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Niz-Chavez v. Garland – The Next Chapter in the Same Story Turning Square Corners and the Evolving Riddle of Proper Immigration Notice

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I. Anything goes: the pre-*Niz-Chavez* charging landscape

In 2018, the Supreme Court issued an opinion in *Pereira v. Sessions* addressing how the Department of Homeland Security (DHS) must fill out a form.[1] This seemingly pedestrian question upset over two decades of established agency practice and raised questions about the legal validity of many thousands or even millions of immigration proceedings.

The form addressed in *Pereira*, called a "notice to appear" (NTA), is issued by the DHS to a noncitizen[2] whom the agency wishes to remove from the United States. The form informs the noncitizen that she needs to attend a removal hearing before an Immigration Judge (IJ) to defend her right to remain in the United States. Subsection 239(a) of the Immigration and Naturalization Act (INA), 8 U.S.C. §1229(a), requires the DHS to provide the noncitizen certain required information concerning the factual basis for the ground(s) of removal, the charged ground(s) of removal, as well as filling in three simple blanks on the form: the *place*, the *date*, and the *time* at which a noncitizen must appear before an IJ—i.e., information necessary for the noncitizen to know when and where to attend her first removal hearing.

The problem was that the DHS had a decades-long practice of failing to state on the NTA the date and the time (and frequently the place) of the removal hearing and instead writing on the blank spots "TBD" (i.e., to be determined) and then, at some unspecified later time relying on an immigration court to mail the noncitizen a notice of hearing (NOH) that provided the missing information.

In his removal case, Mr. Pereira had asked the IJ to grant him a form of immigration relief known as *cancellation of removal*. To be eligible for this relief from removal, a noncitizen must have physically resided in the United States for at least 10 years, among other requirements. Mr. Pereira had physically resided in the U.S. for 13 years, but he had been served the NTA prior to accumulating ten years of physical presence. On this ground, the IJ, the BIA and the First Circuit Court of Appeals all agreed that Mr. Pereira had ran afoul of the *stop-time rule*, under which issuance of a NTA stops the clock on the accrual of physical presence for purposes of eligibility.[3]

Mr. Pereira countered that the NTA issued to him did not comply with the requirements of the statute because it failed to state the information concerning place, time, and date of his removal hearing as required by the statute; as such it was a defective NTA (or in the nomenclature of the law was noncompliant).

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[1] *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

[2] Throughout this Paper, I use the terms noncitizen, alien, and respondent interchangeably.

[3] INA §239(a), 8 U.S.C. §1229(a).

According to Mr. Pereira, an NTA that did not comply with the statute could not trigger the stop-time rule.

The Supreme Court agreed, broadly interpreting what constitutes a valid NTA. The Court held that without that required information (i.e., place, time, and date) in the NTA, the DHS had *not* provided Mr. Pereira with a statutorily compliant NTA.

The Board of Immigration Appeals (BIA or Board) and federal courts reacted swiftly to limit the reach of *Pereira*'s holding so that it would have the most minimal practical effects, thus staving off the flood of motions from the many noncitizens who, like Mr. Pereira, had received noncompliant NTAs lacking information concerning *when* and *where* to appear for their removal proceedings. Because *Pereira*'s analysis and holding had focused on the stop-time rule and eligibility for cancellation of removal, most courts refused to apply its interpretation of the requirements of §239(a) outside of that context—especially to challenges to an immigration court's jurisdiction, as that would have likely invalidated tens of thousands of removal cases with noncompliant NTAs.

About half the federal circuit courts considering how to apply *Pereira* found that any defect in the NTA caused by a failure to include the *when* and the *where* is "cured" by an immigration court's subsequent issuance of an NOH that included the date and time of the removal proceedings (a matter not reached by *Pereira*). These rulings limited the reach of *Pereira* considerably, permitting only a handful more noncitizens to apply for cancellation of removal: those who reached the ten-year physical presence mark *after* the noncompliant NTA was issued but *before* the curing NOH was issued.

For most noncitizens, these BIA and circuit court rulings entirely undermined *Pereira*'s import, even in the context of eligibility for cancellation of removal. But about three years after *Pereira*, the Supreme Court weighed in again. Its resounding message to the lower courts was *not so fast*.

In *Niz-Chavez v. Garland*, the Court affirmed *Pereira*'s holding that an NTA that lacks the place, date and time information is not a statutorily compliant NTA, but this time using language broad enough finally to convince the lower courts of its application outside the stop-time rule.[4] *Niz-Chavez* further held that the so-called two-step approach adopted by the BIA and circuit courts (the NTA followed by a curing NOH) relied on an impermissible reading of the statute, meaning that the stop-time rule could not be triggered by a noncompliant NTA even if that information is later supplied by way of an NOH.

Reminding the lower courts and the BIA that "words are how the law constrains power," the Court emphasized:

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[4] *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).

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