No. 19-1208

IN THE
Supreme Court of the United States

ERIKA JISELA YANEZ-PENA,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

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

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

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(*continued*)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Consitution and Statutes

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Regulations

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are thirty-six former immigration judges ("IJs") 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, and the need for uniform application of the immigration laws.

SUMMARY OF ARGUMENT

It is an axiom of due process that a party charged to defend against a legal proceeding must receive notice of the time and place of the proceeding and an opportunity to be heard. This Court's ruling in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), reflects that axiom in the context of initiating removal proceedings by "notice to appear."

This petition presents a straightforward question of enormous practical significance that has divided the five courts of appeals to have considered the issue: Must the initial written notice served on noncitizens to commence their removal proceedings provide—*in*

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[1] All parties have consented to the filing of this brief. *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.

one document—the "time and place at which the proceedings will be held" (along with charges and other specified information) in order to satisfy the requirements of 8 U.S.C. § 1229(a), or does the statute allow the government to cobble together the required elements of a "notice to appear" from multiple documents, issued at different times, none of which alone contain all of the statutorily required information?

Resolution of this issue will affect thousands of people in the immigration system. For noncitizens applying for cancellation of removal, service of a valid "notice to appear" triggers the so-called "stop-time" rule, which terminates the period of continuous presence required for cancellation eligibility. For noncitizens ordered removed *in absentia*, whether that severe penalty is proper depends on whether the notice served on the noncitizen satisfied the requirements of § 1229(a).

This Court should grant review to resolve the accelerating circuit split over this issue. The Fifth Circuit, agreeing with the Sixth Circuit, held that a defective "notice to appear" lacking the statutorily required time-and-place information could be "cured" by a subsequent "notice of hearing" containing that information, such that the separate documents considered together become "a notice to appear," with the stop-time rule being triggered upon later service of the "curative" notice of hearing. *See Yanez-Pena v. Barr*, 952 F.3d 239 (5th Cir. 2020); *Garcia-Romo v. Barr*, 940 F.3d 192 (6th Cir. 2019). The Third and Tenth Circuits, based on the plain language of § 1229(a) and this Court's decision in *Pereira*, 138 S. Ct. at 2105, have reached the opposite conclusion. *See Guadalupe v. Atty. Gen.*, 951 F.3d 161 (3d Cir. 2020); *Banuelos v. Barr*, 953 F.3d 1176 (10th Cir. 2020). A divided panel

of the Ninth Circuit was in accord with the Third and Tenth Circuits, before that court granted rehearing *en banc*. *See Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019), *vacated and reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020).

This Court should bring harmony to federal law by granting certiorari, reversing the Fifth Circuit, and restoring the common-sense interpretation of § 1229(a) as requiring *one* document that satisfies the statute's requirements.

I. The question presented affects many thousands of people across the country. As the government told this Court in 2018, "almost 100 percent" of putative notices to appear omit the required time-and-place information. *Pereira*, 138 S. Ct. at 2111. Hundreds of thousands of notices to appear are served each year; a dispute about validity is embedded in every proceeding initiated with a notice that lacks time-and-place information. Indeed, tens of thousands of cancellation applications remain pending, each one requiring an IJ to determine whether the stop-time rule was triggered by § 1229(a) notice. Similarly, tens of thousands of *in absentia* removal orders are issued every year, each one dependent on whether proceedings began with the noncitizen's being served a notice to appear that complies with § 1229(a).

This case involves the application of § 1229(a) in both the cancellation of removal and *in absentia* removal contexts, thus presenting an optimal vehicle to address the question presented. *See* Petition for a Writ of Certiorari ("Pet.") at 22-24.

II. Deciding the question presented will also promote uniformity in the nation's immigration laws. Uniformity in this sphere is a foundational principle

of American law, with the Constitution explicitly directing Congress "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. But there can be no uniform law if basic questions affecting the right of an individual to remain in the country get an answer that varies among the circuits. Such a regime would result in divergent outcomes based on geography alone, not the merits of any particular noncitizen's case.

This unfairness may be exacerbated by the Department of Homeland Security's ("DHS") discretion to select the venue for a removal proceeding, and thus the law that governs the case. DHS's ability to choose the venue, coupled with its ability to transfer detainees wherever it sees fit, opens the door to unfair forum shopping for the circuit law it prefers.

III. Requiring DHS to work with the Executive Office for Immigration Review ("EOIR") to obtain time-and-place information *before* serving a notice to appear—and including such information in that document, as § 1229(a) and *Pereira* require—is practical and will reduce administrative inefficiency and error. Doing so will also achieve the legislative purpose of the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), Pub. L. 104-208, Div. C, 110 Stat. 3009-546, of which § 1229(a) was a part, by instituting a "single form of notice" to "simplify procedures for initiating removal proceedings." H.R. Rep. 104-469(I), 1996 WL 168955 at *159.

ARGUMENT

I. THIS PETITION PRESENTS A PRESSING ISSUE OF FEDERAL LAW THAT IMPACTS THOUSANDS OF INDIVIDUALS ACROSS THE COUNTRY.

Whether "a notice to appear" must contain in a single document the time-and-place information § 1229(a) requires is a question of profound importance for many thousands of individuals and their families. Procedurally, a notice to appear initiates removal proceedings against a noncitizen, *see* 8 C.F.R. § 1003.14(a); but it also substantively impacts the noncitizen's rights in several other potentially life-altering ways.

For example, under the so-called "stop-time rule," serving "a notice to appear under section 1229(a)" terminates the period of continuous presence required for cancellation of removal. 8 U.S.C. §§ 1229b(d)(1), 1229b(a)(2), 1229b(b)(1)(A). An applicant otherwise eligible for cancellation can thus be barred from relief based on when she is served with "a notice to appear" conforming to the requirements of § 1229(a).

Additionally, if a noncitizen is served with the "written notice required under . . . section 1229(a)" but does not appear at the removal proceeding, the noncitizen "shall be ordered removed in absentia." *Id.* § 1229a(b)(5)(A). Whether this "severe" penalty is meted out, *Pereira*, 138 S. Ct. at 2111—as it was in this case—flows ineluctably from a determination of whether the putative notice is valid "under . . . section 1229(a)." *See* 8 U.S.C. § 1229a(b)(5)(A) (removal *in absentia* requires the government to establish that "written notice was so provided"); § 1229a(b)(5)(C)(ii) (removal order *in absentia* may be rescinded when the

noncitizen "demonstrates that [she] did not receive notice in accordance with . . . section 1229(a)").[3]

Conclusively defining—as only this Court can—what qualifies as valid notice "under § 1229(a)" can thus determine whether thousands of people may remain in the country.

The reach of the question presented cannot be overstated. In fiscal year 2018, DHS served 308,304 new notices to appear, an increase from 295,214 in 2017, which was itself an increase from approximately 228,000 in 2016 and 192,000 in 2015. EOIR, *Statistics Yearbook: Fiscal Year 2018*, ("EOIR Yearbook") at 7, https://www.justice.gov/eoir/file/1198896/download. In light of the government's 2018 admission to this Court that "almost 100 percent" of "notices to appear omit the time and date of the proceeding over the last three years," *Pereira*, 138 S. Ct. at 2111, each of the hundreds of thousands of purported "notices to appear" served annually represents a potential dispute over the triggering of the "stop-time rule" and the impermissibility of removal *in absentia*.

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[3] Whether DHS has served a valid notice to appear under § 1229(a) can also determine whether a noncitizen requesting voluntary departure—which avoids the harsh consequences for future reentry that flow from a removal order—has met the one-year presence requirement of 8 U.S.C. § 1229c(b). Under that provision, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense" under certain conditions, including that "the alien has been physically present in the United States for a period *of at least one year immediately preceding the date the notice to appear was served under section 1229(a)* of this title[.]" *Id.* § 1229c(b)(1)(A) (emphasis added). A noncitizen who is denied voluntary departure may be ordered removed. *See Tovar v. U.S. Atty. Gen.*, 646 F.3d 1300, 1306 (11th Cir. 2011).

Indeed, as of November 2016, EOIR reported that *40,895* cancellation and suspension cases were awaiting decision. *See* American Immigration Lawyers Association, *EOIR Stakeholder Meeting Agenda: Unofficial AILA Notes*, AILA Doc. No. 17041030, Question No. 11, (Nov. 17, 2016), https://www.aila.org/infonet/aila-eoir-stakeholder-meeting-minutes-11-17-16. Each cancellation case requires calculating the time of the applicant's continuous presence in the United States which, in turn, requires a determination of when the applicant received a valid notice to appear.

The issue the petition presents also affects tens of thousands of noncitizens removed *in absentia*. In fiscal year 2018, *46,480* removal orders were issued *in absentia*, reflecting an upward trend from 2014, when EOIR issued 26,234 such orders. *See* EOIR Yearbook at 33. That draconian penalty is predicated on service of a statutorily compliant notice.

Resolving the question presented will thus provide certainty to a vast population whose eligibility for remaining in the country may depend on whether the "notice" they received conforms with the law. Doing so through *this* case is particularly appropriate. This petition, unlike other similar petitions, cleanly presents this issue in both the cancellation of removal and removal *in absentia* contexts, without the need to address other threshold or ancillary issues. *See* Pet. at 22-24.

II. THE CIRCUIT SPLIT SHOULD BE RESOLVED TO BRING UNIFORMITY TO IMMIGRATION LAW.

There is currently a deepening circuit split over whether "a notice to appear" can be pieced together from multiple documents issued on different dates.

This will result in different outcomes for similarly situated cancellation applicants based solely on which circuit's law governs. Individuals will also be ordered removed *in absentia* simply because their case was brought before an IJ in the Fifth Circuit as opposed to, for example, in the Third Circuit.

These kinds of divergent outcomes undermine the principle of uniformity that is constitutionally embedded in the nation's immigration policy, and, more practically, opens the door to forum shopping by DHS.

A. Allowing the circuit split to persist would undermine the constitutional principle of uniformity in immigration law and result in fundamentally unfair outcomes.

The BIA's "principal mission . . . is to ensure as uniform an interpretation and application of this country's immigration laws as is possible." *Matter of Cerna*, 20 I. & N. Dec. 399, 405 (BIA 1991), *superseded on other grounds by amended regulation*, 8 C.F.R. § 1003.2(b). This uniformity policy is rooted in the Constitution, which directs Congress "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. This "demanding requirement of uniformity was meant to displace the state-to-state variability that had characterized life under the Articles of Confederation." James E. Pfander & Theresa R. Wardon, *Reclaiming The Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 387 (2010). As James Madison explained:

> The dissimilarity in the rules of naturalization has long been remarked as a fault in our system . . . . In one State, residence for a

> short term confers all the rights of citizenship; in another, qualifications of greater importance are required . . . . The new Constitution has accordingly, with great propriety, made provision against them . . . by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

The Federalist No. 42 (James Madison). It was thus recognized as a founding principle that immigrants must not receive differing treatment depending on which jurisdiction's laws applied.

Reflecting the constitutional imperative of uniformity, the BIA has emphasized that the "Federal immigration laws are intended to have uniform nationwide application and to implement a unitary Federal policy." *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 508 (BIA 2008); *see also, e.g.*, *Matter of Jose Marquez Conde*, 27 I. & N. Dec. 251, 255 (BIA 2018) (reaffirming prior BIA decision with modification to give it "nationwide" application, in order to "promote national uniformity in the application of the immigration laws"). Indeed, to further the "interest of uniformity in the application of the immigration laws," the BIA has even withdrawn its own decisions in light of federal circuit authority to the contrary. *Matter of J-H-J*, 26 I. & N. Dec. 563, 564-65 (2015) ("Given the overwhelming circuit court authority in disagreement with [two BIA decisions], we will now accede to the clear majority view of these nine circuits."); *see also Matter of Small*, 23 I. & N. Dec. 448, 450 (BIA 2002) (reconsidering issue and acceding to appellate authority "in the interest of uniform application of the immigration laws").

This Court's resolution of the instant circuit split is necessary to effectuate the nation's fundamental policy of uniformity in its immigration laws. If state-to-state variation in noncitizens' fundamental rights was a fault so significant that it required explicit redress in the Constitution, variation among the circuits on fundamental questions affecting immigration status presents no less a fault. Should the instant circuit split remain unresolved, the differing rules would result in similarly situated individuals acquiring (or not) differing status based purely on where their proceedings are held. As the BIA has previously warned, persistent circuit disagreement "create[s] a very real problem." *Matter of Cerna*, 20 I. & N. Dec. at 408. While "all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide," we are sometimes "left with a patchwork application of the law—with the most profound decisions affecting aliens . . . tied to the mere happenstance of where their cases arise geographically." *Id.*

That is precisely the situation that Petitioner (and numerous others like her) finds herself in. Had her petition for relief been reviewable in the Third Circuit or Tenth Circuit, it would have been granted. Pet. at 21. Because her petition was reviewed under the law of the Fifth Circuit, it was denied. *Id.* This is not how our immigration laws were meant to be administered.

B. The circuit split creates an opportunity for DHS to forum shop.

The different circuit court rules create an opportunity for the government to forum shop. In removal proceedings, venue is initially determined based on where DHS files the notice to appear. *See Yang You Lee v. Lynch*, 791 F.3d 1261, 1265 (10th Cir. 2015); 8

C.F.R. §§ 1003.20(a), 1003.14. On appeal to the circuit courts, venue lies with the "court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2). Absent a change of venue, therefore, DHS's discretionary choice of the venue for filing the notice to appear will determine which circuit's law applies to the case.

DHS's discretion to choose the appropriate venue is amplified by its discretion over transferring detained individuals from one detention center to another. *See Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999). As the DHS Office of the Inspector General has stated, ICE "may decide for operational or other reasons to transfer a detainee from the jurisdiction where the detainee was arrested to a detention facility outside of that jurisdiction." Office of Inspector Gen., U.S. Dep't of Homeland Sec., OIG-10-13, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers* at 2 (2009), https://trac.syr.edu/immigration/library/P4225.pdf. For those transferred detainees, "ICE files the Notice to Appear with the immigration court that has jurisdiction over the *receiving* detention facility." *Id.* (emphasis added). The potential thus exists for DHS to opportunistically move a detainee to a particular facility to avail itself of the circuit law prevailing there.[4]

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[4] ICE maintains over 200 detention facilities to house over 50,000 detainees, and it has not hesitated to utilize its transfer authority. U.S. Immigration and Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report* at 5, 6 (2020), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf. In 2015, for example, ICE recorded 374,059 transfers, enough for *every* detainee to experience, on average, at least one transfer to another facility. TRAC Immigration, *New Data on 637 Detention Facilities Used by ICE in*

This is not an idle concern. Numerous courts have noted the government's "ability to forum shop" in light of its power to "direct[] where an alien is detained." *Alcaide-Zelaya v. McElroy*, No. 99Civ.5102(DC), 2000 WL 1616981, at *5 (S.D.N.Y. Oct. 27, 2000).

In *Alcaide-Zelaya*, a habeas case, the court rejected the government's contention that the petitioner could only seek relief in Louisiana, noting that "the government arrested petitioner, a long-time resident of New York, in New York, and then re-located him to a detention facility in Louisiana . . . where, as the government concedes, petitioner's claims will be dismissed because of Fifth Circuit law." *Id.*; *see also, e.g.*, *Patterson v. INS*, No. Civ.A.3:03CV1363(SRU), 2004 WL 1114575, at *2 (D. Conn. May 14, 2004) (noting the government's power to "move immigration detainees around the country" including "to jurisdictions where the law may be less favorable to them"); *de Jesus Paiva v. Aljets*, No. CIV036075(DWF/AJB), 2003 WL 22888865, at *4 (D. Minn. Dec. 1, 2003) ("To now hold that Petitioners may only file their Petition in the state that the ICE determines to send them would be to allow the ICE to forum shop, intentionally or not.").

Commentators have likewise noted examples of ICE's potential "forum-shopping tactics." *See, e.g.*, Roger C. Grantham, Jr., *Detainee Transfers and Immigration Judges: ICE Forum-Shopping Tactics In Removal Proceedings*, 53 GA. L. REV. 281, 302-04 (2018) (collecting cases).

The law should not permit DHS to game the immigration system by affording it alone the chance to choose the rule of law that will apply to a removal pro-

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FY 2015 (Apr. 12, 2016), http://trac.syr.edu/immigration/reports/422.

ceeding. Federal courts "comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than that of another determine his case." *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993). This Court can rectify this procedural imbalance and restore the promise of fairness before the law by granting review and resolving the instant circuit split to create one rule for what constitutes a valid notice to appear.

III. REQUIRING A NOTICE TO APPEAR TO INCLUDE TIME-AND-PLACE INFORMATION FURTHERS CONGRESS'S INTENT TO STREAMLINE PROCEEDINGS, AND IS WITHIN THE GOVERNMENT'S ADMINISTRATIVE CAPABILITIES.

Resolving the circuit split by reversing the Fifth Circuit and restoring the plain, common-sense meaning of "a notice to appear" as denoting a *single* document that satisfies all of § 1229(a)'s requirements will not only foster uniformity, it will simplify the procedures for commencing removal proceedings, as Congress intended when it passed IIRIRA. Insofar as the government objects that providing basic calendaring information in a single document will somehow be impractical—as it did, to no avail, in *Pereira*, 138 S. Ct. at 2118-19—its concerns deserve no weight. DHS and EOIR have in the past worked together to schedule hearings before serving notices to appear, and there is no reason why that practice cannot continue.

A. Congress intended IIRIRA to simplify and streamline the then-existing two-step notice procedure.

In 1996, Congress enacted IIRIRA to, *inter alia*, "streamline[] rules and procedures for removing illegal aliens" and to "simplify procedures for *initiating*

removal proceedings against an alien." H.R. Rep. 104-469(I), 1996 WL 168955 at *107, *159 (emphasis added). Specifically, as the Third and Tenth Circuits have recognized, the statutory text unambiguously requires providing information about the time and place of hearing, with a statement of the charges, in *one* document.

IIRIRA's legislative history leaves no doubt in this regard. Provisions of IIRIRA were enacted to address problems under existing law that had allowed for a confusing, multi-document process covering notice to a noncitizen of charges and the time and place of hearing. Before IIRIRA, noncitizens received notice of their prospective deportation[5] proceedings through a bifurcated process. First, respondents were served with an "order to show cause." *See* 8 U.S.C. § 1252b(a)(1) (repealed 1996). The order to show cause was required to specify much of the information that must now be included in a "notice to appear"—namely, "[t]he nature of the proceedings against the alien"; "[t]he legal authority under which the proceedings" were to be conducted; "[t]he acts or conduct alleged to be in violation of law"; "[t]he charges against the alien and the statutory provisions alleged to have been violated"; that the respondent "may be represented by counsel"; and the "consequences . . . of failure to provide" a written record of the alien's current address and contact information. *Compare* 8 U.S.C. § 1252b(a)(1)(A)-(F) (repealed 1996), *with* 8 U.S.C.

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[5] IIRIRA eliminated the distinction between exclusion proceedings (which applied to noncitizens seeking admission into the United States) and deportation proceedings (which applied to noncitizens already present in the United States, and charged with deportability) in favor of a single "removal" proceeding. *See Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 349 (2005).

§ 1229(a)(1)(A)-(F) (setting forth same requirements). Notably absent from the order-to-show-cause requirements, however, was the time and place of the respondents' initial hearing.

Instead, the pre-IIRIRA statute separately authorized "[n]otice of time and place of proceedings" to be given to the respondent "in the order to show cause *or otherwise*." *See* 8 U.S.C. § 1252b(a)(2)(A) (repealed 1996) (emphasis added). The regulations then in effect further distinguished between an "order to show cause" and a "notice of hearing." 8 C.F.R. § 242.1 (1996). The former was to be filed with the "Immigration Court," *id.* § 242.1(a) (1996), which would then schedule the hearing and provide "notice of the time, place, and date of the hearing," *id.* §§ 242.1, 3.18 (1996). Notice to respondents was thus permitted to be a two-step process, with time-and-place information allowed in a second, separate "notice of hearing" as a matter of course.

Congress, concerned about administrative inefficiencies and errors resulting from pre-IIRIRA proceedings, sought to simplify those processes. *See, e.g.*, *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 3 (1995) (statement of Chairman Lamar Smith) (asserting need to "look at legislative reforms to streamline the removal process"). "Lapses" in the notification process were specifically singled-out. H.R. Rep. 104-469(I), 1996 WL 168955 at *122 (noting that "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings" had led "some immigration judges to decline to exercise their authority to order an alien deported in absentia").

To "streamlin[e]" the removal process generally, and the notification process in particular, Congress reasoned that all relevant information about a respondents' initial removal hearing should be provided in a single document: "[Section 1229] also will simplify procedures for initiating removal proceedings against an alien. *There will be a single form of notice*. . . ." H.R. Rep. 104-469(I), 1996 WL 168955 at *159 (emphasis added).

The unambiguous text of § 1229(a) reflects this congressional intent, mandating that the "time and place" of removal proceedings "shall" be included in "a 'notice to appear.'" 8 U.S.C. § 1229(a). Indeed, the addition of the "time and place" requirement to § 1229(a) is the *only* statutory change from the list of pre-IIRIRA order-to-show-cause requirements, indicating Congress intended that such information be provided via the "single form of notice" that replaced the old order to show cause. Moreover, there is no option in the new statutory provisions—as there was in the former law—to serve this information via the initial notice to appear "or otherwise," 8 U.S.C. § 1252b(a)(2)(A) (repealed 1996), nor any mention of a separate "notice of hearing." As this Court noted in *Pereira*, using the singular, the "post-IIRIRA statutory regime" created "an entirely different *document* called a 'notice to appear,' which, by statute, must specify the time and place of removal proceedings." 138 S. Ct. at 2117 n.9 (emphasis added). IIRIRA eliminated the former practice of piecemeal notice, consolidating the notice requirement into *one* step and *one* document.

B. Allowing DHS to cure a defective notice to appear by providing time-and-place information in a later notice of hearing replicates the inefficiencies IIRIRA aimed to eliminate.

Sanctioning a two-step notice process—as the Fifth Circuit did—in contravention of the plain statutory text, the legislative history, and this Court's decision in *Pereira*, would resurrect the very inefficiencies that Congress sought to address when it enacted IIRIRA.

Bifurcating the administration of § 1229(a)'s notice requirements between (i) DHS, which serves the initial notice, often without time-and-place information, and (ii) EOIR's immigration courts, which must then send a notice of hearing supplying that missing information, has the counterproductive effect of delaying removal proceedings because it injects an unnecessary step into the notice process. When DHS's initial notice to appear lacks § 1229(a)'s time-and-place information, the respondent must wait for the notice to appear to be filed with an immigration court and entered into the courts' computer systems before the respondent can receive the time-and-place information in a subsequent notice of hearing. *See* 8 C.F.R. §§ 1003.14(a), 1003.18(a).[6] This process can be extremely protracted. In *Pereira*, for example, it took

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[6] *See also* U.S. Dep't of Justice Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Uniform Docketing System Manual* (Rev. Sept. 2018), at Intro-6, https://www.justice.gov/eoir/file/1153561/download ("Docketing Manual") ("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

more than a year for the (defective) notice to appear to be filed with the Boston Immigration Court. 138 S. Ct. at 2112. Such delays can hardly be surprising in light of the extraordinary caseload that the immigration courts must bear. *See* TRAC Immigration, *Immigration Court Backlog Tool*, (March 2020), https://trac.syr.edu/phptools/immigration/court_backlog/ (noting 1,129,890 cases pending before immigration courts across the country). A two-step notice process that places the burden on immigration courts to sort through piles of putative notices to appear, docket them, and only then generate a hearing date for further service will inevitably delay informing the respondent of critical time-and-place information.

This creates what undersigned former BIA Chairman and immigration judge Paul W. Schmidt has called a "No Man's Land": the space between when a respondent is served with an initial notice to appear and when her case is finally filed and docketed—only after which an initial hearing is scheduled and notice sent out to the respondent. *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").

Because the notice to appear must escape this processing gap before any time-and-place information can be set and served, the two-step notice process opens the way for errors. For example, if a respondent duly files a Change of Address form during this period, there will be no record of proceeding to which it

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Master Calendar Hearing . . . and generates a hearing notice informing the parties of the date, time and place for the hearing.").

can attach because no notice to appear has been docketed. *See id.* at 3-4.[7] As Judge Schmidt has noted, "documents that were not immediately posted to the [record of proceeding] were frequently lost and not readily retrievable." Schmidt Brief at 4. As such, the notice of hearing, when finally generated, could end up being sent to the wrong address. *See id.* at 4-6. This in turn could lead to a noncitizen being ordered removed *in absentia* through no fault of her own (and subsequent litigation, causing further administrative burden). *See id.* at 6.

Permitting a defective notice to appear to be "cured" by a subsequent notice of hearing will also increase the fact-finding burdens on already overstretched immigration judges. Under the Fifth Circuit's rule, immigration judges will inevitably have to divert attention away from the merits of a case to investigate whether time-and-place information was provided in a second document; whether that document was properly and accurately served; and whether a filing like a Change of Address form was submitted but improperly recorded in "No Man's Land." Holding instead that the relevant time periods accrue until a *single*, *complete* document is served, as envisioned by Congress and this Court in *Pereira*, would allow for a straightforward, "streamlined" inquiry—either the notice is complete or it is not. *See* H.R. Rep. 104-469(I), 1996 WL 168955 at *107.

Immigration judges are under pressure to increase productivity and adjudicate removal cases at a faster rate. *See* EOIR, *EOIR Performance Plan, Adjudicative Employees* (Dec. 12, 2019),

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[7] A "record of proceeding" is the case file containing all case-related information. Docketing Manual at Intro-6, II-1. It is created after the initiating document is filed. *Id.* at II-1.

https://www.aila.org/File/Related/18082203i.pdf (requiring immigration judges to complete at least 700 cases per year and maintain a remand rate of lower than 15% per year to receive a "satisfactory" review). A notice process spread over multiple documents and indeterminate swaths of time needlessly complicates adjudications and satisfies neither that goal nor IIRIRA's "streamlining" purpose.

C. The government can provide a single notice to appear that includes time-and-place information.

Requiring DHS to serve a single notice that provides the information required by § 1229(a) will reduce the number of steps involved in providing notice, thus promoting adjudicatory efficiency and reducing the risk of delays and errors.

The government should not complain about the purported impracticability of including time-and-place information in a notice to appear. This Court already rejected such concerns in *Pereira*. 138 S. Ct. at 2118 (deeming the government's "practical considerations" to be "meritless" and otherwise failing to "justify departing from the statute's clear text"). The Court dismissed the notion that the government is somehow "incapable of specifying an accurate date and time on a notice to appear," noting that DHS and immigration courts had worked together previously to coordinate setting hearing dates, and that, in light of "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." *Id.*[8]

Indeed, that is precisely what has happened after *Pereira*. In a December 2018 memo, EOIR Director James R. McHenry III stated that, following this Court's decision in *Pereira*, EOIR was "provid[ing] hearing dates directly to DHS for use on NTAs for detained cases and will continue to do so." Memorandum from James R. McHenry III. EOIR Director, to All of EOIR, at 1 n.1 (Dec. 21, 2018), https://www.justice.gov/eoir/file/1122771/download ("McHenry Memo").

As for non-detained cases, EOIR had begun "providing dates and times directly to DHS to use on NTAs for some . . . cases," and was working to "provide access to DHS to its Interactive Scheduling System (ISS)." *Id.* at 1-2. ISS was a system that enabled DHS "to access [EOIR's] data base to enter case data and to schedule the initial master calendar hearing." Docketing Manual at I-2. Thus, as Director McHenry instructed in his memo, "DHS may utilize ISS in order to schedule hearings for specific dates and to reflect those scheduled hearings on NTAs." McHenry Memo at 2.

ISS is not newfangled software that could not be developed until after *Pereira*. It had long been used between the agencies, until approximately May 2014, when it ceased to be active. *See* Schmidt Brief at 6-7

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[8] *See also Guadalupe*, 951 F.3d at 167 (recognizing that requiring "one complete" notice to appear does not prevent DHS from waiting to serve it until after the Department has compiled all of the information set forth in § 1229(a)); *Lopez*, 925 F.3d at 404 (noting that "the Attorney General conceded at oral argument that DHS can reissue complete Notices to Appear to those who have been served defective ones").

(stating that cases scheduled through ISS proceeded "much more smoothly"); Brief for the National Immigrant Justice Center as *Amicus Curiae* in Support of Petitioner, *Pereira v. Sessions*, 138 S. Ct. 2105 (No. 17-459) at 30-31.

The fact that EOIR, post-*Pereira*, revived ISS and otherwise provided time-and-place information to DHS to include in notices to appear demonstrates both that the government understood *Pereira* to require including such information in *one* initial document, and that the two concerned agencies could coordinate scheduling proceedings and generate a notice with the complete information required.

Continuing technological developments should make such cooperation even easier. The EOIR Courts & Appeals System initiative, which seeks to phase out paper filings from immigration courts entirely, has created a "DHS Portal," which allows DHS users to electronically upload case initiation data and view case detail and other information. *See* U.S. Dep't of Justice, *Welcome to the EOIR Courts & Appeals System (ECAS) Information Page*, https://www.justice.gov/eoir/ECAS; U.S. Dep't of Justice, *DHS Portal Overview* (Aug. 7, 2018), https://www.justice.gov/eoir/video/dhs-portal-overview. Effective June 2019, the ISS functionality was to transition to the DHS Portal. *See* U.S. Dep't of Justice, *ECAS DHS Portal Registration Overview* (June 19, 2019), https://www.justice.gov/eoir/video/ecas-dhs-portal-registration-overview. And indeed, as the Acting Deputy Director of EOIR has noted, as of January 31, 2020, DHS is utilizing "an interactive scheduling portal" to "schedule[] the initial master calendar hearing" for "many" non-detained removal cases. Memoran-

dum from Sirce E. Owen, EOIR Acting Deputy Director to All of EOIR (Jan. 31, 2020), https://www.justice.gov/eoir/page/file/1242501/download. DHS is thus perfectly able to coordinate with EOIR and obtain the necessary time-and-place information to be included on a single notice to appear.

Serving a noncitizen with one document that contains the statutorily required information, as mandated by § 1229(a) and *Pereira*, is well within the government's capabilities and reflects axiomatic due process principles. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). The right to "notice and opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *See id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Reading § 1229(a) to allow for multiple purported notices, issued at different times, to supply basic time-and-place information hinders, rather than promotes, meaningful notice. This Court should grant review and hold, consistent with the plain statutory text, the legislative history, this Court's precedent, and due process principles, that § 1229(a)'s requirements must be satisfied in a single document.

CONCLUSION

For the reasons stated above and in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Immigration Judge, New York, 1994-2019

Hon. Sarah Burr

Immigration Judge, New York, 1994-2012

Hon. Esmeralda Cabrera

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

Hon. Teofilo Chapa

Immigration Judge, Miami, 1995-2018

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 and Arlington, 1980-2005

Hon. Bruce J. Einhorn

Immigration Judge, Los Angeles, 1990-2007

Hon. Cecelia Espenoza

Member, Board of Immigration Appeals, 2000-2003

Hon. Noel Ferris

Immigration Judge, New York, 1994-2013

Hon. Gilbert Gembacz

Immigration Judge, Los Angeles, 1996-2008

Hon. John Gossart, Jr.

Immigration Judge, Baltimore, 1982-2013

Hon. Jennie L. Giambastiani

Immigration Judge, Chicago, 2002-2019

Hon. Paul Grussendorf

Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward

Immigration Judge, San Francisco, 1997-2018

Hon. Charles Honeyman

Immigration Judge, Philadelphia and New York, 1995-2020

Hon. Rebecca Jamil

Immigration Judge, San Francisco, 2016-2018

Hon. William F. Joyce

Immigration Judge, Boston, 1996-2002

Hon. Carol King

Immigration Judge, San Francisco, 1995-2017

Hon. Elizabeth Lamb

Immigration Judge, New York, 1995-2018

Hon. Donn Livingston

Immigration Judge, New York City and Denver, 1995-2018

Hon. Margaret McManus

Immigration Judge, New York, 1991-2018

Hon. Charles Pazar

Immigration Judge, Memphis, 1998-2017

Hon. George Proctor

Immigration Judge, Los Angeles and San Francisco, 2003-2012

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Immigration Judge, San Francisco, 1997-2018

Hon. John Richardson

Immigration Judge, Phoenix, 1990-2018

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Member, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy

Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt

Chair, Board of Immigration Appeals, 1995-2001

Member, Board of Immigration Appeals, 2001-2003

Immigration Judge, Arlington, 2003-2016

Hon. Ilyce Shugall

Immigration Judge, San Francisco, 2017-2019

Hon. Denise Slavin

Immigration Judge, Miami and Baltimore, 1995-2019

Hon. Andrea Hawkins Sloan

Immigration Judge, Portland, 2010-2016

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