Strategies and Considerations in the Wake of *Niz-Chavez v. Garland*

Practice Advisory
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Table of Contents

I. Introduction[1]

In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), the U.S. Supreme Court held unequivocally that a Notice to Appear (NTA)—the charging document that commences immigration court removal proceedings—must contain the time and place of the hearing in a single document in order to trigger the stop-time rule in cancellation of removal cases, and that a subsequently-issued hearing notice does not stop time if the NTA did not include the required information. This decision answered some, though by no means all, of the questions raised by the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Following *Niz-Chavez*, U.S. courts of appeals and the Board of Immigration Appeals (BIA) have interpreted the holding and applied the case to a variety of situations. This practice advisory will discuss the Supreme Court's decisions in *Niz-Chavez* and *Pereira* and provide strategies for practitioners to consider in cases where the client's NTA was defective. As this area of the law continues to develop, practitioners should use this practice advisory as a starting point but engage in their own research into the state of the law.

II. Overview

A. Cancellation of Removal

Cancellation of removal is a form of immigration relief that is available in removal proceedings initiated on or after April 1, 1997. It is available to lawful permanent residents (LPRs) under Immigration and Nationality Act (INA) section 240A(a), to non-lawful permanent residents (non-LPRs)[2] under INA § 240A(b)(1), and to certain battered spouses and children under INA § 240A(b)(2).[3] Each type of cancellation has its own set of statutory criteria. If an immigration

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[1] Copyright (c) 2023, American Immigration Council (Council) and the National Immigration Project of the National Lawyers Guild (NIPNLG). The original version of this practice advisory, published on June 30, 2021, was issued by the Council, The Catholic Legal Immigration Network, Inc. (CLINIC), and NIPNLG. Click here for information on reprinting this practice advisory. This practice advisory is intended for authorized legal counsel and is not a substitute for independent legal advice supplied by legal counsel familiar with a client's case. The authors of the 2021 advisory were Khaled Alrabe, Gianna Borroto, Kate Melloy Goettel, Michelle Mendez, Victoria Neilson, Rebecca Scholtz, Cristina Velez, and Karolina Walters. It was updated in 2023 by Gianna Borroto, Suchita Mathur, Kate Melloy Goettel, Michelle Mendez, Victoria Neilson, and Rebecca Scholtz. The authors would like to thank Grant Chamness, Kristin Macleod-Ball, Aimee Mayer-Salins, Abby Nyberg, Trina Realmuto, David Stern, Patrick Taurel, Stacy Tolchin, Ben Winograd, and Valerie Zukin for their contributions to the 2021 advisory.

[2] An LPR may also apply for non-LPR cancellation. *See Matter of A-M-*, 25 I&N Dec. 66, 74-76 (BIA 2009).

[3] This advisory does not address the specific requirements for this form of cancellation of removal because applicants continue to accrue physical presence toward the required 3-year period even after a charging document is issued, and thus *Niz-Chavez* and *Pereira* do not impact eligibility for this form of relief. *See* INA § 240A(b)(2)(A)(ii).

judge (IJ) determines that an individual meets these criteria and merits a favorable exercise of discretion, the IJ may "cancel" removal and the individual either retains or gains LPR status.[4]

To be eligible for LPR cancellation under INA § 240A(a), an individual must demonstrate:

- that they have been an LPR for not less than 5 years;
- that they have continuously resided in the United States for 7 years after admission in any status; and
- that they have not been convicted of an aggravated felony.

To be eligible for non-LPR cancellation under INA § 240A(b)(1),[5] an individual must demonstrate:

- continuous physical presence in the United States for not less than 10 years immediately preceding the date of application;
- good moral character during such period;
- that they have not been convicted of certain criminal offenses; and
- that removal would result in exceptional and extremely unusual hardship to the individual's U.S. citizen or LPR spouse, parent, or child.

Section 240A(d) of the INA, also known as the stop-time rule, governs the calculation of continuous residence or physical presence for accumulating either the 7 years of continuous residence required for LPR cancellation or the 10 years of continuous physical presence required for non-LPR cancellation. Subsection (A) of INA § 240A(d)(1) provides that the accrual of these time periods "shall be deemed to end . . . when the [noncitizen] is served a notice to appear under [INA § 239(a)]."[6]

B. Supreme Court Decision in *Pereira v. Sessions*

1. Facts and Holding

In *Pereira*, the Supreme Court held that an NTA that does not include the time or place of the scheduled immigration court hearing does not trigger the stop-time rule for purposes of cancellation. Mr. Pereira had been served in 2006 by the Department of Homeland Security (DHS) with an NTA that did not include the time and place of his hearing.[7] Subsequently, the court mailed a hearing notice advising Mr. Pereira of the hearing's time and place to the wrong address. As a result, he did not appear at the hearing and an IJ ordered him removed *in absentia*

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[4] The applicant bears the burden of establishing both statutory eligibility and that they merit a favorable exercise of discretion. INA § 240(c)(4)(A); 8 C.F.R. § 1240.8(d).

[5] For more information on non-LPR cancellation, see Immigrant Legal Resource Center, *Non-LPR Cancellation of Removal* (June 2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf.

[6] Subsection (B) of INA § 240A(d)(1) is triggered by the commission of certain crimes. That provision is not at issue in *Pereira* or *Niz-Chavez* and is thus beyond the scope of this practice advisory.

[7] *Pereira*, 138 S. Ct. at 2112.

in 2007.[8] He did not learn of this order until 2013.[9] Due to the lack of proper notice, the immigration court subsequently rescinded the *in absentia* order and reopened proceedings.[10] On the merits, the IJ denied his application for non-LPR cancellation, finding that the 2006 NTA stopped the accrual of continuous physical presence in the United States and thus he did not have the requisite 10 years, because he had entered the United States in 2000.

In an 8-1 decision authored by Justice Sotomayor, the Supreme Court concluded that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' [INA § 239(a)] and therefore does not trigger the stop-time rule."[11] The Court found that the plain language of INA § 239(a)(1)—which unambiguously defines an NTA as specifying, among other things, where and when the noncitizen must appear for removal proceedings—compelled this result.[12] Thus, the Court concluded that Mr. Pereira's NTA did not stop time and remanded his case for further proceedings.[13]

2. *Pereira*'s Impact Beyond the Stop-Time Context

In the wake of *Pereira*, practitioners argued that the Supreme Court's decision applied beyond the cancellation of removal context. Those arguments centered on five major questions: (1) whether removal proceedings initiated through a defective NTA[14] should be terminated because the immigration court lacks jurisdiction over the proceedings; (2) whether a defective NTA violates a claim-processing rule providing a separate basis for termination if the noncitizen meets certain requirements; (3) whether an IJ may issue an *in absentia* order in a case commenced through a defective NTA; (4) whether a defective NTA satisfies the post-conclusion voluntary departure stop-time rule; and (5) whether a prior removal order based on a defective NTA could support a charge of criminal reentry under 8 U.S.C. § 1326.[15] In the months following *Pereira*, IJs terminated approximately 9,000 removal proceedings, a 160 percent increase over terminations for the same period the year before.[16]

On August 31, 2018, in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), the BIA held that a defective NTA does not deprive the immigration court of jurisdiction and is thus not a basis for the termination of removal proceedings, so long as the court serves a subsequent notice of hearing on the noncitizen that provides the time and place of hearing. After *Bermudez-Cota*,

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8 *Pereira*, 138 S. Ct. at 2112.

9 *Id.*

10 *Id.*

11 *Id.* at 2110.

12 *Id.*

13 *Id.* at 2113-14, 2120.

14 For purposes of this practice advisory, the term "defective NTA" means that the NTA lacks time and/or place information as required by INA § 239(a)(1).

15 The implications of *Pereira* and *Niz-Chavez* on criminal re-entry cases is beyond the scope of this practice advisory.

16 Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, REUTERS, Oct. 17, 2018, https://www.reuters.com/article/uk-usa-immigration-terminations-insight-idUKKCN1MR1HE.

the BIA issued other decisions taking an extremely narrow view of *Pereira* in the context of jurisdiction[17] and rescission and reopening of *in absentia* removal orders.[18]

3. *Pereira*'s Aftermath in the Cancellation Stop-Time Context

In *Matter of Mendoza-Hernandez & Capula Cortez*,[19] the BIA issued a ruling narrowing *Pereira* in the context of the cancellation stop-time rule itself. In an *en banc* opinion, the BIA held that even when the NTA issued by DHS is deficient, a subsequent hearing notice issued by the immigration court "cures" the defective NTA and triggers the cancellation of removal stop-time rule. A circuit split on this issue subsequently emerged, with the Third and Tenth Circuits ruling that only a statutorily compliant NTA could stop time,[20] and the Fifth and Sixth Circuits agreeing with the BIA that a subsequently issued hearing notice supplying the missing information cured the NTA's defect and stopped time.[21]

III. Supreme Court Decision in *Niz-Chavez v. Garland*

On April 29, 2021, in *Niz-Chavez v. Garland*, the Supreme Court issued a decision responding to the argument that arose after *Pereira* about whether a subsequent hearing notice could "cure" a defective NTA for purposes of triggering the stop-time rule. Siding with the Third and Tenth Circuits, the Court answered unequivocally: no.

A. Facts and Holding

In *Niz-Chavez*, Justice Gorsuch authored the Court's 6-3 majority opinion, holding that to trigger the stop-time rule, DHS must serve the noncitizen with a single-document NTA containing all the information about an individual's removal proceedings specified in INA § 239(a)(1).

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17 *Matter of Rosales Vargas & Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020) (concluding that an NTA lacking the immigration court's address as required by 8 C.F.R. § 1003.15(b)(6) or a certificate of service as required by 8 C.F.R. § 1003.14(a) did not deprive the immigration court of jurisdiction).

18 *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019) (neither rescission of an *in absentia* order nor termination of proceedings is required due to an NTA's failure to list the time and place of the hearing where subsequent hearing notice with time and place information was properly sent to respondent); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019) (NTA's failure to list the time and place of the hearing did not require rescission of an *in absentia* order where the respondent did not provide an address where notice could be sent).

19 *Matter of Mendoza-Hernandez & Capula Cortez*, 27 I&N Dec. 520 (BIA 2019).

20 *Guadalupe v. Att'y Gen. U.S.*, 951 F.3d 161, 165-67 (3d Cir. 2020); *Banuelos v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020).

21 *Yanez-Pena v. Barr*, 952 F.3d 239, 241 (5th Cir. 2020), *cert. granted, vacated, sub nom. Yanez-Pena v. Garland*, 141 S. Ct. 2589 (2021); *Garcia-Romo v. Barr*, 940 F.3d 192, 205 (6th Cir. 2019), *cert. granted, vacated, sub nom. Garcia-Romo v. Garland*, 141 S.Ct. 2590 (2021); *see also Lopez v. Barr*, 948 F.3d 989 (9th Cir. 2020) (granting *en banc* rehearing of previous Ninth Circuit panel decision that had rejected *Mendoza-Hernandez*), *remanded sub nom. Lopez v. Garland*, 998 F.3d 851 (9th Cir.2021) (remanding case to BIA in light of *Niz-Chavez*).

Mr. Niz-Chavez entered the United States in 2005. In 2013, DHS served him an NTA that did not list a time or place for his initial hearing. Two months later, Mr. Niz-Chavez received a hearing notice stating the time and place of his hearing. Mr. Niz-Chavez applied for withholding of removal and protection under the Convention Against Torture, which the IJ denied. Mr. Niz-Chavez appealed to the BIA, also requesting that the BIA remand to the IJ so that he could apply for non-LPR cancellation of removal based on *Pereira*. The BIA denied Mr. Niz-Chavez's motion to remand, and the Sixth Circuit subsequently denied Mr. Niz-Chavez's petition for review, holding that the stop-time rule was triggered when the government had finished delivering all of the information required by INA § 239(a)(1), which occurred when Mr. Niz-Chavez received his hearing notice.

The Supreme Court then reversed the Sixth Circuit. The Court found that the plain language of INA § 239(a)(1)—which uses the indefinite article "a" when referring to "a 'notice to appear'"—leaves no room to permit a second document to cure the defect. Reversing the Sixth Circuit's decision, the Court concluded that "the government must issue a single and comprehensive notice before it can trigger the stop-time rule."[22] As discussed below, the more expansive language used in *Niz-Chavez* called into question the ongoing validity of the BIA and court of appeals decisions that had interpreted *Pereira* in the narrowest way possible and resulted in further decisions interpreting *Niz-Chavez* and *Pereira* by the U.S. courts of appeals and BIA.

The Supreme Court calls the *Niz-Chavez* case the "next chapter" in the *Pereira* story, noting that though the government could have responded to *Pereira* by issuing NTAs with the information required by INA § 239(a)(1), "it seems the government has chosen instead to continue down the same old path."[23] In rejecting the government's argument that its regulations authorize providing the statutorily required information over multiple notices, the Court cites *Pereira*, stating that "this Court has long made plain, pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'"[24]

B. Impact on Cancellation Stop-Time Rule[25]

As a result of the Supreme Court decisions in *Pereira* and *Niz-Chavez*, noncitizens accrue physical presence and continuous residence for cancellation purposes from the time they enter

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22 *Niz-Chavez*, 141 S. Ct. at 1479.

23 *Id.*

24 *Id*. at 1485.

25 In *Matter of J-L-L-*, 28 I&N Dec. 684 (BIA 2023), the BIA concluded that *Niz-Chavez* and *Pereira* do not apply to charging documents issued before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546. *See* IIRIRA Section 309(c)(5) (stating that section 240A(d) "shall apply to notices to appear issued before, on, or after the date of enactment of this Act [September 30, 1996]."); *see also Gutierrez-Alm v. Garland*, No. 17-71012, 2023 WL 2518338, at *8 (9th Cir. Mar. 15, 2023) ("[A]n Order to Show Cause that fails to disclose the time and place of an immigrant's deportation proceedings is sufficient to trigger the stop-time rule in a transitional rules case."); *Jiang v. Garland*, 18 F.4th 730, 734–35 (2d Cir. 2021) (same).

the United States until DHS serves a single-document NTA containing *all* of the information required by INA § 239(a)(1), including the hearing's time and place. Therefore, if DHS serves an NTA lacking information about the hearing's time or place, that NTA does not stop time and the noncitizen continues to accrue physical presence or continuous residence in the United States for purposes of cancellation eligibility. Similarly, if the immigration court later issues a hearing notice with time and place information, that document does not stop time, as a hearing notice is not a "Notice to Appear." The hearing notice does not make up for DHS's failure to comply with INA § 239(a)(1) because even "if the government finds filling out forms a chore,"[26] Congress intended for DHS to issue "'a' single document"[27] correctly. In other words, DHS's sole opportunity to stop a noncitizen's accrual of physical presence and continuous residence for cancellation purposes is by issuing an NTA that complies with all of the requirements of INA § 239(a)(1).

Practitioners should review cases of clients in removal proceedings who have now been in the United States for at least 10 years (for non-LPR cancellation) or who have resided in the United States continuously for 7 years after admission in any status (for LPR cancellation) and meet the other requirements for cancellation, to assess whether their NTA contains all of the information required by INA § 239(a)(1). If the NTA is missing required information such as the hearing's time or place, the stop-time rule is not triggered and the client will continue to accrue the statutorily required time until DHS serves an NTA that meets all the requirements of INA § 239(a)(1).

Even clients with final orders of removal continue to accrue physical presence or continuous residence for cancellation purposes if their NTA was defective, though they would need to reopen their removal proceedings in order to pursue cancellation before the IJ. *See infra* section V.b. After *Pereira* and *Niz-Chavez,* the BIA in numerous unpublished decisions had concluded that noncitizens were not eligible to reopen their cases to pursue cancellation because, even though the NTA had not stopped time pursuant to *Pereira* and *Niz-Chavez*, the entry of a final removal order did. In *Matter of Chen*, 28 I&N Dec. 676 (BIA 2023), the BIA reversed course and recognized, as had several courts of appeals decisions previously,[28] that the issuance of a final order did not stop time. Thus, a noncitizen who lacked the required physical presence or continuous residence during their immigration court proceedings could acquire the required time period after being ordered removed and could file a motion to reopen to pursue cancellation.

Following *Niz-Chavez* and *Pereira*, DHS sometimes sought to nominally comply with the Supreme Court's decision by issuing NTAs with "fake" hearing dates.[29] Advocates refer to these hearing dates as "fake" because the government apparently never intended to hold a hearing on

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[26] *Niz-Chavez*, 141 S. Ct. at 1485.

[27] *Id*. at 1480.

[28] *Parada v. Garland*, 48 F.4th 374, 377 (5th Cir. 2022) (per curiam); *Estrada-Cardona v. Garland*, 44 F.4th 1275, 1283–86 (10th Cir. 2022); *Quebrado Cantor v. Garland*, 17 F.4th 869, 873-74 (9th Cir. 2021).

[29] *See* AILA, *Practice Alert: DHS Issuing NTAs with Fake Times and Dates* (Nov. 26, 2019), https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-dhs-issuing-ntas-with-fake-times.

the date and time listed—sometimes a time when the court was closed—and instead ostensibly picked a date merely so that the portion of the NTA providing the date and time would not be left blank.[30] Though *Niz-Chavez* notes that after the government has served a compliant NTA, it is permitted under INA § 239(a)(2) to modify the time and place of the hearing if logistics require a change,[31] practitioners could argue that NTAs containing "fake" hearing dates[32] are not valid NTAs because a date the government never intends to actually hold a hearing does not provide notice of the "time . . . at which the proceedings will be held" as required by INA § 239(a)(1)(G)(i).[33]

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[30] *See also* Catherine E. Shoichet, *100+ Immigrants Waited in Line in 10 Cities for Court Dates That Didn't Exist*, CNN, Nov. 2, 2018, https://www.cnn.com/2018/10/31/us/immigration-court-fake-dates/index.html. Under current policy, EOIR is instructed to reject any NTA "in which the time or date of the scheduled hearing is facially incorrect—*e.g.* a hearing scheduled on a weekend or holiday or at a time when the court is not open." Memorandum from James R. McHenry III, Dir., EOIR, "Acceptance of Notices to Appear and Use of the Interactive Scheduling System," at 2 (Dec. 21, 2018), https://www.justice.gov/eoir/file/1122771/download.

[31] *Niz-Chavez*, 141 S. Ct. at 1485.

[32] "Fake" hearing dates refer to both impossible hearing dates and times, such as hearings on weekends, holidays, or outside of the court's business hours (*e.g.*, midnight, 6 a.m.), as well as a hearing date or time that the respondent learns DHS or EOIR never intended to honor. The latter category can be difficult to show factually but could include situations where a respondent appears for court and is told that no NTA has been filed, no hearing was scheduled, or an over-scheduled hearing time. *See, e.g.*, Maria Sacchetti, *Hundreds Show Up for Immigration-Court Hearings That Turn Out Not to Exist*, WASH. POST, Jan. 31, 2019, https://www.washingtonpost.com/local/immigration/hundreds-show-up-for-immigration-court-hearings-that-turn-out-not-to-exist/2019/01/31/e82cc61c-2566-11e9-90cd-dedb0c92dc17_story.html ("[C]onfusion erupted on Oct. 31, when hundreds of immigrants turned up for court nationwide and were told they did not have hearings scheduled."); TRAC Immigration, *DHS Fails to File Paperwork Leading to Large Numbers of Dismissals* (July 29, 2022), https://trac.syr.edu/immigration/reports/691/ (noting that one in six removal cases that DHS initiates are dismissed because DHS fails to file the NTA). In an email to then EOIR director James McHenry obtained by Nico Ratkowski through a FOIA request, then Deputy Chief Immigration Judge Christopher Santoro noted that pursuant to EOIR guidance, IJs could not reject NTAs with facially valid dates and times, "even if they are the result of DHS inadvertently or intentionally making up their own date," and that by not rejecting these NTAs, "we are essentially back in the position of giving DHS carte blanche to make up fake dates."

[33] Practitioners should note that if DHS serves an NTA with a "fake" date DHS does not satisfy the notice requirements through a single document. Either DHS must serve a second NTA that contains a valid date and time or the immigration court must send a hearing notice with the actual time and place. Thus, if DHS chooses to proceed with an NTA bearing a "fake" date it would have to engage in another two-step notice process reminiscent of the scheme rebuked by *Niz-Chavez*. Such a process would also likely cause confusion that would lead to *in absentia* removal orders.

IV. Beyond the Stop-Time Rule: Other Issues Impacted by *Niz-Chavez* and *Pereira*

The *Niz-Chavez* Court's holding is limited to the determination that the government must serve a noncitizen with a single notice that includes all the statutorily required information in INA § 239(a)(1) to trigger the stop-time rule for cancellation of removal. But the Court's rationale for that holding—building upon the statutory interpretation of INA § 239(a) conducted by the *Pereira* Court—gave new life to many of the arguments that practitioners had raised post-*Pereira* before the BIA foreclosed them, and ultimately resulted in important subsequent decisions from the U.S. courts of appeals and BIA.

A. BIA Rules That *Niz-Chavez* Applies to the Post-Conclusion Voluntary Departure Stop-Time Rule

Fortunately, in 2021 the BIA recognized that *Niz-Chavez* applies to the post-conclusion voluntary departure statute's stop-time rule as well. Under the voluntary departure stop-time rule—which is written almost identically to the cancellation stop-time rule—IJs may grant voluntary departure in lieu of a removal order at the conclusion of proceedings if, in addition to meeting other statutory criteria, the noncitizen "has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under [INA § 239(a)]."[34] While *Niz-Chavez* does not explicitly mention the voluntary departure stop-time rule, the BIA in *Matter of M-F-O-*, 28 I&N Dec. 408 (BIA 2021), concluded that a noncitizen accrues physical presence for purposes of post-conclusion voluntary departure "until he is served with a single document providing him with all the information required by [INA §] 239(a)," and that service of a subsequent hearing notice cannot cure a defective NTA in this context.[35] The *M-F-O-* decision followed the reasoning of a Ninth Circuit decision, *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1185 (9th Cir. 2021), that had reached the same result.[36] As a result, practitioners whose clients may benefit from voluntary departure, should carefully review the NTA to determine whether the noncitizen has accrued the required time in the United States.

B. Courts and the BIA Are Split About Whether a Defective NTA is a Sufficient Basis for Rescission and Reopening of a Previously Issued *In Absentia* Removal Order

Whether an IJ may issue an *in absentia* removal order where the respondent received a defective NTA, despite receipt of a subsequent hearing notice, was not before the Court in *Pereira* or *Niz-Chavez*. Like the cancellation stop-time rule at issue in *Pereira*, the statutory provision that permits IJs to proceed *in absentia* when a noncitizen fails to appear at a hearing also cross-

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34 INA § 240B(b)(1)(A).

35 *M-F-O-*, 28 I&N Dec. at 416 (overruling in part *Matter of Viera-Garcia & Ordonez-Viera*, 28 I&N Dec. 223 (BIA 2021)).

36 *See Posos-Sanchez v. Garland*, 3 F.4th 1176, 1185 (9th Cir. 2021) (holding that post-conclusion voluntary departure statute's "physical-presence periods ends only once a noncitizen receives a single document containing the information required by [INA § 239(a)]"). *Cf. Gregorio-Osorio v. Garland*, 27 F.4th 372 (5th Cir. 2022) (remanding at government's request for BIA to consider if voluntary departure stop-time rule is governed by *Niz-Chavez*).

references INA § 239(a)(1). Section 240(b)(5)(A) of the INA states that IJs may issue an *in absentia* removal order if the noncitizen was provided "written notice required under paragraph (1) or (2) of [INA § 239(a)]" and certain other requirements are met. The statute allows for rescission of an *in absentia* removal order if the noncitizen demonstrates in a motion to reopen that they "did not receive notice in accordance with paragraph (1) or (2) of [INA § 239(a)]."[37]

In *Pereira*, the Court rejected the government's argument that the *in absentia* statute's reference to INA § 239(a)(1) meant something different than the stop-time rule's reference to the same provision. The Court found that, "[t]he far simpler explanation, and the one that comports with the actual statutory language and context, is that each of these . . . phrases refers to notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1) [INA § 239(a)(1)]."[38] Following *Pereira*, practitioners argued that if the government had to strictly comply with INA § 239(a) to trigger the stop-time rule, the same strict compliance should be necessary to confer the notice required for an IJ to proceed *in absentia* when a respondent fails to appear at a hearing. In decisions preceding *Niz-Chavez*, the BIA and the Fifth and Sixth Circuits rejected these arguments, concluding that a defective NTA did not require rescission of an *in absentia* removal order based on lack of notice so long as a subsequent hearing notice supplied the missing information.[39]

After *Niz-Chavez* ruled that a subsequent hearing notice cannot "cure" a defective NTA for purposes of the cancellation stop-time rule, the BIA revisited the issue but ultimately came to the same conclusion as it had following *Pereira.* In *Matter of Laparra*, 28 I&N Dec. 425 (BIA 2022), the Board endorsed a narrow reading of *Pereira* and *Niz-Chavez*, holding that rescission was not warranted where DHS served a noncitizen with an NTA that lacked the necessary time and place information under INA § 239(a)(1) because subsequent service of a hearing notice that complied with INA § 239(a)(2) was sufficient "written notice."[40] The *Laparra* decision distinguished *Niz-Chavez* by noting that the Supreme Court had focused heavily on the use of the word "a" preceding "notice to appear" in INA § 239(a). That word led the Court to the conclusion that only a single-document NTA (and not a later-issued hearing notice) could trigger the stop-time rule. In contrast, the BIA reasoned, the *in absentia* statute at INA 240(b)(5)(A) lacked any definite or indefinite article preceding the term "notice." Instead, the statute "mandates the entry of an *in absentia* order of removal . . . where a respondent fails to appear 'after *written notice* required under paragraph (1) or (2) of section 239(a) has been provided.'"[41] Section 239(a)(1), the provision at the heart of *Pereira* and *Niz-Chavez*, describes the NTA's requirements, while section 239(a)(2) is titled "Notice of change in time or place of proceedings" and provides that a noncitizen must be served with a notice specifying the new time or place of proceedings and the consequences for failing to appear. According to the BIA, since the *in*

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37 INA § 240(b)(5)(C)(ii).

38 *Pereira*, 138 S. Ct. at 2118.

39 *Matter of Pena-Mejia*, 27 I&N Dec. 546, 548 (BIA 2019); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551, 553-54 (BIA 2019). *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019); *Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 n.1 (5th Cir. 2018); *see also Molina-Guillen v. U.S. Att'y Gen.*, 758 F. App'x 893 (11th Cir. 2019) (unpublished).

40 *Laparra*, 28 I&N Dec. at 434.

41 *Id.* at 431.

absentia statute does not use the word "a" or "the" preceding "notice," it does not require a discrete act of notice provided in a single document. Instead, because the *in absentia* statute uses the word "or"—referring to notice under INA § 239(a)(1) or INA § 239(a)(2)—an *in absentia* removal order was justified despite a defective NTA so long as a respondent received a statutorily compliant hearing notice from the Immigration Court.

Mr. Laparra filed a petition for review of the BIA's decision, and in 2022 the First Circuit vacated and remanded, concluding under the statute's plain terms IJs may not proceed *in absentia* in cases of a defective NTA, regardless of a subsequent hearing notice supplying the missing information.[42] Nevertheless, the BIA's *Laparra* decision is still binding on IJs outside of the First Circuit, unless the U.S. court of appeals in the relevant jurisdiction has spoken on the question. As of the date of this practice advisory's issuance, three other circuit courts—the Fifth, Ninth, and Eleventh—have considered *Niz-Chavez*'s impact on rescission of *in absentia* removal orders based on lack of notice. The Fifth and Ninth Circuits, like the First Circuit, have concluded that a defective NTA alone—even if a subsequent hearing notice supplies the missing information—provides grounds for notice-based rescission.[43] In contrast, the Eleventh Circuit, with scant discussion of *Niz-Chavez* and *Pereira*, reached the opposite conclusion in *Dacostagomez-Aguilar v. Attorney General*, siding instead with the BIA's reasoning in *Laparra*.[44] The Eleventh Circuit held that to successfully issue a removal order, a noncitizen must show that he "failed to receive the notice for the hearing at which he was ordered removed."[45]

Practitioners should continue to monitor developments in the U.S. courts of appeals on this issue. In the meantime, practitioners outside the First, Fifth, and Ninth Circuits can still pursue notice-based rescission of *in absentia* removal orders where the client's NTA is defective in order to preserve the issue for appeal. Those who practice in the Eleventh Circuit should preserve the arguments in case this question reaches the Supreme Court. In constructing and preserving persuasive defective NTA-based rescission arguments, practitioners should review and incorporate, where helpful, the reasoning of the First, Fifth, and Ninth Circuit decisions. Practitioners may also wish to consult NIPNLG and the Council's practice alert on the *Laparra*

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42 *Laparra-Deleon v. Garland*, 52 F.4th 514, 516 (1st Cir. 2022).

43 *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021); *Singh v. Garland*, 24 F.4th 1315, 1317 (9th Cir. 2022). Since *Rodriguez* and *Laparra* both interpret the statute based on its plain language (rather than through an ambiguity framework), *see Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005), *Rodriguez* continues to govern within the Fifth Circuit and practitioners should rely on it in making notice-based rescission arguments. The Fifth Circuit has continued to follow its holding in *Rodriguez* even after the Board's decision in *Laparra* was issued. *See, e.g., Yanez-Pena v. Garland*, No. 19-60464, 2022 WL 1517045 (5th Cir. May 13, 2022) (per curiam) (relying on *Rodriguez* in granting petition for review of BIA denial of motion to reopen of *in absentia removal* order).

44 *Dacostagomez-Aguilar v. U.S. Att'y Gen.,* 40 F.4th 1312, 1314 (11th Cir. 2022).

45 *Id.*

decision, which offers a number of potential arguments.[46] Practitioners can also access a template motion to rescind an *in absentia* removal order and reopen removal proceedings in light of *Niz-Chavez* by visiting the National Immigration Litigation Alliance website.[47]

The BIA in *Laparra* seems to disavow the Supreme Court's statutory interpretation in *Niz-Chavez*, just as its previous decisions attempted to ignore the Supreme Court's statutory interpretation in *Pereira*.[48] While it is no surprise that the BIA, which is still currently comprised of a Trump administration-selected super majority, has chosen to cabin *Niz-Chavez* to the most restrictive possible reading to avoid benefiting noncitizens with prior orders of removal, it is up to practitioners to preserve and present challenges to the BIA's legally erroneous interpretation of the statute. As a result of such challenges, other U.S. courts of appeals may follow the lead of the First, Fifth, and Ninth Circuits to recognize that a defective NTA is grounds for rescission of an *in absentia* order.

C. Moving to Terminate Based on Defective NTAs

In light of *Pereira* and *Niz-Chavez*'s language about the importance of statutorily compliant NTAs, many practitioners filed motions to terminate removal proceedings that were commenced through a defective NTA. There were two common legal theories for termination: (1) arguing that a defective NTA fails to vest jurisdiction with the immigration court; and (2) arguing that a defective NTA violates a claim-processing rule. This section will first briefly describe the jurisdiction argument, which has been rejected by U.S. courts of appeals and the BIA and will then describe the state of the law with respect to the claim-processing argument.

1. Motions to Terminate Based on the Argument that IJs Lack Jurisdiction Over Proceedings Commenced by Defective NTAs

After the Supreme Court issued *Pereira*, many noncitizens filed motions to terminate removal proceedings, arguing that if an NTA that fails to include a time or place of hearing "is not a 'notice to appear'"[49] for purposes of the stop-time rule, then the defective NTA cannot confer jurisdiction over the proceedings. These arguments largely centered on a regulation, 8 C.F.R. § 1003.14(a), which states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]." Practitioners argued that an NTA—the "charging document," *see* 8 C.F.R. § 1003.13—that lacks time or place information "is not a 'notice to appear under section 1229(a),'" *Pereira*, 138 S.Ct.

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46 *See* NIPNLG, Council, *Practice Alert:* Matter of Laparra, *28 I&N Dec. 425 (BIA 2022)* (Feb. 8, 2022), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2022_8Feb-Matter-of-Laparra.pdf.

47 The template, written in June 2021, is available on the National Immigration Litigation Alliance's (NILA) practice advisory webpage, https://immigrationlitigation.org/practice-advisories/.

48 *See, e.g., Mendoza Hernandez*, 27 I&N Dec. 520.

49 *Pereira*, 138 S. Ct. at 2110 (quoting 8 U.S.C. § 1229b(d)(1)(A)).

at 2110 (quoting 8 U.S.C. § 1229b(d)(1)(A)), and thus does not vest jurisdiction in the immigration court pursuant to 8 C.F.R. § 1003.14(a).

The BIA and all U.S. courts of appeals that addressed the issue have rejected the argument that, under *Pereira*, a defective NTA does not vest the immigration court with jurisdiction.[50] For example, in *Matter of Bermudez-Cota*, the Board held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing 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*."[51] The BIA noted that 8 C.F.R. § 1003.15(b), the regulation listing the requirements for an NTA, "does not mandate that the time and date of the initial hearing must be included in that document."[52] Then, in *Matter of Rosales Vargas & Rosales Rosales*, the BIA concluded that even where an NTA lacks the immigration court's address—information specifically required by 8 C.F.R. § 1003.15(b)(6)—this deficiency can be remedied with a subsequent hearing notice.[53]

After *Niz-Chavez*, many U.S. courts of appeals and the BIA re-affirmed their rejection of the jurisdictional argument.[54] In *Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021), the BIA ruled that a defective NTA does not deprive the immigration court of jurisdiction. The decision came after a BIA amicus invitation on the question following the *Niz-Chavez* ruling. In *Arambula-Bravo*, the BIA decided that *Niz-Chavez* has no impact on immigration court

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50 *See, e.g.*, *Rosales Vargas*, 27 I&N Dec. at 748-52; *Bermudez-Cota*, 27 I&N Dec. at 443-45; *Goncalves Pontes v. Barr*, 938 F.3d 1, 3-7 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110-12 (2d Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 132-34 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 358-62 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 689-91 (5th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 311-15 (6th Cir. 2018); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1159-62 (9th Cir. 2019); *Martinez-Perez v. Barr*, 947 F.3d 1273, 1278-79 (10th Cir. 2020); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1155-57 (11th Cir. 2019); *see also Matter of L-E-A-*, 28 I&N Dec. 304, 306 n.3 (A.G. 2021).

51 27 I&N Dec. at 447 (emphasis added).

52 *Id.* at 445.

53 27 I&N Dec. at 749; *see also id.* at 750 ("We should read 8 C.F.R. § 1003.15(b)(6) in conjunction with 8 C.F.R. § 1003.18(b), which provides that the notice to appear should provide the 'time, place and date of the initial removal hearing, where practicable.'").

54 *See, e.g.*, *Laparra-Deleon*, 52 F.4th at 519; *Chery v. Garland*, 16 F.4th 980, 987 (2d Cir. 2021); *Chavez-Chilel v. U.S. Att'y Gen.*, 20 F.4th 138, 143-44 (3d Cir. 2021); *Perez Vasquez v. Garland*, 4 F.4th 213, 220 (4th Cir. 2021); *Maniar v. Garland*, 998 F.3d 235, 242 n.2 (5th Cir. 2021); *Ramos Rafael v. Garland*, 15 F.4th 797, 800-01 (6th Cir. 2021); *Arreola-Ochoa v. Garland*, 34 F.4th 603, 607 (7th Cir. 2022); *Tino v. Garland*, 13 F.4th 708, 709 n.2 (8th Cir. 2021) (per curiam); *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1191-92 (9th Cir. 2022); *Castelan-Cruz v. Garland*, No. 21-9537, 2022 WL 803975 at *2 (10th Cir. Mar. 17, 2022) (unpublished); *Simpson v. U.S. Att'y Gen.*, 7 F.4th 1046, 1051 (11th Cir. 2021); *Matter of Fernandes*, 28 I&N Dec. 605, 607 (BIA 2022).

jurisdiction and does not disturb the BIA's prior precedent in *Matter of Bermudez-Cota* and *Matter of Rosales Vargas & Rosales Rosales*.[55]

Nonetheless, practitioners may still wish to make these arguments to preserve them for judicial review. Because the *Niz-Chavez* decision focuses heavily on the statutory requirements found at INA § 239(a)(1) rather than the regulations, and because many courts have concluded that only Congress, not the agency through regulations, can define or limit the agency's jurisdiction,[56] practitioners may want to ground their arguments solely on the statute. Some courts, in reaching the conclusion that the statute is not jurisdictional, have relied on the absence of a clear statement from Congress "that the immigration court's jurisdiction depends on the content of notices to appear."[57] In section 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a transitional rule governing removal proceedings, Congress specified that the newly described NTA in INA § 239 "confer[s] jurisdiction on the immigration judge."[58] Practitioners could point out this explicit congressional statement in asking courts to reconsider previous decisions concluding that the statute does not make jurisdiction immigration proceedings dependent on the NTA.[59]

That said, if the BIA or courts of appeals were to find that the immigration court lacked jurisdiction over proceedings commenced with defective NTAs, then tens of thousands of cases would be amenable to termination and even decisions where EOIR granted relief might be called into question.[60] These extraordinary policy concerns may contribute to courts' rejection of arguments that would lead to massive terminations of proceedings based on lack of jurisdiction.

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55 28 I&N Dec. at 390-92.

56 *Cortez*, 930 F.3d at 360 (stating that the attorney general cannot, by regulation, "tell[] himself what he may or may not do") (quotation omitted); *Pierre-Paul*, 930 F.3d at 692 (the agency cannot define the scope of its own power); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) (same); *Perez-Sanchez*, 935 F.3d at 1156 (same); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015 (10th Cir. 2019) (attorney general cannot unilaterally restrict congressionally-delegated agency jurisdiction).

57 *Pierre-Paul*, 930 F.3d at 692.

58 IIRIRA, Pub. L. No. 104-208, Div. C, § 309(c)(2), 110 Stat. 3009, 3009-626 (Sept. 30, 1996).

59 *But see United States v. Lira-Ramirez*, 951 F.3d 1258, 1262 (10th Cir. 2020) (rejecting argument concerning the transitional provision because language was not a "clear statement" of jurisdictional power).

60 *See, e.g.*, *Nkomo*, 930 F.3d at 134 ("So while *Pereira*'s holding expands the class of those eligible for discretionary relief in removal proceedings, Nkomo's argument would invalidate scores of removal orders (and, presumably, grants of relief)."); *Bermudez-Cota*, 27 I&N Dec. at 444 (noting that the *Pereira* decision "did not indicate that proceedings involving similar notices to appear, including those where cancellation of removal, asylum, or some other form of relief had been granted, should be invalidated"); *Rosales Vargas*, 27 I&N Dec. at 752 n.11 (noting that under respondents' theory, "proceedings involving grants of relief" initiated by a defective NTA would be ultra vires).

2. Moving to Terminate Based on the Argument That a Defective NTA Violates a Claim-Processing Rule

Although courts and the BIA have universally agreed that INA § 239(a)(1)'s NTA requirements are not jurisdictional, in the wake of *Pereira* and *Niz-Chavez* an increasing number have concluded that the statute's NTA requirements are claim-processing rules.[61] "[A] claim-processing rule is one that "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[62] A party's "failure to comply with [a claim-processing rule] may be grounds for dismissal of the case . . . . But "such a failure may also be waived or forfeited."[63] A violation of a claim-processing rule, such as the initiation of removal proceedings through a defective NTA, may therefore serve as a basis for a motion to terminate a case. As described below, the BIA's 2022 decision *Matter of Fernandes* governs motions to terminate outside of the Seventh Circuit.[64]

The Seventh Circuit has developed its own body of law about claim-processing rule violations in the defective NTA context. While the BIA and Seventh Circuit agree that timely objection to the NTA can be a basis for termination, they disagree on whether termination is *required* when respondents timely object, and on whether respondent who make untimely objections may nevertheless be entitled to termination in certain circumstances. In *Ortiz-Santiago*, the court held that the INA § 239(a)(1)'s NTA requirements in § 239(a)(1) are claim-processing rules and that "[r]elief will be available for those who make timely objections, as well as those whose timing is excusable and who can show prejudice."[65] Thus, in the Seventh Circuit, IJs must terminate the removal proceedings of noncitizens who timely object and seek termination based on an NTA that does not comply with 239(a)(1).[66] Noncitizens who timely object need not make a prejudice

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61 *Chavez-Chilel*, 20 F.4th at 143; *Perez-Sanchez*, 935 F.3d at 1150 ("[T]he regulations set forth a claim-processing rule as opposed to a jurisdictional one. We recognize § 1229(a)(1) as setting out a claim processing rule as well."); *Martinez-Perez*, 947 F.3d at 1278 (Agreeing that "the requirements relating to notices to appear are non-jurisdictional, claim-processing rules."); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) ("A failure to comply with the statute dictating the content of a Notice to Appear is not one of those fundamental flaws that divests a tribunal of adjudicatory authority. Instead, just as with every other claim-processing rule, failure to comply with that rule may be grounds for dismissal of the case."); *Matter of Fernandes*, 28 I&N Dec. 605, 608-09 (BIA 2022). While the BIA, Third, Seventh, Tenth, and Eleventh Circuits concluded that INA § 239(a)(1)'s NTA requirements are claim-processing rules, the Fourth and Fifth Circuits thus far have only concluded that the regulatory NTA requirements are claim-processing rules. *Cortez*, 930 F.3d at 355; *Pierre-Paul*, 930 F.3d at 691.

62 *Ortiz-Santiago*, 924 F.3d at 963 (*quoting Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

63 *Ortiz-Santiago*, 924 F.3d at 963 (internal citation omitted).

64 *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022).

65 *Ortiz-Santiago*, 924 F.3d at 965.

66 *See Arreola-Ochoa*, 34 F.4th at 608 ("[T]he proceeding must be dismissed for failure to comply with a mandatory claims-processing rule.").

showing to be successful.[67] The Seventh Circuit uses a "holistic and circumstance-specific analysis of timeliness,"[68] but that raising the issue when immigration court proceedings have concluded is untimely.[69] In the Seventh Circuit, factors that an IJ consider in assessing timeliness include, as stated in *Arreola-Ochoa*:

- how much time passed, in absolute terms, between the receipt of the Notice and the raising of the objection;
- did the immigration court set a schedule for filing objections, and did the objection comply with that schedule;
- how much of the merits had been discussed or determined prior to the objection?[70]

Yet respondents in the Seventh Circuit whose objection to the NTA is not deemed timely might still be able to obtain termination if they can show excusable delay and prejudice.[71] Under the Seventh Circuit's case law, a noncitizen making an untimely objection must show that prejudice resulted from the defective NTA itself, such as by "depriv[ing] the [noncitizen] of the ability to attend or prepare for the hearing, including the ability to secure counsel."[72] The Seventh Circuit has provided non-exclusive factors to be considered when considering whether untimeliness is excusable and prejudice can be shown, including the respondent's language skills and access to translation services; whether the respondent had legal counsel; and whether the respondent "file[d] any prior objections but omit[ted] this objection."[73]

The BIA's approach differs from the Seventh Circuit's and applies to all respondents whose removal proceedings take place in jurisdictions other than the Seventh Circuit. In *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022), the BIA finally weighed in on the question of whether violations of INA § 239(a)(1) were grounds for termination under the claim-processing rule theory. The BIA agreed with the Seventh Circuit that INA § 239(a)(1)'s time and place requirement is a claim-processing rule, not a jurisdictional requirement, and that a respondent who timely objects need not show any prejudice caused by the missing time and place

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67 *De La Rosa v. Garland*, 2 F.4th 685, 688 (7th Cir. 2021) (holding that the agency erred by requiring the petitioner—who had timely objected to the defective NTA in his case—to also show prejudice).

68 *Arreola-Ochoa*, 34 F.4th at 608.

69 *Id.*

70 *Id.* at 609. In this decision, the Seventh Circuit applied these factors and others to conclude that a respondent's objection to a defective NTA almost three years after his removal proceedings were initiated, nearly one year after his master calendar hearing, and three days before his merits hearing was not timely, noting that Mr. Arreola-Ochoa had "access to counsel and translation services." *Id.*

71 *Ortiz-Santiago*, 924 F.3d at 965.

72 *Hernandez-Alvarez v. Barr*, 982 F.3d 1088, 1096 (7th Cir. 2020); *see also, e.g.*, *Meraz-Saucedo v. Rosen*, 986 F.3d 676, 683–84 (7th Cir. 2021).

73 *Arreola-Ochoa*, 34 F.4th at 609.

information to a deficient NTA prior to the closing of pleadings.[74] In assessing timeliness, instead of adopting the Seventh Circuit's circumstance-specific approach, the BIA held that generally, an objection to a defective NTA is timely if raised before the closing of pleadings with the IJ.[75] The BIA also diverged from the Seventh Circuit's approach with respect to whether there could ever be relief for respondents whose objection was not timely, and the appropriate remedy for this type of claim-processing rule violation, when timely raised. On the former, the BIA concluded that only those respondents who timely objected to the defective NTA would be entitled to relief, rejecting the Seventh Circuit's allowance for those showing excusable delay and prejudice.[76]

On the question of remedy, in contrast to the Seventh Circuit's case law *requiring* termination when a respondent timely objects, the BIA ruled that in response to timely objections IJs should "exercise judgment and discretion to enforce [the claim-processing] rule as he or she deems appropriate to promote the rule's underlying purpose."[77] Therefore, under *Fernandes*, IJs *may* decide to terminate proceedings because of the deficient NTA, or they may allow DHS to attempt to remedy the noncompliant NTA. The *Fernandes* decision did not elaborate on how IJs should decide whether termination was the appropriate remedy, and if not, what other remedies might even be available.[78] In the wake of *Fernandes*, practitioners outside of the Seventh Circuit report mixed success with motions to terminate based on timely objections to defective NTAs. In some cases, IJs have terminated proceedings[79] while in other cases, IJs have been giving DHS the opportunity to "cure" the defect. In some cases, DHS has been purporting to "cure" the defective NTA by, for example, filing Form I-261, "Additional Charges of Inadmissibility/Deportability" or by hand-writing the missing information onto the NTA after the fact. Practitioners have argued, and some IJs have agreed, that DHS has no authority to amend an

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74 *Id*. at 608, 611. The BIA distinguishes its decision in *Rosales Vargas*, 27 I&N Dec. at 747, because that case considered the claim-processing rule in the regulations, instead of the statute. *Id*. at 612.

75 *Id*. at 610-11. The BIA left open as not before it the situation where a respondent is not mentally competent. *Id.* at 611 n.4. *See also Matter of Nchifor*, 28 I&N Dec. 585, 589 (BIA 2022) (concluding that raising the objection for the first time in a motion to reopen was not timely).

76 *See Fernandes*, 28 I&N Dec. at 609 ("[I]f 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."). *See also Nchifor*, 28 I&N Dec. at 588-89 (describing the Seventh Circuit decisions in *Ortiz-Santiago* and *Arreola-Ocho* and expressly stating the BIA's disagreement with the Seventh Circuit's approach).

77 *Fernandes*, 28 I&N Dec. at 613.

78 For a critique of the *Fernandes* decision's curing discussion, and an argument that the only remedy is termination, see Jeffrey S. Chase, *Deciphering Matter of Fernandes* (Dec. 5, 2022), https://www.jeffreyschase.com/blog/2022/12/5/deciphering-matter-of-fernandes; *see also Fernandes*, 28 I&N Dec. at 618, 625, 628 (Grant, Appellate IJ, dissenting) (critiquing the majority's holding, stating, "the majority leaves the parties and the Immigration Judge at sea to determine what an appropriate remedy would be in this case").

79 For example, IJ Kaufman at the Denver Immigration Court terminated proceedings pursuant to *Matter of Fernandes* in a written decision dated January 10, 2023.

NTA in this way and that doing so violates *Niz-Chavez*'s prohibition against notice-by-installment.[80]

In light of the above precedents, practitioners wishing to seek termination based on a defective NTA under a claim-processing theory should consider the following:

- To ensure that their claim-processing objection is deemed timely, practitioners making this argument should object to the defective NTA at the time of pleadings and refuse to concede proper NTA service.[81]
- Practitioners should argue that termination is the only appropriate remedy, object to DHS's attempts to "cure" the NTA deficiency, and preserve arguments for appellate review. In the Seventh Circuit, practitioners should argue that termination is required where the objection is timely made.
- In the Seventh Circuit, if the objection was untimely, practitioners should explore arguments for excusable delay and prejudice. Outside of the Seventh Circuit, practitioners could still explore arguments for termination despite a "late" objection, such as in cases of respondents who lack competency or in cases where pleadings were never taken and the respondent raises the defective NTA years after receiving an *in absentia* removal order.
- Before seeking termination, practitioners should consider the pros and cons based on the client's individual circumstances and goals, and likely outcomes, and should communicate these points to the client so the client can make an informed decision about

80 *See* 8 C.F.R. § 1240.10(e) (allowing DHS to file additional *charges of removability*); *see also* § 1003.30 (Immigration Court Rules of Procedure, same).

81 *Fernandes*, 28 I&N Dec. at 611 ("[T]he written pleading must include any objection to the absence of time or place information, or the objection will be deemed waived").

whether to pursue termination.[82] Even if the IJ terminates, DHS could file a new, statutorily-compliant NTA.[83]

V. Procedural Considerations When Raising Arguments Based on *Niz-Chavez*

As discussed above, the *Niz-Chavez* decision renders many individuals newly eligible for cancellation of removal and provides new arguments in other contexts, such as rescission of an *in absentia* removal order and termination based on a defective NTA. To benefit from the holding in *Niz-Chavez*, individuals must alert the adjudicator with jurisdiction over the case of the new eligibility for relief. The process for doing so depends on the case's procedural posture.

A. Cases Pending Before IJs and the BIA

Whether to raise a *Niz-Chavez*-based argument orally or in a brief depends on the posture of the removal proceedings and the IJ's approach with regard to the case flow processing policy memo.[84] If the IJ has scheduled a master calendar hearing, the practitioner may choose to raise the *Niz-Chavez*-based argument orally at that future hearing. Practitioners may also raise *Niz-Chavez*-based arguments in writing via written pleadings or objections. If the IJ has scheduled an individual hearing, practitioners may file a brief presenting the *Niz-Chavez*-based argument and, where relevant, attach the cancellation application or proof of voluntary departure eligibility. Practitioners should abide by the Immigration Court Practice Manual, especially the 15-day filing deadline for non-detained individual hearings,[85] and follow any applicable local rules or

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[82] The Asylum Office takes the position that it lacks jurisdiction over individuals with expedited removal orders in removal proceedings if an IJ terminates proceedings based on "technical flaws in the NTA." For further discussion, see the practice advisory by AIC, Dobrin & Han, PC, NWIRP, *USCIS v. EOIR: Jurisdiction over Asylum Applications for Individuals Who Were in Expedited Removal Proceedings or Issued Notices to Appea*r, Lafferty memo addendum, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/uscis_v_eoir_jurisdiction_over_asylum_applications_for_individuals_who_were_in_expedited_removal_proceedings_or_issued_notices_to_appear.pdf. In a recent liaison meeting with the Chicago Asylum Office, that office confirmed it does not believe it has jurisdiction in this circumstance following a *Fernandes* termination. *See also* Asylum Division, USCIS, Affirmative Asylum Procedures Manual, § III.L.6.a., at 75 (May 17, 2016), https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf. ("The asylum office only has jurisdiction over an affirmatively filed Form I-589 for an individual who was also issued an NTA if an Immigration Judge terminates the removal proceedings for substantive or nontechnical reasons. The expedited removal order terminates when an NTA is properly filed with the immigration court.")

[83] *Fernandes*, 28 I&N Dec. at 616 ("DHS may decide it is best to request dismissal without prejudice and file a new notice to appear.").

[84] *See* Memorandum from Tracy Short, Chief Immigration Judge to All of OCIJ on Revised Case Flow Processing Before the Immigration Courts, EOIR PM 21-18 (Apr. 2, 2021), https://www.justice.gov/eoir/book/file/1382736/download.

[85] Immigration Court Practice Manual, Ch. 3.1(b)(2) (Sept. 6, 2022), https://www.justice.gov/eoir/book/file/1528921/download.

individual IJ practices. If the noncitizen acquires the required period of continuous residence or physical presence after the IJ has already conducted the individual hearing on another type of relief, but the IJ has not issued a decision,[86] practitioners should move for another individual hearing for the IJ to consider cancellation relief or post-conclusion voluntary departure, as relevant.[87] If the IJ has issued a removal order, practitioners should consider the post-order options discussed below.

Individuals with cases who acquire the required period of physical presence or continuous residence while their case is pending on appeal to the BIA should file a motion to remand. A motion to remand seeks to return jurisdiction of a case pending before the BIA to the IJ for consideration of newly available evidence or newly acquired eligibility for relief.[88]

In this situation, a motion to remand is required because the client was not eligible for cancellation of removal or voluntary departure at the time the case was decided before the IJ, because at that time they lacked the requisite period of physical presence or continuous residence. In this example, after the IJ hearing, the new facts arose—they gained the requisite time completed in the United States—making the client eligible for cancellation or voluntary departure. Practitioners may file a motion to remand at any time while the appeal is pending at the BIA and must include new evidence or applications for relief with the motion.[89] In granting a motion to remand, the BIA may consolidate the motion with the underlying appeal.

Practitioners may also wish to seek termination of the removal proceedings by arguing that that the defective NTA violates a claim-processing rule. Practitioners should take care to make this argument early in the proceedings and before the close of pleadings. If the IJ denies the motion to terminate, practitioners may wish to preserve the argument in any future BIA appeal.[90]

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[86] This includes situations where the IJ has reserved a decision in a cancellation case because of the annual numerical cap but has indicated they are inclined to grant. *Cf.* Memorandum from MaryBeth Keller, Chief IJ, to All IJs, Court Administrators, Att'y Advisors and Judicial Law Clerks and Immigr. Court Staff on Operating Policies and Procedures Memorandum 17-04, Applications for Cancellation of Removal or Suspension of Deportation That Are Subject to the Cap 3 (Dec. 20, 2017), https://www.justice.gov/eoir/file/oppm17-04/download.

[87] *See Matter of Chen*, 28 I&N Dec. 676, 679 (BIA 2023) (holding that issuance of a final order of removal does not stop the accrual of time).

[88] *See* BIA Practice Manual, Ch. 5.8(a) (Nov. 14, 2022), https://www.justice.gov/eoir/book/file/1528926/download; *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992) (recognizing motions to remand for cases on appeal with the BIA and noting that substantive motion to reopen standard applies); *see also Matter of L-O-G-*, 21 I&N Dec. 413, 414 (BIA 1996) (setting forth general standard for reopening).

[89] BIA Practice Manual §§ 5.8(a), 4.8(b), https://www.justice.gov/eoir/book/file/1528926/download (last updated Aug. 16, 2022).

[90] Practitioners could pursue an interlocutory appeal on a denial of a motion to terminate, but it is unlikely that the BIA will entertain an interlocutory appeal. *See Matter of K-*, 20 I&N Dec. 418, 419–20 (BIA 1991).

B. Cases With Final Orders by IJs or the BIA

Whether or not an individual appealed a removal order to the BIA or the court of appeals, practitioners may consider a motion to reopen for a client who acquired the required period of continuous residence or physical presence after the individual immigration court hearing. However, practitioners should be aware of the numerical limitations and filing deadlines for motions to reopen. Congress afforded all individuals the opportunity to file a motion to reopen within 90 days of the final order.[91] Motions to reopen are appropriate to present new evidence, which in this scenario would be new eligibility for cancellation or voluntary departure.[92] Motions to reopen denied by IJs are appealable to the BIA. BIA decisions affirming an IJ denial of a motion or denying a motion in the first instance are reviewable on petition for review (PFR) to the U.S. court of appeals with jurisdiction over the immigration court. Practitioners with clients newly eligible for cancellation should consider filing a motion to reopen presenting the client's defective NTA, a declaration from the client regarding continuous physical presence or continuous residence as new evidence of cancellation eligibility, and the cancellation application. Practitioners should ensure that the motion includes a cancellation application and evidence of eligibility for relief, or else risk summary denial by the IJ or BIA.[93] Similarly, practitioners with clients newly eligible for post-conclusion voluntary departure should consider filing a motion to reopen presenting the client's defective NTA and a declaration from the client regarding the client's eligibility including regarding continuous physical presence.[94] Generally, it is best practice to file the motion to reopen within 90 days of discovering facts that merit equitable tolling of the deadline, which in this case would be the date on which the client acquired the required period of continuous residence or physical presence.

Many individuals may complete the required period of continuous residence or physical presence—and thus become eligible for cancellation or post-conclusion voluntary departure—more than 90 days after receiving a final removal order and thus after the 90-day deadline for a motion to reopen. Practitioners who were unable to comply with those deadlines may still

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91 INA § 240(c)(7). In the Seventh Circuit, which has concluded that INA § 239(a)(1) is a claim-processing rule, practitioners may want to argue excusable delay and prejudice in motion to reopen cases in which the respondent did not timely challenge the defective NTA during the previous immigration court proceedings. *See Chen v. Barr*, 960 F.3d 448, 449 (7th Cir. 2020).

92 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3).

93 For more information on motions to reopen, see, for example, Council, NILA, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Apr. 25, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf; CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Oct. 12, 2020), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders.

94 *See also Nchifor*, 28 I&N Dec. at 589-90 (granting motion to reopen for consideration of voluntary departure in light of *Niz-Chavez*).

present an equitable tolling argument based on facts specific to the client.[95] Both the time and numerical limitations on motions to reopen are subject to equitable tolling, a longstanding principle through which courts can excuse failure to comply with non-jurisdictional deadlines that litigants miss despite diligent efforts to comply. Therefore, if more than 90 days have elapsed since a removal order became final, individuals nevertheless may file a statutory motion to reopen if they successfully make—and document with evidence—an argument that the filing deadline should be equitably tolled. In general, to succeed on an equitable tolling argument, a noncitizen must demonstrate an extraordinary circumstance that prevented timely filing and that they acted with due diligence in pursuing their rights.[96] In addition to a tolling argument, practitioners should also include a *sua sponte* reconsideration or reopening argument in the alternative.[97]

In absentia orders of removal are subject to different rescission and reopening rules.[98] There is no deadline to file a motion to rescind and reopen *in absentia* removal orders based on lack of notice.[99] Practitioners may wish to file a motion to rescind and reopen based on the argument that a defective NTA does not provide the statutorily required notice. Such a motion would not be subject to a filing deadline. Practitioners could also file a concurrent motion to terminate pursuant to *Matter of Fernandes* with the motion to rescind and reopen.[100] Practitioners may include an alternative request for *sua sponte* reopening, especially when claiming new eligibility for cancellation relief. If claiming new eligibility for relief in the motion to rescind and reopen, practitioners should include the cancellation application and evidence of *prima facie* eligibility.

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95 Equitable tolling claims should be well documented, including through declarations from the noncitizen detailing all efforts made to pursue their claims and/or obstacles that prevented them from timely filing. *See, e.g.*, *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344-45 (5th Cir. 2016) (stating that the BIA should give due consideration to the specific facts and realities of the case and should not apply the equitable tolling standard "too harshly"); *Gonzalez-Cantu v. Sessions*, 866 F.3d 302, 305 (5th Cir. 2017).

96 *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 649 (2010) (stating that a petitioner is entitled to equitable tolling only if he shows (1) that "he has been pursuing his rights diligently" and (2) that "some extraordinary circumstance stood in his way" and prevented timely filing).

97 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1); *see also Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999) (stating that *sua sponte* is "an extraordinary remedy reserved for truly exceptional situations"); *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997) (noting that the BIA can "reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy.").

98 INA § 240(b)(5)(C).

99 INA § 240(b)(5)(C)(ii). Motions to rescind and reopen *in absentia* removal orders based on exceptional circumstances must be filed within 180 days of the IJ's final order. However, the 180-day deadline for seeking rescission based on exceptional circumstances also is subject to equitable tolling.

100 Immigration courts disfavor compound motions. Immigration Court Practice Manual Ch. 5.4, https://www.justice.gov/eoir/reference-materials/ic/chapter-5/4 ("Time and number limits are strictly enforced.").

Motions to reopen filed jointly with DHS also avoid the time and number bars for motions to reopen. Practitioners should consider asking Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) to join in motions to reopen as an act of prosecutorial discretion. On June 9, 2021, DHS issued "Interim Litigation Position Regarding Motions to Reopen in Light of the U.S. Supreme Court Decision in *Niz-Chavez v. Garland*" instructing ICE attorneys appearing before EOIR to exercise prosecutorial discretion on a case-by-case basis by joining or not opposing a motion to reopen that demonstrates that the respondent is *prima facie* eligible for cancellation of removal.[101] The guidance instructed ICE attorneys to join or not oppose these motions to reopen until 180 days from the date of the *Niz-Chavez* decision, which was October 26, 2021.[102] While this deadline has passed, practitioners should consider requesting that ICE attorneys join their motion to reopen on a case-by-case basis, citing their client's individual circumstances and how reopening aligns with OPLA's stated policies regarding prosecutorial discretion.[103] EOIR will then decide whether to reopen such cases, and the June 11, 2021 EOIR memorandum titled "Effect of Department of Homeland Security Enforcement Priorities," reminds IJs that "[t]he role of the immigration court and the BIA, like all other tribunals, is to resolve disputes" and that "it is imperative that EOIR's adjudicators use adjudication resources to resolve questions before them in cases that remain in dispute."[104] Indeed, unopposed motions to reopen and joint motions to reopen do not present questions that remain in dispute.

C. Cases Before the Courts of Appeals

Noncitizens who have recently acquired the requisite period of continuous residence or physical presence and who have PFRs pending, such as an appeal of a denied asylum application, may wish to confer with opposing government counsel to seek an unopposed motion to remand for consideration of new *prima facie* cancellation or post-conclusion voluntary departure eligibility. In this scenario, it is advisable to file a motion to reopen with the BIA based on the relief the noncitizen is newly eligible for.[105] If the PFR is at the briefing stage, practitioners should file a motion with the circuit court to hold PFR briefing in abeyance pending the BIA's adjudication of

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101 "ICE Interim Litigation Position Regarding Motions to Reopen in Light of the U.S. Supreme Court Decision in *Niz-Chavez v. Garland*" (June 9, 2021), https://www.ice.gov/legal-notices.

102 *Id*. Note that if ICE OPLA joins a motion to reopen, there is no motion to reopen filing fee. *See* 8 CFR § 1003.24(b)(2)(vii).

103 For more information on making prosecutorial discretion requests to OPLA, see NIPNLG and Immigrant Legal Resource Center's practice advisory, "Advocating for Prosecutorial Discretion in Removal Proceedings Under the Doyle Memo" (July 2022), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2022_21June-Doyle-memo-advisory.pdf.

104 Memorandum from Jean King, Acting Director, EOIR, "Effect of Department of Homeland Security Enforcement Priorities" (June 11, 2021), https://www.justice.gov/eoir/book/file/1403401/download.

105 *See, e.g.*, *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 63 (1st Cir. 2013) (a court must "allow[] the agency the first opportunity to correct its own bevues").

the motion to reopen. In this situation, practitioners should attach the motion to reopen as an exhibit to the abeyance motion.

VI. Conclusion

The Supreme Court's *Niz-Chavez* decision signals to the BIA and U.S. courts of appeals that gave *Pereira* its narrowest possible reading that they erred. It is clear following *Niz-Chavez* that many noncitizens whose ability to seek cancellation of removal or post-conclusion voluntary departure who were foreclosed by the stop-time rule, may now have the ability to seek these forms of relief. Similarly, some federal circuit courts have already found *Niz-Chavez* to have broader implications for those filing motions to terminate or motions to reopen or rescind *in absentia* removal orders. It is likely that issues surrounding defective NTAs will continue to be litigated for some time, and practitioners should be certain to preserve every possible issue for appeal as answers to the many questions raised by *Pereira* and *Niz-Chavez* continue to be resolved by the courts.