board decisions addressing analogous circumstances. The opinion in *In re G-Y-R-*, 23 I&N Dec. 181, 192 (BIA 2001), holds that termination is warranted where a respondent does not actually or constructively receive an NTA. Similarly, the Board in *Matter of Mejia-Andino*, 23 I&N Dec. 533, 537 (BIA 2002), held that termination is appropriate where DHS never properly serves the NTA. The same conclusion follows directly where the respondent is never served with a proper NTA. After all, where a purported NTA is deficient, DHS has not properly served the statutory NTA, and the respondent

[3] The Seventh Circuit's view that the prejudice inquiry focuses only on "prejudice suffered at the time of the hearing," and not "prejudice derived from the removal proceedings generally" (*Hernandez-Alvarez v. Barr*, 982 F.3d 1088, 1096 (7th Cir. 2020)) crystallized before, and cannot be reconciled with, *Niz-Chavez*.

will—given that a second supplemental document cannot cure a deficient notice under *Niz-Chavez*—never receive the statutorily required document.[4]

Moreover, the Attorney General's opinion in *Matter of S-O-G-*, 27 I&N Dec. 462 (AG 2018), which limits dismissal in some circumstances, has no application here. By its terms, *S-O-G-* addresses only the circumstances in which a case may be dismissed *after* "DHS initiates removal proceedings by issuing, serving, and filing a Notice to Appear." *Id.* at 465. The reasoning of *S-O-G-* is similarly limited: The Attorney General reasoned that, once a proceeding is properly initiated, "immigration judges may exercise *only* the authority provided by statute or delegated by the Attorney General." *Id.* at 465-66 (quotation omitted). *S-O-G-* accordingly does not, and cannot, restrict the dismissal of proceedings that were never properly initiated in the first instance.

Furthermore, the restrictions in *S-O-G-* are invalid. The holding in *S-O-G-* rests on the Attorney General's prior decision in *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018). *See S-O-G-*, 27 I&N Dec. at 462-63, 465-66. Specifically, the opinion in *S-O-G-* holds that immigration judges lack general termination authority because *Castro-Tum* reached the same conclusion with respect to administrative closure and because it reads the governing regulations in the same restrictive way as *Castro-Tum*. *Id.* at 466. But the Attorney General has now overruled *Castro-Tum* and reinstated the authority of immigration judges to administratively close cases consistent with the Board's prior precedent. *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (AG 2021). The key piece of reasoning in *S-O-G-*—that if administrative closure cannot be

[4] Neither DHS nor the Board has never suggested any other effective remedy for violations of § 239(a)(1).

authorized, neither can dismissal—has therefore been nullified, and the restrictions that *S-O-G-* sought to place on dismissal are not only inapplicable but also invalid.

CONCLUSION

For the reasons above, even if § 239(a)(1) constitutes a non-jurisdictional rule, it is a mandatory claim-processing rule that must be automatically enforced when its violation is timely raised. And termination of the proceeding is the proper remedy when a respondent either timely raises a violation of § 239(a)(1) or untimely raises the objection but satisfies the undemanding test for prejudice in this context.

Respectfully submitted,

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