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 AMICUS CURIAE IMMIGRANT ADVOCATES RESPONSE COLLABORATIVE

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Immigrant Advocates Response Collaborative (I-ARC) is a membership of more than 80 legal service providers, bar associations, and professional associates who assist immigrants across New York. I-ARC and its members stand up for noncitizens' rights throughout the state, support litigation and amicus efforts to obtain injunctions against nationwide anti-immigrant policies, and fight ways in which the legal system places noncitizens and their attorneys at distinct disadvantages. I-ARC also leads immigration-attorney trainings and conferences and issues reports on the state of immigration legal services and the challenges they face, exposing ways in which immigration enforcement agencies abuse their statutory authority.

As a collaborative of and for attorneys representing immigrant New Yorkers from myriad communities, I-ARC has a unique perspective to offer this Court on the often devastating consequences of inadequate notice given noncitizens through faulty Notices to Appear ("NTAs"). It also can shed light on the disadvantages that immigration attorneys face when NTAs do not include all statutorily required scheduling information, and the burdens placed on immigrants' ability to exercise their Fifth Amendment right to retain counsel for these hearings. Given Congress's clear

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[1] Both parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored any part of this brief, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person other than *amicus* made such a contribution. All parties have been timely notified of the submission of this brief.

instructions to provide adequate notice in a single NTA and this Court's straightforward holding in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), DHS's continued refusal to provide adequate notice in a single document to all noncitizens subject to NTAs is unconscionable and must be reversed.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's endorsement of the government's practice of sending required NTA information in multiple mailings violates the plain text of the statute and creates an intractable circuit split (as discussed in the Petition). Absent this Court's reversal, it also causes dire consequences for noncitizens who, without receiving all required notice in one document, may become ineligible for cancellation of removal or may not receive or comprehend the import of multiple mailings and thus fail to appear at their removal hearing, leading to removal *in absentia*. The lack of proper notice also can hinder immigrants' ability to retain counsel for these important hearings.

Given these extreme adverse consequences, Congress explicitly implemented a single-step process where one NTA document contains all information required to put noncitizens on notice for their hearings. That change in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") helps to simplify and streamline removal proceedings, while ensuring that any *in absentia* orders are justified by adequate notice to the noncitizen. Single NTAs containing all relevant information also work together with the new stop-time rule to reduce gamesmanship

by both noncitizens *and* the government, while ensuring fundamental fairness.

Put simply, Congress was right in its judgment that single NTAs are necessary to protect noncitizens' due process rights—including their right to access counsel. Actually receiving and comprehending all relevant hearing information makes retaining and benefiting from counsel more realistic and more probable. To the extent the statute's NTA requirements are at all opaque (in fact, they are clear), the Court should err on the side of protecting noncitizens' Fifth Amendment rights.

Nor can the government reasonably argue that implementing a scheduling system allowing for inclusion of time, date, and location information in initial NTA mailings would pose any substantial burden. In fact, reviving a software-based scheduling system for coordination between DHS and immigration courts would help the government achieve efficiency goals undoubtedly in its own interests, and bring the immigration court system closer in administrability and rationality to every other litigation system in the nation.

Given the critical importance of this issue to countless noncitizens, and their crucial statutory and constitutional rights to proper notice and access to counsel before potential removal, the Court should grant the writ of certiorari and reverse the Fifth Circuit.

ARGUMENT

I. Single NTAs Can Prevent Dire Consequences For Countless Noncitizens.

Proper service of a single NTA as required by statute is crucial for preserving immigrants' due process rights and ensuring their access to legal representation. Especially in light of the harsh consequences flowing from the stop-time rule and potential removal *in absentia*, adequate notice must be given to noncitizens subject to removal proceedings so that immigration courts can be confident the noncitizen knew of the hearing, when and where it would take place, and the relevant consequences. Congress decided, for good reason, that establishing confidence in proper notice requires the government to send the immigrant a single NTA containing all this information.

A. Dire consequences.

This Court well knows the consequences that turn on when and whether an adequate NTA has been sent to a noncitizen. Under the "stop-time" rule, if a statutorily sufficient NTA has been served on the noncitizen, she can no longer accrue any time toward the 10-year physical presence requirement for cancellation of removal under 8 U.S.C. § 1229b. *Pereira*, 138 S. Ct. at 2110. A noncitizen's eligibility to remain in the country often turns on if and when a true NTA has been served.

"The consequences of a noncitizen's failure to appear at a removal proceeding" are even more severe. *Id.* at 2111. If a removable noncitizen does not receive all the information required to be included in an NTA (in particular, the time and place of her hearing) in one

mailing and fails to either read or understand a subsequent mailing with that information, that may lead to the noncitizen failing to appear at a removal proceeding—resulting in automatic "remov[al] in absentia." § 1229a(b)(5)(A). Noncitizens subject to such removal orders become ineligible for some forms of discretionary relief, *Pereira*, 138 S. Ct. at 2111, and may be removed without ever attending (or being represented by counsel at) a hearing.[2]

The sheer numbers of noncitizens (like Petitioner) who are charged with "entry without inspection," and whose deportation proceedings end in ordered deportation, are staggering—highlighting the wide impact of NTA procedures used to initiate and provide notice for these hearings. In the last several years, "entry without inspection" represented the largest category of charged offense in new deportation proceedings. See NEW DEPORTATION PROCEEDINGS FILED IN IMMIGRATION COURT, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (in 2017, 48.4% of all charged offenses; in 2018, 45.2%; in 2019, 58.6%). These percentages represent hundreds of thousands of immigrants every year—including 350,217 new "entry without inspection" proceedings in 2019. *Ibid.* In all, 308,304 new NTAs were issued in FY2018 (the last year reported by the government). See STATISTICS YEARBOOK: FISCAL YEAR 2018, EOIR, at 7, https://www.justice.gov/eoir/file/1198896/download. And from 2017 to present, between 81% and 92% of all deportation proceedings have ended in

[2] Both the stop-time rule and removal *in absentia* are implicated here, making this case an ideal vehicle for certiorari. Pet. 22-24.

deportation orders. OUTCOMES OF DEPORTATION PROCEEDINGS IN IMMIGRATION COURT, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php.

These numbers emphasize the consequential nature of these proceedings, and the clear need for proper notice of and access to legal representation at them.

B. Single NTAs with all required information are needed for proper notice.

One step Congress took to ensure that noncitizens are fully on notice of these consequential proceedings was to require a single NTA mailing that includes all necessary information—including notice of the hearing, its consequences, and its time and place. In the experience of *amicus* I-ARC and its members, immigrants who receive NTAs often do not have static living situations or addresses, or may live with other people or in multiple places. See, *e.g.*, *Renaut* v. *Lynch*, 791 F.3d 163, 170 (1st Cir. 2015) (noting "the government actually acknowledged that some aliens do not have a stable home address"). Many recent immigrants do not have *permanent* addresses and, as a result, are less likely to receive all of the documents if the NTA information is spread over multiple mailings. Many immigrants also did not learn English as their first language, increasing the difficulty of making sense of multiple documents, how they relate to each other, and their effect on the noncitizen's obligations.

These are just some of the reasons that it is "infinitely easier" for a noncitizen "to receive and to keep track of the date and place of the hearing, along with the legal basis and cited acts to be addressed at the hearing," if all the relevant "information is contained

in a single document" as the law requires. *Guadalupe* v. *Att'y Gen. U.S.*, 951 F.3d 161, 164 (3d Cir. 2020) (holding that a single document must contain all NTA information, in conflict with the Fifth Circuit holding below). The increased burden on the noncitizen of collecting and comprehending multiple notice documents is unacceptable given the extreme consequences of missing or misunderstanding those documents—*i.e.*, disqualification from cancellation of removal or, worse still, automatic removal without a hearing.

Congress decided, quite rightly, that a single document with all relevant information was necessary to place noncitizens fully on notice so they can prepare and/or retain counsel for these proceedings. It is "infinitely easier" for the noncitizen to understand the need for an attorney and to actually engage a particular attorney for the hearing if the NTA includes all relevant language as to its legal importance *and* a date and location for the hearing. While the statute provides for the possibility of a subsequent notice, that is only for a "change or postponement" in the time and place of the proceedings, § 1229(a)(2)(A), which as this Court has noted, *presumes* the first mailing included a time and place. See *Pereira*, 138 S. Ct. at 2114. If the first NTA did include the time and place of the hearing as required, even if the noncitizen does not receive a subsequent notice of change, she would still appear at the initial time and place and thereby learn of the change so she can appear at the rescheduled hearing too. Spreading out the initial disclosure over multiple mailings, on the other hand, increases the likelihood that the noncitizen never receives a notice with a time

and place, or fails to understand the relevance of a subsequent mailing and what is expected of her. It may further burden her ability to retain counsel, as well.

The immigration attorneys who are retained despite multiple mailings also are burdened by the government's failure to follow the statute governing NTAs. Immigration attorneys already are overwhelmed with forever-pending cases with constantly changing hearing dates. Indeed, the average removal case has been pending for 728 days, and there are around 1.13 million pending cases right now. IMMIGRATION COURT BACKLOG TOOL, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog. This enormous backlog falls on the desks of approximately 465 immigration judges—which makes an average backlog of 2,430 cases per judge. *Executive Office for Immigration Review to Swear in 28 Immigration Judges, Bringing Judge Corps to Highest Level in History*, DOJ, https://www.justice.gov/opa/pr/executive-office-immigration-review-swear-28-immigration-judges-bringing-judge-corps-highest. These numbers also mean immigration attorneys must juggle many cases and appearance dates across long periods of time, all while trying to keep up with the "constant flux" of immigration policies and "unreliability of federal immigration agencies." Nicole Narea, *How Immigration Attys Are Battling Burnout Under Trump*, LAW360 (July 29, 2019), https://www.law360.com/articles/1182648/how-immigration-attys-are-battling-burnout-under-trump.

Just as a matter of scheduling logistics and common sense, immigration attorneys can more readily agree to take on a case if the immigrant is informed of

the time and place of the hearing in the first document instead of a subsequent document. Attorneys also more easily can advise their clients regarding importance and logistical ramifications of NTAs if all relevant information comes to the immigrant at once.

Whether noncitizens are prejudiced because they didn't receive subsequent mailings with required NTA information, didn't understand the relationship between multiple mailings, or weren't able to obtain adequate representation, this much is clear: strict compliance with the statute and this Court's holding in *Pereira* is necessary to avoid the injustice of a removal order resulting from a noncitizen's failure to appear because she did not receive statutorily required notice.

II. Congress Intended To Create A Single NTA To Simplify And Streamline Removal Proceedings While Ensuring Adequate Notice.

A. Congress explicitly changed the notice procedure from two steps to one.

The predecessor to IIRIRA in effect before 1996 included an optional two-step process for providing notice of deportation proceedings to noncitizens—where notice of the time and place of the hearing could be provided "in the order to show cause *or otherwise*." 8 U.S.C. § 1252b(a)(1) (1994) (emphasis added). Congress's removal of that language, and inclusion of the notice of the time and place of the proceedings into the NTA, changes the previous two-step process into a one-step process.

This change was conspicuous. The IIRIRA re-constructed the statute to incorporate what used to be two

subsections—§ 1252b(a)(1) (order to show cause) and § 1252b(a)(2) (notice of time and place of proceedings)—into one subsection—§ 1229(a)(1) (notice to appear, inclusive of the time and place of proceedings). The previous version showed what needed to be included in the order to show cause in subsection (a)(1), and explained that the notice of hearing information in subsection (a)(2) could be included in the order to show cause "or otherwise." The current version, by contrast, eliminated the second subsection and rolled the notice and time requirement into a single subsection.

The legislative history confirms that this statutory change and the accompanying requirement that all information listed in a single subsection must be included in a single NTA document was intentional. See, *e.g.*, H.R. REP. NO. 104-469(I), 1996 WL 168955, at *230 ("New section 239 [§ 1229] ('Initiation of removal proceedings') restates the provisions of current subsections (a) and (b) of section 242B [§ 1252b] regarding the provision of notice ('Notice to Appear') to aliens placed in removal proceedings."); *id.* at *239 (noting the prior two-step process of serving a "prior notice of hearing and order to show cause" was insufficient going forward, but would be sufficient to retain jurisdiction over previously served noncitizens). This conspicuous statutory change and supporting congressional intent must have real effect.

B. Congress's overarching purpose was to simplify and streamline proceedings while protecting immigrants' procedural rights.

Congress's goal in amending the notice procedure was to streamline and simplify removal proceedings,

including, without question, to ensure proper notice. See *id.* at *158-159 (explaining that section 1229 "provides that there will be a single, streamlined 'removal proceeding' before an immigration judge for all inadmissible and deportable aliens," and "also will simplify procedures for initiating removal proceedings against an alien"); see also *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims*, 104th Cong. 1 (1995) (statement of Chairman Lamar Smith) (voicing intent to "encourage changes that need to be made at the INS and EOIR to make our removal system credible" and for "legislative reforms to streamline the removal process"); 142 Cong. Rec. H2374 (Mar. 19, 1996) (statement of Rep. Dreier) (discussing need to streamline deportation process and reduce time to process cases).

Delay in removal proceedings—caused in part by multiple documents sent to noncitizens—was something Congress wanted to eliminate, especially given the enormous backlogs of cases in immigration courts. The government consistently—and correctly—has pointed out that part of Congress's concern was that "noncitizens could delay their removal proceedings in order to extend the periods of continuous presence" under the old system. *Banuelos* v. *Barr*, 953 F.3d 1176, 1182 (10th Cir. 2020). This concern, however, was tied to Congress's perception that "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings lead some immigration judges to decline to exercise their authority to order an alien deported in absentia." H.R. REP. NO. 104-469(I), at *122; see also *id.* at *159 (noting Judiciary Committee's concern with "protracted disputes concerning whether an

alien has been provided proper notice of a proceeding"). Under the old system, Immigration Judges often were uncertain regarding whether absent noncitizens received proper notice—let alone adequate opportunity to retain counsel and for counsel to advise—and that uncertainty led the Immigration Judges (quite rightly) to deny removal *in absentia* in many cases.

In response, Congress increased the punishment for failing to appear for a proceeding in order to decrease the no-show rate at these proceedings, *id.* at *122, and simultaneously (and just as importantly) improved the procedures for notifying noncitizens of their deportation proceedings by removing the possibility of piecemeal notices. That second step was crucial to Congress's plan to make Immigration Judges comfortable that absent immigrants were not absent for want of proper notice, and thus may be fairly ordered removed *in absentia*. See *ibid.*

Several other changes in IIRIRA eased certain burdens on the government to obtain *in absentia* orders, such as allowing "service by mail of the required notice of hearing" to constitute "sufficient" notice if there is "proof of delivery to the most recent [noncitizen] address." *Id.* at *159; see also Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444-01, 449 (Jan. 3, 1997). But the other side of the equation—Congress tightening notice requirements—was just as important. See H.R. REP. NO. 104-469(I), at *159. And Congress clearly recognized the need for fewer documents to constitute proper notice. It found that reducing the number of mailings by half—from two documents (order to show cause plus

notice of hearing) to one (an NTA)—justified the reduced mailing standard and more severe consequences for no-shows. This Court should not ignore Congress's rationale for statutory changes in the immigration context. See, *e.g.*, *Judulang* v. *Holder*, 565 U.S. 42, 55 (2011) (interpretations of immigration laws must be tied "to the purposes of the immigration laws or the appropriate operation of the immigration system").

C. The government's interpretation invites gamesmanship from both sides.

Congress's desire to "streamline" and "simplify" removal proceedings also reflected its concern with manipulation of the system. While some changes (like addition of the stop-time rule) were made to reduce manipulation by the noncitizen, see, *e.g.*, *Banuelos*, 953 F.3d at 1182, Congress also recognized the need to reduce the potential for the continued "perceived or genuine" governmental gamesmanship in the "procedures for notifying aliens of deportation proceedings" that Immigration Judges were relying on to delay proceedings. See H.R. REP. NO. 104-469(I), at *122. These concerns are particularly important due to the reduced 10-day time period provided to a noncitizen—and her counsel—between receiving an NTA and potentially being required to appear for the proceeding. *Id.* at *230.

A holding allowing two mailings under the current statue—*e.g.*, one document with the information pursuant to § 1299(a)(1)(A)-(F), and one with hearing date and time information pursuant to § 1299(a)(1)(G)—defies Congress's intention to change the notice procedures, returns the statute to its predecessor version, and replaces the unambiguous statutory text with the

government's current arbitrary procedure of mailing incomplete NTAs. It also invites the very gamesmanship from both sides that IIRIRA clearly sought to avoid.

As Congress explained, the two-step system invited noncitizens to "frustrate removal through taking advantage of certain procedural loopholes," for example by obtaining continuances and "request[ing] a change of venue of their proceeding" in between the receipt of the order to show cause and the notice of hearing document. H.R. REP. NO. 104-469(I), at *122. The government's reading of IIRIRA to continue to permit multiple mailings leaves open the door to manipulation that the government admits IIRIRA was designed to eliminate. As the Tenth Circuit illustrated:

> Suppose that the government issues a notice to appear without the date and time. The notice must be served on the noncitizen, so he or she would know that the government is intending to initiate removal proceedings. With this knowledge, the noncitizen could try to move the proceedings to another immigration court. This effort could stall the issuance of a notice of hearing because a new immigration court would need to set the hearing. And if the new immigration court has a backlog, the delay could be considerable.

Banuelos, 953 F.3d at 1182. Allowing two mailings clearly does not address Congress's intent to reduce disputes regarding proper notice.

Additionally, a holding that two *or more* documents can constitute a proper NTA also opens the door for

possible governmental gamesmanship—for example by sending the information listed in § 1299(a)(1) in as many documents and mailings as it would like. Yet multiple documents unnecessarily subject noncitizens to confusion and the increased burden of sorting through and understanding their rights and obligations. See *Guadalupe*, 951 F.3d at 164-165.

In fact, the "immigration enforcement priorities" achieved through the new NTA one-document process have been recognized by the government's own regulations and news releases. See, *e.g.*, USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities USCIS, https://www.uscis.gov/news/news-releases/uscis-updates-notice-appear-policy-guidance-support-dhs-enforcement-priorities ("A Notice to Appear (NTA) is *a document* given to an alien that instructs them to appear before an immigration judge on a certain date.") (emphasis added); 62 Fed. Reg. 444-01, at 449 ("[T]he proposed rule implements the language of the amended Act indicating that the time and place of the hearing must be on *the* Notice to Appear.") (emphasis added). Thus, spreading an NTA's required information over multiple mailings already is an improper manipulation of Congress's mandated notice system.

III. The Single NTA Requirement Is Critical To Ensure Noncitizens' Due Process Rights, Including Their Ability To Access Counsel.

A. Constitutional due process requires access to counsel for noncitizens in removal proceedings.

Noncitizens facing removal proceedings are entitled to due process under the Fifth Amendment. *Reno* v. *Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) ("[Because removal] visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom[,] . . . [m]eticulous care must be exercised" to preserve "essential standards of fairness.").

Due process under the Fifth Amendment requires, among other things, that noncitizens in removal proceedings have access to counsel. See, *e.g.*, *Zuniga* v. *Barr*, 946 F.3d 464, 468-471 (9th Cir. 2019) (due process entitles them to counsel of their choice and Congress has recognized this right by codifying it in the INA); *Leslie* v. *Att'y Gen. U.S.*, 611 F.3d 171, 181 (3d Cir. 2010) ("[T]he Fifth Amendment . . . indisputably affords an alien the right to counsel of his or her own choice at his or her own expense."); *Castaneda-Delgado* v. *I.N.S.*, 525 F.2d 1295, 1302 (7th Cir. 1975) (right to counsel is "an integral part of the procedural due process to which the alien is entitled"). Congress took several steps to protect noncitizens' rights to counsel, including mandating that Immigration Judges advise noncitizens of their rights to representation at their own expense and make them aware of

pro bono representation opportunities. See 8 C.F.R. § 1240.10(a)(1)-(2). Another step Congress took: the single-NTA requirement.

B. Lack of access to counsel severely prejudices noncitizens in removal proceedings.

Noncitizens subject to removal proceedings clearly benefit from the opportunity to retain counsel to advise them of the significance of the proceedings and to know when and where to prepare the removal defense. They, and any counsel they retain, must know when and where to prepare for costly and intricate removal proceedings. Attendance, and by extension, the access to counsel, are "infinitely" more difficult when the required NTA information, such as date and geographic location, may be spread out over multiple documents sent months or years apart. See *Guadalupe*, 951 F.3d at 164-165.

The participation of immigration attorneys in removal proceedings "[u]nsurprisingly" leads to "substantially better outcomes." *The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 Harv. L. Rev. 726, 729 (2018). "In an empirical study of six years of removal cases, detainees with attorneys had their cases terminated or obtained immigration relief 21% of the time, fully ten-and-a-half times more than the 2% rate for those fighting their cases pro se." *Ibid.* (citing Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 9 (2015)). These percentage differences have massive real-world effects. In the first three months of 2020, 161,052 deportation orders have issued. This already

approaches the number for all of 2019 (215,570 individuals) and surpasses 2018 (144,168 individuals). See OUTCOMES OF DEPORTATION PROCEEDINGS IN IMMIGRATION COURT, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php.

Of course, a removal hearing conducted *in absentia* (as happened to Petitioner here) will, as a definitional matter, lack the presence of counsel for the noncitizen. Thus, any removal ordered *in absentia* after insufficient, piecemeal so-called NTAs necessarily raises the serious due process concern about whether the noncitizen and her counsel received adequate notice of the hearing, such that the attorney can communicate the consequences of the NTA and subsequent hearing and help the noncitizen prepare. The solution Congress crafted was to create ground rules for adequate notice in the first place—*i.e.*, to require a single, complete NTA before a finding of deportability necessarily attaches to the noncitizen (whether as a result of the stop-time rule or a removal *in absentia*).

C. Given the "drastic" stakes of deportation, this Court has interpreted deportation statutes against removal where possible.

This Court has consistently reaffirmed a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 320 (2001); see also *I.N.S.* v. *Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. . . . [T]o give meaning to the statute in the light

of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens[.]"). Because deportation, especially resulting from removal *in absentia*, "is a drastic measure" with "considerable" stakes for the noncitizen, Congress is only deemed to have required that result after "the narrowest of several possible meanings of the words" Congress used. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948); *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile. . . . We will not attribute to Congress a purpose to make [a noncitizen's] right to remain here dependent on circumstances so fortuitous and capricious as those" the government advocates.).

Examples abound of decisions in which circuit courts have found themselves compelled to reverse deportation orders where an immigration judge failed to protect a noncitizen's access to counsel. See, *e.g.*, *J.E.F.M.* v. *Lynch*, 837 F.3d 1026, 1033 (9th Cir. 2016) ("An immigration judge's failure to inquire into whether the petitioner wants (or can knowingly waive) counsel is grounds for reversal."); *Leslie*, 611 F.3d at 182-183 (vacating deportation order where immigration judge had failed to "comply scrupulously" with regulatory requirements protecting the "fundamental right to counsel at removal hearings"); *Romero-Morales* v. *I.N.S.*, 25 F.3d 125, 130-131 (2d Cir. 1994) (vacating order of deportation *in absentia* and denial of motion to reopen where Immigration Judge had refused to grant continuance to allow petitioner to appear with new counsel of his choice); *Yiu Fong Cheung* v. *I.N.S.*, 418 F.2d 460, 464 (D.C. Cir. 1969) (vacating

deportation order, noting that "some rights, like the assistance of counsel, are so basic to a fair trial that their infraction can never be treated as harmless error"). Here too, affirming the right to adequate notice through statutorily mandated NTAs on the front end will help noncitizens more readily exercise their basic rights to counsel—as any just system of notice requires.

D. Due process concerns counsel in favor of interpreting the NTA statute not to allow piecemeal notice.

First, as demonstrated by the Court's longstanding principle of narrowly interpreting deportation rules, there are categorically disparate interests at stake here. Even if the government had some incremental interest in sending an NTA before arranging a hearing date for claims-processing convenience (though as described, *infra*, in Section IV, complying with the single-NTA rule actually will benefit the government in the long run), that interest would pale in comparison to noncitizens' paramount interest in proper notice and opportunity to retain counsel before potential deportation. Some noncitizens likely need counsel to advise them of the significance of the proceedings in the first place, and to know when and where to prepare. See *Alvarez-Espino* v. *Barr*, 951 F.3d 868, 872 (7th Cir. 2020) ("[I]t is up to counsel, not the client, to ask the right questions and to solicit information pertinent to potential legal grounds to prevent removal."). And, as explained in Section I, *supra*, it is more difficult for noncitizens to retain counsel or for counsel to prepare a removal defense in the abstract with no fixed hearing date or location. Certainty of time, date, and location

actually allows counsel to do their jobs—advise on importance and logistical requirements and prepare a defense for and make themselves available at the time and place of the proceeding.

Furthermore, in the context of the stop-time rule at issue, the only practical difference in allowing the government to "cure" a deficient NTA with an incomplete "notice of hearing" is to affect people on the margin who are well on their way to fulfilling the ten-year requirement. The government's incremental claims-processing convenience does not justify categorically flipping a noncitizen from eligible for cancellation of removal, to removable, simply because the government prefers sending in a piecemeal fashion the critical information required in the NTA. Indeed, the new NTA rules embody Congress's judgment as to what constitutes a fundamentally fair hearing. See, *supra*, Section II. A fair hearing must always begin with proper notice. See, *e.g.*, *Leslie*, 611 F.3d at 181 ("A proceeding may be fundamentally unfair if an alien is prevented from reasonably presenting his case[.]").

Second, given that removal proceedings involve the government's application of complex statutes and regulations with drastic effects on human lives, courts provide a necessary check to ensure that basic notice and other requirements are strictly enforced—especially when access to counsel is implicated. Shirking of these and other requirements is likely why "a growing number of federal judges review decisions by the immigration courts with apparent skepticism." Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. Chi. L. R. 1671, 1672 (2007); see also *Baez-Sanchez* v. *Barr*, 947 F.3d 1033, 1035-1036 (7th Cir.

2020) (reprimanding the Board for failing to implement binding law). Here again, the BIA has ignored the plain text of the statute (and the Court's *Pereira* decision), and it deserves no deference. See Pet. 18-20.

The practical consequences of failure to safeguard proper notice and access to counsel in these complex, high-stakes removal proceedings demand strict compliance. See *Alvarez-Espino*, 951 F.3d at 872 ("The Board should not have faulted Alvarez-Espino for failing to provide his initial counsel with information significant to a potential U visa application. . . . To place the burden on Alvarez-Espino as the Board did is to require him to have a nuanced understanding of American immigration law. That expectation defies reality."); *Montes-Lopez* v. *Holder*, 694 F.3d 1085, 1089, 1094 (9th Cir. 2012) (vacating Immigration Judge's deportation order that "failed to adequately protect the Petitioner's right under 8 U.S.C. § 1362 to be represented by an attorney," including by subjecting the petitioner to a "prolonged and hostile interrogation" in the absence of counsel).

IV. Adherence To The Single NTA Requirement Will Not Burden The Government, But Will Instead Serve Its Interests In Efficiency.

Issuing a single NTA with all relevant information is no significant burden on the government, and it would actually be helpful to it given that interests in simplicity, administrability, and efficiency all cut in favor of one NTA. As such, there is no countervailing interest weighing against the noncitizen's due process right to proper notice before the possibility of removal.

In a sharp divide with the Fifth Circuit opinion below, the Third Circuit rightly concluded that it is "no great imposition on the government to require it to communicate all [required] information to the noncitizen in one document." *Guadalupe*, 951 F.3d at 165. Even if the first document sent does not have all "the statutorily required information," an NTA with all the required information "can easily be sent later" once the government has all that information. *Ibid.* As it is, the government has just under ten years from a noncitizen's entry to send them a single, complete NTA in order to trigger the stop-time rule. And if the government or immigration court needs to change the date or place of the hearing after the NTA is sent, there is a provision for that in the statute too. See 8 U.S.C. § 1229(a)(2)(A)(i).

As this Court explained in *Pereira*, there is no reason the government cannot send all the relevant information in the first notice document. "Given today's advanced software capabilities" and the previous scheduling system that "enabled DHS and the immigration court to coordinate in setting hearing dates," "it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear." *Pereira*, 138 S. Ct. at 2119; see also *Matter of Mendoza-Hernandez*, 27 I&N Dec. 520, 540 (BIA 2019) (en banc) (dissenting op.) (noting government's capability to schedule hearings before sending NTAs). In fact, an *amicus* brief filed in *Pereira* made clear that DHS and immigration courts previously coordinated scheduling hearings in this way through a master calendar, which has since fallen out of use. Br. of Former BIA Chairman and Immigration

Judge Schmidt as *Amicus Curiae* at 6-8, *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459). It is hard to believe that an automatic scheduling system could not be created or, more accurately, revived to permit accurate hearing time and place information in the initial mailing.

As Retired BIA Chairman and Immigration Judge Schmidt has explained, a single mailing for NTAs is not just doable (and statutorily required), but also would be beneficial to DHS and immigration courts alike in promoting efficient administration of the immigration-hearing system. See *id.* at 5-8. The most generous thing that can be said about piecemeal NTAs is that they are the suboptimal approach from a bureaucratic perspective. Multiple mailings create problems not just for noncitizen and attorney, but for the immigration court clerk's office in tracking communications. Multiple mailings "increase[] the potential for defective notices, which tend[] to result, in turn, 'in absentia Removal Orders' that are later challenged, while only adding to the work of an overburdened Clerk's office." *Id.* at 6. They also lead to more delay and inaccuracy in the system, resulting in "procedurally unfair results." *Ibid.*

Just as this obvious point supported the holding in *Pereira*, it supports granting certiorari here:

> [I]ncluding time-and-place information in [a single, complete] NTA is not only what the statute requires, but it would also be in *everyone's* interest to have a system for doing so: It would help not only the respondents who deserve immediate, accurate, and complete notice in their

> NTAs, but the IJs, clerks, Court Administrators, Assistant Chief Immigration Judges, DHS officials, BIA members, and EOIR officials who toil away in this system. And that is not to mention the taxpayers, who actually fund this system and expect DHS and the Immigration Court to produce reasonably fair, accurate, and timely results.

Id. at 8. Just so. This Court's review is needed to ensure this statutorily required and universally beneficial result.

CONCLUSION

For these reasons, we respectfully request the Court grant the Petition.

Respectfully submitted,

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