UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT STREET, SUITE 3101
DENVER, COLORADO 80294

IN THE MATTERS OF	IN REMOVAL PROCEEDINGS FILE NO
Respondent	

DATE: January 10, 2023

ORDER OF THE IMMIGRATION JUDGE

The respondent objects to the adequacy of the notice to appear filed by the Department of Homeland Security ("DHS" or "Department") and argues the deficiencies necessitate dismissal of these proceedings. A review of the record of proceedings reveals that the notice to appear served on the respondent by the DHS does not designate the time and place of removal proceedings pursuant to section 239(a)(l)(G)(i) of the Immigration and Nationality Act ("INA" or "the Act").

The contents of a notice to appear are defined in INA § 239(a), and include, *inter alia*, the nature of the proceedings, the legal authority under which the proceedings are conducted, the allegations and charges levied against the noncitizen, and the time and place at which proceedings will be held. INA §§ 239(a)(1)(A)-(D), (G)(i). In 2018, the Supreme Court considered the contours of the notice to appear within the context of the "stop-time rule" under INA § 240A(d)(1)(a). *See Pereira v. Sessions*, 585 U.S. ___, 138 S. Ct. 2105 (2018). In so doing, the Supreme Court determined that a putative notice to appear that does not designate the time or place of a noncitizen's removal proceedings is not a "notice to appear" as defined under INA § 239(a), and thus does not trigger the "stop-time rule." *Id.* at 2108. Subsequently, parties began to assert that a putative notice to appear that does not contain the time or place of removal proceedings cannot be used to initiate removal proceedings before an Immigration Court pursuant. *See* 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service."); 8 C.F.R. § 1003.13 (defining a "charging document" as "a written instrument which initiates a proceeding before an Immigration Judge," including a notice to appear). Addressing these arguments, the Board of Immigration Appeals ("BIA" or "the Board") noted *Pereira*'s "emphatically narrow framing," and found the tailored nature of this decision counseled against applying its analysis within the jurisdictional context. *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 443 (BIA 2018). Upon analyzing the requirements contained within INA § 239(a) and 8 C.F.R. § 1003.14(a), the Board endorsed a "two-step notice process," concluding that an otherwise defective notice to appear meets the requirements of INA § 239(a) – and jurisdiction vests with the Immigration Judge pursuant to 8 C.F.R. § 1003.14(a) – where a notice of hearing providing

the missing information is subsequently sent to the respondent. *See id.* at 447. The Tenth Circuit has held differently, stating that an Immigration Judge is not awarded jurisdiction over removal proceedings through a regulatory power, and that a regulatory or statutory defect in the NTA does not deprive an Immigration Judge of jurisdiction. *See Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-18 (10th Cir. 2019).

In the course of engaging in statutory interpretation of the definition of a "notice to appear" under INA § 239(a) within the context of the "stop-time rule," the Supreme Court rebuked the "two-step notice process" advanced by the Board, holding that "a notice to appear" under INA § 239(a)(1) constitutes a single document, provided at a discrete time, and containing all of the statutorily-required information. *See Niz-Chavez v. Garland*, 593 U.S. ___, 141 S. Ct. 1474 (2021). In the wake of the Supreme Court's decision, the Board revisited the issue of jurisdiction, finding that *Niz-Chavez* does not abrogate *Bermudez-Cota. Matter of Arambula-Bravo*, 28 I&N Dec. 388, 391-392 (BIA 2021). The Board emphasized that the regulations control the process by which jurisdiction vests in removal proceedings, and affirmed that – because the regulations do not mandate the inclusion of a hearing date and time on the case-initiating "charging document" – a notice to appear that does not contain such information is sufficient to vest the Immigration Court with subject matter jurisdiction. *Arambula-Bravo*, 28 I&N Dec. at 390-91. Meanwhile, the Tenth Circuit has long rebuked the two-step notice process in relation to triggering the stop-time rule, *Estrada-Cardona v. Garland*, 44 F.4th 1275, and it continues to hold the position that a defective NTA does not present a jurisdictional issue. *See Martinez-Perez v. Barr*, 947 F.3d 1273, 1277-79 (10th Cir. 2020). In light of the foregoing, the Court finds the notice to appear filed in the instant case properly vested jurisdiction with the Immigration Judge.

However, the Court's analysis cannot end here. Though not jurisdictional, both the Tenth Circuit and the Board have agreed the statutory requirements contained in INA §239(a)(1) are mandatory in nature. *See Bermudez-Cota*, 27 I&N Dec. at 447; *Martinez-Perez*, 947 F.3d at 1278-79 ("To be sure, Congress's language in [INA § 239(a)(1)] is definitional, and time-and-place information is unquestionably part of a Notice's essential character" (internal citations and quotations omitted.); *Matter of Fernandes*, 28 I&N Dec. 605, 608-09 (BIA 2022). In analyzing the Department's violation of this statutory requirement, the Board recently concluded INA § 239(a)(1)(G)(i) constitutes a mandatory claim-processing rule. *See Fernandes*, 28 I&N Dec. at 608-09. The Tenth Circuit previously held the same. *See Martinez-Perez*, 947 F.3d at 1278. Claim-processing rules do not implicate a court's jurisdiction, but rather "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1279 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). Unlike subject matter jurisdiction, a respondent may affirmatively waive any claims related to a violation of a claim-processing rule or may forfeit any objection if not raised in a timely manner. *Fernandes*, 28 I&N Dec. at 609; *see also Matter of Rosales Vargas*, 27 I&N Dec. 745, 753 (BIA 2020).

As previously noted, the notice to appear filed by the DHS in this case does not contain the requisite information pertaining to the date and time of the respondent's removal proceedings. Therefore, the Court finds that the DHS has violated the claim-processing rule at INA § 239(a)(1)(G)(i). *Fernandes*, 28 I&N Dec. at 608-09. Having concluded that the DHS breached a mandatory claim-processing rule, the Court must now determine whether the respondent raised a timely objection to the DHS's violation. *Id.* at 609.

"The statutory text provides no guidance on when an objection to a noncompliant notice to appear is considered timely." *Id.* Nevertheless, the Board has set forth guidelines regarding the outer

limits of a "timely" objection to the DHS's violation of INA § 239(a)(1)(G)(i). *Id.* at 610-11. In accordance with substantial precedent holding that an objection to a claim-processing rule violation is untimely when raised "after the party has litigated and lost the case on the merits," *see Kontrick v. Ryan*, 540 U.S. 443, 459, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004), the Board has held that, where a respondent does not challenge a noncompliant notice to appear before the Immigration Judge or on direct appeal before the Board, but instead raises the objection in a motion to reopen, the objection is forfeited as untimely. *See Matter of Nchifor*, 28 I&N Dec. 585, 589 (BIA 2022). Thus, binding precedent clearly dictates that where a respondent fails to challenge a noncompliant notice to appear prior to a final decision on the merits of the case the objection is forfeited as untimely.

Here, the respondent has raised an objection to the DHS's violation of INA § 239(a)(1)(G)(i) prior to the Court issuing an administratively final decision on the merits of the case. *See generally* INA § 240 (defining "removal proceedings" to include, inter alia, a determination regarding a respondent's inadmissibility or deportability *and* the adjudication of applications for relief); *see also* INA § 240(c)(1)(A) (stating the Immigration Judge shall decide whether a respondent is removable from the United States at the *conclusion* of the proceeding); 8 C.F.R. § 1240.12 (stating "the decision" of the Immigration Judge shall include a finding of inadmissibility or removability, shall state the reasons for granting or denying relief, and shall be concluded with the order of the Immigration Judge – directing the respondent's removal from the United States, the termination of proceedings, or "other such disposition of the case as may be appropriate"); 8 C.F.R. § 1003.39 ("Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first."). Therefore, the Court finds the respondent's objection to the DHS's claim-processing rule violation is not *per se* untimely.

Where a respondent raises an objection to a violation of INA § 239(a)(1)(G)(i) prior to the conclusion of proceedings, the Board has stated such an objection will generally be deemed timely if it is made before the close of pleadings. *See Fernandes*, 28 I&N Dec. at 610-11. Additionally, 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." *Id.* at 611. The Court first notes that the Board's language regarding the timeliness of raising a claim-processing rule refers to the pre-pleading timeline as a "guideline." *Id.* at 610. The Court further notes these pre-pleadings timeliness guidelines, set forth by the Board for the first time in *Matter of Fernandes*, appear starkly at odds with prior precedent finding that a challenge to a noncompliant notice to appear may be timely raised even after the close of pleadings. In *Matter of Rosales Vargas*, the Board concluded the respondents timely objected to the claim-processing violations triggered by the deficiencies in their notices to appear where they did not raise the challenges until "the day of the scheduled individual calendar hearings," after having appeared at their initial master calendar hearings and submitting pleadings conceding proper service of the notices to appear.[1] *See Rosales Vargas*, 27 I&N Dec. at 746, 753.

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[1] While *Rosales Vargas* only examined challenges to noncompliant notices to appear pursuant to the regulatory claim-processing rules set forth at 8 C.F.R. §§ 1003.14(a), 1003.15(b)(6), as evidenced by the Board's reliance on case law addressing 8 C.F.R. § 1003.14(a) in support of its efforts to establish new standards related to the timeliness of claim-processing objections under INA § 239(a), this precedent is nonetheless instructive as to the timeliness of statutory objections to noncompliant notices to appear. *See Fernandes*, 28 I&N Dec. at 609-10 (stating the Fifth Circuit provided guidance on the issue of timeliness in *Pierre-Paul v. Barr*, 930 F.3d 684, 693 n.6 (5th Cir. 2019)); *see also Pierre-Paul*, 930 F.3d at 691-93 (analyzing 8 C.F.R. § 1003.14(a) as a claim-processing rule and concluding an objection to a violation of this rule is untimely where it was not raised until an appeal was pending before the BIA). Moreover, the Court can ascertain no reason why the timeliness of an objection to a DHS violation of a statutory requirement set forth by

Setting forth new timeliness guidelines in *Matter of Fernandes*, the Board did not account for its departure from the timeliness standards previously applied in *Matter of Rosales Vargas*. *See generally Fernandes*, 28 I&N Dec. at 609-10. Additionally, though the Board asserts these new, more restrictive guidelines are "consistent with the decisions of the Federal courts," *see id.* at 610, the decisions referenced by the Board do not appear to obviate the previously-accepted practice of allowing parties to raise objections to violations of claim-processing rules prior to the adjudication of the case on the merits. *See id.* (citing *Pierre-Paul v. Barr*, 930 F.3d 684, 693 n.6 (5th Cir. 2019).[2] Moreover, though the Board called its new guideline consistent with the decisions of Federal courts, it also acknowledged its inconsistency with caselaw in the Seventh Circuit. *Id.* at 609, n.3 (noting that the Seventh Circuit considers a different set of factors in determining whether an objection is timely or there a exists a permissible excuse for the delay and citing *Arreola-Ochoa v. Garland*, 34 F.4th 603, 609 (7th Cir. 2022)).

The seminal Tenth Circuit case on retroactive application of agency adjudications is *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015), which discusses when an agency adjudication, such as a decision by the Board of Immigration Appeals, should be given retroactive or prospective effect. The Tenth Circuit determined that when an agency decision meets the factors articulated in *Stewart Capital Corp v. Andrus*, 701 F.2d 846 (10th Cir. 1983)—including the burden on the parties when the new rule is imposed, the parties' reliance on the former rule, and whether the adjudication overturns well-established practice, the decision "should be treated no different[ly] from a new agency rule announced by notice-and-comment rulemaking . . . for purposes of retroactivity analysis," and can thus only be applied prospectively. *De Niz Robles*, 803 F.3d at 1173. The Board has also itself recognized that as a general rule, retroactivity is not favored in the law. *Matter of Cordero-Garcia*, 27 I&N Dec. 652, 655 (BIA 2019). The Supreme Court has also acknowledged that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in analyzing retroactivity. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). The Court determines that the Board's decision in *Matter of Fernandes* set forth new "guidelines" circumscribing previously accepted timeliness standards for objections to violations of claim-processing rules, and respondents may have relied on the previously-accepted practice allowing for timely objections raised any time prior to a final administrative decision. Thus, in cases where a respondent seeks to raise a statutory claim-processing violation before an Immigration Judge, the Court finds standards of fair notice and reasonable reliance counsel that the Board's new timeliness guidelines be applied only prospectively to respondents who enter pleadings with the benefit of the Board's guidance in *Matter of Fernandes*.

Congress under INA § 239(a) would be subject to greater constraints than an objection to a DHS violation of a regulation promulgated by the Executive Office for Immigration Review under 8 C.F.R. § 1003.14(a).

[2] In *Fernandes*, the Board cited to n.6 in *Pierre-Paul*, for "collecting cases" consistent with the "guideline" that an objection to a noncompliant notice to appear be raised before the close of pleadings. However, the Court does not see that the cases collected in *Pierre-Paul* generally support such a conclusion. *See Sobani v. Gonzales*, 191 F.App'x 258, 259 (5th Cir. 2006) (finding that the petitioner waived his challenge to the Immigration Judge's *jurisdiction* because he did not raise it at the removal hearing and conceded removability); *Nunez v. Sessions*, 882 F.3d 499, 505 n.2 (5th Cir. 2018) (finding the court did not have jurisdiction over the respondent's argument related to the deficiency of the notice to appear because she did not raise it before the Board, and therefore failed to exhaust her administrative remedies); *Qureshi v. Gonzales*, 442 F.3d 985, 990 (7th Cir. 2006) (making no mention of statutory objections to claim-processing rules, but finding a concession of removability as charged in the notice to appear waives jurisdictional arguments pursuant to 8 C.F.R. §§ 1003.14(a) and 1003.32(a)); *United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242, 1245 (D.C. Cir. 1997) (stating, "Arguments as to agency jurisdiction, however, cannot be raised for the first time on appeal . . . .").

Additionally, the Court finds that the respondent's claim is timely made pursuant to a substantive development in law providing the respondent with the foundation upon which to raise the objection. The Court acknowledges that prior to the Board's decision in *Fernandes*, the Tenth Circuit had already recognized the requirements relating to notices to appear as claim-processing rules and that the failure to comply with such a rule may be grounds for dismissal of a case. *Martinez-Perez*, 947 F.3d at 1279 (Jan. 17, 2020). However, it was not until much more recently that the Board first clarified in *Fernandes* that a respondent who has made a timely objection to a noncompliant notice to appear under INA § 239(a)(1) is not required to show they were prejudiced in raising the claim-processing violation. *Fernandes*, 28 I&N Dec. at 611-13.

Therefore, in consideration of the totality of the circumstances in the instant case, including the existence of a substantive development in law providing a basis for the respondent's objection, as well as prior precedent permitting timely objections to claim-processing violations before a final adjudication on the merits of the case, the Court finds the respondent has raised a timely objection to the DHS violation of INA § 239(a)(1)(G)(i). Furthermore, as noted, because the respondent has raised a timely objection to the statutory claim-processing violation, the respondent need not demonstrate that the violation resulted in prejudice. *Fernandes*, 28 I&N Dec. at 610-11.

"A claim-processing rule is mandatory to the extent a court must enforce the rule if a party properly raises it." *Martinez-Perez*, 947 F.3d at 1279. Having found the respondent's objection is timely, such that the respondent has not forfeited the right to raise this claim, the Court now turns to the appropriate remedy for the violation at issue.

The Board has stated, ". . . [A]n Immigration Judge may exercise judgment and discretion to enforce [the claim-processing rule at INA § 239(a)] as he or she deems appropriate to promote the rule's underlying purpose." *Fernandes*, 28 I&N Dec. at 613 (citing 8 C.F.R. § 1003.10(b)). Pursuant to the Board's recommendation that the Court explore various avenues by which the Department could remedy its claim-processing rule violation – including but not limited to dismissal or termination of proceedings, *see id.* at 613-17 – the Court has conducted a thorough review of the means by which the DHS might attempt to cure the defective notice to appear.[3] The Court will now address these proposed remedies.

As previously noted, the Supreme Court has concluded that "a notice to appear" under INA § 239(a)(1) is a single document, provided at a discrete time, and containing all of the statutorily-required information. *See Niz-Chavez*, 141 S. Ct. at 1474. Thus, whether the DHS can remedy its violation of INA § 239(a)(1)(G)(i) by employing means short of dismissal or termination of proceedings is dependent upon the Department's ability to cure the defective notice to appear without running afoul of the Supreme Court's clear directive relating to the singular nature of a notice to appear. *See Fernandes*, 28 I&N Dec. at 612 ("[T]he Supreme Court emphasized in *Niz-Chavez* that a notice of hearing does not excuse DHS's violation of section 239(a)(1) when it issues a noncompliant notice to appear.").

One proposed remedy for the DHS violation of INA § 239(a) is the amendment of the defective notice to appear through the filing of a Form I-261, "Additional Charges of

[3] Though the Board has stated an Immigration Judge is not *required* to terminate proceedings upon a respondent raising a timely objection to a violation of INA § 239(a)(1), it has not precluded the Court from exercising its discretionary authority to prescribe the remedy it deems most appropriate in a given case – including termination of proceedings. *See Fernandes*, 28 I&N Dec. at 613-16.

Inadmissibility/Deportability," containing the date and time of the respondent's initial hearing in removal proceedings or the date and time of some future hearing. The authority of the DHS to amend the contents of the notice to appear by filing a Form I-261 is derived from 8 C.F.R. § 1003.30, which states: "At any time during deportation or removal proceedings, additional or substituted charges of deportability and/or factual allegations may be lodged by the Service in writing." Conspicuously absent from this provision is any mention of the Department's authority to amend other information required by INA § 239(a)(1), including the date and time of the proceedings. This apparent omission is elucidated, however, by a nearby regulation and its statutory counterpart. Pursuant to 8 C.F.R. § 1003.18(b), where the time, place, and date of the initial removal hearing is not contained in the notice to appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the respondent of the time, place, and date of the hearing. 8 C.F.R. § 1003.18(b). "In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding." *Id.* This language mirrors that of INA § 239(a)(2)(A), which sets forth the procedure by which "Notice of change in time or place of proceedings" may be provided to the respondent. *See* INA § 239(a)(2)(A). As the Act and its attendant regulations explicitly delineate the means by which the time and place information contained within the notice to appear may be amended, the Court finds the DHS cannot circumvent these prescribed procedures by attempting to employ its limited authority to amend allegations and charges under 8 C.F.R. § 1003.30.

The Court notes that, although the Act and controlling regulations provide a means by which the requisite date and time information in a notice to appear may be amended, this procedure constitutes the very "two-step notice process" eschewed by the Supreme Court in *Niz-Chavez*. As previously discussed, the Supreme Court concluded that a defective notice to appear issued in conjunction with a notice of hearing under INA § 239(a)(2)(A) does not constitute "a notice to appear" under INA § 239(a). *Niz-Chavez*, 141 S. Ct. at 1486 (stating, "Interpreting the phrase 'a notice to appear' to require a single notice – rather than 2 or 20 documents," ensures the federal government does not exceed its statutory license). The Supreme Court further clarified that the procedures for amending the requisite time and place information under INA § 239(a)(1)(G)(i) may only be invoked *after* the DHS serves a statutorily compliant notice to appear.[4] *See Niz-Chavez*, 141 S. Ct. at 1479, 1485 ("[O]nce the government serves a compliant notice to appear, IIRIRA permits it to send a supplemental notice amending the time and place of an alien's hearing if logistics require a change.") (citing INA § 239(a)(2)(A)). Therefore, because the DHS has not served and filed a statutorily compliant notice to appear, the Court finds the DHS cannot remedy its claim-processing violation by amending the date and time information pursuant to the procedures set forth in INA § 239(a)(2)(A) and 8 C.F.R. § 1003.18(b). *Niz-Chavez*, 141 S. Ct. at 1485.

Similarly, the DHS cannot cure a defective notice to appear by simply filing a Form I-831, "Continuation Page for Form I-862," effectively seeking to amend the previously-filed notice to

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[4] As the Supreme Court noted in *Niz-Chavez*, the government could have responded to the Supreme Court's binding interpretation of INA § 239(a) in *Pereira* by "issuing notices to appear with all the information § 1229(a)(1) requires—and then amending the time or place information if circumstances required it. After all, in the very next statutory subsection, § 1229(a)(2), Congress expressly contemplated that possibility. But, at least in cases like ours, it seems the government has chosen instead to continue down the same old path." *Niz-Chavez*, 141 S. Ct. at 1479.

appear by attaching an addendum to this filing. As discussed above, the Act and regulations clearly set forth the process by which the statutorily-required date and time information in a notice to appear may be amended. INA § 239(a)(2)(A);8 C.F.R. § 1003.18(b). Moreover, to the extent a Form I-831 acts, in substance, as a "supplemental notice amending the time and place" of the proceedings, this piecemeal notice-by-installment cannot fulfill the statutory requirements of INA § 239(a), and therefore fails to remedy the DHS violation of the claim-processing rule.[5] *Niz-Chavez*, 141 S. Ct. at 1485.

Regarding any attempt by the DHS to cure the defective notice to appear by filing a new, statutorily compliant notice to appear in the instant proceedings, the Court finds this purported remedy is circumscribed by the nature of the "case-initiating" document at issue and its function within removal proceedings. The regulations provide that jurisdiction vests and proceedings before an Immigration Judge commence when a charging document is filed with the Immigration Court. 8 C.F.R. § 1003.14(a). As previously stated, the Tenth Circuit has clarified that this regulation is not truly "jurisdictional," as Immigration Judges obtain their powers from Congress, not agency regulations. *Lopez-Munoz*, 941 F.3d at 1015. However, while recognizing the regulation's mention of the term "jurisdiction" to be "colloquial," *id.*, the Tenth Circuit has also recognized there is no doubt that "an agency may adopt rules and processes to maintain order." *Martinez-Perez*, 947 F.3d at 1279 (citing *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019). In the case of the Executive Office for Immigration Review, the regulations provide the process by which removal proceedings are initiated: the filing of a charging document with the Court. 8 C.F.R. § 1003.14(a). Under the regulations, a charging document that satisfies the regulatory requirements for a "notice to appear" under 8 C.F.R. § 1003.15 is sufficient to initiate removal proceedings, irrespective of the document's failure to comply with the statutory requirements for notices to appear under INA § 239(a). *See Arambula-Bravo*, 28 I&N Dec. at 390-91; *See also* 8 C.F.R. § 1003.14(a). The regulations also provide that where the time, place, and date of the initial removal hearing is not contained in the notice to appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the respondent of the time, place, and date of the hearing. 8 C.F.R. § 1003.18(b). There is no regulatory authority that instead permits the filing of a new charging document to provide this information. Thus, in looking to the relevant regulations for the proper procedure of removal proceedings, the Court can find no authority that the filing of a new notice to appear while proceedings remain pending could in any way serve to replace, supersede, or perfect the previously-filed notice to appear.[6] Therefore, while the filing of a statutorily-compliant notice to

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[5] Additionally, the Court notes the Act's implementing regulations delegate the authority to issue Forms I-862, Notices to Appear, and, by extension, continuations of Forms I-862, to specific officers enumerated at 8 C.F.R. § 239.1(a). Absent evidence that a duly authorized officer has issued a Form I-831, "Continuation Page for Form I-862," the Department does not have plenary authority to amend the Form I-862, Notice to Appear, in this manner.

[6] Neither the Tenth Circuit nor the Board have addressed the proposed remedy of filing a new notice to appear in the same proceedings to perfect a previously-filed defective document. However, the Court notes a decision in which the Sixth Circuit had cause to examine the disparate procedural consequences of the DHS's decision to file a new notice to appear in pending proceedings in lieu of amending the initial notice to appear pursuant to 8 C.F.R. § 1003.30. In *Arangure v. Garland*, No. 19-4025, 2022 WL 539224 (6th Cir. Feb. 23, 2022) (unpublished), the Court noted its underlying precedential decision relating to the application of the doctrine of res judicata was premised on the procedural posture created by the DHS's decision to "initiate[] separate removal proceedings by filing a new notice to appear" before the first proceeding became final. *See Arangure*, No. 19-4025, slip op. at 6 n.7 (citing *Arangure v. Whitaker*, 911 F.3d 333 (2018)). There, the DHS argued it had effectively exercised its right to bring additional or substituted charges in removal proceedings pursuant to 8 C.F.R. § 1003.30 by filing a new notice to appear prior to the proceedings becoming final under 8 C.F.R. § 1003.39. *Id.* The Sixth Circuit rebuffed this argument, noting, the "DHS did not add 'additional or substituted charges' to an existing proceeding . . . . It initiated a separate removal proceeding by filing a new notice to

appear might institute new proceedings against the respondent – unencumbered by the DHS violation of the mandatory claim-processing rule at INA § 239(a)(1)(G)(i) – this corrective action would not serve to remedy the claim-processing violation in the proceedings currently before the Court.

By similar reasoning, the Court does not see that the DHS can remedy a defective NTA by simply writing in a date and time of a hearing into the original document after it has already been filed with the Court. While such an approach would not appear to run afoul of the Supreme Court's requirement that an NTA be a "single document," the Supreme Court has further required that such document must be provided at a "discrete time, and contain[] all of the statutorily-required information," and "no one thinks this information may be provided by installment."[7] *Niz-Chavez*, 141 S. Ct. at 1474, 1482 n. 2 (citing 8 U.S.C. § 1229(a)(1)(G)(i)). Moreover, just as there is a lack of regulatory authority permitting the filing of a new charging document in the ongoing proceedings, the regulations also do not permit writing in changes to an existing NTA. As discussed above, the only procedure affording the DHS an opportunity to amend the contents of an NTA is provided for in 8 C.F.R. § 1003.30, which addresses only the addition or substitution of charges and factual allegations through the filing of a Form I-261. As already addressed, there is no mention of any DHS authority to amend other information required by INA § 239(a)(1), including the date and time of the proceedings. Instead, both 8 C.F.R. § 1003.18(b) and INA § 239(a)(2)(A) provide that where the time, place, and date of the initial removal hearing is not contained in the notice to appear, or where there is a change in this information, the Immigration Court shall be responsible for providing written notice of this information. Moreover, as previously noted, the Supreme Court has also clarified that the procedures for amending the requisite time and place information under INA § 239(a)(1)(G)(i) may only be invoked *after* the DHS serves a statutorily compliant notice to appear. *See Niz-Chavez*, 141 S. Ct. at 1479, 1485 ("[O]nce the government serves a compliant notice to appear, IIRIRA permits it to send a supplemental notice amending the time and place of an alien's hearing if logistics require a change.") (citing INA § 239(a)(2)(A)).

In light of the foregoing analysis, the Court finds the Board's attempts to analogize the DHS violation of INA § 239(a)(1) to cases involving ineffective service of the notice to appear to be inapposite. *See Fernandes*, 28 I&N Dec. at 615 (citing *B.R. v. Garland*, 26 F.4th 827, 840 (9th Cir. 2022), *Matter of W-A-F-C-*, 26 I&N Dec. 880, 882 (BIA 2016), and *Matter of E-S-I-*, 26 I&N Dec. 136, 145 (BIA 2013)). While improper service of a statutorily compliant notice to appear might be cured by subsequent service, pursuant to the Supreme Court's clear mandate that a notice to appear must contain – in a single document – all of the statutorily required information set forth at INA § 239(a)(1), the Court has found no precedential, statutory, or regulatory support for the proposition that the DHS can cure a statutorily defective notice to appear by later amending this document. *Niz-Chavez*, 141 S. Ct. at 1486.

In addition, though the Board likens INA § 239(a)(1)(G)(i) to other mandatory claim-processing rules defining documents filed in dissimilar proceedings – such as certificates of appealability ("COAs") defined at 28 U.S.C. § 2253(c) – the Court finds case law relative to these unrelated documents is not instructive as to the remedy available for a violation of INA

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appear—a position DHS has taken throughout this litigation (including in this appeal) and that both this court and the BIA have accepted." *Id.* (internal citations omitted).

[7] Additionally, the Court cannot view the writing in of additional information on a notice to appear to masquerade as the issuance of a new statutorily compliant document as the Court again notes the Act's implementing regulations delegate the authority to issue NTAs to specific officers enumerated at 8 C.F.R. § 239.1(a).

§ 239(a)(1)(G)(i). *See Fernandes*, 28 I&N Dec. at 614-15 (citing *Gonzalez v. Thaler*, 565 U.S. 134 (2012)). The Supreme Court has stated a COA that does not comply with the mandatory claim-processing rule at 28 U.S.C. § 2253(c)(3) (requiring that the document contain a constitutional issue) "is not equivalent to the lack of any COA," such that the defect may be remedied by amendment to the COA or remand to the district judge for specification of a constitutional issue. *See Gonzalez*, 565 U.S. at 143, 146. Conversely, in the case of a notice to appear defined under INA § 239(a)(1), the Supreme Court has explicitly stated "*this* case-initiating document must include (among other things) '[t]he time and place at which the proceedings will be held," and "no one thinks this information may be provided by installment," thereby foreclosing remedy by amendment. *Niz-Chavez*, 141 S. Ct. at 1482 n. 2 (citing 8 U.S.C. § 1229(a)(1)(G)(i)) (emphasis in original). *See also id.* at 1482 (likening a notice to appear to other "case initiating documents," which "[n]o one contends . . . may be shattered to bits" and "issued piece by piece," such as an indictment, an information, or a civil complaint). Thus, the Court finds the Supreme Court's interpretation of separate statutory provisions is not instructive as to the remedy available for the DHS violation of INA § 239(a)(1)(G)(i), nor does it supersede the Supreme Court's analysis of the statutory claim-processing rule herein at issue.[8]

Pursuant to the foregoing, the Court finds the only viable remedy for the DHS violation of INA § 239(a)(1)(G)(i) is dismissal or termination of these proceedings.[9] While the Board in *Fernandes* instructed that an Immigration Judge may afford the DHS an opportunity to remedy the claim-processing violation at issue in this case without ordering termination of proceedings, 28 I&N Dec. at 616, the Board did not provide an option for a legally permissible and sufficient remedy.[10] *Id.* at 616 ("The precise contours of permissible remedies are not before us at this time."). Within this decision, this Court has evaluated potential remedies beyond dismissal, and found none to be permissible. The Tenth Circuit has stated that, "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." *Martinez-Perez*, 947 F.3d at 1279 (citing *Ortiz-Santiago*, 924 F.3d at 963). *See also Arreola-Ochoaa*, 34 F.4th at 607 (stating that if a noncitizen raises a timely objection to the notice to appear, the proceeding must be dismissed for failure to comply with a mandatory claims-processing rule, and after dismissal, the DHS remains free to issue a proper notice and begin a new proceeding).

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[8] The Board also noted the Supreme Court has found that, while "a court may overlook defects in a notice to appeal" under 18 U.S.C. § 3742(a), it "may not overlook the failure to file a notice of appeal at all." *See Fernandes*, 28 I&N Dec. at 614-15 (quoting *Maurique v. United States*, 137 S. Ct. 1266, 1274, 197 L. Ed. 2d 599 (2017)) (internal quotation marks omitted). However, with respect to "notices to appeal" under 18 U.S.C. § 3742(a), the Supreme Court has recognized that Federal Rule of Appellate Procedure 3(a)(2) explicitly provides that a court of appeals may, in its discretion, overlook defects in a notice to appeal other than the failure to timely file a notice. *See Maurique*, 137 S. Ct. at 1271-72. As there is no analogous statute granting the Court the discretionary authority to overlook defects in a notice to appear where a timely objection is raised, the Court finds it does not have the authority to simply "overlook" the statutory defects in the notice to appear.

[9] The Attorney General has recognized that generally, "termination" and "dismissal" may be used interchangeably. *Matter of Coronado-Acevedo*, 28 I&N Dec. 648, n.1 (A.G. 2022).

[10] In *Fernandes*, the Board cited to *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 465-55 (A.G. 2018) which stated that once a notice to appear is filed with the Immigration Court, an Immigration Judge may only terminate proceedings in limited circumstances.). However, the Attorney General recently overruled *S-O-G- & F-D-B-*. *Coronado-Acevedo*, 28 I&N Dec. 628.

Therefore, the Court will **GRANT** the respondent's motion and will dismiss these proceedings without prejudice.

The Court's decision does not preclude the Department from properly commencing proceedings pursuant to the issuance of a new notice to appear in compliance with the statutory requirements in INA § 239(a).

ORDERS

Accordingly, it is hereby ordered that:

1. The respondent's Motion is **GRANTED.**

2. The proceedings are **DISMISSED WITHOUT PREJUDICE.**

Appeal Rights: This decision is final unless an appeal is filed on Form EOIR-26, Notice of Appeal, with the Board of Immigration Appeals within thirty (30) calendar days of the date of the mailing of this written decision. Your notice of appeal, attached documents, and filing fee or a fee waiver request must be mailed to:

Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Appeal forms are available in electronic format at http://www.justice.gov/eoir/formslist.htm. The fees are listed at http://www.justice.gov/eoir/appealtypes.htm.

Order of the Immigration Judge

Immigration Judge: KAUFMAN, MATTHEW 01/10/2023

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