John M. Miano
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(202) 232-5590
Attorneys for Amicus Curiae Federation for American Immigration Reform

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Amicus Invitation No. 20-04-09

Request to Appear as *Amicus Curiae*

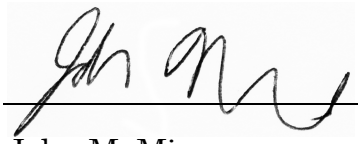
INTRODUCTION

Pursuant to Rules 2.10 and 4.6 of the Practice Manual of the Board of Immigration Appeals (Board), the Federation for American Immigration Reform (FAIR) hereby requests leave to file an *amicus curiae* brief in response to *Amicus* Invitation No. 19-11-6. The *amicus curiae* brief is submitted with this motion.

FAIR is a non-partisan, public interest organization with a support base comprising nearly fifty private foundations and over 1.9 million diverse members and supporters. FAIR's mission is to discern, put forward, and advocate immigration policies that will best serve American environmental, societal, and economic interests today and into the future.

The Board has solicited *amicus* briefs from FAIR for over twenty years. *See e.g.*, *Matter of Q— T— M— T—*, 21 I. & N. Dec. 639 (B.I.A. 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., attorney for *amicus curiae* FAIR and noting that "[t]he Board acknowledges with appreciation the brief submitted by *amicus curiae*."). Therefore, *Amicus* FAIR respectfully requests leave to file the brief accompanying this motion to assist the Board with the issue presented.

Respectfully submitted,



John M. Miano
D.C. Bar No. 1003068
Christopher Hajec
D.C. Bar No. 492551
Immigration Reform Law Institute
25 Massachusetts Ave, N.W., Suite 335
Washington, D.C. 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: jmiano@verizon.net

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Christopher J. Hajec
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Brief *Amicus Curiae* of the Federation for American Immigration Reform

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ISSUE PRESENTED

The Board's issue presented:

> Where the Migrant Protection Protocol (MPP) notice and advisal 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, is notice of the hearing adequate to satisfy due process?

SUMMARY OF THE ARGUMENT

Congress determines what is required for due process for notice of removal hearings. Because Congress has specified what is required for such due process and because advisal sheets are not part of Congress's requirements, due process does not require that such sheets be provided, let alone be attested. The question of how respondents should be notified of how to appear at a removal hearing should be left to agency regulations or procedures, or additional lawmaking by Congress.

ARGUMENT

In this case, Respondents failed to appear at a removal hearing. Opinion below at 1. After having been apprehended in the United States, Respondents had been placed in the Migrant Protection Program and were returned to Mexico until their removal proceedings in the United States were completed. *Id.* at 1–2. Because Respondents were outside the United States, they had to report to a port of entry in El Paso for transportation to the hearing. *Id.* at 3. The government submitted a certificate of service that notice of the hearing had been provided and it had satisfied the statutory and regulatory requirements of service. *Id.* at 2. The government asserted that it provided Respondents instructions on how to report to the hearing and submitted such instructions. *Id.* at 3. It did not provide documentation certifying the service of those

instructions, however. *Id*.

I. Congress defined the requirements for providing a notice to appear at a removal hearing, and those requirements were satisfied.

For an alien on the threshold of initial entry, due process is "'[w]hatever the procedure authorized by Congress is.'" *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). Title 8, section 1229 sets forth ten requirements for a notice to appear.

Here, there is no dispute that the notice of the hearing complied with the statutory requirements of § 1229. Opinion below, Ex. 1. The Immigration Judge noted that the notice to appear had been properly served in accordance with regulation and statute. *Id*. at 2. There is no dispute that the statutory procedural requirements were satisfied. *Id*. It follows that the constitutional requirements of due process have been satisfied, as well, because here those requirements are one and the same. *See Shaughnessy,* 345 U.S. at 212.

II. An immigration judge does not have the power to expand the statutory requirements for notice of a hearing.

The fundamental issue in this case is whether an immigration judge can expand the requirements for service beyond those required by statute. The Board has rejected such expanded requirements in the past. In 2007, the Board addressed cases where the immigration judge expanded the requirements for service beyond those of statute and regulation. In *In re: Guadalupe Garcia Morales*, the immigration judge denied DHS's motions to proceed *in absentia* when aliens had not appeared at removal hearings. 2007 Immig. Rptr. LEXIS 11487 (BIA, July 10, 2007). The aliens had been notified by regular mail as required by statute. *Id*. at 6. The immigration judge, however, ruled that the aliens must be served by certified mail. *Id*. at 2. Nonetheless,

the Board found that proper notice of the hearing had been given when the statutory and regulatory requirements had been met. *Id*. at 6–7. *Accord In re: Gustavo Adolfo Salgado-Martinez*, 2007 Immig. Rptr. LEXIS 8819 (BIA Jul. 10, 2007); *In re: Jorge Cardoza-Clavel*, 2007 Immig. Rptr. LEXIS 9688 (BIA Jul. 10, 2007); *In re: Maira Yanira Melara-De Cardoza*, 2007 Immig. Rptr. LEXIS 10411 (BIA Jul. 10, 2007).

III. The question of how Migrant Protection Protocol instruction sheets should be delivered is not a tribunal issue.

The statutory requirements of due process only require notice of the hearing. 8 U.S.C. § 1229. They do not include a requirement that a Respondent be provided with instructions on how to get to the hearing. Even if the government had not provided Respondents with such instructions, service of the notice of the hearing satisfies the due process requirement. *See Shaughnessy,* 345 U.S. at 212. Therefore, due process does not require an attestation that a respondent has received such instructions. 8 U.S.C. § 1229.

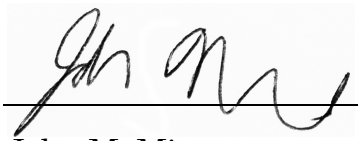
The situation under the law could well be considered to be unfair if a respondent has a hearing in one location but is unaware that he needs to go to another location for transportation to that hearing. "If the law is unfair or unjust, the remedy is to change the law itself through the legislative process." *Vt. Dev. Credit Corp. v. Kitchel*, 149 Vt. 421, 427, 544 A.2d 1165, 1168 (1988). There are many ways to address this potential unfairness. The government asserts that it provides respondents directions. Opinion below at 2. Another possibility is for the agency to post signs with directions where aliens are detained. Yet another possibility is to add the instructions to the certificate of service. The proper means for determining how such instructions are provided under the Migrant Protection Protocol is through agency regulation or procedures, or further Congressional action, not by tribunals expanding the

statutory and regulatory requirements of due process. *Cf. Vt. Dev. Credit Corp,* 149 Vt. at 427.

CONCLUSION

For the reasons given above, the judgment of the Immigration Judge should be reversed.

Respectfully submitted,



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