No. 17-0345

In the Supreme Court of Texas

PATRICIA MOSLEY

Petitioner,

v.

TEXAS HEALTH AND HUMAN SERVICES COMMISSION AND TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

Respondents.

AMICUS CURIAE BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

On Petition for Review from the
Third Court of Appeals, Austin, Texas
Cause No. 03-16-00358-CV

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Institute for Justice respectfully submits this *amicus curiae* brief in support of Petitioner Patricia Mosley, pursuant to Texas Rule of Appellate Procedure 11.

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. Constitutional guarantees of procedural due process undergird all of these foundations. That is why, on numerous occasions, IJ has challenged inadequate notice to allow individuals to defend their rights. IJ successfully represented Bill Brody in his fight against the Village of Port Chester, New York, which failed to inform Mr. Brody of his sole opportunity to challenge the condemnation of his property. *Brody v. Village of Port Chester*, 434 F.3d 121, 124 (2d Cir. 2005). IJ is currently litigating a notice issue in a civil forfeiture context in *Nwaorie v. Customs and*

[1] Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *amicus* confirms that no person or entity other than *amicus* made a monetary contribution to the preparation or filing of this brief.

Border Protection ("CBP"), in which it argues that CBP violated the Plaintiff's due process rights when it failed to provide notice of currency reporting requirements and still seized her money for failure to report. *Nwaorie v. CBP*, No. 4:18-cv-1406 (S.D. Tex., complaint filed May 3, 2018). IJ has an interest in Ms. Mosley's case because the decision below disregards the fundamental notions of fairness underlying due process and charges Petitioner with knowing the law even though the government itself did not know it and even though by directing Petitioner to follow an erroneous regulation, it caused her to forfeit her right to judicial review and her right to practice the occupation of her choosing. Our Constitution forbids treating people that way.[2]

SUMMARY OF ARGUMENT

It should be uncontroversial to say that government should not actively lie to its citizens. And it should be even more uncontroversial to say that government should not lie to its citizens about government procedures designed to protect those citizens' rights. Both the federal and Texas constitutions function as guarantees that such behavior by

[2] For purposes of this brief, the Institute for Justice incorporates by reference the Statement of the Case, the Statement of Jurisdiction, the Issues Presented, and the Statement of Facts provided by Petitioner Mosley in her Petition for Review, filed June 21, 2017.

the government will not be tolerated. These guarantees are embodied in the notion of procedural due process that ensures the existence of a "minimum standard of decency, honor, and reliability in [people's] dealings with their Government." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984). By granting review in this case and reaffirming procedural due process guarantees protecting against misleading behavior by the government, this Court will reinforce individuals' trust, if not in particular governmental agencies, then at least in the Constitution.

Patricia Mosley is a home health aide. Her constitutionally protected rights to judicial review and to making an honest living in the occupation of her choice are being threatened because she followed an officially promulgated fourteen-year-old law that the government specifically told her to follow. The government now argues that she should have known not to trust it and should have looked to other law instead. Because she did not, she no longer has the right to challenge an adverse administrative decision and is effectively barred from working as a home health aide again. But the U. S. Constitution (as

well as the Texas Constitution)[3] does not let people be treated this way. It guarantees the right to procedural due process, which means that government cannot direct an individual to follow the wrong steps and then argue that she should have known to take the right ones.

Patricia Mosley's due process rights were violated for three reasons. First, the Constitution does not allow the government to charge individuals with knowing the law when it misleads them by providing them with wrong information. Second, the Constitution requires adequate notice, and notice is by definition inadequate when it does nothing to alert individuals to the need for inquiring about the proper law or when the notice contains misrepresentations. Third, traditional notions of fair play and justice undergirding due process guarantees cannot be reconciled with expecting individuals to know the law even when the government itself does not know it.

This amicus brief does not make a judgment on whether the two laws—Section 2001.145(a) of the Texas Government Code and the former Section 711.1431 of the Texas Administrative Code—can be

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[3] This amicus brief deals solely with procedural due process as guaranteed by the federal Constitution. But protections provided by the Texas Constitution are at least as strong. *See Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W. 3d 1, 15 (Tex. 2015) (stating that procedural due process guarantees in federal and Texas constitutions are without "meaningful distinction").

reconciled. It simply states that if it is indeed true that the two are irreconcilable, then it is a violation of due process to deny Ms. Mosley judicial review because she followed the erroneous law that the government specifically directed her to follow. As the Fifth Circuit reasoned, while there is no obligation to provide individuals with interpretations of relevant laws, "the government nonetheless may not affirmatively misrepresent [them]." *United States v. Henderson*, 707 F.2d 853, 856 (5th Cir. 1983). Holding otherwise would be inconsistent with "[f]undamental notions of fairness and due process." *Id.*

ARGUMENT

I. PATRICIA MOSLEY'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE SHE WAS AFFIRMATIVELY MISLED BY THE GOVERNMENT, WHOSE REGULATIONS AND ACTIONS PREVENTED HER FROM FILING A MOTION FOR REHEARING.

Patricia Mosley relied on officially promulgated regulations ("DFPS regulations"), according to which she had thirty days from the date she received the agency's order to ask for judicial review of her administrative case. Ms. Mosley also relied on the word of the Administrative Law Judge ("ALJ") who, in a letter addressed directly to Ms. Mosley, specifically stated that unless she "timely petition[s] for judicial review" in accordance with DFPS regulations, her name "will be

submitted to the Employee Misconduct Registry," which means she would never be able to practice as a home health aide again. Petition for Review (Pet.), Tab A. Because she relied on the information in the DFPS regulations and in the ALJ letter, Ms. Mosley went straight to the court, without asking for a rehearing. She is now told that due to these actions, she is forever barred from seeking judicial review of the administrative decision against her.

Numerous circuit courts have found similarly misleading notices on how to appeal adverse administrative judgments unconstitutional. In addition, the U. S. Supreme Court has found it unconstitutional to charge a person with knowledge of an underlying statute when this person relied on the inconsistent regulation.

A. Misleading Notices on How to Appeal an Adverse Administrative Ruling are Unconstitutional.

Different federal circuit courts have developed slightly different tests for when instructions on how to appeal an adverse decision are constitutionally inadequate. Some require that the notice be "sufficiently" misleading; some require that there be detrimental reliance; some do not require both elements. All, however, agree that if there is a sufficiently misleading notice and detrimental reliance, that

notice is unconstitutional. Here, assuming the statute and the regulations cannot be reconciled, the notice given to Ms. Mosley was not only misleading, but affirmatively false. Ms. Mosley relied on it to her profound detriment—permanent exclusion from her profession. The notice she received is plainly unconstitutional.

In the social-security benefits context, federal circuits agree that if a notice provides the claimant with misleading information on how to appeal an adverse administrative decision and there is a detrimental reliance on this notice, it is violative of due process. *Loudermilk v. Barnhart*, 290 F.3d 1265, 1269 (11th Cir. 2002); *Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995); *Day v. Shalala*, 23 F.3d 1052, 1065-66 (6th Cir. 1994); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1349 (8th Cir. 1993); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). As the Ninth Circuit reasoned:

> Requiring notices to *accurately* state how a claimant might appeal an initial decision does not impose a significant financial or administrative burden on the Secretary. Moreover, the form of the notice used here is *sufficiently misleading* that it introduces a high risk of error into the disability decisionmaking process. . . . [T]he notice violates appellant's fifth amendment right to due process.

Gonzalez, 914 F.2d at 1203 (emphasis added).

The claimant in *Gonzalez* was notified by the ALJ that her application for disability benefits was denied. *Id.* at 1200. In that same notice she was told that "[i]f you do not request reconsideration of your case within the prescribed time period, you still have the right to file another application at any time." *Id.* at 1203. The notice did not make it clear, however, that if she chose to file a new petition, rather than appeal the initial adverse decision, this new petition could be subject to res judicata. *Id.* Sure enough, when Ms. Gonzales filed another application for disability, the ALJ refused to reopen her claim. *Id.* at 1200. The Ninth Circuit, in an opinion joined by Judge Kozinski, found that "this notice form violates a claimant's fifth amendment right to procedural due process," since by being misleading, it was not "reasonably calculated to afford parties their right to present objections." *Id.* at 1203 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Both the claimant in *Gonzalez* and Patricia Mosley were misled about how to appeal an adverse administrative decision. In fact, Ms. Mosley's case is even stronger, since the notice provided to her did not simply imply that there would be no repercussions if she chose one

course of action over the other. The notice provided to her explicitly stated that she had only one option and had to go with it if she wanted to contest the adverse administrative ruling. In addition, the notice provided to her quoted from a binding law, according to which she had to file her petition for review with a district court. If it is unconstitutionally misleading to imply that a petitioner has a choice where there is none, then surely it is unconstitutionally misleading to expressly direct her to the wrong option and quote officially promulgated regulations to do so. In addition, had the government not provided Ms. Mosley with information on how to appeal the adverse administrative ruling, had it not promulgated the DFPS regulations (i.e. binding law), and had it not quoted from this binding law, Ms. Mosley would not have relied on this misinformation, but would have discovered deadlines for herself. While the court in *Gonzalez* did not require the showing of detrimental reliance, some other circuit courts do, and even by their standards, Ms. Mosley's due process rights were violated. *See Loudermilk*, 290 F.3d at 1269; *Gilbert*, 45 F.3d at 1394; *Day*, 23 F.3d at 1065-66; *Burks-Marshall*, 7 F.3d at 1349.

B. It Is Unconstitutional to Charge a Person With Knowledge of a Statute When the Officially Promulgated Regulation (on Which the Person Relied) Is Inconsistent With That Statute.

According to the United States Supreme Court, it is unconstitutional to charge someone with knowledge of the law if they were "affirmatively misled by the responsible administrative agency" into believing that they were complying with it. *United States v. Pa. Indus. Chem. Corp. ("PICCO")*, 411 U.S. 655, 674 (1973).

The facts of *PICCO* are similar to the situation at bar. Pennsylvania Industrial Chemical Corporation ("PICCO") relied on regulations promulgated by the Army Corps of Engineers to determine what kind of substance it was allowed to discharge into navigable waters. *Id.* at 657-59. These regulations turned out to be inconsistent with the statute, and the government went after PICCO for violating it. *Id.* at 657-58. PICCO was fined $10,000 after it was found guilty by a jury. *Id.* at 660. The Supreme Court reversed, determining that charging PICCO with knowledge of the statute when it relied on affirmatively misleading regulations was violative of due process, as guaranteed by the federal Constitution. *Id.* at 674 (discussing "traditional notions of fairness inherent in our system of criminal

justice"). According to the Court, PICCO "had a right to look to the . . . regulations for guidance" because "their designed purpose was to guide persons as to the meaning and requirements of the statute." *Id.* at 674 (citations omitted).

Ms. Mosley's case is similarly about being punished for relying on an officially promulgated regulation. But as the Court explained, those relying on such regulations for guidance have every right to do so, without being charged with knowledge of the statute itself, or the ability to interpret it. *Id.* at 674. It is true that complying with DFPS regulations did not cause Ms. Mosley to get criminally convicted, but the consequences of this compliance are at least as severe. Instead of losing $10,000 worth in fines, as was the case in *PICCO*, Ms. Mosley, by relying on the DFPS regulations, lost her right to judicial review and, as a consequence, her right to earn an honest living in the occupation of her choice. Surely, given the grave consequences of her predicament, she, just like the plaintiff in *PICCO*, should not be charged with knowing the statute when she reasonably relied on regulations interpreting and implementing it.

The state argues that an incorrect agency statement and, by implication, an incorrect agency regulation, "is legally no different than silence." To hold otherwise, it says, is to "contravene a bedrock jurisprudential principle: that individuals are presumed to know the law." Resp. Br. at 23. But this statement is simply inconsistent with the constitutional guarantee of due process and with the jurisprudence interpreting it. As many federal circuit courts have found, a notice that is misleading introduces a high risk of error into a consequential decision making and is thus violative of due process. In addition, the U.S. Supreme Court held that an individual has every right to rely on a regulation interpreting a statute, even if the regulation is mistaken. To charge this individual with knowing the newfound view of the correct statute is inconsistent with due process.

II. PATRICIA MOSLEY'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE NOTICE PROVIDED TO HER WAS CONSTITUTIONALLY INADEQUATE.

The content of the notice provided to Ms. Mosley was not only actively misleading, it was also woefully inadequate by constitutional due process standards. To begin with, there was nothing in the letter to move Ms. Mosley to inquire about the language of the Texas

Administrative Procedure Act (the "APA") or about which one of the two officially promulgated laws (the APA statute or the DFPS regulations) controls. Second, the erroneous direction provided by the ALJ and by the officially promulgated regulations "negat[ed] the very reason for such notice and thus [ran] afoul of . . . fundamental due process rights." *Henderson*, 707 F.2d at 857.

A. If Nothing in a Notice Alerts an Individual to the Need to Inquire Further into the Substance of the Law, It Is Constitutionally Inadequate.

In *Lambert v. California*, the U. S. Supreme Court reasoned that "due process places some limits" on the principle that "ignorance of the law will not excuse." 355 U.S. 225, 228 (1957). This limit is embodied in the concept of notice, which can be expressed as the existence of "circumstances which might move one to inquire" as to the existence of the law with which one is supposed to comply. *Id.* at 229. In *Lambert*, the Los Angeles Municipal Code required a convicted person to register in order to be allowed to remain in Los Angeles for over five days. *Id.* at 226. The Supreme Court held that this requirement violated procedural due process. *Id.* at 229-30. The Court reasoned that "this appellant on first becoming aware of her duty to register was given no

opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent." *Id.* at 229. "She could but suffer the consequences of the ordinance," the Court continued. As such, to be consistent with due process, "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary." *Id.* at 229.

In line with *Lambert*, the Second Circuit found that property owners should not be charged with knowing the laws affecting ownership of their property if notice provided to them would not have moved them to suspect that unless they act to protect their rights, these rights would be taken away. *Brody v. Village of Port Chester*, 434 F.3d 121, 130 (2d Cir. 2005). The case involved a property owner who was denied an opportunity to challenge a local government's determination of public use, making his property subject to condemnation. *Id.* at 125. Among other things, the notice provided by the local government did not inform the property owner that he had thirty days from the publication of the determination to seek judicial review. *Id.* The Second Circuit held that "due process requires the condemnor to give as much notice as is practicable in attempting to inform an affected

property owner of a proceeding that threatens to deprive the owner of that property interest," which means that the government must "include mention of the commencement of the thirty-day challenge period." *Id.* at 132. Charging the property owner with knowing the law in this case was inappropriate. *Id.* at 131. After all, "[i]t is not likely that the average landowner would have appreciated that notice of the Determination and Findings began the exclusive period in which to initiate a challenge to the condemnor's determination." *Id.* at 132.

Just as was the case with the petitioners in *Lambert* and *Brody*, nothing in the circumstances surrounding notice provided to Patricia Mosley would have moved her to inquire about the actual text of the APA or about which law—the APA statute or the DFPS regulations—should control. Quite to the contrary. The notice was specific about the need to follow the DFPS regulations in order to appeal the adverse administrative ruling that threatened to forever prevent Ms. Mosley from practicing the occupation of her choice. The notice unambiguously stated that "your name will be submitted to the Employee Misconduct Registry *unless* you file a timely petition for judicial review." Pet., Tab A (emphasis added). The notice also quoted from the DFPS regulations

according to which the petition for review "*must* be filed" within thirty days after the receipt of the notice. *Id.* (emphasis added). No reasonable person reading this notice would have possibly believed that there was even a possibility that an alternative course of action needed to be taken. According to the notice, there was only one course of action: to file a petition for judicial review within thirty days of the receipt of the notice. While *Lambert* dealt with criminal law, the consequences for Ms. Mosley are just as severe as the consequences for the petitioner in *Lambert*, who had to pay $250 for violating the ordinance and was placed on a three-year probation. *Lambert*, 355 U.S. at 227. In fact, the life sentence of not being able to work in the occupation of her choosing might be even worse than a sentence of a limited probation.

B. The Notice to Patricia Mosley Was Constitutionally Inadequate Because It Contained Misrepresentations.

The notice provided to Patricia Mosley was also not adequate because it misrepresented the controlling law on what to do in order to appeal an administrative ruling. The Fifth Circuit specifically stated that such a "defective notice" cannot be countenanced. *Henderson*, 707

F.2d at 856. After all, "[t]he government should not be entitled to profit by its own misrepresentations." *Id.*

In *Henderson*, the Farmers Home Administration sent a Notice of Delinquency and Acceleration of Indebtedness to home owners, informing them that their debt was being accelerated and the only way for them to avoid foreclosure was by paying roughly $9,000. *Id.* at 855. They did not pay this sum and the United States foreclosed. *Id.* at 854. The information about the need to pay $9,000 turned out to be incorrect. According to the relevant statutes, all the homeowners had to do to prevent the foreclosure proceedings from being initiated was to pay $1,200. *Id.* at 856. The government argued that "it was under no obligation to explain the relevant statutes" to the homeowners and that "such explanation should have been rendered by the Hendersons' attorney." *Id.* at 856. The Fifth Circuit disagreed. It reasoned that while there is no obligation to provide individuals with interpretations of relevant laws, "the government nonetheless may not affirmatively misrepresent the obligations of a debtor." *Id.* Holding otherwise would

be inconsistent with "[f]undamental notions of fairness and due process." *Id.*[4]

The Ninth Circuit similarly found that when erroneous advice provided by the government is "in the form of a crucial misstatement in an official decision," it is inconsistent with due process. *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) (cited approvingly in *Heckler*, 467 U.S. at 61 n.13).

In *Brandt*, the Los Angeles Office of the Bureau of Land Management (the "Office") issued a decision rejecting an oil and gas lease offer but explicitly stated that "'the offerors are allowed the right to substitute within 30 days new offer forms . . . without losing their priority,'" which the lease applicants promptly did. *Brandt*, 427 F.2d at 55. The Secretary of the Interior, when reviewing the case, disagreed with the Office's assessment and found that "the amended offer was an attempt to create a new offer." *Id.* Moreover, the Secretary concluded

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[4] In a similar vein, the First Court of Appeals in Houston found that "a misleading notice is equal to no notice" and as such constitutes "a denial of the plaintiff's due process right to be heard." *Seckers v. Ocean Chem., Inc.*, 845 S.W.2d 317, 318 (Tex. App.—Houston [1st Dist.] 1996, no pet.). The case involved a failure to appear at a June 14 hearing on a motion to dismiss, due to the notice of the hearing containing a penmanship issue, whereby the date for the hearing could have been read as June 17, rather than June 14. *Id.* at 318.

that "by failing to appeal from the decision of the Los Angeles office concerning the validity of the original lease offer, the appellants lost any right to assert the validity of the original offer." *Id.* In other words, the Office directed petitioners to do one thing, which they did, and the Secretary of the Interior found that because the petitioners listened to the Office, they forfeited their right to ever attempt to defend the original offer as valid.

The Ninth Circuit found that such a bait and switch violated due process. *Id.* at 56-57. According to the court, the party that is adversely affected by an administrative decision "must be afforded proper notice of action to be taken." *Id.* at 56. Citing *Mullane v. Central Hanover Bank & Trust Company*, the court found that proper notice means that it is "reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." *Id.* Because the decision incorrectly and "affirmatively promised that an adverse effect need not result" causing the loss of "an effective right of appeal," the notice was not reasonably calculated to inform and thus violated due process. *Id.* at 56-57. "To say to these appellants, 'The

joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Id.* at 57.

If the types of notices provided by the government in *Henderson* and *Brandt* are violative of constitutional due process rights, then surely the notice and the officially promulgated regulations issued by the Texas government in the case at bar are as well. None of the three notices were reasonably calculated to inform individuals of actions that had to be taken. Quite the opposite. All actively misled the individuals into following procedures that adversely affected their rights. Only the situation with Ms. Mosley is even worse, since the regulations and the decision letter both misstated the procedures.

Thus, the U.S. Supreme Court's decisions in *Lambert* and *Mullane*, as well as the Fifth and the Ninth Circuit Courts' decisions in *Henderson* and *Brandt* provide additional support to Ms. Mosley's position that she was denied procedural due process rights under the Fourteenth Amendment. Nothing in the notice or regulations provided to her by the ALJ could have possibly alerted her about the need to investigate the language of the APA or which law—the APA statute or the DFPS regulations—controls. In addition, the notice was not

reasonably calculated to inform Ms. Mosley of proceedings that would have affected her legally protected interest. As such, the notice provided to her was inconsistent with protections enshrined in our Bill of Rights.

III. PATRICIA MOSLEY'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE IT IS NOT CONSISTENT WITH TRADITIONAL NOTIONS OF FAIR PLAY AND JUSTICE TO HAVE HIGHER EXPECTATIONS OF AN INDIVIDUAL THAN OF THE GOVERNMENT.

Citizens have an interest in "some minimum standard of decency, honor, and reliability in their dealings with their Government." *Heckler*, 467 U.S. at 61. This standard is violated when the government has a higher expectation of a citizen than it does of itself.

For fourteen years, the state of Texas had on the books an officially promulgated regulation that it now says is wrong. In other words, for fourteen years, the government did not know that this regulation was inconsistent with the APA, the very same statute that it charges Patricia Mosley with knowing. Yet, despite itself not knowing the statute, the government now wants Patricia Mosley to be punished for trusting it by losing her right of judicial review and by forever being prevented from practicing the occupation of her choice.

Justice Robert Jackson once powerfully denounced such a double-standard. "It is very well to say that those who deal with the

Government should turn square corners. But there is no reason why the square corners should constitute a one-way street." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting) (cited approvingly in *Heckler*, 467 U.S. at 61 n.13). Justice Jackson was reacting to an unseemly double-standard of charging a company with knowing the law involving crop insurance, even though a governmental entity itself did not know it and advised the company wrongly. After all, "those who represented the Government in taking on the risk apparently no more suspected the existence of a hidden regulation that would render the contract void than did the policy holder." *Id.* at 387.

Just as was the case in *Merrill*, Patricia Mosley trusted the government's word and acted upon it. She should not be presumed to know the law better than the government that apparently not only wrongly understood the law but also promulgated regulations based on this wrongful understanding. As Justice Jackson pointed out, the notions of "fundamental principles of fair dealing" should not constitute a one-way street. *Id.* at 388.

This is why the Third Court's reliance on *Hernandez v. Texas Department of Insurance* in concluding that Ms. Mosley "is charged

with notice of the APA and its requirements" is misplaced. *See Mosley v. Tex. Health and Hum. Servs. Comm'n*, 517 S.W.3d 346, 355 (Tex. App—Austin 2017, pet. filed) (citing 923 S.W.2d 192, 195 (Tex. App.—Austin 1996, no writ)). To begin with, the Third Court was wrong to hold in *Hernandez* that individuals are charged with knowing the APA. This presumption of knowledge is inconsistent with the adequate notice requirements undergirding the guarantee of due process. *See Mullane*, 339 U.S. at 314 (reasoning that notice must be "reasonably calculated, under all the circumstances" to afford individuals an opportunity to protect their rights). In addition, *Hernandez* is distinguishable and, if anything, demonstrates why Patricia Mosley should not be charged with knowing the APA. After all, the insurance agent in *Hernandez*, who missed her deadline to file a petition for judicial review, was never told by the government to do anything contrary to the APA requirements. *Hernandez v. Tex. Dep't of Ins.,* 923 S.W.2d 192, 193 (Tex. App.—Austin 1996, no writ). In addition, there were no officially promulgated regulations inconsistent with the APA. *Id.* While it is bad enough to say, as the Court does in *Hernandez*, that the insurance agent is charged with knowing the APA, *id.* at 195, it is yet worse to

say, as the Third Court seems to imply here, that Ms. Mosley is charged with knowing the APA and following its language, even though the government's own regulations, for fourteen years, did not do so and even though the ALJ specifically told Ms. Mosley that she must follow these regulations and not the APA to appeal the adverse administrative ruling. *See Mosley*, 517 S.W.3d at 355.

Punishing an individual for listening to the government's order and following its regulations violates basic notions of fair play and justice and breaches even the "minimum standard of decency, honor, and reliability" in citizens' dealings with their government. *Heckler*, 467 U.S. at 61. Trust in government is what differentiates democratic republics from tyrannical regimes. Once this trust is lost, so is the basis for governance that uses trust as a basis for ordering society rather than coercion. Ms. Mosley trusted the word and the law of her government. For this government to now turn its back on her is tantamount to saying "'The joke is on you. You shouldn't have trusted us'" and, as one federal circuit court pointed out, this kind of behavior is "hardly worthy of our great government." *Brandt*, 427 F.2d at 57.

PRAYER

Patricia Mosley was misled by her government. The government now says that she should have known better and instead of following the law it pointed her to, should have known a different law that controlled in her situation. Because she did not, she is now denied her right of judicial review as well as her right to practice the occupation of her choosing. But our Constitution forbids treating people this way. It provides for procedural due process protections that guard against government misleading people. To reinforce these protections, this Court should grant review and reaffirm that individuals can have trust in the Constitution as a backstop against governmental abuse.

RESPECTFULLY SUBMITTED this 27th day of July, 2018,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF COMPLIANCE

This brief contains 5,101 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate procedure.

/s/ Anya Bidwell
Anya Bidwell

CERTIFICATE OF SERVICE

I certify that on this 27th day of July, 2018, I caused a true and correct copy of the foregoing Amicus Curiae Brief of Institute for Justice in Support of Petitioner to be served electronically to the following counsel of record:

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