19-60758

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FIDENCIO MUNOZ-GRANADOS,
ALSO KNOWN AS FIDENCIO MUNOZ,
Petitioner,

v.

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

ON PETITION FOR REVIEW OF AN ORDER
BY THE BOARD OF IMMIGRATION APPEALS
A205-007-027

BRIEF OF *AMICI CURIAE* RETIRED IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED PERSONS

Regarding Case No. 19-60758, *Fidencio Muñoz-Granados v. William P. Barr, U.S. Attorney General*, I certify that the following listed persons and entities, as described in the Local Rule 29.2 and the fourth sentence of Local Rule 28.2.1, have an interest in the outcome of this case and an interest in the content of this *amici curiae* brief. I make these representations so that this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICI CURIAE*

Amici curiae are Retired Immigration Judges and Former Members of the Board of Immigration Appeals who have substantial combined years of service and intimate knowledge of the U.S. immigration system. *Amici* are invested in the resolution of this case because they have dedicated their careers to improving the fairness and efficiency of the U.S. immigration system. *Amici* also have a unique ability to provide insights about the practical impact of the legal result supported by a*mici*, which arises from their substantial familiarity with the procedures and reality of immigration proceedings.[2]

INTRODUCTION

For decades, Congress has required noncitizens to receive notice of the time and place of their immigration hearings. The requirement to provide a hearing time and place in the initial notice initiating removal proceedings is not only a statutory requirement, but it also facilitates the efficient processing of removal cases and avoids costly scheduling errors. Based on our experience and knowledge of the

[2] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Federal Rules of Appellate Procedure 29(a)(2), *amici curiae* further state that all parties have consented to the filing of this *amici curiae* brief.

removal process, arguments contesting the feasibility of putting time-and-place information on an initial charging document are simply unfounded.

Before 1996, an "Order to Show Cause" was the document that initiated removal proceedings. That document required the time and place of the initial hearing to be listed on it. *See* 8 U.S.C. § 1252b(a)(2)(A)(i) ("[W]ritten notice shall be given in person to the alien . . . of the time and place at which the proceedings will be held.") (repealed 1996). Orders to Show Cause had a heightened service requirement. *See Matter of Grijalva*, 21 I. & N. Dec. 27, 32 (BIA 1995) (holding that Orders to Show Cause served by mail must be done so through certified mail with a properly signed return receipt).

After Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), removal proceedings were typically initiated by a Notice to Appear ("NTA"), which also required the time and place at which removal proceedings were to commence to be included on the document, but had a more relaxed service requirement. 8 U.S.C. § 1229(a). With the relaxed service requirements of an NTA, proper notice of when and where removal proceedings are to begin has become all the more critical. Indeed, as the Supreme Court reasoned in *Pereira v. Sessions*, the consequences of failing to provide time-and-place information on an NTA may be significant. *See Pereira v. Sessions*, 138 S.Ct. 2105, 2111 (2018) (reasoning that without proper notice of a removal

proceeding, the noncitizen may not appear in immigration court when she is supposed to and consequently be ordered removed *in absentia*).

Federal law therefore requires an NTA to include both the time and place at which removal proceedings are to commence. It is also entirely feasible to include such crucial information on an NTA. As detailed in this brief, not only is the inclusion of such information required, but it also improves the efficiency of immigration courts and limits costly procedural errors. It has been done before and continues to be done now with relative ease.

ARGUMENT

I. FAILING TO INCLUDE THE REQUIRED DATE AND PLACE REMOVAL PROCEEDINGS ARE TO COMMENCE ON AN NTA RESULTS IN UNNECESSARY DELAY AND COSTLY PROCEDURAL ERRORS.

The Department of Homeland Security ("DHS") and immigration courts under the Department of Justice have distinct responsibilities in the removal process. DHS initiates removal proceedings against a noncitizen by serving the person with an NTA and subsequently filing that NTA with the immigration court. 8 C.F.R. § 1003.14(a). A statutorily-adequate NTA requires DHS to include the scheduled time and place of when removal proceedings will commence. 8 U.S.C. § 1229(a)(1)(G). Not until the charging document is served and filed with the immigration court does an immigration judge have the authority to conduct removal proceedings. 8 C.F.R. § 1003.14(a). After the charging document is filed,

the immigration court is subsequently responsible for updating both DHS and the respondent with information on the time and place of all future removal proceedings. 8 C.F.R. § 1003.18(a).

If DHS's purported NTA fails to include the time and place at which removal proceedings will commence—as required by 8 U.S.C. § 1229(a)(1)(G)—then significant delays and errors may occur in the scheduling and completion of proceedings. To prevent these obstacles in the removal process, DHS must include accurate time-and-place information on the NTA. When DHS omits time-and-place information on its charging documents to noncitizens, the agency improperly shifts the burden of scheduling an initial hearing onto the immigration courts. Such a shift is particularly onerous when the immigration courts are drowning in a sea of over 1,000,000 backlogged removal cases. *See* TRAC, Immigration, Immigration Court Backlog Tool (Sept. 19, 2019), https://trac.syr.edu/phptools/immigration/court_backlog/ (noting that there are 1,007,155 pending removal cases).

Consequently, if a purported NTA is served and filed with the immigration court without accurate time-and-place information, then it is likely to sit in a pile until an overworked immigration court clerk can manually input the NTA information into the court's computer system. Subsequently, a Notice of Hearing ("NOH") containing the time-and-place information that should have been

included on the NTA in the first place would need to be generated. This processing gap—described by former BIA Chairman Paul Wickham Schmidt as a "No Man's Land"—exposes proceedings to needless delay and error. *See* Brief of 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).

Requiring an NOH to communicate the initial hearing date in removal proceedings thus inserts an extra step into an already complicated removal system and results in delay and fertile grounds for costly processing errors. For example, filings sent to the immigration court during the time Chairman Schmidt calls "No Man's Land" may get lost or improperly recorded. Those filings, including Change of Address forms and Attorney Appearance notices, contain critical processing information that can result in a noncitizen being order removed *in absentia* because a subsequent NOH was not sent to the proper address.[3] *See* Brief of Former BIA Chairman and Immigration Judge Paul Wickham Schmidt at 6, *Pereira*, 138 S.Ct. 2105 (No. 17-459) (noting that the use of an NOH to communicate initial hearing information led to a rise in *in absentia* removal orders when respondents failed to show up for their initial hearings).

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[3] Motions to reopen seeking to rescind *in absentia* removal orders have further added to the immigration courts' backlog.

Omitting the required date and place removal hearings are to commence from an NTA produces processing delays, necessarily requires the immigration court to pursue the additional burdensome step of issuing an NOH, and exacerbates the potential for costly procedural errors.

II. INCLUDING THE DATE-AND-PLACE INFORMATION ON AN NTA IS ENTIRELY PRACTICABLE WITH REASONABLE INTERAGENCY COORDINATION.

Including the required logistical information on an NTA is not only required, but it is also practicable. In fact, it has been done before and is in the process of being done now through interagency coordination.[4] *See* EOIR, *Privacy Impact Assessment for the eWorld Adjudication System*, at 2–3 (Dec. 13, 2018), https://www.justice.gov/opcl/page/file/1120991/download ("The eWorld System includes all aspects of [EOIR] case management including the ability to schedule cases using collected information to issue hearing notices . . . .") (The application is "used by EOIR to exchange case-related immigration information with DHS as authorized by statute" and is both an immigration retrieval and immigration exchange system); *Memorandum of Agreement between Department of Homeland Security and The Department of Justice, Executive Office for Immigration Review*

[4] Asylum offices under U.S. Citizenship and Immigration Services have routinely used existing technology to ensure that the NTAs they issue when referring cases to an immigration court contain a date and place removal hearings are to commence. In our experience, referrals from asylum offices comport with the both the statute and existing technological systems.

Regarding the Sharing of Information on Immigration Cases, at 1–2 (Signed and Effective on Oct. 15, 2012), https://www.justice.gov/sites/default/files/eoir/legacy/2014/11/20/DHS-MOA-Data-Agreement.pdf ("This MOA clarifies the authority for DHS and EOIR to exchange immigration case data and reiterates the security and privacy mechanisms established to protect this data.") (noting that Appendix D contains specific information available to be shared between DHS and EOIR).

A. Including the Necessary Hearing Information On An NTA Through Reasonable Interagency Coordination Has Been Done Before.

The Interactive Scheduling System ("ISS") was a tool previously used by DHS that gave the agency limited electronic access to local immigration courts' dockets for the purpose of scheduling an initial removal hearing. In so doing, DHS could easily check and reserve the appropriate time on an immigration court's docket before including the date and location of the hearing on the NTA.

ISS not only enabled DHS to provide the required time-and-place information on an NTA, but it also facilitated immigration courts' scheduling process and removed the need to issue an initial NOH. Indeed, Chairman Schmidt noted that cases scheduled under ISS proceeded "much more smoothly" and involved fewer procedural errors than cases requiring the additional NOH step. Brief of Former BIA Chairman and Immigration Judge Paul Wickham Schmidt at

7, *Pereira*, 138 S.Ct. 2105 (No. 17-459). Thus, ISS saved immigration courts valuable time and helped judges process cases efficiently.

Despite the functionality of ISS, there were shortcomings including the limited access DHS personnel had to the program and its inability to account for immigration court adjudication priorities. Some of those concerns have subsequently been addressed in new interagency communication systems.

B. Including the Necessary Hearing Information on an NTA Through Reasonable Interagency Coordination Is Being Done Now.

In August 2019, the Executive Office of Immigration Review ("EOIR") transitioned nationwide to a new electronic system: the EOIR Courts and Appeals System ("ECAS"). *See* Executive Office of Immigration Review, "Welcome to Internet Immigration Information," (Sept. 19, 2019), https://www.justice.gov/eoir/ECAS. ECAS is designed to modernize the filing systems in immigration courts by migrating from a paper-based system to an electronic system. *Id.* Such a system could be further adapted for the scheduling of cases.

Within these modernization efforts, "DHS Portal" allows DHS to file NTA data with immigration courts, review electronic copies of removal proceedings, and see case details. *Id.* Although DHS Portal replaces ISS, it retains all the capabilities of the old ISS platform, "including scheduling hearings for all DHS." It is also now available to even more DHS personnel than it was available to under

the prior ISS system. *See* Executive Office of Immigration Review, *ECAS DHS Portal Registration Overview*, YouTube (June 19, 2019), https://www.youtube.com/watch?time_continue=4&v=8O0Upogx4-o.

DHS Portal, in conjunction with ECAS, facilitates the efficient scheduling and processing of removal proceedings. Consequently, DHS personnel can schedule an initial removal hearing via DHS Portal and include that scheduling information on an NTA. If the initial scheduled hearing must be postponed, then the immigration court can issue a subsequent NOH. In that respect, immigration judges may manage their own dockets in pursuit of judicial efficiency and adjudicating priority cases. *See* Dana Leigh Marks, *I'm An Immigration Judge. Here's How We Can Fix Our Courts*, Wash. Post (Apr. 12, 2019), https://www.washingtonpost.com/opinions/im-an-immigration-judge-heres-how-we-can-fix-our-courts/2019/04/12/76afe914-5d3e-11e9-a00e-050dc7b82693_story.html ("We need to be free to be independent judges, not be monitored and rated like assembly-line workers."). DHS Portal, therefore, makes it completely practicable for DHS agents to schedule initial hearings for removal proceedings and to include the statutorily required time-and-place information on an NTA; this advanced scheduling aligns with legal requirements for NTAs, prevents many of the costly procedural errors incumbent with a two-step system, and facilitates the fair and efficient processing of removal cases.

III. REQUIRING AN NTA THAT INCLUDES THE DATE AND TIME REMOVAL PROCEEDINGS WILL COMMENCE TO TRIGGER THE STOP-TIME RULE WILL NOT RESULT IN FLOODGATES OPENING.

Concerns that an overwhelming number of individuals previously deemed ineligible for cancellation of removal will now be eligible for such relief if this Court reverses the BIA's decision in *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520 (BIA 2019), are misplaced. Simply put, the requisite residency period as required by 8 U.S.C. §§ 1229b(a)(1) or 1229b(b)(1)(A) is not enough to render an individual in removal proceedings eligible for cancellation of removal relief.

First, both Lawful Permanent Resident ("LPR") and non-LPR cancellation of removal requires several elements beyond just the residency requirement. *See* 8 U.S.C. § 1229b(a)(2)–(3), 1229b(b)(1)(B)–(D). For example, LPR cancellation of removal requires an individual not to have any criminal convictions that qualify as an aggravated felony. 8 U.S.C. § 1229b(a)(3). Non-LPR cancellation of removal requires both a showing of "good moral character" and "exceptional and extremely unusual hardship" to a qualifying family member. 8 U.S.C. § 1229b(b)(1)(B), 1229b(b)(1)(D). With very few exceptions, there is also a numerical limit on the number of people who can be granted this relief in a given year. 8 U.S.C. § 1229b(e)(1).

Second, cancellation of removal is a discretionary form of relief. *See Sung v. Keisler*, 505 F.3d 372, 377 (5th Cir. 2007). Finally, an immigration judge or BIA

may also deny a motion to reopen a prior removal order in which an individual would apply for cancellation of removal based on an exercise of discretion. *See* 8 C.F.R. §§ 1003.23(b)(3) and 1003.2(a).

Moreover, arguments that an overwhelming number of new motions to reopen in which individuals will request cancellation of removal are not only without merit, but also irrelevant.[5] A federal agency does not have the authority to ignore the Supreme Court's interpretation of a statute. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

CONCLUSION

We respectfully request that this Court grant the petition for review and hold that the stop-time rule can only be triggered by an NTA that contains the date and place removal proceeding are to be commenced.

DATED: December 31, 2019

[5] The Supreme Court has already noted that these practical concerns "are meritless and do not justify departing from statute's clear text." *Pereira*, 138 S.Ct. at 2109.

Respectfully submitted,

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This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32 as it contains 2,391 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14-point font.

DATED: December 31, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2019, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioner's Petition for Review, with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system:

DATED: December 31, 2019

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