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

| In the Matter of:<br><br>Amicus Invitation No. 23-01-08<br>(Notice to Appear) | **Amicus Invitation No. 23-01-08** |
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# REQUEST TO APPEAR AND BRIEF OF 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. 23-01-08 (BIA 2023). The *amicus curiae* brief is submitted with this request.

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

IRLI is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed amicus curiae briefs in a wide variety of cases, including: *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022), *petition for cert. filed,* No. 22-1071 (S. Ct. May 1, 2023); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

## ISSUES PRESENTED

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?

## SUMMARY OF ARGUMENT

In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), the Supreme Court addressed the sufficiency of a notice to appear ("NTA") in the context of the stop-time rule, holding that the rule could not be triggered unless the alien received all of the statutorily required information in

a single document. Subsequently, in *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022), the Board of Immigration Appeals ("the Board") held that a notice to appear ("NTA") with missing time and place information can be cured by the Department of Homeland Security ("DHS") without requiring termination of the proceedings.

The single-document requirement of *Niz-Chavez* should not be applicable in the jurisdiction vesting context. If it is required, however, an alien should be required to make a timely objection and show that he was prejudiced by the missing information, and an Immigration Judge should permit DHS to remedy the defect without terminating the proceedings.

## ARGUMENT

### I. DHS Is Permitted to Remedy a Non-Compliant Notice to Appear.

#### A. The Immigration and Nationality Act and its implementing regulations work together as a claim-processing rule to commence removal proceedings.

The Immigration and Nationality Act ("INA") provides that "[i]n removal proceedings under section 240, written notice . . . shall be given . . . to the alien . . . specifying" certain statutory information, including the time and place of the removal proceeding. 8 U.S.C. § 1229(a). This written notice is referred to as a notice to appear ("NTA"), and is required to contain, among other things, the charges of inadmissibility/deportability and the time and place of the upcoming removal proceedings. *Id.*

According to the relevant regulations, "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]. The charging document must include a certificate showing service on the opposing party . . . which indicates the Immigration Court in which the charging document is filed." 8 C.F.R. § 1003.14(a). This charging document is often the §1229(a) NTA. As with the INA, the implementing regulations explicitly address the contents of an NTA. Importantly, the regulations

recognize that time and place information may not have been provided initially and instruct DHS how to remedy this situation:

> [DHS] shall provide in the Notice to Appear, the time, place[,] and date of the initial removal hearing, *where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing.* In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences . . . of failing, except under exceptional circumstances . . . to attend such proceeding.

8 C.F.R. § 1003.18(b) (emphasis added). DHS is clearly permitted to cure an allegedly noncompliant NTA by issuing of a Notice of Hearing ("NOH") to provide both the alien and the government with missing or changed time and place information, and thus an NTA missing such information is not grounds for termination of removal proceedings.

Both the Board and federal courts have recognized that the implementing regulations work in conjunction with "section 239(a)(1) [8 U.S.C. § 1229(a)(1), which] sets forth a *non-mandatory* claim-processing rule that allows for flexible enforcement." *Matter of Fernandes*, 28 I.&N. Dec. 605, 619 (BIA 2022) (Grant, AIJ, dissenting) (emphasis original). *See also United States v. Gayatn-Reyes*, No. 22-11891, 2023 U.S. App. LEXIS 3501, at *4 (11th Cir. Feb. 14, 2023) ("After *Niz-Chavez*, we reiterated that the NTA requirements in 8 U.S.C. § 1229(a) are not jurisdictional and, instead, 'set[] forth only a claim-processing rule.'") (quoting *Farah v. United States AG*, 12 F.4th 1312, 1322 (11th Cir. 2021)). As AIJ Grant explained in his *Fernandes* dissent:

> The specific claim-processing rule at issue in this case is properly viewed as an instantiation of fundamental due process—the right to know when and where one's hearing shall take place. In every other context involving a claim of violation of due process, the

> Board, with the approbation of the Federal courts, requires a showing of prejudice. By setting aside this requirement, the majority opens up a potential hornets' nest of due process and claim-processing litigation in circumstances where parties have suffered no prejudice.

*Id*. at 617 (Grant, AIJ, dissenting) (internal citations omitted). Accordingly, neither the INA nor the regulations should be interpreted to preclude DHS from amending an NTA for case initiation purposes where there is no prejudice to the alien.

Justice Kavanaugh, dissenting in *Niz-Chavez*, explained that "a notice to appear is akin to a charging document *plus* a calendaring document." *Niz-Chavez*, 141 S. Ct. at 1492 (Kavanaugh, J., dissenting) (emphasis original). On one hand, it is like an "indictment [which] generally provides charging information[,]" and on the other it "tell[s] a noncitizen when and where to appear." *Id*. An alien who receives an NTA without time and place information thus has the benefit of knowing the charges against him and being able to prepare his defense, even if the time and date of his hearing have not yet been provided. *See Chavez-Chilel v. AG United States*, 20 F.4th 138, 144 (3d Cir. 2021) ("The purpose of an NTA is to notify a noncitizen that she is removable and provide the basis for that allegation."). There is no prejudice to the alien because her "opportunity to contest the charge against her, present evidence, and receive CAT relief," *id*., is not impacted by missing time and date information. Accordingly, such "harmless error" does not warrant terminating or reinitiating removal proceedings. *Id*. *See also Matter of Fernandes*, 28 I.&N. Dec. at 614 ("A noncompliant notice to appear is not equivalent to a lack of a notice to appear altogether.").

It is appropriate then, that in the case of "a violation of a claims processing rule, as compared with a jurisdictional rule, the adjudicator has the authority to determine how to address the noncompliance. Thus, because there can be equitable reasons to excuse noncompliance with

a claims-processing rule, there is no automatic requirement that a violation of a claims-processing rule results in the termination of a proceeding." *Chavez-Chilel*, 20 F.4th AT 143-44. *See also Guinanzaca v. AG United States*, No. 22-2440, 2023 U.S. App. LEXIS 14109, at *4-5 (3d Cir. June 7, 2023) (explaining that "[t]he NTA's omission [of time and place information] was harmless" because the alien and his counsel had received repeated notice regarding his merits hearing, and "[h]e appeared at every scheduled hearing, represented by counsel. Termination is unwarranted under these circumstances.").

Thus, although an immigration judge can neither "ignore [n]or overlook" the procedural error, he is not required to "treat the notice to appear as never having been served or filed." *Matter of Fernandes*, 28 I&N Dec. at 614 (citations omitted). Accordingly, numerous circuit courts have rejected the application of *Niz-Chavez's* single-document rule to the jurisdiction of the immigration court. *See, e.g., United States v. Bastide-Hernandez*, 39 F.4th 1187, 1191 (9th Cir. 2022) ("We join the emerging consensus of our sister circuits in holding that it does not [implicate jurisdiction]. Section 1003.14(a) is a claim-processing rule not implicating the court's adjudicatory authority, and we read its reference to 'jurisdiction' in a purely colloquial sense."); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1017 (10th Cir. 2019) ("Section 1229(a) does not refer to 'jurisdiction' or 'the courts' statutory or constitutional *power* to adjudicate the case.' Thus, § 1229(a) is non-jurisdictional.") (emphasis original); *Pierre-Paul v. Barr*, 930 F.3d 684, 691 (5th Cir. 2019), *abrogated in part on other grounds by Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) ("Even if Pierre-Paul's notice to appear were defective, and even if that defect could not be cured, 8 C.F.R. § 1003.14 is not jurisdictional but is a claim-processing rule."). Courts have also permitted DHS to cure defective service of an NTA. *See B.R. v. Garland*, 26 F.4th 827, 838 (9th

Cir. 2022) ("holding that DHS may cure defective service to avoid violating § 1229 and related regulations"). As the Ninth Circuit explained:

> We see no reason to burden the government's efforts in enforcing immigration laws by judicially mandating service of charging documents on all aliens be perfect on the very first attempt absent statutory or regulatory language so requiring. As written, the function of the service requirement is to provide notice to the alien of his removal proceedings, not to delay interminably proceedings with unnecessary, do-or-die procedural hurdles. The service requirement performs that function so long as the government properly served notice on the alien before a hearing on substantive matters, regardless whether service occurs on the first attempt or by subsequent cure.

*Id.*

Indeed, "the immigration courts' adjudicatory authority over removal proceedings comes not from the agency regulation codified at 8 C.F.R. § 1003.14(a), but from Congress. It is the INA that 'explicitly and directly grants that authority[.]' [*United States v.*] *Arroyo*, 356 F. Supp. 3d [619, 624 (W.D. Tex. 2018)]." *United States v. Cortez*, 930 F.3d 350, 360 (4th Cir. 2019). Thus, "'[t]hat statutory grant of authority is the immigration judges' 'subject matter jurisdiction,' and it preexisted' – by decades - § 1003.14(a)'s reference to the vesting of jurisdiction in immigration court.'" *Id*. It follows that "nothing about that broad and mandatory grant of adjudicatory authority is made contingent on compliance with rules governing notices to appear, whether statutory or regulatory." *Id*. (citations omitted). Allowing DHS to remedy missing time and place information thus comports with the claim-processing nature of the NTA.

**B. The single document requirement of *Niz-Chavez v. Garland* does not prevent DHS from curing an NTA.**

The INA provides DHS discretion to cancel the removal of otherwise deportable aliens in certain circumstances. 8 U.S.C. § 1229b(b). One of the requirements to prove eligibility is that the alien must establish that he was continuously physically present in the United States for ten

years prior to the initiation of removal proceedings via the receipt of an NTA. 8 U.S.C. § 1229b(b)(1)(A). Receipt of an NTA "stops-time" on the alien's accrual of continuous physical presence.

Congress enacted the stop-time rule to prevent aliens from dragging out their removal proceedings to accrue enough continuous physical presence to be eligible for cancellation. The report of the House Committee on the Judiciary expressly addressed the issue, explaining that it was necessary because aliens were using these procedural "delay strategies" to obtain relief from removal:

> Suspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued. This includes aliens who failed to appear for their deportation proceedings and were ordered deported in absentia, and then seek to re-open proceedings once the requisite time has passed. Such tactics are possible because some Federal courts permit aliens to continue to accrue time toward the seven year threshold even after they have been placed in deportation proceedings. Similar delay strategies are adopted by aliens in section 212(c) cases, where persons who have been in the United States for a number of years, but have only been lawful permanent residents for a short period of time, seek and obtain this form of relief.

H.R. Rep. No. 104-469(I) (1996), Report of the Committee on the Judiciary: Immigration in the National Interest Act of 1995. *See also Pereira v. Sessions*, 138 S. Ct. 2105, 2119 (2018) ("Congress enacted the stop-time rule to prevent noncitizens from exploiting administrative delays to 'buy time' during which they accumulate periods of continuous presence."); *Arca-Pineda v. AG of the United States*, 527 F.3d 101, 106 (3d Cir. 2008) ("Other courts have agreed that the stop-time rule was enacted to combat efforts by aliens to intentionally delay their immigration proceedings to enable them to apply for suspension of deportation."); *Appiah v. United States INS*, 202 F.3d 704, 710 (4th Cir. 2000) ("The stop-time rule is rationally grounded. Congress enacted the rule to remove an alien's incentive for prolonging deportation proceedings

in order to become eligible for suspension. Removing the incentive for delay in the deportation process is a valid government objective, and applying the stop-time rule to aliens such as Appiah who are already in deportation proceedings rationally furthers this purpose.") (internal citation omitted). It is clear that Congress did not intend to provide aliens with a procedural way out of their removal proceedings, especially in cases where there is no harm or prejudice as a result of the missing information.

In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), and its predecessor case, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Supreme Court addressed the requirements of NTAs in the context of triggering the stop-time rule. Together, these cases hold that the stop-time rule is not triggered until an alien receives a single-document NTA that contains all the statutorily required information. *Id.* As the Ninth Circuit explained, the *Niz-Chavez* "decision did not concern the docketing procedure set forth in 8 C.F.R. § 1003.14(a). Thus, while the supplement of a notice of hearing would not cure any NTA deficiencies under § 1229(a), we continue to hold that it suffices for purposes of § 1003.14(a)." *Bastide-Hernandez*, 39 F.4th at 1193 n.9. *See also Berroa v. Garland*, No. 20-706 NAC, 2023 U.S. App. LEXIS 18905, at *3 (2d Cir. July 25, 2023) ("But we subsequently held that both *Pereira*—as discussed in *Banegas-Gomez*[, 922 F.3d 101, 110 (2d Cir. 2019)]—and *Niz-Chavez* address a 'narrow question' regarding the stop-time rule and do not 'void jurisdiction in cases in which an NTA omits a hearing time or place.'") (quoting *Chery v. Garland*, 16 F.4th 980, 986-87 (2d. Cir. 2021)).

Thus, because the *Niz-Chavez* court analyzed the single-document requirement in the context of the stop-time rule, the holding had no impact on the jurisdiction of the immigration court, the ability of DHS to rectify defective service, or the ability of DHS to remedy an otherwise noncompliant NTA. *See Niz-Chavez*, 141 S. Ct. at 1491 (Kavanaugh, J., dissenting) (explaining

that the impact of the majority's decision was that "the Government may use two documents to initiate removal proceedings, but the Government must use a single document if it wants to stop the continuous-presence clock[.]"). It would be incorrect to rely on *Niz-Chavez* to expand the single-document holding to a context outside the limited scope of the stop-time rule.

In fact, BIA recognized the inapplicability of *Niz-Chavez* outside of the stop-time rule context:

> As the majority holds in its treatment of the jurisdictional question, *Niz-Chavez's* holding was limited to whether a notice of hearing could cure a defective notice to appear and trigger the "stop-time" rule *for cancellation of removal*. *Matter of Fernandes*, 28 I.&N. Dec. at 606-07. Moreover, as we recently acknowledged, *Niz-Chavez* did not address whether section 239(a)(1) was a claim processing rule or whether a respondent must show prejudice after raising an objection to a defective notice to appear. *See Matter of Nchifor*, 28 I.&N. Dec. 585, 589 (BIA 2022) (*Niz-Chavez* did not reference the Supreme Court's jurisprudence relating to claim-processing rules, nor did it address [how] a respondent may raise a valid objection to missing time or place information on a notice to appear . . . ."). Our holding in *Matter of Rosales Vargas and Rosales Rosales*[, 27 I. & N. Dec. 745, 753 (BIA 2020)] thus survives *Niz-Chavez* and controls the outcome in this case, requiring the respondent to show that he experienced apparent prejudice from the defective notice to appear. 27 I.&N. Dec. 753-54.

*Matter of Fernandes*, 28 I.&N. Dec.at 626 (Grant, AIJ, dissenting) (emphasis and alterations original). Therefore *Niz-Chavez* does not require a single-document NTA. Even if it did, moreover, DHS would still be able to cure a noncompliant NTA.

## II. REMEDY

### A. Remedy for non-compliant NTA requires a timely objection and a showing of prejudice to the alien.

As the Board recognized in *Fernandes*,

> because the rule is not jurisdictional, it does not deprive the adjudicating body . . . of authority or power. Second, the

> requirements in such rules are subject to waiver and forfeiture, unless properly and timely raised by the affected party. Thus, if a respondent does not raise an objection to a defect in the notice to appear in a timely manner, such an objection is waived or forfeited.

*Matter of Fernandes*, 28 I.&N. Dec. at 609. Then, erroneously, the Board held "that where a respondent has made a timely objection to a notice to appear missing time or place information, the respondent is not generally required to show he or she was prejudiced by this missing information." *Id.* at 613.

Timeliness is important because "[t]imely objections provide the government the opportunity to cure any error." *Meraz-Saucedo v. Rosen*, 986 F.3d 676, 683 (7th Cir. 2021). At the very least, to be timely, "a petitioner must allege a claim-processing violation related to defects in an NTA in the proceedings before the agency[.]" *Leon-Garcia v. Garland*, Nos. 21-70836, 22-448, 2023 U.S. App. LEXIS 14253, at *5 (9th Cir. June 8, 2023), citing *Umana-Escobar v. Garland*, No. 19-70964, -- F.4th --, 2023 WL 3606117, at *5 (9th Cir. May 23, 2023). In *Fernandes*, the Board held that "an objection to a noncompliant notice to appear [is] timely if it is raised prior to the closing of pleadings before the Immigration Judge." *Fernandes*, 28 I.&N. Dec. at 610-11. Failure to object and concession of removability, however, constitute waiver and preclude the alien from later challenging the NTA. *Pierre-Paul*, 930 F.3d at 693 n.6 ("Pierre-Paul cannot prevail because he waived his challenge by failing to object to the notice to appear and conceding his removability.")

The Board erred in *Fernandes* by not requiring a showing of prejudice to the alien from an NTA with missing time and place information. "Besides ignoring the effect of binding regulations, the majority's conclusion that the respondent need not show prejudice from violation of the claim-processing rule at section 239(a)(1) also effectively reverses very recent Board precedent that those who claim violation of a claim-processing rule must show prejudice."

*Fernandes*, 28 I.&N. Dec. at 624 (Grant, AIJ, dissenting). Indeed, as AIJ Grant explained, "prejudice [i]s not only relevant, but dispositive[.]" *Id*. at 625, citing *Chavez-Chilel v. AG United States*, 20 F.4th 138, 144 (3d Cir. 2021). Requiring "prejudice be shown is important" because (1) the INA and its implementing regulations create a "flexible enforcement" claim-processing scheme; (2) the purpose of such claim-processing scheme is "to promote the orderly process of litigation," which is disrupted by termination of proceedings; and (3) prejudice is required in the due process context. *Fernandes*, 28 I.&N. Dec. at 626-27.

Because a showing of prejudice is required for due process violations, moreover, it should be an obvious requirement for sustaining an objection to an allegedly non-compliant NTA. *See Vasha v. Gonzales*, 410 F.3d 863, 872 (6th Cir. 2005) ("Therefore, reviewing an alleged due process violation is a two-step inquiry: first, whether there was a defect in the removal proceeding; and second, whether the alien was prejudiced because of it."); *Ramos v. Gonzales*, 414 F.3d 800, 804 (7th Cir. 2005) ("The due process violation must have been one likely to have an impact on the result of the proceeding. Whether or not Ramos is correct that the IJ's procedures fell short of the constitutionally required standard, we conclude that he cannot show prejudice on this record."); *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003) ("To advance a successful claim for ineffective assistance of counsel, an alien must demonstrate prejudice[.]"). In the NTA context, "[p]rejudice [i]s absent [where] the respondents were subsequently informed of the location, time, and date of their hearings[.]" *Fernandes*, 28 I.&N. Dec. at 625 (Grant, AIJ, dissenting), citing *Matter of Rosales Vargas and Rosales Rosales*, 27 I.&N. Dec. 745, 753-54 (BIA 2020).

The prejudice requirement has also been applied to permit DHS to cure defective service of an NTA. Such cure, however, would not be available unless "improper service amounts to an

egregious regulatory violation which works to prejudice an alien's interests." *B.R. v. Garland*, 26 F.4th 827, 840 (9th Cir. 2022). The following test, applied by the Ninth Circuit in defective service cases, would also be appropriate in the context of a noncompliant NTA:

> [A] petitioner is entitled to termination of their [sic] proceedings without prejudice as long as the following requirements are satisfied: (1) the agency violated a regulation; (2) the regulation was promulgated for the benefit of petitioners; and (3) the violation was egregious, meaning that it involved conscience-shocking conduct, deprived the petitioner of fundamental rights, or prejudiced the petitioner.

*Sanchez v. Sessions*, 904 F.3d 643, 655 (9th Cir. 2018).

### B. Issuing a subsequent NOH remedies an NTA with missing time and place information for jurisdictional purposes.

Regardless of whether prejudice is required, "a remedy may be allowed, and the nature of the violation informs the nature of the remedy." *Fernandes*, 28 I.&N. Dec. at 616. As explained above, the regulations explicitly contemplate that an NTA may be issued and a case may commence without time and place information.

"[T]he BIA has fully explained . . . [8 C.F.R] § 1003.18(b) supplies the appropriate remedy: providing the alien and the government with the complete notice at a later time." *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020). Indeed, "the regulatory history of 8 C.F.R. § 1003.18(b) 'supports [the Board's] conclusion that . . . either the DHS or the Immigration Court may schedule the *initial removal hearing* and notify the respondent of the time and place of that hearing . . . through either a notice to appear . . . *or a notice of hearing*.'" *Fernandes*, 28 I.&N. Dec. at 624 n.8 (Grant, AIJ, dissenting) (emphasis original), quoting *Matter of Laparra*, 28 I.&N. Dec. 425, 435 (BIA 2022). *See also In re Vargas*, 27 I. & N. Dec. 745, 753 (B.I.A. January 9, 2020) ("Moreover, § 1003.15(b)(6) is an internal docketing rule to be read in conjunction with other internal docketing regulations, which specifically permit the time, place, and date of a

hearing to be excluded from the notice to appear, if later provided.") (citing 8 C.F.R. § 1003.18(b)); *Martinez-Lopez v. Barr*, 943 F.3d 766, 770 (5th Cir. 2019) ("The notices Martinez-Lopez and her son received satisfied the relevant regulations. Although they did not specify a date and time for the appearance, the regulations require that information only where practicable. Moreover, any defect was cured by the notices Martinez-Lopez and her son received just over a month later. As a result, the notices vested the IJ with jurisdiction.").

### C. Termination is not the proper remedy for missing time and place information.

As BIA explained in *Fernandes*, a timely objection, even if sustained, does not require termination of the proceedings. *Fernandes*, 28 I.&N. Dec. at 613. The Board provided three reasons why termination was not necessary. "First . . . the claim-processing rule at section 239(a)(1) is not jurisdictional and relates to matters within an Immigration Judge's authority." *Id*. Accordingly, "it follows that an Immigration Judge may exercise judgment and discretion to enforce that rule as he or she deems appropriate to promote the rule's underlying purpose." *Id.* "Second, the [INA] does not explicitly provide that termination is the sole consequence for violating that rule. Indeed, neither the text of section 239(a)(1), nor any other statute, mandates that proceedings should be terminated if DHS fails to comply with the requirements[.]" *Id*. Importantly, the text also does not "explicitly preclude an Immigration Judge from allowing DHS to remedy missing time or place information." *Id*. at 614. Finally, the Board noted that applicable Supreme Court precedent "suggests that where the claim-processing violation stems from a defect in a document that can be corrected, adjudicators may allow the violating party to remedy the defect without dismissing the proceedings." *Id*.

Indeed, termination of immigration proceedings in this context is outside of the IJ's authority. The regulations explicitly address termination and only permit it in limited situations:

> An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

8 C.F.R. § 1239.2. *See also, Fernandes*, 28 I.&N. Dec. at 623 (Grant, AIJ, dissenting) ("Once the case is filed with the Immigration Court and proceedings commence, and Immigration Judge is obliged to adjudicate a respondent's case and can only terminate proceedings in limited circumstances.").

**D. Form I-261 is not the proper remedy for missing time and place information.**

The Board addressed the use of Form I-261 to remedy missing time and place information in an unpublished opinion, *Matter of X*, issued on June 9, 2023. There, the Board held that DHS may not use Form I-261 for missing time and place information because the form is specifically intended for use under 8 C.F.R. § 1003.30, which provides that "[a]t any time during deportation or removal proceedings, additional or substituted charges of deportability and/or factual allegations may be lodged by the Service in writing." 8 C.F.R. § 1003.30. Therefore, Form I-261 is not appropriate to remedy missing time and place information because "[a] Form I-261 [only] allows the government to add or substitute charges of deportability and factual allegations." *Falomir-Montoya v. Garland*, No. 18-71794, 2022 U.S. App. LEXIS 24664, at *2 n.1 (9th Cir. Aug. 31, 2022).

## CONCLUSION

For the foregoing reasons, an Immigration Judge may permit the Department of Homeland Security to cure a non-compliant NTA.

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_/s/ Gina M. D'Andrea_____________

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## CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2023, 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:

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