Matter of Alexandre Ricardo Marcelo FERNANDES, Respondent

Decided August 4, 2022

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) The time and place requirement in section 239(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(1) (2018), is a claim-processing rule, not a jurisdictional requirement.

(2) An objection to a noncompliant notice to appear will generally be considered timely if it is raised prior to the closing of pleadings before the Immigration Judge.

(3) A respondent who has made a timely objection to a noncompliant notice to appear is not generally required to show he or she was prejudiced by missing time or place information.

(4) An Immigration Judge may allow the Department Homeland Security to remedy a noncompliant notice to appear without ordering the termination of removal proceedings.

FOR THE RESPONDENT: Jeffrey B. Rubin, Esquire, Boston, Massachusetts

FOR THE DEPARTMENT OF HOMELAND SECURITY: Kaylee J. Klixbull, Associate Legal Advisor

BEFORE: Board Panel: MULLANE and MANN, Appellate Immigration Judges. Dissenting Opinion: GRANT, Appellate Immigration Judge.

MULLANE, Appellate Immigration Judge:

In a decision dated June 17, 2021, an Immigration Judge denied the respondent's motion to terminate his removal proceedings and ordered him removed from the United States. The respondent has appealed from this decision.[1] The record will be remanded.

I. FACTUAL AND PROCEDURAL HISTORY

The facts in this case are not disputed. The respondent is a native and citizen of Portugal who was admitted to the United States as a lawful

[1] The Board requested and received supplemental briefs from the parties and held oral argument in this case. We grant the Department of Homeland Security's motion to extend the page limitation for its supplemental brief. We also received a brief from an amicus curiae. We acknowledge with appreciation the briefs submitted by the parties and amicus.

permanent resident. On March 1, 2021, the Department of Homeland Security ("DHS") personally served a notice to appear on the respondent. The notice to appear ordered the respondent to appear before an Immigration Judge at the Boston Immigration Court at a date and time "to be set." DHS filed the notice to appear with the Boston Immigration Court on March 10, 2021. On March 12, 2021, the Immigration Court mailed to the respondent a notice of hearing informing him that his initial hearing was scheduled to take place on March 18, 2021. The respondent was detained throughout proceedings.

The respondent appeared at the March 18, 2021, hearing and two subsequent hearings. At these hearings, no pleadings to the allegations or charge in the notice to appear were taken, and the respondent was afforded continuances to obtain counsel. At a fourth hearing on April 15, 2021, the respondent appeared with counsel. The respondent's counsel requested a continuance, which was granted until May 6, 2021.

Prior to that next hearing, the respondent filed a written pleading objecting to the adequacy of the notice to appear. At the May 6, 2021, hearing, the respondent expressly declined to concede proper service of the notice to appear and requested an opportunity to submit a motion to dismiss because the notice to appear did not specify the date and time of the initial hearing. The Immigration Judge did not address the adequacy of the notice to appear. Instead, he found that the respondent was removable as charged and afforded him an opportunity to submit a written brief. On May 25, 2021, the respondent filed a motion, which he titled a "Motion to Quash Service of Process for the Respondent's Notice to Appear and Dismiss Removal Proceedings," arguing that the notice to appear was defective because it lacked date and time information. DHS filed an opposition to the motion. On June 17, 2021, the Immigration Judge denied respondent's motion and ordered him removed. This appeal followed.

II. ANALYSIS

A. Section 239(a)(1) Is Not a Jurisdictional Rule

Section 239(a)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229(a)(1) (2018), provides that a "written notice" in the form of a "notice to appear" "shall be given . . . to the alien" in removal proceedings, specifying, among other things, "[t]he time and place at which the proceedings will be held." In two cases, the Supreme Court of the United States considered whether a notice to appear that did not specify the time or place of an initial hearing, as required by section 239(a)(1) of the INA, 8 U.S.C. § 1229(a)(1), triggered the so-called "stop-time" rule under section

240A(d)(1) of the INA, 8 U.S.C. § 1229b(d)(1) (2018).[2] In *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018), the Court concluded that a "notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings . . . does not trigger the stop-time rule." In *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021), the Court concluded that to trigger the "stop-time" rule, a notice to appear must be a single document specifying the time and place of the hearing, and a noncompliant notice to appear missing time or place information cannot be cured by a subsequent notice of hearing specifying this information.

Following *Pereira* and *Niz-Chavez*, respondents argued that a notice to appear that failed to specify the time or place of the initial hearing deprived an Immigration Court of jurisdiction over removal proceedings. We addressed this argument in *Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021). In that case, we held that a notice to appear that lacks the time or place information required by section 239(a)(1) is sufficient to vest an Immigration Court with subject matter jurisdiction, and neither *Pereira* nor *Niz-Chavez* affects an Immigration Judge's jurisdiction. *Id.* at 391. The courts of appeals, including the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, have likewise agreed that neither *Pereira* nor *Niz-Chavez* affects an Immigration Court's jurisdiction. *See United States v. Castillo-Martinez*, 16 F.4th 906, 914 n.3 (1st Cir. 2021), *cert. docketed*, No. 21-7762 (U.S. May 3, 2022); *see also Chavez-Chilel v. Att'y Gen. U.S.*, 20 F.4th 138, 142–44 (3d Cir. 2021); *Chery v. Garland*, 16 F.4th 980, 986–87 (2d Cir. 2021); *Ramos Rafael v. Garland*, 15 F.4th 797, 800–01 (6th Cir. 2021); *Tino v. Garland*, 13 F.4th 708, 709 n.2 (8th Cir. 2021) (per curiam); *Maniar v. Garland*, 998 F.3d 235, 242 & n.2 (5th Cir. 2021).

The respondent argues that, under *Pereira* and *Niz-Chavez*, an Immigration Court is only vested with jurisdiction upon the service of a single document containing all of the information required by section 239(a)(1) of the INA, 8 U.S.C. § 1229(a)(1). Thus, he contends the notice to appear in his case, which failed to specify the time and date of his initial hearing, did not vest the Immigration Court with jurisdiction over his removal proceedings.

We adhere to our view in *Matter of Arambula-Bravo* and the view of the courts of appeals that have addressed the issue that section 239(a)(1) is not a jurisdictional provision. Our holding in *Matter of Arambula-Bravo*, however, did not answer whether section 239(a)(1) is a non-jurisdictional claim-processing rule or what should be done if there is a timely objection to

[2] Pursuant to the "stop-time" rule, an applicant for cancellation of removal stops accruing continuous physical presence when, among other things, he or she "is served a notice to appear under section 239(a)." INA § 240A(d)(1)(A), 8 U.S.C. § 1229b(d)(1)(A).

a noncompliant notice to appear. *See* 28 I&N Dec. at 392 n.3 (reserving these issues). The respondent argues that: (1) the time and place requirement in section 239(a)(1)(G) of the INA, 8 U.S.C. § 1229(a)(1)(G), is a mandatory claim-processing rule; (2) his noncompliant notice to appear violated this claim-processing rule because it failed to specify the date and time of his initial hearing; (3) since he raised a timely objection to this violation, he is not required to show prejudice arising from the violation; and (4) the only remedy for a violation of section 239(a)(1)(G) is a dismissal or termination of the proceedings upon the respondent's timely objection. Accordingly, he argues that the Immigration Judge erred in denying his motion to terminate. We address these arguments in turn.

B. Section 239(a)(1) Is a Claim-Processing Rule

Some of the courts of appeals have characterized section 239(a)(1) as a claim-processing rule. *See Chavez-Chilel*, 20 F.4th at 143; *Martinez-Perez v. Barr*, 947 F.3d 1273, 1277–79 (10th Cir. 2020); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1153 (11th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019). As a general matter, "claim-processing rules" are those that "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Claim-processing rules do not implicate the jurisdiction of a tribunal. *Id.*

We conclude that the time and place requirement in section 239(a)(1) is a claim-processing rule, not a jurisdictional requirement. Congress has not made the Immigration Courts' jurisdiction dependent upon the content of a notice to appear. *See, e.g.*, *Pierre-Paul v. Barr*, 930 F.3d 684, 692 (5th Cir. 2019), *abrogated on other grounds by Niz-Chavez*, 141 S. Ct. at 1485. Moreover, like other claim-processing rules, section 239(a)(1) fosters "the efficient and fair administration of claims." *Matter of Nchifor*, 28 I&N Dec. 585, 588 (BIA 2022) (citing *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 157 (2013); *Henderson*, 562 U.S. at 434). By giving the respondents notice of where and when to appear for the hearing, the time and place requirement in this provision "promote[s] the orderly progress of" the removal proceedings. *Henderson*, 562 U.S. at 435; *see also Chavez-Chilel*, 20 F.4th at 143 ("By providing [time or place] information, the agency can set a schedule for moving the case forward.").

Although not jurisdictional, a claim-processing rule may be mandatory in the sense that the rule must be enforced if it is properly raised. *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017). A claim-processing rule may be mandatory if the statute defining that rule

includes the word "shall," as is the case with section 239(a)(1) of the INA, 8 U.S.C. § 1229(a)(1). *See, e.g.*, *United States v. Kwai Fun Wong*, 575 U.S. 402, 410–19 (2015) (construing the statutory phrase "shall be forever barred" as a non-jurisdictional claim-processing rule). However, a mandatory claim-processing rule is different from a jurisdictional requirement in two important ways.

First, because the rule is not jurisdictional, it does not deprive the adjudicating body, in this case the Immigration Courts, 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. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019); *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017). 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. *See, e.g.*, *Pierre-Paul*, 930 F.3d at 693 (concluding that a respondent had forfeited his claim-processing objection to missing time or place information on a notice to appear based on 8 C.F.R. § 1003.14 (2021) because he failed to timely raise that objection); *see also Matter of Nchifor*, 28 I&N Dec. at 589 (agreeing with and applying the Fifth Circuit's approach in *Pierre-Paul* to objections to noncompliant notices to appear raised in the motions context).

It is possible that a respondent may explicitly waive an objection to a defect in the notice to appear if, for example, the respondent intends to apply for relief or protection from removal and is looking for a speedy resolution of those applications. However, even in the absence of an explicit waiver, the objection is waived or forfeited if not timely raised.

1. The Respondent Timely Objected to the Noncompliant Notice to Appear

The statutory text provides no guidance on when an objection to a noncompliant notice to appear is considered timely. Likewise, the Supreme Court's jurisprudence addressing claim-processing rules in different contexts offers little guidance. However, the Fifth Circuit has provided guidance on this question.

In *Pierre-Paul*, the Fifth Circuit noted that a respondent generally waives his challenge to a noncompliant notice to appear by failing to raise this objection at the time he concedes removability. *See* 930 F.3d at 693 n.6.[3]

[3] We note that the Seventh Circuit considers a different set of factors in determining whether an objection is timely, including: the time that passed between the receipt of the notice to appear and the objection; whether a schedule was set for filing objections, and whether the objection complied with that schedule; how much of the merits was discussed or determined before the objection; and whether the respondent had access to counsel or an interpreter. *Arreola-Ochoa v. Garland*, 34 F.4th 603, 609 (7th Cir. 2022). This case

Relying on *Pierre-Paul*, we held in *Matter of Nchifor*, 28 I&N Dec. at 589, that a respondent who did not challenge a noncompliant notice to appear before the Immigration Judge or the Board but rather raised his objection for the first time in a motion to reopen waited too long and forfeited that objection. However, we did not decide in *Matter of Nchifor* at what point an objection will be considered timely.

We agree with the respondent that an objection to the adequacy of a notice to appear need not be raised at the time it was served to be considered timely. Section 239(b)(1) of the INA, 8 U.S.C. § 1229(b)(1), gives respondents "the opportunity to secure counsel before the first [removal] hearing date" by requiring that the initial "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear," and thus the time and place requirement in a notice to appear gives respondents the opportunity to secure counsel for their initial hearing. *See also Pereira*, 138 S. Ct. at 2114–15 ("For § 1229(b)(1) to have any meaning, the 'notice to appear' must specify the time and place that the noncitizen, and his counsel, must appear at the removal hearing."). At the same time, allowing a respondent to raise an objection at any point in the proceedings after the notice to appear has been served would affect DHS' ability to timely remedy the noncompliant notice to appear and might force DHS to start proceedings anew, causing an undue delay and hindering the orderly progress of the proceedings.

The respondent argues that his objection to the noncompliant notice to appear was timely because he raised it before the closing of pleadings. The respondent's actions provide a useful guideline regarding the timeliness of an objection. Generally, requiring respondents to raise an objection before the closing of pleadings would not force respondents (especially unrepresented respondents) to raise an objection at the initial appearance before an Immigration Judge and would allow them an adequate opportunity to obtain counsel. *See generally id.* (discussing the importance of the right to counsel in removal proceedings). This guideline would also allow DHS an opportunity to remedy the noncompliant notice to appear before any substantive matters are discussed or determined, which would prevent an undue delay and promote the orderly progress of the proceedings. We also consider this guideline to be consistent with the decisions of the Federal courts, *see Pierre-Paul*, 930 F.3d at 693 n.6 (collecting cases), and the Federal Rules of Civil Procedure, which require that certain defenses be asserted in a responsive pleading or motion before pleading, *see* Fed. R. Civ. P. 12(b).

Accordingly, we will generally consider an objection to a noncompliant notice to appear to be timely if it is raised prior to the closing of pleadings

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does not arise in the Seventh Circuit, and as noted below, we will not follow *Arreola-Ochoa* in this case.

before the Immigration Judge.[4] Such an objection may be made either orally at the hearing or in writing. Where pleadings are made in writing, the written pleading must include any objection to the absence of time or place information, or the objection will be deemed waived. Under this standard, the respondent in this case made a timely objection to the noncompliant notice to appear.[5]

2. The Respondent Is Not Required to Show Prejudice

In denying the respondent's motion to terminate the proceedings, the Immigration Judge noted that the lack of date and time information on the notice to appear did not prejudice the respondent. The respondent argues that since he made a timely objection to the violation of section 239(a)(1)(G)(i), he is not required to show prejudice. We agree.

We start with the statutory text. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017). In this case, section 239(a)(1)(G) is silent on this specific question, as it does not explicitly require a respondent to show that a violation of the statute prejudiced him or her before DHS may provide a remedy. When Congress intends to require a showing of prejudice after a party objects to the violation of a claim-processing rule, it generally does so explicitly. *See, e.g.*, *Hamer*, 138 S. Ct. at 19 (discussing a statutory claim-processing rule that allows for an extension of the time for appeal if "no party would be prejudiced" (citation omitted)); *cf. Manrique*, 137 S. Ct. at 1274 (noting that "mandatory claim-processing rules, although subject to forfeiture, are not subject to harmless-error analysis," which disregards errors that do not affect substantial rights (citing Fed. R. Crim. P. 52(b) (defining "harmless error"))).

We are unaware of any Supreme Court decision that requires a showing of prejudice where a claim-processing rule uses the mandatory term ("shall") and where the statutory language does not include a prejudice requirement. *See Davis*, 139 S. Ct. at 1849 (noting that a mandatory claim-processing rule must be enforced if properly raised); *cf. Matter of Nchifor*, 28 I&N Dec. at 588 (concluding that the Supreme Court's claim-processing jurisprudence "does not require a separate examination of prejudice" where an objection is untimely). Considering that claim-processing rules are intended to promote the orderly progress of litigation, we are hesitant to read a prejudice requirement into section 239(a)(1) where none exists. *See Romag Fasteners,*

[4] This case does not require us to address when a mentally incompetent respondent must raise an objection to a noncompliant notice to appear.

[5] The Immigration Judge in this case did not make a finding as to whether the respondent's objection was timely. However, based on the undisputed facts and the legal standard we articulate today, we conclude that the respondent's objection was timely.

Inc v. Fossil, Inc., 140 S. Ct. 1492, 1495 (2020) (stating that courts should generally avoid reading requirements into statutes that are not present). Such a reading of section 239(a)(1) would require a separate determination of the existence and extent of prejudice in each individual case, and it may be difficult for respondents to demonstrate any tangible prejudice.

It may be argued that respondents are not prejudiced from the lack of time or place information on a notice to appear, where they are provided with this information in a subsequent notice of hearing. Indeed, in *Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745, 753–54 (BIA 2020), we concluded that termination of proceedings was not warranted, even though the respondents in that case had timely objected to their noncompliant notices to appear, because there was "no apparent prejudice."[6]

Matter of Rosales Vargas and Rosales Rosales is distinguishable because in that case we considered the claim-processing rule in the regulations, rather than section 239(a)(1), which we now conclude is a claim-processing rule. Furthermore, that case involved whether termination was warranted—in other words, the question of remedy. What remedy should be provided for a violation of a claim-processing rule is a separate question from whether prejudice must be shown to establish that a claim-processing violation occurred and before a remedy may be provided. Finally, although a respondent who is subsequently informed of the time and place of the hearing through a notice of hearing may not be prejudiced by a noncompliant notice to appear missing that information, the Supreme Court emphasized in *Niz-Chavez* that a notice of hearing does not excuse DHS' violation of section 239(a)(1) when it issues a noncompliant notice to appear.[7]

DHS and the dissent posit that the regulations authorize the issuance of an incomplete notice to appear followed by a notice of hearing supplying the missing time or place information. However, the current case involves the claim-processing rule at section 239(a)(1), not the regulations. Further, the regulatory history of the provision on which DHS and the dissent rely, 8 C.F.R. § 1003.18(b) (2021), acknowledges the time and place requirement in section 239(a)(1). Specifically, this history reflects that the regulation was intended to "implement[] the language of [section 239(a)(1)] indicating that the time and place of the hearing *must* be on the Notice to Appear." Inspection and Expedited Removal of Aliens; Detention and Removal of

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[6] The Third and the Ninth Circuits agreed with our decision in *Matter of Rosales Vargas and Rosales Rosales* that termination is not warranted where the respondent cannot show prejudice based on a noncompliant notice to appear. *Chavez-Chilel*, 20 F.4th at 144; *Aguilar Fermin v. Barr*, 958 F.3d 887, 894–95 (9th Cir. 2020).

[7] Generally, notices of hearing are issued after the service of a notice to appear, and they are not subject to the 10-day period requirement in section 239(b)(1), which may or may not affect a respondent.

Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 449 (Jan. 3, 1997) (emphasis added). We therefore read the regulation as being consistent with the statutory requirement to include the time and place of the hearing on a notice to appear. *See Sec'y of Lab. v. W. Fuels-Utah Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) ("[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." (citation omitted)). Further, the dissent's claims, like DHS', are undermined by the explanatory statement in the regulatory history cited above, which notes two exceptions to the time and place requirement. The first had to do with the time pressure associated with revising the immigration system between the date section 239(a)(1) was enacted and the date it became effective: April 1, 1997. *See* 62 Fed. Reg. at 444, 449. The other is a practical one relating to "power outages [and] computer crashes/downtime" that is not applicable in this case. *Id.* at 449.

In sum, section 239(a)(1) does not require the respondent to show prejudice, and we are unwilling to impose such a requirement. Thus, we conclude 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.[8]

3. The Immigration Judge May Allow DHS to Remedy the Noncompliant Notice to Appear without Terminating Proceedings

Because he made a timely objection to the violation of a mandatory claim-processing rule, the respondent argues the only appropriate remedy is the immediate termination of the proceedings. Thus, he contends the Immigration Judge erred in denying his motion to dismiss or terminate the proceedings. We disagree.

First, as noted, the claim-processing rule at section 239(a)(1) is not jurisdictional and relates to matters within an Immigration Judge's authority. Since it relates to matters within an Immigration Judge's authority, 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. *See* 8 C.F.R. § 1003.10(b) (2021) ("[I]mmigration judges shall

[8] The respondent has not shown that the lack of date and time information in the notice to appear violated his right to due process. To establish a due process violation, the respondent must show that a procedural error led to fundamental unfairness and actual prejudice. *See Toribio-Chavez v. Holder*, 611 F.3d 57, 65 (1st Cir. 2010); *Lopez-Reyes v. Gonzales*, 496 F.3d 20, 23 (1st Cir. 2007). The respondent was aware of the date and time of the initial hearing and was able to attend this and other hearings. He was also granted continuances to secure counsel. Thus, he has not shown he was prejudiced by the lack of date and time on his notice to appear.

exercise their independent judgment and discretion and may take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition of such cases."). While an Immigration Judge may not overlook or ignore a violation of section 239(a)(1) if the issue is timely raised, it does not necessarily follow that an Immigration Judge has no discretion in determining how to enforce that rule or remedy its violation. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 85 n.9 (2009) (recognizing that an agency "may prescribe and enforce reasonable procedural requirements" for claim-processing rules). In fact, requiring immediate termination for a violation of section 239(a)(1), would "essentially [turn] the time and place requirement for a notice to appear [into] a jurisdictional requirement." *Matter of Nchifor*, 28 I&N Dec. at 588 n.7.

Second, the claim-processing rule embodied in section 239(a)(1) 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 of section 239(a)(1), including the time and place requirement at section 239(a)(1)(G)(i). Nor does this statutory text explicitly preclude an Immigration Judge from allowing DHS to remedy missing time or place information. *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016) (discussing a statutory claim-processing rule that "says nothing . . . about the remedy for a violation of that rule," and concluding that in "the absence of congressional guidance regarding a remedy, '[a]lthough the duty is mandatory, the sanction for breach is not loss of all later powers to act'" (alteration in original) (quoting *United States v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990))).

Third, the Supreme Court's jurisprudence addressing claim-processing rules suggests that termination is not the most appropriate remedy for a noncompliant notice to appear. Instead, it 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 proceedings.

For example, in *Gonzalez v. Thaler*, 565 U.S. 134 (2012), the Court addressed a State prisoner's defective certificate of appealability ("COA"), a prerequisite for appeal in habeas corpus proceedings. Federal law requires a COA to show that the prisoner was denied a constitutional right. The Court concluded that this law is a mandatory claim-processing rule, not a jurisdictional requirement, and the State had timely objected to the failure of the prisoner's COA to indicate a constitutional issue. The Court nevertheless found that a "defective COA is not equivalent to the lack of any COA." *Id.* at 143; *cf. Manrique*, 137 S. Ct. at 1274 (stating that a court may

"overlook defects in a notice of appeal" but "may not overlook the failure to file a notice of appeal at all"). Accordingly, the Court held that a violation of the claim-processing rule at issue did not necessarily require dismissal. Instead, the Court found that "[i]f a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals panel must address the defect by considering an amendment to the COA or remanding to the district judge for specification of the issues." *Gonzalez*, 565 U.S. at 146.

A similar principle applies in the case of a noncompliant notice to appear. A noncompliant notice to appear is not equivalent to a lack of a notice to appear altogether. While an Immigration Judge cannot simply ignore or overlook DHS' failure to include the required time or place information on a notice to appear if the issue is timely raised, the Immigration Judge also cannot simply treat the notice to appear as never having been served or filed. *See Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 465–66 (A.G. 2018) (citing *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 (BIA 2017) (stating that once a notice to appear is filed with an Immigration Court, an Immigration Judge may only terminate proceedings in limited circumstances)); *see also Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012).

Finally, the respondent argues that, while violations of other claim-processing rules may be cured, the violation of section 239(a)(1)(G)(i) can only be remedied by termination because the notice to appear is a case-initiating document. In *Niz-Chavez*, 141 S. Ct. at 1482, the Supreme Court acknowledged that a notice to appear is a case-initiating document, comparable to a complaint in a civil case. Nevertheless, a defective civil complaint or criminal information may be amended when necessary, rather than requiring an outright dismissal or termination of the case. *See, e.g.*, Fed. R. Civ. P. 15 (allowing for amended and supplemental complaints); Fed. R. Crim. P. 7(e) (providing that "the court may permit an information to be amended at any time before the verdict or finding," if certain conditions are met). This promotes the orderliness of the process but also gives the parties a remedy for a noncompliant filing that is not futile or frivolous. In addition, not allowing a complaint or information to be amended would cause a case to be dismissed and waste judicial and administrative resources. We therefore reject the respondent's argument that termination is the only appropriate remedy for a violation of section 239(a)(1)(G)(i).

Importantly, the Federal courts and the Board have permitted DHS to remedy defective service of a notice to appear in other contexts without requiring termination. *See B.R. v. Garland*, 26 F.4th 827, 840 (9th Cir. 2022) (holding that Immigration Judges have the authority to allow DHS to cure improper service of a notice to appear on a minor without requiring termination); *Matter of W-A-F-C-*, 26 I&N Dec. 880, 882 (BIA 2016)

(providing that an Immigration Judge should grant a continuance to allow DHS to properly serve a notice to appear on a minor); *Matter of E-S-I-*, 26 I&N Dec. 136, 145 (BIA 2013) (same where indicia of incompetency are present); *cf. Matter of Hernandez*, 21 I&N Dec. 224, 228 (BIA 1996) (allowing an Immigration Judge to take corrective action short of termination where an order to show cause was not properly served). We similarly conclude that the omission of time or place information in a notice to appear "can be cured and is not fatal," and thus the Immigration Judge in this case may allow DHS to remedy the defect in the notice to appear without ordering the termination of removal proceedings. *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020); *see also Union Pac. R.R. Co.*, 558 U.S. at 84 (stating that when a claim-processing objection is raised, adjudicators may "adjourn the proceeding pending cure of any lapse"); *State Farm Fire & Cas. Co.*, 137 S. Ct. at 442 (concluding that a claim-processing violation does not deprive an adjudicator of "all later powers to act'" (citation omitted)).[9]

The dissent posits that, to the extent a claim-processing rule violation occurred, prejudice must be shown, and no prejudice was shown in this case. We view things differently. In our view, when a claim-processing rule violation occurs, prejudice need not be shown, but a remedy may be allowed, and the nature of the violation informs the nature of the remedy.

Based on the above, we will remand this matter to the Immigration Judge so that DHS may remedy the noncompliant notice to appear. The precise contours of permissible remedies are not before us at this time.[10] DHS may decide it is best to request dismissal without prejudice and file a new notice to appear. *See* 8 C.F.R. §§ 239.2(a), (c), 1239.2(a), (c) (2021). No matter the remedy, however, any actions and decisions that took place following the respondent's timely objection regarding the deficiency of the notice to appear should be carefully considered anew. Accordingly, the appeal is sustained, the Immigration Judge's decision is vacated, and the record is remanded for further proceedings.

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[9] The Seventh Circuit has held that a respondent is entitled to dismissal or termination of the proceedings where the notice to appear was noncompliant and the respondent made a timely objection. *See Arreola-Ochoa*, 34 F.4th at 608 ("[T]he proceeding must be dismissed for failure to comply with a mandatory claims-processing rule."); *Ortiz-Santiago*, 924 F.3d at 965. While we are bound by the Seventh Circuit's decisions in cases arising within that circuit, we do not apply this rule in cases arising outside the Seventh Circuit. *See Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012) ("We apply the law of the circuit in cases arising in that jurisdiction, but we are not bound by a decision of a court of appeals in a different circuit.").

[10] The logistics of issuing a new and compliant notice to appear may depend in part on the DHS' internal procedures and guidelines, not all of which are within our authority to address.

ORDER: The respondent's appeal is sustained, and the Immigration Judge's decision is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing order and for the entry of a new decision.

DISSENTING OPINION: Edward R. Grant, Appellate Immigration Judge

I respectfully dissent. The question presented to us is straightforward: whether the failure of the Department of Homeland ("DHS") to include in the notice to appear time-and-date information regarding this detained criminal respondent's first Immigration Court hearing, when raised in a timely objection, requires finding, without any showing of prejudice, the proceedings must be halted (and likely terminated) pending service of a complete notice to appear. This, as the majority notes, is a question we left open in *Matter of Arambula-Bravo*, 28 I&N Dec. 388, 392 n.3 (BIA 2021). The majority unwisely and incorrectly answers it in the affirmative.

The majority's defense of this position relies on a defective understanding of claim-processing rules in general, and of the claim-processing rules specifically applicable to this case. The majority effectively and impermissibly sets aside the governing regulations set forth in 8 C.F.R. §§ 1003.14, 1003.15, and 1003.18 (2021), which specifically permit the filing of a notice to appear lacking the specific time-and-date information called for in section 239(a)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229(a)(1) (2018), provided the Immigration Court sends a subsequent notice of hearing providing that information to a respondent. 8 C.F.R. § 1003.18(b). Notably, the majority rejects the respondent's claim that the holding in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), compels a finding that the Immigration lacked jurisdiction over his case—but then pivots to hold that *Niz-Chavez* effectively invalidates the regulatory procedure followed for decades by Immigration Courts in following up incomplete notices to appear with a notice of hearing. *See Matter of Fernandes*, 28 I&N Dec. 605, 612–13 (BIA 2022).

The majority's conclusion contradicts the Board's recent holding in *Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020). *Accord Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020) (holding that a failure to include the identity and address of the Immigration Court—information also required by section 239(a)(1)(G)—is remedied by the issuance of a subsequent notice of hearing in accordance with 8 C.F.R. § 1003.18(b)). In so doing, the majority adopts the "claim-processing" approach of a single Federal circuit court of appeals, setting aside explicit

rulings to the contrary from two other circuits, as well as the implicit rulings of several other circuits. *Compare Ortiz-Santiago v. Barr*, 924 F.3d 956, 964–65 (7th Cir. 2019) (holding section 239(a)(1)(G) is a mandatory claim-processing rule requiring quashing of an incomplete notice to appear), *with Chavez-Chilel v. Att'y Gen. U.S.*, 20 F.4th 138, 143–44 & n.5 (3d Cir. 2021) (collecting cases and holding that the omission of the date and time from a notice to appear is "harmless error" and that given the purpose of this specific claim-processing rule, "equitable considerations inform whether technical noncompliance requires particular relief"), *and United States v. Cortez*, 930 F.3d 350, 362–63 (4th Cir. 2019), *as amended* (concluding based on the specific provisions of 8 C.F.R. §§ 1003.14(a), 1003.15(c), and 1003.18(b), that the omission of the time and date from a notice to appear did not violate a claim-processing rule).[1]

By rejecting these precedents, the majority leaves the parties and the Immigration Judge at sea to determine what an appropriate remedy would be in this case. The majority rejects the respondent's contention that the only remedy is termination of proceedings without prejudice to DHS' ability to serve and file a fully-compliant notice to appear. However, it is difficult to see what other "remedy" can be found—the respondent will insist on that course of action, and he has a valid point: neither an Immigration Judge nor DHS has authority to "pencil in" a hearing date after the fact on an already-served notice to appear. The majority suggests that DHS may choose to withdraw the current notice to appear and restart proceedings—and it offers no other alternative, having taken the issuance of a notice of hearing off the table. This would constitute a profound waste of judicial resources in a case where the respondent is clearly removable, has presented no valid claim for relief, and has suffered no prejudice. Moreover, this precedent will create confusion in Immigration Courts across the country—the majority acknowledges the contrary rulings of the United States Courts of Appeals for

[1] As the United States Court of Appeals for the Fourth Circuit noted in *Cortez*, the majority of circuits "have agreed that the required contents of the notice to appear that commences removal proceedings under 8 C.F.R. § 1003.14(a) are those set out by regulation, not the INA." 930 F.3d at 363 (citing *Ali v. Barr*, 924 F.3d 983, 985–86 (8th Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 111–12 (2d Cir, 2019); *Santos-Santos v. Barr*, 917 F.3d 486, 489–91 (6th Cir. 2019)). These courts, along with the Seventh Circuit, agreed that these regulatory provisions constitute a claim-processing rule, and that the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), could not be read to divest Immigration Courts of jurisdiction when an incomplete notice to appear has been docketed. However, the Seventh Circuit continues to stand alone in concluding that *Pereira* requires treating section 239(a)(1) as a mandatory claim-processing rule that effectively overrides the regulations' allowance for an incomplete notice to appear to be docketed, and for time-and-date information to be provided in a subsequent notice of hearing. *Arreola-Ochoa v. Garland*, 34 F.4th 603, 608 (7th Cir. 2022).

the Third, Fourth, and Ninth Circuits, but does not clearly state whether its decision, or the law of those circuits, should apply to this and analogous "claim-processing" objections raised in those jurisdictions.

As the following will explain, there was no violation of a mandatory claim-processing rule under the INA and its implementing regulations in this case. 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. *See Franco-Ardon v. Barr*, 922 F.3d 23, 25 (1st Cir. 2019) (holding that a noncitizen claiming ineffective assistance of counsel must show prejudice); *Hernandez v. Reno*, 238 F.3d 50, 57 (1st Cir. 2001) (declining to incorporate the presumed prejudice standard from criminal law into civil immigration proceedings). 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.[2] As the Immigration Judge here concluded, to the extent a claim-processing rule was violated, that violation was remedied—at no prejudice to the respondent—by issuance of the subsequent notices of hearing. There is thus no reason to terminate or remand these proceedings, and the decision below should be affirmed.[3]

I. DISCUSSION

As I explain below, section 239(a)(1) sets forth a *non-mandatory* claim-processing rule that allows for flexible enforcement. *See Young v. SEC*, 956 F.3d 650, 654–55 (D.C. Cir. 2020) (recognizing that, in addition to "mandatory claims-processing deadlines," there are "*nonmandatory* claims-processing deadlines, which are . . . flexible when raised by an opposing party" (emphasis added)). The way to enforce section 239(a)(1) and address a notice to appear that does not comply with the statute is through its implementing regulations. A remedy was provided in this case, in the form of a notice of hearing under 8 C.F.R. § 1003.18(b), informing the

[2] Ironically, the majority rejects the respondent's due process claim on precisely these grounds—that he has failed to establish the required prejudice. *See Matter of Fernandes*, 28 I&N Dec. at 613 n.8. No adequate explanation is provided for why a "no prejudice" standard should be applied to the alleged violation of a statutory claim-processing rule—particularly when the rule at issue exists precisely to safeguard the very due process rights the respondent claims have been infringed.

[3] I concur in the majority's rejection of the respondent's claim that the Immigration Judge lacked jurisdiction over these proceedings, and its rejection of the respondent's generalized due process claim. I would also treat the respondent's claim-processing objection as timely raised.

respondent of the time and place of his hearing, and he appeared for this hearing—and all other hearings—as scheduled. Thus, no claim-processing violation occurred in this case and, even if one did, the respondent was not prejudiced.

A. Mandatory and Non-Mandatory Claim-Processing Rules

In some cases, claim-processing rules "may be" mandatory. *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (stating that that a "claim-processing rule" requiring parties to take certain procedural steps in, or prior to, litigation, "*may be* 'mandatory' *in the sense* that a court must enforce the rule" if timely raised (emphases added) (quoting *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam))). However, the jurisprudence of the Supreme Court of the United States—on which the majority relies—also permits for claim-processing rules that are *not mandatory*, meaning they are amenable to more flexible enforcement. *See Dolan v. United States*, 560 U.S. 605 (2010).

In *Dolan*, the rule at issue provided that a sentencing court "*shall* set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." *Id.* at 608 (emphasis added) (citation omitted). The sentencing court in that case missed the 90-day deadline, even though all the information needed to determine the victim's losses was available before the deadline, and no excuse was offered for missing the deadline. *Id.* at 609–10. The defendant argued that, since the 90-day limitation was not met, the law no longer authorized the sentencing court to order restitution. The Court disagreed.

The Supreme Court noted that the rule at issue could be: (1) a jurisdictional condition; (2) a claim-processing rule; or (3) a rule that seeks to speed an action by creating a time-related directive but that does not affect a judge's or other public official's power to take the relevant action. The Court concluded that the rule at issue fell within the third category. It was neither jurisdictional nor a claim-processing rule, and thus the sentencing court could order restitution even though the defendant had timely raised the court's failure to meet the 90-day deadline.

The Court recognized the statute used the word "shall," a mandatory term, but the use of this word was not dispositive of whether the rule was either a jurisdictional or claim-processing rule, or fell within the third category of rules. *Id.* at 611–12 (observing that "a statute's use of ['shall'] alone has not always led this Court to bar judges (or other officials) from taking the action to which a missed statutory deadline refers," especially where the statute "does not specify a consequence for noncompliance" (citation omitted)); *see also id.* at 614–15 (noting that in other cases, the Court had interpreted

statutes using "shall" in a similar manner). In discerning the consequences for a violation of the deadline, the Court also examined the "substantive purpose" of the statute—namely, the importance of imposing restitution upon those convicted of certain Federal crimes and ensuring that victims of crime receive full restitution. *Id.* at 612. The Court then found that, even where a sentencing court's "delay causes the defendant prejudice—perhaps by depriving him of evidence to rebut the claimed restitution amount"—the proper remedy is for the defendant "to ask the court to take that fact into account" when it makes a final determination regarding his victim's losses. *Id.* at 617.

The third category of rules the Court discussed in *Dolan* should be viewed as "claim-processing rules" in a general sense because, consistent with the Court's later clarification in *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), they "seek to promote the orderly progress of litigation by requiring . . . certain procedural steps [be taken] at specified times." However, this category of claim-processing rules are *not mandatory* because they are subject to exceptions and need not be enforced even if properly raised.[4] Indeed, the Court in *Dolan* allowed the sentencing court to order restitution, even though the defendant had properly raised the court's failure to meet the statutory deadline. Moreover, in determining how the deadline should be enforced, and the sentencing court's failure remedied, the Court took account of circumstances like prejudice (or the lack thereof) and the reason for the failure—considerations that are irrelevant in the context of "mandatory" claim-processing rules. *See Dolan*, 560 U.S. at 617; *see also Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019).

That non-mandatory claim-processing rules exist should not surprise us. Indeed, the INA contains several rules, which use mandatory terms like "shall" and "must" that do not implicate our jurisdiction, are amendable to exceptions, and do not require strict enforcement once a violation is raised. For example, section 240(c)(7)(C)(i) of the INA, 8 U.S.C. § 1229a(c)(7)(C)(i) (2018), provides that, subject to certain statutory exceptions, "the motion to reopen *shall* be filed within 90 days of entry of a final administrative order of removal." (Emphasis added.) Similarly,

[4] Other Supreme Court decisions support the existence of a distinct category of claim-processing rules that, despite use of the word "shall," are not mandatory and subject to exceptions. *See United States v. Kwai Fun Wong*, 575 U.S. 402, 410–12 (2015) (concluding that a statutory claim-processing rule—a deadline provision stating that a tort claim "shall be forever barred" if it is untimely filed—was subject to equitable tolling); *Henderson*, 562 U.S. at 435, 441–42 (holding that a statutory appeals deadline was a "quintessential claim-processing rule[]" that, despite its use of "shall," could be subject to exceptions, and remanding for the lower court to consider such exceptions); *cf. Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019) (concluding that a "mandatory" claim-processing rule is "not susceptible to [an] equitable approach").

section 240(c)(6)(B) of the INA, 8 U.S.C. § 1229a(c)(6)(B), states that, subject to exceptions, a motion to reconsider "*must be* filed within 30 days of the date of entry of a final administrative order of removal." (Emphasis added.) Nevertheless, it is generally accepted—even in the Seventh Circuit—that these statutory deadlines are claim-processing rules that need not be enforced if timely raised, because they are subject to equitable tolling. *See, e.g.*, *Ramos-Braga v. Sessions*, 900 F.3d 871, 876 (7th Cir. 2018) (per curiam).[5]

In a single sentence, the majority acknowledges the possibility that section 239(a)(1) "*may be* mandatory" because it includes the word "shall," which, as noted above, is not dispositive. *Matter of Fernandes*, 28 I&N Dec. at 608–09 (emphasis added). However, the majority, without further explanation or discussion, immediately jumps to treating section 239(a)(1) as a "mandatory" claim-processing rule that must be strictly enforced if timely raised. *Id.* I cannot join the majority in making this leap. The better reading of section 239(a)(1) treats this provision as a claim-processing rule that is not mandatory and allows for flexible enforcement. Circuit case law clearly endorses this reading. *See Chavez-Chilel*, 20 F.4th at 143 (concluding that "[s]ection 1229 is a claims-processing rule" but stating that where "there is a violation of [this] claims processing rule . . . the adjudicator has the authority to determine how to address the noncompliance"). Section 239(a)(1)'s implementing regulations—which we are bound to follow—provide the means for enforcing the statute and addressing a noncompliant notice to appear.

B. Section 239(a)(1) and the Regulations Establish a Complementary Claim-Processing Rule

The substantive purpose of the time and place requirement at section 239(a)(1)(G)(i) is to "ensure that noncitizens appear for proceedings by requiring that the noncitizen be informed of the time and place of the hearing." *Id.*; *see also Dolan*, 560 U.S. at 612 (looking to a rule's "substantive purpose" in assessing how it should be enforced). "By

[5] Despite the mandatory language at 8 C.F.R. § 1003.38(b) (2021) (stating that a notice to appeal "shall be filed" with the Board within 30 days of the Immigration Judge's decision), the First, Second, Fifth, and Ninth Circuits have all concluded that, the appeal deadline is a claim-processing rule amenable to equitable tolling. *See Boch-Saban v. Garland*, 30 F.4th 411, 413 (5th Cir. 2022) (per curiam); *James v. Garland*, 16 F.4th 320, 322–26 (1st Cir. 2021); *Attipoe v. Barr*, 945 F.3d 76, 79–80 (2d Cir. 2019); *Irigoyen-Briones v. Holder*, 644 F.3d 943, 946–48 (9th Cir. 2011). *But see Matter of Liadov*, 23 I&N Dec. 990, 993 (BIA 2006) ("Neither the statute nor the regulations grant us the authority to extend the time for filing appeals.").

providing that information, the agency can set a schedule for moving the case forward." *Chavez-Chilel*, 20 F.4th at 143. Section 239(a)(1)'s implementing regulations complement the statute's substantive purpose.

The regulations provide that removal proceedings commence before an Immigration Judge "when a charging document is filed with the Immigration Court" by DHS. 8 C.F.R. § 1003.14(a). They additionally state that while time and place information should be included in a charging document under 8 C.F.R. § 1003.14(a) "where practicable," 8 C.F.R. § 1003.18(b), in all other cases the Immigration Court is responsible for ensuring notice to a respondent of the hearing's "time, place, and date," *id.*

Most circuits agree that neither section 239(a)(1), nor its implementing regulations, requires a notice to appear to specify the time and place of proceedings before that notice to appear may be filed with the Immigration Court and commence removal proceedings under 8 C.F.R. § 1003.14(a). *See Cortez*, 930 F.3d at 363 (agreeing "with the substantial majority of courts to address this issue" and holding that it "is the regulatory definition of 'notice to appear,' and not § 1229(a)'s definition, that controls in determining when a case is properly docketed with the immigration court under 8 C.F.R. § 1003.14(a)"); *see also United States v. Vasquez Flores*, No. 19-4190, 2021 WL 3615366, at *2 n.3 (4th Cir. Aug. 16, 2021) (per curiam) ("*Niz-Chavez*'s reasoning does not undermine the reasoning in *Cortez* . . . .").[6] Once the case is filed with the Immigration Court and proceedings commence, an Immigration Judge is obliged to adjudicate a respondent's case and can only terminate proceedings in limited circumstances. *See, e.g.*, *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 465–66 (A.G. 2018). A notice to appear's failure to specify time or place information is not among these circumstances because, in such a case, "§ 1003.18(b) *supplies the appropriate remedy*: providing the [respondent] and the government with the complete notice at a later time" in a notice of hearing. *Aguilar Fermin*, 958 F.3d at 895 (emphasis added).[7]

The majority's conclusion is plainly inconsistent with the regulatory scheme and the holdings of most circuits. Although the majority claims it is reading the regulations in harmony with section 239(a)(1), its effect is to read

[6] Until today, the only court that broke with this overwhelming consensus was the Seventh Circuit. *See Cortez*, 930 F.3d at 363 (citing *Ortiz-Santiago*, 924 F.3d at 959–63). Now, the Board does so too.

[7] The regulations provide that, an Immigration Judge may terminate proceedings so that certain respondents may naturalize, but they state that, "*in every other case*, the removal hearing shall be completed as promptly as possible." 8 C.F.R. § 1239.2(f) (2021) (emphasis added). The INA additionally states, "At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States." INA § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A). Neither the INA nor the regulations permit an Immigration Judge to "quash" a notice to appear.

them out of existence, limiting their application to the period immediately following the enactment of section 239(a)(1) or to circumstances where it is impossible to include a hearing date on the notice to appear.[8] Absent such circumstances, the majority apparently concludes (but without saying so) that the regulations are inconsistent with the statute and ultra vires. Absent the promulgation of new regulations or a decision from a controlling Federal court, we lack the authority to declare our own regulations ultra vires based on a contrary interpretation of the INA. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980 (9th Cir. 2006) ("The [Board] must follow its own regulations."). To avoid these issues, the binding regulations should be read as complementing—and enforcing—the substantive purpose of section 239(a)(1): ensuring a respondent's appearance for proceedings by informing him or her of the time and place of the proceeding. As recognized by the Third, Fourth, and Ninth Circuits, the regulations provide a remedy for addressing a noncompliant notice to appear in the form of a compliant notice of hearing.

Under this reading, no claim-processing violation occurred in this case. Although the notice to appear here failed to specify the date and time of the respondent's initial hearing, he was informed of this information through the service of a notice of hearing consistent with 8 C.F.R. § 1003.18(b), and he appeared for this hearing.

C. The Respondent Must Show Prejudice and Has Failed to Do So

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.

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[8] Citing the regulatory history of 8 C.F.R. § 1003.18(b), the majority suggests that the Department of Justice only intended Immigration Judges to issue notices of hearing supplying the time and place of the initial hearing in two circumstances—where there was time pressure to revise the immigration system prior to the 1997 effective date of section 239(a)(1), and where there was a power outage or computer crash. *See Matter of Fernandes*, 28 I&N Dec. at 612–13. The majority's interpretation of this regulatory history departs from our previous interpretation of that history in *Matter of Laparra*, 28 I&N Dec. 425, 435 (BIA 2022) (stating that the regulatory history of 8 C.F.R. § 1003.18(b) "supports our 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*" (emphases added)). Furthermore, during the past quarter-century, thousands of notices of hearing have been issued in cases where a notice to appear was incomplete; virtually none of these cases involved a power failure or similar exigency.

In denying the motion to terminate the proceedings, the Immigration Judge found that the respondent suffered no harm from the notice to appear's omission of the date-and-time information. This decision conforms to our holding in *Matter of Rosales Vargas and Rosales Rosales,* 27 I&N Dec. 745 (BIA 2020). *Accord Aguilar Fermin*, 958 F.3d at 895. There we concluded that because the respondents had not shown prejudice, termination of the proceedings was not warranted, even though the respondents in that case made a timely objection to a notice to appear that did not conform to the *statutory* and *regulatory* requirement that the "place" where proceedings will be held be listed on the notice to appear. *Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. at 753–54. Prejudice was absent because the respondents were subsequently informed of the location, time, and date of their hearings—as the respondent in this case was informed, shortly after issuance of the notice to appear, of the date and time of his initial hearing. There, as here, the Immigration Judge had no authority to terminate proceedings. *See id.* at 754 (citing *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012)).

The majority makes no pretense that *Matter of Rosales Vargas and Rosales Rosales* can survive its holding in this case. In fact, how could it? The requirement to include the "place" of the Immigration Court hearing is stated in the very same statutory clause—section 239(a)(1)(G)(i)—as the requirement to include the "time" of the hearing. The majority instead attempts to distinguish *Matter of Rosales Vargas and Rosales Rosales* on two grounds: first, that the respondents' claim in that case was focused on the regulations, not the requirements of section 239(a)(1); and second, that the Board's prior holding may be inconsistent with *Niz-Chavez*.

Neither ground is persuasive. First, in assessing a requirement of prejudice, it makes no difference whether a claim-processing rule arises under regulations or a statute. Even if the notice to appear here did not comply with section 239(a)(1), as opposed to the regulations, it does not follow that prejudice is irrelevant. In fact, the Third Circuit found that prejudice was not only relevant, but dispositive in such a circumstance. *See Chavez-Chilel*, 20 F.4th at 144. Favorably citing *Matter of Rosales Vargas and Rosales Rosales*, the Third Circuit stated in *Chavez-Chilel* that "even if [a notice to appear's] omission of a date and place *did not comply with the statute*," that omission did not require remand because "the omission was *harmless*." *Id.* (emphases added). The court noted that even though the notice to appear was defective under the statute, "the subsequent [notice of hearing] provided the date and time of the hearing." *Id.* Thus, the "lack of a date and time for a hearing on the [notice to appear] did not impede [the noncitizen's] opportunity to contest the charge against her, present evidence," or apply for relief. *Id.* "Accordingly, DHS's failure to include

the date and time for her hearing on the [notice to appear] itself *was harmless error*, and thus a remand to direct the termination of the proceeding, *or to re-initiate it*, is unwarranted." *Id.* (emphases added). The majority makes no effort to engage with the Third Circuit's reasoning or explain why it is inapplicable to this case.[9]

Second, the suggestion that *Matter of Rosales Vargas and Rosales Rosales* cannot survive *Niz-Chavez* demonstrates the underlying incoherence of the majority's position. At one point, it reaffirms that *Niz-Chavez* has no bearing on an Immigration Court's jurisdiction. But on this point, it pivots to state (without making a clear holding) that *Niz-Chavez* invalidates not only *Matter of Rosales Vargas and Rosales Rosales*, but the entire regulatory scheme underlying that decision—along with the decisions of the Third and Ninth Circuits that expressly endorsed it. 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* thus survives *Niz-Chavez* and controls the outcome of this case, requiring the respondent to show that he experienced "apparent prejudice" from the defective notice to appear. 27 I&N Dec. 753–54.

The requirement that prejudice be shown is important for several reasons. First, as previously discussed, the claim-processing rule at issue is not one that is subject to inflexible enforcement. The majority plainly admits this. It never holds outright that section 239(a)(1) constitutes a "mandatory" claim-processing rule, and in rejecting the respondent's claim that proceedings must be terminated, it clearly comes down on the side of "flexible enforcement." But in any scheme of "flexible enforcement," some

[9] The majority's rationale for imposing the "no prejudice" rule reduces to this: the absence of a prejudice requirement in the text of section 239(a)(1). *Matter of Rosales Rosales* is sufficient to refute this rationale. There, the regulation imposing a requirement to state the "place" of the hearing also did not include a requirement that a noncitizen show prejudice if the notice to appear omitted this information, yet the Board held that prejudice must be shown.

showing of harm beyond the mere fact of a violation is relevant, if not required. *See Chavez-Chilel*, 20 F.4th at 144.

Second, the rules at issue—both statutory and regulatory—are designed to promote the orderly progress of litigation. The regulations specifically allow for the precise circumstance that occurred here—a notice to appear without time-and-date information that may be supplemented by one or more subsequent notices of hearing. The regulations represent the Attorney General's judgment that the orderly conduct of litigation in the extremely high-volume context of Immigration Courts requires this level of flexibility. Accordingly, it is appropriate that a party (either a noncitizen or DHS) claiming a violation of one of these claim-processing rules demonstrate prejudice before a sanction so disruptive to the orderly progress of proceedings as termination is applied.

Third, the requirements in section 239(a)(1) and the regulations instantiate the most fundamental requirement of due process—that a noncitizen placed in removal proceedings be informed, inter alia, of the nature of the charges, the applicable grounds of inadmissibility or deportability, and the time and place where the proceedings will take place. In this sense, they serve a purpose more important than merely to "promote the orderly progress of litigation." *Henderson*, 562 U.S. at 435. If viewed in this light, it should be easy to see why prejudice needs to be shown—because this is the exact standard we require when a respondent claims a violation of due process. The majority imposes this requirement in rejecting the respondent's claim that his due process rights were violated. *See Matter of Fernandes*, 28 I&N Dec. at 613 n.8 (citing *Toribio-Chavez v. Holder*, 611 F.3d 57, 65 (1st Cir. 2010); *Lopez-Reyes v. Gonzales*, 496 F.3d 20, 23 (1st Cir. 2007)); *see also Santos-Alvarado v. Barr*, 967 F.3d 428, 439 (5th Cir. 2020); *Tiscareno-Garcia v. Holder*, 780 F.3d 205, 211 (4th Cir. 2015). Rather than follow the logical path and apply the same requirement to an alleged violation of this claim-processing rule, the majority dispenses entirely with the need to show prejudice.

In the respondent's case, the initial hearing was held on March 18, 2021, more than 6 weeks after the notice to appear was served on him on January 27, 2021.[10] Furthermore, the respondent was granted a number of

[10] The respondent's initial hearing was scheduled for March 18, 2021, which was 6 days after the notice of hearing was sent to him. However, as the respondent was in detention, it was unlikely that he would have been unaware of the hearing date and time or that he may have failed to appear at the hearing. In the case of detained respondents, the statute required that any removal proceeding should begin "as expeditiously as possible" after the conviction. INA § 239(d)(1), 8 U.S.C. § 1229(d)(1). Furthermore, the respondent was immediately granted a continuance in order to obtain counsel, after being fully advised of his procedural and substantive rights by the Immigration Judge.

continuances until he appeared with counsel on April 15, 2021. The respondent argues that the lack of a date and time of hearing in the notice to appear was not a harmless error in his case, because the Immigration Judge denied his motion to terminate and ordered him removed. However, a prejudice inquiry in this context focuses specifically on prejudice suffered by the lack of place, date, and time of the initial hearing in the notice to appear as required in section 239(a)(1)(G)(i), rather than any prejudice derived from being placed in the removal proceedings generally. *See Hernandez-Alvarez v. Barr*, 982 F.3d 1088, 1096 (7th Cir. 2020).

Thus, while there conceivably may be cases where a respondent suffers prejudice from the lack of place, date, and time information in the notice to appear, such is not the case here. The respondent attended all of his hearings, was given multiple continuances, and was well represented by counsel. *See Chen v. Barr*, 960 F.3d 448, 451 (7th Cir. 2020) (determining that respondent could not show prejudice because she did not "contend she lacked actual knowledge of the time and place for the hearing" and she appeared with counsel). Because the respondent did not suffer prejudice from the lack of date and time of the initial hearing in the notice to appear, the Immigration Judge properly denied his motion to terminate.

II. CONCLUSION

Based on the foregoing, I would conclude that (1) section 239(a)(1) is a non-mandatory claim-processing rule that can be flexibly enforced through its implementing regulations; (2) under section 239(a)(1) and the regulations, no claim-processing violation occurred in this case; and (3) even if a violation occurred, the respondent was required to, but did not, establish any prejudice based on the defective notice to appear.

If all three of these propositions are incorrect, as the majority holds, there is no point remanding for any purpose other than terminating the current proceedings and requiring issuance of a new, statutorily-compliant notice to appear. The majority avoids this conclusion by punting—stating it is up to the Immigration Judge to provide some unspecified remedy for the defective notice to appear. *Matter of Fernandes*, 28 I&N Dec. at 616. In doing so, it sidesteps our responsibility to provide clear guidance to Immigration Judges. Absent clear guidance, litigation on this issue will proliferate.

If the majority is suggesting that a defective notice to appear can be remedied after the fact by writing in the time and place of the hearing, it can point to no regulation authorizing this action—nor identify *which* date should be inserted. As noted, the regulation at 8 C.F.R. § 1003.18(b) provides a clear remedy: the service of a notice of hearing on the respondent supplying the missing time or place information, as occurred in this case.

If a notice of hearing under 8 C.F.R. § 1003.18(b) is off the table because that regulation is ultra vires, as the majority effectively holds, then the only cure for a noncompliant notice to appear is a compliant one. This "cure" necessarily results in termination because there can only be one notice to appear in any given proceeding. Once DHS withdraws a noncompliant notice to appear, the proceedings end, pending the filing of a compliant notice to appear commencing new proceedings. *See* 8 C.F.R. §§ 239.2(a), (c), 1239.2(a), (c) (2021); *see also* 8 C.F.R. § 1003.14(a) (stating that the filing of "*a* charging document" commences proceedings (emphasis added)). Thus, although it does not explicitly say so, the majority ultimately reaches the same result as the outlier decisions from the Seventh Circuit. *See, e.g.*, *Arreola-Ochoa*, 34 F.4th 603, 608 (7th Cir. 2022).

The majority denies this, suggesting that DHS may *choose* to withdraw the defective notice to appear on remand. In reality, DHS has no other choice—and the majority should acknowledge this. For these reasons, I respectfully dissent and would affirm the decision of the Immigration Judge in all respects.