No. 16-60847

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MELIDA TERESA LUNA-GARCIA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, U. S. ATTORNEY GENERAL,

Respondent.

Petition for Review from a Decision of the
Board of Immigration Appeals

PETITIONER'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

(5th Cir. R. 28.2.1)

(1) No. 16-60847; Melida Teresa Luna-Garcia v. Sessions
BIA Case No. A97-831-833.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent: Jefferson B. Sessions, III, U.S. Attorney General

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REQUEST FOR ORAL ARGUMENT

(5th Cir. R. 28.2.3)

Petitioner Melida Teresa Luna-Garcia respectfully requests oral argument in this matter. The issue presented in the briefs—whether a noncitizen is entitled to written notice of the time and date of her removal proceedings when she provides a foreign address, as opposed to a U.S. address, to the Attorney General—is one of first impression in any of the United States Courts of Appeal. It is an issue that arises frequently, and statements made recently by the Department of Homeland Security pursuant the new Administration's immigration policy changes make clear that it will arise even more frequently in the coming years. The issue also implicates constitutional concerns of due process in the immigration context. Petitioner respectfully suggests that oral discussion of the facts and relevant precedent would benefit the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the Bureau of Immigration Appeals' ("BIA") decision under 8 U.S.C. § 1252(a)(1), which provides for judicial review of final orders of removal. *See Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015) (reviewing the BIA's denial of a motion to reopen); *Hernandez v. Lynch*, 825 F.3d 266, 268 & n.2 (5th Cir. 2016) (reviewing the BIA's denial of a motion to reopen ordered *in absentia*).

II. QUESTION PRESENTED FOR REVIEW

The question presented for this Court's review is whether, pursuant to the Immigration and Nationality Act ("INA") § 239(a)(1), a noncitizen is entitled to written notice of the time and date of her removal proceedings when she provides a foreign address to the Attorney General as the "address . . . at which [she] may be contacted" under INA § 239(a)(1)(F)(i).

III. STATEMENT OF THE CASE

Melida Teresa Luna-Garcia ("Luna-Garcia" or "Petitioner") is a native and citizen of Guatemala. AR 102.[1] She entered the United States on April 15, 2004. AR 102. Shortly thereafter, Petitioner was apprehended by a U.S. Customs and Border Protection ("CBP") agent near Laredo, Texas. AR 84. When the agent asked Petitioner for "an address where [she] could receive mail," she provided the

[1] All record citations refer to the Certified Administrative Record ("AR"), filed in this Court on January 30, 2017.

agent with her home address in Guatemala. AR 82, 86 (noting Petitioner's "permanent residence"). After a brief detention, Petitioner was released on her own recognizance. AR 87.

On April 30, 2004, the CBP agent served Petitioner with a Notice to Appear ("NTA"), charging her as a noncitizen present in the United States without being admitted or paroled. AR 84. The NTA did not contain the time and date of her removal hearing, but instead stated that the hearing would take place on a date and time "to be set." AR 84. The NTA further stated,

> **Failure to Appear:** You are required to provide the INS, in writing, *with your full mailing address* and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided a copy of this form. Notices of hearing will be mailed to this address. If you do not submit this Form EOIR-33 and do not *otherwise provide an address at which you may be reached* during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

AR 85 (emphasis added).

Petitioner was never provided with a Form EOIR-33. AR 82. At the time she was served with the NTA, however, she provided the government, through the CBP agent, with her "full mailing address" and the "address at which [she could] be reached"; therefore, she did not need to file a Form EOIR-33 to make the

changes to which the NTA referred. AR 82. Petitioner expected to receive the government's notice regarding the date and time "to be set" at the address she had already provided—her mailing address in Guatemala. AR 82.

The Guatemalan address that Petitioner provided to the CBP agent is reflected on Petitioner's Form I-213 ("Record of Deportable/Inadmissible Alien") in a box entitled "Number, Street, City, Province (State) and Country of Permanent Residence" but is not reflected on her NTA. *See* AR 86-87 (Form I-213), 84-85 (NTA). On the NTA, in a blank following "currently residing at," there is a space labeled "Number, street, city[,] state, and ZIP code." In that space appear the words "FAILED TO PROVIDE A US ADDRESS." AR 84. The Guatemalan address that Petitioner gave to the CBP agent was provided to, and available to, the immigration court during Petitioner's immigration proceedings. AR 86-87.

The immigration court, however, never provided Petitioner with written notice of the time and date of her removal proceedings. AR 90 (noting that written notice was "not given to the respondent because the respondent failed to provide the court with his/her address as required under Section 239(a)(1)(F) of the Act after having been advised of that requirement in the Notice to Appear"). Those proceedings were held in her absence on June 10, 2004, after which an immigration judge ordered Petitioner removed *in absentia*. AR 90. The *in absentia* removal order was never served on Petitioner. AR 82, 62.

In January 2016, Petitioner moved to reopen and rescind the *in absentia* removal order. AR 67-80. The Immigration Judge ("IJ") denied Petitioner's motion, reasoning that the Guatemalan address that she had provided did not suffice under the applicable "law and regulations," which "requir[e] that the respondent provide an address 'at which the alien may be contacted.' § 239(a)(1)(F)(i)." AR 61; *see also* AR 62 (citing 8 C.F.R. §§ 1003.15(a), (c)(2), (d)(1)-(2)). The IJ further observed that Petitioner was not at that time in Guatemala and "had no plans to go there but was traveling to New York to seek employment." AR 61. Because, according to the IJ, Petitioner had not complied with applicable "law and regulations," the government was not required to provide her with written notice of the time and date of her removal proceedings. AR 62 (citing INA § 240(b)(5)(C)(ii)).

Petitioner filed an administrative appeal challenging the IJ's decision. AR 18. The BIA dismissed the appeal in a non-precedential decision authored by a single member of the Board, who stated that, "[i]n view of the respondent's failure to provide her U.S. address, no notice for a hearing was required." AR 2 (citing INA § 240(b)(5)(B)). Petitioner timely seeks review from this Court. *See* Petition for Review (filed on Dec. 23, 2016).

IV. SUMMARY OF THE ARGUMENT

When Congress enacted the INA, it provided every noncitizen with a statutory right to written notice of the "time and place" of any removal proceedings that the government initiates against him or her. INA § 239(a)(1). Here, the government concedes that it never provided Petitioner with that written notice, even though Petitioner complied fully with the requirements of INA § 239(a)(1)(F)(i) by providing the government with "an address at which [she could] be contacted." The BIA erred when it concluded that the government's statutory notice requirement was never triggered because Petitioner had provided the government with a Guatemalan, rather than a U.S., address. Petitioner seeks review of that erroneous legal conclusion.

This case presents a question of law that the Court must review *de novo*, without any deference to the agency. *See Rodriguez-Avalos v. Holder*, 788 F.3d 444, 448-49 (5th Cir. 2015). Where, as here, the BIA's legal conclusion was issued in a non-precedential agency decision, the conclusion does not carry the force of law and is entitled to deference only to the extent that it carries the power to persuade. *Dhuka v. Holder*, 716 F.3d 149, 154-56 (5th Cir. 2013) (holding that single-judge opinions of the BIA do not carry the force of law and describing deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Because,

however, this decision lacks any reasoning or power to persuade, the Court should not defer to it at all.

On *de novo* review, and applying this Court's traditional tools of statutory construction, it is clear that the statute, which requires a noncitizen only to provide an "address at which [he or she] may be contacted," INA § 239(a)(1)(F)(i), does *not* require the noncitizen to provide the government with a U.S. address. A contrary construction would be inconsistent with the provision's text, would contravene IIRIRA's statutory scheme,[2] and would compromise a noncitizen's due process rights. For those reasons, this Court should grant the petition for review and remand this matter back to the agency.

To the extent that the Court is inclined to let the BIA's interpretation stand, then, for two reasons, the Court must still grant the petition for review under principles of due process. First, due process required that Petitioner be provided with reasonable opportunity to be present at her removal hearing. *See United States v. Estrada-Trochez*, 66 F.3d 733, 736 (5th Cir. 1995). She was not provided with *any* notice of her hearing, however. If the BIA's interpretation of INA § 239(a)(1)(F)(i) is correct, then that statute is unconstitutional to the extent that it permits removal *in absentia* with no notice of hearing, as in Petitioner's case.

[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208. 110 Stat. §§ 3009-546 (1996) ("IIRIRA"). The statutory scheme to which we refer generally includes, in large part, the 1996 comprehensive amendments made to the INA through IIRIRA.

Second, Petitioner's due process rights were violated when the government failed to inform her through its agents or forms that providing a foreign address would not comply with the requirements of INA § 239(a)(1)(F)(i).

V. SCOPE AND STANDARD OF REVIEW

The scope of this Court's review generally is limited to the decision of the BIA, unless it is clear that the IJ's decision had "some impact" on the BIA's decision. *Chun v. INS*, 40 F.3d 76, 78 (5th Cir. 1994). Here, the BIA decided the question presented for review independently of the IJ. *See* AR 2-3. Review is therefore limited to the BIA's decision.

This Court reviews for abuse of discretion the BIA's denial of a motion to reopen. *Singh v. Lynch*, 840 F.3d 220, 222 (5th Cir. 2016). Under that standard, the BIA's decision will stand "so long as it is not capricious . . . , utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible rational approach." *Id.* (internal quotation marks omitted). Questions of law, however, are reviewed *de novo*, "accord[ing] deference to the BIA's interpretation of immigration statutes unless the record reveals compelling evidence that the BIA's interpretation is incorrect." *Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009) (citing *Mikhael v. INS*, 115 F.3d 299, 302 (5th Cir. 1997)). When the BIA makes an error of law, that error, by

definition, constitutes an abuse of discretion. *Alarcon-Chavez v. Gonzales*, 403 F.3d 343, 345 (5th Cir. 2005).

VI. ARGUMENT

A. The BIA abused its discretion when it denied Petitioner's motion to reopen

Through the INA, Congress has provided noncitizens with a statutory right to written notice of the "time and place" of any removal proceedings that the government initiates against them. INA § 239(a)(1). Congress has further provided, under the same law, certain requirements for the contents of that written notice. For instance, the written notice must provide the noncitizen with notice of

(1) "[t]he time and place at which the proceedings will be held," § 239(a)(1)(G)(i);

(2) "[t]he requirement that the [noncitizen] must immediately provide (or have provided) the Attorney General with a written record of an address or telephone number (if any) at which the [noncitizen] may be contacted respecting [those removal] proceedings . . . ," § 239(a)(1)(F)(i);

(3) "[t]he requirement that the [noncitizen] must provide the Attorney General immediately with a written record of any change of the [noncitizen]'s address or telephone number," § 239(a)(1)(F)(ii); and

(4) "[t]he consequences . . . of failure to provide address and telephone information pursuant to this subparagraph," § 239(a)(1)(F)(iii).

Likewise, when the time or place of the noncitizen's removal proceedings changes, the government must provide the noncitizen with further notice of "the new time or place of the proceedings." INA § 239(a)(2)(A)(i).

The government is relieved of its burden to provide written notice in *only one* circumstance: when the noncitizen does not provide the government with an "address . . . at which [she] may be contacted" pursuant to § 239(a)(1)(F)(i). *See* INA § 239(a)(2)(B). In other words, as long as the noncitizen provides the government with an "address . . . at which [she] may be contacted" pursuant to § 239(a)(1)(F)(i), the noncitizen is entitled to written notice under INA § 239(a)(1). *See* INA § 239(a)(2)(B) (listing only one exception to the government's notice requirement). And, as long as she is provided with written notice that complies with the statute, a noncitizen who fails to appear at her removal proceedings may be ordered removed *in absentia*. INA § 240(b)(5)(A).

The right to written notice under INA § 239(a)(1) is a cornerstone of due process, to which every noncitizen is entitled. *Estrada-Trochez*, 66 F.3d at 733-36. Thus, a noncitizen who is not provided with adequate notice of his or her removal proceedings may seek to have his or her *in absentia* removal order rescinded "upon a motion to reopen filed at any time if the [noncitizen] demonstrates that [she] did not receive notice in accordance with [§ 239]." INA § 240(b)(5)(C)(ii).

1. The BIA's interpretation is not entitled to *Skidmore* deference.

In this case, the BIA erroneously concluded that the government was relieved of its requirement to provide written notice under INA § 239(a)(1)(F)(i) because Petitioner provided the government with a Guatemalan, rather than a U.S.,

address. Where, as here, the BIA reaches a legal conclusion in a non-precedential decision, that decision is entitled only to *Skidmore* deference, the scope of which is proportional to the decision's thoroughness, reasoning, consistency, and power to persuade. *Dhuka,* 716 F.3d at 154-56 (citing *Skidmore*, 323 U.S. at 140). Here, however, the BIA's decision does not suffice under that standard, so this Court should not defer to it at all.

The BIA's decision in this case offers virtually no reasoning to support its conclusion. It does not even go so far as to cite the relevant statutory wording, and instead makes the conclusory statement that, "[i]n view of the respondent's failure to provide her U.S. address, no notice for a hearing was required." AR 7. It does not explain why the statute requires a U.S. address, nor does it give any reason why the statute—or the BIA's own regulations—should be so limited. *See* AR 7-8. Indeed, the *only* point the decision purports to make is that "the NTA calls for a U.S. form of address (ie, city, state and zip code)," AR 7, yet it does not explain why that information is relevant to its conclusion.[3] And, further to that point, the decision does not explain why, if the statute *requires* a U.S. address, the BIA's own Form EOIR–33 asks the noncitizen to provide his or her "[c]ountry, if other than U.S." *See* U.S. Department of Justice, Form EOIR–33/IC, Alien's Change of

[3] Indeed, the BIA's determination that the NTA calls for a "U.S. form of address" is incorrect because the city, state, zip code address format is not unique to the United States. Many countries outside of the United States use a similar address format.

Address Form (2015), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir33icsanantonio.pdf.[4]

Furthermore, the BIA's decision is unpersuasive because it relies on irrelevant case law, overlooks relevant caselaw, and introduces inconsistencies within the agency's own decisions. First, the BIA's reliance on *Abarca-Orellana v. Holder*,[5] *Li v. Holder*,[6] and *Gomez-Palacios*[7] is unpersuasive because those cases involve circumstances in which the noncitizen did not provide *any address at all*; thus, the cases are inapposite. Second, the BIA's failure to cite its own relevant precedent undermines the persuasiveness of its decision. In *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 448 (BIA 1996), the BIA described the government's "long history"—predating IIRIRA—of returning noncitizens to foreign countries pending removal proceedings.

Third, the rule the BIA applied here is inconsistent with its earlier decisions. In *Matter of Rivas-Vivas*, 2008 WL 486913 (BIA Jan. 30, 2008) (unpublished), the Petitioner was served with a Notice to Appear and returned to Mexico to await her

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[4] The version of Form EOIR-33 effective in 2004, the date Petitioner initially was apprehended, likewise asked for the noncitizen's "Country, if other than U.S." *See* Form EOIR-33, Alien's Change of Address Form, OMB #1125-0004 (2003) (expiring Aug. 31, 2005). Both versions of the form also allow the noncitizen to provide an address "[i]n care of" another person.

[5] 539 F. App'x 588 (5th Cir. 2013).

[6] 402 F. App'x 923 (5th Cir. 2010).

[7] 560 F.3d 354 (5th Cir. 2009).

removal hearing. *Id.* at *1. A notice of hearing was mailed to her address in Mexico, and when she failed to appear at her hearing, she was ordered removed *in absentia*. *Id.* Reviewing the question whether Petitioner's notice was sufficient, the BIA explained that "[w]ritten notice is considered sufficient if provided at the most recent address provided under section 239(a)(1)(F) of the Act." *Id.* The BIA went on to explain that the *in absentia* order was proper because the notice was sufficient: the "record reflects that the [notice] was mailed to the respondent at the address she provided, and concedes is correct, *in Mexico*." *Id.* (emphasis added). The BIA's explanation in *Rivas-Vivas* cannot be reconciled with the rule it applied in this case, however. In both cases, the noncitizen provided a foreign address, but here, the BIA departed without explanation from its decision in *Rivas-Vivas* that a foreign address suffices to trigger the government's notice requirement.

Because it lacks any degree of thoroughness or reasoning, this Court should not afford the BIA's interpretation of INA § 239(a)(1) any deference whatsoever. The agency's failure consistently to apply the interpretation it now prefers only further compels that result. Because, applying *Skidmore*, the interpretation lacks entirely any "power to persuade," this Court should not defer to it at all, and should proceed to review the statute *de novo*.

2. A noncitizen may provide a foreign address to satisfy INA § 239(a)(1)(F).

Absent any degree of agency deference, the issue presented for review becomes a pure question of law: whether the address that Petitioner provided to CBP agents was sufficient under § 239(a)(1)(F)(i) to trigger the government's written notice requirement. A straightforward application of this Court's tools for statutory interpretation makes clear that the answer to that question is "Yes." *See Martinez v. Mukasey*, 519 F.3d 532, 542-44 (5th Cir. 2008) (describing those interpretive tools).

When called upon to interpret the meaning of a statute, this Court's primary object is to ascertain Congress's intent. "Needless to say, plain statutory language is the most instructive and reliable indicator of Congressional intent." *Id.* at 543 (citing *White v. INS*, 75 F.3d 213, 215 (5th Cir. 1996)). Thus, absent an indication to the contrary, this Court should apply the " 'ordinary, contemporary, common meaning' " of the words the statute contains. *Id.* (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)). At bottom, this Court must " 'presume that a legislature says in a statute what it means and means in a statute what is says there.' " *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Here, the statute's text unambiguously provides that *any* address—U.S. or foreign—suffices under § 239(a)(1) to trigger the government's written notice

requirement. That text requires the noncitizen simply to provide the government with "an address . . . at which the [noncitizen] may be contacted respecting [removal] proceedings." INA § 239(a)(1)(F)(i). The address the noncitizen provides clearly may be U.S. or foreign—nothing in the statute precludes a noncitizen from providing a foreign address to satisfy that obligation, and the statute's text does not require the address to be within the United States. Given that Congress could have written the statute to require a "U.S. address" or an address "within the United States," and given that this Court must presume that the legislature "means in a statute what it says there," *Martinez*, 519 F.3d at 543, that should be the end of this Court's inquiry.

3. Other tools of statutory construction confirm what the text already makes clear.

Although "chief among the [Court's tools of statutory construction] is the plain language of the statute," *Khalid v. Holder*, 655 F.3d 363, 367 (5th Cir. 2011), *abrogated on other grounds by Scialabba v. Cuellar de Osario*, 134 S. Ct. 2191 (2014) (internal quotations omitted), the Supreme Court has also explained that "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994). "Thus, a statutory provision cannot be read in isolation, but necessarily derives meaning from the context provided by the surrounding provisions, as well as the broader context of the statute as a whole." *Khalid*, 655 F.3d at 367.

The expedited removal provisions of IIRIRA provide this Court with a compelling contextual clue for determining the meaning of INA § 239(a)(1). Under those provisions, an immigration officer must inspect any noncitizen who applies for admission to the United States. INA § 235(a)(3). If, after that inspection, "the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings. INA § 235(b)(2)(A). For aliens arriving on land from contiguous foreign territories, the immigration officer has the authority to "return the alien to that territory pending [those] proceeding[s]." INA § 235(b)(2)(C). In other words, when a noncitizen, such as Petitioner, crosses the U.S. border from Mexico and is inspected by an immigration officer, that officer unilaterally may return the noncitizen to Mexico, where she must reside while her removal proceedings are ongoing.

Again, this Court must presume, when construing a statute, that the "legislature says in a statute what it means and means in a statute what it says." *Martinez*, 519 F.3d at 543. The Court must recognize, then, that under IIRIRA, the legislature *not only* intended for the government to provide a noncitizen with notice of her removal proceedings at an address at which the noncitizen "may be contacted," *but also* contemplated that the government may require that noncitizen to reside in a foreign territory *at the time the notice would issue*. Construing

§ 239(a)(1) together with § 235(b)(2)(C) therefore compels the conclusion that the address "at which the [noncitizen] may be contacted" within the meaning of § 239 may, in fact, be a foreign address.[8]

This statute's text and context make abundantly clear that the address a noncitizen must provide the government under § 239(a)(1)(F)(i) need not be a U.S. address. Two other interpretive canons bolster that conclusion. First, the conclusion finds support in the canon of statutory construction that this Court applies in immigration cases, pursuant to which the Court construes immigration laws narrowly and in favor of the noncitizen. *See Vidal v. Gonzales*, 491 F.3d 250, 254 (5th Cir. 2007) (noting that rule as one of this Court's "twin canons of statutory construction" in immigration cases). Second, even if the BIA's construction of INA § 239(a)(1) were reasonable, it would give rise to serious constitutional concerns, as explained below. Petitioner's construction should therefore prevail under this Court's familiar canon of constitutional avoidance,

[8] Earlier this year, the Department of Homeland Security stated its intent to expand implementation of § 235(b)(2)(C) by directing "CBP and ICE personnel . . . , to the extent appropriate and reasonably practicable, [to] return aliens described in section 235(b)(2)(A) of the INA, who are placed in removal proceedings under section 240 of the INA . . . to the territory of the foreign contiguous country from which they arrived pending such removal proceedings." *See* U.S. Department of Homeland Security, *Memorandum re: Implementing the President's Border Security and Immigration Enforcement Improvement Policies*, at 7 (Feb. 20, 2017), *available at* https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies. In light of that stated intent, it is likely that the question presented in this matter will arise even more frequently than it has in the past.

pursuant to which the Court must assume that Congress did not intend a construction that gives rise to constitutional doubts. *See Rios-Valenzuela v. DHS*, 506 F.3d 393, 400 & n.14 (5th Cir. 2007) (describing the constitutional avoidance doctrine).

4. Petitioner was entitled to, but not provided with, adequate notice.

For the reasons explained above, Petitioner has a statutory right to written notice of the time and date of her removal proceedings. She was not provided with any such notice—a fact the government conceded at the outset of these proceedings. *See* AR 90 (noting that written notice was "not given to the respondent because the respondent failed to provide the court with his/her address as required under Section 239(a)(1)(F) of the Act after having been advised of that requirement in the Notice to Appear"). Because she was entitled to, but not provided with, *any* notice of her immigration proceedings, the BIA legally erred when it dismissed her appeal of her motion to reopen. The BIA's legal error, by definition, constituted an abuse of discretion. *See Alarcon-Chavez*, 403 F.3d at 345.

B. If the BIA properly construed INA § 239, then the statute unconstitutionally deprives noncitizens of fundamental due process protections.

To the extent that this Court chooses to defer to the BIA's interpretation of INA § 239(a)(1)(F)(i), then the statute, as applied in Petitioner's circumstances,

operated to deprive Petitioner of fundamental due process protections. Alternatively, due process required that Petitioner be informed that the foreign address she provided was insufficient under the statute.

Every noncitizen who enters the United States, even if unlawfully, is entitled to the protections afforded under the Due Process Clause. *Nose v. Att'y Gen. of U.S.*, 993 F.2d 75, 78 (5th Cir. 1993) (citing *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1036 (5th Cir. 1982)). Those protections include the right to be provided with notice, hearing, and a fair opportunity to be heard. *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002) (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 (1953)). Section 240(b)(4) of the INA, entitled "Alien's rights in proceeding," incorporates those fundamental constitutional rights into the federal immigration laws: "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . . ." INA § 240(b)(4)(B); *see also* INA § 240(b)(5)(A) (noncitizen may be removed *in absentia* only if provided written notice of hearing). In other words, under both the statute and the Constitution, an *in absentia* removal order is permissible only when the noncitizen's due process rights have been preserved, and when the government has met its obligation to provide notice as mandated by INA § 239(a).

Here, Petitioner's due process rights were violated in two ways. First, the BIA's interpretation of INA § 239(a)(1)(F)(i), if correct, would allow the government to remove a noncitizen *in absentia* without providing any notice at all. Put differently, the interpretation would deprive entirely a noncitizen in Petitioner's circumstances of her constitutional right to be present at her removal hearing, thereby violating a fundamental protection of the Due Process Clause. Second, if the BIA is correct that INA § 239(a)(1)(F)(i) requires a noncitizen to provide a U.S. address, Petitioner's due process rights were violated to the extent that she was never *informed* that the address she provided to immigration officials was non-compliant, depriving her of the opportunity to provide a compliant address and receive notice of her hearing.

1. Petitioner's due process rights were violated when she was removed pursuant to the INA's *in absentia* provision without notice.

The BIA's interpretation of INA § 239(a)(1)(F)(i), if correct, would permit the government to remove, *in abstentia*, any noncitizen in Petitioner's circumstances without providing the written notice required by the INA. That interpretation gives rise to grave constitutional concerns, as it would compromise a fundamental protection afforded under the Due Process Clause.

Under INA § 239(a)(1), removal proceedings against a noncitizen can be initiated only upon notice to the noncitizen. The notice must include certain

information, including the nature of the proceedings against the noncitizen, the charges against the noncitizen, and the time and place at which the proceedings will be held. INA § 239(a)(1)(A), (D), (G). The INA's notice provisions serve as a cornerstone of due process—under the Due Process Clause, every noncitizen is entitled to notice and an opportunity to be heard. *Lopez-Ortiz*, 313 F.3d at 230. Because the government ordered Petitioner removed *in absentia* without providing Petitioner with *any* notice of her hearing, Petitioner was never afforded those fundamental due process rights. Because she was not afforded her fundamental due process rights, her *in absentia* removal order issued in error. The BIA legally erred in concluding otherwise.

The cases in which this Court has held that a noncitizen's due process rights were not violated in the *in absentia* context do not provide guidance here. In each of those cases, the government had issued some form of notice, albeit with an accompanying procedural defect. *See, e.g.*, *Cruz-Diaz v. Holder*, 388 F. App'x 429 (5th Cir. 2010) (notice provided verbally to noncitizen); *Lopez-Dubon v. Holder*, 609 F.3d 642 (5th Cir. 2010) (notice not personally served on minor); *Gomez-Palacios v. Holder*, 560 F.3d 354 (5th Cir. 2009) (notice provided to a former address); *Patel v. INS*, 803 F.2d 804, 806 (5th Cir. 1986) (notice provided but continuance not granted). Here, by contrast, Petitioner did not receive *any* notice of her hearing and had no reason to know that her June 2004 hearing had

even been scheduled—*not* because of any procedural defect, but because the government never issued the notice in the first place.

The facts here are instead more analogous to those in *Leslie v. Att'y Gen. of U.S.*, 611 F.3d 171 (3d Cir. 2010). In *Leslie*, the noncitizen argued that his removal violated his due process rights because (1) the government failed to inform him of the availability of free legal services after he stated that he could not afford an attorney, and (2) he received notice of his hearing just one day before it was scheduled to occur. Although the Third Circuit granted the petitioner relief based on the first argument, the court found it "difficult to believe that a notice, issued under 8 U.S.C. § 1229(a)(1)(G)(i), would satisfy the Due Process Clause without affording an alien adequate time and opportunity to prepare arguments on his or her own behalf." *Id.* at 182. Likewise here, Petitioner had no opportunity to meaningfully participate in her proceeding because she was never informed that the hearing had been scheduled.

2. Petitioner's due process rights were violated when the government failed to inform her of the requirement that she must provide a U.S. address, rather than a foreign address, to receive notice of her hearing.

Petitioner provided an address to the government that she believed to have satisfied her obligations under the INA. When she was apprehended upon entry into the United States, the CBP agent asked her for an "address where [she] could receive mail." AR 82. Petitioner provided her Guatemalan address—the only

mailing address she had. AR 82, 86. Two weeks later, when the CBP agent served Petitioner with an NTA, it did not contain the time and date of her removal hearing, but instead stated that the hearing would be set and instructed her to use the government-provided Form EOIR–33 to notify the government of any changes to her address. AR 85. But Petitioner was never provided with a Form EOIR–33, and in any event had already provided the government with her full mailing address. Understanding this to have been sufficient for purposes of notice, Petitioner expected to receive her notice at her address in Guatemala. AR 82.

Significantly, at no point did the government notify or inform Petitioner that the address that she provided to the CBP agent did not comply with the requirements of INA § 239(a)(1)(F)(i). Indeed, the government's own forms suggest that that was probably not the case—as noted above, the government's own Form EOIR–33 asks the signer to list a "[c]ountry, if other than U.S." for both "old" and "new" addresses, suggesting that the agency believed that a foreign address would suffice to trigger notice. *See* U.S. Department of Justice, Form EOIR–33/IC, Alien's Change of Address Form (2015), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir33icsanantonio.pdf. To remove Petitioner on the basis that she did not provide a U.S. mailing address, when she was never informed by the government that she was required to do so, deprived Petitioner of the reasonable opportunity to be

present at her own removal hearing, thereby violating Petitioner's due process rights.

3. Because Petitioner's due process rights were violated, no showing of prejudice is required.

Petitioner was denied her fundamental due process rights to notice and opportunity to participate in her removal proceedings. When such fundamental rights are denied, no showing of prejudice is required. *United States v. Raya-Vaca*, 771 F.3d 1195, 1205 (9th Cir. 2014). Even if a showing of prejudice was necessary, Petitioner has suffered substantial prejudice because she was not afforded any opportunity to be present in her own removal hearing, as mandated by § 240(b). *See Patel*, 803 F.2d at 807 (requiring showing of substantial prejudice to prevail on due process claim).

VII. CONCLUSION

For the foregoing reasons, this Court should **GRANT** the petition for review and remand this matter to the immigration court for further proceedings.

DATED this 20th day of March, 2017.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on March 20, 2017.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,533 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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