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Taking the "Consequences Under Section 240(b)(5)" of Failing to Appear at Removal Proceedings Seriously

The Immigration and Nationality Act's Lost Appellate Rights Warnings

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Abstract: Throughout the 25 years since the INA's current notice and failure-to-appear provisions took effect, the government has notified noncitizens of removal proceedings using forms that make no mention of the limits that INA § 240(b)(5)(C) and (D) impose on the appellate rights of absentees ordered removed. Those forms have thus not satisfied warnings of the "consequences under section 240(b)(5)" of failing to appear as required by INA § 239(a)(1) and (2). Not only does it follow from INA § 239(a)(1) and (2)'s plain language that notices in removal proceedings must warn noncitizens that their appellate rights may be limited as § 240(b)(5)(C) and (D) provide by failing to appear, this reading is confirmed by the canons of construction and by the history and express purpose of the INA's notice and failure-to-appear provisions.

Section 239(a)(1) of the Immigration and Nationality Act (INA) requires noncitizens in removal proceedings to be given written notice specifying "[t]he consequences under section 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings."[1] And § 239(a)(2) similarly requires notices of changes or postponements to the time or place of their proceedings to specify "the consequences under section 240(b)(5) of failing, except under exceptional circumstances, to attend such proceedings."[2]

In turn, § 240(b)(5) provides in relevant part as follows:

> Consequences of Failure to Appear.—
>
> (A) In general.—Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this

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subparagraph if provided at the most recent address provided under section 239(a)(1)(F).

. . .

(C) Rescission of order.—Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 239(a) or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

. . .

(D) Effect on judicial review.—Any petition for review under section 242 of an order entered in absentia under this paragraph shall (except in cases described in section 242(b)(5)) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.[3]

Since these provisions first took effect, the government has always notified noncitizens of removal proceedings using forms that warn them that failing to appear at their proceedings can result in them being ordered removed in their absence.[4] But those forms have never warned noncitizens that a failure to appear can also result in their appellate rights being limited in any of the ways § 240(b)(5)(C) and (D) provide.[5] Among other things, those forms have thus not put noncitizens on notice that a failure to appear can result in the forfeiture of their rights to rescind a removal order through a direct appeal to the Board of Immigration Appeals (BIA),[6] to rescind an order through a motion to reopen presenting evidence of eligibility for relief from removal,[7] or to obtain judicial review of the BIA's refusal to reopen proceedings based on such evidence.[8]

Throughout the four years before Congress enacted the above provisions, however, the government used a form that explicitly warned noncitizens that they risked losing rights to rescission and review by failing to appear at proceedings.[9] Specifically, the form warned them that:

If you are ordered deported in your absence, you cannot seek to have that order rescinded except that: (a) you may file a motion to reopen the hearing within 180 days after the date of the order if you are able to show that your failure to appear was because of exceptional circumstances, or (b) you may file a motion to reopen at any time after the date of the order if you can show that you did not receive

> written notice of your hearing and you had provided your address and telephone number (or any changes of your address or telephone number) as required, or that you were incarcerated and did not appear at your hearing through no fault of your own. If you choose to seek judicial review of a deportation order entered in your absence, you must file the petition for review within 60 days (30 days if you are convicted of an aggravated felony) after the date of the final order, and the review shall be confined to the issues of validity of the notice provided to you, the reasons for your failure to appear at your hearing, and whether the government established that you are deportable.[10]

At that time, former INA § 242B(a)(2) required notices to specify the "consequences under subsection (c)" of failures to appear at deportation proceedings, and imposed limits on the rescission and review of absentees' deportation orders under § 242B(c)(3) and (4), respectively.[11] And though § 242B(c) differed from current § 240(b)(5) in certain respects,[12] the BIA has nonetheless recognized that § 240(b)(5)'s provisions are "nearly identical" to former § 242B(c)'s.[13]

What is more, some commentators have characterized the loss of rights to rescission and review under former § 242B(c)(3) and (4) as being among the "consequences" of failing to appear under former § 242B(c). For instance, one scholarly article on former § 242B's failure-to-appear provisions noted that the "limitations on rescission" and "limits on judicial review" were among the "three . . . consequences" of failing to appear under § 242B(c).[14] And one circuit has noted in a nonprecedential opinion that "[t]he consequences that had to be included in [a] notice" under § 242B(a)(2) included the "limitations upon when and how [an] *in absentia* order may be rescinded."[15]

Likewise, this article argues that a notice must warn its recipient of § 240(b)(5)(C) and (D)'s limits on appellate rights for it to satisfy § 239(a)(1) or (2).[16] Because they are not imposed on noncitizens but for a failure to appear, those limits fall within § 239(a)(1) and (2)'s plain language.[17] And the canons of construction leave no reasonable room for doubt that this was purposeful. After all, Congress could have easily clarified that it did not intend to require warnings of the § 240(b)(5)(C) and (D) limits by having § 239(a)(1) and (2) narrowly reference subparagraph (A) of § 240(b)(5) alone rather than broadly reference paragraph (5) as a whole. On the contrary, Congress instead signaled that was indeed what it intended by not only giving § 240(b)(5) in its entirety the heading "Consequences of failure to appear," but also by using a synonym for "consequence" in subparagraph (D)'s heading. And that Congress acted purposefully in requiring notices to warn noncitizens of the § 240(b)(5)(C) and (D) limits is also clear from the history of the INA's notice and failure-to-appear provisions. For, among other things, they derive in part from a proposed amendment to the INA intended to implement recommendations in a report noting that absentees did not "suffer . . . such adverse *consequences* as *loss of*

appeal rights."[18] Finally, requiring notices to warn noncitizens that they can lose appellate rights by failing to appear advances Congress's stated purpose in enacting the INA's notice and failure-to-appear provisions of ensuring that noncitizens attend their proceedings. In turn, because the government's forms have not warned noncitizens of the § 240(b)(5)(C) and (D) limits, those forms have not satisfied § 239(a)(1) or (2).

The Plain Language

Start with § 239(a)(1) and (2)'s plain language. Again, both § 239(a)(1) and (2) require notices to "specify[]" the "consequences under section 240(b)(5)" of failing "except under exceptional circumstances" to appear at removal proceedings. And § 240(b)(5)(C) and (D) are "under section 240(b)(5)." So, if a person of ordinary competence in the English language would describe the limits on appellate relief imposed by § 240(b)(5)(C) and (D) as "consequences" of failures "except under exceptional circumstances" to appear, the plain language of § 239(a)(1) and (2) requires notices of removal proceedings to specify those limits.

Meanwhile, that an ordinary reader would read § 239(a)(1) and (2)'s plain language to encompass the § 240(b)(5)(C) and (D) limits on appellate relief fall is supported in the first place by the fact that this coincides with how some commentators have read their predecessors.[19] So, too, is this supported by the fact that their predecessors originated in response to an agency report that expressly characterized the "loss of appeal rights" as a "consequence[]" of failing to appear.[20] For even on a strict textualist approach to statutory construction, consideration of legislative history is appropriate where, as here, it is considered only for the narrow purpose of "showing that a particular word . . . is capable of bearing a particular meaning."[21]

More importantly, this conclusion also straightforwardly follows from how the word "consequence" is ordinarily used. As Justice Antonin Scalia noted in writing for the Supreme Court in *Burrage v. United States*,[22] "it is natural to say that one event is the outcome or consequence of another when the former would not have occurred *but for* the latter."[23] Similarly, in concluding that an appellant's claims were a "consequence" of a car accident, a Second Circuit opinion noted that this was because "*but for* the accident, [the appellant] would not have any claims."[24] Analogously, because noncitizens are only at risk of having their appellate rights stripped by § 240(b)(5)(C) and (D) if they fail to appear at their proceedings, they will not lose their rights under those provisions but for a failure to appear.[25] So, it is natural to say that the loss of rights under § 240(b)(5)(C) and (D) is a "consequence" of failing to appear.

Nor is there anything counterintuitive about calling the loss of appellate rights a "consequence" of something else. For example, Judge Diane Wood of

the Seventh Circuit authored an opinion joined by then-Judge Richard Posner identifying the "loss of appellate rights" to be among the "consequences [that] flow from a guilty plea" that the Federal Rules of Criminal Procedure require judges to advise defendants of before accepting their pleas.[26] And one Federal Circuit opinion described the "loss of appeal rights" as among the "consequences" of a Navy employee's refusal to retract his resignation of his position.[27]

And that noncitizens must be ordered removed before the § 240(b)(5)(C) and (D) limits can be imposed on them also does not undermine the conclusion that § 240(b)(5)(C) and (D) set forth "consequences" of a failure to appear. As Justice Scalia recognized in *Burrage*, because all that is meant by calling one event the "consequence" of another is that the first event was a necessary cause of the second, "it is beside the point [whether the second event] also resulted from a host of *other* necessary causes."[28] Likewise, it is beside the point that § 240(b)(5)(C) and (D) strip noncitizens of rights only if they fail to appear *and* are ordered removed. This merely means that the loss of appellate rights under § 240(b)(5)(C) and (D) is properly deemed a "consequence" of both those things.[29]

What is more, concluding that the loss of rights under § 240(b)(5)(C) and (D) is not a "consequence under section 240(b)(5)" of failing to appear for purposes of § 239(a)(1) and (2) because that is not solely caused by a nonappearance would have the absurd implication of meaning that nothing is. The only other subparagraph under § 240(b)(5) that can be intelligibly described as imposing a "consequence" for failing to appear besides (C) and (D) is (A), which authorizes the entry of removal orders against absentees.[30] And a nonappearance alone is not sufficient for the entry of an order under § 240(b)(5)(A). Before a noncitizen may be ordered removed under that subparagraph, the Department of Homeland Security (DHS) must first meet its burden of establishing that the noncitizen received the notice required under § 239(a)(1) or (2) and is removable.[31] So, if the loss of rights under § 240(b)(5)(C) and (D) does not qualify as a "consequence under section 240(b)(5)" of failing to appear within § 239(a)(1) and (2)'s meaning because a failure to appear alone is not enough to trigger that outcome, nothing qualifies as such. Strictly speaking, the only things that can be described as "consequences under section 240(b)(5)" solely caused by a failure to appear are *the risks* of being ordered removed and losing appellate rights.

In fact, the necessary causes for being ordered removed under § 240(b)(5)(A) are actually identical to the necessary causes for losing appellate rights under § 240(b)(5)(C) and (D). This is because § 240(b)(5)(A) does not just permit the entry of a removal order if DHS meets its burden, but *requires* it. Subparagraph (A) provides that a noncitizen who fails to appear "*shall* be ordered removed" if DHS meets its burden.[32] Once DHS meets its burden under subparagraph (A), then an order of removal is automatic as far as the

statute is concerned.[33] And so too then is the imposition of the § 240(b)(5)(C) and (D) limits. From a textual standpoint, as soon as DHS meets its burden under subparagraph (A), it is a foregone conclusion that the noncitizen will both be ordered removed under that subparagraph and simultaneously stripped of appellate rights by subparagraphs (C) and (D). Any distinction that might be drawn between the necessary causes of the former and the necessary causes of the latter would thus be merely academic.

Finally, the fact that § 239(a)(1) and (2) more precisely reference the "consequences under section 240(b)(5)" of failing "*except under exceptional circumstances*" to appear does not undermine the points above. The second phrase's plain language would only exclude the § 240(b)(5)(C) and (D) limits from § 239(a)(1) and (2)'s required warnings if those limits did not apply to noncitizens who fail to appear due to exceptional circumstances.[34] But the § 240(b)(5)(C) and (D) limits apply to noncitizens who fail to appear due to exceptional circumstances. To be sure, § 240(b)(5)(C) permits them to rescind a removal order upon a motion to reopen demonstrating those exceptional circumstances.[35] But this permission is secondary to—and is necessitated by—§ 240(b)(5)(C)'s primary function of eliminating every other option for rescinding orders besides the ones it lists. Whether their failures to appear are due to exceptional circumstances or not, all noncitizens ordered removed in their absence are barred from rescinding their orders through a direct appeal to the BIA,[36] upon a motion to reopen presenting previously unavailable evidence,[37] and so forth. Likewise, and moreover, all noncitizens who fail to appear are subject to the limits on judicial review § 240(b)(5)(D) imposes.[38] Accordingly, § 239(a)(1) and (2)'s use of the phrase "except under exceptional circumstances" does not serve to exclude the 240(b)(5)(C) and (D) limits from their required warnings.

The Canons of Construction

In addition to the fact that § 239(a)(1) and (2)'s plain language demands that notices warn noncitizens of the § 240(b)(5)(C) and (D) limits, consideration of the canons of construction confirms that they demand this.

For starters, take the "familiar 'easy-to-say-so-if-that-is-what-was-meant' rule."[39] Again, only subparagraphs (A), (C), and (D) of § 240(b)(5) plausibly describe "consequences" of a failure to appear. So, if Congress did not intend for § 239(a)(1) and (2) to require notices to warn noncitizens of the § 240(b)(5)(C) and (D) limits, it could have easily made that clear by instead just referencing the "consequences under § 240(b)(5)(A)" of failing to appear. The fact that Congress did not do so, but instead broadly referenced paragraph (b)(5) as a whole, is reason enough to think that it did not intend to require only that noncitizens be warned of what § 240(b)(5)(A) provides. And this

implies that it must have intended to require that they be warned of what § 240(b)(5)(C) and (D) provide as well.

Next, consider the phrase "consequences under section 240(b)(5)" in context with § 240(b)(5)'s headings.[40] Specifically, note that Congress gave both the entirety of § 240(b)(5) the heading "Consequences of Failure to Appear," and subparagraph (D) the heading "Effect on judicial review":

> Consequences of Failure to Appear.—
>
> . . .
>
> (C) Rescission of order . . . .
>
> . . .
>
> (D) Effect on judicial review . . . .[41]

It would have been irrational for Congress to give § 240(b)(5) the heading "Consequences of Failure to Appear" if it intended the phrase "consequences under section 240(b)(5)" to refer just to subparagraph (A). On the contrary, one would expect a rational Congress to give it that heading to instead clarify that this was *not* its intent. And the same goes for the fact that Congress gave subparagraph (D) the heading "*Effect* on judicial review." The word "effect" is generally used synonymously with "consequence."[42] If Congress did not intend for the phrase "consequences under section 240(b)(5)" to encompass § 240(b)(5)(D), it would have been irrational for Congress to use a synonym of "consequence" in § 240(b)(5)(D)'s heading. Again, this is instead what one would expect a rational Congress to do if it was trying to eliminate doubt that that phrase indeed encompasses § 240(b)(5)(D).

Last, legislative history aside, that Congress intended to require notices in removal proceedings to warn noncitizens of the § 240(b)(5)(C) and (D) limits is suggested by the purpose evident in § 239(a)(1) and (2)'s very text.[43] If nothing else, the requirement that noncitizens' notices "specify[]" the "consequences under section 240(b)(5)" of failing to appear indicates that Congress intended to require the government to notify noncitizens of what § 240(b)(5) provides will happen if they do not attend their proceedings. That inference is also supported by considerations of statutory structure indicating that Congress intended for its failure-to-appear penalties to only be imposed on noncitizens who were first notified of them, such as the fact that Congress expressly provided that those penalties would become effective on the same date as its notice requirements.[44] And, again, § 240(b)(5) provides that noncitizens who fail to appear at their proceedings not only subject themselves to the risk of being ordered removed under subparagraph (A), but also the risk of losing their appellate rights under subparagraphs (C) and (D). In turn, whereas requiring the government to notify noncitizens of both these risks fully advances § 239(a)(1) and (2)'s evident purpose, requiring it to warn them only of the first risk does not.

Legislative History

Turn now to the history of the INA's notice and failure-to-appear provisions. Congress enacted its current notice and failure-to-appear provisions through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[45] which revised provisions first enacted through the Immigration and Nationality Act of 1990 (IMMACT90).[46] And neither IMMACT90's history nor IIRIRA's leave any reasonable room for doubt that Congress intended for § 239(a)(1) and (2) to require warnings of the § 240(b)(5)(C) and (D) limits.

IMMACT90

As the BIA has noted, "[t]he enactment of [IMMACT90's notice and failure-to-appear provisions] respond[ed] to some of the concerns raised in an October 1989 United States General Accounting Office ('GAO') report."[47] At the request of the Chairman of the House Subcommittee on Immigration, Refugees, and International Law (Immigration Subcommittee), this report described the factors resulting in failures to appear at proceedings and made proposals to reduce the rate of nonappearance.[48]

The GAO's report attributed the high rate of nonattendance at immigration proceedings to two reasons relevant to this article. One was immigration judges' reluctance to order noncitizens deported in their absence.[49] Immigration judges interviewed for the report said they were willing to enter deportation orders *in absentia* only "when they personally notif[ied] the aliens of the date of the next hearing and of the consequences of not appearing."[50] The other applicable reason was that failures to appear did not result in "such adverse *consequences* as *loss of appeal rights* or denial of the rights to claim relief from deportation."[51] For instance, it explained that "aliens suffer no adverse *consequences* from their non-appearances" because "they still can apply for relief from deportation *or can file motions on their behalf*."[52]

In turn, the GAO report made two relevant proposals. First, it proposed that the written notices given to noncitizens contain "the possible consequences, such as being ordered deported in absentia, of their failure to appear."[53] Second, it proposed that the INA be modified to make noncitizens' motions to reopen following a failure to appear "be limited to explaining the reasons for their failure to appear."[54]

There is nothing within the GAO's report that could be reasonably interpreted as a recommendation that noncitizens' notices only contain warnings of the risk of being ordered deported in their absence. Of course, the GAO's report recommended that noncitizens be warned of that. But because it merely proposed that noncitizens be warned of "consequences, *such as* being ordered deported in absentia," the GAO report clearly mentioned this just as

an example.[55] Nor does anything else in the GAO report or IMMACT90's history more broadly suggest that the Immigration Subcommittee or other members of Congress involved in drafting and passing IMMACT90 might have read that recommendation differently.[56]

At a hearing before the Immigration Subcommittee discussing its report, a GAO representative proposed that Congress implement its recommendations by adding the following to the INA:

> Any alien who without reasonable cause does not attend a proceeding and is ordered to be deported in absentia, shall not be eligible for any discretionary relief from deportation while remaining in the United States except as provided in section 1253(h) of this title. Any petition for review of such an order entered in absentia or motion to reopen the proceeding shall be confined to reasons for not attending the proceeding and to the issue of deportability.[57]

Anyone familiar with the GAO's report would recognize that the second sentence of this proposal addressed its observation that absentees did not suffer "adverse consequences" like the "loss of appeal rights" or limits on their ability to "file motions on their behalf." Presumably, this includes former Representative Lamar Smith, who was on the Immigration Subcommittee at the time, participated in this hearing, and later introduced IIRIRA.[58]

A few months later, the chairman of the Immigration Subcommittee proposed a new bill, H.R. 4300, incorporating the GAO's suggested language.[59] Among other things, H.R. 4300 would have added new paragraphs (2) and (3) to INA § 242(b), to provide in relevant part as follows:

> (2)(A) Any alien who, after written notice required under paragraph (1)(A)(ii) has been provided to the alien or the alien's counsel of record, does not attend a proceeding, shall be ordered deported under paragraph (1) in absentia if a prima facie case of deportability of the alien is established.
>
> (B) Such an order may be rescinded only—
>
> (i) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was for reasonable cause shown, or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien was not notified in accordance with paragraph (1)(A)(ii)
>
> (C) Any petition for review under section 106 of an order entered in absentia shall, notwithstanding such section, be filed not later than 60 days after the date of the final order of deportation and shall (except in cases described in section 106(a)(5)) be confined to the issues of the validity of the notice provided to the alien, to the reasons for the

alien's not attending the proceeding, and to whether or not a prima facie case of deportability has been established.

(3)(A) Any alien against whom a final order of deportation is entered in absentia under this section and who, at the time of the notice described in paragraph (1)(A)(ii) was provided oral notice of the consequences under this subparagraph of failing without reasonable cause to attend a proceeding under this section, shall not be eligible for relief described in subparagraph (E) for a period of 5 years after the date of the entry of the order.

. . .

(E) The relief described in this subparagraph is—

(4) relief under section 212(c),

(ii) voluntary departure under paragraph (1),

(iii) suspension of deportation or voluntary departure under section 244

(iv) asylum under section 208, and

(v) for adjustment or change of status under sections 245, 248, 249.[60]

H.R. 4300 would have also created a new written notice requirement at § 1252(b)(1)(A)(ii).[61] Mirroring the GAO report's recommendation, H.R. 4300 also provided that notices under that provision "*shall specify the consequences, under subsection (b) and section 266(e), of failing without reasonable cause to attend such proceedings*."[62]

Importantly, H.R. 4300 could not have been reasonably interpreted to require that notices warn noncitizens only of the risk of a deportation order under its new § 242(b)(2)(A). For one, H.R. 4300's notice provision broadly required warnings of the consequences under "subsection (b)" of failing to appear. So that requirement unambiguously extended to its new § 242(b)(3)(E)'s limits on eligibility for relief from removal as well. Moreover, it would have also required notices to warn noncitizens of the consequences of failing to appear found elsewhere in the INA, "under section 266(e)." H.R. 4300's plain language thus clearly demanded that notices warn noncitizens of more than just that failing to appear put them at risk of being ordered deported. And though Congress ultimately eliminated H.R. 4300's other required warnings when it enacted IMMACT90, it nonetheless simultaneously added the headings discussed above clarifying that notices must warn noncitizens of the risks of nonappearances for their appellate rights:

Sec. 242B. (a) Notices.—

. . .

(2) Notice of time and place of proceedings.—In deportation proceedings under section 242—

(A) written notice shall be given . . . of—

. . .

> (ii) the consequences under subsection (c) of the failure to appear at such proceedings; and
>
> (B) in the case of any change or postponement in the time and place of such proceedings, written notice shall be given . . . of—
>
> . . .
>
> (ii) the consequences under subsection (c) of failing, except under exceptional circumstances, to attend such proceedings.
>
> . . .
>
> (c) Consequences of Failure to Appear.—
>
> (1) In general.—Any alien who, after written notice required under subsection (a)(2) has been provided to the alien or the alien's counsel of record, except as provided in paragraph (2), does not attend a proceeding under section 242, shall be ordered deported under section 242(b)(1) in absentia if the Service establishes by clear, unequivocal, and convincing evidence that, except as provided in paragraph (2), the written notice was so provided and that the alien is deportable.
>
> . . .
>
> (3) Rescission of order.—Such an order may be rescinded only—
>
> (A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2)), or
>
> (B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.
>
> . . .
>
> (4) Effect on judicial review.—Any petition for review under section 106 of an order entered in absentia under this subsection shall, notwithstanding such section, be filed not later than 60 days after the date of the final order of deportation and shall (except in cases described in section 106(a)(5)) be confined to the issues of the validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether or not clear, convincing, and unequivocal evidence of deportability has been established.[63]

IIRIRA

On June 13, 1992, IMMACT90's new notice and failure-to-appear provisions took effect.[64] The day before that, the Immigration and Naturalization Service (INS) began giving noncitizens in deportation proceedings Form I-221,

Order to Show Cause and Notice of Hearing, which contained the warnings regarding noncitizens' appellate rights quoted at the beginning of this article.[65] And the INS continued giving noncitizens the Form I-221 containing those warnings until it started implementing IIRIRA in 1997.[66] When Congress enacted IIRIRA in 1996, then the INS had been warning noncitizens that they risked losing their appellate rights by not appearing at deportation proceedings throughout the entire time that penalty was enforced.

And because Congress did not make any change to the INA's provisions that might reasonably be taken as clarification that notices did not need to warn noncitizens about the prospect of losing their appellate rights, it had no reason to expect that passing IIRIRA would lead the INS to stop giving those warnings. On the contrary, the conference report through which Congress enacted IIRIRA characterized its notice and failure-to-appear provisions as "restat[ing]" IMMACT90's provisions.[67] And though they identified other changes IIRIRA nonetheless did make to IMMACT90's notice and failure-to-appear provisions, the conferees made no mention of any change to IMMACT90's required warnings about the consequences of failures to appear.[68]

In fact, at least at first, the INS apparently did not read IIRIRA as making any change to the INA's required warnings either. When it proposed replacing its Form I-221, Order to Show Cause and Notice of Hearing, with its current Form I-862, Notice to Appear, the INS stated that "[t]he Notice to Appear must contain nearly all of the information that was required to be in the Form I–221."[69] And in listing various requirements IIRIRA did eliminate, the INS made no mention of the required warnings about failures to appear.[70]

Statutory Purpose

Finally, the requirement that notices warn noncitizens that failing to appear can result in them losing appellate rights promotes Congress's express purpose in enacting the INA's notice and failure-to-appear provisions.

Congress enacted IMMACT90 by voting to agree to a conference report that explained its notice and failure-to-appear provisions had the purpose of "ensur[ing] that aliens properly notified of impending deportation proceedings, or other proceedings, in fact appear for such proceedings."[71] And because both the Senate and House of Representatives voted directly on the report containing that explanation, it is uniquely probative evidence of Congress's intent.[72] Nor is there anything within IIRIRA's text or history to indicate that its notice provisions had a different purpose. Again, though IIRIRA departed from IMMACT90 in certain respects, the joint conference report through which Congress enacted IIRIRA nonetheless indicates that its notice and failure-to-appear provisions were intended to "restate[]" IMMACT90's.[73]

In turn, requiring that notices in removal proceedings warn noncitizens that they can lose appellate rights by failing to appear is likely to better advance

this purpose than not requiring those warnings. After all, any penalty will be effective at achieving its intended goal only insofar as those subject to it are aware that it exists. And requiring that notices in removal proceedings warn noncitizens that they can lose appellate rights by failing to appear is likely to increase awareness of this penalty and, in turn, improve its effectiveness at ensuring that noncitizens appear for their proceedings. As such, it should come as no surprise that Congress saw fit to require those warnings.

Conclusion

In short, not only does INA § 239(a)(1) and (2)'s plain language make clear that notices in removal proceedings must warn noncitizens of the § 240(b)(5)(C) and (D) limits on appellate rights, this is confirmed by the canons of construction as well as the history and stated purpose of the INA's notice and failure-to-appear provisions. And because the forms the government has used in removal proceedings have never contained those warnings, it follows from this that the government's forms have never satisfied INA § 239(a)(1) or (2).

Meanwhile, recognizing this opens the door to promising litigation strategies in the various contexts implicated by the Supreme Court's analysis of § 239(a)(1) and (2)'s notice requirements in *Pereira v. Sessions*[74] and *Niz-Chavez v. Garland*.[75] Given that *Pereira* and *Niz-Chavez* addressed § 239(a)(1)(G)(i) and (2)(A)(i)'s requirements that notices specify when and where noncitizen's removal proceedings will be held, practitioners have largely focused their attempts to extend *Pereira* and *Niz-Chavez*'s holdings on those requirements. But not only does the reasoning for extending those holdings mostly apply with equal force to § 239(a)(1)(G)(ii) and (2)(A)(ii)'s required warnings, strategies based on § 239(a)(1)(G)(ii) and (2)(A)(ii) also have some notable advantages over strategies based on § 239(a)(1)(G)(i) and (2)(A)(i).

Consider first practitioners' efforts to extend *Pereira* and *Niz-Chavez*'s holdings to the rescission of *in absentia* orders under § 240(b)(5)(C)(ii). The most obvious textual hurdle to the conclusion that noncitizens are eligible to rescind their orders under that clause due to the government's failure to satisfy § 239(a)(1)(G)(i)'s requirement is that § 240(b)(5)(A) permits the entry of an *in absentia* order if, as relevant here, the noncitizen was provided notice under § 239(a)(1) "or" (2). But whether or not it can be reasonably inferred from this that noncitizens cannot rescind *their* orders under § 240(b)(5)(C)(ii) if they received notice of the time and place of their proceedings at any point,[76] the consequences under § 240(b)(5)(C) and (D) of failing to appear have not been specified in the standardized forms the government has used to provide notice under either § 239(a)(1) or (2).[77] So, unless and until the government starts using new forms, this reasoning would bar rescission for lack of notice of the consequences under § 240(b)(5)(C) and (D) only in rare cases, if ever.

Next, take efforts to extend *Pereira* and *Niz-Chavez* to the termination of removal proceedings based on the theory that § 239(a)(1)(G)(i)'s requirement that notices under § 239(a)(1) specify the time and place of proceedings is a mandatory claim-processing rule.[78] To the extent that this reasoning is based simply on the fact that § 239(a)(1)(G)(i) imposes this requirement rather than the fact that §239(a) further defines a "notice to appear" as a notice satisfying that requirement, there is no apparent reason for rejecting the conclusion that § 239(a)(1)(G)(ii)'s requirement is a mandatory claim-processing rule as well. Moreover, whereas the BIA has recently held that immigration judges may offer the DHS an opportunity to remedy a noncompliant notice as an alternative to terminating proceedings,[79] it seems reasonable to think that remedying failures to satisfy § 239(a)(1)(G)(ii) might be comparably burdensome as remedying failures to satisfy § 239(a)(1)(G)(i) is. If so, the former clause might very well offer a similarly effective means of protecting the interests of those removal respondents who cannot invoke the latter one.

Finally, the truth of this article's claim opens the possibility for a far larger pool of noncitizens to obtain cancellation of removal and other forms of relief implicated by *Pereira* and *Niz-Chavez*'s holdings. The primary obstacle to invoking this article's claim in those contexts is that, in concluding that the definition of a "notice to appear" incorporates § 239(a)(1)(G)(i)'s requirement, *Pereira* emphasized that time-and-place information is essential to a notice to appear's function.[80] As *Pereira* noted, noncitizens cannot be reasonably expected to appear for removal proceedings if they are not told when and where their proceedings will be held. By contrast, this reasoning does not apply to notice of the consequences of failing to appear. Although it is *less* reasonable to expect noncitizens who are not notified of those consequences to appear at their proceedings, it is surely not *un*reasonable to expect them to do so. But this does not justify rejecting the conclusion that § 239(a)(1)'s definition of a "notice to appear" incorporates clause (ii) of § 239(a)(1)(G) as well as clause (i). For starters, the relationship between time-and-place information and the function of a notice to appear was just one of numerous considerations the Court relied on in supporting its holding.[81] Nor is there any other obvious reason for thinking that time-and-place information would be part of the definition of a "notice to appear" and thus limits eligibility for relief from removal but that warnings of the consequences of failing to appear would not be. After all, not only are both requirements found under the same paragraph—and are the only clauses found under this paragraph at that—but there is nothing within the statutory text by which it can be reasonably inferred that Congress intended for one of that paragraph's clauses to be treated differently from its other.[82] Last but not least, *Pereira* also suggests in passing that a notice to appear might be alternatively characterized as having the broader function of "*facilitat*[*ing*]" appearances,[83] and warning noncitizens about what will happen if they do not appear at their proceedings is directly relevant to that function.

Notes

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1. INA § 239(a)(1)(G)(ii).
2. INA § 239(a)(2)(A)(ii).
3. INA § 240(b)(5).
4. *See, e.g.*, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, Uniform Docketing System Manual, at X-95, X-107 (2013), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual_12_2013.pdf [Docketing Manual] (example copies of Notice of Hearing in Removal Proceedings and Form I-862, Notice to Appear).
5. *See id.*
6. *See, e.g.*, *Matter of Guzman*, 22 I&N Dec. 722, 723 (B.I.A. 1999).
7. *See, e.g.*, *Rosswest v. U.S. Att'y Gen.*, 585 Fed. App'x 971, 976 (11th Cir. 2014). To be clear, where a noncitizen's *in absentia* order is rescinded after making one of the showings described under INA § 240(b)(5)(C)(i) or (ii), the noncitizen becomes eligible again to pursue relief from removal. Moreover, it bears noting that a failure to appear alone does not preclude a noncitizen from pursuing relief from removal. Noncitizens who fail to appear for their proceedings are only barred from applying for relief from removal if they were also given oral notice in a language they understand of the consequences of failing to appear under INA § 240(c)(7). *See id.*; *see also Matter of M–S–*, 22 I&N Dec. 349, 356-57 (B.I.A. 1998) (holding that noncitizen's failure to appear did not bar her from moving to reopen her proceedings to apply for previously unavailable relief since she was not given oral notice of the consequences of failing to appear under § 240(c)(7)). And such a noncitizen will become free to pursue relief again after 10 years. *See* INA § 240(c)(7). Nonetheless, the plain language of § 240(b)(5)(C) unambiguously bars noncitizens ordered removed under § 240(b)(5)(A) from *rescinding* their removal orders upon a showing that they are eligible for relief from removal, or upon any other showing not described under § 240(b)(5)(C)(i) and (ii). *See* INA § 240(b)(5)(C). In other words, even though noncitizens orderd removed under § 240(b)(5)(A) are not thereby barred by § 240(b)(5)(C) from pursuing relief from removal, their eligibility for relief does not permit them to annul the order and its underlying determinations. *See M–S–*, 22 I&N Dec. at 352-54 (analyzing the meaning of the word "rescind" and its relevance to noncitizens' rights to pursue relief from removal). The author thanks the editorial staff for prompting him to clarify these points.
8. *See, e.g.*, *Jian Zhang v. Gonzales*, 177 Fed. App'x 609, 610 (9th Cir. 2006).
9. *See* Docketing Manual, *supra* note 4, at X-124.
10. *See id.* at X-122. Whereas the INA's provisions at this time were like its current provisions in mandating entry of an order *in absentia* if an immigration judge determined a noncitizen was deportable and provided statutorily sufficient notice, its provisions importantly differed from its current ones in that the INA permitted immigration judges to decline to conduct proceedings in the noncitizen's absence, and thus to avoid making determinations on these issues. *Compare* INA § 242(b) (1991-1996)

with INA § 239; *see also infra* note 34. The author thanks the editorial staff for prompting him to clarify this point.

11. INA § 242B(a)(2), (c)(3), (4) (1991-1996).

12. Most notably, whereas former INA § 242B applied only to "deportation" proceedings, and not also to "exclusion" proceedings, §§ 239 and 240 consolidated deportation and exclusion into "removal" proceedings, and apply the provisions previously under § 242B to the latter. *Compare* INA § 242B (1991-1996) *with* INA §§ 239, 240.

13. *Matter of Guzman*, *supra* note 6, at 723.

14. Iris Gomez, *Consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act*, 30 San Diego L. Rev. 75, 128 n. 317 (1993) [*Consequences*].

15. *Interiano De Rivas v. Gonzalez*, 177 Fed. App'x 447, 450 & n. 1 (5th Cir. 2006).

16. A handful of unpublished circuit court decisions have rejected the conclusion that notices under INA § 239(a)(1) and (2) must contain warnings corresponding to § 240(b)(5)(C) and (D). But to the author's knowledge, neither any court nor the BIA has analyzed the specific claim defended in this article: i.e., that § 239(a)(1) and (2) require noncitizens to be warned that failures to appear might result in them losing their appellate rights in the ways § 240(b)(5)(C) and (D) provide. Rather than analyzing whether § 239(a)(1) and (2) require noncitizens to be warned of the limits § 240(b)(5)(C) and (D) impose, every decision the author is aware of containing relevant analysis has instead only discussed whether § 239(a)(1) and (2) require noncitizens to be given information about the appellate rights that remain available to them notwithstanding the § 240(b)(5)(C) and (D) limits. *See, e.g.*, *Sukhwinder Singh v. Holder*, 565 Fed. App'x 14, 15 (2d Cir. 2014) ("Singh … asserts that [his notice to appear] was deficient *because it failed to mention the procedures for rescinding an in absentia order*, as set forth in the last three subsections of § [240](b)(5). However, the statute requires notice only of the consequences of failing to appear, *not the procedure to reverse the resulting order*.") (emphasis added). And the claim that § 239(a)(1) and (2) require noncitizens to be warned about the rights they might *lose* due to § 240(b)(5)(C) and (D) is distinct from the claim that § 239(a)(1) and (2) require noncitizens to be informed about the rights they will *retain* under § 240(b)(5)(C). Whereas it is straightforward to understand the former claim as implicating "consequences" of a failure to appear, it is much less natural to describe the latter claim as such. In any event, this article only defends the claim that § 239(a)(1) and (2) require warnings about what noncitizens stand to lose under § 240(b)(5)(C) and (D).

Meanwhile, the decision the author is aware of that comes closest to squarely confronting this article's claim rejected the petitioner's argument there without any relevant discussion. *See Liemmertz v. Whitaker*, 745 Fed. App'x 748, 748 (9th Cir. 2018) ("We reject Liemmertz's unsupported contention that her notice of hearing was insufficient under [§ 239](a)(2)(A)(ii) because it did not inform her of the scope of judicial review of an in absentia order."). As such, neither it nor any other decision known to the author suggests a reason for rejecting this article's claim that the plain language of § 239(a)(1) and (2)'s references to the "consequences under section 240(b)(5)" of failing, except under exceptional circumstances, to appear encompasses the loss of appellate rights under § 240(b)(5)(C) and (D). Nor, in turn, does any decision known to the author identify a reason for setting aside any of the various considerations this article discusses that confirm that Congress intended this.

17. To be clear, INA § 239(a)(2) differs from § 239(a)(1) in using the terms "failing" and "attend" rather than by referencing "the failure" to "appear" for proceeding. *Compare* INA § 239(a)(1)(G)(ii) *with* INA § 239(a)(2)(A)(ii). But nothing turns on those differences for purposes of this article's argument. For sake of brevity, it thus uses § 239(a)(1) and (2)'s terminology interchangeably.

18. *See* General Accounting Office, GAO/GGD-90-18, Immigration Control: Deporting and Excluding Aliens from the United States 31 (1989) [Immigration Control] (emphasis added).

19. *See supra* notes 14, 15 and accompanying text.

20. *See* GAO, Immigration Control, *supra* note 18, at 31.

21. *See* Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 388 (2012) [Reading Law].

22. 571 U.S. 204 (2014).

23. *Id.* at 212 (emphasis added).

24. *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 116 (2d Cir. 2005) (emphasis added).

25. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739 (2020) ("[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

26. *See United States v. Sura*, 511 F.3d 654, 662 (7th Cir. 2007). Judge Frank Easterbrook dissented from the majority's opinion in *Sura*, but not on the grounds that the loss of appeal rights is properly deemed a "consequence" of a guilty plea. *See id.* at 664-68.

27. *See Cruz v. Dep't of Navy*, 934 F.2d 1240, 1245 n. 5 (Fed. Cir. 1991).

28. *See Burrage*, 571 U.S. at 212 (emphasis in original).

29. For this reason, it is no objection to this article's claim to note that INA § 240(b)(5)(C) and (D) can also be meaningfully described as setting forth the consequences of an *in absentia* removal order. Though true, the relevant question as far as the statutory text is concerned is just whether common usage justifies describing § 240(b)(5)(C) and (D) as setting forth consequences of failing to appear. And there is nothing inconsistent about describing them in both ways. Because describing something as the "consequence" of another ordinarily only means that the former would not have occurred but for the latter, it follows from the fact that a noncitizen cannot be ordered removed *in absentia* in the first place but for a failure to appear that the consequences of an *in absentia* order are properly described as the consequences of a failure to appear too. And as the discussion in the subsequent paragraphs of the text clarify, concluding that the § 240(b)(5)(C) and (D) limits are not consequences of a failure to appear since the entry of an *in absentia* order is also a necessary condition for their imposition makes little sense from the standpoint of the statutory text anyway. For a failure to appear is not the only necessary condition for an *in absentia* order to be entered under § 240(b)(5)(A) either. So, if the § 240(b)(5)(C) and (D) limits could not be properly deemed "consequences" of a failure to appear because a failure to appear is not the only necessary cause for them to be imposed, this would have the absurd implication of meaning that nothing under § 240(b)(5) can be properly deemed a "consequence" of a failure to appear. Moreover, because § 240(b)(5)(A) makes the entry of an *in absentia* order mandatory where its other necessary conditions are present, the necessary conditions for triggering the § 240(b)(5)(C) and (D) limits are functionally identical to the necessary conditions for an *in absentia* order. As such, there is no basis in the statutory text for distinguishing between the necessary conditions for an *in absentia* order versus

the necessary conditions for the imposition of the § 240(b)(5)(C) and (D) limits such that the former could be appropriately described as "consequences" of a failure to appear but the latter could not. The author thanks the editorial staff for prompting him to clarify these points.

30. *See* INA § 240(b)(5)(A). Subparagraph (E) clarifies that (b)(5)'s other subparagraphs apply to all noncitizens in removal proceedings regardless of location, and subparagraph (B) imposes consequences for the failure to provide address and telephone information. *See* INA § 240(b)(5)(B), (E); *see also* INA § 240(b)(5)(A) (deeming notice sufficient if mailed to the noncitizen's last known address). Section 239(a)(1) separately provides that notices must specify the "consequences under section 240(b)(5) of failure to provide address and telephone information." INA § 239(a)(1)(F)(iii).

31. *See* INA § 240(b)(5)(A).

32. *See id.* (emphasis added).

33. *See, e.g.*, *Ahmed v. Gonzales*, 432 F.3d 709, 712 (7th Cir. 2005).

34. The implications, if any, of INA § 239(a)(1) and (2)'s use of the phrase "except under exceptional circumstances" are unclear. Those provisions' history strongly suggests that this phrase was originally intended to clarify that noncitizens would not be subject to any consequences for failing to appear whatsoever if that failure was due to exceptional circumstance and, in any event, that its inclusion in § 239(a)(1) and (2) was a drafting error.

Section 239(a)(1) and (2) originated from a proposed bill that would have required notices to warn noncitizens of the consequences of failing to appear "*without reasonable cause*." *See* H.R. 4300, 101st Cong., § 405(a) (1990), *reprinted in* 13 Igor I. Kavass and Bernard D. Reams Jr., *Immigration Act of 1990: A Legislative History of Pub. L. No. 101-649*, at 687-773 (1997) [IMMACT90] (emphasis added). This mirrored the INA's existing provision, which permitted proceedings to be held in a noncitizen's absence only if the noncitizen failed to appear "without reasonable cause." *See* INA § 242(b) (1990). H.R. 4300's use of this phrase is most naturally interpreted as functioning to clarify that the existing provision remained in force, thereby precluding proceedings to be held in a noncitizen's absence where the noncitizen had reasonable cause for failing to appear.

However, Congress ultimately replaced the phrase "without reasonable cause" in its new warning provisions with "except under exceptional circumstances." *See* INA §§ 242(b), 242B(a)(2) (1991-1996). This was apparently because Congress elsewhere incorporated language from a separate proposed bill applying the exceptional-circumstances standard to motions to reopen following a nonappearance. *See* H.R. 5284, 101st Cong., § 3(a) (1990). Yet Congress left the INA's existing provision referencing the reasonable-cause standard unchanged, causing confusion as to how the INA's existing reasonable-cause provision could be reconciled with its new, exceptional-circumstances provisions. *See, e.g.*, Gomez, *Consequences*, *supra* note 14, at 85-86; *Romero-Morales v. INS*, 25 F.3d 125, 128 (2d Cir. 1994); *Sharma v. INS*, 89 F.3d 545, 548 (9th Cir. 1996). This confusion suggests that Congress planned—but neglected—to update the older provision to replace its reasonable-cause standard with the exceptional-circumstances standard or, perhaps, mistakenly incorporated the exceptional-circumstances standard in the warning requirements rather than just in its motions-to-reopen provisions. But instead of either updating the older provision or correcting the warning requirements when it revised the INA again to enact § 239(a)(1) and (2), Congress chose to remove the older provision altogether and retain the exceptional-circumstances standard in the warning requirements. *See* INA § 239.

35. *See* INA § 240(b)(5)(C)(i).

36. *See, e.g.*, *Matter of W–F–*, 21 I&N Dec. 503, 505 (B.I.A. 1996) (noting Board's lack of jurisdiction over direct appeal of noncitizen's claim he had exceptional circumstances for his failure to appear).

37. *See, e.g.*, *Rosswest v. U.S. Att'y Gen.*, 585 Fed. App'x 971, 976 (11th Cir. 2014) (holding that § 240(b)(5)(C) precluded rescission of order based on evidence of eligibility for adjustment of status).

38. *See, e.g.*, *Jian Zhang v. Gonzales*, 177 Fed. App'x 609, 610 (9th Cir. 2006) (holding that § 1229a(b)(5)(D) barred review of claim regarding eligibility for adjustment of status).

39. *See* Scalia and Garner, Reading Law, *supra* note 21, 181-82 (citing *Beck v. Comm'r*, B.T.A. 147, 148 (1940)).

40. *See id.* at 221 ("[T]itle and headings are permissible indicators of meaning.").

41. INA § 240(b)(5).

42. *See, e.g.*, The Random House Dictionary of the English Language 433 (2d unabridged ed. 1987) (defining "consequence" as "the effect, result, or outcome of something occurring earlier"); Oxford English Dictionary 762 (2d ed. 1989) (defining "consequence" as "[a] thing or circumstance which follows as an effect or result from something preceding"); Black's Law Dictionary 381 (11th ed. 2019) (defining "consequence" as "[a] result that follows as an effect of something that came before").

43. *See* Scalia and Garner, Reading Law, *supra* note 21, at 56 ("[W]ords are given meaning by their context, and context includes the purpose of the text . . . .").

44. *See Lahmidi v. INS*, 149 F.3d 1011, 1014-15 (9th Cir. 1998).

45. Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-587.

46. Pub. L. No. 101-649, § 545(g), 104 Stat. 4978, 5063.

47. *See Matter of Grijalva*, 21 I&N Dec. 27, 30 (B.I.A. 1995).

48. *See* GAO, Immigration Control, *supra* note 18, at 22.

49. *See id.* at 29-31.

50. *See id.* at 30.

51. *See id.* at 31 (emphasis added).

52. *See id.* at 34 (emphasis added).

53. *See id.* at 35.

54. *See id.* at 53.

55. *See id.* at 35 (emphasis added).

56. *See id.* at 22-38.

57. Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immig., Refugees, and Int'l Law of the H. Comm. on the Judiciary, 101st Cong., at 80 (1989) [Criminal Aliens], *reprinted in* 12 Kavass and Reams, IMMACT90, *supra* note 34.

58. *See id.* at 1; *see generally* Lamar Smith and Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L.J. 883 (1997).

59. *See* H.R. 4300, 101st Cong., § 405(a) (1990), *reprinted in* 13 Kavass and Reams, IMMACT90, *supra* note 34, at 687-773.

60. *Id.* at 767-68.

61. *Id.* at 766.

62. *Id.* (emphasis added).

63. *Compare* IMMACT90, § 545(a) *with* INA §§ 239(a)(1), (2), 240(b)(5).

64. *See* Delay of the Effective Date of Notice-Related Provisions of Section 242B of the Immigration and Nationality Act, 57 Fed. Reg. 5180, 5180-81 (Feb. 12, 1992).

65. *See* U.S. Department of Justice, Docketing Manual, *supra* note 4, at X-122.

66. *See, e.g.*, *Barrera-Vasquez v. United States*, No. 08 CR. 1127 LBS, 2011 WL 335168, at *1 (S.D.N.Y. Feb. 1, 2011); Proposed Rule: Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 449 (Jan. 3, 1997) [Proposed Rule] (announcing replacement of Form I-221 with Form I-862, Notice to Appear, effective April 1, 1997).

67. *See* H.R. Conf. Rep. 104-828, at 211-12 (1996); *see also* H. Rep. 104-469, pt. 1, at 230-31 (1996).

68. *See* H.R. Conf. Rep. 104-828, at 211-12; H. Rep. 104-469, pt. 1, at 230-31.

69. *See* Proposed Rule, *supra* note 66, at 449.

70. *See id.*

71. *See* H.R. Conf. Rep. 101-955, at 132 (1990); 136 Cong. Rec. S35,608, S35,608-S35,621 (Oct. 26, 1990) (agreeing to H.R. Conf. Rep. 101-955); 136 Cong. Rec. H12,358, H12,358-H12,369 (Oct. 27, 1990) (same).

72. *Cf.* Scalia and Garner, Reading Law, *supra* note 21, at 376 (criticizing committee reports and floor statements' value as evidence of Congress's intent on grounds that Congress as a whole does not agree to them).

73. *See* H.R. Conf. Rep. 104-828, at 211-12 (1996).

74. 138 S. Ct. 2105 (2018).

75. 141 S. Ct. 1474 (2021).

76. *See, e.g.*, *Matter of Laparra-Deleon*, 28 I&N Dec. 425, 428, 430, 436 (B.I.A. 2022); *but see, e.g.*, *Laparra-Deleon v. Garland*, 52 F.4th 514, 521 (1st Cir. 2022) (rejecting the BIA's reasoning in *Matter of Laparra-Deleon*).

77. *See supra* note 4.

78. *See, e.g.*, *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019).

79. *See Matter of Fernandes*, 28 I&N Dec. 605, 613-16 (B.I.A. 2022).

80. *See Pereira*, *supra* note 74, at 2115-16.

81. *See id.* at 2113-20.

82. *See* INA § 239(a)(1)(G).

83. *See Pereira*, *supra* note 74, at 2115 (emphasis added); *see also Matter of Mendoza-Hernandez*, 27 I&N Dec. 520, 532 (B.I.A. 2019) (relying on *Pereira*'s description of a notice to appear's function in reasoning that the regulations "focus . . . on the contents of the notice and *facilitating* the alien's appearance") (emphasis added).