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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the matter of:	)	**A #: [NOT PROVIDED]**
Respondent [NOT PROVIDED]	)	

AMICI CURIAE BRIEF OF TAHIRIH JUSTICE CENTER, THE AMERICAN IMMIGRATION COUNCIL, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, HIAS, THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND HUMAN RIGHTS FIRST IN SUPPORT OF RESPONDENTS

AMICUS INVITATION No. 20-04-09

I. INTRODUCTION

Amici Curiae Tahirih Justice Center (Tahirih), the American Immigration Council (Council), the American Immigration Lawyers Association (AILA), HIAS, the Fred T. Korematsu Center for Law and Equality (Korematsu Center), and Human Rights First submit this brief in response to the Board of Immigration Appeals' (Board) Amicus Invitation 20-04-09. At issue is whether Migrant Protection Protocols (MPP) notice and advisal sheets, informally known as "tear sheets," provide sufficient notice to respondents of their hearings absent any proof that the Department of Homeland Security (DHS) properly served them. The tear sheets provide the only notice offered by DHS regarding where and when respondents subject to MPP must appear for transport to their removal hearings. DHS' practice—seeking to remove respondents subject to MPP *in absentia* without providing sufficient proof that they received an advisal of how to appear at their scheduled hearings—violates respondents' statutory rights to reasonable notice and to a full and fair hearing. Furthermore, DHS' practice is insufficient to comply with the requirements for issuing an *in absentia* removal order. Therefore, the Board should hold that DHS' service practices for MPP tear sheets deny respondents due process of law.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has previously appeared as amicus before the Board and the federal courts of appeals on issues relating to the interpretation of federal immigration laws and policies, and has a substantial interest in the issue presented in this case,

which implicates the due process rights of noncitizens in removal proceedings and their ability to access a full and fair court hearing.

AILA is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before DHS, immigration courts and the Board of Immigration Appeals, as well as before federal courts.

Tahirih is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its inception in 1997, Tahirih has provided free legal assistance to more than 25,000 individuals, many of whom have experienced the significant psychological and neurobiological effects caused by the trauma of gender-based violence. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity.

HIAS was founded in the 1880s to support Jews fleeing pogroms in Central and Eastern Europe, and is the oldest refugee-serving organization in the United States. After over 100 years of protecting Jewish refugees, HIAS began assisting and advocating for refugees of all

backgrounds in the 1980s. Today, HIAS provides services to refugees, asylum seekers and other forcibly displaced populations regardless of their national, ethnic or religious background in 15 countries, including the United States. Although most of the people HIAS serves today are not Jewish, serving them is an expression of Jewish values such as tikkun olam (repairing the world) and welcoming and protecting the stranger. HIAS' interest in this case stems from its work serving asylum seekers on both sides of the U.S./Mexico border. Through a robust pro bono program, and with the assistance of four offices in Mexico, HIAS provides legal support services to asylum seekers stuck in Mexico due to MPP and refers cases to HIAS Border Fellows, located within legal service organizations in California and Texas, as well as to HIAS pro bono attorneys across the country.

The Korematsu Center is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 120,000 Japanese Americans, the Korematsu Center works to advance social justice. The Korematsu Center has a special interest in addressing government action targeted at classes of persons based on race, nationality, or religion, including the procedures at issue here that implicate important due process rights of noncitizens.

Human Rights First is a non-governmental organization established in 1978 that works to ensure the United States' leadership on human rights globally, and compliance domestically with its human rights commitments. Human Rights First operates one of the largest programs for pro bono legal representation of refugees in the nation, working in partnership with volunteer lawyers at leading law firms to provide legal representation, without charge, to indigent asylum

applicants. Human Rights First has conducted extensive research and issued reports about the current and historical practices of, and legal framework governing, the United States' expedited removal procedures and non-refoulement obligations, and the forced return policy known as MPP. Human Rights First currently represents asylum seekers forced to remain in Mexico under MPP.

II. BACKGROUND

MPP, or Remain in Mexico, is a border policy through which DHS officials return non-Mexicans who are allegedly not clearly admissible to the United States back to Mexico to wait for their removal proceedings. U.S. Dep't of Homeland Sec., *Migrant Protection Protocols*, www.dhs.gov/migrant-protection-protocols (last updated Oct. 21, 2020) [hereinafter "DHS MPP Website"]. Practically speaking, this means that asylum seekers and others seeking to enter the United States wait in Mexico, a country in which many have no ties and no safe place to stay, until they are called to court in the United States. In its first year, MPP sent about 60,000 asylum seekers and migrants to Mexico, including thousands to the state of Tamaulipas, a state which the U.S. State Department assessed as a Level 4/Do Not Travel threat. *See* Human Rights First, *Marking One Year of the Horrific "Remain in Mexico" Policy* (Jan. 22, 2020), https://www.humanrightsfirst.org/press-release/marking-one-year-horrific-remain-mexico-policy-over-800-violent-attacks-asylum-seekers [hereinafter "*Horrific 'Remain in Mexico' Policy*"]. In that year, there were more than 800 publicly reported violent attacks against people subject to MPP while in Mexico. *Id*.

By design, individuals placed in MPP may not independently appear at the immigration court for their hearing at the time and place listed on the notice to appear (NTA). Instead, they must go to a designated port of entry (POE)—not the court specified in the NTA—at a different

time so that DHS officials can transport them to the location of their hearing. *See* DHS MPP Website at "How does the MPP process work?" Moreover, individuals placed in MPP are advised "that they may not attempt to enter the identified POE for their hearings before the designated time on the tear sheets." *Id*. DHS provides the information regarding the designated POE and the date and time an individual in MPP must appear at that POE to be transported to their removal hearing on the tear sheet. *Id*. The NTA itself contains no information about the required POE appearance and makes no reference to the tear sheet or other addendum that contains this vital information.

In the instant case, the Immigration Judge (IJ) concluded that DHS "failed to meet its burden of establishing that the respondents were properly notified of the procedures for appearing at the hearing." I.J. Dec. at 3. Specifically, the IJ noted that the tear sheets contained no information—such as a name or A number—that would connect a tear sheet to a particular respondent and no signature or certification from a DHS official attesting that the tear sheet was served. *Id.* at 3-4. The IJ was correct to deny DHS' motion to proceed *in absentia* against the respondents because DHS failed to meet its burden of demonstrating that it had adequately notified respondents of their hearings. Instead, respondents received clearly inadequate notice. Moreover, the IJ was correct to dismiss the case because this failure denied respondents their statutory rights to reasonable notice and a full and fair hearing and, thereby, denied them due process of law.

III. DHS' USE OF UNACKNOWLEDGED TEAR SHEETS WITHOUT PROPER SERVICE DEPRIVES RESPONDENTS OF THE PROCESS REQUIRED BY THE IMMIGRATION AND NATIONALITY ACT.

By placing an individual in MPP, DHS officials make the affirmative choice to initiate full removal proceedings under Section 240 of the Immigration and Nationality Act (INA)

against that individual. *See* DHS MPP Website at "How does the MPP process work?" Respondents facing deportation through § 240 proceedings are "entitled to a full and fair removal hearing under *both* the [INA] and the Due Process Clause of the Fifth Amendment." *Matter of R-C-R-*, 28 I&N Dec. 74, 77 (BIA 2020) (emphasis added); *see also Vetcher v. Barr*, 953 F.3d 361, 370 (5th Cir. 2020) (acknowledging a noncitizen's "right to a full and fair hearing"), *petition for cert. filed* No. 19-1437 (June 26, 2020). In MPP, respondents retain the same rights "just like any other [noncitizen] in removal proceedings pursuant to Section 240 of the INA." DHS MPP Website at "How does the MPP process work?" However, DHS' notice practices for individuals subject to MPP fail to provide the protections required by statute.[1]

[1] Amici address only the sufficiency of notice provided by unacknowledged tear sheets in cases where the record contains no evidence that respondents received the information regarding how to appear at their scheduled MPP hearings. However, even receiving a tear sheet is often insufficient to convey this information in many cases. *See* Brief of Border Legal and Humanitarian Service Providers as *Amici Curiae* in Support of Respondents (explaining how common errors on tear sheets and failure to include proper logistical information for how to access the designated POE from the Mexican side of the border keep many individuals from attending their hearings); Amicus Brief of Las Americas Immigrant Advocacy Center at 11-13, 22-23 (detailing how providing sometimes inaccurate notice only in writing and not in respondents' native languages may prevent many individuals from attending their hearings).

Furthermore, even if DHS did provide the statutorily required notice of MPP hearings, the program would remain fatally flawed because it deprives respondents of any meaningful opportunity for a fair hearing regardless of notice. For example, MPP forces individuals subject to the program to live in dangerous conditions that prevent them from attending hearings and deprives individuals of their right to counsel and their right to removal proceedings conducted in a language they understand. *See, e.g.*, *Horrific "Remain in Mexico" Policy*; TRAC Immigration, *Details on Remain in Mexico (MPP) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/ (last visited Oct. 23, 2020) (showing that, through September 2020, only 4,968 of 67,790 MPP cases had legal representation); Testimony of Laura Pena, ABA before the U.S. House of Representatives, Committee on Homeland Security, Subcommittee on Border Security, Facilitation and Operations, 7 (Nov. 19, 2019), https://homeland.house.gov/imo/media/doc/Testimony-Pena.pdf (reporting that court observer found, in MPP, "[t]he interpreter does not offer simultaneous translation of the entirety of the proceedings").

A. In MPP cases, INA § 239(a)(1) notice must include information about how to access the location of removal proceedings at the scheduled time.

The INA provides specific requirements for notice of removal proceedings under § 240. To initiate removal proceedings, DHS must serve a noncitizen with an NTA, which provides them with written notice of important and legally required information. *See* INA § 239(a)(1). The NTA must include "the time and place at which the proceedings will be held" and information about the nature of the proceedings, the charges to be brought, and the consequences of failing to appear. *Id.* In general, to comply with the time and place component of the NTA, DHS merely informs respondents of the date and time of the hearing and the location of the court where the hearing will take place. However, in MPP cases, the government must provide transportation and access from Mexico to the United States. Therefore, notice of "the time and place at which proceedings will be held" would be meaningless—and, therefore, statutorily insufficient—without further information about how respondents in Mexico can access their hearings in the United States, including the information listed on the tear sheet. *See* I.J. Dec. at 4-5 (finding notice of time and place of court hearing typically provided under § 239(a) "meaningless" in MPP cases without additional notice of "when, where, and how to report for transportation to [respondents'] hearing in the United States from Mexico").

Inclusion of the time and place information is a critical component of any NTA because, without that information, respondents would have no way to access their hearings. As the Supreme Court has explained, "[c]onveying . . . time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings." *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018); *cf. Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (noting that the "right to be heard has little reality or worth unless one is informed that the matter is pending

and can choose for himself whether to appear or default, acquiesce or contest"). But, in MPP cases, simple notice of the time and place of the court hearing as generally provided in NTAs cannot, without more, provide the "essential function" of enabling respondents to appear at their hearings.

Respondents in MPP cannot transport themselves to an immigration court at a scheduled time in order to access their hearing. Instead, respondents are required to appear at a separate remote location—a designated POE at the U.S-Mexico border—at a specific time many hours before the scheduled hearing. DHS then detains the respondents to appear via video for their proceedings elsewhere or detains and transports them to the place of the court hearing. Thus, because of the additional burdens and practical obstacles the government imposed by implementing MPP, additional notice is needed to provide the same "essential function" as the NTA in non-MPP proceedings. In these cases, notice of when and where respondents must physically appear at the remote location on the U.S.-Mexico border to be transported to their hearing in custody—i.e., the information from the tear sheet—is a requisite additional piece of the necessary notice of the time and place of the proceedings themselves. Absent this expanded notice for MPP cases, § 239(a)(1)(G) notice would not be "reasonably calculated" to inform respondents whose travel ability is restricted by the government's actions as to how they can actually access their hearings. *Cf. Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001) (finding it "critical that notice be reasonably calculated to apprise the [noncitizen] of his or her scheduled hearing and the immigration charges levied by the Service"). Instead, it would be affirmatively misleading—it would instruct respondents to go to a place that they cannot access. As courts have recognized in other contexts, "confusing" and "affirmatively misleading" information cannot provide meaningful notice. *Walters v. Reno,* 145 F.3d 1032, 1043 (9th Cir. 1998) (holding

that a form lacking relevant information "lulls the [noncitizen] into a false sense of procedural security" and thus does not provide meaningful notice); *see also United States v. Charleswell*, 456 F.3d 347, 357 (3d Cir. 2006) (finding that "it is simply unrealistic to expect [a noncitizen] to recognize, understand and pursue his statutory right" based on a misleading form absent additional notice); *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000) ("Fair or adequate notice has two basic elements: content and delivery. If the notice is unclear, the fact that it was received will not make it adequate.").

Congress' intent, as set forth in § 239(a)(1), requires respondents to receive information about how to access the location of removal proceedings at the scheduled time. In MPP cases, this requires full disclosure of how noncitizens can access their proceedings. Congress crafted § 239(a)(1), including the notice of time and place provision, to incorporate due process requirements regarding "the right to notice of the nature of the charges and a meaningful opportunity to be heard." *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) (internal quotation omitted); *see also id*. at 351 ("Congress, in enacting the immigration laws, has codified these rights by requiring that a Notice to Appear be served upon [noncitizens] in removal proceedings."); *Nazarova v. Immigration & Naturalization Serv.*, 171 F.3d 478, 482 (7th Cir. 1999) ("Th[e] statutory concern with notice has its genesis in the well-settled fact that [noncitizens] have due process rights in deportation hearings."); *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) ("To meet traditional standards of fundamental fairness in determining whether [a noncitizen] is competent to participate in immigration proceedings, Immigration Judges must accord [noncitizens] the specific rights and privileges prescribed in the Act.") (internal quotation omitted).

Constitutional principles also require this kind of notice. As the Supreme Court has

explained, meaningful notice sufficient for constitutional due process must "reasonably . . . convey the required information, . . . must afford a reasonable time for those interested to make their appearance," and "[t]he means [of providing notice] employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 314-15 (citations omitted); *see also Nozzi v. Hous. Auth.*, 806 F.3d 1178, 1994 (9th Cir. 2015) (holding that "[t]he means [of providing notice] employed must be reasonably certain to actually inform the party, and in choosing the means, one must take account of the capacities and circumstances of the parties to whom the notice is addressed") (citations and quotations omitted). For individuals who are permitted by the U.S. government to access their removal proceedings *only* by going to a POE as opposed to the court address listed on the NTA at a different time than their scheduled hearing as listed on the NTA, notice of the time and place of their hearing must include sufficient notice of this separate location and time if it is to "afford a reasonable time for those interested to make their appearance" at the hearing. *Mullane*, 339 U.S. at 314. Because Congress crafted § 239(a)(1) to incorporate due process requirements, and constitutional due process requires sufficient notice of when and where the government requires respondents in MPP cases to physically appear at the separate location on the U.S.-Mexico border to access the court and appear at their hearing, § 239(a)(1) requires it as well.[2]

[2] Because the INA's notice provision incorporates due process requirements, the Board need not address what due process protections would be required by the Fifth Amendment absent the statutory protections. *See Califano v. Yamasaki*, 442 U.S. 682, 692 (1979) ("A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question."). However, in interpreting the protections required by the INA, the Board should "assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary." *Id.* at 693; *see also Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail . . . ."); *Matter of Abdelghany*, 26 I&N Dec. 254, 264 (BIA 2014) (interpreting former INA § 212(c) to avoid "serious constitutional problems").

Thus, to provide the process that is due to respondents under the statute, § 239(a)(1) must be interpreted to require full notice of all necessary information, including the information provided on the tear sheet, in MPP cases.

B. DHS' practice deprives respondents of their right to a full and fair hearing pursuant to INA § 240(b)(4).

For noncitizens in proceedings under INA § 240, "Congress has set *by statute* certain standards a fair hearing must include . . . ." *Olabanji v. Immigration & Naturalization Serv.*, 973 F.2d 1232, 1234 (5th Cir. 1992) (quoting *Drobny v. Immigration & Naturalization Serv.*, 947 F.2d 241, 244 (7th Cir. 1991)). For example, § 240 guarantees respondents the right "to be represented, at no expense to the Government, by counsel of the [noncitizen's] choosing," INA § 240(b)(4)(A), and the right to "a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen's] own behalf, and to cross-examine witnesses presented by the Government," INA § 240(b)(4)(B). In addition, as this Board and federal courts have recognized, because ensuring the right to a full and fair hearing may require more than just those rights enumerated in the statute, § 240(b)(4)(B) also is interpreted to include additional unenumerated rights. *See, e.g.*, *Matter of Tomas*, 19 I&N Dec. 464, 465 (BIA 1987) (finding right to a competent interpreter). Because a respondent must have a meaningful opportunity to attend in order for his or her hearing to be fair, the right to notice regarding how the respondent is to appear at that hearing should be counted among those unenumerated rights under § 240(b)(4)(B). *See Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008) (recognizing that "fundamental fairness" requires "a meaningful opportunity to present evidence and be heard by an impartial judge"). In the instant case, in order to have a full and fair hearing,

the respondents needed sufficient notice of the information provided on the MPP tear sheet—the time and place of transport to their hearing.[3]

In determining whether an unenumerated right is guaranteed by INA § 240(b)(4), the Board must assess whether the right is necessary for the meaningful exercise of a right expressly provided for by the statute. For example, in *Olabanji*, a federal court recognized noncitizens' right to evidence that the government made reasonable efforts to secure a witness' presence in court for cross-examination before the government can rely on the witness' affidavit in removal proceedings instead. 973 F.3d at 1234-36. The court did so even though there is no enumerated right to application of the rules of evidence in removal proceedings. *Id.* at 1234. The court reasoned that recognizing this right was essential to allow a respondent "a reasonable opportunity . . . to cross-examine witnesses presented by the Government," INA § 240(b)(4)(B) and, thereby, to ensure the right to a full and fair hearing. 973 F.3d at 1234-35. Another court found that a respondent had an unenumerated right to timely disclosure of a report used against him in a removal hearing, because the disclosure was necessary for the respondent to meaningfully exercise his statutory right to a reasonable opportunity to examine the evidence against him. *See Bondarenko v. Holder*, 733 F.3d 899, 906-07 (9th Cir. 2013). This Board also has recognized unenumerated rights under § 240(b)(4)(B), including that a competent interpreter was "important to the fundamental fairness of a hearing" and essential for respondents to meaningfully exercise their statutory right to present evidence on their own behalf. *Matter of Tomas*, 19 I&N Dec. at 465.

Similarly, in the instant case, respondents in MPP cannot meaningfully exercise their enumerated statutory rights to, inter alia, examine evidence, present evidence on their own behalf, or cross-examine witnesses, *see* INA § 240(b)(4)(B), without sufficient notice of how to

[3] This is true regardless of whether this Board agrees that notice of the information on the tear sheet is expressly required under INA § 239(a)(1)(G).

appear at the hearing where these activities will take place. Thus, not only INA § 239(a)(1), *see supra* Section III.A, but also § 240(b)(4)(B) implicitly requires DHS to provide sufficient notice of "when, where, and how to report for transportation to [respondents'] hearing in the United States from Mexico." I.J. Dec. at 4 (finding that the INA requires this additional notice). This is true because, under MPP, respondents' appearance at the removal hearing where they can examine and present evidence and cross-examine witnesses is dependent upon their appearance at the government-designated POE on the government-specified date and time in order to be transported by the government to the removal hearing in the United States from where the respondents have been waiting in Mexico. *See* DHS MPP Website at "How does the MPP process work?" DHS conveys this important information through the MPP tear sheet. *Id*. Therefore, the right to sufficient notice of the information in the tear sheet is necessary for a respondent to meaningfully exercise the enumerated rights that attach once a respondent appears at the hearing. Failure to provide respondents such notice denies them their statutory right to a full and fair hearing and, consequently, the process due to them under the immigration statutes.

C. DHS' practice is contrary to the service requirements in INA § 239(a)(1) and is insufficient to allow for entry of an *in absentia* removal order under INA § 240(b)(5)(A).

Because notice under INA § 239(a)(1) and a full and fair hearing under INA § 240(b)(4)(B) require information about how to access removal proceedings in MPP cases, the INA also dictates how DHS must provide that information to respondents. Service of the information required by § 239(a)(1) must be "in person . . . (or, if personal service is not practicable, through service by mail to the [noncitizen] or to the [noncitizen]'s counsel of record, if any)." INA § 239(a)(1); *see also* 8 C.F.R. § 1003.14(a) (requiring DHS to provide the immigration court with a certificate of service indicating that the NTA was served on the

respondent in order to commence removal proceedings). Furthermore, to proceed against a respondent who does not appear in immigration court *in absentia*, DHS must "establish[] by clear, unequivocal, and convincing evidence" that it provided written notice as required by § 239(a). INA § 240(b)(5)(A); *see also* 8 C.F.R. § 1003.26(c)(2).[4]

The record in this case contains no indication that DHS complied with these requirements. *See* I.J. Dec. at 3-4. The IJ found that the tear sheets:

> [D]o not contain any information that identifies them as relating to the respective respondents in these cases. None contain the respondent's name or A-number, such that it could be determined by the Court that the instruction sheets relate to a particular respondent . . . . Significantly, all of the tear sheets in these cases are devoid of any indication that they were served on the respective respondents, such as a signature, or fingerprint, or certification from an officer attesting that the instructions were served on the respective respondents.

Id.; *see also* Amicus Invitation No. 20-04-09 at 1 (assessing notice where tear sheets "are not signed nor otherwise acknowledged by the respondent on the record, and the record contains no specific attestation of any kind, from either party, that the respondents received specific advisals adequate to allow them to appear at the scheduled hearing from their location in contiguous territory"). Instead, it appears that the only indication that respondents received the tear sheet is unsupported assertions of DHS counsel, but such statements cannot serve as evidence sufficient to meet DHS' burden. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (recognizing that statements of counsel are not evidence); *Cruz-Gomez v. Lynch*, 801 F.3d 695, 697-98 (6th Cir. 2015) (noting that, in *in absentia* hearings, "the government has the burden of demonstrating . . . that proper notice was served"); *see also* I.J. Dec. at 3 (noting that DHS' assertion that the tear sheets were "incorporated into the respondent's A-file during the normal

[4] Requirements for proceeding *in absentia* under INA § 240(b)(5)(A) apply to MPP cases. *See* INA § 240(b)(5)(E).

course of business . . . is insufficient to establish the tear sheets were actually provided to the respondents in the context of these cases"). Because DHS did not "establish[] by clear, unequivocal, and convincing evidence" that it provided respondents with sufficient written notice, the IJ was correct to find that the immigration court lacked jurisdiction under § 239(a)(1) and to dismiss the case. INA § 239(a).

The Board's decision in *Matter of Rodriguez Rodriguez*, 27 I&N Dec. 762 (BIA 2020), is not to the contrary. In that case, the Board determined that the respondent received sufficient notice of his removal proceedings where "[b]oth the MPP [tear] sheet and the courtesy copy of the MPP [tear] Sheet in the Spanish language *contain the respondent's signature*." *Id.* at 765 (emphasis added). By obtaining respondent's signature on the MPP tear sheet, DHS provided at least some documentation of personal service of the information on the tear sheet on the respondent. In the instant case, DHS failed to document *any* service of the MPP tear sheet on the respondents and thus could not have complied with its statutory obligations to provide notice and proof of service. *See* I.J. Dec. at 3-4.

Strict adherence to this statutory evidentiary burden, as well as the service requirement in § 239(a)(1), is always important. However, it is even more critical in MPP cases given the substantial burdens the government has chosen to impose on asylum seekers by forcing them to remain in Mexico. Those burdens include limitations on asylum seekers' ability to travel and access court proceedings as well as processes that sharply disadvantage respondents in Mexico who have extreme difficulties getting access to counsel, access to documents, and access to information that is easily available to the DHS attorneys prosecuting their removal cases. *See, e.g.*, Brief of Border Legal and Humanitarian Service Providers as *Amici Curiae* in Support of Respondents (describing how tear sheets commonly contain incorrect, inadequate, or illegible

information and explaining how MPP respondents are targets of assault, kidnapping, and robbery in Mexico and often lose important documents during these attacks); *cf.* Gustavo Solis, "CBP agents wrote fake court dates on paperwork to send migrants back to Mexico, records show," The San Diego Union-Tribune (Nov. 7, 2019), https://www.sandiegouniontribune.com/news/immigration/story/2019-11-07/cbp-fraud (documenting U.S. Customs and Border Protection officers' use of fraudulent information on tear sheets and practice of sending individuals granted asylum or with terminated proceedings to Mexico pursuant to MPP). The possibility of inaccurate information is always present when DHS seeks to proceed against a respondent *in absentia*, which is why DHS bears the burden of affirmatively proving sufficient and accurate notice when it seeks the strong sanction of an *in absentia* removal order. In light of the chaos that characterizes MPP, as well as the likelihood that particular tear sheets contain inaccurate information, it is imperative that an immigration court has access to a copy of the actual document provided to each respondent before it can assess whether any alleged notice of a hearing provided the process required under INA §§ 239 and 240. Given the high stakes, immigration courts must not terminate asylum claims based solely on a respondent's absence without proof of this notice.

At a minimum, "clear, unequivocal, and convincing evidence" of service in MPP cases requires DHS to provide individualized proof that it served the respondent with clear and accurate notice of how to access removal proceedings in MPP cases and proof that the information provided applies to the particular respondent before the court.

IV. CONCLUSION

For the foregoing reasons, Amici ask the Board to hold that DHS' service practices for MPP tear sheets deny respondents their statutory right to notice of the time and place of their

removal proceedings, their statutory right to a full and fair hearing, and, consequently, due process of law.

October 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 26, 2020, I, Karolina J. Walters, had a copy of this Amici Curiae Brief of Tahirih Justice Center, the American Immigration Council, the American Immigration Lawyers Association, HIAS, The Fred T. Korematsu Center for Law and Equality, and Human Rights First in Support of Respondents and all attached documents served by hand delivery on the following:

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Amicus Invitation No. 20-04-09 indicates that the Clerk's Office will serve a copy on the parties if the Board grants the accompanying Request to Appear as Amici Curiae and accepts the amici curiae brief.

s/ Karolina J. Walters
Karolina J. Walters

Dated: October 26, 2020