

DACOSTAGOMEZ-AGUILAR V. U.S. ATTORNEY GENERAL:
ELEVENTH CIRCUIT HOLDS ONLY ONE FORM OF NOTICE
IS REQUIRED TO UPHOLD AN IN ABSENTIA REMOVAL
ORDER

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In *Dacostagomez-Aguilar v. U.S. Attorney General*, the United States Court of Appeals for the Eleventh Circuit addressed what specific notice deficiencies an immigrant must show under the Immigration and Nationality Act¹ to reopen his or her case after an in absentia removal order has been entered.² On appeal, the Eleventh Circuit held that “a movant must show that he failed to receive the notice for the hearing at which he was ordered to remove.”³ Thus, the government is only required to send one form of notice recognized by the Act as long as the notice was proper for the specific hearing at which the alien did not appear.⁴ The Board of Immigration Appeals denied Dacostagomez-Aguilar’s request to reopen his removal proceedings, and the Eleventh Circuit denied his petition to review.⁵

Dacostagomez-Aguilar entered the United States in October of 2003 with his mother, younger sister, and two cousins.⁶ The group of five crawled under a border fence between Mexico and Arizona but was apprehended by Border Patrol shortly after.⁷ Upon apprehension, Dacostagomez-Aguilar was given a notice to appear “for removal proceedings in the Phoenix Immigration Court at a date and time ‘to be set.’”⁸ The group gave Border Patrol the address of the residence where it would be staying in Rock Springs, Georgia.⁹ The Phoenix Immigration Court sent notice to this address of a hearing to take place in November 2004; however, the group had moved to another residence in

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¹ Immigration and Nationality Act § 239(a), 8 U.S.C. § 1229.

² *Dacostagomez-Aguilar v. U.S. Att’y Gen.*, 40 F.4th 1312, 1314 (11th Cir. 2022).

³ *Id.*

⁴ *Id.*; see 8 U.S.C. § 1229(a)(1)–(2) (providing two methods of notice for immigration proceedings).

⁵ *Dacostagomez-Aguilar*, 40 F.4th at 1320.

⁶ *Id.* at 1314.

⁷ *Id.*

⁸ *Id.* (citing 8 U.S.C. § 1182(a)(6)(A)(i)).

⁹ *Id.*

Dalton, Georgia.¹⁰ The group moved once again after this but failed to inform the immigration court of either move.¹¹

Dacostagomez-Aguilar's aunt, the individual the group lived with in Rock Springs, Georgia, moved to transfer Dacostagomez-Aguilar's case to the Atlanta Immigration Court without his knowledge.¹² After the motion was granted, the government was required to send another notice to Dacostagomez-Aguilar that set forth "the new time and location of [his] removal proceedings."¹³ The Atlanta Immigration Court sent the new notice to appear to the Rock Springs address—the latest address it had on file—which was returned, undelivered.¹⁴ The immigration court resent the notice, pushing the hearing back to February 2005.¹⁵ This notice was also returned undelivered.¹⁶ Thus, Dacostagomez-Aguilar did not receive any of the notices sent to the Rock Springs address and missed his hearing date; as a result, the immigration judge entered an in absentia removal order.¹⁷

Over a decade later in July of 2019, Dacostagomez-Aguilar moved to reopen his removal proceedings.¹⁸ Dacostagomez-Aguilar argued that he could not be removed because he did not receive proper notice of his removal proceedings.¹⁹ An immigration judge denied his motion, and the Board of Immigration Appeals affirmed the judgment, finding:

[A]n immigration judge can enter—and need not rescind—an in absentia removal order if "a written notice containing the time and place of the hearing was provided *either* in a notice to appear under [§ 1229(a)(1)] *or* in a subsequent notice of the time and place of the hearing pursuant to [§ 1229(a)(2)]."²⁰

Dacostagomez-Aguilar appealed this decision to the Eleventh Circuit.²¹

¹⁰ *Id.*

¹¹ *Dacostagomez-Aguilar*, 40 F.4th at 1314.

¹² *Id.*

¹³ *Id.*; see 8 U.S.C. § 1229(a)(2)(A).

¹⁴ See *Dacostagomez-Aguilar*, 40 F.4th at 1314.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1314–15. If an alien does not appear at his or her removal hearing, the immigration court can order the removal of the alien "in absentia" if the alien received proper notice of the hearing. *Id.* at 1315 (citing 8 U.S.C. § 1229a(b)(5)(A)).

¹⁸ *Id.* "[A]n alien can move to reopen his proceedings 'at any time' if he 'did not receive notice in accordance with paragraph (1) or (2)' of § 1229(a)." *Dacostagomez-Aguilar*, 40 F.4th at 1315 (citing 8 U.S.C. § 1229a(b)(5)(C)(ii)).

¹⁹ *Id.*

²⁰ *Id.* (citing *Matter of Pena-Mejia*, 27 I. & N. Dec. 546, 548 (B.I.A. 2019)).

²¹ *Id.*

The Eleventh Circuit reviewed the “denial of [Dacostagomez-Aguilar’s] motion to reopen for an abuse of discretion, [and] review[ed] any underlying legal conclusions *de novo*.”²² Under the Act, there are two types of notice that the government can send: paragraph (1) of § 1229(a) requires “an initial notice to appear,” and paragraph (2) requires “a notice of a change in the time or place of a hearing.”²³ The Eleventh Circuit considered whether only one of these forms of notice was required, or both.²⁴

Dacostagomez-Aguilar argued that reopening of his case must be allowed “unless he received proper notice under both paragraphs (1) and (2).”²⁵ The Eleventh Circuit explained that, textually, Congress chose to connect paragraphs (1) and (2) with the conjunction “or” instead of “and.”²⁶ This implies that only one of the two types of notice is required rather than both.²⁷

Next, the court explained that the statute has two parts that work in tandem with one another: the reopening provision and the removal provision.²⁸ The removal provision provides which type of notice is required to enter an in absentia order.²⁹ The reopening provision provides for the ability to keep the order in place except under circumstances where the alien can prove that proper notice was not received.³⁰

Since the two provisions work together, the court looked to the removal provision to glean more information about the meaning and intent of the reopening provision.³¹ The removal provision states:

Any alien who, *after written notice required under paragraph (1) or (2) of section 1229(a) of this title 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 [government] 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)).³²

Here, Congress again used “or” to separate the two types of notice, further indicating that it intended for only one type of notice to be

²² *Id.* (citing *Li v. U.S. Att’y Gen*, 488 F.3d 1371, 1374 (11th Cir. 2007)).

²³ *Id.* at 1315; *see* 8 U.S.C. § 1229(a)(1)–(2).

²⁴ *Dacostagomez-Aguilar*, 40 F.4th at 1315–16.

²⁵ *Id.* at 1316.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Dacostagomez-Aguilar*, 40 F.4th at 1316.

³¹ *Id.* (“Because the provisions’ notice requirements mirror one another, any insight about notice to in the removal section can inform our interpretation of the reopening provision.”).

³² *Id.* (quoting 8 U.S.C. § 1229a(b)(5)(A) (emphasis added)).

required to sustain an in absentia removal order.³³ Moreover, Congress plainly stated that the government must prove by “clear, unequivocal, and convincing evidence that *the* written notice was provided.”³⁴ The Eleventh Circuit concluded that the use of “the” combined with the singular form of “notice” clearly showed that only one type of proper notice is required under the statute.³⁵

After its analysis of the plain language of the statute, the Eleventh Circuit analyzed which type of notice would be required in a case to enter an in absentia order for removal.³⁶ The court stated that “[f]or the original hearing, the government must provide a paragraph (1) notice to appear.”³⁷ However, when a hearing is rescheduled or changed in location, a paragraph (2) notice is required.³⁸ A paragraph (2) notice will also be required for any additional hearings scheduled after the initial hearing.³⁹ For an in absentia removal order to be entered, “the notice that matters is the notice for the hearing missed.”⁴⁰ Therefore, “[a]n alien must show that he did not receive notice under the relevant *paragraph*—paragraph (1) or (2).”⁴¹

The Eleventh Circuit further explained that “[a]ny other result would . . . run headlong into a constitutional conflict” because due process rights under the Fifth Amendment extend to aliens in removal proceedings.⁴² Thus, aliens have “a right to notice and to an opportunity to be heard,” and “those rights would be curbed if the government could order the removal of an alliance for failure to attend a hearing that he did not know was happening.”⁴³ The Eleventh Circuit concluded that Congress did not intend for an in absentia removal order to be immune from contest when an alien did not receive notice of a removal hearing before the immigration court.⁴⁴ Accordingly, the notice challenged must be the notice for the *specific* hearing in which the immigration court granted an in absentia removal.⁴⁵

Here, the notice to appear that Dacostagomez-Aguilar initially received from Border Patrol upon entering the United States was

³³ *Id.* at 1316–17.

³⁴ *Id.* at 1317 (emphasis added) (quoting 8 U.S.C. § 1229a(b)(5)(A)).

³⁵ *Id.*

³⁶ *Dacostagomez-Aguilar*, 40 F.4th at 1317.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (internal quotation marks omitted).

⁴² *Dacostagomez-Aguilar*, 40 F.4th at 1317–18.

⁴³ *Id.* at 1318.

⁴⁴ *Id.*

⁴⁵ *Id.*

improper and incomplete because it did not include the date or time of the hearing.⁴⁶ However, the Eleventh Circuit noted that this paragraph (1) notice was irrelevant for Dacostagomez-Aguilar's present challenge because it was not the notice for the hearing that Dacostagomez-Aguilar missed.⁴⁷

The Eleventh Circuit explained that Dacostagomez-Aguilar's hearing was rescheduled twice and, on both occasions, the immigration court sent paragraph (2) notices to his last known address.⁴⁸ These notices included both the time and place of the hearing in accordance with paragraph (2).⁴⁹ Under the Act, "[i]n the case of an alien not in detention, a written notice *shall not be required* under this paragraph if the alien has failed to provide the address required."⁵⁰ Since Dacostagomez-Aguilar failed to inform the government of his change of address, the government was no longer required to give him notice under this statute.⁵¹

Dacostagomez-Aguilar additionally argued that his case should be remanded because the venue of his case was changed upon a motion filed by his aunt rather than himself, which he argued violated his due process rights.⁵² The Eleventh Circuit disagreed and instead determined that "more is needed to create a constitutional violation—the procedural error must deny a person adequate notice or an opportunity to be heard."⁵³ The immigration court tried twice to inform Dacostagomez-Aguilar that "the venue had changed in a way 'reasonably calculated' to ensure that the information reached him: a written notice mailed to his last-known address."⁵⁴ Since Dacostagomez-Aguilar failed to inform the immigration court of his relocation, the Eleventh Circuit held that Dacostagomez-Aguilar's due process rights had not been violated.⁵⁵

The Eleventh Circuit's decision in this case places the responsibility on aliens in removal proceedings to keep the court informed of their

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Dacostagomez-Aguilar*, 40 F.4th at 1318–19.

⁴⁹ *Id.* at 1319.

⁵⁰ 8 U.S.C. § 1229(a)(2)(B) (emphasis added).

⁵¹ *Dacostagomez-Aguilar*, 40 F.4th at 1319.

⁵² *Id.*; see 8 C.F.R. § 1003.20(b) (providing that only a party to the proceeding can move for a change of venue).

⁵³ *Dacostagomez-Aguilar*, 40 F.4th at 1319 (citing *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1229 (11th Cir. 2009)).

⁵⁴ *Id.* (citing *Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258, 1259–61 (11th Cir. 2002) (internal quotation marks omitted)).

⁵⁵ *Id.*

whereabouts and not avoid their mandatory hearings.⁵⁶ Under this precedent, aliens in removal proceedings must be proactive, diligently complying with government requests.⁵⁷ Immigrants cannot “circumvent the immigration process” by avoiding their hearings, failing to inform the government of their location while their removal orders lie dormant, and subsequently challenging their removal based on lack of notice.⁵⁸

⁵⁶ *See id.* at 1319–20.

⁵⁷ *See id.* at 1319–20.

⁵⁸ *See id.* at 1313–14.