Brooklyn Law Review

Volume 88 | Issue 1 Article 8

12-9-2022

The Cost of Cutting Corners: Jurisdictional Implications Flowing from Removal Proceedings Commenced by a Defective Notice to Appear

Juliana M. Lopez

The Cost of Cutting Corners

JURISDICTIONAL IMPLICATIONS FLOWING FROM REMOVAL PROCEEDINGS COMMENCED BY A DEFECTIVE NOTICE TO APPEAR

"[W]ords are how the law constrains power. . . . If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."–Justice Neil Gorsuch, *Niz-Chavez v. Garland*[1]

INTRODUCTION

In 2018, the Department of Homeland Security (DHS) left out the date, time, and place of the initial hearing in "almost 100 percent" of the removal proceedings it initiated.[2] This practice left noncitizen[3] respondents uncertain about when and where they were required to appear for "a grave legal proceeding" that could result in their deportation and permanent separation from their families.[4] Currently, once a noncitizen fails to appear at any scheduled removal proceeding,

---

[1] Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021).

[2] Pereira v. Sessions, 138 S. Ct. 2105, 2111 (2018) (explaining that at oral argument in *Pereira*, counsel for the government acknowledged that "almost 100 percent" of NTAs issued over the past three years had left the date, time, and place of the proceeding "to be determined").

[3] A noncitizen is an individual "who is not a citizen or national of the United States." *Reporting Terminology and Definition*, DEP'T. OF HOMELAND SEC. (last updated Aug. 12, 2022), https://www.dhs.gov/immigration-statistics/reporting-terminology-definitions#14 [https://perma.cc/A4R5-2HQK]. Noncitizens include legal permanent residents, temporary visitors, and undocumented immigrants. Maria Sacchetti, *ICE, CBP To Stop Using 'Illegal Alien' and 'Assimilation' Under New Biden Administration Order*, WASH. POST (Apr. 19, 2021, 9:14 AM), https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html [https://perma.cc/F2FU-YWNJ]. While "noncitizen" is not perfect nomenclature, it is "the preferred terminology" to maintain the dignity of people who are forced to interact with the US immigration system. *Id.*

[4] *Niz-Chavez*, 141 S. Ct. at 1482; *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1209 (2018) (quoting Lee v. United States, 137 S. Ct. 1958, 1968) ("This Court has reiterated that deportation is a 'particularly severe penalty,' which may be of greater concern to a convicted [noncitizen] than any 'potential jail sentence.'").

the immigration judge can issue a removal order *in absentia*.[5] In short, a judge can order a noncitizen's deportation, even if that noncitizen did not know when or where their removal proceeding was taking place.[6] The government treats these orders as final and enforceable, and, as a result, does not give noncitizens an opportunity to be heard.[7] The only response to an *in absentia* removal order at noncitizens' disposal is to file a written motion to reopen.[8] However, because "[c]ourts disfavor motions to reopen" and these motions are subject to strict time and numerical limitations, they are consequentially "difficult, if not impossible, to win."[9] Given the finality of *in absentia* removal orders, noncitizens who are not given proper notice of their hearings by the government face almost automatic deportation without having their day in court.[10]

As concerns over due process and fairness became louder and more overwhelming, the Supreme Court took notice and decided to review a case that dealt with the serious consequences of a defective Notice to Appear (NTA).[11] In *Pereira v. Sessions*, the Court concluded that an NTA without the time and place of the hearing is statutorily defective and does not trigger the stop-time rule[12]—the end of a noncitizen's period of continuous residence—for purposes of immigration relief in the form of cancellation of

---

[5] "*In absentia*" means "in the absence of the person involved." *In Absentia*, DICTIONARY.COM, https://www.dictionary.com/browse/in-absentia [https://perma.cc/HLZ9-5874]. Immigration judges can issue *in absentia* removal orders if the noncitizen is removable and there is some evidence that they received notice of the time and place of the proceeding. 8 C.F.R. § 1003.26(a) (2022). However, "notice issues were rarely identified by immigration judges." Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 853 (2020).

[6] *See* Eagly & Shafer, *supra* note 5, at 853.

[7] *Id.* at 822 ("The practice . . . differs markedly from the criminal system, where failure to appear at trial is generally treated with issuance of an arrest warrant, not adjudication of the criminal charges without the defendant present in court.") (footnote omitted).

[8] 8 C.F.R. § 1003.23(b)(4)(ii) (2022).

[9] Robert L. Koehl, Comment, *Perpetual Finality: In Immigration Removal Proceedings, Motions to Reopen Create More Problems Than They Solve*, 2 TEX. A&M L. REV. 107, 121, 129 (2014) (explaining that noncitizens are "barred from filing more than one motion to reopen" and it must be received within 90 days of the noncitizen's final removal order); Sabrineh Ardalan, *Asymmetries in Immigration Protection*, 85 BROOK. L. REV. 319, 322, 331 (2020).

[10] Eagly & Shafer, *supra* note 5, at 850.

[11] *See* Pereira v. Sessions, 138 S. Ct. 2105, 2109, 2111 (2018) (explaining that an NTA is defective if it "fails to specify time-and-place information" and that a defective NTA can result in the issuance of an *in absentia* removal order and unfairly render a noncitizen ineligible for cancellation or removal); *see also* 8 U.S.C. § 1229(a)(1)(G) (explaining that the statute requires that the notice to appear specify the "[t]he time and place at which proceedings will be held").

[12] *Pereira*, 138 S. Ct. at 2115; 8 U.S.C. § 1229b(d)(1) (meaning that a noncitizen's "period of continuous residence or continuous physical presence" ends when they are "served a notice to appear" for removal proceedings).

removal.[13] However, the Court's ruling in this seminal case led to widespread confusion and disagreement regarding the interpretation and implications of the decision. Months after the *Pereira* decision in June 2018, DHS started issuing NTAs with "[f]ake court dates,"[14] and when noncitizens appeared for their hearings, they were turned away without an explanation.[15] In response, immigration advocates tried to expand *Pereira* "beyond the cancellation of removal context" and raised the novel argument that, since jurisdiction only vests after the issuance of a statutorily compliant NTA, immigration courts should dismiss cases commenced with a defective NTA because they lack jurisdiction.[16] Unfortunately, both the Board of Immigration Appeals (BIA) and all courts of appeals who heard such cases rejected this argument. Instead, they interpreted *Pereira* narrowly, claiming that a defective NTA could be remedied by a later hearing notice that indicated where and when the noncitizen had to appear for their removal proceeding.[17]

Finally, in April 2021, the Supreme Court sought to clarify the lingering ambiguity once and for all in *Niz-Chavez*.[18] In that case, the Court held that a second notice cannot cure the defective nature of the first NTA and concluded that the government is required to serve "a single and comprehensive notice" before the stop-time rule is triggered.[19] Although *Niz*

---

[13] *Pereira*, 138 S. Ct. at 2110 (explaining that cancellation of removal is a type of discretionary immigration relief available to certain noncitizens who are facing removal in immigration court); 8 U.S.C. § 1229b(b)(1); IMMIGR. LEGAL RES. CTR., NON-LPR CANCELLATION OF REMOVAL: AN OVERVIEW OF ELIGIBILITY FOR IMMIGRATION PRACTITIONERS 1 (2018) [hereinafter NON-LPR CANCELLATION OF REMOVAL], https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf [https://perma.cc/4CMQ-HKR5] (explaining that if a noncitizen is granted cancellation of removal, they are given a green card and allowed to remain in the country).

[14] Monique O. Madan, *Fake Court Dates Are Being Issued in Immigration Court. Here's Why*, MIA. HERALD (Sept. 22, 2019, 7:35 PM) https://www.seattletimes.com/nation-world/fake-court-dates-are-being-issued-in-immigration-court-heres-why/ [https://perma.cc/C2MN-M6E2].

[15] *See id.*

[16] KHALED ALRABE ET AL., AM. IMMIGR. COUNCIL ET AL., PRACTICE ADVISORY: STRATEGIES AND CONSIDERATIONS IN THE WAKE OF NIZ-CHAVEZ V. GARLAND 3 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/strategies_and_considerations_in_the_wake_of_niz-chavez_v._garland_advisory.pdf [https://perma.cc/M98S-GZLK].

[17] *See In re* Rosales Vargas, 27 I. & N. Dec. 745, 751–54 (B.I.A. 2020); *In re* Bermudez-Cota, 27 I. & N. Dec. 441, 443 (B.I.A. 2018); Goncalves Pontes v. Barr, 938 F.3d 1, 5 (1st Cir. 2019); Banegas Gomez v. Barr, 922 F.3d 101, 110 (2d Cir. 2019); Nkomo v. Att'y Gen., 930 F.3d 129, 133 (3d Cir. 2019); United States v. Cortez, 930 F.3d 350, 365 (4th Cir. 2019).

[18] Jayesh Rathod, *Unusual Alliance of Justices Holds Government to Strict Notice Requirement in Removal Proceedings*, SCOTUSBLOG (May 2, 2021, 3:58 PM), https://www.scotusblog.com/2021/05/unusual-alliance-of-justices-holds-government-to-strict-notice-requirement-in-removal-proceedings/ [https://perma.cc/992T-S68Z].

[19] *See* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1479, 1486 (2021).

Chavez, like *Pereira*, does not explicitly discuss the matter of jurisdiction, the Court's reasoning provides a stronger legal basis for a lack of jurisdiction argument.[20]

This note will argue that the *Niz-Chavez* holding reaches beyond the stop-time rule and soundly contests the jurisdiction of immigration courts when they have commenced proceedings with a defective NTA. Removal proceedings should be terminated because *Niz-Chavez*: (1) foreclosed the two-step notice process, (2) affirmed the supremacy of a statute's clear text over self-serving regulations, and (3) recognized the serious and far-reaching implications of commencing removal proceedings against a noncitizen.[21] To further clarify this stance, this note proposes an amendment to the Immigration and Nationality Act (INA) confirming the statutory requirements for the issuance of NTAs and asserting that jurisdiction only vests in an immigration court if those statutory requirements are met. The purpose of this amendment is to forbid the government from changing the procedural and jurisdictional framework of removal proceedings to serve its shifting interests, thoughtlessly harming the lives of noncitizens and their families.

Part I of this note provides the legal framework that governed the issuance of NTAs and relevant case law prior to *Pereira* before discussing *Pereira* in depth. This Part then concludes with an overview of the jurisdictional challenges that arose following *Pereira*. Part II covers the various BIA and courts of appeals cases stemming from *Pereira* that rejected the argument that the filing of a statutorily defective NTA fails to vest jurisdiction with the immigration court. Part III discusses *Niz-Chavez*, particularly its upending of the recurring rationale rejecting jurisdictional challenges, emphasis on statutes over regulations, and strong policy arguments demonstrating the human impact of disregarding the important procedural mechanism of NTAs. Finally, Part IV proposes the expansion of *Niz-Chavez* and the codification of the mandatory termination of proceedings that start with a defective NTA with an amendment to the INA. This proposal would resolve the discrepancy between the statutory and regulatory NTA requirements, as well as the issue of the legal authority for the vesting of jurisdiction.

---

[20] ALRABE ET AL., *supra* note 16, at 3.

[21] *Niz-Chavez*, 141 S. Ct. at 1485 (citing Pereira v. Sessions, 138 S. Ct. 2105, 2115 (2018)).

I. THE FAR-REACHING EFFECTS OF A DEFECTIVE NOTICE TO APPEAR

The *Niz-Chavez* decision centers on the contents of the NTA that is served on noncitizens to alert them that they must appear in immigration court for a hearing.[22] Contrary to statute and common sense, prior to 2018, DHS issued many NTAs without a date, time, or place to initiate removal proceedings against noncitizens.[23] In *Pereira*, the Court attempted to rectify this practice by affirming that DHS cannot use a defective NTA to prevent noncitizens from being eligible for cancellation of removal.[24] However, the *Pereira* decision failed to clarify the requirements underlying the issuance of NTAs and further, called into question whether immigration courts had jurisdiction over removal proceedings commenced with a defective NTA.[25]

A. Conflicting Guidance Regarding NTA Requirements

The problem with defective NTAs is, at its core, the clash between clear statutory requirements and ambiguous regulatory language.[26] An NTA in a removal proceeding under section 239(a) of the INA is a written notice given to a noncitizen explaining "[t]he nature of the proceedings," the charges against them, and their "conduct alleged to be in violation of law," among many other things.[27] The statute also states that the NTA must specify "[t]he time and place at which the proceedings will be held."[28] Despite the clear language of the INA, in 1997, the Attorney General issued a conflicting regulation that the NTA need only provide "the time, place and date of the initial removal hearing, *where practicable*."[29] This led to DHS issuing NTAs without the date,

---

[22] *Id.* at 1479; 8 U.S.C. § 1229(a)(1).

[23] *In re* Camarillo, 25 I. & N. Dec. 644, 645 (B.I.A. 2011); Ashley Oldfield, Pereira v. Sessions*: The Supreme Court's Call for Common Sense*, 55 WAKE FOREST L. REV. 415, 422 (2020); Lonny Hoffman, Pereira*'s Aftershocks*, 61 WM. & MARY L. REV. 1, 15–16 (2019).

[24] *Pereira*, 138 S. Ct. at 2113–14.

[25] Oldfield, *supra* note 23, at 425–26; Kit Johnson, Pereira v. Sessions*: A Jurisdictional Surprise for Immigration Courts*, 50 COLUM. HUM. RTS. L. REV. 1, 2–3 (2019).

[26] Oldfield, *supra* note 23, at 418–19.

[27] 8 U.S.C. § 1229(a)(1). The NTA must specify the following: "[t]he nature of the proceedings;" "[t]he legal authority under which the proceedings are conducted;" "[t]he acts or conduct alleged to be in violation of law;" "[t]he charges against the [noncitizen] and the statutory provisions alleged to have been violated;" that the noncitizen has a right to "be represented by counsel," that the noncitizen must provide their "address and telephone number" and any changes to either; and "[t]he time and place at which the proceedings will be held" and the consequences of failing to appear at the proceedings. *Id.*

[28] 8 U.S.C. § 1229(a)(1)(G)(i).

[29] 62 Fed. Reg. 10332 (Mar. 6, 1997) (emphasis added).

time, or place of the proceeding, and, as a result, noncitizens routinely missing their hearings due to these omissions.[30] While the regulation entrusted the immigration court with scheduling the hearing and providing subsequent notice to noncitizens whose initial NTA omitted the time and place of the hearing, the Executive Office for Immigration Review (EOIR)[31] did not have the capacity to perform this task.[32] Due to extended delays and administrative errors, EOIR consistently failed to provide proper timely notice to noncitizens.[33]

Plainly, there is a tension between the regulation-mandated notice and the provisions of the statute, which impose a greater burden on DHS.[34] This inconsistency has produced clear due process violations because it strips noncitizens of their right to be heard at their own highly consequential proceedings.[35] While the regulation absolves the government from providing noncitizens with critical information regarding their initial hearing, DHS has continued to uphold the adverse effects triggered by proper issuance—most notably, the stopping of the period of continual physical presence for purposes of cancellation of removal.[36]

B. Cancellation of Removal and the Stop-Time Rule

The NTA provision, cancellation of removal, and stop-time rule were part of larger reforms instituted by Congress in 1996

---

[30] DENIED A DAY IN COURT: THE GOVERNMENT'S USE OF *IN ABSENTIA* REMOVAL ORDERS AGAINST FAMILIES SEEKING ASYLUM 20–21 (2019) [hereinafter DENIED A DAY IN COURT], https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court-2019-Update.pdf [https://perma.cc/8NH7-QNPC].

[31] The Executive Office for Immigration Review was created by the Department of Justice in 1983 to administer the country's immigration court system. *News and Information*, EXEC. OFF. OF IMMIGR. REV. (last updated Apr. 30, 2015), https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/6PAX-RMRM].

[32] 8 C.F.R. § 1003.18(a) (2022); Oldfield, *supra* note 23, at 419 (quoting Brief of Former BIA Chairman and Immigration Judge Paul Wickham Schmidt as Amicus Curiae Supporting Petitioner at 4, Pereira v. Sessions, 138 S. Ct. 2105 (2010) (No. 17-459) (describing "how documents were frequently lost and not readily retrievable and how data entry errors were common due to 'the volume of cases, time pressures, and periodic staffing shortages'")).

[33] Oldfield, *supra* note 23, at 419.

[34] *Id.* at 418–19.

[35] *See* Maria Kennison, *Stopping the Clock: Resolving the Circuit Split Over the Notice to Appear and the Stop-Time Rule Under the Immigration and Nationality Act*, 122 DICK. L. REV. 767, 799 (2018). The Supreme Court has recognized that "[i]t is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings," regardless of their unlawful entry or presence in the country. Reno v. Flores, 507 U.S. 292, 306 (1993); Zadvydas v. Davis, 533 U.S. 678, 693 (2001). Further, under the INA, noncitizens are entitled to several procedural due process protections, including the right to a hearing and a meaningful opportunity to be heard before deprivation of a liberty interest. 8 U.S.C. § 1229a(b)(4).

[36] *Id.*; *see also* Johnson, *supra* note 25.

through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[37] IIRIRA made drastic changes to immigration laws "and laid the groundwork for the massive deportation machine that exists today."[38] Specifically, it removed crucial defenses against deportation, subjected many more noncitizens to detention and deportation, and lengthened the list of criminal convictions for which noncitizens could be automatically deported.[39] IIRIRA "'slowly, but purposefully' conflated criminality with lack of immigration status," causing a rise in fast-track deportations with minimal to no due process.[40]

Additionally, IIRIRA took away discretion from immigration judges, making it increasingly difficult for them to grant relief from removal based on fairness arising from noncitizens' individual situations.[41] It replaced "suspension of deportation" with the more restrictive cancellation of removal.[42] Cancellation of removal is a type of discretionary immigration relief available to noncitizens in removal proceedings who have well-established roots in the United States and meet the other onerous requirements.[43] The US Attorney General has the ability to "cancel removal" and adjust the status of these noncitizens.[44] If a noncitizen is granted cancellation of removal, proceedings are terminated and the noncitizen is allowed to

---

[37] 8 U.S.C. § 1229b.

[38] Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration [https://perma.cc/HK34-5RG3].

[39] *US: 20 Years of Immigration Abuses*, HUM. RTS. WATCH (Apr. 25, 2016, 8:00 AM), https://www.hrw.org/news/2016/04/25/us-20-years-immigrant-abuses [https://perma.cc/N2SR-Z3CX].

[40] Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to Current US Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SEC., 192, 192, 202 (2018) (quoting Leisy Abrego et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. ON MIGRATION & HUM. SEC. 694, 695 (2017)); Oldfield, *supra* note 23, at 418.

[41] Kerwin, *supra* note 40, at 194.

[42] *Id.*

[43] H.R. REP. NO. 104–828, at 48–50 (1996) (Conf. Rep.). For green card holders, cancellation of removal requires: (1) continuous presence for seven years; (2) permanent residence for five years; and (3) no aggravated felony convictions. For non-green card holders, cancellation of removal requires: (1) continuous presence for ten years; (2) "a showing that removal would cause exceptional and extremely undue hardship to a US citizen or green card holding spouse, child, or parent;" (3) "good moral character; and" (4) "no convictions for [an extensive] range of crimes." Kerwin, *supra* note 40, at 194. Even if a noncitizen meets these baseline requirements, a judge has the discretion to deny cancellation. *Id.*

[44] Adjustment of status is the process of changing your status to that of a legal permanent resident or a green card holder from within the United States. *Adjustment of Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Sept. 9, 2020), https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-of-status [https://perma.cc/CU34-URYG]; H.R. REP. NO. 104–828, at 48; *see also* 3B AM. JUR. 2D *Aliens and Citizens* § 1670 (2022).

lawfully remain in the United States.[45] For noncitizens in removal proceedings who entered the United States without inspection,[46] cancellation is likely the only form of immigration relief available to them.[47]

One of the requirements to be eligible for cancellation of removal is a period of "continuous physical presence" in the United States after entry into the country and prior to proceedings.[48] The stop-time rule controls the calculation of the period of continuous physical presence, which ends when the noncitizen is served with an NTA.[49] This rule can be very problematic for noncitizens because using the date that a defective NTA was issued to "stop the clock" can foreclose the only avenue that they have to remain in this country with their family.[50] Given that the stop-time rule is triggered when the NTA is served, it is important to identify what DHS will deem an NTA valid and whether defective NTAs will still prompt the stopping of the clock for continuous presence.[51]

*C. The Pre-*Pereira *Legal Landscape*

In 2011, in *In re Camarillo*, the BIA addressed whether defective NTAs trigger the stop-time rule for purposes of cancellation of removal.[52] There, the BIA held that under the stop-time rule, the period of continuous presence ends with the service of an NTA, regardless of whether the notice includes a date and time.[53] The BIA reasoned that since the language of the stop-time rule was ambiguous, the rule's reference to the NTA simply clarified what document DHS needs to serve without

---

[45] 3B AM. JUR. 2D *Aliens and Citizens* § 1670 (2022). However, a noncitizen can once again become deportable and be placed in removal proceedings if they are arrested or convicted of certain crimes. *Legal Rights After Cancellation of Removal Has Been Granted*, NOLO, https://www.nolo.com/legal-encyclopedia/legal-rights-after-cancellation-of-removal-has-been-granted.html [https://perma.cc/JKE5-EAAZ].

[46] Entry without inspection with respect to a noncitizen means that the noncitizen did not enter lawfully "into the United States after inspection and authorization by an immigration officer." AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: INSPECTION, ENTRY, AND ADMISSION 1 n.3 (2015).

[47] NON-LPR CANCELLATION OF REMOVAL, *supra* note 13, at 1.

[48] 8 U.S.C. § 1229b(a) (explaining that, for cancellation of removal for legal permanent residents, an individual must demonstrate continuous residence in the United States for seven years after admission "in any status"); 8 U.S.C. § 1229b(b)(1) (explaining that, for cancellation of removal for non-legal permanent residents, an individual must demonstrate continuous physical presence in the United States for "not [fewer] than ten years immediately preceding [such application] date").

[49] 8 U.S.C. § 1229b(d)(1).

[50] Pereira v. Sessions, 138 S. Ct. 2105, 2112 (2018).

[51] Oldfield, *supra* note 23, at 418–19.

[52] *In re* Camarillo, 25 I. & N. Dec. 644, 645 (B.I.A. 2011).

[53] *Id.*

compelling "substantive requirements" on the notice itself.[54] Following *Camarillo*, almost all courts deferred to the BIA's interpretation of the stop-time rule[55] and held that the time and place of the hearing need not be included in the notice.[56]

By 2018, DHS commenced nearly all cases filed in the previous three years with charging documents that left out the time, date, and place of the proceeding.[57] In permitting DHS to issue NTAs with critical information "to be determined,"[58] the government accepted a "countertextual mode of providing notice."[59] With an incomplete NTA, noncitizens could not reasonably obtain legal representation, prepare for their removal proceedings, or create an emergency preparedness plan.[60] Further, failing to provide proper notice to noncitizens facing the possibility of deportation cuts against EOIR's mission to adjudicate cases "fair[ly], expeditious[ly], and uniform[ly]."[61] Thus, in practice, DHS regularly evaded statutory constraints and its own guiding principles by allowing removal proceedings to go on despite the fact that the defective NTAs almost ensured

---

[54] *Camarillo*, 25 I. & N. Dec. at 647.

[55] "The [BIA] is the highest administrative body for interpreting and applying immigration law . . . [and its] decisions are binding on all DHS officers and Immigration Judges unless modified or overruled by the Attorney General or a federal court. Most BIA decisions are subject to judicial review in the federal courts." *Board of Immigration Appeals*, EXEC. OFF. OF IMMIGR. REV. (last updated Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/KX4P-LPUV]. However, "[a]s an administrative body, the BIA's decisions are entitled to judicial deference under *Chevron U.S.A. v. Natural Resources Defense Council*, unless the determination is 'arbitrary, capricious, or manifestly contrary to the statute.'" Jennifer Safstrom, *An Analysis of the Applications and Implications of Chevron Deference in Immigration*, 34 GEO. IMMIGR. L.J. 53, 54 (2020).

[56] Oldfield, *supra* note 23, at 422; Hoffman, *supra* note 23, at 15–16; Moscoso-Castellanos v. Lynch, 803 F.3d 1079, 1083 (9th Cir. 2015); Guaman-Yuqui v. Lynch, 786 F.3d 235, 238–40 (2d Cir. 2015); Gonzalez-Garcia v. Holder, 770 F.3d 431, 434–35 (6th Cir. 2014); Wang v. Holder, 759 F.3d 670, 674–75 (7th Cir. 2014); Urbina v. Holder, 745 F.3d 736, 740 (4th Cir. 2014). The one exception was the Third Circuit's decision in *Orozco-Velasquez v. Attorney General*. Orozco-Velasquez v. Att'y Gen., 817 F.3d 78, 79 (3d Cir. 2016). There, the court held that the BIA's statutory construction was not entitled to deference because it directly conflicted with Section 1229(a)'s plain text and Congress' intent to require that the NTA include the date and time. *Id.* at 81–83.

[57] Transcript of Oral Argument at 52, Pereira v. Sessions, 138 S. Ct. 2105 (2018) (No. 17-459). In practice, DHS often served charging documents on noncitizens with no date or time for the hearing because DHS did not learn when the hearing would be scheduled until it filed the NTA with the immigration court, which "DHS often wait[ed] *years* to file." Brief of National Immigrant Justice Center as Amicus Curiae Supporting Petitioner at 27, Pereira v. Sessions, 138 S. Ct. 2105 (2010) (No. 17-459).

[58] Johnson, *supra* note 25, at 25.

[59] *Orozco-Velasquez*, 817 F.3d at 84.

[60] Kennison, *supra* note 35, at 799.

[61] *Executive Office of Immigration Review: About the Office*, DEP'T OF JUST. (last updated Feb. 3, 2021), https://www.justice.gov/eoir/about-office [https://perma.cc/YK37-FDSE].

that noncitizens would not have the opportunity to be heard and would be subsequently deported.[62]

D. The Pereira *Decision and its Unforeseen Jurisdictional Implications*

In mid-2018, the Supreme Court cemented the due process "rights of noncitizens seeking cancellation of removal," and possibly those of other respondents receiving "similarly deficient notices."[63] In *Pereira*, the Court resolved the circuit split over whether a defective NTA was sufficient to "stop" the accrual of continuous presence for the purpose of cancellation of removal.[64] Relying on the plain meaning of the text, "statutory context, and common sense," the Court held that a notice without the date, time, and place of the noncitizen's removal proceeding does not comply with the statutory requirements for an NTA.[65] Rejecting the government's arguments, the Court found that Section 1229(a) was "quintessential definitional language," and the time and date requirement was consistent with congressional intent.[66] While the Court underscored "the narrowness of its holding" to the cancellation of removal context,[67] it also emphasized that the government cannot change the law for the sake of efficiency or convenience.[68] Ultimately, *Pereira*, in asserting that a defective NTA did not trigger the stop-time rule, protected noncitizens from deportation by preserving their eligibility for cancellation of removal.[69]

However, post-*Pereira*, there was a great deal of confusion among immigration judges, court administrators, and the Department of Justice (DOJ) about how to interpret and implement the decision.[70] For court administrators, there were conflicting directives as to whether courts should accept defective

---

[62] Johnson, *supra* note 25, at 25; Kennison, *supra* note 35, at 799.

[63] Jason Boyd, *A Victory for Due Process*, THINK IMMIGR. (June 27, 2018), https://thinkimmigration.org/blog/2018/06/27/a-victory-for-due-process/ [https://perma.cc/8923-NBVU].

[64] Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018).

[65] *Id.* at 2110.

[66] *Id.* at 2116, 2119.

[67] Patrick J. Glen & Alanna R. Kennedy, *The Strange and Unexpected Afterlife of* Pereira v. Sessions, 34 GEO. IMMIGR. L.J. 1, 4 (2019).

[68] *Pereira*, 138 S. Ct. at 2118 (stating that "practical considerations are meritless and do not justify departing from the statute's clear text").

[69] DAN KESSELBRENNER ET AL., NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD & IMMIGR. DEF. PROJECT, PRACTICE ADVISORY: CHALLENGING THE VALIDITY OF NOTICE TO APPEAR LACKING TIME-AND-PLACE 9–10 (2018).

[70] Oldfield, *supra* note 23, at 425–26.

NTAs moving forward.[71] Internal emails obtained through a Freedom of Information Act request revealed that the DOJ did not intend to comply with *Pereira* "because doing so would conflict with the agency's self-imposed deportation quotas."[72] Moreover, while some judges wanted clarification on *Pereira*, perceiving "its VERY large implications,"[73] others accepted its jurisdictional consequences and terminated removal proceedings initiated with a defective NTA.[74] Simultaneously, DHS—in a bad faith effort to conform to *Pereira*—started issuing NTAs with inaccurate, and sometimes nonsensical, dates and times.[75] As a result, many noncitizens showed up to court on those "fake date[s]" and were turned away because their hearings were not on the court's docket.[76] Although these NTAs technically provided dates and times, the "dummy dates" were still not proper notice because they did not give noncitizens accurate information regarding their

---

[71] *Id.* at 426 (citing E-mail from Donna L. Wilson on behalf of MaryBeth Keller, Chief Immigration Judge, to Judges and Court Adm'rs (June 27, 2018, 1:48 PM); E-mail from Christopher A. Santoro, Principal Deputy Chief Immigration Judge, to All of OCIJ HDQ and Courts (July 11, 2018, 12:45 PM)).

[72] Matthew Hoppock, *Post-Pereira, the DOJ Chooses Harsh IJ Performance Metrics over Compliance with Supreme Court Mandate*, HOPPOCK L. FIRM (Sept. 20, 2018), https://www.hoppocklawfirm.com/post-pereira-the-doj-chooses-harsh-ij-performance-metrics-over-compliance-with-supreme-court-mandate/ [https://perma.cc/5V8F-9VWH]; *see also* Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges [https://perma.cc/878T-94G7] (explaining that the Department of Justice implemented new quotas that would "require [immigration judges] to clear at least 700 cases a year" or face consequences). The new "quotas could undermine judicial independence" and further violate immigrants' due process rights. *Id.*

[73] Oldfield, *supra* note 23, at 426 (citing E-mail from Richard Averwater, Immigration Judge, Memphis Immigration Court, to H. Kevin Mart, Assistant Chief Immigration Judge, Atlanta Immigration Court (June 25, 2018, 10:24 AM)).

[74] *See* Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, REUTERS (Oct. 17, 2018, 7:06 AM), https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK [https://perma.cc/9VNQ-4AZB] (explaining that in the months following *Pereira*, immigration judges terminated approximately 9,000 removal proceedings, "a 160 percent increase from" terminations for the same period the year before).

[75] Dianne Solis, *ICE Is Ordering Immigrants to Appear in Court, but the Judges Aren't Expecting Them*, DALLAS MORNING NEWS (Sept. 16, 2018, 5:30 AM), https://www.dallasnews.com/news/immigration/2018/09/16/ice-is-ordering-immigrants-to-appear-in-court-but-the-judges-arent-expecting-them/ [https://perma.cc/P6B3-XRMZ]. "People have been ordered to appear on national holidays, on weekends, and even at midnight—when . . . immigration court isn't operating." Madan, *supra* note 14.

[76] Madan, *supra* note 14; Elvia Malagon, *Immigration Attorneys Blame Glitch for Long Lines in Chicago Court*, CHI. TRIB. (Oct. 31, 2018, 6:45 PM), https://www.chicagotribune.com/news/breaking/ct-met-immigration-court-long-lines-20181031-story.html [https://perma.cc/6RZJ-Y57A]; Catherine E. Shoichet, *100+ Immigrants Waited in Line in 10 Cities for Court Dates that Didn't Exist*, CNN (Nov. 2, 2018, 4:52 PM), https://www.cnn.com/2018/10/31/us/immigration-court-fake-dates/index.html [https://perma.cc/SAV7-EHCA].

upcoming hearing.[77] Even more, these "fake date[s]" created chaos and fear around the courthouse and left noncitizens unsure about the future of their immigration cases after "go[ing] through large lengths to make it to court."[78] This unforeseen practice further heightened the need to settle conflicting guidelines and provide noncitizens with valid notice so they could properly prepare for their immigration cases.

While DHS and DOJ were attempting to circumvent the ruling, immigration advocates began to challenge immigration courts' jurisdiction over removal proceedings commenced with defective NTAs.[79] Their stance was clear: current removal proceedings against noncitizens who had been served with defective NTAs should be terminated, and noncitizens who already had an order of removal through faulty NTAs should have their cases reopened.[80] Immigration attorneys also filed motions to dismiss illegal reentry charges and challenged *in absentia* removal orders.[81] In making these extensive *Pereira*-based arguments, immigration advocates and practitioners intended to broaden the reach of the decision and urge the government to follow immigration statutes and regulations which ensure fairness and preserve noncitizens' due process rights.[82]

Ultimately, most of the confusion from the pre-*Pereira* legal framework regarding the NTA remained unresolved following *Pereira*.[83] In fact, *Pereira* raised the question of whether a defective NTA affects the vesting of jurisdiction in immigration courts.[84] Subsequent lower court decisions sought

---

[77] Madan, *supra* note 14; Letter from Douglas R. Hibbard, Chief, Initial Request Staff, to Matthew Hoppock, MuckRock News (May 3, 2019), https://cdn.muckrock.com/foia_files/2019/05/03/05._Final_Response_5.3.19.pdf [https://perma.cc/6P2F-CM3L].

[78] Madan, *supra* note 14. Noncitizens "are driving like eight hours and taking off of work in order to appear at these hearings, only to find out that it's not the actual correct hearing date. The impact is their jobs, it's their life, and also just the anxiety." Shoichet, *supra* note 76.

[79] Johnson, *supra* note 25, at 3–4.

[80] *See* Robin Abcarian, *New Supreme Court Case Could Upend Thousands of Deportation Cases in Setback for Immigration Hard-Liners*, L.A. TIMES (July 13, 2018, 3:00 AM), https://www.latimes.com/local/abcarian/la-me-abcarian-pereira-deportation-20180713-story.html [https://perma.cc/N9FX-C6MR]; *see also* Amy Taxin, *Immigration Cases Tossed in Fallout from High Court Ruling*, ASSOCIATED PRESS (Aug, 13, 2018), https://apnews.com/article/supreme-courts-az-state-wire-wa-state-wire-boston-courts-0801b133b2904a66a423e7a822a85042 [https://perma.cc/2SEK-2PLN] (explaining how "[i]n some cases, they're asking for deportation cases to be thrown out entirely, and in others, for a deportation order to be wiped from immigrants' records so they can get another chance to argue they should be allowed to remain in the country").

[81] *See* KESSELBRENNER, *supra* note 69, at 15–17 (discussing strategies to challenge jurisdiction).

[82] *Id.*

[83] Oldfield, *supra* note 23, at 425–26.

[84] Johnson, *supra* note 25, at 2–3.

to resolve this inquiry and decide whether the consequences tied to the issuance of an NTA should commence when the initial notice was defective.[85]

II. POST-*PEREIRA* REJECTIONS OF JURISDICTIONAL ARGUMENTS

Months after the Court decided *Pereira*, the BIA and several courts of appeals rejected claims that the issuance of a defective NTA prevents the vesting of jurisdiction in immigration courts.[86] These decisions underscored three central arguments: (1) the regulation does not mandate the time and date be included in the NTA, (2) a two-step notice process is enough to meet the notice requirement, and (3) the notice requirements relating to NTAs are nonjurisdictional, claim-processing rules.[87]

A. The Vesting of Subject Matter Jurisdiction

Nonetheless, immediately after *Pereira*, immigration attorneys contended that the decision extended "beyond the cancellation of removal context."[88] One of their main claims was that the immigration court does not have subject matter jurisdiction over proceedings commenced with a defective NTA.[89] The language of 8 C.F.R. § 1003.14(a) does not explicitly indicate which type of jurisdiction vests, and post-*Pereira* briefs and advisories refrained from taking a position.[90] However, the first full sentence of the regulation states that "[j]urisdiction vests, *and proceedings before an Immigration Judge commence*, when a charging document is filed with the Immigration Court by the Service."[91] The fact that "vests" is immediately followed by "proceedings before an Immigration Judge" suggests that the requirement is one of subject matter jurisdiction.[92] This

---

[85] KATY LEWIS ET AL., CATH. LEGAL IMMIGR. NETWORK, INC., PRACTICE ADVISORY: *PEREIRA V. SESSIONS*–UPDATED STRATEGIES AND CONSIDERATIONS 20 (2019).

[86] *Id.*

[87] *Id.* at 7–10.

[88] ALRABE ET AL., *supra* note 16, at 3.

[89] *Id.*; *see also* Johnson, *supra* note 25, at 4–6 (2019); LEWIS ET AL., *supra* note 85, at 13.

[90] *See* 8 C.F.R. § 1003.14(a) (2022); *see also* KESSELBRENNER ET AL., *supra* note 69, at 13–16 (noting [w]hether the purported [notice to appear] creates an issue around personal jurisdiction or subject-matter jurisdiction . . .").

[91] 8 C.F.R. § 1003.14(a) (2022) (emphasis added).

[92] *Id.*; Johnson, *supra* note 25, at 4–5. A plain reading of the regulation suggests that it refers to subject matter jurisdiction because it establishes how a "particular case is properly heard before an immigration court." *Id.*

distinction is important because while "[d]efects in personal jurisdiction" can be waived, defects in subject matter jurisdiction are not waivable.[93] Thus, since the textual construction of the regulation intimates that subject matter jurisdiction does not vest until an NTA with the date, place, and time is served on the noncitizen, the immigration court lacks jurisdiction over proceedings initiated with a defective NTA.[94] Consequently, there was initial hope within the immigration advocacy community that *Pereira* could have far reaching jurisdictional implications.[95] Many district courts granted motions to terminate removal proceedings on the basis of practitioners' jurisdictional arguments.[96]

B. Regulatory NTA Requirements and Two-Step Notice

However, after the precedential BIA decision in *In re Bermudez-Cota*, most courts of appeals took a narrow reading of the decision and closed off all jurisdictional challenges.[97] In *Bermudez-Cota*, the BIA held that a statutorily deficient NTA did not deprive the immigration court of jurisdiction in removal proceedings.[98] Its conclusion was based on the narrowness of the *Pereira* ruling,[99] the fact that the regulation does not mandate the time and date be included in the NTA,[100] and the theory that the two-step notice process is enough to meet the notice requirement.[101] In reaching its conclusion that a secondary hearing notice with the date and time of the proceeding cures an initial defective NTA and vests the immigration court with jurisdiction over the proceeding, the BIA relied on pre-*Pereira* court of appeals decisions that found a two-step notice process sufficient.[102] Following *Bermudez-Cota*, almost all US courts of

---

[93] Johnson, *supra* note 25, at 4–5 (explaining that if personal jurisdiction is referenced, a noncitizen waives the NTA challenge by appearing in court); Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973) ("[W]here there is no jurisdiction over subject matter, there is, as well, no discretion to ignore that lack of jurisdiction."). This has a significant effect on noncitizens in criminal prosecutions for illegal reentry since it gives them an opportunity "to collaterally attack their predicate removal orders on the basis of lack of subject matter jurisdiction." Oldfield, *supra* note 23, at 433–34.

[94] *Id.* at 439.

[95] LEWIS ET AL., *supra* note 85, at 7, 20.

[96] *Id.*

[97] *Id.* at 7–10, 20.

[98] *In re* Bermudez-Cota, 27 I. & N. Dec. 441, 447 (B.I.A. 2018).

[99] *Id.* at 443.

[100] *Id.* at 443–44.

[101] *Id.* at 447; Glen & Kennedy, *supra* note 67, at 5.

[102] LEWIS, *supra* note 85, at 8 ("Notably, however, the BIA did not reconcile the holdings of the U.S. courts of appeal cases on which it relied with the statutory analysis in *Pereira*.").

appeals have held that a defective NTA does not deprive immigration court of jurisdiction.[103]

The Second, Third, Fifth, Sixth, and Ninth Circuits have expressly deferred to *Bermudez-Cota*, rejecting jurisdictional challenges.[104] These courts of appeals have reasoned that a defective NTA still satisfies the regulatory requirements, and a two-step notice system ensures that jurisdiction has vested.[105] For instance, in *Hernandez-Perez v. Whitaker*, the Sixth Circuit concluded that jurisdiction vested when the second notice with the date and time was provided.[106] Notably, the Sixth Circuit recognized that there was a "common-sense discomfort" in diverging from the statutory text of the NTA requirements.[107] However, the court expressed greater concerns over the "unusually broad implications" of allowing jurisdictional challenges given that nearly 100 percent of NTAs issued by the government in the past three years were defective.[108] This argument is similar to the administrative and practical concerns that the Supreme Court adamantly rejected in *Pereira*.[109]

C. Notice Requirements as Nonjurisdictional, Claim-Processing Rules

Conversely, the Seventh and Eleventh Circuits held that the notice requirements are nonjurisdictional, claim-processing rules.[110] Claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take

---

[103] *Id.*

[104] Glen & Kennedy, *supra* note 67, at 5.

[105] *Id.*; *see also* Banegas Gomez v. Barr, 922 F.3d 101, 111–12 (2d Cir. 2019) (rejecting a jurisdictional challenge based on remedying effect of the two-step notice process); Santos-Santos v. Barr, 917 F.3d 486, 490–91 (6th Cir. 2019) (referencing both the satisfaction of the regulatory requirements and the curing effect of the secondary Notice of Hearing when rejecting the noncitizen's jurisdictional challenge); Karingithi v. Whitaker, 913 F.3d 1158, 1159 (9th Cir. 2019) (explaining that jurisdiction vested since the NTA missing a date and time still "satisfied the regulatory requirements"); Mejia-Castanon v. Att'y Gen., 931 F.3d 224, 232 n.7 (3d Cir. 2019) (concluding that Pereira's explanation of an NTA "does not implicate an immigration judge's authority to adjudicate"); Pierre-Paul v. Barr, 930 F.3d 684, 690 (5th Cir. 2019), *cert denied*, 140 S. Ct. 2716 (mem) (holding that the defective NTA was sufficient because it met the regulatory obligations).

[106] Hernandez-Perez v. Whitaker, 911 F.3d 305, 314–15 (6th Cir. 2018).

[107] *Id.* at 314.

[108] *Id.*; LEWIS ET AL., *supra* note 85, at 8.

[109] Pereira v. Sessions, 138 S. Ct. 2105, 2118 (2018) ("These practical considerations are meritless and do not justify departing from the statute's clear text.").

[110] Glen & Kennedy, *supra* note 67, at 5; Ortiz-Santiago v. Barr, 924 F.3d 956, 963 (7th Cir. 2019); Perez-Sanchez v. U.S. Att'y Gen., 935 F.3d 1148, 1153 (11th Cir. 2019) (stating that "both the regulation and the statute set forth only claim-processing rules with respect to the service or filing of an NTA").

particular procedural steps at certain specified times."[111] In *Ortiz-Santiago v. Barr*, the Seventh Circuit conceded that the statutory requirements govern over regulatory ones but still held that the immigration court retained jurisdiction because failure to comply with a claim-processing rule does not "divest[] a tribunal of adjudicatory authority."[112] Further, although the government's failure to adhere to the requirements "may be grounds for dismissal," the court found that Mr. Ortiz-Santiago did not make a timely objection or prove that his timing was excusable and show prejudice.[113] The following year, in 2020, the BIA concluded in *In re Rosales-Vargas* that noncitizens held the burden of demonstrating prejudice from DHS's violations of regulatory requirements in each case.[114] Ultimately, while the theory that the notice requirement is a claim-processing rule provides some room for noncitizens to challenge proceedings initiated with a defective NTA, the BIA and the courts of appeals have continued to put the onus on noncitizens.[115]

Given the Court's position in *Pereira*, the fact that jurisdictional challenges might be administratively burdensome cannot justify ignoring the statutory requirements or, even more importantly, shattering families and upending noncitizens' lives.[116] Rather than continuing to put the burden on noncitizens, the government should issue clear direction that omissions in the NTA will not count as valid notice and thus will not trigger the vesting of jurisdiction in immigration courts. This clarification will ensure that all branches follow this stance and that noncitizens and their families have a fair chance of remaining together.

Overall, while immigration advocates continued to challenge immigration court's jurisdiction after *Pereira*,[117] the BIA's decision in *Bermudez-Cota* made jurisdictional arguments very unlikely to succeed.[118] Further, even the few courts of appeals cases that allowed noncitizens to challenge DHS's omission of important information in the NTA did not attack the root of the problem: the lack of clarity on the proper NTA

---

[111] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

[112] *Ortiz-Santiago*, 924 F.3d at 963; Oldfield, *supra* note 23, at 431 (citing *Ortiz-Santiago*, 924 F.3d at 963).

[113] *Ortiz-Santiago*, 924 F.3d at 963–65. A practice advisory has also urged practitioners to "continue to raise the jurisdictional argument at the earliest opportunity to ensure that it is not later deemed waived." LEWIS ET AL., *supra* note 85, at 10 n.43.

[114] *In re* Rosales-Vargas, 27 I. & N. Dec. 745, 753 (B.I.A. 2020).

[115] *See* LEWIS ET AL., *supra* note 85, at 10.

[116] Oldfield, *supra* note 23, at 440–41.

[117] LEWIS ET AL., *supra* note 85, at 10.

[118] *Id.* at 13.

requirements and the legal authority of the vesting of jurisdiction.[119] Ultimately, this outcome has been disastrous because it has largely barred noncitizens and their attorneys from successfully terminating proceedings initiated with defective NTAs.[120] The only way this issue can be comprehensively addressed is through federal legislation that establishes uniform criteria for NTAs and makes clear when and how jurisdiction is vested in the immigration courts.

III. *NIZ-CHAVEZ*'S STRONGER JURISDICTIONAL IMPLICATIONS

Since *Pereira* and subsequent case law left the problem of the issuance of defective NTAs largely unresolved, the Supreme Court attempted to provide additional clarification.[121] Specifically, *Niz-Chavez* required a single, complete document to serve as the NTA.[122] While *Niz-Chavez*, like *Pereira*, did not explicitly mention jurisdiction, its foreclosure of the two-step notice rationale, emphasis on statute over regulation, and reference to the real world implications of a defective NTA have reopened the door to arguments that immigration courts lack jurisdiction over these cases.[123] While all post-*Niz-Chavez* efforts have been unsuccessful in terminating proceedings, the BIA invited discussion around the jurisdictional effects of *Niz-Chavez*, which led to strong policy arguments urging the termination of removal proceedings commenced with a defective NTA.[124] Nonetheless, the courts have proved to be an inadequate means of obtaining a comprehensive and long-lasting solution to the jurisdictional issues arising from defective NTAs.

The Supreme Court's "potentially revolutionary" holding in *Niz-Chavez* clarified *Pereira*.[125] The Court overturned the two-step notice process that was previously considered a "cure" for an initial defective NTA and a defense against jurisdictional challenges.[126] In *Niz-Chavez*, the Court held that INA § 239(a)(1) requires DHS to provide all of the statutory information in a

---

[119] Glen & Kennedy, supra note 67, at 5; Ortiz-Santiago v. Barr, 924 F.3d 956, 962 (7th Cir. 2019); Perez-Sanchez v. U.S. Att'y Gen., 935 F.3d 1148, 1153 (11th Cir. 2019).

[120] LEWIS ET AL., supra note 85, at 10.

[121] ALRABE ET AL., supra note 16, at 5.

[122] Geoffrey A. Hoffman, Niz-Chavez *and Jurisdiction?*, LEXISNEXIS LEGAL NEWS ROOM (May 2, 2021), https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/prof-geoffrey-hoffman-niz-chavez-and-jurisdiction# [https://perma.cc/AH8W-FE3E].

[123] Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480, 1485 (2021).

[124] BD. OF IMMIGR. APPEALS, AMICUS INVITATION NO. 21-20-07 (2021), https://www.justice.gov/eoir/page/file/1413376/download [https://perma.cc/5ZUZ-N8PZ].

[125] Hoffman, *supra* note 122.

[126] *Id.*

single document, noting that an NTA cannot be "a mishmash of pieces with some assembly required."[127] Reiterating *Pereira*, the Court stated that DHS must "turn square corners when it deals with" noncitizens with limited knowledge of English and that "pleas of administrative inconvenience" cannot excuse DHS cutting corners.[128] In this context, Justice Gorsuch asserted that when a government agency like DHS brings a civil action against a noncitizen, it cannot act in a manner that aims to achieve an unfair litigation advantage, particularly when they are already "the party with far more resources."[129] There is an overarching trend from the Supreme Court of holding "the government to a stricter"—albeit, already existent—standard, which, in turn, requires the careful consideration of noncitizens' due process rights.[130] In reaching its decision, the Court focused on the inadequacy of a two-step notice process, the clear meaning of the statute and legislative history, and the severe nature of removal proceedings.[131]

A. Statutory Language Requires a Single, Complete NTA

By requiring a single NTA that provides the noncitizen with complete and accurate information, *Niz-Chavez* barred DHS's practice of issuing two successive NTAs to noncitizens.[132] The two-step process previously recommended by the BIA and most US courts of appeals invited a lot of confusion and unfairness for noncitizens navigating an already complex civil proceeding.[133] For example, sometimes noncitizens never received a second NTA with the date and time of the proceedings and were ordered deported *in absentia*; while others received a second NTA with a date that had already passed on the same day they received their order of removal for failing to appear.[134]

---

[127] *Niz-Chavez*, 141 S. Ct. at 1480.

[128] *Id.* at 1485–86.

[129] *Id.* at 1485; *see* Bruce D. Greenberg, *The "Square Corners" Doctrine*, N.J. APP. L. (Oct. 6, 2011), http://appellatelaw-nj.com/the-square-corners-doctrine/ [https://perma.cc/UAD6-5R8N]; *see also* Brief for the American Immigration Lawyers Association et al. as Amici Curiae, In the Matter of Amicus Invitation No. 21-20-07 (2021) [hereinafter Brief for AILA] at 2.

[130] Rathod, *supra* note 18.

[131] ALRABE ET AL., *supra* note 16, at 5.

[132] *Niz-Chavez*, 141 S. Ct. at 1482.

[133] *Id.* at 1485.

[134] Karolina Walters, *Supreme Court Rejects Government Practice of 'Notice-by-Installment in* Niz-Chavez v. Garland, IMMIGR. IMPACT (Apr. 30, 2021), https://immigrationimpact.com/2021/04/30/notice-to-appear-niz-chavez-supreme-court-ruling/#.YTuOWC1h1hA [https://perma.cc/SGP2-YNUF]; *see also* DENIED A DAY IN COURT, *supra* note 30, at 18–19 (illustrating instances where notices never arrived or were not received in time).

Further, dismissing the government's pleas of self-serving regulations and speculative and unsupported policy considerations, the Court adamantly held that the statutory language explicitly required the government to provide noncitizens with critical information about their proceedings in a single document.[135] Justice Gorsuch concluded that there is "a plain statutory command" that follows from the ordinary meaning of the terms in the statute, as well as the legislative history.[136] When the meaning of the statutory text and congressional intent is plain and clear, there is no other valid interpretation.[137]

B. Practical Implications of a Defective NTA

Tellingly, the decision references *Pereira* to highlight the importance of issuing a single NTA, since the serving of the NTA commences a serious legal proceeding that is comparable to "an indictment in a criminal case."[138] The initiation of removal proceedings has serious and far-reaching consequences for noncitizens and their families.[139] When noncitizens are not initially given proper notice and are thus unable to appear for their scheduled hearing, immigration judges have the authority to issue *in absentia* removal orders, which effectively orders their deportation without an opportunity to be heard in court.[140] Other times, as was the case for petitioners Pereira and Niz-Chavez, even when noncitizens are able to appear for their scheduled hearing, the issuance of a defective NTA can unfairly bar them from their only avenue of relief from deportation.[141] Many noncitizens consider deportation a far worse outcome than any potential jail sentence.[142] While most post-*Pereira* decisions focus on the potential administrative burden of terminating "tens of thousands of cases," there is no similar concern for the lives of the noncitizens affected by these due process violations.[143] The Court in *Niz-Chavez* recognized that, at minimum, DHS must provide noncitizens with one

---

135 *Niz-Chavez*, 141 S. Ct. at 1485.

136 *Id.* at 1486.

137 *Id.*

138 *Id.* at 1482 (citing *Pereira*, 138 S. Ct. at 2110).

139 *Id.* at 1485 (citing *Pereira*, 138 S. Ct. at 2118).

140 8 C.F.R. § 1003.26(c) (2022); Eagly & Shafer, *supra* note 5, at 822.

141 *See* Pereira v. Sessions, 138 S. Ct. 2105, 2112 (2018); *see also Niz-Chavez*, 141 S. Ct. at 1479.

142 Sessions v. Dimaya, 138 S. Ct. 1204, 1209 (2018).

143 ALRABE ET AL., *supra* note 16, at 13.

comprehensive NTA if it aims to proceed against them in immigration court.[144]

As important as avoiding lengthy adjudication delays is to a functional immigration system, it cannot come at the expense of due process and fairness.[145] Noncitizens must be provided with the time and place of their first hearing in the initial NTA so they can obtain legal representation, prepare their cases, and appear at their hearings.[146] Many noncitizens cannot afford private counsel because they "are unable to work" or do not make enough money to provide both for their family and pay legal fees.[147] These difficulties are compounded for noncitizens with cases in small cities who can face greater difficulty finding counsel compared to their counterparts in medium or large cities.[148] Noncitizens with hearings in small cities had a representation rate of 11 percent, four times less than the 47 percent representation rate of noncitizens with hearings in large cities.[149] Further, noncitizens who do not speak English or lack English literacy face even more obstacles in finding an attorney and seeking immigration "relief and benefits."[150] Thus, due to financial, geographical, and language access barriers, noncitizens need sufficient time to find low-cost or pro bono attorneys willing to take on their cases.[151]

Obtaining legal representation is critical if a noncitizen wants to present a successful case.[152] According to a report analyzing removal cases decided between 2007 and 2012, represented noncitizens "were five times more likely to seek relief" than unrepresented noncitizens.[153] Representation also increased noncitizens' likelihood of obtaining relief; nondetained represented noncitizens were almost "five times more likely than their

---

[144] *Niz-Chavez*, 141 S. Ct. at 1485–86.

[145] Walters, *supra* note 134.

[146] INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/D7YB-SH3T].

[147] *Id.* at 6.

[148] *Id.* at 10.

[149] *Id.*

[150] Pooja R. Dadhania, *Language Access and Due Process in Asylum Interviews*, 97 DENVER L. REV. 707, 708 (2020); *see also* Cristobal Ramon & Lucas Reyes, *Language Access in the Immigration System: A Primer*, BIPARTISAN POL'Y CTR. (Sept. 18, 2020), https://bipartisanpolicy.org/blog/language-access-in-the-immigration-system-a-primer/ [https://perma.cc/24H7-TPEQ].

[151] EAGLY & SHAFER, *supra* note 146, at 6–10.

[152] *Asylum Denial Rates Continue to Climb*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Oct. 28, 2020), https://trac.syr.edu/immigration/reports/630/ [https://perma.cc/H8FR-22D4].

[153] EAGLY & SHAFER, *supra* note 146, at 2.

unrepresented counterparts to obtain relief if they sought it."[154] A more recent report analyzing asylum outcomes for Fiscal Year 2020 further confirmed this trend, and found that the odds of being successful if unrepresented was 17.7 percent, while the grant rate among represented asylum seekers was almost double, at 31.1 percent.[155] Thus, in order to avoid the devastating consequences of an unsuccessful immigration case, DHS should issue statutorily sufficient NTAs that allow noncitizens to effectively plan for their upcoming hearing alongside an attorney.[156]

This contextual backdrop is extremely important because it accurately elevates the issue of defective NTAs from something of minor procedural importance to a humanitarian disaster that affects the lives of tens of thousands of noncitizens living in this country.[157] In addition, it supports this note's recommendation of a legislative solution that will forbid the government from cutting corners when it comes to basic due process rights.

C. New Avenues for Jurisdictional Arguments

While *Niz-Chavez* does not discuss the matter of jurisdiction and limits its holding to the context of the stop-time rule, the foreclosure of the two-step notice process overturned several post-*Pereira* decisions that held that jurisdiction vests upon the serving of a secondary notice with the date, time, and place of the proceeding.[158] Specifically, it upended the BIA's precedential decision in *Bermudez-Cota* that all subsequent US court of appeals decisions relied on to reject jurisdictional challenges to proceedings commenced with a defective NTA.[159] Given that one of the fundamental rationales in support of these decisions was nullified in *Niz-Chavez*, succeeding decisions should not be able to cite to *Bermudez-Cota* and its progeny.[160] Thus, at least in the jurisdictions that previously relied on the

---

[154] *Id.* at 3.

[155] *Asylum Denial Rates Continue to Climb*, *supra* note 152, at 1; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-72, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES 33 (2016), https://www.gao.gov/assets/gao-17-72.pdf [https://perma.cc/4LZ2-NNWC] (reporting that representation on average nearly doubles the likelihood of affirmative and defensive cases being granted asylum).

[156] *See* DENIED A DAY IN COURT, *supra* note 30, at 18–20 (illustrating multiple instances of immigration cases which failed due to notice failures and defects).

[157] *See* Walters, *supra* note 134, at 4 (noting the importance of notice and the opportunity to be heard in the context of asylum seekers).

[158] Hoffman, *supra* note 122; ALRABE ET AL., *supra* note 16, at 13.

[159] *In re* Bermudez-Cota, 27 I. & N. Dec. 441, 447 (B.I.A. 2018).

[160] ALRABE ET AL., *supra* note 16, at 12–13.

two-step notice process, the immigration court should terminate noncitizens' removal proceedings and, if applicable, reissue an NTA with a meetable date, time, and place of the hearing so that noncitizens receive proper notice of their hearing and can prepare accordingly.[161]

Moreover, Justice Gorsuch's opinion emphasized Congress's authority through statute—rather than the agency's authority through regulations—to confer jurisdiction to immigration judges through the issuance of a statutorily sufficient NTA.[162] The Court further clarified that when the government wants to commence a removal proceeding against a noncitizen, it must "at least supply him with a single and reasonably comprehensive statement" explaining the "proceedings against him."[163] This language indicates that an NTA is invalid if it lacks the statutory requirements of date, place, and time.[164]

Immigration advocates have agreed that the broad and strong language the Court employed around strict compliance with INA § 239(a)(1) can be used in future jurisdictional arguments.[165] Specifically, advice to practitioners suggests that maintaining strict compliance with the statute is needed in order "to trigger consequences set forth in the INA that are tied to the NTA's issuance."[166] Therefore, it follows that if the NTA is deficient, it cannot give legal authority to immigration judges to start removal proceedings against noncitizens, and proceedings must be terminated and reissued, if necessary.[167]

*D. Post-*Niz-Chavez *Case Law*

Unfortunately, despite Justice Gorsuch's strong language, *Niz-Chavez* has not provided the last word on the jurisdictional issue at play. Since *Niz-Chavez* was decided, several courts,[168] and most recently, the BIA, have rejected the

---

[161] *Id.* at 3.

[162] *See generally* Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021) (referring consistently to statutory authority rather than regulatory guidance when discussing Congress's intent regarding NTAs).

[163] *Id.* at 1486.

[164] Hoffman, *supra* note 122.

[165] *Id.*; ALRABE ET AL., *supra* note 16, at 12–16.

[166] *Id.* at 15.

[167] *Id.* at 15–16; Hoffman, *supra* note 122.

[168] *See* Maniar v. Garland, 998 F.3d 235, 242 n.2 (5th Cir. 2021); Herrera-Antunez v. Garland, 848 F. App'x 486, 487 (2d Cir. 2021); United States v. Ceja-Melchor, No. 19-CR-00184-LHK, 2021 WL 3616777, at *5 (N.D. Cal. Aug. 16, 2021) ("Niz Chavez does not concern whether a defective NTA deprives the immigration court of jurisdiction over removal proceedings.").

argument that a defective NTA denies the immigration court of jurisdiction over the proceeding.[169] In *Maniar v. Garland*, the Fifth Circuit affirmed prior precedent, stating that it is the regulations and not the statute that govern the specific requirements a valid charging document must satisfy for jurisdiction to vest.[170] While the court recognized that *Niz-Chavez* invalidated the rationale behind permitting the two-step notice process, the court held that its previous decision in *Pierre-Paul v. Barr* still controlled.[171] Namely, the court reasoned that a defective NTA was sufficient for jurisdiction to vest because it still met the regulatory requirements and the regulations are what "govern what a notice to appear must contain to constitute a valid charging document."[172] Similarly, in *Herrera-Antunez v. Garland*, the Second Circuit reaffirmed its decision in *Banegas Gomez v. Barr* that *Pereira* does not negate jurisdiction where the case was initiated by an NTA that excluded the time and place of the hearing.[173] Thus, these post-*Niz-Chavez* cases suggest that courts are applying the same narrow reading to *Niz-Chavez* as they did to *Pereira*, and applicants may be unable to raise jurisdictional challenges.[174] However, these courts' decisions contradict the underlying reasoning in *Niz-Chavez* and fail to resolve the different interpretations lower courts have taken since *Pereira*.

Even though some courts of appeals have rejected the jurisdictional arguments, on July 20, 2021, the BIA invited the public to file amicus briefs evaluating whether *Niz-Chavez* affects immigration courts' jurisdiction over removal proceedings initiated with a defective NTA.[175] In soliciting amicus briefs, the BIA not only recognized that jurisdictional challenges stemming from a deficient NTA were "issues of

---

[169] ALRABE ET AL., *supra* note 16, at 13; *Board of Immigration Appeals Once Again Rules That Defective Notices to Appear Do Not Impact Immigration Court Jurisdiction*, CATH. LEGAL IMMIGR. NETWORK (Sept. 29, 2021), https://cliniclegal.org/stories/board-immigration-appeals-once-again-rules-defective-notices-appear-do-not-impact [https://perma.cc/K5KY-4UXK] [hereinafter CATH. LEGAL IMMIGR. NETWORK].

[170] *See Maniar*, 998 F.3d at 242 n.2 (citing Pierre-Paul v. Barr, 930 F.3d 684, 693 (5th Cir. 2019), *overruling recognized by* Garcia-Turcios v. Garland, No. 20-61008, 2022 WL 2132535, at *1 (5th Cir. 2022)).

[171] *Id.* (citing *Pierre-Paul*, 930 F.3d at 691, 693).

[172] *Id.* (citing *Pierre-Paul*, 930 F.3d at 693).

[173] *Herrera-Antunez*, 848 F. App'x at 487 (citing Banegas Gomez v. Barr, 922 F.3d 101, 110 (2d Cir. 2019)).

[174] ALRABE ET AL., *supra* note 16, at 13; CATH. LEGAL IMMIGR. NETWORK, *supra* note 169, at 1–2.

[175] BD. OF IMMIGR. APPEALS, *supra* note 124.

significance," [176] but it also signaled that it was considering whether to break from prior precedent.

E. Policy Arguments that Reinforce Jurisdictional Implications

Immigration advocates and experts quickly responded to the BIA's invitation and voiced their firm stance that the *Niz-Chavez* decision undoubtedly had jurisdictional implications.[177] While the submitted briefs took different paths to reach similar conclusions, they all stressed the real-world impact of allowing defective NTAs to have serious and life-threatening effects on the lives of noncitizens.[178]

1. Mandatory Claim-Processing Rules

The American Immigration Lawyers Association (AILA),[179] along with other immigration advocate partners, submitted an amicus brief urging the BIA that the only the appropriate remedy for DHS's violation of § 239(a)(1) is the termination of proceedings.[180] First, using *Niz-Chavez's* insistence on strict compliance with the statute, AILA argued that Congress used directive language, specified the information an NTA must contain, and included no exceptions in the statute.[181] Second, even if the BIA concludes that NTA requirements are not jurisdictional, AILA asserted that they

---

[176] *See Agency Invitations to File Amicus Briefs*, EXEC. OFF. OF IMMIGR. REV. (2021), https://www.justice.gov/eoir/amicus-briefs [https://perma.cc/5KZ9-YJL8].

[177] *See* Brief for AILA, *supra* note 129, at 5: ("[T]here can be no doubt that *Niz-Chavez* represents a complete reversal of the law concerning § 239(a)(1)"). Notably, some advocates stated that the jurisdictional "question was too narrow," and that even if the BIA did not find that the statutory requirements were jurisdictional, they still needed to be enforced as a matter of course. *Id.* at 2; *see also* Amicus Brief of the University of Houston Law Center Immigration Responding to Amicus Invitation No. 21-20-07 (Notice to Appear), In the Matter of Amicus Invitation No. 21-20-07 (2021) [hereinafter Brief for University of Houston Law Center] at 1 ("[*Niz-Chavez*] must be interpreted to deprive the United States Immigration Court of jurisdiction and warrant reopening in cases with final orders of removal where the NTA issued by DHS was *defective*, i.e., lacking the time and place of the hearing.") (emphasis in original); Brief for the Round Table of Former Immigration Judges as Amicus Curiae, In the Matter of Amicus Invitation No. 21-20-07 (2021) [hereinafter Brief for Round Table] at 3–4 (agreeing with arguments supporting the contention that jurisdiction does not vest in the court if the charging document is defective).

[178] *See* Brief for AILA, *supra* note 129, at 1; Brief for University of Houston Law Center, *supra* note 177, at 2, 8; Brief for Round Table, *supra* note 177, at 9.

[179] "The American Immigration Lawyers Association (AILA) is the national association of more than 16,000 attorneys and law professors who practice and teach immigration law." *About*, AM. IMMIGR. LAWS. ASS'N, (June 2, 2022, 11:18 AM), https://www.aila.org/about [https://perma.cc/SK72-RUPQ].

[180] Brief for AILA, *supra* note 129, at 2, 7.

[181] *Id.* at 2–3.

are, "at . . . minimum, *mandatory* claim-processing rules," which must be enforced any time a respondent makes a timely objection.[182] Because mandatory claim-processing rules are exempt from harmless-error analysis, relief must be available to noncitizens who timely raise a violation.[183] In effect, DHS must terminate removal proceedings and reissue the NTA—where applicable—with the appropriate information.[184] Further, in this case, AILA correctly reasoned that noncitizens who make a delayed *Niz-Chavez* argument satisfy the prejudice requirement given their receipt of an incomplete NTA.[185]

2. Double Standard for Strict Compliance with Procedure

AILA also made a compelling policy argument that expands on Gorsuch's opinion in *Niz-Chavez*: there is a stark double standard for strict compliance with procedural regulations.[186] Noncitizens, including those proceeding *pro se*, are expected to "comply with all applicable procedural obligations," while DHS has consistently failed to abide by very simple requirements regarding NTAs and has faced no sanctions for said violations.[187] This tension illustrates the government's willingness to ignore noncitizens' due process rights for the sake of efficiency. Thus, the need for true legislative reform to hold the government accountable for its actions and prevent further misuse of NTAs to deport noncitizens without granting them proper due process could not be greater.

3. Removal Proceedings' Peculiarity and Unwaivable Jurisdictional Challenges

Additionally, other immigration advocates brought attention to the uniqueness of removal proceedings and the ability to limit the undeniable jurisdictional implications of *Niz-*

---

[182] *Id.* at 3.

[183] Manrique v. U.S. 137 S. Ct. 1266, 1274 (2017); *see also* Ortiz-Santiago v. Barr, 924 F.3d 956, 965 (7th Cir. 2019). Harmless-error analysis is a determination, made by an appellate court, of whether a constitutional violation carried out by a lower court was "damaging enough" to affect the outcome of the case and justify a reversal of judgement or a retrial. *Harmless Error*, LEGAL INFO. INST. (last updated Mar. 2022), https://www.law.cornell.edu/wex/harmless_error [https://perma.cc/Z95U-EX5A]. Given that claim-processing rules are exempt from harmless-error analysis, violations raised by noncitizens must be addressed even if they ultimately do not affect the outcome of the case.

[184] Brief for AILA, *supra* note 129, at 7–8.

[185] *Id.* at 6.

[186] *Id.* at 1.

[187] *Id.*

Chavez to advocate for the termination of proceedings commenced with a defective NTA.[188] Geoffrey Hoffman, on behalf of the University of Houston Law Center Immigration Clinic, followed this line of reasoning in the brief he submitted to the BIA.[189] Emphasizing that the NTA is "the bedrock of the Immigration Court[] ," he argued that strict compliance with the statutory requirements is necessary to prompt the consequences of its issuance.[190] Hoffman also rejected the claim-processing rule rationale since it is not found "in the [statute], regulations, or any . . . BIA case law."[191] Further, he explained how the rationale behind the rule did not apply in this context because—unlike plaintiffs in regular federal civil actions—noncitizens in removal proceedings are responding to a matter initiated by DHS and they have no simple way of mending the harmful results of a defective NTA and, after *Niz-Chavez*, DHS cannot cure an initially defective NTA.[192]

Moreover, since courts are required to dismiss cases absent subject matter jurisdiction,[193] to conclude that jurisdiction is not impacted when proceedings are initiated by a defective NTA not only hampers "EOIR's ability to operate as a *bona fide* court," but it also brings into question its ability to provide due process and objectivity to noncitizens.[194] Hoffman suggested the remedy of allowing immigration judges *sua sponte* authority to reopen cases initiated with a defective NTA.[195] He also rebuffed the consequentialist policy argument that jurisdictional challenges would overburden the courts.[196] This is because it: (1) assumes no prejudice to noncitizens who litigated their cases even with an invalid NTA,[197] (2) ignores the possibility of "an administrative

---

[188] Brief for University of Houston Law Center, *supra* note 177, at 2, 6, 8–10.

[189] *Id.* at 1 (noting that *Niz-Chavez* should be interpreted to "warrant reopening in cases with final orders of removal where the NTA issued by DHS was *defective*, i.e., lacking the time and place of hearing").

[190] *Id.*

[191] *Id.* at 5–6.

[192] *Id.* at 6.

[193] Oldfield, *supra* note 23, at 437 (footnote omitted); Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996); *see also* Oldfield, *supra* note 23, at 437, 442 (arguing that the fact that the Court did not address jurisdiction in *Pereira* or *Niz-Chavez* does not confirm that jurisdiction was not affected).

[194] Brief for University of Houston Law Center, *supra* note 177, at 2.

[195] *Id.* at 8.

[196] *Id.* at 8. Consequentialism is a school of thought that assesses whether something is just based on what its consequences are rather than the underlying act itself. *Consequentialism*, ETHICS UNWRAPPED, https://ethicsunwrapped.utexas.edu/glossary/consequentialism [https://perma.cc/3KXQ-W9QF].

[197] Brief for University of Houston Law Center, *supra* note 177, at 8.

rule" with various consideration factors,[198] and (3) neglects that "a reasonable time limit" can be placed.[199]

In sum, Hoffman asserted that since the claim-processing rule rationale has no merit in the context of removal proceedings and immigration courts can properly limit jurisdictional challenges, a defective NTA should result in the termination of removal proceedings against the noncitizen.[200] These strong policy arguments can be further bolstered by a statutory clarification of the obligations of DHS when issuing NTAs to trigger the vesting of jurisdiction.[201]

4. Invalid *In Absentia* Removal Orders

Finally, former immigration judges and BIA members (Round Table) submitted a brief to the BIA focusing on the effect of defective NTAs on *in absentia* removal orders.[202] The Round Table concluded that irrespective of whether the BIA decides the decision impacts immigration courts' jurisdiction or is merely a claim-processing rule, *in absentia* orders instigated through defective NTAs are invalid due to *Niz-Chavez*.[203] Specifically, since the noncitizen did not appear for the proceedings—because DHS failed to provide proper notice—they could not make a timely objection.[204] Still, they did not waive their right to object, so these cases must be vacated by the court.[205] While more narrow in its conclusion, the Round Table effectively explained why one of the most common and harsh consequences of defective NTAs on noncitizens—the issuing of *in absentia* removal orders—is invalid.[206] Again, moving forward, the government can better ensure that *in absentia* removal orders are not initially issued to noncitizens who did not receive proper notice by disallowing the vesting of jurisdiction in immigration courts.

Unfortunately, in September 2021, a month after the deadline of the BIA amicus invitation, the BIA rejected a noncitizen's jurisdictional challenge based on a defective NTA in *In re Arambula-Bravo*.[207] In reaching its conclusion, the BIA

---

198 *Id.* at 9.
199 *Id.* at 10.
200 *Id.* at 6–10.
201 *See supra* Part II; *see also supra* Section III.D.
202 Brief for Round Table, *supra* note 177, at 5.
203 *Id.* at 9–10.
204 *Id.* at 6.
205 *Id.* at 6–8.
206 *Id.* at 9.
207 *In re* Arambula-Bravo, 28 I. & N. Dec. 388 (B.I.A. 2021); CATH. LEGAL IMMIGR. NETWORK, *supra* note 169.

simply cited to earlier decisions and reiterated that "[t]he only question addressed by *Niz-Chavez* . . . is immaterial to jurisdiction" without resolving the tension between their reasoning and that of *Pereira* and *Niz-Chavez*.[208] Still, practitioners trying to terminate proceedings "based on a defective NTA" are urged to continue "mak[ing] jurisdictional arguments" in their motions "to preserve the issue for review."[209] While this strategy will help noncitizens who have already been affected by defective NTAs, it will not prevent this violation of due process from happening to other noncitizens.

The policy arguments advanced by the amicus briefs, along with the post-*Niz-Chavez* practice advisories and post-*Pereira* legal scholarship, strongly suggest that the *Niz-Chavez* holding can be expanded beyond the stop-time rule and support jurisdictional challenges.[210] However, aside from simply recognizing the extension, it should be codified to end conflicting interpretations, prevent endless litigation, and above all, protect noncitizens' due process rights. The sum of this procedural mess is that tens of thousands of noncitizens are being deprived of their opportunity to be heard and ordered deported, in large part, because they received no notice or incorrect notice of their immigration hearings.[211]

IV. SOLUTION: RECOGNIZING AND CODIFYING IMMIGRATION COURT'S LACK OF JURISDICTION OVER REMOVAL PROCEEDINGS INITIATED WITH DEFECTIVE NTAS

Ultimately, it remains unclear whether DHS will correctly and timely implement the NTA requirements established in *Niz-Chavez* and whether noncitizens in removal proceedings commenced by defective NTAs will be granted termination. Congress must definitively resolve this issue, which has stripped noncitizens of their due process rights and left them with no possible path to fight their removal proceedings.[212] While the courts have tried to address this problem over the past few years, conflicting decisions, as well as persistent schemes to circumvent

---

[208] *In re* Arambula-Bravo, 28 I. & N. Dec. at 391.

[209] CATH. LEGAL IMMIGR. NETWORK, *supra* note 169.

[210] *See* ALRABE ET AL., *supra* note 16, at 15; Oldfield, *supra* note 23, at 415; *see generally* Brief for University of Houston Law Center, *supra* note 177 (arguing that under *Niz-Chavez*, an NTA which fails to specify a hearing's date and location cannot vest jurisdiction in an immigration court).

[211] DENIED A DAY IN COURT, *supra* note 30, at 14.

[212] *Id.*

the law, have proven that these efforts are not enough.[213] Instead, along with the expansion of *Niz-Chavez* to support the termination of proceedings commenced with defective NTAs, this note urges for legislative reform that will codify the true requirements for the issuance of an NTA and clarify the vesting of jurisdiction in immigration courts.

Although the Court did not explicitly discuss jurisdiction in *Niz-Chavez*, the natural consequences of the decision suggest that immigration courts do not have jurisdiction over removal proceedings initiated by a defective NTA. First, the fact that jurisdiction is not directly addressed in the decision does not confirm that jurisdiction is not affected because the Court often "assumes jurisdiction to resolve a case" and jurisdiction was not questioned by either party in this instance.[214] Further, this note argues that *Niz-Chavez*'s (1) foreclosure of the two-step notice process, (2) affirmation of the supremacy of a statute's clear text over self-serving regulations, and (3) recognition of the serious and far-reaching implications of the commencement of removal proceedings calls for the termination of proceedings commenced with a defective NTA due to lack of jurisdiction.[215]

In addition to expanding the *Niz-Chavez* decision to terminate proceedings started with a defective NTA, this note recommends an amendment to the INA further clarifying the NTA statutory requirements and the legal authority for the vesting of jurisdiction. The purpose of these changes is to disallow the executive branch and its agencies from changing the procedural and jurisdictional framework of removal proceedings for their convenience and political interests, while undermining the due process rights of noncitizens.

This solution is necessary because the Court's decisions in *Pereira* and *Niz-Chavez* have not been sufficient to resolve the issue of whether a defective NTA impacts immigration courts' jurisdiction over removal proceedings.[216] Currently, neither the statute nor the regulation provides affirmative and specific guidance on the effect of an NTA without the date or place on jurisdiction.[217] An amendment with the ensuing language would make clear that the time and place must appear on the initial NTA and that if that information is not included, jurisdiction

---

[213] ALRABE ET AL., *supra* note 16, at 24 (citing KESSELBRENNER ET AL., *supra* note 69, at 13–14).

[214] Johnson, *supra* note 25, at 6; *see also* Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996); Oldfield, *supra* note 23, at 436–37.

[215] *See supra* Part III.

[216] *See* LEWIS ET AL., *supra* note 85, at 7–10; ALRABE ET AL., *supra* note 16, at 12–15.

[217] 8 U.S.C. § 1229(a); 8 C.F.R. § 1003.14(a) (2022).

does not vest in the immigration court and removal proceedings must be terminated. This would produce greater consistency among immigration courts' decision making, lessen litigation on the issue, and reduce backlogs in the immigration system.[218]

Moreover, a legislative solution is the most permanent way to protect noncitizens' due process rights against potential future anti-immigrant administrations. While regulations and court decisions are easier to change or overturn, respectively, an amendment to the INA would ensure that one of noncitizens' basic procedural safeguards—valid and complete notice of the commencement of removal proceedings against them[219]—is not removed or altered. Specifically, rewording the statute to express that the initial NTA needs to include the time and place of the hearing in order to trigger the vesting of jurisdiction in immigration courts would prevent erroneous *in absentia* removal orders and allow noncitizens sufficient time to find legal counsel and prepare their case.

This note proposes the following language for the amendment(s) to U.S.C. § 1229(a):

> (1)(G)(iii) The time and place at which the proceedings will be held must be provided in the initial notice to appear.
>
> (4) Jurisdiction
>
> (A) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a notice to appear that includes all information in sections 1229(a)(1)(A)–(G) is filed with the Immigration Court and served on the noncitizen.
>
> (B) In the case that the initial notice to appear does not include all information in sections 1229(a)(1)(A)–(G), removal proceedings must be terminated.

In the alternative, I recommend that DHS and DOJ rescind "*where practicable*" from Section 1003.18(b) of the Code of Federal Regulations to avoid the recurrent tension between the language in the statute and the regulation.[220] Further, DHS and DOJ should publish a notice of proposed rulemaking to C.F.R. § 1003.14(a) to clarify that the charging document must include the time and place of the proceedings.[221]

---

[218] *See supra* Part III.

[219] *See* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021) (explaining that "when the federal government seeks a procedural advantage against an individual," the least they can do is give them a "single and reasonably comprehensive statement of the nature of the proceedings against [them]"); *see also* Brief for AILA, *supra* note 129, at 1.

[220] 8 C.F.R. § 1003.18(b) (2022) (emphasis added).

[221] *Id.*; § 1003.14(a).

CONCLUSION

Ultimately, the Court's decision in *Niz-Chavez* can be extended beyond the stop-time rule context and thus, has generated additional questions about its jurisdictional implications.[222] If, as argued in this note, *Niz-Chavez* challenges immigration courts' jurisdiction over cases initiated with a defective NTA, then the immediate remedy is to terminate removal proceedings against noncitizens affected by this practice. However, given that in applying *Niz-Chavez*, the BIA and the lower courts have objected to jurisdictional implications and refused to terminate proceedings,[223] a legislative solution is a more complete way to resolve these issues regarding the issuance of the NTA and its procedural consequences. An amendment to the INA must be considered to bar the government from continuing to destroy the lives of noncitizens and their families for political optics that pander to xenophobia.

Juliana M. Lopez[†]

---

[222] ALRABE ET AL., *supra* note 16, at 12–15.

[223] *In re* Arambula-Bravo, 28 I. & N. Dec. 388, 391 (B.I.A. 2021); Maniar v. Garland, 998 F.3d 235, 242 n.2 (5th Cir. 2021); Herrera-Antunez v. Garland, 848 F. App'x 486, 486–87 (2d Cir. 2021); United States v. Ceja-Melchor, No. 19-CR-00184-LHK, 2021 WL 3616777, at *5 (N.D. Cal. Aug. 16, 2021).

[†] J.D. Candidate, Brooklyn Law School, 2023; B.A. Princeton University, 2017. A heartfelt thank you to the *Brooklyn Law Review* staff for their hard work and careful editing throughout the publication process. Thank you to my Brooklyn Law School friends, Mercy and Cari, for their patience, encouragement, and support. Thank you to my partner Ronnie for always being there and pushing me to pursue my goals. Finally, a special thank you to my immigrant parents who inspired me to do this research and taught me the meaning of hard work and perseverance. I would not be where I am today without your sacrifices and unwavering support.