No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* § 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," those periods end when the government serves a "notice to appear under section 1229(a) of this title." *Id.* § 1229b(d)(1)(A). Section 1229(a) defines a "notice to appear" as "written notice . . . specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1).

The question presented is:

Whether, to trigger the stop-time rule by serving a "notice to appear under section 1229(a)," the government must "specify" the items listed in § 1229(a)'s definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

PARTIES TO THE PROCEEDING

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JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The petition for a writ of certiorari was filed on September 27, 2017, and granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application * * * * .

8 U.S.C. § 1229b(d)(1) provides in relevant part:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end

> * * * when the alien is served a notice to appear under section 1229(a) of this title[1] * * * *.

8 U.S.C. § 1229(a)(1) provides:

> In removal proceedings under section 1229a of this title,[2] written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:
>
> (A) The nature of the proceedings against the alien.
>
> (B) The legal authority under which the proceedings are conducted.
>
> (C) The acts or conduct alleged to be in violation of law.
>
> (D) The charges against the alien and the statutory provisions alleged to have been violated.
>
> (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1)

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[1] The version appearing in the United States Code uses "section 1229(a) of this title" in place of "section 239(a)" (of the Immigration and Nationality Act), as in the session law. *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, § 1506(b)(1), 114 Stat. 1527. Pursuant to this Court's Rule 34.5, this brief uses the codified version.

[2] The session law uses "section 240," rather than "section 1229a of this title." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-587.

and (ii) a current list of counsel prepared under subsection (b)(2).

(F)

(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

The full text of Sections 1229 and 1229b, together with other relevant statutes and regulations, are reproduced in the appendix to this brief.

INTRODUCTION

Cancellation of removal is a critical form of immigration relief that prevents the break-up of immigrant families and allows the most deserving immigrants to remain in the country. To be eligible for cancellation, an immigrant must have been living in the United States for a specified number of years. The "stop-time rule" at issue in this case gives the government the power to end the period of qualifying residence by serving a specific document: a "notice to appear under section 1229(a) of this title." 8 U.S.C. § 1229b(d)(1). Section 1229(a), in turn, defines what a notice to appear is: it contains six specific pieces of information, two requirements for the immigrant to fulfill, and two admonitions about the immigration consequences of failure to meet the requirements.

The question in this case is whether notice that is *not* a "notice to appear" as that term is defined in section 1229(a) can nevertheless be a "notice to appear under section 1229(a)" for purposes of the stop-time rule. The answer to that question is, unambiguously, no. The statute's plain text—supported by its structure, its history, and accepted canons of statutory interpretation—provides that only notice that satisfies section 1229(a)'s definition of a "notice to appear" qualifies as a "notice to appear under section 1229(a)," triggering the stop-time rule and potentially barring access to this vital form of relief.

The Board of Immigration Appeals ("BIA") rejected that straightforward reading of the statute. *Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011). It largely ignored the statute's text, concluding, after cursory analysis, that the text is ambiguous. *Id.* at

647. Viewing that purported ambiguity as license to adopt a "reasonable" interpretation "within our adjudicative authority and administrative judgment," *id.* at 651, the BIA focused on accommodating the Department of Homeland Security ("DHS"). While the statute requires that a notice to appear include the "time and place at which the proceedings will be held," 8 U.S.C. § 1229(a)(1)(G)(i), DHS provides that information in a notice to appear only "*where practicable*." 8 C.F.R. § 1003.18(b) (emphasis added). To accommodate this regulation, which makes optional what the statute makes mandatory, the BIA held that the statute imposes *no* "substantive requirements" concerning what notice the government must provide to trigger the stop-time rule—if the government serves something it calls a "notice to appear," that is enough, even if it is otherwise just a blank piece of paper. *Camarillo*, 25 I. & N. Dec. at 647. The court of appeals, applying *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deferred to the BIA's decision. Pet. App. 6a-14a.

This Court should reverse the court of appeals and reject the BIA's attempt to rewrite the statute's text to accommodate DHS's administrative practice. The statutory text imposes a straightforward requirement on the government: if it wants to invoke the stop-time rule, it must serve a "notice to appear under section 1229(a)." A document that does not meet the definitional elements of the cross-referenced provision is *not* a "notice to appear under section 1229(a)." The statute's structure and history confirm this straightforward reading of the statutory text.

The BIA's interpretation is also not a reasonable one. The BIA's primary basis for rejecting the statute's plain meaning—to avoid consequences for the government's insistence on serving notice that does not meet the statute's requirements—is not a valid basis for an agency to interpret even an ambiguous statute. In cases where DHS's notice practices are *not* at issue, the BIA has adopted reasoning in significant conflict with *Camarillo*—it has held, for instance, that if the government serves a new "notice to appear," rather that completing or revising a noncompliant notice, then only the *new* "notice to appear" triggers the stop-time rule. *Matter of Ordaz*, 26 I. & N. Dec. 637 (BIA 2015). That decision not only conflicts with *Camarillo*, but means that when an immigrant's time stops impermissibly "hangs on the fortuity of an individual official's decision." *Judulang v. Holder*, 565 U.S. 42, 58 (2011).

Because the statute's text is unambiguous, and because, in any event, the BIA's interpretation is not a reasonable one, this Court should reject the BIA's interpretation of the stop-time rule and hold that only service of a "notice to appear" that satisfies § 1229(a)'s definition of that term constitutes a "notice to appear under section 1229(a)" for purposes of the stop-time rule.

STATEMENT

A. Cancellation Of Removal Is An Important Discretionary Form Of Relief Available Only To The Most Deserving Immigrants

For almost eighty years, Congress has given the Attorney General discretion to allow deserving immigrants with longstanding ties to the United States

to remain as lawful permanent residents, even if they would otherwise be inadmissible, deportable, or removable. This important form of relief originated in a 1934 proposal from the Immigration and Naturalization Service ("INS"), which believed such relief was necessary to prevent "extreme hardship" to U.S. citizens and residents with family ties to undocumented immigrants. S. Rep. No. 31-1515, at 595-96 (1950). Specifically, the INS criticized then-existing law for providing discretionary relief only for those seeking admission to the country, and not providing a way for the Attorney General to allow longtime U.S. residents to remain here. *Id.* INS officials noted that there were "a large number of cases" involving "aliens who were in the United States in an illegal status" who "had established family ties here by acquiring a spouse or children, or both." *Id.* According to INS officials, "the law was too stringent," causing "extreme hardship" to these families. *Id.* The INS therefore proposed legislation that would allow such immigrants to seek discretionary relief to remain in the country as lawful permanent residents. *Id.*

Congress followed the INS's suggestion and in due course adopted a new form of relief called suspension of deportation. *See* Alien Registration Act, 1940, ch. 439, § 20, 54 Stat. 672. In its original form, this provision gave the Attorney General power to "suspend deportation" of an otherwise-deportable immigrant if that immigrant "has proved good moral character for the preceding five years" and the Attorney General "finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien." *Id.* To ensure that only the

most deserving immigrants were eligible for suspension of deportation, Congress barred those with certain criminal convictions from eligibility for relief. 54 Stat. 672-73. Though Congress amended "suspension of deportation" over the following decades, its basic structure remained constant: those with good moral character, extended residence in the United States, and immediate family members who are U.S. citizens or lawful permanent residents could seek discretionary relief from the Attorney General to suspend deportation and adjust their status to lawful permanent resident. *See, e.g.*, 8 U.S.C. § 1254 (1952).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div. C, 110 Stat. 3009-546, Congress replaced suspension of deportation with a similar form of relief called "cancellation of removal." *See* 8 U.S.C. § 1229b. Like its predecessor, cancellation of removal is available only to the most deserving immigrants with long-standing ties to the United States.

The "cancellation of removal" provision gives the Attorney General the power to cancel removal and grant a green card to eligible non-permanent residents when their removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b). This discretionary relief is available only to those with "good moral character" who have not been convicted of specified criminal offenses, and who do not pose a security risk. *Id.*; *see also id.* § 1229b(c)(4). To be eligible, the applicant must have "been physically present in the United States for a continuous period of

not less than 10 years immediately preceding the" cancellation application. *Id.* § 1229b(b)(1)(A).

The Attorney General can also cancel removal for lawful permanent residents who do not present a security risk when the equities favor allowing them to remain in the country. *Id.* § 1229b(a), (c)(4); *Matter of Sotelo-Sotelo*, 23 I. & N. Dec. 201, 203 (BIA 2001). Immigrants seeking this form of relief must show that they have been lawful permanent residents for at least five years, have continuously resided in the United States for at least seven years, and have not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(1)-(3).

Cancellation is often the only form of relief that can keep immigrant families united and allow immigrants who have made positive contributions to their communities to remain in the country. And everyone seeking cancellation must demonstrate a period of continuous presence or residence in the United States.[3] This case is about how to determine when that period stops accruing.

B. Congress Creates The Stop-Time Rule, Triggered By Service Of A "Notice To Appear," And Defines A "Notice To Appear" As Notice Of Specific Information, Including Hearing Time And Place

Congress adopted the "stop-time" rule at issue in this case to fix a specific problem that had arisen under suspension of deportation and other earlier forms

[3] For simplicity, this brief uses the term "continuous residence" to encompass the different durational requirements for permanent residents and nonpermanent residents.

of discretionary relief. Before 1996, the period of continuous residence continued to run during the pendency of removal proceedings. *See Matter of Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 670-71 (BIA 2004). Congress grew concerned that immigrants had an incentive to avoid and slow removal proceedings in order to satisfy the residence requirement. *Id.*

In response, IIRIRA enacted the stop-time rule. Under this rule, "any period of continuous residence or continuous physical presence in the United States shall be deemed to end" when one of two things happens. 8 U.S.C. § 1229b(d)(1). First, and directly relevant here, the period ends "when the alien is served a notice to appear under section 1229(a) of this title." *Id.* In other words, IIRIRA specified that the stop-time rule is triggered, and the period of continuous residence deemed to end, upon service of a specific document: "a notice to appear under section 1229(a)."

Second, the period also ends if the immigrant "commit[s]" certain offenses that would be grounds for removal or inadmissibility. 8 U.S.C. § 1229b(d)(1)(B).[4] That provision is not at issue in this case, which thus turns on when DHS served "a notice to appear under section 1229(a)."

Section 1229(a), which was also enacted in IIRIRA, provides that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information. 8 U.S.C. § 1229(a)(1). Included in the list of information that together

[4] The period stops on the date when the crime is committed, not the later date when the immigrant is convicted. *Matter of Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999).

makes up a "notice to appear" are the key pieces of information an immigrant needs in order to "appear" at a hearing—information like the "acts or conduct alleged to be in violation of law"; the "charges against the alien and the statutory provisions alleged to have been violated"; the fact that the "alien may be represented by counsel"; the "time and place at which the proceedings will be held"; and the "consequences . . . of the failure . . . to appear at such proceedings." *Id.* These vital pieces of information are all treated identically in the statute—each is required ("shall" be included), and the statute does not give DHS, the BIA, or any other agency the authority to decide that some of this information can be left out while still serving a "notice to appear" as § 1229(a) defines that term.

IIRIRA not only enacted *both* the stop-time rule *and* the substantive "notice to appear" definition, but was also the first statute to require that the "time and place" of proceedings be included in the initial notice, rather than a subsequent hearing notice. Prior to IIRIRA, noncitizens were notified of deportation proceedings through an "order to show cause." *See* 8 U.S.C. § 1252b(a)(1) (1994). An "order to show cause" did *not* need to include the time and place of the hearing: though the statute required that such information be provided eventually, it could be provided "in the order to show cause *or otherwise*." *Id.* § 1252b(a)(2)(A) (emphasis added). Pre-1996 regulations specified that, consistent with that version of the statute, the time-and-place information would *not* be provided in the "order to show cause," but would later be sent by the immigration court. 8 C.F.R. §§ 242.1(b), 3.18 (1996).

In IIRIRA, however, Congress rejected this flexibility. Congress had grown concerned that existing notice procedures led to unnecessary disputes about whether noncitizens had received certain notices. *See* H.R. Rep. No. 104-469, pt. I, at 122, 159 (1996) (House Report); pp. 38-39, *infra*. In order to streamline notice procedures and avoid these disputes, IIRIRA abandoned the option of sending a hearing notice after the charging document: Instead of allowing the government to provide time-and-place information in the notice to appear "or otherwise," it explicitly *required* that the "time and place" of proceedings "shall" be included in the "notice to appear" itself. 8 U.S.C. § 1229(a)(1)(G)(i).

Thus, IIRIRA both triggered the stop-time rule on service of a "notice to appear under section 1229(a)," and drafted section 1229(a) to state that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information—including, for the first time, the time and place of the hearing.[5]

C. Disregarding IIRIRA, The Government Enacts Regulations Permitting Service Of A Purported "Notice To Appear" That Does Not Include The Hearing Time Or Place

The issue in this case arises because the government has continued its pre-IIRIRA notice practices—

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[5] For immigrants who were seeking suspension of deportation under the pre-IIRIRA regime, Congress made the service of an order to show cause trigger the stop-time rule. *See Matter of Nolasco-Tofino*, 22 I. & N. Dec. 632, 633-641 (BIA 1999) (en banc).

serving notices that do not satisfy IIRIRA's stricter requirements for a "notice to appear"—and yet insists that these non-compliant notices are "notices to appear under section 1229(a)" for purposes of the stop-time rule.

There is no dispute that § 1229(a) requires that the government include in a "notice to appear" all of the specified information, requirements, and warnings—including not just the "time and place" of the hearing, but also other crucial facts like the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. § 1229(a)(1). The statutory text states explicitly that a "notice to appear" "shall . . . specify[]" each piece of information. *Id.* Thus, as the court of appeals in this case recognized, "[i]t is undisputed that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." Pet. App. 8a.

The government, however, has decided it can simply *call* a document a "notice to appear" without satisfying IIRIRA's requirement that such a notice "shall" include the "time and place" of the hearing. 8 U.S.C. § 1229(a). Rather than maintain a system that would allow the government to serve a "notice to appear" that includes the "time and place" of the hearing—for instance, having enforcement officials contact the immigration court to schedule a hearing before serving the notice to appear, or creating a database that would allow enforcement officials to access the next available hearing time and include it in a notice to appear—the government simply promulgated a new regulation stating that providing time-and-place information in a notice to appear would be *op-*

tional. Specifically, shortly *after* IIRIRA required that a "notice to appear" "shall" specify the "time and place" of proceedings, the Attorney General adopted a regulation stating that the "notice to appear" need only provide "the time, place and date of the initial removal hearing[] *where practicable*." 62 Fed. Reg. 10,312, 10,332 (Mar. 6, 1997) (emphasis added); *see* 8 C.F.R. § 1003.18(b) (current version following renumbering in 2003); *compare id.* § 1003.15 (items that "must" be included in a notice to appear). And while the agency responsible for preparing the notice is now DHS, *see id.* § 1001.1(c), the regulations are no more rigorous following the change.

In practice, DHS often follows the more flexible regulation, rather than the statute's strict requirement. Thus, when DHS decides it is not "practicable" to include the time-and-place information, as required by statute, it serves a notice that it *labels* a "notice to appear," but that does not "specify[]" all the information that together constitutes the document that is "referred to as a 'notice to appear'" in § 1229(a). These non-compliant notices state that the date, time, and/or place of the hearing are "to be determined." The government then files this notice with the immigration court, which the government views as the formal "commence[ment]" of removal proceedings. 8 C.F.R. §§ 1003.14(a), 1239.1(a). When the filed notice does not include the time and/or place of the initial hearing, the immigration court "schedule[s] the initial removal hearing and provid[es] notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. § 1003.18(b).

D. The Board Of Immigration Appeals Concludes That A Notice Triggers The Stop-Time Rule Even If It Does Not Satisfy The Statutory "Notice To Appear" Definition

The government's assertion that it may disregard the statute's notice requirements at will raises the question in this case: whether the government's service of notice that does not qualify as a "notice to appear" as section 1229(a) defines that term is still a "notice to appear under section 1229(a)" for purposes of the stop-time rule. *See* 8 U.S.C. § 1229b(d)(1). Following the statute's clear text, the first two courts of appeals to address this issue held that the stop-time rule ends the period of continuous residence only once an immigrant receives written notice of *all* the information listed in the statute's definition of a "notice to appear." *Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012) ("[W]e hold that the stop-time rule is triggered upon service of a Notice to Appear that (alone or in combination with a subsequent notice) provides the notice required by § [1229](a)(1)"); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005) (notice that "failed to specify the date or location" of hearing does not trigger stop-time rule; stop-time rule was only triggered by service of "proper hearing notice" over a year later).

The BIA, however, rejected the courts of appeals' then-unanimous interpretation of the statute in *Matter of Camarillo*. DHS served Camarillo with a document that DHS had labeled a "notice to appear," but that did not state the date or time of any hearing. 25 I. & N. Dec. at 644. DHS then did nothing for more than *two years*. Finally, after Camarillo

had maintained sufficient U.S. residence to qualify for cancellation (in her case, seven years, because she was a lawful permanent resident), DHS filed its non-compliant notice with the immigration court, and the immigration court sent Camarillo a hearing notice. *Id.* at 644-45 & n.1. Camarillo applied for cancellation of removal, and the Immigration Judge ("IJ") granted her application. *Id.* at 645. The IJ concluded that Camarillo was eligible because her period of continuous residence continued until she received written notice of all of the information required in a "notice to appear," which did not occur until she was informed of the date and time for her appearance in November 2007. *Id.*

The BIA reversed, in a published decision, concluding that Camarillo stopped accruing residence when DHS served its initial notice in August 2005, even though that document did not include a statutorily required element of a "notice to appear" (the date and time of her hearing). *Id.* The BIA held that while the IJ's reading of the statute was "plausible," an "equally plausible" reading was that the reference to a "notice to appear under section [1229](a)" is "simply definitional." *Id.* at 647. Under this "definitional" reading, the statutory phrase "merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but does not impose *any* "substantive requirements" as to what must be in that document to end the period of continuous residence. *Id.*

Having found the statutory language "ambiguous," the BIA adopted its "definitional" interpretation. *Id.* The BIA concluded that the "key phrase" is "served a notice to appear," and that the words "under section

[1229](a)" merely "specify the document the DHS must serve." *Id.* The BIA also noted that the stop-time rule refers to § 1229(a), rather than the specific paragraph, § 1229(a)(1), that includes the "notice to appear" definition. *Id.* at 647-48. And the BIA understood the legislative history to support its non-substantive interpretation. *Id.* at 649-50.

The BIA emphasized the government's regulation that "expressly provides that the time, place, and date of an initial removal hearing shall be provided in the notice to appear only 'where practicable.'" *Id.* at 648 (quoting 8 C.F.R. § 1003.18(b)). When the government does not provide such information in the "notice to appear," then scheduling and providing notice of hearings falls to the immigration court under 8 C.F.R. § 1003.18(b). *Id.* at 650. According to the BIA, holding that a notice that does not qualify as a "notice to appear" under § 1229(a)'s definition nevertheless triggers the stop-time rule is necessary to allow the government to serve non-compliant notices without suffering the consequence of failing to trigger the stop-time rule until the immigration court sends its subsequent notice. *Id.*

Ultimately, the BIA concluded that its interpretation "represents, at a minimum, a reasonable choice within a gap left open by Congress," and thus decided to "adopt this approach as a matter within our adjudicative authority and administrative judgment." *Id.* at 651 (citing *Chevron*, 467 U.S. at 843-44, 866).

E. The First Circuit Defers To The BIA

1. Petitioner Wescley Pereira originally entered the United States on a tourist visa in June 2000, when he was 19 years old. Pet. App. 3a, 21a. He is

now married and has two young children, K (age 8) and M L (age 4), both of whom are U.S. citizens. *See* J.A. 23, 50, 55. Mr. Pereira and his family live on Martha's Vineyard, where Mr. Pereira works as a handyman and is the primary breadwinner for his family. J.A. 23. Mr. Pereira is a well-respected member of the Martha's Vineyard community. He has no relevant criminal history. The administrative record includes numerous letters from neighbors, friends, fellow churchgoers, and employers describing Mr. Pereira as not just a "wonderful, dedicated father and gentle husband," but a "hard worker" who is "as honest as they come," "goes out of his way to help not just his neighbors, but everyone that he can," and "contributes in a very positive way to our community." J.A. 23-32, 50-57.

2. In May 2006, DHS personally served Mr. Pereira with a document titled "notice to appear," charging him as removable for overstaying his visa. That notice, however, did not state the date or time of his initial hearing—it instructed him to appear "on a date to be set at a time to be set." J.A. 9; Pet. App. 3a. More than a year later, DHS filed the notice to appear with the immigration court, and the court tried to mail Mr. Pereira a notice setting the time of his hearing. Pet. App. 3a. However the court sent the notice to Mr. Pereira's street address rather than his post office box (where residents of Martha's Vineyard often receive mail), and the notice was returned as undeliverable. Pet. App. 3a & n.1; *see also* J.A. 36-37 (DHS's "Notice to EOIR: Alien Address" form only provides the immigration court with "street address," not mailing address), 45-46. The court held a hearing in absentia and ordered Mr. Pereira removed. Pet. App. 3a.

Mr. Pereira remained in the United States, having never received any hearing notice, and having no knowledge of the in absentia removal order.

3. In March 2013, Mr. Pereira was pulled over for not having his headlights on. He was ultimately detained by DHS. Pet. App. 3a. Because the immigration court had not mailed the 2007 hearing notice to his mailing address, the IJ reopened the removal proceedings.

Mr. Pereira applied for cancellation of removal. Pet. App. 3a-4a. By that time he had lived in the United States for well over ten years. Because he has never committed any crime that would trigger the stop-time rule, *see* 8 U.S.C. § 1229b(d)(1)(B), his eligibility depended on whether the 2006 notice stopped his period of continuous residence despite concededly not meeting all the elements of the statutory definition of a "notice to appear." *Id.* Relying on the BIA's decision in *Camarillo*, the IJ pretermitted the application, and the BIA affirmed. Pet. App. 4a, 17a-25a.

4. The First Circuit denied a petition for review. In applying *Chevron*'s first step, the court recognized that "§ 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." Pet. App. 8a. But it nevertheless found the statute ambiguous because the stop-time rule "does not explicitly state" that the government must comply with that duty "in order to cut off an alien's period of continuous physical presence" by serving a notice to appear. Pet. App. 9a. The court acknowledged that the stop-time rule explicitly referenced a notice to appear "under § 1229(a)," but concluded that this language does not

"clearly indicate" that the written notice necessary to trigger the stop-time rule must satisfy the requirements for a notice to appear under § 1229(a). *Id.* The Court made no attempt to use interpretive canons to resolve what it perceived to be textual ambiguity.

Having found the statutory language ambiguous, the court then concluded, under *Chevron*'s second step, that the BIA's interpretation was a permissible one. The court largely accepted the BIA's reasoning. *See* Pet. App. 9a-14a. Most notably, the court held that the BIA's interpretation was reasonable because it "accommodate[d] the[] practical constraints" that purportedly make it "not practical" to satisfy the statute's requirement that the time and place of the hearing be included in the "notice to appear." Pet. App. 12a.[6]

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[6] Other courts of appeals reached conflicting decisions concerning whether to defer to the BIA's decision in *Camarillo*. The Third Circuit held that the statute unambiguously requires service of a "notice to appear" that meets § 1229(a)'s definition of that term to trigger the stop-time rule. *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016). The other courts of appeals to address this issue, including the two that had previously adopted the opposite interpretation, deferred to the BIA under *Chevron* and, when applicable, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235 (2d Cir. 2015); *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736 (4th Cir. 2014).

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals. Even *Chevron*'s deferential standard of review does not permit the BIA to twist unambiguous statutory language. When DHS serves notice that does not meet the statute's definition of a "notice to appear," it fails to trigger the stop-time rule.

I. The statute's unambiguous text alone requires reversal. The stop-time rule only applies upon service of a specific document: a "notice to appear under section 1229(a)." Section 1229(a) states that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information vital to an immigrant's ability to meaningfully "appear" at a hearing. 8 U.S.C. § 1229(a)(1). Thus, under section 1229(a), a "notice to appear" is defined as a document with specific *contents*, not just a specific title. A document that *lacks* those contents is not a "notice to appear" as § 1229(a) defines that term, and hence cannot be a "notice to appear under section 1229(a)" for purposes of the stop-time rule.

That straightforward reading of the statute's text is confirmed by its structure. Section 1229(a)'s "notice to appear" definition provides no basis for distinguishing among the pieces of information that "shall" be included in a "notice to appear." Thus, as the BIA recognized, if the government can trigger the stop-time rule without providing *all* of the required information, then the government can trigger the rule without providing *any* of that information. *Camarillo*, 25 I. & N. Dec. at 647 (BIA interprets the statute not to impose any "substantive requirements"). Notably, neither the government nor the courts of ap-

peals have been willing to accept that serving a blank piece of paper labeled "notice to appear" triggers the stop-time rule. *E.g.*, Pet. App. 8a-9a n.5; Br. in Opp. 14. But they also have not explained what would give the BIA authority to pick and choose which "notice to appear" requirements the government can ignore while still triggering the stop-time rule. The only way the stop-time rule comports with the statutory structure is if "notice to appear under section 1229(a)" means a "notice to appear" that satisfies § 1229(a)'s definition of that term. There is no basis to treat some pieces of the definition as important and others as irrelevant.

The fact that all the pertinent provisions were enacted in IIRIRA further supports reading the statutory text to mean what it says. IIRIRA did four things all at once: it created the "notice to appear"; defined that document to require inclusion of specific information, including, for the first time, the date and time of the hearing; adopted the stop-time rule; and based that rule on the newly created "notice to appear under section 1229(a)." The stop-time rule's incorporation of the substantive definition of a "notice to appear" was therefore not an accident, but a part of one coherent statutory scheme. Further, requiring the government to satisfy the statutory "notice to appear" definition to trigger the stop-time rule aligns with the expressed purpose of the stop-time rule: to prevent immigrants from delaying or avoiding proceedings in order to keep accruing qualifying residence. It is only upon service of the required information that Congress's concern kicks in, as an immigrant cannot avoid or delay proceedings before the government has scheduled them.

Finally, to the extent any doubts remain after considering the statute's text, structure, and history, the Court should apply the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

II. Even if some ambiguity remains, the BIA's interpretation is not reasonable. The BIA sought to interpret the statute so that DHS could continue serving notice that does not satisfy § 1229(a)'s requirements for a "notice to appear" without delaying the stop-time trigger. *Camarillo*, 25 I. & N. Dec. at 648, 650; *see also* 8 C.F.R. § 1003.18(b). Protecting DHS from the consequences of its non-compliant notice practices is not a reasonable basis to interpret the statute's text. Even at *Chevron*'s second step, the question is whether the BIA reasonably *interpreted the statute*, not reasonably accommodated the questionable practices of another administrative agency.

In *Matter of Ordaz*, the BIA revealed just how much *Camarillo* rested on the BIA's desire to avoid stop-time delays from DHS's notice practices. *Ordaz* held that if DHS serves a second "notice to appear," rather than completing or amending an original notice that DHS never filed with the immigration court, then only the *second* notice triggers the stop-time rule. 26 I. & N. Dec. 637, 639 (BIA 2015). That decision not only relies on reasoning incompatible with *Camarillo*, but leads to different results based on whether an enforcement official elects to serve a hearing notice (triggering the stop-time rule on the earlier, non-compliant notice) or a new, complete, "notice to appear" (triggering the stop-time rule on

service of the new notice). A question as important as cancellation eligibility should not "hang[] on the fortuity of an individual official's decision" as to how to label a notice. *Judulang*, 565 U.S. at 58.

ARGUMENT

I. The Statute Unambiguously Triggers The Stop-Time Rule Only Upon Service Of Notice That Satisfies The Statutory Definition Of A "Notice To Appear"

An administrative agency cannot ignore the "unambiguously expressed intent of Congress," no matter how expedient it may be to do so. *Chevron*, 467 U.S. at 842-43. Thus, if an agency's desired statutory interpretation conflicts with the statute's text, the agency is entitled to no deference—this Court follows the statute, not the agency. *Id.* Determining whether a statute is "ambiguous" for purposes of *Chevron* requires more than asking whether the statutory language could, in the abstract, be given more than one meaning. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context[.]"). This Court defers to agency interpretations only if the statute remains ambiguous after applying "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Thus, even superficially ambiguous statutory language can unambiguously preclude the agency's interpretation when "read in context" using "normal [interpretive] tools." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568-72 (2017). If such tools resolve any ambiguity, then "there is, for *Chevron* purposes, no ambiguity . . . for [the] agency to resolve." *St. Cyr*, 533 U.S. at 320 n.45.

The statute's text resolves this case. A notice that is not a "notice to appear" under § 1229(a)'s definition of that term cannot be a "notice to appear under section 1229(a)," and hence cannot trigger the stop-time rule. That reading is confirmed by the statute's structure and history.

A. A "Notice To Appear Under Section 1229(a)" Is A Notice That Has The Elements Specified In Section 1229(a)

The statutory language is crystal clear: Whatever label DHS may place on a particular document, that document is only a "notice to appear under section 1229(a)," as used in the statutory stop-time rule, if it includes the information listed in § 1229(a)'s definition of a "notice to appear." The BIA's contrary reading—which allows a document to end an immigrant's continuous residence based purely on the caption, not the contents—directly conflicts with the clear statutory text.

1. Congress left no ambiguity concerning what the government must do to trigger the stop-time rule. Under that rule, an immigrant's "continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). This provision does not give DHS or the BIA authority to define what constitutes a notice to appear that triggers the stop-time rule. Instead, by its clear terms, the statute triggers the stop-time rule only on service of a "notice to appear *under section 1229(a)*." *Id.* (emphasis added).

Section 1229(a) states that the type of notice that is "in this section referred to as a 'notice to appear'" is "written notice . . . specifying the following." 8 U.S.C. § 1229(a)(1). It then lists the precise information that must be included for a document to be "referred to" as a "notice to appear" under that section. This includes not only the "time and place at which the proceedings will be held," but also, among other things, the "acts or conduct alleged to be in violation of the law," the "charges against the alien and the statutory provisions alleged to have been violated," the fact that the "alien may be represented by counsel," and the "consequences . . . of the failure, except under exceptional circumstances, to appear at [the] proceedings." *Id.* Written notice that does *not* "specify[]" this information is not the type of document that is "in this section referred to as a 'notice to appear.'" Section 1229(a) thus defines the term "notice to appear" as only a document that includes written notice of *all* the information required by the statute.

Taken together, these two provisions unambiguously provide that the stop-time rule only ends an immigrant's period of continuous residence when the immigrant is served with written notice of the specific information listed in § 1229(a)'s definition. Only written notice of that information constitutes a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1).

2. The BIA and the court of appeals incorrectly concluded that these straightforward provisions were ambiguous. The BIA reasoned that the phrase "notice to appear under section 1229(a)" could be read to "merely specif[y] the document the DHS must serve

on the alien to trigger the 'stop-time' rule," and not to "impose substantive requirements for a notice to appear to be effective in order for that trigger to occur." *Camarillo*, 25 I. & N. Dec. at 647. The court of appeals similarly reasoned that the "stop-time rule does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence," and that the reference to a notice to appear "under § 1229(a)" "does not clearly indicate whether the rule incorporates the requirements of that section." Pet. App. 9a.

This reasoning is directly at odds with the statutory text. The stop-time rule does not end the period of continuous residence upon service of any form of notice, but only upon service of a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). And section 1229(a) states exactly what type of notice is "in this section referred to as a 'notice to appear'"—it is not just a document with a certain *title*, but a document with specific *contents*. *Id.* § 1229(a)(1). Thus, the stop-time rule *does* "impose substantive requirements" on a qualifying notice to appear, *Camarillo*, 25 I. & N. Dec. at 647, and *does* "explicitly state that the date and time of the hearing must be included in a notice to appear" to end the period of continuous residence, Pet. App. 9a. By its clear terms, the stop-time rule is only triggered by service of a particular document, and the stop-time rule cross-references the statutory provision that defines that document as one that includes specific information, including the time and place of the hearing. Congress left no interpretive gap for the BIA to fill—it made clear that the stop-time trigger is service of written notice that

includes the information specified in § 1229(a)'s definition.

3. The government takes a slightly different tack, arguing that the word "under" precludes finding the statute unambiguous. According to the government, because one possible meaning of "under" is "subject to" or "governed by," the stop-time rule could be read to end an immigrant's period of continuous residence when the government serves a notice *governed by* § 1229(a)'s definition of a "notice to appear," regardless whether the notice actually *satisfies* § 1229(a)'s definition of that term. *See* Br. in Opp. 11-12. Under this reading, whether the government triggered the stop-time rule would turn entirely on whether the government's *intent* was to serve a "notice to appear under section 1229(a)," not whether it actually did so.

Read in context, however, the statute precludes the government's interpretation just as clearly as it precludes that of the BIA and court of appeals. While the word "under" can have multiple meanings in the abstract, that does not mean the word *always* creates ambiguity. *E.g.*, *Mead Corp. v Tilley*, 490 U.S. 714, 722-23 (1989) (phrase "benefits under the plan" "can refer only to" one particular allocation of benefits). Rather, the word "draw[s] its meaning from context," *Ardestani v. INS*, 502 U.S. 129, 135 (1991), and that context can "make[] clear" what the phrase means, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630 (2018). *See also Brown*, 513 U.S. at 118 ("Ambiguity is a creature not of definitional possibilities but of statutory context[.]"). In *this* context, the word "under" creates no ambiguity: it connects the stop-time rule's reference to a "notice to appear" to the

statutory provision that defines the term "notice to appear" as a document with particular substance, not just a particular label.

4. Other provisions in *this* statute show that when the statute refers to a "notice to appear," it means a notice that satisfies § 1229(a)'s "notice to appear" definition. For instance, in order to ensure "that an alien be permitted the opportunity to secure counsel before the first hearing date" in removal proceedings, the statute provides that "the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear[.]" 8 U.S.C. § 1229(b)(1). This provision would be largely meaningless if the government could serve a "notice to appear" for purposes of § 1229(b)(1) without including the information specified in § 1229(a)'s "notice to appear" definition. Under the government's reading, DHS could serve a self-styled "notice to appear" that did not include a hearing date, the charges against the immigrant, or the right to counsel, and then, two years later, provide all of that information on the eve of the hearing. That would hardly afford the "opportunity to secure counsel before the first hearing date" the statute guarantees. 8 U.S.C. § 1229(b)(1).

Similarly, the statute allows for an in absentia removal order for "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) . . ., does not attend a proceeding[.]" 8 U.S.C. § 1229a(b)(5). Under the government's reading of the statute, the government could seek an in absentia removal order without *ever* telling an immigrant when or where the hearing would be held. After all, the government asserts that it can serve a "notice to appear"—*i.e.* "written notice required under para-

graph (1)" of "section 1229(a)"—that does *not* specify the time or place of the hearing. According to the government's reading, an in absentia hearing could thus be scheduled and held without any actual notice to the immigrant at all. Clearly, however, Congress did not intend to authorize in absentia proceedings against immigrants who missed a hearing that the government never bothered to tell them about.

Congress triggered the stop-time rule on a "notice to appear under section 1229(a)," and section 1229(a) defines that term as notice with particular substance. Notice *without* that substance is not a "notice to appear under section 1229(a)," and does not trigger the stop-time rule. Congress left the BIA no ambiguity to resolve.

B. Traditional Tools Of Statutory Interpretation Confirm That Only Notice That Satisfies The Statute's Definition Of A "Notice To Appear" Triggers The Stop-Time Rule

Normal tools of statutory interpretation confirm that the plain reading of the statute's unambiguous text is the right one. *See Esquivel-Quintana*, 137 S. Ct. at 1569 ("normal tools of statutory interpretation" apply at *Chevron*'s first step). The statute's structure and history show that Congress used the phrase "notice to appear" to have a substantive meaning, as does the accepted rule of statutory construction that lingering ambiguities in statutes relating to deportation should be construed in favor of noncitizens.

1. The statutory structure shows that when Congress referred to a "notice to appear," it meant a document that satisfies the statutory definition of that

term, not any document DHS chooses to label as a "notice to appear."

a. The "notice to appear" definition treats all of section 1229(a)'s substantive notice requirements equally—it provides no textual basis for holding that some, but not all, of the required information can be omitted while still serving a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The BIA and the government's interpretations of the stop-time rule would thus inevitably mean that a document the government labeled a "notice to appear" would trigger the stop-time rule regardless whether that document provided *any* of the information listed in § 1229(a)(1), or even any information at all. *See Orozco-Velasquez*, 817 F.3d at 84 ("Taken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information whatsoever as a 'stop-time' trigger[.]"). The BIA explicitly embraced this outcome, describing its reading of the statute as one that "does not impose substantive requirements for a notice to appear" to trigger the stop-time rule. *Camarillo*, 25 I. & N. Dec. at 647. The government's interpretation leads to the same result, as a document labeled a "notice to appear" would trigger the stop-time rule so long as the government intended to serve that document "pursuant to" § 1229(a), regardless whether it satisfied *any* of § 1229(a)'s substantive requirements.

This non-substantive interpretation of the stop-time rule would give DHS enormous power to stop immigrants from accruing residence while providing them little, if any, information. For instance, under the BIA and the government's reading, DHS could stop a lawful permanent resident from accruing ad-

ditional residence by serving notice that did not even state the charges that allegedly made her removable. Indeed, in theory, DHS could stop every noncitizen in the country from accruing additional residence by mailing each of them a "notice to appear" stating that the government would seek to remove them at some uncertain future date on unspecified future charges.

Such a non-substantive interpretation of a "notice to appear" makes no sense given the text Congress chose. Congress specifically triggered the stop-time rule on service of a "notice to appear *under section 1229(a)*," a section that defines that term to have a particular substantive meaning. And the substance of a "notice to appear" under § 1229(a)'s definition includes information vital to an immigrant's ability to meaningfully appear at a hearing—for instance, the "charges against the alien and the statutory provisions alleged to have been violated," and the fact that the "alien may be represented by counsel," not to mention the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). Indeed, even the phrase "notice to appear" itself implies that the notice have *some* content—at the very least, "notice" of when, where, or why the immigrant is supposed to "appear." If Congress intended to trigger the stop-time rule upon service of notice that does *not* satisfy § 1229(a)'s definition of a "notice to appear," there is no reason it would have both used the statutorily-defined phrase "notice to appear" *and* explicitly cross-referenced the provision giving that phrase a substantive, not titular, meaning.

Notably, several of the courts of appeals that deferred to the BIA were unwilling to accept these im-

plications of the BIA's rule, and kept open the possibility that, if the government omitted some other, unspecified information, the written notice would not trigger the stop-time rule. *E.g.*, *Urbina*, 745 F.3d at 740 ("We do not decide today whether a more egregious case might warrant a different result."); *Guaman-Yuqui*, 786 F.3d at 241 n.3 ("We have no occasion to address in this case whether other deficiencies in a notice to appear may preclude that notice from triggering the stop-time rule."); Pet. App. 8a-9a n.5 (not deciding whether a notice "containing no information whatsoever" could trigger the stop-time rule because "this case does not require us to define the boundaries of our deference to the agency's statutory construction"). Even the government seems to recognize that a notice must provide *some* information in order to trigger the stop-time rule. *See* Br. in Opp. 14.

None of these courts provides any justification for distinguishing among the substantive requirements in § 1229(a)'s definition of a "notice to appear"—none explained, for instance, why written notice that omitted the "time and place" of the hearing should be treated any differently than written notice that omitted the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. § 1229(a)(1)(D), (G)(i). The government's only attempt to distinguish among the elements of the definition is a baldly atextual appeal to statutory "purpose," whereby some elements serve the statute's purpose and some do not. Br. in Opp. 13-14; *see also Camarillo*, 25 I. & N. Dec. at 650 (reasoning that time-and-place information is not necessary to satisfy "[a] primary purpose" of a notice to appear). But if notice must meet *some* of § 1229(a)'s requirements to

trigger the stop-time rule, then it must meet *all* of those requirements, for the same textual reasons. Nothing in the statute gives the BIA (or the courts of appeals) the authority to pick and choose which requirements from the "notice to appear" definition DHS can ignore while still triggering the stop-time rule.

b. Both the BIA and the government place significant weight on the fact that the stop-time rule cross-references the subsection (§ 1229(a)) rather than the paragraph (§ 1229(a)(1)), that includes the "notice to appear" definition. *See Camarillo*, 25 I. & N. Dec. at 647-48; Br. in Opp. 14-15. That reliance is misplaced. Identifying a subsection as the location for the definition of a particular term clearly identifies that definition even where the definition happens to be contained in a specific paragraph of that subsection. While the statute certainly *could* have cross-referenced paragraph (1) in particular, its reference to subsection (a) was still perfectly clear given that the phrase "notice to appear" *is defined within subsection (a)*, and there are no *other* definitions of "notice to appear" outside of paragraph (1). Recognizing this, Congress regularly cross-references higher-level provisions than strictly necessary. *E.g.*, 18 U.S.C. § 2119(2) (cross-referencing definition in "section 1365" when definition is in § 1365(h)(3)); 42 U.S.C. § 7661(2) (cross-referencing definition in "section 7412" when definition is in § 7412(a)(1)). There is thus no reason to read anything into Congress's cross-reference to "section 1229(a)" rather than "section 1229(a)(1)." Section 1229(a) defines a "notice to appear," and that definition is limited to notices that provide specific information, including the "time and place" of the hearing.

Indeed, the structure of § 1229(a) as a whole supports interpreting the stop-time rule to require notice that meets the statute's definition of a "notice to appear." Within § 1229(a), paragraph (1) requires and defines a "notice to appear," and paragraph (2) provides procedures for notifying an immigrant of a "change in time or place of proceedings." The stop-time rule refers to a "notice to appear under section 1229(a)," and a "notice to appear" is only defined in paragraph (1). That paragraph (2) includes provisions for *changing* the time of the proceedings only emphasizes that a notice to appear as defined in paragraph (1) must include the time of the proceedings—if it did not, then there would be nothing to "change" under paragraph (2).

The BIA concluded that § 1229(a)(2) supports its counter-textual reading because it shows that "Congress envisioned that circumstances beyond the control of the DHS would require a change in the hearing date and specifically provided that such notification could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 647-48. That is true, but irrelevant. The fact that the statute allows hearing times to be *changed* does not mean that it treats hearing times as meaningless. The statute allows for a "change or postponement" in an existing hearing date precisely because the statute requires that there already *be* a hearing date. And for purposes of the stop-time rule, once the government serves notice that meets the statute's definition of a "notice to appear," including the "time and place" of the hearing, 8 U.S.C. § 1229(a)(1)(G)(i), the immigrant stops accruing time; it does not matter whether the hearing date later changes under paragraph (2).

c. The fact that the stop-time rule involves only *eligibility* for *discretionary* relief, not entitlement to relief, also provides structural support for interpreting the statutory text literally. *See Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (narrowly interpreting provision limiting eligibility for cancellation of removal in part because of discretionary nature of relief). The statute includes rigorous eligibility requirements, and even satisfying those requirements only gives the Attorney General discretion to grant relief—discretion that is itself limited by the annual cap on the number of immigrants who can receive cancellation. 8 U.S.C. § 1229b(e). The strict eligibility requirements and the discretionary nature of relief, combined with the life-changing impact cancellation has both on immigrants and their U.S. citizen or permanent resident families, supports reading the statute to mean what it says—*i.e.*, that the government must serve notice that meets section 1229(a)'s substantive requirements for a "notice to appear" to trigger the stop-time rule and potentially cut off the last chance for relief for the most deserving immigrants.

Cancellation eligibility for non-permanent residents is particularly limited. To qualify for cancellation, a non-permanent resident must not only have a "spouse, parent, or child" who is a U.S. citizen or lawful permanent resident, but also show that her deportation would cause "exceptional and extremely unusual hardship" to that family member. 8 U.S.C. § 1229b(b)(1)(D). She must prove that she has "good moral character." *Id.* § 1229b(b)(1)(B). She cannot have *any* criminal conviction that makes her inadmissible (under section 1182(a)(2)) or removable (under section 1227(a)(2))—including almost any drug

crime, *see id.* § 1227(a)(2)(B). *Id.* § 1229b(b)(1)(C). She cannot pose a security risk under §§ 1182(a)(3) and 1227(a)(4). *Id.* § 1229b(c)(4). And she cannot have committed removable immigration fraud under § 1227(a)(3). *Id.* § 1229b(b)(1)(C). Finally, she must show ten years of continuous residence prior to service of a "notice to appear under section 1229(a)." *Id.* § 1229b(b)(1)(A), (d)(1). Even meeting these stringent requirements only qualifies an applicant for *discretionary* relief—the Attorney General can still decline to grant cancellation if there is some other reason the applicant is not deserving of a green card.

The standard for cancellation eligibility is demanding even for a permanent resident. She must show not only five years of lawful permanent residence, but seven years of continuous residence. 8 U.S.C. § 1229b(a)(1). Those periods are cut off not only upon service of a "notice to appear under § 1229(a)," but also on the date she "*commit[s]*" any criminal offense that would make her inadmissible under § 1182(a)(2). *Id.* § 1229b(d)(1). She is also ineligible if she poses a security risk (under 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4)), or has committed an aggravated felony—a term that itself encompasses a broad range of criminal offenses, including many drug crimes, *see* § 1101(a)(43). 8 U.S.C. §§ 1229b(a)(3), 1229b(c)(4). And like a non-permanent-resident applicant, these criteria only establish *eligibility* for discretionary relief—even a qualifying applicant still must show that the equities favor allowing her to remain in the country. *See Sotelo-Sotelo*, 23 I. & N. Dec. at 203.

Given these restrictions, the only people for whom the statutory question in this case will matter will be

the most deserving immigrants—those who would qualify for cancellation of removal but for the BIA's interpretation of the stop-time rule, and deserve a favorable exercise of discretion. Those candidates are non-permanent residents with extended residence in the United States, good moral character, little or no criminal history, and close U.S. family members who would suffer "exceptional and extremely unusual hardship" if the applicant were removed; or permanent residents with extended U.S. residence, limited criminal history, and a strong equitable case for remaining in the country. Given the numerous ways in which cancellation is limited to the most deserving applicants, combined with the devastating impact removal would have not only on cancellation applicants but also on their families, there is good reason that Congress would have set a high, substantive bar on what the government must do to trigger the stop-time rule, and cut off eligibility for relief. *See Moncrieffe*, 569 U.S. at 204.

2. The legislative history also supports interpreting the stop-time rule to end a period of continuous residence only once the government serves written notice of all of the information required by § 1229(a).

a. Both the stop-time rule and the "notice to appear" definition were enacted as part of IIRIRA. Thus, the Congress that decided to trigger the stop-time rule on a "notice to appear under § 1229(a)" knew full well that § 1229(a) defined a "notice to appear" as a notice that provided specific information, including the time and place of proceedings.

Before IIRIRA, there were multiple different notices related to initiating different types of immigration hearings. *See Judulang*, 565 U.S. at 45-46. What

were then called deportation proceedings were initiated by an "order to show cause." The statute imposed many of the same substantive requirements on an order to show cause that it now imposes on a "notice to appear." *See* 8 U.S.C. § 1252b(a)(1) (1994). Notably, however, the statute did *not* require that the "order to show cause" include the time and place of the hearing. Instead, it provided that written notice of "the time and place at which the proceedings will be held" shall be given "in the order to show cause *or otherwise*." 8 U.S.C. § 1252b(a)(2)(A) (1994) (emphasis added). The regulations provided, consistent with the statutory scheme then in effect, that notice of the time and place of the hearing would be provided by the immigration court, not in the order to show cause. *See* 8 C.F.R. § 242.1(b) (1996) ("The Order [to show cause] shall call on the respondent to appear before an Immigration Judge for a hearing at a time and place which shall be specified by the Immigration Court"); 8 C.F.R. § 3.18 (1996) ("The Immigration Court shall be responsible for providing notice of the time, place, and date of the hearing to the government and respondent/applicant."). The statute and implementing regulations also provided for an entirely separate notice to initiate what were then called "exclusion" proceedings—*i.e.*, proceedings seeking to preclude a noncitizen from entering the country. *See* 8 U.S.C. §§ 1225, 1226 (1994); 8 C.F.R. § 235.6(a) (1996).

The legislative history of IIRIRA shows that Congress sought to simplify the different notices that previously initiated different types of proceedings. Among other things, Congress was frustrated with the "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings," and

the resulting disputes about receipt of notice and inability to carry out in absentia deportation proceedings. House Report 122, 158-59.

Among Congress's responses to these concerns was to require that the "time and place" of the initial removal proceedings be included *in the notice to appear itself*, and not in a separate document. 8 U.S.C. § 1229(a)(1)(G)(i). Specifically, Congress combined deportation and exclusion proceedings into a single form of proceeding called "removal," *see Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 349-350 (2005), and created the "notice to appear" as a single form of notice to initiate such a proceeding, 8 U.S.C. § 1229(a). Congress defined a "notice to appear" as notice of particular information. *Id.* § 1229(a)(1). Much of that information was taken from the prior definition of an "order to show cause." *See* 8 U.S.C. § 1229(a)(1)(A)-(F); 8 U.S.C. § 1252b(a)(1) (1994). But Congress specifically added the "time and place at which the proceedings will be held" as information that "shall" be included for notice to qualify as a "notice to appear." 8 U.S.C. § 1229(a)(1)(G)(i). In other words, Congress abandoned the previous flexibility of allowing the government to use multiple notices in favor of the simplicity of requiring that the government serve all necessary notice in the "notice to appear."

This history shows that when Congress enacted the stop-time rule in IIRIRA, it knew that a reference to a "notice to appear under section 1229(a)" was a reference to a provision that gave a "notice to appear" a substantive meaning. And the history shows that Congress would have been *particularly* aware that a "notice to appear" must include the

time and place of the hearing, as requiring that information in a "notice to appear" was the most significant change between the earlier definition of an "order to show cause" and IIRIRA's definition of a "notice to appear."

b. The BIA and the government rely heavily on legislative history suggesting that Congress adopted the stop-time rule based on its concern that immigrants could use procedural maneuvers to extend proceedings in order to meet statutory residence requirements. *Camarillo*, 25 I. & N. Dec. at 649; Br. in Opp. 16-17. That history is entirely consistent with, and in fact supports, reading the stop-time rule to be triggered only by service of a "notice to appear" that satisfies § 1229(a)'s definition of that term—*i.e.*, notice that actually informs an immigrant of when, where, and why they are supposed to appear. Nothing in the legislative history suggests that Congress intended to end the period of continuous residence when *the government* delays removal proceedings—sometimes for years—by failing to schedule and serve notice of a hearing.

Congress's concern in adopting the stop-time rule was very specific: Because immigrants continued to accrue residence during removal proceedings, immigrants might seek to avoid, obstruct and delay those proceedings to obtain the necessary period of continuous residence and apply for relief. As the BIA explained, this loophole allowed "aliens in deportation proceedings [to] knowingly file[] meritless applications for relief or otherwise exploit[] administrative delays in the hearing and appeal processes in order to 'buy time,' during which they could acquire a period of continuous presence that would qualify them

for forms of relief that were unavailable to them when proceedings were initiated." *Cisneros-Gonzalez*, 23 I. & N. Dec. at 670; *see also* House Report 121-22 (noting that noncitizens sought to "abuse[]" the earlier laws by "seeking to delay proceedings until [the required residence period] ha[s] accrued," and "fail[ing] to appear for their deportation proceedings" and "seeking to re-open proceedings once the requisite time has passed").

An immigrant cannot duck or delay a removal proceeding, however, *when she has not been told that any hearing has been scheduled.* Until then, there is simply nothing an immigrant can do to extend her period of continuous residence (other than hope that the government continues its own delay). *Nothing* in the legislative history suggests that Congress intended to stop accrual of residence simply because the *government* did not act quickly enough in serving notice of an actual hearing—and even if the legislative history suggested such an intent, the text directly refutes it by triggering the stop-time rule on service of a form of notice that "shall . . . specify[]" the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). When the government *does* serve all the notice that together constitutes a "notice to appear under section 1229(a)," then the immigrant's continuous residence is "deemed to end," removing any incentive to delay proceedings to obtain cancellation eligibility. 8 U.S.C. § 1229b(d)(1).

The concerns expressed in the legislative history thus cleanly align with the unambiguous text Congress chose. Congress sought to ensure that an immigrant could not avoid or delay removal proceed-

ings to satisfy the residence requirement. And so IIRIRA gave the government the power to stop accrual of residence by serving a "notice to appear" that, under section 1229(a)'s definition, "shall" inform the immigrant of *actual* hearings. It is only upon receiving such notice that, were it not for the stop-time rule, an immigrant might have incentives to delay proceedings. Interpreting a "notice to appear under § 1229(a)" to mean what it says—*i.e.*, notice satisfying § 1229(a)'s definition of a "notice to appear"—thus ends the period of continuous residence at the precise point at which an immigrant's incentives to avoid or delay proceedings might kick in. By contrast, interpreting a "notice to appear under section 1229(a)" to include notices that do *not* include "time and place" information—and hence do not satisfy § 1229(a)'s definition of a "notice to appear"—would not resolve the concern expressed in the legislative history, but would only penalize immigrants who cannot avoid, delay, or obstruct proceedings.[7]

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[7] In addition to legislative history concerning the purpose of the stop-time rule, the BIA relied on a "committee explanatory memorandum included in the Congressional Record," which explained that before IIRIRA an immigrant could continue to accrue time "regardless of whether . . . [the INS] had initiated deportation proceedings." *Camarillo*, 25 I. & N. Dec. at 649-50 (quoting 143 Cong. Rec. S12265, S12266 (daily ed. Nov. 9, 1997)). The BIA thought this statement showed Congress's intent to trigger the stop-time rule when the government "serves the charging document." *Id.* But the next paragraph of the memorandum, which the BIA ignored, recognized that, as the statute's text makes clear, the stop-time rule is *not* triggered by service of anything the government deems a "charging document," but only on "receipt of a 'notice to appear,' the new document the Act created to begin 'removal' proceedings." 143 Cong. Rec. S12265, S12266 (daily ed. Nov. 9, 1997).

3. This Court's "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" also weighs strongly against the BIA's interpretation. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). That principle applies to both "punitive" provisions that establish grounds for removal and "humanitarian" provisions, like cancellation of removal, that provide relief from removal. *INS v. Errico*, 385 U.S. 214, 225 (1966). The fact that cancellation is, by its terms, a discretionary form of relief only available to a limited class of the most sympathetic and deserving immigrants makes this interpretive principle particularly applicable in this case. Thus, as in this Court's decision in *St. Cyr*, any "lingering ambiguities" that remain after considering the statute's text, structure, and history must be resolved against the government. 533 U.S. at 320 n.45 (concluding that, after applying interpretive principles to "any lingering ambiguities," there was "for *Chevron* purposes, no [remaining] ambiguity . . . for the agency to resolve").

The "accepted principle[] of statutory construction" that courts "resolve [] doubt[s]" in deportation provisions "in favor of" noncitizens stems from the nature of deportation. *Costello v. INS*, 376 U.S. 120, 128 (1964). This Court has repeatedly recognized that "deportation is a drastic measure and at times the equivalent of banishment or exile." *Id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)); *see also INS v. Errico*, 385 U.S. 214, 225 (1966); *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also see also Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010) (recognizing "the seriousness of deportation" and the

"concomitant impact of deportation on families living lawfully in this country"). Thus, even where the government's proposed interpretation "might find support in logic," this Court "will not assume that Congress meant to trench on [noncitizens'] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan*, 333 U.S. at 10.

The principle of construing statutes in favor of noncitizens is particularly applicable in interpreting a provision, like cancellation of removal, that is not "punitive" but "was designed to accomplish a humanitarian result." *Errico*, 385 U.S. at 225. Thus, in *Errico*, this Court applied the principle to resolve ambiguities in a provision with the "humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens." *Id.* And the Court similarly applied the principle in *St. Cyr*, which concerned a form of relief from inadmissibility for certain lawful permanent residents. 533 U.S. at 320.

The purposes behind this principle are particularly applicable to determining eligibility for cancellation of removal, which not only "prevents[s] the breaking up of families," *Errico*, 385 U.S. at 225, but is available only to those who meet numerous stringent requirements. *See* pp. 35-38, *supra*. Even then, the Attorney General can still deny cancellation if he concludes that the immigrant should not remain in the country. *See* pp. 36-37, *supra*. Construing lingering doubts in favor of immigrants is particularly important in determining eligibility for such a limited, discretionary, and vitally important form of relief. *See Errico*, 385 U.S. at 225; *St. Cyr*, 533 U.S. at

320; *cf. Moncrieffe*, 569 U.S. at 204 (relying on discretionary nature of relief as basis to narrowly construe provision limiting eligibility for cancellation); *Dean v. United States*, 556 U.S. 568, 585-85 (2009) (Breyer, J., dissenting) (explaining that lenity is particularly important when interpreting provisions, like mandatory minimum sentences, that remove adjudicatory discretion).

This Court can apply this "accepted principle[] of statutory construction," *Costello*, 376 U.S. at 128, without reaching the "reasonableness" of the BIA's interpretation under *Chevron*'s second step. This Court applies "normal tools of statutory interpretation" before deeming a statute "ambiguous" for *Chevron* purposes. *E.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1569, 1572 (applying "normal tools of statutory interpretation" to conclude that a statute, "read in context, unambiguously forecloses the Board's interpretation" without reaching *Chevron*'s second step). The principle that ambiguous deportation provisions should be read to have the "narrowest of several possible meanings," *Fong Haw Tan*, 333 U.S. at 10, is precisely such an interpretive tool.

This Court recognized this precise point in *St. Cyr*. That case involved the question whether IIRIRA's repeal of a form of relief formerly available in section 212(c) of the INA applied retroactively. 533 U.S. at 314-15. This Court held that IIRIRA was "ambiguous" as to whether its repeal applied retroactively. *Id.* at 315. The government argued that because the statute was ambiguous, the Court should defer to the BIA, which had held that IIRIRA *is* retroactive. This Court disagreed, concluding that deference only applies "to agency interpretations of statutes that, *ap-*

plying the normal 'tools of statutory construction,' are ambiguous." *Id.* at 320 n.45 (emphasis added) (quoting *Chevron*, 467 U.S. at 843). The Court identified two relevant tools of statutory construction: "[t]he presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Id.* at 320 (internal quotation marks omitted). Applying these principles, the Court concluded that "there is, for *Chevron* purposes, no ambiguity in such a statute for [the] agency to resolve." *Id.* at 320 n.45.[8]

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[8] This does not mean, of course, that any time an immigration provision relating to deportation contains any ambiguity, the immigrant must win. Traditional interpretive canons may show that, despite facial ambiguity, Congress intended the less-immigrant-friendly interpretation. *See, e.g.*, *Kawashima v. Holder*, 565 U.S. 478, 489 (2012) (recognizing that "we have, in the past, construed ambiguities in deportation statutes in the alien's favor," but concluding that "the application of the present statute [is] clear enough that resort to the rule of lenity is not warranted"). And this Court has also suggested that "ordinary canons of statutory construction" might apply differently, for *Chevron* purposes, when the BIA is giving content to a general standard—like "well-founded fear"—rather than engaging in a form of statutory construction that is "narrower[and] well within the province of the judiciary"—like whether Congress intended two standards to be identical. *Cardoza-Fonseca*, 480 U.S. at 447-49. Like the question in *Cardoza-Fonseca*, the question in this case is a "narrow[]" question of statutory interpretation that is "well within the province of the judiciary." *Id.* Thus, the Court must apply "ordinary canons of statutory construction"—including the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"—before reaching *Chevron*'s second step. *Id.* at 449.

As in *St. Cyr*, the statute's text, confirmed by its structure, its history, and traditional interpretive canons, unambiguously resolves this case. The stop-time rule is triggered only by service of a "notice to appear under section 1229(a)," and a document that lacks the time and place of the hearing is not a "notice to appear" as § 1229(a) defines that term. The statute's structure and history confirm the plain meaning of the text. And to the extent any lingering doubts remain, they should, consistent with this Court's longstanding interpretive principles, be construed in the immigrant's favor. As in *St. Cyr*, "there is, for *Chevron* purposes, no ambiguity [left] for [the] agency to resolve." *St. Cyr*, 533 U.S. at 320 n.45.

II. The BIA's Interpretation Is Unreasonable And Not Entitled To Deference

Even if some ambiguity remains after reading the statute using normal interpretive tools, the BIA's interpretation is not a reasonable one. It not only rests on a misunderstanding of the statute's text, structure, and history, *see* pp. 24-48, *supra*, but it is also based on an impermissible desire to accommodate the government's unwillingness to serve notices that meet the statute's definition of a "notice to appear." The BIA effectively recognized the problems with *Camarillo* in its subsequent decision in *Ordaz*, which not only relies on reasoning incompatible with *Camarillo* but also, when combined with *Camarillo*, makes the stop-time trigger turn on the whims of individual DHS officials.

1. To the extent the BIA concluded that its non-substantive interpretation of the stop-time rule was reasonable based on the statute's text, structure, and

history, the BIA's analysis was deeply flawed. *See Camarillo*, 25 I. & N. Dec. at 647-650. In reality, the statute's text, supported by its structure and history, weighs strongly—indeed, as already explained, dispositively, pp. 24-48, *supra*—*against* the BIA's construction of the statute.

At the very least, the text, structure and history weigh strongly against the "reasonableness" of the BIA's interpretation. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442-43 (2014) ("reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole" (internal quotation marks and citations omitted)). This is especially true given the "accepted principle[] of statutory construction" that any "doubts" concerning the proper interpretation of the stop-time rule should be "resolve[d]" in favor of immigrants. *Costello*, 376 U.S. at 128. If, under *Chevron*, courts can adopt an agency's statutory interpretation even if it is not the best interpretation of the statute, courts should at least place a heavy burden on agencies to justify interpreting a statute in a way the reviewing court would not independently accept.

2. The BIA's justification for its non-substantive interpretation of the statute—to allow the government to follow its own flexible regulation, rather than the more demanding statutory text, without delaying the stop-time trigger—is not a reasonable one.

In the stop-time rule, IIRIRA gave the government significant power to end an immigrant's period of continuous residence, but required that the government provide more information than was previously required in order to exercise that power. As ex-

plained above, pp. 11, 38-40, *supra*, the predecessor of the "notice to appear," called an "order to show cause," did *not* need to include the date and time of the hearing. IIRIRA rejected this endorsement of a dual-notice system: as one of many steps Congress took to simplify the notice process, IIRIRA required that the "time and place at which the proceedings will be held" "shall" be "specif[ied]" in the "notice to appear" itself. 8 U.S.C. § 1229(a)(1)(G)(i); *see also* Pet. App. 8a. IIRIRA then cross-referenced this new, stricter, "notice to appear" definition in the stop-time rule. 8 U.S.C. § 1229b(d)(1).

Apparently, however, the government did not like IIRIRA's requirement that the hearing information "shall" be included in the "notice to appear," preferring the pre-IIRIRA regime in which providing such information in the "order to show cause" was optional. The government therefore, shortly after IIRIRA, adopted a regulation repudiating IIRIRA's command that the "time and place" of the hearing "shall" be provided in the "notice to appear," and restating the old system in which such information need only be included in the "notice to appear" "where practicable." 8 C.F.R. § 1003.18(b).

The BIA concluded that notice triggers the stop-time rule even without satisfying § 1229(a)'s definition of a "notice to appear" largely to allow the government to shirk its responsibility under IIRIRA to provide hearing information in the "notice to appear," while still triggering the stop-time rule. The BIA relied on the regulations making it optional whether to include hearing information in the notice to appear, and largely ignored the *statute's* requirement that the "notice to appear" "shall . . . specify[]"

such information. *Camarillo*, 25 I. & N. Dec. at 648, 650. And it noted that under the government's regulation, the obligation to actually provide hearing notice falls on the immigration court. *Id.* The BIA then expressed concern that "scheduling delays in Immigration Court" could impact when hearing notice was served, which would delay the stop-time trigger if providing such information was necessary to trigger the stop-time rule. *Id.* at 650. According to the BIA, Congress would not have expected that such scheduling delays in immigration court could delay triggering the stop-time rule. *Id.* at 650.

What Congress would have expected, however, is that the government would follow the statute. After all, if the "notice to appear" included the "time and place" of the hearing, as the statute indisputably requires, then the immigrant would stop accruing residence upon service of that document and any "delays" in immigration court would be irrelevant. But instead of, for instance, having enforcement agents call the immigration court to schedule a hearing before serving the "notice to appear" or maintaining a system that allows agents to access the next available hearing date—as IIRIRA clearly envisioned—the government has stuck to the pre-IIRIRA system of serving non-compliant notices, filing them with the immigration court (sometimes years after service, as in both *Camarillo* and this case), and then waiting for the immigration court to schedule a hearing. The statute itself makes clear what impact this practice has on the stop-time rule: that rule is triggered by a "notice to appear under section 1229(a)," and section 1229(a) states that notice is not a "notice to appear" unless it includes the "time and place" of the hearing. The BIA cannot reasonably contort this plain lan-

guage to avoid any adverse stop-time consequences from the government's refusal to follow IIRIRA's notice requirements.

3. The unreasonableness of the BIA's decision is highlighted by the BIA's subsequent decision in *Matter of Ordaz*. The question in *Ordaz* was whether service of a "notice to appear" triggers the stop-time rule if the government never files the notice with the immigration court, and then serves a new "notice to appear" later, after the immigrant has satisfied the permanent residence requirement. 26 I. & N. Dec. at 638. The BIA held that service of the first "notice to appear" does *not* trigger the stop-time rule. *Id.* at 639.

Ordaz's reasoning is flatly inconsistent with *Camarillo*. In *Ordaz*, the BIA explained that if the first notice *did* trigger the stop-time rule, that "would potentially render an alien ineligible for relief on the basis of a charging document that was invalid or otherwise insufficient to support a removal charge as issued." *Id.* at 640. Congress, according to the BIA, could not have intended "such far-reaching consequences." *Id.* at 640. But *Camarillo*'s consequences are even more extreme: *Camarillo* not only "*potentially* render[s] an alien ineligible for relief" based on an "invalid" or "insufficient" charging document, it *automatically* has that result. After all, there is no dispute that a notice that lacks the "time and place at which the proceedings will be held"—or any of the other information required in a "notice to appear" under § 1229(a)'s definition—is not, on its own, a valid or sufficient "notice to appear." And yet *Camarillo* held that such invalid and insufficient notice *does* trigger the stop-time rule.

Ordaz's discussion of *Camarillo* shows that *Camarillo* is simply an attempt to let DHS escape the stop-time consequences of refusing to follow IIRIRA's command that a "notice to appear" must include the "time and place" of the hearing. The BIA effectively admitted that the primary distinction between *Camarillo* and *Ordaz* is that *Camarillo* involved a systematic practice the BIA felt that it needed to protect, whereas *Ordaz* did not. *Ordaz* distinguished *Camarillo* largely because "the time and location where the proceedings will take place" is "often provided after service of a notice to appear."[9] *Ordaz*, 26 I. & N. Dec. at 642. No such concerns were implicated by *Ordaz*, because DHS does not "often" serve multiple notices to appear. Twisting the statute was therefore not necessary in *Ordaz* because there was no non-compliant regulatory regime that needed to be protected from stop-time consequences.

The combination of *Ordaz* and *Camarillo* makes the stop-time trigger turn on arbitrary conduct of individual enforcement officials. For instance, imagine an immigrant who is served with a notice labeled "notice to appear" that states that the charges against him and the date and time of his hearing are "to be determined." Years go by, the government does not file the notice with the immigration court, and the immigrant becomes eligible for cancellation

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[9] Remarkably, *Ordaz* stated that this delayed notice is "contemplated by both the Act and the regulations." *Id.* at 642. The BIA did not cite any provision of "the Act" that "contemplated" that notice of the "time and place" of hearings would take place outside the "notice to appear." After all, "the Act" states that the "notice to appear" "shall . . . specify[] . . . the time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i).

of removal. The immigrant then, like Mr. Pereira, is pulled over for not turning on his headlights and comes to the attention of a DHS official. The official could do one of two things. He could serve a hearing notice and notice of additional charges (*see* 8 C.F.R. § 1240.10(e)), in which case the prior notice would, under *Camarillo*, trigger the stop-time rule. Or he could serve a new "notice to appear" that includes the hearing date and charges, in which case only that *later* notice would trigger the stop-time rule under *Ordaz*.

In any rational system, these two scenarios would be treated the same for stop-time purposes. After all, the immigrant would receive exactly the same notice at exactly the same time under either scenario—all that differs is the title of the piece of paper on which the notice is provided. But under the BIA's approach, the title of the piece of paper is life-changing. If the immigrant receives a hearing notice and notice of additional charges, the immigrant is forever barred from applying for cancellation of removal, separated from his family, and removed from the country he has called home for more than a decade. If, however, the DHS official serves a new "notice to appear," providing exactly the same information, then the immigrant is free to apply for cancellation of removal and potentially obtain lawful permanent residence. For the reasons already explained, the statute's text precludes this absurdity by requiring notice of *all* the information listed in the definition of a "notice to appear under section 1229(a)" to trigger the stop-time rule. But even if that provision is, somehow, ambiguous, the BIA cannot reasonably interpret the statute such that "everything hangs on

the fortuity of an individual official's decision." *Judulang*, 565 U.S. at 58.

* * *

The problems with the BIA's interpretation of the stop-time rule are so extreme that its decision falls far outside the deference owed to the agency under *Chevron*. Indeed, if deference *were* somehow owed to the BIA's decision in this case, it would raise significant constitutional questions.[10] The Court need not reach those questions, however, because the statute, read correctly, does not contain any ambiguity for the agency to resolve. And if it did, even *Chevron*'s deferential standard of review does not permit the BIA to use its interpretive authority to protect the executive branch from the consequences of serving notice that does not satisfy the statutory requirements for a "notice to appear."

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[10] *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). To the extent the Court concludes that it is necessary to reach these constitutional issues to resolve this case, it should request supplemental briefing and argument. *Cf. Johnson v. United States*, 135 S. Ct. 939 (2015); *see* Pet. 22 n.4; Cert. Reply Br. 12.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

1. The current version of 8 U.S.C. § 1229 provides:

§ 1229. Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F) (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable,

through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In 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 under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit

that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in

subparagraph (T) or (U) of section 1101 (a)(15) of this title.

2. The current version of 8 U.S.C. § 1229b provides:

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than

10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who

is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title 111-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's

lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a—

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for

adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A) (iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of title 22, if the relative—

(i) was, on the date on which law enforcement applied for such continued presence—

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under

subparagraph (A) may extend until the later of—

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3) (A) of title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if—

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101 (a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before

September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the

Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

3. The current version of 8 C.F.R. § 1003.18 provides:

§ 1003.18 Scheduling of cases.

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

4. The 1994 version of 8 U.S.C. § 1252b provided in pertinent part:

§ 1252b. Deportation procedures

(a) Notices

(1) Order to show cause

In deportation proceedings under section 1252 of this title, written notice (in this section referred to as an "order to show cause") shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided a list of counsel prepared under subsection (b)(2) of this section.

(F) (i) The requirement that the alien must immediately provide (or have provided) the

Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1252 of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under subsection (c)(2) of this section of failure to provide address and telephone information pursuant to this subparagraph.

(2) Notice of time and place of proceedings

In deportation proceedings under section 1252 of this title—

(A) written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise, of –

(i) the time and place at which the proceedings will be held, and

(ii) the consequences under subsection (c) of this section of the failure, except under exceptional circumstances, 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 in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) of—

(i) the new time or place of the proceedings, and

(ii) the consequences under subsection (c) of this section of failing, except under exceptional circumstances, to attend such proceedings.

In 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 under subsection(a)(1)(F) of this section.

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