No. 19-779

IN THE
Supreme Court of the United States

JORDANY PIERRE-PAUL,
Petitioner,

— v. —

WILLIAM P. BARR, U.S. ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

SHANE PENNINGTON
Counsel of Record
YETTER COLEMAN LLP
811 Main Street
Suite 4100
Houston, TX 77002
(713) 632-8000
spennington@yettercoleman.com

Counsel for Amici Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, are retired Immigration Judges and former members of the Board of Immigration Appeals with substantial combined years of service and intimate knowledge of the U.S. immigration system.[2] *Amici* seek to share their knowledge and perspective with the Court, in the hope that their insights into the realities of immigration-court litigation will genuinely assist the Court in deciding whether to grant review in this case.

SUMMARY OF ARGUMENT

The circuit splits at issue in this case are exceptionally important for at least three reasons. First, they have enormous practical consequences for the immigration system as a whole. In particular, they make a notoriously complex area of law more difficult for noncitizens

---

[1] Pursuant to Supreme Court Rule 37, all parties received notice of *amici curiae*'s intent to file this brief 10 days before its due date. All parties to this matter have granted consent to this *amici curiae* brief. Counsel for *amici curiae* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A list of *amici* along with short biographies is included in the Appendix to this brief.

to understand and for immigration judges to apply.

Second, they create bad incentives and prejudice noncitizens. The consequences of those bad incentives played out dramatically in the months following this Court's decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), when, in an utterly indefensible response to the decision, the Government began serving notices to appear ("NTAs") with "fake dates," causing mass confusion and very real harm to thousands of vulnerable noncitizens and their families.

Third, because NTAs serve a vital role throughout the removal process and beyond, guidance from this Court regarding the questions presented would have an immediate and profound impact far beyond the specific context of this case.

ARGUMENT

I. THE CIRCUIT SPLITS AT ISSUE HAVE INTOLERABLE CONSEQUENCES FOR THE NATIONWIDE IMMIGRATION SYSTEM

The fact that this case features three circuit splits would counsel in favor of granting the petition regardless of the specific area of federal law involved. But because these particular circuit splits have been wreaking havoc on the Nation's immigration system for years, the need

for guidance from this Court is exceptionally urgent.

This Court has often emphasized "the Nation's need to speak with one voice in immigration matters" and the importance "of uniform administration [of immigration matters] in the federal courts." *Zadvydas* v. *Davis*, 533 U.S. 678, 700-01 (2001). That priority status is justified because removal and detention implicate paramount physical liberty concerns. Indeed, "deportation is a particularly severe penalty, which may be of greater concern to a convicted alien than any potential jail sentence." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1213 (2018) (quotation marks omitted); see also *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) (because "deportation is a drastic measure and at times the equivalent of banishment [or] exile," the Court "will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of [statutory language]"); *Padilla* v. *Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty.'"); *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945) ("[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the

deprivation of the right to pursue a vocation or a calling." (citations omitted)).

Unique features of the immigration system make uniform administration of the particular laws at issue here even more urgent. Noncitizens often move between the time they receive a defective notice to appear and the time of their actual hearing. Our Nation's immigration laws are notoriously complex, and most noncitizens cannot afford immigration counsel. As a result, they often struggle to understand their rights and obligations under *one* circuit's view of the law. Learning *another* circuit's differing view of the same law after a move is next to impossible for them. Simply put, the current disarray in the circuits effectively deprives many noncitizens of any realistic chance to understand their rights, much less protect them.

Furthermore, when outcomes in matters with such severe consequences turn on geography instead of the predictable application of clear legal rules, the risk of forum shopping increases. Reports of immigration lawyers advising their clients to take steps to ensure that their matters are heard in a "friendly" forum are, sadly, not uncommon. And because DHS can bring removal proceedings in the immigration court of its choice, there is also a risk that the Government will exploit the confusion in the law to its benefit. When fundamental rights are at stake—as they are in all removal proceedings—

it is especially important that outcomes not turn on venue.

The widespread confusion these three circuit splits have engendered has harmful practical effects on immigration judges as well. With the increasing popularity of immigration "service centers,"[3] immigration judges often hear cases in different jurisdictions on short notice. Having to apply different circuit precedent from one case to the next increases the risk of error in any given case and undermines public confidence in the immigration system as a whole. It also slows down the process as immigration judges wade through unfamiliar circuit precedent to nail down a new circuit's approach to basic questions.

Immigration courts are overwhelmed and understaffed. As a result, they currently face an unprecedented backlog that recently swelled to over one million pending matters.[4] Yet despite that caseload crisis, the wheels of justice often grind to a halt as immigration judges—even very experienced ones—are forced to conduct legal

---

[3] https://www.uscis.gov/ tools/glossary? topic_id=s# alpha-listing (explaining that "USCIS has five service centers: California, Nebraska, Potomac, Texas, and Vermont" and that service centers "do not provide in-person services, conduct interviews, or receive walk-in applications or questions").

[4] https://trac.syr. edu/ phptools/immigration/ court_backlog/ apprep_backlog. php (last visited January 15, 2020).

research to answer routine questions of immigration law that remain the subject of intractable disagreement among the circuits. Given the critical need for *improved* efficiency in the immigration courts, these unnecessary delays are unacceptable.

Making matters worse, immigration judges are "graded" according to how quickly they resolve cases. Indeed, new standards and deadlines have made speed more important than ever.[5] Naturally, the risk of error inherent in any immigration matter increases significantly when immigration judges must apply unfamiliar legal standards to resolve complex legal questions on short notice. Adding time pressure to the mix virtually guarantees higher error rates.

II. THE FIFTH CIRCUIT'S APPROACH CREATES BAD INCENTIVES AND PREJUDICES NONCITIZENS

Justice Scalia once observed that the executive is incentivized to take "an erroneously broad view" of criminal statutes to preserve the possibility that the statute "may cover more than is entirely apparent." *Crandon* v. *United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring in judgment). That insight applies

---

[5] Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges.

with equal force in the immigration context. Cf. *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (applying rule of lenity in immigration context); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (same); *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (the separation of powers concerns that preclude deference to the executive on questions of criminal law apply with equal force in other contexts, including at least some immigration issues).

Unfortunately, however, the Fifth Circuit's approach to defective NTAs creates more bad incentives that prejudice noncitizens. If, as the Fifth Circuit held, the Government can cure an NTA that is defective because it lacks time-and-place information simply by sending a notice of hearing with the missing information much later, there is no reason it could not cure any other defect in an NTA the same way. As a result, the Government currently has a strong incentive to hand noncitizens barebones NTAs that may not even permit them a reasonable opportunity to prepare for—or even appear at—their removal hearings only to provide a "curative" notice of hearing just days before the noncitizen must appear.

The Government's response to *Pereira* dramatically illustrates the point. Just months after this Court's decision, the Government started intentionally including "fake dates" in

the NTAs it issues.[6] Immigration and Customs Enforcement served noncitizens with notices to appear directing them to appear at removal hearings on dates that had not been cleared or in any way coordinated with the immigration court.[7] The Government ordered them to appear at midnight, on weekends, and even on dates that do not exist (like one notice that apparently referred to September 31st as the hearing date).[8]

The chaos that ensued was well-documented. An immigration court in Orlando, for instance, was overrun on October 31, 2018 when more than 100 people showed up for a hearing the Government had scheduled.[9] An eyewitness described the scene:

> At the peak, the line was coming out of the door, down the sidewalk,

---

[6] Dianne Solis, *ICE Is Ordering Immigrants To Appear in Court, but the Judges Aren't Expecting Them*, Dall. News (Sept. 16, 2018), https://www.dallasnews.com/news/immigration/2018/09/16/ice-ordering-immigrants-appear-court-judges-expecting.

[7] Ibid.

[8] Ibid.

[9] Monivette Cordeiro, *Roughly 100 People Gather at Orlando Immigration Court Because ICE Agents Gave Them Fake Hearing Dates*, Orlando Weekly (Nov. 1, 2018), https://www.orlandoweekly.com/Blogs/archives/2018/11/01/roughly-100-people-gather-at-orlando-immigration-court-because-ice-agents-gave-them-fake-hearing-dates

> down the right and well into the parking lot. Inside there was a ton of people waiting to ask about their court dates. All of them were given fake court dates for Halloween morning at 9 a.m.[10]

The fake dates fiasco persisted long into 2019. On January 31, 2019, for example, more than 1,000 noncitizens dutifully appeared at immigration courts around the country for more phantom hearings. [11] This cannot be what Congress intended.

III. THE QUESTIONS PRESENTED EACH HAVE RAMIFICATIONS FAR BEYOND THE SPECIFIC CONTEXT OF THIS CASE

The Courts of appeals have described the ramifications of these questions as "seismic," "unusually broad," and "far reaching." *Hernandez-Perez* v. *Whitaker,* 911 F.3d 305, 314 (6th Cir. 2018); *Ali* v. *Barr,* 924 F.3d 983, 986 (8th Cir. 2019); *Banegas Gomez* v. *Barr*, 922 F.3d 101, 112 n.2 (2d Cir. 2019). Indeed, because the filing of an NTA marks the commencement of

---

[10] Ibid.

[11] Catherine E. Shoichet, *The Wave of "Fake Dates" Cause Chaos in Immigration Courts*, CNN Politics (Jan. 31, 2019), https://www.cnn.com/2019/01/31/politics/immigration-court-fake-dates/index.html.

nearly all immigration proceedings, the issues presented here affect "thousands, if not millions of removal proceedings." *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 962 (7th Cir. 2019). Guidance from this Court would therefore have an immediate and profound impact in a variety of immigration contexts. *Dable* v. *Barr*, No. 18-3037, 2019 WL 6824856, at *4 n.6 (6th Cir. Dec. 13, 2019) (discussing some of the questions presented here before concluding that "given the conflicts among the circuits, the time may be ripe for Supreme Court review"). A few examples are discussed below.

First, the same questions frequently arise in the context of motions to terminate removal proceedings. Indeed, since *Pereira*, immigration courts have been flooded with motions to terminate the proceedings based on defects in putative NTAs. E.g., *Matter of Flores-Aguirre,* 2019 WL 7168785, at *1 (BIA Oct. 29, 2019) (unpublished) ("The Immigration Judge terminated these removal proceedings upon concluding that the Notice to Appear ('NTA') was defective under *Pereira v. Sessions,* … as it did not contain the time and place of the respondent's initial removal hearing."); *Matter of Juarez Alfaro,* 2019 WL 7168779, at *1 (BIA Oct. 25, 2019) (unpublished) ("The Immigration Judge, relying on *Pereira* v. *Sessions,* … granted the respondent's motion to terminate."). As a result of the same disagreements among the courts of appeals at issue here, resolution of

motions to terminate very often hinge on geography. Immigration courts in Chicago and Miami, for example, will likely grant them. Yet identical motions in immigration courts in San Francisco and New York, will likely be denied.

Second, the same issues also arise in the *in absentia* removal context. Section 1229(a) requires the NTA to inform the noncitizen of the consequences of failing to appear after receiving notice, including that the immigration judge may enter an *in absentia* order of removal against him. See 8 U.S.C. § 1229(a)(1)(G)(ii); id. § 1229a(b)(5)(A). An *in absentia* removal order entered without proper notice to the noncitizen may be rescinded at any time upon a motion to reopen if the noncitizen demonstrates that he did not receive notice in accordance with section 1229(a). Id. § 1229a(b)(5)(C)(ii).

The Fifth Circuit routinely denies petitions for review of BIA orders affirming *in absentia* removal orders even when the Government did not provide the noncitizen with an NTA that included the time and place of the removal proceedings. E.g., *Mauricio-Benitez* v. *Sessions*, 988 F.3d 844 (5th Cir. 2018). If the "definition" of NTA that this Court held was compelled by the unambiguous language of section 1229(a) applied to section 1229a(b)(5)(C)(ii)'s reference to "notice in accordance with paragraph (1) or (2) of section 1229(a) of this title," however, such defects would

provide a basis for reopening an *in absentia* removal order.

In absentia removal orders pose unique risks to noncitizens' physical liberty interests. They are also being used more and more frequently. Accordingly, the need for guidance from this Court is even more urgent in this context.

The circuit splits at issue here have consequences in the criminal context as well. In a prosecution for illegal reentry under 18 U.S.C. § 1326, the Government must prove that the defendant was subject to a valid removal order. Several district courts have dismissed criminal convictions because of jurisdictional flaws in the Government's notification procedures. E.g., *United States* v. *Rosas-Ramirez*, No. 18-cr-53, 2019 WL 6327573 (N.D. Cal. Nov. 26, 2019); *United States* v. *Gutierrez-Ramirez*, No. 18-CR-00422-BLF-1, 2019 WL 3346481, at *4 (N.D. Cal. July 25, 2019); *United States* v. *Martinez-Aguilar*, No. 18-cr-300, 2019 WL 2562655, at *3-6 (C.D. Cal. June 13, 2019); *United States* v. *Ramos-Urias*, No. 18-cr-76, 2019 WL 1567526, at *3 (N.D. Cal. Apr. 8, 2019). Other courts have disagreed, while simultaneously acknowledging that "reasonable minds may differ" on this issue. *United States* v. *Arteaga-Centeno*, No. 18-cr-332, 2019 WL 3207849, at *1 (N.D. Cal. July 16, 2019) (Breyer, J.) (requesting appellate "guidance").

In short, the petition presents the Court with the unique opportunity to resolve three circuit

splits in a single case, bringing much-needed clarity to issues that arise frequently in several contexts throughout the immigration system and beyond.

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

SHANE PENNINGTON
Counsel of Record
YETTER COLEMAN LLP
811 Main Street
Suite 4100
Houston, TX 77002
(713) 632-8000
spennington@yettercoleman.com

Counsel for Amici Curiae

Appendix

APPENDIX: LIST OF *AMICI CURIAE*

The Honorable Steven Abrams served as an Immigration Judge at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City. Prior to his appointment to the bench, he worked as a Special U.S. Attorney in the Eastern District of New York, and before that as District Counsel, Special Counsel for criminal litigation, and general attorney for the former Immigration and Naturalization Service ("INS").

The Honorable Teofilo Chapa served as an Immigration Judge in Miami, Florida from 1995 until 2018.

The Honorable Jeffrey S. Chase served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board from 2007 to 2017. He now works in private practice as an independent consultant on immigration law, and is of counsel to the law firm of DiRaimondo & Masi in New York City.

The Honorable George T. Chew served as an Immigration Judge in New York from 1995 to 2017. Previously, he served as a trial attorney at the former INS.

The Honorable James R. Fujimoto served as an Immigration Judge in Chicago from 1990 until 2019.

The Honorable Jennie L. Giambastiani served as an Immigration Judge in Chicago from 2002 until 2019.

The Honorable Paul Grussendorf served as an Immigration Judge from 1997 to 2004 in the Philadelphia and San Francisco Immigration Courts.

The Honorable Miriam Hayward is a retired Immigration Judge. She served on the San Francisco Immigration Court from 1997 until 2018.

The Honorable Rebecca Jamil was appointed as an Immigration Judge in February 2016 and heard cases at the San Francisco Immigration Court until July 2018. From 2011 to February 2016, Judge Jamil served as assistant chief counsel for U.S. Immigration and Customs Enforcement in San Francisco. From 2006 to 2011, she served as staff attorney in the Research Unit, U.S. Court of Appeals for the Ninth Circuit, in San Francisco, focusing exclusively on immigration cases.

The Honorable Edward Kandler was appointed as an Immigration Judge in October 1998. Prior to his appointment to the Immigration Court in Seattle in June 2004, he served as an Immigration Judge at the Immigration Court in San Francisco from August 2000 to June 2004 and at the Immigration Court in New York City from October 1998 to August

2000. From 1983 to 1988, Judge Kandler served as an Assistant U.S. Attorney in the Eastern District of California.

The Honorable Carol King served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary member of the Board for six months between 2010 and 2011.

The Honorable Margaret McManus was appointed as an Immigration Judge in 1991 and *retired from the bench in January 2019.*

The Honorable Charles Pazar served as an Immigration Judge in Memphis, Tennessee, *from 1998 until his retirement in 2017.* He served in the Drug Enforcement Administration Office of Chief Counsel and INS Office of General Counsel. He was a Senior Litigation Counsel at OIL immediately preceding his appointment as an Immigration Judge.

The Honorable George Proctor served as an Immigration Judge in Los Angeles and San Francisco. He was appointed a U.S. Attorney by Presidents Carter and Reagan. He also served as a career attorney in the Criminal Division of the Department of Justice.

The Honorable John W. Richardson served as an Immigration Judge in Phoenix, Arizona, from 1990 until 2018. From 1968 to 1990, he served in the United States Army, Judge Advocate General's Corps.

The Honorable Lory D. Rosenberg served on the Board from 1995 to 2002. She is the founder of IDEAS Consulting and Coaching, LLC, a consulting service for immigration lawyers, and currently works as Senior Advisor for the Immigrant Defenders Law Group.

The Honorable Susan Roy started her legal career as a Staff Attorney at the Board, a position she received through the Attorney General Honors Program. She served as an Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge in Newark.

The Honorable Paul W. Schmidt served as an Immigration Judge from 2003 to 2016 in Arlington, VA. He previously served as Chairman of the Board from 1995 to 2001, and as a Board Member from 2001 to 2003. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1979 to 1981 and 1986 to 1987.

The Honorable Ilyce S. Shugall served as an Immigration Judge from 2017 until 2019 in the San Francisco Immigration Court.

The Honorable Andrea Hawkins Sloan was appointed an Immigration Judge in 2010 following a career in administrative law. She served on the bench of the Portland Immigration Court until 2017.

The Honorable Polly A. Webber served as an Immigration Judge from 1995 to 2016 in San Francisco, after 18 years in private immigration practice. She was National President of the American Immigration Lawyers Association from 1989 to 1990 and taught Immigration and Nationality Law at Santa Clara University School of Law.

The Honorable Robert D. Weisel served as an Immigration Judge in the New York Immigration Court from 1989 until his retirement at the end of 2016. Judge Weisel was an Assistant Chief Immigration Judge, supervising court operations both in New York City and New Jersey. He was also in charge of the nationwide Immigration Court mentoring program for both Immigration Judges and Judicial Law Clerks. During his tenure as Assistant Chief Immigration Judge, the New York court initiated the first assigned counsel system within the Immigration Court's nationwide Institutional Hearing Program.