Nos. 22-674 and 22-884

IN THE

Supreme Court of the United States

MORIS ESMELIS CAMPOS-CHAVES, *Petitioner*,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, *Respondent.*

MERRICK B. GARLAND, ATTORNEY GENERAL, *Petitioner*,

v.

VARINDER SINGH AND RUAL DANIEL MENDEZ-COLÍN, *Respondents.*

On Writ of Certiorari to the
United States Courts of Appeals for the Fifth and Ninth Circuits

BRIEF *AMICI CURIAE* FOR NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF PETITIONER CAMPOS-CHAVES AND RESPONDENTS SINGH AND MENDEZ-COLÍN

Charles Roth
NATIONAL IMMIGRANT
JUSTICE CENTER
224 SOUTH MICHIGAN AVE.
SUITE 600
CHICAGO, IL 60604
(312) 660-1613
croth@heartlandalliance.org

Counsel for National Immigrant Justice Center

Matthew E. Price
Counsel of Record
JENNER & BLOCK LLP
1099 NEW YORK AVE. NW
SUITE 900
WASHINGTON, DC 20001
(202) 639-6873
mprice@jenner.com

Michael J. DeMar
JENNER & BLOCK LLP
353 N. CLARK ST.
CHICAGO, IL 60654

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae agree with the arguments urged by the noncitizen parties in this case. They write separately to emphasize the importance of access to counsel in removal proceedings, and to vindicate the express direction given by Congress to facilitate the opportunity for a noncitizen to obtain counsel in removal proceedings.

The **National Immigrant Justice Center** ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. Noncitizens do not have a right to government-paid counsel, so access to counsel in removal proceedings falls on nonprofit organizations like NIJC, as well as local and national bar associations. NIJC's experience in representing noncitizens in removal proceedings, and assisting other attorneys in similar representation, informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

substantial interest in the issue now before the Court, both as an advocate for the rights of immigrants generally and as the leader of a network of *pro bono* attorneys who regularly represent immigrants.

The **American Immigration Lawyers Association** (AILA), founded in 1946, is a national, non-partisan, non-profit association with more than 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, and advance the quality of immigration and nationality law and practice. AILA's members practice regularly before the Department of Homeland Security, immigration courts and the Board of Immigration Appeals, as well as before the federal courts. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeals and the U.S. Supreme Court.

The **American Immigration Council** ("Council") is a non-profit, non-partisan organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act. The Council has a strong interest in ensuring fair process for immigrants, in part by speaking out against inaccurate and unduly restrictive

interpretations of America's immigration laws.

SUMMARY OF ARGUMENT

Congress directed that a hearing may not be scheduled sooner than ten days after service of a Notice to Appear to ensure that noncitizens are "permitted the opportunity to secure counsel before the first hearing." 8 U.S.C. § 1229(b)(1). To perform that function, a Notice to Appear must provide "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(G)(i).

The Government nevertheless contends that it may omit the time and place of the first hearing from the Notice to Appear, but cure that defect by later issuing a Notice of Hearing. That interpretation of the statute cannot be squared with the mandatory language of the statute and would frustrate Congress's intent. The Notice of Hearing provision does not require any lead time between the issuance of the notice and the hearing. Under the Government's interpretation, it could issue a defective Notice to Appear failing to identify the time or place of a hearing, and then subsequently issue a Notice of Hearing directing the noncitizen to appear the next day, leaving the noncitizen just one day to find counsel—in violation of the statutory command.

That interpretation could make it even harder for many noncitizens to retain counsel, counter to Congress's express intent in requiring that the Notice to Appear contain the time and place of the hearing and provide the noncitizen ten days' lead time before the hearing date. For many noncitizens, mere notice that proceedings have commenced against them, without

notice of the time or date of the hearing, is insufficient to facilitate their retention of counsel. Noncitizens of limited means cannot afford to keep counsel on retainer for years, and immigration attorneys with full caseloads may be reluctant to take on a representation when the hearing date is unknown. Moreover, venue will sometimes be uncertain, leaving the noncitizen unsure whether to hire an attorney in, say, Chicago or instead in Memphis—and an attorney may be unwilling to commit to a representation that could require travel.

The Court should not accept the Government's atextual reading of the statute that can only aggravate the challenges noncitizens face in retaining counsel. Counsel is extraordinarily important to noncitizens in removal proceedings. Indeed, data show that in many cases representation is outcome determinative. The Court should rigorously enforce provisions Congress adopted for the precise purpose of facilitating such representation.

Nor should the Court accept the Government's claim that its interpretation is necessary to avoid anomalous results in a case like *Mendez-Colín*. The gist of the Government's argument is that Mendez-Colín should not be permitted to seek rescission of his *in absentia* removal order because he was present at multiple hearings, represented by counsel, and apparently did not object to the Notice to Appear. That argument sounds in waiver or forfeiture; but the Government has chosen not to raise either. The Government complains that this is a "bizarre" outcome, but any apparent anomalies are due to the Government's own litigation choices.

ARGUMENT

I. A Notice to Appear Stating the Time and Place of Proceedings Is Vitally Important to Noncitizens' Ability to Retain Counsel.

As this Court recognized in *Niz-Chavez v. Garland*, "Congress took pains to describe exactly what the government had to include in a notice to appear, and … the time and place of the hearing were among them." 141 S. Ct. 1474, 1479 (2021); 8 U.S.C. § 1229(a)(1). Congress's "aim [was] to supply an affected party with a single document highlighting certain salient features of the proceedings against him." *Niz-Chavez*, 141 S. Ct. at 1482.

The Government nevertheless argues that it can issue a defective Notice to Appear, omitting the time and place of the hearing, but still remove a noncitizen *in absentia* so long as it subsequently issued the noncitizen a Notice of Hearing designating a time and place for proceedings. *See* U.S. Br. 26.

This interpretation frustrates one of the main purposes of requiring the time and place of hearing to be included in the Notice to Appear, which is to facilitate noncitizens' ability to retain counsel to represent them in removal proceedings. This purpose is set forth in the statutory text itself. Congress specified that "[i]n order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a …, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an

earlier hearing date." 8 U.S.C. § 1229(b)(1); *see also id.* § 1229(a)(1)(E) (requiring notice of right to retain counsel and list of *pro bono* counsel).

Because a "notice to appear" must contain "[t]he time and place at which the proceedings will be held," *id.* §§ 1229(b)(1), (a)(1)(G)(i), Sections 1229(a) and 1229(b) work together to ensure that a noncitizen will have at least ten days to secure counsel after knowing the time and place of the hearing.

Under the Government's interpretation, however, this ten-day window vanishes. In the provision governing a Notice of Hearing, *see id.* § 1229(a)(2), there is no requirement for any period of lead time in advance of the hearing. Thus, if the Government's argument were accepted, noncitizens could learn the time and place of their first hearing with fewer than ten days' notice. For example, on day 1, a Notice to Appear could be issued without indicating any time or place for a hearing; and on day 9, a Notice of Hearing could be issued setting a hearing for day 11. Or a Notice to Appear could be issued without indicating any time or place for a hearing; and then months or years later, following no action in the case, a Notice of Hearing could be issued setting a hearing two days hence.

When Congress established a ten-day lead time between the issuance of a Notice to Appear and the first hearing, for the express purpose of enabling retention of counsel, it certainly did not intend to create a loophole that would allow the Government to leave the time and place of the hearing undisclosed, and then surprise the

noncitizen with a hearing date and location with no advance notice. That is why Congress included "[t]he time and place at which the proceedings will be held" as one of the pieces of information "specifi[ed]" in the Notice to Appear that "shall be given" to the noncitizen, 8 U.S.C. § 1229(a)(1), (a)(1)(G)(i), and why Congress linked the ten-day notice provision, *id.* § 1229(b)(1), to "service of the notice to appear." *Id.*

A situation in which noncitizens end up with fewer than ten days' notice of the time and place of their first hearing is not merely hypothetical. For instance, Paul Garcia contacted counsel after receiving a Notice to Appear; counsel told him to call back when he had a hearing date. *See*, Pet. for Writ of Cert. 3, *Garcia v. Garland*, No. 21-5928 (U.S. Feb. 2, 2022). Unfortunately, the notice of hearing was mailed to Mr. Garcia only three days before hearing; he received it five days afterwards. *Id.* He was lucky in that he was able to obtain *pro bono* counsel for his second hearing; but he was *pro se* at his first hearing, precisely the result Congress sought to avoid.

The Government may argue that the omission of a hearing time and place from the Notice to Appear does not preclude a noncitizen from retaining counsel. But the goal of the rule is to *increase the likelihood* that counsel can be retained from the start. The practical reality, which Congress surely understood, is that noncitizens can more easily find counsel when they have notice of a specific hearing date with some advance warning. That is so for several reasons.

First, keeping attorneys on retainer based on the prospect of future litigation is a luxury. Congress knew that most litigants, whether they are Americans or noncitizens, cannot afford to hire lawyers to sit around waiting for the case to begin at an unknown time and in an unknown place. When Congress concluded that affording some brief notice before the first hearing would increase the chance of counsel being retained, its logic was entirely reasonable.

Second, many counsel are reluctant to agree to take on a representation for which the time of the proceedings is unidentified. Noncitizens' removal proceedings may be the most important thing in their lives, but immigration attorneys generally have many clients, each with separate deadlines and timing considerations. Attorneys must frequently juggle multiple commitments. When an attorney cannot know whether a hearing will be scheduled in one week, four weeks, four months, or a year, this naturally affects their ability and willingness to take on the case.

Moreover, once an attorney enters an appearance in a case, leave of court is required to withdraw. 8 C.F.R. § 1003.17(a)(3); *see also* 8 C.F.R. § 1003.102(q)(3) (obligation to carry through duties undertaken unless leave granted to withdraw). It is not uncommon for attorneys to lose touch with clients, even under the best of circumstances. It is entirely foreseeable that clients with no known deadlines and no known hearings may feel less urgency to inform their attorneys when they move, increasing the chance of losing track of the client. Yet the attorney remains responsible for attending any

hearing, once scheduled, on the client's behalf—potentially without compensation—and will spend time and money searching for the client. Understandably, many attorneys will not wish to make this kind of open-ended commitment, and instead will decline to finalize a representation agreement until the hearing date is known.

That is especially so given the Department of Homeland Security's practice of issuing Notices to Appear but not filing those Notices with the Immigration Court for months or even years. For example, in *Pereira v. Sessions*, it took the government more than a year to file the Notice to Appear with the Immigration Court, on August 9, 2007, after having served Mr. Pereira with the document on May 31, 2006. 138 S. Ct. 2105, 2112 (2018). Delays this long are not at all unusual. *See*, *e.g.*, *Madrid-Mancia v. Att'y Gen. of U.S.*, 72 F.4th 508, 513 (3d Cir. 2023) (delay of over three years). Faced with this practice, it is natural for an attorney to respond to a request for representation by telling a noncitizen to be back in touch once she has a hearing date. [2]

Third, and relatedly, for many noncitizens who are served with a Notice to Appear, venue is uncertain—and therefore, until a place for proceedings is set, such noncitizens do not know *where* to retain counsel. Venue for Immigration Court proceedings lies with the Immigration Court in which the Department of

[2] Until an attorney files an appearance form, she would receive no electronic notification of any developments in the case.

Homeland Security files the Notice to Appear. 8 C.F.R. §§ 1003.14(a) & 1003.20(a). The Department has discretion to select the venue. *See Matter of Rahman*, 20 I. & N. Dec. 480, 483 (BIA 1992) (finding that venue choice "is rather entrusted in the first instance to the discretion of the district director, who files the charging document in the venue selected." (citing *Matter of Victorino*, 18 I. & N. Dec. 259 (B.I.A. 1982))).[3] During any period before the Notice to Appear is filed with an immigration court (which, as noted above, can be months or even years), counsel could have no confidence in the place where the case would proceed.

Finally, requiring the Notice to Appear to include the time and place of the first hearing increases the chances the noncitizen will know of, and attend, her removal hearing. Many noncitizens move while their cases are pending, and *Amici* are aware of situations in which noncitizens missed receiving a Notice of Hearing in the process. Beyond the difficulties generally experienced with *pro se* individuals, many noncitizens have limited English literacy. Every extra hurdle increases the risk that the noncitizen will not receive notice of the hearing.

Further, as noted, the Department of Homeland

---

[3] The Department of Justice's "EOIR Operational Status Map" tool, *see* https://www.justice.gov/eoir-operational-status/operational-status-map, allows a noncitizen and/or attorney to search for the appropriate immigration court by zip code. But the website cautions that this application will help find "the immigration court *most likely* assigned to your case" and further cautions that "[a]s always, notices from the immigration court are the official source for case information." *Id.* (emphasis added).

Security does not always immediately file a Notice to Appear with an Immigration Court; consequently, if a noncitizen moves and attempts to notify the Immigration Court of the new address as she is required to do, the Court will not have any file open. A noncitizen attempting to file a change of address would likely face difficulties registering such a change, if her attempt was not rejected outright. For instance, in *Madrid-Mancia*, the noncitizen attempted to change her address in April 2014, but she was informed that the immigration officer could not register her new address because she was not yet "in their system." 72 F.4th at 513 n.5 (quoting record material). In 2017, three years later, the Notice to Appear was finally filed, and the immigration court sent a Notice of Hearing in August 2017. *Id.* at 513-14. Unsurprisingly, she did not receive the notice and was removed *in absentia*.

In sum, Section 1229(a) is, at minimum, a mandatory rule. *See Matter of Fernandes*, 28 I. & N. Dec. 605, 608 (B.I.A. 2022). A mandatory rule "assure[s] relief to a party properly raising" a violation of that rule. *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 (2017) ("If properly invoked, mandatory claim-processing rules must be enforced…"). To the extent that a noncitizen is issued a deficient Notice to Appear, followed by a Notice of Hearing, and appears at the proceedings, the issue of deficient notice can be raised and cured through the issuance of a new and complete Notice to Appear. But if the noncitizen fails to appear and is ordered removed *in absentia*, the Government cannot point to the Notice of Hearing to

cure the defective notice. Instead, the removal order should be rescinded, when, as here, properly challenged by the noncitizen.

II. The Court Should Avoid Interpreting the Statute in a Way That Inhibits Representation Because of the Critical Importance of Counsel.

When Congress designed a framework to facilitate retention of counsel, it did so for good reason. Data show that representation is critically important to noncitizens in removal proceedings; indeed, it can be outcome determinative.

For example, a comprehensive national study on access to counsel in immigration courts showed that, of the more than 1.2 million deportation cases decided between 2007 and 2012, only thirty-seven percent of all noncitizens and a mere fourteen percent of detained individuals secured representation (with only two percent having obtained *pro bono* representation). Yet those with attorneys fared far better than similarly situated individuals without attorneys. Those with lawyers were fifteen times more likely to seek relief from removal, and five and a half times more likely to obtain relief from removal. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

Another study found that of those noncitizens who obtained relief from deportation between 2007 and 2012, only five percent were unrepresented. *See* Karen Berberich et al., *The Case for Universal Representation*, VERA INST. OF JUST. 2 (Dec. 2018). During that same

period, only seven percent of noncitizens represented by counsel were removed *in absentia* for failing to appear in court, compared to sixty-eight percent of those not represented by counsel. *Id.* at 14.

A third study found that, of the noncitizens whose cases commenced between FY 2011 and FY 2019 and were ultimately granted relief from removal, approximately ninety-three percent were represented by counsel. And of those who were ordered removed during the same timeframe, eighty-one percent were unrepresented. Muzaffar Chishti et al., *At the Breaking Point: Rethinking the U.S. Immigration Court System*, MIGRATION POL'Y INST. 29 (July 2023).

These statistics only confirm the common-sense intuition that a fair immigration court system must seek to facilitate counsel for those who need it—as Congress recognized when it required the time and place of the hearing to be included on the Notice to Appear, required ten days' lead time so that the noncitizen is "permitted the opportunity to secure counsel before the first hearing date," and required that a list of *pro bono* counsel be provided. 8 U.S.C. § 1229(b)(1)-(2); *id.* § 1229(a)(1)(E).

III. Any Apparent Anomaly Regarding Mendez-Colín Is Due to the Government's Failure to Argue Forfeiture or Waiver.

The Government cites the fact pattern in *Mendez-Colín* to contend that allowing rescission would have unjustified results. Mendez-Colín attended multiple hearings, including with counsel, before mistaking the

time of the fifth hearing in the case, and at those four prior hearings did not dispute the sufficiency of the Notice to Appear. U.S. Br. 45. The Government further represents that Mendez-Colín's counsel "affirmatively stated that there was 'no issue'" with the Notice of Hearing that preceded the removal *in absentia*. *Id.* at 32.

Whatever their merits, these arguments sound in waiver or forfeiture: the upshot of the Government's point is that Mendez-Colín waived or forfeited any objection by attending the four earlier hearings and not raising the defective Notice to Appear. Yet curiously, the Government argues neither waiver nor forfeiture in its brief.

Instead, the Government uses the results in *Mendez-Colín* to complain about the "remarkable breadth" of the Ninth Circuit's holding. Pet. Cert. 24 (No. 22-284). In the same way, the Government repeatedly appeals to "common sense," U.S. Br. 19-20, 44-46, and, citing the facts in *Mendez-Colín*, complains of the "bizarre consequences" of the statute. U.S. Br. 44. It then asks the Court to contort the statute's plain language to avoid those results. But there is no practical reason to do so. Any "bizarre consequences" are the result of the Government's litigation choices, not the statute Congress wrote.

The Government is free to make a different choice in future cases. It might even ask on remand to be relieved of the consequences of any waiver or forfeiture in *Mendez-Colín*. But its litigation choices are not a reason

for this Court to avoid Congress's command.

CONCLUSION

For the foregoing reasons, the Ninth Circuit should be affirmed and the Fifth Circuit reversed.

Respectfully submitted,

Charles Roth
NATIONAL IMMIGRANT
JUSTICE CENTER
224 SOUTH MICHIGAN AVE.
SUITE 600
CHICAGO, IL 60604
(312) 660-1613
croth@heartlandalliance.org

Counsel for National Immigrant Justice Center

Matthew E. Price
Counsel of Record
JENNER & BLOCK LLP
1099 NEW YORK AVE. NW
SUITE 900
WASHINGTON, DC 20001
(202) 639-6873
mprice@jenner.com

Michael J. DeMar
JENNER & BLOCK LLP
353 N. CLARK ST.
CHICAGO, IL 60654

Counsel for Amici Curiae