Gina M. D'Andrea
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington, D.C. 20001
(202) 232-5590

Attorneys for Amicus Curiae Immigration Reform Law Institute

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: Amicus Invitation No. 21–20–07 Notice to Appear	**Amicus Invitation No. 21–20–07**

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE

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REQUEST TO APPEAR AS *AMICUS CURIAE*

The Immigration Reform Law Institute respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 21-20-07 (B.I.A. 2021). The *amicus curiae* brief is submitted with this request.

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens and lawful permanent residents, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

ISSUE PRESENTED

Whether, and if so to what extent, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), impacts the jurisdiction of an Immigration Court where the Notice to Appear fails to satisfy the statutory requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a)?

SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") provides the Attorney General discretion to cancel the removal of otherwise deportable aliens in certain circumstances. 8 U.S.C. § 1229b(b). Essential to obtaining such relief is that the alien be able to show that he or she was continuously

present in the United States for ten years prior to the initiation of removal proceedings. 8 U.S.C. § 1229b(b)(1)(A). An alien accrues continuous presence until the stop-time rule is triggered by their receipt of a Notice to Appear ("NTA"). 8 U.S.C. § 1229(a)(1). Jurisdiction of the immigration courts, however, is governed by federal regulations not the INA. The regulations pertaining to jurisdiction are less strict, permitting jurisdiction to vest with the filing of a charging document that may or may not be a notice to appear. Unlike the § 1229(a)(1) NTA, the charging document required for jurisdiction is not required to contain the date and location information of the upcoming hearing. 8 C.F.R. § 1003.18(b).

Two recent Supreme Court cases, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), addressed the requirements of NTA's in connection with the stop-time rule. In *Pereira*, the Court held that the stop-time rule is not triggered unless and until an alien receives all of the information required by §1229(a). In *Niz-Chavez*, the Court held that an NTA sufficient to trigger the stop-time rule is a single document containing all of the information required by § 1229(a)(1). Importantly, jurisdiction was not raised by the parties or the Court. In addition, the Board of Immigration Appeals ("BIA") and several circuit courts have considered the question of whether the *Pereira* ruling impacted jurisdiction and unanimously rejected arguments that §1229(a)(1)'s requirements must be met for jurisdiction to vest with the immigration courts.

Finally, the NTA of § 1229(a)(1) and the charging document of § 1003.14 are separate documents with independent requirements. Neither law refers to the other, and there is no indication that they were intended to work in conjunction. This is clear from explicit language in the regulations that date and location information is not required to be included in a charging document for jurisdiction to vest.

ARGUMENT

I. The question of jurisdiction was not addressed by the parties or the Court.

It is well-established that federal courts are only permitted to address the issues raised by the parties. *See, e.g., North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("Early in its history, this Court held that it had no power to issue advisory opinions . . . and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.") (internal citations omitted). *See also Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477 (1990) ("Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies."). Regardless of whether jurisdiction is raised by the parties, however, courts have an obligation to ensure that they have jurisdiction. *Texas v. Florida*, 306 U.S. 398, 405 (1939) ("[T]he duty which rests upon this Court to see to it that the exercise of its powers be confined within the limits prescribed by the Constitution make it incumbent upon us to inquire of our own motion whether the case is one within its jurisdiction."); *California v. Texas*, 437 U.S. 601, 604 (1978) ("Although none of the parties raised any question of this Court's jurisdiction, the Court considered the question *sua sponte*"). In *Niz-Chavez*, the Supreme Court saw no need to address whether the defective NTA rendered jurisdiction defective—an indication that, for the Court, jurisdiction was not even in question.

In *Pereira*, the Supreme Court held that an NTA must contain the statutorily required information listed 8 U.S.C. § 1229(a) for the stop-time rule to come into effect. *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018) ("[I]t is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, specifies the time and place of the removal proceedings."). Several courts have since concluded that *Pereira* "was not in any way concerned with the Immigration Court's jurisdiction." *Karingithi v. Whitaker*, 913 F. 3d 1158,

1159 (9th Cir. 2019). *See also Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314–15 (6th Cir. 2018) (explaining that "*Pereira* is an imperfect fit in the jurisdictional context"); *United States v. Perez-Arellano*, 756 F. App'x 291, 294 (4th Cir. 2018) ("Simply put, *Pereira* did not address the question of an immigration judge's jurisdiction to rule on an alien's removability.").

Similarly, in *Niz-Chavez*, the Court did not consider jurisdictional issues. Limiting its analysis to whether the statutorily required information necessary to trigger the stop-time rule could be conveyed to removable aliens in multiple documents, the Court held that "[a] notice to appear sufficient to trigger the IIRIRA's stop-time rule is a single document containing all the information about an individual's removal hearing specified in § 1229(a)(1)." *Niz-Chavez*, 141 S. Ct. at 1476-77. Neither case contains any indication that such requirements are also applicable to jurisdiction vesting rules.

Indeed, because these rulings were answers to narrow questions pertaining to § 1229(a)(1), they are not applicable to jurisdiction vesting regulations. As the Board explained, the Court in *Pereira* "would not have specifically referred to the question before it as being 'narrow' . . . Nor would the Court have repeatedly emphasized the dispositive question was whether a document that fails to specify the time and place of proceedings triggers the 'stop-time' rule" if the holding was meant to apply to the jurisdiction of immigration courts. *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (B.I.A. 2018).

Also, as Justice Kavanaugh explained in his dissent, the Court established that "the Government may use two documents to initiate removal proceedings, but the Government must use a single document if it also wants to stop the continuous-presence clock[.]" *Niz-Chavez*, 141 S. Ct. at 1491 (Kavanaugh, J., dissenting). Thus, a single-document NTA is necessary solely for the stop-time rule—not for the initiation of removal proceedings, let alone for jurisdiction.

II. A defective Notice to Appear sufficient to prevent the stop-time rule from being triggered does not strip an immigration court of jurisdiction because the regulations that establish jurisdiction are not reliant on the requirements of 8 U.S.C. § 1229(a)(1).

The statute at issue in *Niz-Chavez* does not address the jurisdiction of immigration courts. 8 U.S.C. § 1229(a). *See also Yonis Ahmed Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019) ("§ 1229(a) says nothing about how jurisdiction vests in an immigration court"). Instead, the jurisdiction of immigration courts is governed by administrative regulations without reference to the requirements of § 1229(a). *Karingithi*, 913 F.3d at 1160 (explaining that "the regulations make no reference to § 1229(a)'s definition of a 'notice to appear.'"); *Gomez v. Barr*, 922 F.3d 101, 111 (2d Cir. 2019) ("The agency regulations do not refer to § 1229(a)(1)'s requirements when defining what an NTA is for purposes of vesting jurisdiction in the Immigration Court."). Therefore, because "the jurisdiction of an immigration court is governed by agency regulation . . . not by 8 U.S.C. § 1229(a) . . . the regulations do not concern the written notice contemplated in [§ 1229(a)]"). *United States v. Mendoza-Sanchez*, 963 F.3d 158, 161–62 (1st Cir. 2020) (internal citation omitted).

The NTA provision includes seven mandatory components, including "the nature of the proceedings against the alien . . . [t]he acts or conduct alleged to be in violation of law . . . [and] [t]he time and place at which the proceedings must be held." 8 U.S.C. § 1229(a)(1). In comparison, the jurisdiction vesting regulation is concise, providing that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court[.]" 8 C.F.R. § 1003.14(a). Unlike the expansive requirements of § 1229(a), "the regulation does not specify what information must be contained in a 'charging document' filed with an immigration court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest." *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441,

445 (B.I.A. 2018). These differences reflect that, unlike an NTA, which is aimed at providing sufficient information to "facilitate[e] the alien's appearance," less information is necessary to vest jurisdiction and commence proceedings. *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, 532 (B.I.A. 2019). As a result, the omission of the information required by § 1229(a) from a charging document "does not create a jurisdictional defect." *United States v. Lira-Ramirez*, 951 F.3d 1258, 1260-61 (10th Cir. 2020).

Further, though the applicable regulations charge the immigration court with informing both the government and the alien of the hearing information, 8 C.F.R. § 1003.18(a) (instructing the immigration court to "provid[e] notice to the government and the alien of the time, place, and date of hearings."), hearing date and location information is only required to be included "*where practicable*," 8 C.F.R. § 1003.18(b) (emphasis added). The difference between these jurisdictional requirements and those of the stop-time rule could not be clearer.

Accordingly, the argument that a defective NTA strips an immigration court of jurisdiction has been "considered and rejected" by "the BIA and a unanimous chorus of other circuits." *Yonis Ahmed Ali*, 924 F.3d at 986. *See also Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (B.I.A. 2018) (explaining that a defective NTA "vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the alien."); *United States v. Mendoza-Sanchez*, 963 F.3d 158, 161–62 (1st Cir. 2020). ("We have already squarely rejected the contention that the omission of the initial hearing date and time in a notice to appear deprives the immigration court of jurisdiction over a removal proceeding."); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018) ("If *Pereira's* holding applied to jurisdiction, there also would not have been jurisdiction in *Pereira* itself. But the Court took up, decided, and remanded *Pereira* without even

hinting at the possibility of a jurisdictional flaw."). As these courts have explained, the requirements of § 1229(a) are not relevant to the jurisdiction vesting regulations.

CONCLUSION

For the foregoing reasons, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), has no impact on the jurisdiction of an Immigration Court where the Notice to Appear fails to satisfy the statutory requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a).

August 6, 2021

Respectfully submitted,

Gina M. D'Andrea
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
Tel: (202) 232-5590
Fax: (202) 464-3590
Email: gdandrea@irli.org
Attorneys for Amicus Curiae Immigration Reform Law Institute

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I, Gina M. D'Andrea, submitted three (3) copies of the foregoing *amicus curiae* brief to the Board of Immigration Appeals at the following address:

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

via UPS overnight delivery.

August 6, 2021

Gina M. D'Andrea
Attorney for *Amicus Curiae*
Immigration Reform Law Institute