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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: 21-20-07** **(Notice to Appear)**

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE ATTORNEYS UNITED FOR A SECURE AMERICA

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REQUEST TO APPEAR AS AMICUS CURIAE

Attorneys United for a Secure America (AUSA), 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 (Notice to Appear) (BIA 2021). The *amicus curiae* brief is submitted with this request.

INTEREST OF AMICUS CURIAE

AUSA is a nationwide network of attorneys, law students, and paralegals who support strong immigration law enforcement. AUSA is a project of the Immigration Reform Law Institute (IRLI), a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. AUSA members have filed briefs in many immigration-related cases before federal courts and administrative bodies, including *Dep't of Homeland Sec. v. Thuraissigiam*, 19-161 (U.S.), *Gomez v. Trump*, 1:20-cv-01419 (D.D.C.), *Make the Road New York v. Cuccinelli*, 0:19-03595 (2nd Cir.); and *Matter of Reyes*, 28 I&N Dec. 52 (B.I.A. 2020). AUSA believes immigration policies must be reformed to serve the national interest. Specifically, AUSA seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. Therefore, AUSA respectfully requests leave to file the brief accompanying this motion to assist the Board with the issue presented.

ISSUE PRESENTED

The Board's 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 THE ARGUMENT

Congress enumerated the requirements for the "notice to appear" (NTA) issued to an alien to initiate removal proceedings. The United States Supreme Court, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), issued a narrow ruling in which it concluded that an NTA must include all of the statutory requirements on one form listed in 8 U.S.C. § 1229(a) on one form to trigger the stop-time rule.

Immigration courts are federal civil law courts that conduct removal proceedings and adjudicate asylum claims. Jurisdiction for Immigration courts is often vested with the filing of the "notice to appear" forms (NTAs) discussed in *Niz-Chavez*. The absence of a retro-activity clause in both the statutory language, and that of the Court's opinion, does not permit a restarting of decided cases or for NTAs issued prior to this ruling. Therefore, *Niz-Chavez* merely impacts the jurisdiction of an Immigration court for NTAs issued at least 30 days following the decision.

An immigration judge may determine whether or not the required information was provided on one NTA to an illegal alien. The Supreme Court has explained that a "notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time *for those interested to make their appearance*. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, *the constitutional requirements are satisfied*." (emphasis added). *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 307, 70 S. Ct. 652, 654 (1950) (Due process requires notice "reasonably calculated" to apprise parties of the pendency of the action and the opportunity to present objections). *Mullane* supra. NTA's served to illegal aliens prior to Niz-Chavez will not have a retroactive effect on the outcome of cases currently on the docket or already settled.

ARGUMENT:

I. NIZ-CHAVEZ REQUIRES THAT "A NOTICE TO APPEAR" INCLUDE ALL OF THE STATUTORY REQUIREMENTS IN 8 U.S.C. § 1229(a) ON ONE FORM TO TRIGGER THE STOP-TIME RULE

In *Niz-Chavez*, the Supreme Court issued a narrow ruling, based on the interpretation of the word "a," "notice to appear" (NTA) must include all of the statutory requirements enumerated in section 239(a) of the Immigration and Nationality Act (INA), 8 U.S.C. §1229(a), on one form that is served to an illegal alien to trigger the one-stop rule and end the alien's accrual of continuous presence.

Section 239(a) of the INA, Initiation of removal proceedings, states that:

"a. Notice to Appear
1. In general - In removal proceedings under section 240 of this Act [8 U.S.C 1229a], written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:
A. The nature of the proceedings against the alien.
B. The legal authority under which the proceedings are conducted.
C. The acts or conduct alleged to be in violation of law.
D. The charges against the alien and the statutory provisions alleged to have been violated.
E. The alien may be represented by counsel and the alien will be provided
i. a period of time to secure counsel under subsection (b)(1) of this section and
ii. a current list of counsel prepared under subsection (b)(2) of this section .
F.
i. The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 240 of this Act [8 U.S.C 1229a].
ii. The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.
iii. The consequences under section 240(b)(5) of this Act [8 U.S.C 1229a(b)(5)] of failure to provide address and telephone information pursuant to this subparagraph.
G.
i. The time and place at which the proceedings will be held.

> ii. The consequences under section 240(b)(5) of this Act [8 U.S.C 1229a(b)(5)] of the failure, except under exceptional circumstances, to appear at such proceedings."

8 USC §1229(a). The Court explained that an NTA that did not contain all of this information was incomplete and as such the alien would continue to accrue continuous physical presence until such time as he received a single, complete NTA which would then trigger the "stop-time" rule. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1488 (2021). The Court added that the "Government may not yet know exactly when the hearing will occur. So the Government sometimes will first inform the noncitizen of the charges, and only later provide the exact time and place of the hearing". Niz-Chavez supra. However, subsequent changes to the date and time of the hearing listed on a statutorily compliant NTA would not impact the date the "stop-time" rule was triggered by the initial NTA.

Congress included the "stop-time" rule in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U. S. C. §1229b (b)(1), as "[o]riginally, an alien continued to accrue time toward the presence requirement during the pendency of his removal proceedings" and that without the "stop-time" rule, "it gave immigrants an undue incentive to delay things. See, *e.g.*, *In re Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 670-671 (BIA 2004). Under the statute's terms, "any period of continuous . . . presence in the United States shall be deemed to end . . . when the alien is served a notice to appear." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1478-79 (2021).

Section 1229(a), as explained supra, requires the Government, in order to trigger the stop-time rule, "must serve "a" notice containing all the information Congress has specified". The Court noted that "both in 1996 and today[,] 'a' notice would seem to suggest just that: 'a'

single document containing the required information, not a mishmash of pieces with some assembly required". *Niz-Chavez*, supra at 1480.

Pereira required all statutory information, including the time, place and date of the initial removable hearing, be delivered to the alien before the stop-time rule could be triggered, but did not address whether the information could be provided in multiple documents. *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2107 (2018). The Court's subsequent holding in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) did not change the rule regarding the completeness of an NTA, rather it interpreted the word "a" in the statute to mean that an NTA must include all of the information on one form instead of in multiple documents in order to trigger the stop-time rule. *Niz-Chavez*, supra at 1480.

The petitioner, Agusto Niz-Chavez, was sent more than one document: the first contained the charges against him and the second, sent two months later, contained the time and place of his hearing. The majority held that a notice to appear sufficient to trigger the IIRIRA's stop-time rule consists of a single document containing all of the relevant information about an individual's removal hearing as specified in §1229(a)(1). *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1478-86 (2021). The Court emphasized in its ruling that the statutory command by Congress was for the NTA to include all of the statutory required information to be provided to an alien on one form to trigger the "stop-time" rule. *Id.* at 1486. Congress defined the requirements for providing a notice to appear at a removal hearing, and those requirements were not changed by the decision.

Section 1229(a)(1) explains that written notice is referred to as 'a notice to appear.' While a correction or change to the hearing date and time is permitted to be sent at a later date, the *Niz-Chavez* Court opined that Congress's decision to use the "indefinite article 'a' suggests it envisioned 'a' single notice provided at a discrete time rather than a series of notices that

collectively provide the required information". *Id*. at 1474. The *Niz Chavez* Court emphasized that the IIRIRA's structure and history supported the notion of the government issuing a single notice that contained all the required statutory information.

The Court also pointed to two related provisions, §§1229(e)(1) and 1229a(b)(7), which both used the definite "article with a singular noun ("the notice") when referring to the government's charging document—a combination that again suggests a discrete document." *Id*. at 1474. The Court also cited the other provision, §1229(a)(2)(A), which required "a written notice" when there was a change to an alien's hearing date. *Niz-Chavez*, s*upra* at 1477.

The *Cisneros Gonzales* Board of Immigration Appeals (BIA) decision noted that prior to IIRIRA "an alien continued to accrue time toward the presence requirement during the pendency of his removal proceedings. With time, though, there was a concern that gave aliens an undue incentive to use delay tactics." *See In re Cisneros Gonzales*, 23 I. & N. Dec. 668, 670–671 (BIA 2004). Congress responded to these concerns with a new "stop-time" rule" in the IIRIRA. *Niz-Chavez, supra* at 1478-79. Thus, the *Niz-Chavez* Court concluded that all of the statutorily required information must be included on a single document to satisfy the "stop-time" rule.

The First Circuit explained section 239(a) of the INA in *Pereira*, noting:

> "The referenced provision, §1229(a), contains three subsections, the first of which states in part: In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) …Id. § 1229(a)(1). That subsection goes on to specify ten items, including the charges against the alien, the alien's alleged illegal conduct, and "[t]he time and place at which the proceedings will be held…"

Pereira v. Sessions, 866 F. 3d 1, 4 (1st Cir. 2017).

Both the *Pereira* and *Niz-Chavez* courts addressed the required elements of the NTA as they pertain to the "stop-time" rule. The *Pereira* Court addressed whether the "notice" was "nonetheless effective to end the alien's period of continuous physical presence affirmatively in *Matter of Camarillo*" and whether the "BIA's construction of the stop-time rule, under 8 U.S.C.S. § 1229b (d)(1), was a permissible construction of the ambiguous statute to which the court deferred because the construction was neither arbitrary and capricious nor contrary to the statute…" *Pereira, supra at 2*. The *Pereira* court did not contemplate the issue of whether all the required information was to be provided on one form; the court focused on whether the "stop-time" rule could be triggered before the alien received all of the required information. The Pereira ruling was that the "stop-time rule does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence. See 8 U.S.C. §1229b (d)(1)." *Pereira, supra at 5.*

Ultimately, however, the *Niz-Chavez* Court "… rejected the government's practice in *Pereira* v. *Sessions,"* which permitted more than one form to be provided to an alien to comply with the statutory due process notice requirements but did not overrule *Pereira* in *toto. Niz-Chavez, Id*. at 1479. Therefore, the stop-time rule is triggered when the government issued one NTA form to an alien containing all of the statutory requirements.

II. IMMIGRATION COURTS' JURISDICTION IS LIMITED TO FEDERAL CIVIL LAW TO ADJUDICATE WHETHER AN ILLEGAL ALIEN SHOULD BE REMOVED OR HAVE THE RIGHT TO REMAIN IN THE UNITED STATES.

Immigration courts are civil courts in which immigration judges conduct removal proceedings and adjudicate asylum claims for aliens who have claimed asylum upon reaching the

United States. Upon "conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States". 8 U.S.C.S. § 1229a. In contrast, Article III federal courts have jurisdiction over cases concerning criminal offenses, including criminal charges for immigration offenses, such as illegal entry or reentry, are not considered part of the immigration court system.

Only cases that are within the jurisdiction of the immigration courts may be heard by the immigration judges. *Niz-Chavez* had no impact on such jurisdiction, it merely clarified that a "notice to appear" (NTA) must be on one form for the stop-time rule to be triggered. *Niz-Chavez*, s*upra* at 1477. Immigration judges can make determinations as to whether all of the statutorily required information was provided. 8 U.S.C.S. § 1229a. In circumstances where the form is incomplete, as in the required information is missing, the stop-time rule does not go into effect until all statutory requirements are provided.

After *Niz-Chavez*, the NTA must include all statutory requirements on one form to trigger the "stop-time" rule. *Niz-Chavez, supra* at 1474. A motion for a continuance is at the discretion of an immigration judge. However, "It is not good cause to continue removal proceedings to await results of collateral event, which may occur at some uncertain, indefinite date in future and outcome of which may or may not be favorable to respondent". *In re: Heung Tae Kim Sun Ok Hwang a.k.a. Sun Ok Kim Hwang a.k.a. Sun Ok Kim Jae Young Kim*, (BIA & AAU Non-Precedent Decisions, Aug. 20, 2010).

The *Shaughnessy* court determined that for aliens, due process is "'[w]hatever the procedure authorized by Congress is.'" *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). The INA outlines ten (10) requirements for a compliant NTA form. 8 U.S.C. § 1229(a).

The *Niz-Chavez* court held that all ten requirements must be included in a single NTA form in order to trigger the "stop-time" rule. *Niz-Chavez, supra* at 1477. Thus, prior to Niz-Chavez, the stop-time rule would not be triggered until the alien was served with all required statutory information.

The remaining issue is whether the Niz-Chavez decision applies retroactively or prospectively. As a general proposition, judicial decisions are said to "enunciate the law as it has always existed" and thus have little bearing on cases either on a court's current docket or already settled. It is settled law that if Congress intended a federal statute be retroactive upon a Court's ruling, the language in the statute would indicate as such. *Landgraf* affirmed that a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox* v. *Hart*, 260 U.S. 427, 435." *Landgraf v. Usi Film Prods.* 511 U.S. 244, 269. Thus, the immigration courts would not have any jurisdiction over cases currently on the docket or previously settled.

III. CONGRESS DID NOT INTEND SECTION 239(a) OF THE INA, 8 U.S.C. § 1229(a) TO BE RETROACTIVE BASED ON COURT DECISIONS.

In *Matter of Velasco*, the BIA confirmed the prospective application of 8 C.F.R. § 1240.26(c), Nt. (2009) et al to cases on or after January 20, 2009". *Matter of Velasco*, 25 I. & N. Dec. 143 (BIA 2009). In that case, BIA found that the 2009 voluntary departure regulations *did not apply retroactively*, and that "where an individual granted voluntary departure by an [immigration judge] before January 20, 2009 failed to pay the bond, the penalties imposed for failing to depart the United States within the departure period did not apply". *Matter of Velasco*, Id. at 143, 3. The 7th Circuit Court of Appeals, in *Bachynskvy*, etermined that the "warnings required by the current regulations regarding voluntary departure are not retroactively applicable

to grants of voluntary departure made before January 20, 2009. We also find that *Bachynskyy* cannot raise a colorable due process claim as there was no procedural defect based on the lack of advisals…" *Bachynskyy v. Holder*, 668 F.3d 412, 414 (7th Cir. 2011) ("[T]he provisions of this rule are prospective only."). *Bachynskyy, Id. at 419.*

Congress was silent with respect to the retroactive application of the "stop-time" rule, while it expressly mandated the retroactive application of certain other provisions of IIRIRA. For example, in the transitional rules, Congress expressly mandated that the stop-time rule applied retroactively to applications for suspension of deportation that were pending at the time of IIRIRA's enactment. *Briseno-Flores*, 492 F.3d 226, 230 (2007). The transitional period of the IIRIRA was temporary and any retroactive benefit no longer applies.

During the 21st century, legislation has been the direct means of legal ordering, and cautiousness has given deference to legislative judgments as to whether there was retroactive intent. There are many impediments to retroactive civil legislation which would likely open up a "can of worms" and chaos within the courts, thus "prospectivity remains the appropriate default rule." prospectivity remains the appropriate default rule." *Landgraf v. Usi Film Prods.* 511 U.S. 244, 272 (1994). Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations.

The Supreme Court thus established "prospectivity" as the appropriate default rule:

> "The presumption against statutory retroactivity had special force in the era… Has given way to greater deference to legislative judgments. . . .*prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations."*

In re Burk Dev. Co., 205 B.R. 778, 794 (Bankr. M.D. La. 1997). S*ee also*, *Labojewski v. Gonzales*, 407 F.3d 814, 816 (7th Cir. 2005).

Congress did not intend section 239(a) of the INA to be retroactive and it is the public's expectation that such a decision would be applied only to future cases. Therefore, a complete NTA form provided to an illegal alien, after the *Niz-Chavez* decision, must include all of the required information on one form in order to trigger the stop-time rule, but one provided before the decision would not.

The U.S. Constitution affords additional protections against retroactivity. Analyzing the rules of statutory construction to determine if Congress intended the statute to be applied retroactively or prospectively, Congress would need to state its intention for retroactive application in the statutory language. If there is neither an express command nor an intent to apply a statute prospectively only, the court must look to the effect that the statute will have on those it governs. *Landgraf v. USI Film Products*, 511 U.S. 244, 263, 280 (1994). If it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," then it has a "retroactive effect" and should only apply prospectively, unless Congress clearly intended to apply the statute to pending cases. *Landgraf, Id.* at 280. Conversely, if it would merely affect prospective relief, change procedural rules, or allocate jurisdiction, then the court would apply the statutory construction rules to determine whether it should be applied retroactively *Landgraf, Id.* at 266 (listing the Ex Post Facto Clause, Contracts Clause, Takings Clause, Bill of Attainder Clauses, and Due Process Clause as examples of constitutional protections against retroactivity).

Generally, Congress does not provide administrative agencies authority to create rules that have retroactive effect. However, if the statute conferring the rule making powers to

administrative agencies provides that certain rules can apply retroactively, the agencies can create retroactive rules. A "statutory grant of legislative rule making authority to an administrative agency will not grant the power to promulgate rules having retroactive effect unless that power is conveyed by Congress in express terms". *Portlock v. Barnhart,* 208 F. Supp. 2d 451 (D. Del. 2002). Thus, unless the language of the statute provides for a retroactive effect, such administrative rules will only have a prospective effect. Section 239(a) provides no such authority to the courts. As such, immigration courts will have jurisdiction over NTAs issued after *Niz-Chavez.*

The retroactive standard that has been applied was enunciated in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). The *Chevron Oil Co.* case, determined that the "the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." citing *Cipriano* v. *City of Houma, 395 U.S. 701, 706 (1969). Chevron Oil Co. v. Huson,* 404 U.S. 97, 107, 92 S. Ct. 349, 355 (1971).

To determine whether a statute can operate prospectively. Courts must "look to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Then, the courts must look to see whether a decision to apply retroactively a decision will produce substantial inequitable results." *American Trucking Assn's v. Smith,* 496 U.S. 167, 179–86 (1990). The *Niz-Chavez* decisions produces no such inequitable results to prior cases, even if all the required statutory information was provided to alien on more than one form. It has been a long standing principle that Congress would have the foresight whether a statute could be applied retroactively to previous cases. The absence of retroactive

language within section 239(a) of the INA indicates that Congress never intended it to be retroactively applied.

So long as Congress stays within constitutional limits, it has the power to enact laws that act retroactively. In *Rendon*, the Court determined that congressional enactments will not be construed to have retroactive effect unless their language requires that result. This is because the

> "[p]resumption against retroactive legislation is deeply rooted in jurisprudence, and embodies a legal doctrine centuries older than the Republic.
> When a clear expression of congressional intent is required before giving statutes retroactive effect, it is assured that Congress has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. In the context of immigration, the presumption against retroactivity is further buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."

Rendon v. United States AG, 972 F.3d 1252, 1254 (11th Cir. 2020).

Neither the language in 8 U.S.C. section 1229(a) et seq. enacted by Congress nor the *Niz-Chavez* Court specified a retroactive effect. Therefore, NTAs issued after *Niz-Chavez* would require one form to serve as notice to illegal aliens which contained all of the statutory requirements. The *Niz-Chavez* decision would have no retroactive effect on NTAs previously served.

CONCLUSION

For the forgoing reasons, the extent to which *Niz-Chavez v. Garland* affects the jurisdiction of immigration court cases is limited to NTAs issued after the decision of the Supreme Court.

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CERTIFICATE OF SERVICE

I hereby certify that on, August 6, 2021, I submitted the forgoing *amicus curiae* brief the Board of Immigration Appeals via courier service sent three (3) copies for distribution to the parties, to:

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