U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Office of the Chief Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

August 24, 2023

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Re: Amicus Invitation No. 23-01-08 [redacted]

Dear Amici:

The Board of Immigration Appeals received on August 14, 2023, your request for extension of time in which to file your amicus curiae brief. Your request is hereby granted as follows:

Your brief and two copies should be submitted to the Board, no later than **September 14. 2023.** In addition, please attach a copy of this letter to the front of your brief.

Respectfully,

Robab Butt
Information Management Team

cc: Parties are served electronically.

AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street NW Suite 300
Washington DC 2005

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In re:

Amicus Invitation No. 23-01-08

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Request to Appear as Amicus Curiae

The American Immigration Lawyers Association ("AILA") is a national non-profit association with over 16,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of AILA members. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts and the Board of Immigration Appeals ("BIA" or "Board"), as well as before federal courts.

AILA requests to appear as amicus curiae in response to the BIA invitation number 23-01-08. The Board may grant permission to amicus curiae to appear, on a case-by-case basis, if the public interest will be served thereby. 8 C.F.R. § 1292.1(d). The Board invited public comment on questions relating to the application of *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022), to DHS attempts to cure defective Notices to Appear ("NTAs").

AILA benefits from its members' experience in pursuing non-citizen rights under the U.S. Supreme Court's precedent in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), and the Board's subsequent decision in *Matter of Fernandes*. Agency precedent on this issue will affect thousands of clients AILA members represent. AILA submits this brief to ensure that fairness and the agency's obligation to do justice are considered in weighing the issues presented.

AILA has previously requested and been granted leave to appear as amicus curiae in numerous cases before the Board and the Attorney General. AILA submitted a timely request for an extension of the initial filing deadline in this matter. The Board granted AILA's request and set a new filing deadline of September 14, 2023. AILA therefore respectfully asks for leave to appear as amicus curiae and file the following timely brief.

Introduction and Issues Presented

On August 1, 2023, the Board invited briefs from amici to address the following issues:

> Pursuant to *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022):
>
> 1. Should an Immigration Judge allow DHS to remedy a non-compliant Notice to Appear?
>
> 2. To remedy a non-compliant Notice to Appear, is either
> (1) issuing an I-261, or
> (2) amending the Notice to Appear,
> permitted by the regulations, and would either comport with the single document requirement emphasized by the United States Supreme Court in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021)? If not, how can a non-compliant Notice to Appear be remedied?

In answer to the first question, an Immigration Judge should *not* allow DHS to remedy—*i.e.*, to correct in the same removal proceeding—a non-compliant Notice to Appear. *Niz-Chavez* was decided more than two years ago, and DHS is well aware of its statutory obligation to serve "a single document" that includes all of the information section 239(a)(1) of the Immigration and Nationality Act (INA) requires. 141 S. Ct. at 1478. If DHS serves what it now knows is a statutorily non-compliant document, and a noncitizen objects under *Fernandes*, the IJ should terminate proceedings. That termination should be with prejudice—or, at the very least, the Board should make clear

that, if DHS does not start to comply with *Niz-Chavez* in short order, the Board will soon require that all such terminations be with prejudice.

For that reason, the Board need not address the second question in the Amicus Invitation. But if the Board concludes that the Immigration Judge should give DHS some opportunity to remedy a non-compliant Notice to Appear, the Board should clarify that the only form of permissible remedy is a *compliant* Notice to Appear that provides all of the information required by section 239(a)(1) in "a single document." 141 S. Ct. at 1478. Neither the Supreme Court's decision in *Niz-Chavez* nor the applicable regulations permit using an I-261 or an amendment to fill in gaps in a non-compliant Notice to Appear.

Argument

I. Termination with prejudice is the appropriate response to a timely *Fernandes* motion

A. An Immigration Judge has no choice but to terminate removal proceedings if DHS has not served a Notice to Appear that complies with the statute.

For DHS to place someone in removal proceedings, it must comply with the statutory requirements of INA § 239. This statute, and its corresponding regulation, 8 C.F.R. § 239, provide the basic requirements for the lawful initiation of removal proceedings against a noncitizen. Put another way, the law requires a process that flows in a particular way, starting with the service of a Notice to Appear, or Form I-862, which is effectively a complaint. *See* INA §239(a). The statute and regulations specify who must issue the NTA, how it must be served, and when it must be served. *See* INA § 239(a)-(b); 8 C.F.R. § 239.1(a).

In 2018, the Supreme Court held that a Form I-862 that is missing the date, time and/or location information for an initial Master Calendar hearing is not a valid NTA.

See Pereira v. Sessions, 138 S. Ct. 2105, 2110 (2018). Subsequently, litigants and adjudicators tried to understand how this holding would alter the unlawful actions that had become standard DHS practice in initiating removal proceedings under the Act. Perhaps to calm the storms, the Seventh Circuit decided *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019), holding for the first time that the omission of the date and time in the NTA was a claim-processing rule violation. Even so, outside the Seventh Circuit, the remainder of the jurisdictions continued to grapple with a two-step process for proper initiation of removal proceedings involving the issuance of a Form I-862 followed by a subsequent hearing notice—until the Supreme Court struck down that method. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).

The Board, following the Seventh Circuit, decided *Matter of Fernandes,* 28 I&N Dec. 605 (BIA 2022), which recognized the statutory NTA requirements as a claim-processing rule rather than a jurisdictional one. Further, rather than require termination of proceedings initiated with a defective NTA, the Board has to date added uncertainty to the already confusing legal landscape surrounding non-compliant NTAs by permitting immigration courts to make up a variety of rules. The dissent in *Fernandes* sounded the warning bells when it suggested that the only way to rectify a Form I-862 was to terminate proceedings and issue a compliant NTA, rather than allowing some sort of purported "remedy" within proceedings that had never been properly instituted in the first place.

Ultimately, the Supreme Court's decision in *Niz-Chavez* was clear: If DHS has not served *a single document* with all the information required by section 239(a)(1), it has not served a Notice to Appear that complies with the statute. Under the claim-processing

framework the Board applied in *Fernandes*, it is clear that, if a noncitizen objects to the non-compliant, case-initiating document, *the proceeding cannot move forward. E.g.*, *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13, 17-18 (2017) ("[I]f properly invoked, mandatory claim-processing rules must be enforced"; they "ensure relief to a party properly raising them." (brackets omitted)). Time has come for the Board to decide, clearly, that the only legitimate response to a noncitizen's timely objection under *Fernandes* is the termination of proceedings.

B. The required termination should be with prejudice.

As a general rule, termination of proceedings under *Fernandes* should be with prejudice, unless DHS can show extraordinary circumstances that required that they not comply with the statute—akin to the standard for equitable tolling. *Cf. Matter of Morales Morales*, 28 I&N Dec. 714, 716 (BIA 2023) (explaining, in the context of an appeal filing deadline, that "a claims processing rule…must be applied strictly, but with an important exception: equitable tolling"). If the Board allows for termination without prejudice, it should clarify (1) that DHS must comply with the statute in issuing any new Notice to Appear, including complying with section 239(b)'s requirement that the Notice to Appear be served at least ten days prior to the first hearing; and (2) that it will not tolerate DHS's willful noncompliance with the statute forever, and will ultimately require with-prejudice termination if DHS refuses to change what it now knows are non-compliant notice practices.

As the *Niz-Chavez* Court noted, "[i]f 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." 141 S. Ct. at 1486. Yet it has now been more than two years since *Niz-Chavez*, more than five years since *Pereira*, and more than *twenty-six*

years since the government "expressly acknowledged," in its post-IIRIRA rulemaking cited in *Niz-Chavez*, "that 'the language of the amended Act indicat[es] that *the time and place of the hearing must be on the Notice to Appear*.'" *Niz-Chavez*, 141 S. Ct. at 1484 (quoting 62 Fed. Reg. 449 (1997)) (emphasis in original). And DHS *still* refuses to comply what it now indisputably knows (and, as the regulatory preambles show, *always* actually knew) to be the statute's requirements. The Board simply should not tolerate DHS's insistence on continuing to thumb its nose at the statute, at noncitizens, and at the entire immigration court system. If DHS refuses to comply with the statute, and the noncitizen objects, the Immigration Judge should dismiss with prejudice, and DHS should lose its chance to bring those particular removal grounds against that noncitizen.

Indeed, any other outcome creates practically no incentive for DHS to comply with the statute. After all, if DHS serves a non-compliant notice and the noncitizen does not object, then the proceedings simply go forward and DHS loses little. And if the noncitizen objects and dismissal is without prejudice, DHS just gets a do-over. A without-prejudice dismissal thus places all of the onus on noncitizens, many of whom are not even represented, to police DHS's intentional noncompliance with the statute's notice requirements.

At the very least, the Board should make clear that it will not tolerate DHS's refusal to comply with the statute *indefinitely*. At some point, DHS's intentional violations of the statute—as definitively construed by the Supreme Court—should lead to automatic and permanent termination of the relevant proceeding.

II. An I-261, or amending the Notice to Appear, does not comply with *Niz-Chavez*.

For the reasons explained above, there is no remedy to a non-compliant Notice to Appear. If DHS serves a notice to appear that does not comply with § 239(a), the immigration judge must terminate proceedings. For that reason, the Board need not even reach its second question. But if the Board does reach that question, it should hold that neither an I-261 nor an amendment cures a non-compliant notice: The only potential remedy, absent termination, is a new, compliant Notice to Appear. That answer is compelled, independently, by governing regulations and the Supreme Court's decision in *Niz-Chavez*.

A. *Niz-Chavez* does not permit remedying a non-compliant NTA with an I-261 or an amendment to a non-compliant NTA.

The Supreme Court's holding in *Niz-Chavez* was straightforward: To comply with the statute, a notice to appear must be "a single document containing all the information" required by Section 239(a)(1). 141 S. Ct. at 1478. Thus, DHS does not serve a compliant Notice to Appear if it splits the necessary information across multiple documents.

That holding alone precludes the potential remedies identified in the Board's second question. After all, if the initial, putative notice to appear lacks the "time and place at which the proceeding will be held," § 239(a)(1), and DHS later provides that "time and place" information in a subsequent I-261, DHS has not served "*a single document* containing all the [required] information." *Niz-Chavez*, 141 S. Ct. at 1478. Instead, it has served the required information over *two* documents. An "amendment" to the Notice to Appear suffers from the same flaw. Providing some of the required information in the putative, non-compliant Notice to Appear, and then the rest of the

information in a subsequent amendment, is not the same as providing all of the required information in "a single document," as *Niz-Chavez* explicitly requires. *Niz-Chavez*, 141 S. Ct. at 1478.

Indeed, *Niz-Chavez* leaves no room for *any* type of "remedy" to a non-compliant Notice to Appear short of serving a *compliant* Notice to Appear that includes all of the required information in "a single document." *Niz-Chavez*, 141 S. Ct. at 1478. Thus, if the Board decides that DHS should have the opportunity to "remedy" a non-compliant Notice to Appear, it should make clear that the only way that DHS can do so is to serve a single notice document that complies with the statute (including the timing requirements in section 239(b)). If DHS cannot or will not comply with the statute as interpreted in *Niz-Chavez*, even after being given the chance to do so, then termination is plainly warranted.

B. The regulations do not permit remedying a non-compliant Notice to Appear through an I-261 or an amendment to the notice to appear.

Issuing an I-261 is not a remedy permitted by the governing regulations. The Board referred in *Matter of Fernandes* to the possibility of DHS "issuing a new and compliant notice to appear," *Matter of Fernandes*, 28 I&N Dec. at 616 n.10, not the possibility of DHS issuing a Form I-261 under 8 CFR § 1003.30. This was for good reason.

A Form I-261 is not a Notice to Appear. It is intended to provide "additional or substituted charges of [inadmissibility and/or] deportability and/or factual allegations", 8 C.F.R. §§ 1003.30, 1240.10. Omitted information regarding the time and place of a hearing is neither a charge of deportability nor a factual allegation. Thus, a Form I-261

cannot be used to remedy a *Fernandes* defect in a Notice to Appear. Regulatorily speaking, doing so is the proverbial attempt to fit a square peg into a round hole.

Moreover, a Form I-261 will almost invariably be issued by a DHS attorney representing the agency in removal proceedings. A DHS attorney, however, is generally not authorized to issue a notice to appear. See 8 C.F.R. § 239.1(a)(1)-(45). They could only potentially qualify under the catch-all category of "Other duly authorized officers or employees of the Department of Homeland Security or of the United States who are delegated the authority as provided by 8 CFR 2.1 to issue notices to appear, and who have successfully completed any required immigration law enforcement training." 8 C.F.R. § 239.1(a)(46). But they generally do not qualify under this category either. Even if a Form I-261 were an otherwise-viable remedy for a noncompliant Notice to Appear, which it is not, it could only be proper under the regulations when the issuing DHS attorney met the criteria of 8 C.F.R. § 239.1(a)(46), including both delegation and required law enforcement training.

Amending the Notice to Appear is also generally not permitted by the regulations, for essentially the same reason. Within the context of removal proceedings, the person amending the Notice to Appear would generally be the DHS attorney. The DHS attorney, however, is almost invariably not an authorized issuing official under 8 C.F.R. § 239.1(a). That being the case, a DHS attorney cannot create a new valid Notice to Appear through an amendment to an existing Notice to Appear any more than they could issue a complete Notice to Appear in the first instance, even if piecemeal creation of a valid Notice to Appear were permissible under *Niz-Chavez v. Garland*.

Conclusion

The Board should hold that if DHS serves a putative Notice to Appear that does not comply with *Niz-Chavez*, termination with prejudice is warranted.

Date: September 14, 2023

Respectfully submitted,

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On behalf of American Immigration Lawyers Association (AILA)

*As members of the AILA Amicus Committee

CERTIFICATE OF SERVICE

I, Elissa Steglich, do hereby certify that, on September 14, 2023, I hand delivered three copies of this Request to Appear as Amicus Curaie and Brief of the American Immigration Lawyers Committee to the Board of Immigration Appeals to:

Amicus Clerk
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On behalf of American Immigration Lawyers Association (AILA)