No. 19-863

IN THE

Supreme Court of the United States

AGUSTO NIZ-CHAVEZ,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR PETITIONER

SUFEN HILF
HILF & HILF, PLC
1775 W. Big Beaver Rd.
Troy, MI 48084

BENJAMIN HAYES
GOODWIN PROCTER LLP
1900 N St. NW
Washington, DC 20036

DAVID J. ZIMMER
Counsel of Record
GERARD J. CEDRONE
GABRIEL ROSSMAN
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
dzimmer@goodwinlaw.com
(617) 570-1000

Counsel for Petitioner

August 6, 2020

QUESTION PRESENTED

Eligibility for a form of immigration relief called cancellation of removal requires a specified period of presence or residence in the United States. 8 U.S.C. § 1229b(a)(2), (b)(1)(A). The "stop-time rule" gives the government the power to end an immigrant's qualifying period of presence or residence by serving "a notice to appear under section 1229(a)." *Id.* § 1229b(d)(1). Section 1229(a) defines "a 'notice to appear'" as written notice of specified information about a removal proceeding. In *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), this Court held that, to trigger the stop-time rule, the government must serve notice "in accordance with" section 1229(a)'s definitional requirements. *Id.* at 2117.

The question presented in this case is:

Whether "a 'notice to appear'" as defined in section 1229(a) is a specific notice document that includes all of the required information or an amalgam of information that the government may serve over the course of as many documents and as much time as it chooses.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

RULES

CONGRESSIONAL REPORTS

OTHER AUTHORITIES

INTRODUCTION

Cancellation of removal is a critical form of immigration relief that prevents the breakup of immigrant families and allows the most deserving noncitizens to remain in this country. To be eligible for cancellation, an immigrant must satisfy numerous requirements, including having lived in the United States for a specified number of years.

A provision known as the "stop-time rule" gives the government the power to end that period of qualifying residence, but it requires that the government take specific action—"serve[] a notice to appear under section 1229(a) of [Title 8]"—in order to do so. 8 U.S.C. § 1229b(d)(1). Section 1229(a), in turn, defines what "a 'notice to appear'" is: it is "written notice … specifying" seven related pieces of information about the removal proceeding at which the noncitizen must appear.

The question in this case is whether "a 'notice to appear,'" as defined in section 1229(a), is a specific notice document that provides all the required information about the removal proceeding, or whether it is merely an amalgam of information that the government may provide over the course of as many documents, and as much time, as it chooses. The text and structure of the statute supply a clear answer: "a 'notice to appear'" is a document that contains all the information listed in section 1229(a)(1). That result makes perfect sense: providing this related information in one place is necessary to avoid "confus[ing] and confound[ing]" noncitizens—most of whom are unrepresented—by forcing them to piece together information about their removal proceedings that the government serves in separate forms at

different times. *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2118-2119 (2018).

The government, however, refuses to provide the specific notice document that section 1229(a) demands. One critical component of "a 'notice to appear'" is—as the document's name suggests—the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). In enacting section 1229(a), Congress removed statutory language allowing the government to provide such time-and-place information in a later notice. Consistent with that change, the government recognized, in post-enactment rulemaking, that section 1229(a) defines a specific notice document and requires the time-and-place information to "be on the Notice to Appear" itself. 62 Fed. Reg. 444, 449 (Jan. 3, 1997). Yet the government has inexplicably refused to carry out this conceded requirement. It *almost never* provides time-and-place information in the "notice to appear," instead transmitting that information in a separate "hearing notice" it serves later—at times, years later. *Pereira*, 138 S. Ct. at 2111.

This is the second time the Court has confronted the government's attempts to avoid the stop-time consequences of its refusal to do what it acknowledged the statute requires. The government previously claimed that it could serve "a notice to appear under section 1229(a)" (thus triggering the stop-time rule) by serving any document *labeled* a "notice to appear"—even if that document did not comply with section 1229(a)'s definition of the term. This Court rejected that argument in *Pereira*, holding that the stop-time rule unambiguously requires notice "in accordance with" section 1229(a)'s definition. 138 S.

Ct. at 2117. Not only did the government's position conflict with the statute's unambiguous text, the Court explained, but allowing the government to "serve notices that lack any information about the time and place of the removal proceedings" would unfairly "confuse and confound" noncitizens. *Id.* at 2118-2119.

Unwilling to abandon its bifurcated notice process, however, the government now claims—in direct conflict with its post-enactment rulemaking—that its multi-step notice practice actually complies with section 1229(a) after all. "[A] 'notice to appear,'" the government now argues, is not actually a specific notice document, but merely a collection of information that the government can divide up however it pleases. Sitting en banc, a slim majority of the Board of Immigration Appeals (Board or BIA) accepted this argument over a vigorous dissent, and the court of appeals in this case agreed.

This Court should reject the government's interpretation, which is no more faithful to the statute than its position in *Pereira*. The government's approach flies in the face of the unitary nature of the term "*a* 'notice to appear.'" It is inconsistent with surrounding statutory provisions, which make clear that the notice to appear must be served at one specific time. It is irreconcilable with Congress's decision to remove a prior provision allowing the government to serve time-and-place information in a separate hearing notice. And it conflicts with longstanding and widespread recognition that "a 'notice to appear'" is, in fact, a specific document. Indeed, the government's position would allow it to serve the very "notices that lack any information

about the time and place of the removal proceedings" that this Court understood its decision in *Pereira* to preclude. 138 S. Ct. at 2119.

Section 1229(a) means what it says: "a 'notice to appear'" is a document that includes all of the information enumerated in the statute. The Court should reverse the judgment below.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a) is reported at 789 Fed. Appx. 523. The decisions of the BIA (Pet. App. 16a) and the immigration judge (Pet. App. 26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2019. The petition for a writ of certiorari was filed on January 9, 2020, and granted on June 8, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 240A of the Immigration and Nationality Act, as codified at 8 U.S.C. § 1229b, provides in relevant part:

* * *

(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 * * * .

* * *

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

Section 239(a) of the Immigration and Nationality Act, as codified at 8 U.S.C. § 1229(a), provides in relevant part:

(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. * * *

The full text of sections 1229 and 1229b, together with other relevant statutes and regulations, is reproduced in the appendix.

STATEMENT

A. The Attorney General can cancel removal for particularly deserving noncitizens.

For more than a century, the immigration laws have given the Attorney General (or another official) discretion to allow deserving immigrants with U.S. family connections to remain as lawful permanent residents even if they were otherwise inadmissible or removable. *See* Immigration Act of 1917, ch. 29, § 3, proviso 7, 39 Stat. 874, 878. As one Congressional report explained, such provisions protect "aliens of long residence and family ties in the United States" whose removal "would result in a serious economic detriment to the[ir] family." S. Rep. No. 81-1515, at 600 (1950). The current statute—8 U.S.C. § 1229b—continues this tradition by allowing the Attorney General to grant "cancellation of removal" to both permanent and nonpermanent residents.

Permanent residents may obtain cancellation if they have not been convicted of an aggravated felony and if the equities favor allowing them to remain in the country. 8 U.S.C. § 1229b(a)(3); *see Matter of Sotelo-Sotelo*, 23 I. & N. Dec. 201, 203 (BIA 2001). To be eligible, they must show that they have been lawful permanent residents for at least five years and that they have continuously resided in the United States for at least seven years. 8 U.S.C. § 1229b(a)(1)-(2).

Nonpermanent residents, meanwhile, may obtain cancellation (and a green card) if their removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident. *Id.* § 1229b(b)(1)(D). Cancellation is only available to nonpermanent residents with "good moral character" who have not been convicted of specified criminal offenses. *Id.* § 1229b(b)(1)(B)-(C). Nonpermanent residents seeking cancellation must show that they have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding" their applications for cancellation. *Id.* § 1229b(b)(1)(A).

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. Noncitizens' ability to even apply for that vital form of relief often turns on whether they can meet the required periods of continuous physical presence or continuous residence in the United States.[1]

B. Congress allows the government to stop noncitizens from accruing continuous residence by serving "a notice to appear under section 1229(a)."

1. The stop-time rule arose to address a specific problem with earlier forms of discretionary relief. Before 1996, a noncitizen continued to accrue qualifying residence even during the pendency of removal

[1] For simplicity, this brief uses the term "continuous residence" to encompass both continuous residence and continuous physical presence.

proceedings. *See Matter of Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 671 (BIA 2004). Congress grew concerned that immigrants had an incentive to obstruct and slow removal proceedings to satisfy the residence requirement. *Id.*

In response, Congress enacted the stop-time rule in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-546, 3009-595. Under this rule, "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." 8 U.S.C. § 1229b(d)(1). In other words, Congress gave the government the power to end a noncitizen's accrual of continuous residence, but required the government to take a specific action—"serve[] a notice to appear under section 1229(a)"—in order to do so. If the government does not comply with its statutory notice obligations, it does not trigger the stop-time rule and the noncitizen continues to accrue continuous residence. *See Pereira*, 138 S. Ct. at 2119.

2. IIRIRA also created the triggering document—the "notice to appear." In defining "a 'notice to appear,'" Congress largely copied the statutory definition of a prior form of notice, called an "order to show cause," which required the government to serve a single notice document containing certain specific information. As relevant here, the only significant change that Congress made in IIRIRA was that the "time and place at which the proceedings will be held"—which was an *optional* part of "an 'order to

show cause"'—became a *required* part of the new "notice to appear."

a. For nearly fifty years prior to IIRIRA, what were then called deportation proceedings were initiated with an "order to show cause." The "order to show cause" grew out of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163. Section 242(b) of the 1952 Act gave the Attorney General broad discretion to define, through regulations, the notice required to institute deportation proceedings. 66 Stat. at 209-210. The provision required only that the regulations ensure that the noncitizen "be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held." *Id.*

The Attorney General's implementing regulations, promulgated in 1956, created the "order to show cause." *See* 21 Fed. Reg. 97, 98-99 (Jan. 6, 1956) (codified at 8 C.F.R. § 242.1(b) (1957)). The regulations required the order to contain specific information—namely, "a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated." *Id.* The regulations also required the order to "call upon the respondent to appear before a special inquiry officer for hearing at a time and place *stated in the order*." *Id.* at 99 (emphasis added).

The government recognized that this "order to show cause" was a specific document that must itself

contain the required information, but found the requirement that this document include the "time and place" of the hearing difficult to fulfill. Thus, in 1978, the Immigration and Naturalization Service (INS) revised the regulation to make the time-and-place information optional. As the regulatory preambles explained, "[t]he existing rule requires the date and place of the hearing to be specified at the time the order to show cause is issued," but it is often "not possible to hold the hearing as specified in the order to show cause." 43 Fed. Reg. 36,238 (Aug. 16, 1978). The amended regulation provided that the time-and-place information "may be stated in the order [to show cause] or may be later specified." *Id.* at 36,239 (codified at 8 C.F.R. § 242.1(b) (1979)). In 1987, the regulation was further amended to specify that the time-and-place information would be later provided by the immigration court. 52 Fed. Reg. 2,931, 2,939 (Jan. 29, 1987) (codified at 8 C.F.R. § 242.1(b) (1988)).

Congress incorporated this regulatory scheme into the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Limiting some of the discretion granted by the 1952 Act, the 1990 Act required that deportation proceedings be instituted by service of "an order to show cause." *Id.* § 545(a), 101 Stat. at 5061-5062 (codified at 8 U.S.C. § 1252b (1994)). And it defined the term "in this section referred to as an 'order to show cause'" as "written notice … specifying" particular information about the deportation hearing, including 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," and the fact that the "alien may be represented by counsel." 8 U.S.C. § 1252b(a)(1) (1994). Like

the then-current regulations, however, the statute did *not* require that the "order to show cause" identify "the time and place at which the proceedings will be held"; that information could be provided "in the order to show cause or otherwise." *Id.* § 1252b(a)(2)(A). Consistent with the statute's flexibility regarding time-and-place information, INS retained its regulations specifying that such information would be separately provided by the immigration court. *See* 8 C.F.R. §§ 242.1(b), 3.18 (1996).

b. In IIRIRA, Congress changed the name of the notice required to initiate removal proceedings from an "order to show cause" to a "notice to appear." *See* IIRIRA § 304(a)(3), 110 Stat. at 3009-587 (codified, as relevant, at 8 U.S.C. § 1229(a)). Congress also made one key substantive change to the required notice. Concerned that existing notice procedures led to unnecessary disputes about whether noncitizens received hearing notices, *see* H.R. Rep. No. 104-469, pt. I, at 122, 159 (1996), Congress abandoned the *option* of sending a hearing notice after the initial notice document. Instead, as the name "notice to appear" suggests, Congress *required* that the "time and place at which the proceedings will be held" be included in the "notice to appear" itself. 8 U.S.C. § 1229(a)(1)(G)(i).

Aside from making the time-and-place information a required part of the "notice to appear," Congress largely copied the definition of "a 'notice to appear'" from the prior definition of "an 'order to show cause.'" Most notably, it retained the same definitional structure, defining the term "a 'notice to appear'" as "written notice … specifying" particular information about the removal hearing. *Id.*

§ 1229(a)(1)(G)(i); *see also* H.R. Rep. No. 104-469, pt. I, at 230 ("notice to appear" definition "restates the provisions of current [statutory definition] regarding the provision of notice").

C. The government recognizes, in post-enactment rulemaking, that a "notice to appear" is a specific notice document that must include time-and-place information.

The government immediately recognized that IIRIRA required it to provide a specific document—"a 'notice to appear'"—that included all of the information listed in section 1229(a)(1), including time-and-place information. In 1997, INS and the Executive Office for Immigration Review (EOIR) jointly issued a proposed rule to implement the new "notice to appear" provision. A preamble to the proposed regulations explained, in a section entitled "The Notice to Appear (Form I-862)," that the rule "implements the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear." 62 Fed. Reg. at 449. The agencies recognized that the government would need "automated scheduling" to implement this requirement, and committed to implement such scheduling "as fully as possible by April 1, 1997"—the effective date of the new notice provision. *Id.*; *see* IIRIRA § 309(a), 110 Stat. at 3009-625.

The regulatory preamble also suggested that in a very limited set of situations—"e.g., power outages, computer crashes/downtime"—such "automated scheduling will not be possible." 62 Fed. Reg. at 449. The rule the agency proposed—now codified at 8 C.F.R. § 1003.18—thus stated that the agency "shall provide in the Notice to Appear, the time, place and

date of the initial removal hearing, *where practicable*." 62 Fed. Reg. at 457 (emphasis added). Even as it purported to make optional what the statute itself requires, this rule confirmed the government's understanding that a "notice to appear" must be a single document—after all, if a "notice to appear" could be multiple documents, then the time-and-place information would be "in the Notice to Appear" *regardless* of when, and in what document, the government provided it.

D. The government invokes the stop-time rule without serving notices that comply with its own interpretation of section 1229(a), but this Court rejects that approach.

Ultimately, the government refused to do what it conceded the statute required. It never meaningfully implemented the "automated scheduling" it had recognized as necessary and feasible. Instead, by 2017, the government relied on the "where practicable" language in the regulation to exclude time-and-place information from "*almost 100 percent*" of its putative notices to appear. *Pereira*, 138 S. Ct. at 2111 (emphasis added).[2]

The government's refusal to follow section 1229(a)'s conceded requirements created a problem for the stop-time rule. As discussed above, p. 9, *supra*, that rule requires that the government "serve[] a notice to appear under section 1229(a)" to end an immigrant's period of continuous residence. 8 U.S.C.

---

[2] Various immigration-related responsibilities of the Attorney General and INS were transferred to the Department of Homeland Security (DHS) when that department was created. *See generally Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005).

§ 1229b(d)(1). Yet the government's notices did not qualify as "a 'notice to appear'" as section 1229(a) defines that term. Unwilling to accept the stop-time consequences of its refusal to comply with section 1229(a), the government claimed that it could trigger the stop-time rule by serving a document *labeled* as a notice to appear, regardless whether it qualified as "a 'notice to appear'" under section 1229(a)'s definition of that term.

The BIA agreed with the government in *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011), concluding that the statute does not impose any "substantive requirements" on the notice the government must provide to trigger the stop-time rule. *Id.* at 647. Notably, the BIA *rejected* the argument the government makes in this case, explaining that "notice[s] of hearing" are *not* "a constituent part of a notice to appear," which must be a single document. *Id.* at 648; *see also Matter of Ordaz*, 26 I. & N. Dec. 637, 640 n.3 (BIA 2015) (a "notice to appear" is a "single instrument").

In *Pereira*, this Court rejected the BIA's decision and held that the government must serve a notice to appear "in accordance with" section 1229(a)'s requirements in order to trigger the stop-time rule. 138 S. Ct. at 2117. Section 1229(a), the Court explained, uses "quintessential definitional language" to establish what a notice to appear is—*i.e.*, "'written notice' that, as relevant here, 'specif[ies] … [t]he time and place at which the [removal] proceedings will be held.'" *Id.* (quoting § 1229(a)(1)(G)(i)). Notice that does not meet those definitional requirements is not "a proper notice to appear," and does not trigger the stop-time rule. *Id.* at 2119-2120.

Because the government did not serve a hearing notice on Mr. Pereira until after he accrued sufficient continuous residence to be eligible for cancellation, the government clearly had not triggered the stop-time rule under this Court's interpretation of the statute. The Court therefore did not explicitly address the interpretive question at issue here. The Court did, however, understand its decision to prevent the government from "confus[ing] and confound[ing] noncitizens" by "serv[ing] notices that lack any information about the time and place of the removal proceedings." *Id.* at 2118-2119.

E. The Board holds that section 1229(a) allows the government to serve the information specified in that section over as many documents and as much time as it chooses.

After *Pereira*, the government abruptly changed tack. Despite its post-IIRIRA recognition that section 1229(a) defines a specific notice document that must include the time and place of proceedings, the government now claims that section 1229(a) merely identifies information that the government can serve in however many pieces it wishes.

A sharply divided en banc BIA endorsed the government's position. *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520 (2019). The Board concluded that although the statute's reference to "a" notice to appear "is in the singular," the statute nevertheless does not require that the notice come "in a single document." *Id.* at 531. Instead, "it may be provided in one or more documents—in a single or multiple mailings." *Id.* The Board recognized that it had previously reached the opposite conclusion, but reversed

course with the largely unexplained statement that its previous analysis was "flawed." *Id.* at 525 & n.8.

Six Board Members dissented, concluding that the majority's position is irreconcilable with the statute's text and history. *Id.* at 536 (Guendelsberger, Board Member, dissenting). The dissent explained that "the statute contains no ambiguity or gap that would permit a 'combination' approach to trigger the stop time rule," as the "statute refers to a single document, 'a notice to appear.'" *Id.* at 539. In other words, the dissent reasoned, the statute's plain language "leaves no room for the majority's conclusion that a subsequent notice of hearing can cure a notice to appear that fails to specify the time and place of the initial removal hearing." *Id.* at 545. The dissent also explained that the majority's position is irreconcilable with IIRIRA, which explicitly *rejected* the two-step process, mandating "a one-step 'notice to appear.'" *Id.* at 539.

F. The Sixth Circuit adopts the Board's reasoning and holds that Mr. Niz-Chavez cannot apply for cancellation of removal to remain with his U.S.-citizen children.

1. Petitioner Agusto Niz-Chavez is a native and citizen of Guatemala. Around 2002, a land dispute arose between Mr. Niz-Chavez's family and villagers from Ixchiguan, a neighboring village. Pet. App. 2a. The Ixchiguan villagers murdered Mr. Niz-Chavez's brother-in-law and threatened to kill Mr. Niz-Chavez and his family if they did not leave. Pet. App. 2a-3a. Mr. Niz-Chavez and his family fled and have not returned, though they continued to receive threats. Pet. App. 3a.

Mr. Niz-Chavez arrived in the United States in 2005 and moved to Detroit in 2007. Pet. App. 3a. He currently lives with and is the primary breadwinner for his long-time partner and their three young U.S.-citizen children, two of whom have significant health issues. *Id.*; J.A. 67-75. Since coming to the United States fourteen years ago, Mr. Niz-Chavez has had no criminal history other than two misdemeanor convictions for driving without a license. Mr. Niz-Chavez has been recognized by those in his community as "hard working," "respectful," and "kind." J.A. 73-74. He is a "good loving [f]ather that provides for his family as much as he can," and "fights for them in order to support them every day," especially as "he is the only one in his family working." *Id.* He is also "an active member of [his Church] Community," where he is a "minister leader." J.A. 72.

2. In March 2013, police stopped Mr. Niz-Chavez for having a broken tail light and referred him to immigration authorities. On March 26, 2013, the government served Mr. Niz-Chavez with a document labeled "Notice to Appear." J.A. 5-11. That document did not specify when Mr. Niz-Chavez was required to appear, but stated that the hearing would be held on "a date to be set at a time to be set." J.A. 6. On May 29, 2013, the immigration court sent Mr. Niz-Chavez a hearing notice scheduling his case for June 25, 2013. J.A. 12-14. Mr. Niz-Chavez conceded removability but applied for withholding of removal and relief under the Convention Against Torture. Pet. App. 3a.

A merits hearing was held on September 13, 2017. Pet. App. 4a. At the hearing, Mr. Niz-Chavez sought to apply for cancellation of removal given that

he had been present in the United States for approximately twelve years. Pet. App. 42a. But the immigration judge (IJ) concluded, and Mr. Niz-Chavez was forced to concede, that under then-governing law, his continuous presence ended when he received the putative "Notice to Appear" in March 2013, even though that document did not comply with section 1229(a) because it lacked the required time-and-place information. *See Camarillo*, 25 I. & N. Dec. at 647; *Gonzales-Garcia* v. *Holder*, 770 F.3d 431 (6th Cir. 2014) (deferring to *Camarillo*).

The IJ ultimately denied Mr. Niz-Chavez's applications for relief, and Mr. Niz-Chavez appealed to the BIA. While his appeal was pending, this Court decided *Pereira*. Mr. Niz-Chavez sought a remand to the IJ to consider his application for cancellation of removal in light of *Pereira*. Pet. App. 4a. The BIA denied the motion to remand and affirmed the IJ's decision, concluding that Mr. Niz-Chavez was not eligible for cancellation under *Pereira* because the combination of the putative notice to appear and the subsequent hearing notice triggered the stop-time rule in June 2013. Pet. App. 4a, 22a.

3. Mr. Niz-Chavez filed a petition for review at the Sixth Circuit. While that petition was pending, the Sixth Circuit decided *Garcia-Romo* v. *Barr*, 940 F.3d 192 (2019), in which it accepted the Board's conclusion that the statute does not define "a 'notice to appear'" as a specific notice document. The court reasoned that requiring "*a* singular, compliant document" gives too "cramped" a reading to "the indefinite article 'a.'" *Id.* at 201. Based on two colloquial examples, the court concluded that "[w]hen the word 'a' precedes a noun such as 'notice,' describing a writ-

ten communication, the customary meaning does not necessarily require that the notice be given in a single document." *Id.* Thus, section 1229(a) allows the government to provide the required information "in multiple components or installments." *Id.*

Based on *Garcia-Romo*, the Sixth Circuit denied Mr. Niz-Chavez's petition for review. Pet. App. 13a-15a.[3]

SUMMARY OF ARGUMENT

I. The Court should reject the BIA's approach to section 1229(a) and reverse the judgment below. In light of its text, structure, history, and purpose, the statute is unambiguous: a notice to appear is a specific document that includes all of the closely related information listed in section 1229(a)(1).

A. Beginning with the text, the statute uses "quintessential definitional language" to establish a specific, singular statutory term—"a 'notice to appear"—and it defines that term as "written notice … specifying" the enumerated pieces of information. *Pereira*, 138 S. Ct. at 2116. To serve "*a* 'notice to appear," therefore, the government must serve "*a*" notice document that includes the required information; it cannot combine information it provides in different notices served at completely different times.

The government resists this straightforward reading based on colloquial examples in which, it says, the singular article "a" identifies an object that can be divided into multiple pieces. Those examples not only fail on their own terms, but also reveal lit-

---

[3] Other courts have reached conflicting decisions on the question presented. *See* Pet. 14-16; Pet. Reply 3.

tle, if anything, about the specific context at issue, in which the singular article "a" precedes what the government itself has recognized to be the title of a legal document.

The statutory structure and surrounding provisions confirm the point. Section 1229(a)'s equivalent treatment of the interconnected information listed in the statute is inconsistent with the government's claim that it can split that information up and provide it in separate notices served years apart. Two neighboring provisions—sections 1229a(b)(7) and 1229(e)—also make clear that "a 'notice to appear'" is a specific document served at one time.

In keeping with this textual and contextual evidence, both the government and the BIA—before their opportunistic changes of heart—repeatedly recognized that section 1229(a) defines a specific notice document. And this Court's reasoning in *Pereira* presupposed that "a 'notice to appear'" is a single document that includes time-and-place information.

B. History puts the question presented even further beyond dispute. The statutory predecessor to the "notice to appear" was the "order to show cause," which the government had long recognized to be a specific document. The statute's text confirmed this, as it allowed the government to provide the time and place of proceedings either "in the order to show cause *or otherwise*"—language that only makes sense if the "order to show cause" was a specific document.

In enacting section 1229(a), Congress essentially copied the former "order to show cause" definition, thus preserving the requirement that the government provide the specified information in a single

document. And the one key substantive change Congress made confirms that interpretation: Congress eliminated the option of providing time-and-place information separately, requiring instead that such information be in the "notice to appear" itself. That amendment is impossible to square with the government's view that "a 'notice to appear'" merely refers to a collection of information.

C. The statute's purposes also refute the government's interpretation.

IIRIRA's legislative history shows that Congress required time-and-place information to be provided in the notice to appear itself in order to simplify the notice process and avoid the risk of "lapses … in the procedures for notifying aliens" that had occurred under a two-step notice process. H.R. Rep. No. 104-469, pt. I, at 122. The government's interpretation directly undermines that goal by authorizing the very multi-step notice processes that led to those "lapses."

Interpreting section 1229(a) to require a specific notice document is also consistent with the purpose of the stop-time rule—*i.e.*, avoiding gamesmanship by noncitizens. As this Court recognized in *Pereira*, nothing about interpreting section 1229(a) to require a specific document permits such gamesmanship: The government always has the power to trigger the stop-time rule by serving notice that meets section 1229(a)'s definition of "a 'notice to appear.'"

D. To the extent there is any lingering doubt, the government's interpretation is undermined by the fact that the stop-time rule involves only a threshold question of eligibility for a discretionary form of re-

lief and by the well-established rule that ambiguities in removal provisions are to be resolved against the government.

II. Even if the statute's text, structure, history, and purpose left some room for uncertainty, this Court should still reject the government's position because it is neither the best, nor even a reasonable, interpretation. Given that the BIA abandoned its prior construction of the statute without any meaningful explanation, its decision is not entitled to deference. And even if it were, the Board's decision brushes aside the statute's text, structure, and history for no better reason than allowing the government to avoid the stop-time consequences of its decision to flout what it previously acknowledged as the statute's requirements. That decision is unreasonable. And, to the extent necessary, this Court should reconsider whether the Board's interpretations of the INA are *ever* entitled to deference.

ARGUMENT

To trigger the stop-time rule, the government must serve a notice "in accordance with" section 1229(a)'s definition of "a 'notice to appear.'" *Pereira*, 138 S. Ct. at 2117. And section 1229(a) is unambiguous: "a 'notice to appear'" is a specific document that includes all of the closely related information in the statutory definition. The BIA's contrary conclusion disregarded the statute's "text, structure, history, and purpose." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019). Because the statute is clear, "that is the end of the matter." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). And even if there were some ambiguity, the Board's decision is not entitled to deference.

I. The statute unambiguously defines "a 'notice to appear'" as a single document that includes all of the closely related information in section 1229(a).

Here, as in *Pereira*, "Congress has supplied a clear and unambiguous answer to the interpretive question at hand." 138 S. Ct. at 2113. All of the relevant considerations—the plain text of the statute, the language and structure of surrounding provisions, the statute's historical evolution, and the purposes of its requirements—point to the same conclusion: "a 'notice to appear'" is a specific document.

A. The statute's text and structure require a specific notice document.

1. Start with the statutory text. Under section 1229b(d)(1), a noncitizen's period of continuous residence is "deemed to end … when the alien is served a notice to appear under section 1229(a)." Section 1229(a), in turn, establishes what "a 'notice to appear'" is. *Pereira*, 138 S. Ct. at 2116. Specifically, the statute defines "a 'notice to appear'" as "written notice … specifying" seven discrete pieces of information—including the "charges against the alien," the "time and place at which" to appear to defend against those charges, and the right to be represented by counsel. 8 U.S.C. § 1229(a)(1). A notice document that does not provide that required information—all of it—does not meet this definition. It is not notice "in accordance with" section 1229(a), and so does not trigger the stop-time rule. *Pereira*, 138 S. Ct. at 2117.

That conclusion follows directly from the statute's use of a singular defined term—"*a* 'notice to ap-

pear'"—which forecloses the government's interpretation that it may cobble together *different* notices served at different times or even by different government agencies. *See, e.g.*, *Banuelos-Galviz* v. *Barr*, 953 F.3d 1176, 1181 (10th Cir. 2020). As this Court explained, Congress could have written section 1229(a) to state that "a 'notice to appear' is 'complete' when it specifies" the last piece of required information. *Pereira*, 138 S. Ct. at 2116. Instead, Congress used "quintessential definitional language" to create a specific term—"*a* 'notice to appear'"—and it defined that term as "written notice … specifying" the requisite information. *Id.*

To counter that straightforward reading, the government argues that "[t]he indefinite article 'a' is often used to refer to something that may be provided in more than one installment." Br. in Opp. 10. The government offers two colloquial examples: a writer who "provide[s] 'a manuscript' to his publisher by providing some chapters on one day and the remaining chapters on another," and an employee who "complete[s] 'a questionnaire' for his employer by completing some answers at one time and the remaining answers at a different time." *Id.*

As an initial matter, it is not at all clear the government is right about even these examples. "[A] publisher who asked would-be authors to submit 'a manuscript' would presumably frown at seriatim submissions of individual chapters." *Banuelos-Galviz*, 953 F.3d at 1181. And an employer who asked an employee to complete "a questionnaire" containing thirty questions would be surprised to receive the answer to one question every day for a month.

Even crediting these examples, however, countless examples point in the opposite direction. The purchaser of "a piano" would surely be dissatisfied to receive successive deliveries of strings, keys, pedals, and oak boards. The buyer of "a car" does not expect to receive the chassis now, with the wheels and engine to follow. And a customer who orders delivery of "a Big Mac" does not expect to receive the two all-beef patties, special sauce, lettuce, cheese, pickles, onions, and sesame-seed bun in separate deliveries by different drivers at different times.

At best, then, the government's examples suggest that the question whether the indefinite article allows the object it modifies to be subdivided into its constituent parts—and still count as "an" object—depends on context. *See, e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (explaining that "context" often "negates" particular "definitional possibilities"). And here the relevant context is a familiar one: As the government explained in *Pereira*, "a Notice to Appear is a charging document. It's like an indictment in a criminal case [or] a complaint in a civil case." Tr. of Oral Arg. 39, *Pereira*, *supra*.

In *that* context, the article "a" plainly connotes a single document. Take Civil Rule 8(a), which establishes the requirements for a complaint in a civil case: "A pleading that sets forth a claim for relief" must contain (1) a jurisdictional statement, (2) a short and plain statement of the claim, and (3) a demand for relief. Under that rule, a plaintiff cannot initially file a complaint containing *only* a demand for relief, and then hope to survive a motion to dismiss by offering a statement of the claim later, in a separate brief.

Provisions governing other pleadings and court filings are of similar effect. Consider this Court's Rule 24.1: "A brief on the merits" must contain ten enumerated sections. That rule demands a single document with the required contents; it does not permit ten separately bound booklets, one each for the questions presented, table of contents, jurisdictional statement, and so on.

The language of section 1229(a) compels the same conclusion. If anything, section 1229(a) is even clearer than the foregoing examples in that it uses what this Court has called "quintessential definitional language" to delineate what "*a* 'notice to appear'" is. *Pereira*, 138 S. Ct. at 2116. Even if the government serves the required pieces over the course of multiple installments, it has never served "a 'notice to appear'" as defined in section 1229(a), and so has not triggered the stop-time rule.[4]

2. A "wider look at the statute's structure," *Romag Fasteners, Inc.* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020), confirms that the government must serve a single notice document containing all the closely related information listed in section 1229(a). As mentioned, section 1229(a)(1) requires "a 'notice to appear'" to "specify[]" seven pieces of information

[4] The government has previously relied on the Dictionary Act. *See* 1 U.S.C. § 1 ("[W]ords importing the singular include and apply to several persons, parties, or things…."). But, as even courts upholding the BIA's approach have recognized, that provision is "not relevant" to the question presented here, which "is *not* whether there can be 'multiple notices to appear,'" but whether the government can serve a *single* notice to appear by cobbling together several *separate* documents—none of which, by itself, satisfies the statutory definition. *Garcia-Romo*, 940 F.3d at 203.

about the removal proceeding at which the noncitizen must appear. At the risk of repetition, they are:

(A) the "nature of the proceedings";

(B) the "legal authority" for the proceedings;

(C) the "acts or conduct" in which the alien allegedly engaged;

(D) the "charges against the alien," including the specific statutory violations alleged;

(E) information about the alien's right to counsel, including that the alien will be provided with a current list of potential pro bono counsel;

(F) information about the alien's obligation to provide his or her current address; and

(G) the "time and place at which the proceedings will be held" and the consequences of failing appear.

One feature of this list immediately stands out: the interconnected nature of the required information. Subparagraphs (A)-(G) each list a separate but related detail of a *single* removal proceeding. The "acts or conduct" in which the noncitizen allegedly engaged, for example, are logically connected to the legal "charges against the alien." And the "time and place" of proceedings is closely connected to the "nature of the proceedings" and the noncitizen's right and need to obtain counsel. The interdependence of these details—and the fact that *only together* do they give a noncitizen all the information needed to appear and participate in the relevant proceedings—undermines the government's contention that it can provide each piece of information separately.

While the government's putative notices to appear most frequently omit the time-and-place information, *see* p. 14, *supra*, the BIA's conclusion that the government may transmit information across multiple documents is not limited to time-and-place information. Instead, the Board authorized the government to divide up the required notice however it wants—*i.e.*, "in one or more documents—in a single or multiple mailings." *Mendoza-Hernandez*, 27 I. & N. Dec. at 531. That is no surprise, because section 1229(a)(1) treats all of the required (and related) information *identically*. In other words, there is no statutory basis to allow the government to separate out some, but not all, of the required information.

The government has embraced that expansive view, arguing that it "may provide … some information in one written notice and the rest of the information in another." Br. in Opp. 10. On the government's reading, for example, it could indicate its desire to remove a noncitizen in one notice, then provide the time and place of the hearing in a separate notice, then provide details about the charges against the alien in yet *another* notice. Alternatively, it could provide all of the generic information about removal proceedings—the nature of the proceedings, the legal authority under which they are conducted, the right to counsel, etc.—to every noncitizen as he or she enters the country, and then leave that information out of the notice served at the outset of an actual removal proceeding. Such a piecemeal approach is impossible to square with the interrelatedness of the information required by section 1229(a)'s definition of "a 'notice to appear.'"

3. An examination of "other neighboring provisions in the Act," *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017), yields still more evidence that "a 'notice to appear'" is a single document.

One neighboring provision, section 1229a(b)(7), is particularly telling, because it unambiguously contemplates a notice document that is served at a specific time. Under that provision, an alien who has been ordered removed in absentia is ineligible for certain forms of relief if, "at *the time* of the notice described in paragraph (1) or (2) of section 1229(a)," the alien received oral notice of the time and place of the removal proceedings and of the consequences of failing to appear. 8 U.S.C. § 1229a(b)(7) (emphasis added). Congress enacted this language in the same section of IIRIRA that enacted the definition of "a 'notice to appear,'" *see* IIRIRA § 304(a)(3), 110 Stat. at 3009-587 *et seq.*, and sections 1229(a) and 1229a repeatedly cross-reference one another.

The upshot of this language is clear: A reference to "*the time* of the notice described in paragraph (1) or (2) of section 1229(a)" makes sense only if the notice to appear (*i.e.*, "the notice described in paragraph (1)") is a single document that is served at a discrete moment. Any other construction makes a hash of the statute. In particular, it is entirely unclear what it would mean to give oral notice "at *the time*" of the notice to appear if—as the government claims—a notice to appear can be provided through *different* documents served at *different* times.[5]

---

[5] The government's conduct in this case underscores this point. In its initial notice, the government attempted to invoke section

Another nearby provision, section 1229(e), likewise presupposes a specific notice document. That provision establishes special rules that apply when immigration authorities undertake "an enforcement action leading to a removal proceeding" at sensitive locations like domestic-violence shelters. 8 U.S.C. § 1229(e)(1)-(2). In those circumstances, the statute says, "the Notice to Appear shall include a statement that" the government has complied with certain heightened requirements. *Id.* § 1229(e)(1).

The government's position makes this reference to "the Notice to Appear" surplusage. After all, if "the Notice to Appear" potentially encompasses *every* written piece of information the government provides, then there is no difference between merely requiring that the government make the statement generally and requiring that the government make the statement in "the Notice to Appear." Like section 1229a(b)(7), then, section 1229(e)(1) shows that Congress understood the "notice to appear" to be a specific document.

4. Finally, this straightforward reading of the statute's text has been confirmed by the government, the BIA, and this Court.

a. As discussed, pp. 13-14, *supra*, the government itself previously read section 1229(a) to require a specific document. In post-IIRIRA rulemaking, INS and EOIR recognized that the statute mandates a specific "[f]orm." 62 Fed. Reg. at 449. The agencies

---

1229a(b)(7) by certifying that it gave Mr. Niz-Chavez "oral notice … of the time and place of his … hearing." J.A. 11. But it obviously had *not* provided that information, because such time-and-place information was still "to be set." J.A. 6.

described "a 'notice to appear'" as "[t]he charging document" that commences removal proceedings, and explained that "[t]he Notice to Appear" must contain all of the specified information. *Id.* The agencies also recognized that "the language of the amended Act indicat[es] that the time and place of the hearing must be on the Notice to Appear," and that the agencies would need to implement "automated scheduling" to comply with this new "requirement." *Id.* This regulatory language—promulgated by the government on the heels of IIRIRA's passage—is further confirmation that the statute means what it says.

b. Before *Pereira*, the BIA also repeatedly recognized that section 1229(a) defines a specific notice document. Until its unexplained about-face, *see* p. 16, *supra*, the Board described "the notice to appear" as "a single instrument." *Ordaz*, 26 I. & N. Dec. at 640 n.3. Indeed, it explicitly *rejected* the view that "two documents" can "combine together to comprise the requisite service of a notice to appear," referring to "a notice to appear" as "*the* charging document issued only by the DHS." *Camarillo*, 25 I. & N. Dec. at 648 (emphasis added). As the Board noted, these decisions were consistent with agency regulations that did not (and do not) authorize immigration courts to issue notices to appear (or constituent parts thereof). *Id.* at 650; *see* 8 C.F.R. § 239.1.

c. While this Court has never explicitly decided the question presented in this case, its reasoning in *Pereira* plainly contemplated a specific notice document. There, the government argued that, based on "administrative realities," it should not be required to "include the date and time of the initial removal hearing on the notice to appear." Gov't Br. 48, *Perei-*

ra, *supra*. In rejecting that argument, the Court did not dispute that its decision did, in fact, affirm such a requirement. Instead, the Court explained that, "[g]iven today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not … work together to schedule hearings before sending notices to appear." 138 S. Ct. at 2119. Even more tellingly, the Court observed that it would "'confuse and confound' noncitizens" to allow "the Government to serve notices that lack any information about the time and place of the removal proceedings." *Id.* In short, this Court explained that the government can and should do precisely what it is now refusing to do: serve time-and-place information in its notices to appear.[6]

These various descriptions—by those most closely tasked with reading and applying section 1229(a)—make little sense if the government is correct that the statute's text and structure permit a Frankenstein notice, stitched together from different papers served at different times.[7]

---

[6] In *Pereira* and elsewhere, this Court has also referred to a "notice to appear" as a specific "document." *Pereira*, 138 S. Ct. at 2117 n.9; *Arizona* v. *United States*, 567 U.S. 387, 407 (2012) (describing the "administrative document called a 'Notice to Appear'"); *cf. also* Tr. of Oral Arg. 39, *Pereira*, *supra* (referring to "a Notice to Appear" as "a charging document").

[7] A few pre-*Pereira* decisions endorsed a two-step notice process, but those decisions ignored the statute's text and history and never even acknowledged the singular nature of the phrase "a 'notice to appear.'" *See, e.g.*, *Popa* v. *Holder*, 571 F.3d 890, 895-896 (9th Cir. 2009); *Dababneh* v. *Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006). To the extent they provided any rationale for endorsing a two-step approach, they rested largely on the policy arguments this Court rejected in *Pereira*. *See Popa*, 571 F.3d at

B. The statute's history unambiguously demonstrates that section 1229(a) requires a specific notice document.

The history of section 1229(a) removes any doubt that the singular nature of the phrase "a 'notice to appear'" was intentional. Over the years, regulatory and statutory provisions varied as to whether the "order to show cause"—the predecessor to the "notice to appear"—needed to include time-and-place information. What was never disputed, however, was that the "order to show cause" was a specific document.

In enacting section 1229(a), Congress readopted that understanding. The statute's definition of "a 'notice to appear'" copied, almost verbatim, the language that had defined "an 'order to show cause.'" And the key substantive change to the definition—Congress's rejection of language that allowed the government to provide time-and-place information after the initial notice document—confirms that "a 'notice to appear'" is a specific document.

1. As discussed, pp. 10-12, *supra*, prior to 1996, what were then called deportation proceedings were initiated with "an 'order to show cause.'" 8 U.S.C. § 1252b(a)(1) (1994). Both the text and history of the statute make clear that "an 'order to show cause'" was a single document.

a. Unlike the definition of "a 'notice to appear,'" the definition of "an 'order to show cause'" did *not* require that the document include time-and-place in-

---

896 ("[A]n immigration court must be permitted flexibility" because "circumstances may arise in which it is not feasible" to provide time-and-place information in the initial notice.).

formation. That information could be provided *either* "in the order to show cause" itself "*or otherwise*." 8 U.S.C. § 1252b(a)(2)(A) (1994) (emphasis added). This language shows that the "order to show cause" was a single document. After all, if the information required for an "order to show cause" could be provided in as many notices as the government chose, then the statute's distinction between providing time-and-place information "in the order to show cause" and providing that information "otherwise" (*i.e.*, in another document) would have been meaningless. The statute thus authorized either a one- or two-step notice process, but it barred the government from dividing the "order to show" cause itself into multiple pieces.

b. This straightforward textual reading is confirmed by the regulatory background against which Congress enacted the "order to show cause" definition. As described, pp. 10-12, *supra*, from 1956 to 1978, the regulations—like the current definition in section 1229(a)—required that the "time and place" of the hearing be "stated in the order [to show cause]" itself. 8 C.F.R. § 242.1(b) (1957). The government recognized that this regulation established that the "order to show cause" was a specific notice document and hence "require[d] the date and place of the hearing to be specified at the time the order to show cause is issued," not in some later-served document. 43 Fed. Reg. at 36,238.

INS found this requirement difficult to administer, so it eventually amended the regulation in 1978 to read—consistent with the flexible statutory scheme then in place, *see* p. 10, *supra*—that the time-and-place information "may be stated in the order [to

show cause] or may be later specified." 52 Fed. Reg. at 2,939. The revised regulation thus maintained what the agency recognized to be a specific "order to show cause" document, but added flexibility by allowing the agency to provide time-and-place information either in that document or later.

The Immigration Act of 1990 incorporated this regulatory regime into the statute. It adopted the phrase "order to show cause," which had been understood to be a specific notice document for more than three decades. And it required that document to include practically the same information required by the existing regulations.[8] *Compare* 8 C.F.R. § 242.1(b) (1988), *with* 8 U.S.C. § 1252b(a)(2)(A) (1994). Like the existing regulatory scheme, the statute allowed the government to provide time-and-place information "in the order to show cause or otherwise." 8 U.S.C. § 1252b(a)(2)(A) (1994).

In short, the pre-IIRIRA statute's structure and history show that the "order to show cause" was a specific notice document—one that could, but did not need to, include the time and place of the hearing.

2. IIRIRA's definition of "a 'notice to appear'" essentially readopted the 1990 Act's definition of "an 'order to show cause,'" but amended it to require that the "time and place at which the proceedings will be held" be provided as part of the "notice to appear" itself, rather than in a separate, later-served docu-

[8] The only substantive change was the addition of the requirements that the noncitizen be informed that she may be represented by counsel and that she must provide her contact information to the Attorney General.

ment. IIRIRA thus rejected the very two-step notice process that the government now follows.

a. Given that "an 'order to show cause'" was a single document, and that section 1229(a) uses the same definitional structure as the pre-IIRIRA provision, a "notice to appear" must necessarily be a single notice document as well. Indeed, the language Congress used to create and define "a 'notice to appear'" was copied almost verbatim from the earlier "order to show cause" provision. A comparison of the two provisions reads:

> In ~~deportation~~ removal proceedings under section ~~1252~~ 1229a of this title, written notice (in this section referred to as a~~n~~ ~~"order to show cause"~~ "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, ~~such notice shall be given by certified~~ through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

8 U.S.C. § 1252b(a)(1) (1994); 8 U.S.C. § 1229(a)(1) (2018). Other than changing "deportation" to "removal," adjusting the statutory references, and removing the certified mail requirement, these definitional provisions are identical.

By copying the definitional language from the "order to show cause" provision, Congress maintained the prior Act's requirement that the government provide the requisite information in a specific document. As this Court has consistently explained, "when statutory language is obviously transplanted from other legislation, we have reason to think it brings the old soil with it." *United States* v. *Davis*,

139 S. Ct. 2319, 2331 (2019) (quotation marks and alterations omitted). The legislative history confirms this interpretive presumption, clarifying that Congress intended to largely "restate[]" the provisions in the prior statute "regarding the provision of notice."[9] H.R. Rep. No. 104-469, pt. I, at 230. There is simply no way to read the "order to show cause" definition as defining a specific document but the "notice to appear" definition as defining a collection of information—largely the *same* information—that can be split up however the government chooses.

b. Interpreting "a 'notice to appear'" as a collection of information would also nullify Congress's decision to make time-and-place information a required, not optional, part of the "notice to appear." Under the government's interpretation, that amendment did not actually change the government's notice requirements *at all*. That flies in the face of the presumption that Congress's amendments have "real and substantial effect." *Ross* v. *Blake*, 136 S. Ct. 1850, 1858 (2016).

The government recognized as much in *Pereira*. In discussing the statute's history, the government did not dispute that IIRIRA "abandoned the previous flexibility of allowing the government to use multiple notices to convey all the required information." But, the government argued, this was "beside the point," because "omission of a hearing date in a notice to ap-

---

[9] In *Pereira*, the government also recognized that IIRIRA was not intended to "reflect a sea change" in the statute's notice requirements and that "Congress largely copied over" the definition of "an 'order to show cause'" into the new definition of "a 'notice to appear.'" Gov't Br. 42-44, *Pereira*, *supra*.

pear" does not "nullify the stop-time rule." Gov't Br. 43-44, *Pereira*, *supra* (quotation marks omitted).

Having lost the latter argument, the government now abandons its concession and claims that IIRIRA did not, in fact, reject the government's use of "multiple notices" after all. Instead, the government argues that by amending the statute to make time-and-place information a required part of "a 'notice to appear,'" Congress merely ensured that the government does not trigger the stop-time rule by serving "'a notice to appear under section 1229(a)' *until* it has provided such time-and-place information." Br. in Opp. 11.

But if Congress's aim was simply to require that service of time-and-place information be part of the stop-time trigger, it could have easily drafted the *stop-time rule* to achieve that result. Instead, Congress amended the statute's *substantive notice requirements*. The government's claim that Congress's amendment to the notice requirements did not alter those requirements *at all* is improbable at best. That is especially true given that, as discussed, pp. 37-38, *supra*, Congress also copied definitional language that had previously established a specific notice document.

C. The Board's interpretation is inconsistent with the purposes behind the relevant statutory provisions.

The purposes underlying both of the relevant provisions at issue—section 1229(a)'s definition of "a 'notice to appear'" and section 1229b's stop-time rule—support interpreting section 1229(a) to require a specific notice document.

1. a. IIRIRA's legislative history identifies the concern that motivated Congress's revisions to the existing notice procedures: simplifying the notice process to make it more efficient and comprehensible. The House Judiciary Committee Report, for instance, described a concern about "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings" and Congress's desire to "simplify procedures for initiating removal proceedings" by requiring a "single form of notice." H.R. Rep. No. 104-469, pt. I, at 122, 159. This Court similarly noted in *Pereira* that it unfairly "'confuse[s] and confound[s]' noncitizens" to receive "notices that lack any information about the time and place of the removal proceedings." 138 S. Ct. at 2118-2119.

The government's interpretation of section 1229(a) undermines this purpose because it allows the government to continue with the two-step notice process that caused the "lapses" Congress sought to avoid. In *Pereira*, for example, after serving notice lacking time-and-place information on Mr. Pereira, the government mailed the subsequent hearing notice to the wrong address. 138 S. Ct. at 2107. Similarly, in *Yi Di Wang* v. *Holder*, 759 F.3d 670, (7th Cir. 2014), the government repeatedly failed to properly serve the hearing notice over the course of more than *ten years*. *Id.* at 671-672. These problems are exacerbated by the sometimes years-long delay before the government *even tries* to serve a hearing notice. *E.g.*, *Pereira*, 138 S. Ct. at 2112 (more than one year); *Camarillo*, 25 I. & N. Dec. at 644-645 & n.1 (more than two years). The one-step notice that

the government recognized the statute requires largely avoids these problems.[10]

Moreover, the government's position would allow it to implement multi-step notice processes far more complex—and far more likely to lead to notice disputes and unfairness to noncitizens—than even the two-step process with which Congress was concerned. For instance, as discussed, p. 29, *supra*, the government could provide every noncitizen entering the country with a written overview of removal proceedings—including the fact that those in removal proceedings have a right to counsel, must provide the Attorney General with their address and telephone number, and suffer certain consequences if they do not appear at their proceedings. *See* 8 U.S.C. § 1229(a)(1)(E), (F)(i), (G)(ii). On the government's reading of section 1229(a), it could then omit that critical information from the individual notice it provides years later at the outset of an actual removal proceeding.

Requiring time-and-place information in a specific "notice to appear" document was an unsurprising way to address Congress's desire to simplify the notice process. After all, the regulations had, for more than twenty years, required time-and-place information in the initial notice document. *See* pp. 10-11, *supra*. INS abandoned that requirement given the difficulty—in the 1950s through 1970s—of providing

---

[10] The government can, of course, change the hearing date provided in a notice to appear. 8 U.S.C. § 1229(a)(2). But if the government failed to properly serve notice of a changed hearing date, that issue could be resolved when the noncitizen appeared at the initially noticed date. That is not true if the initial notice has no date at all.

accurate time-and-place information in the initial notice. *See* pp. 10-11, *supra*. But by 1997, technology had significantly advanced, and INS and EOIR recognized that implementing the "automated scheduling" necessary to provide time-and-place information in the initial notice was perfectly feasible. 62 Fed. Reg. at 449; *see also Pereira*, 138 S. Ct. at 2118-2119 ("Given today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not … work together to schedule hearings before sending notices to appear.").

b. Ignoring IIRIRA's actual legislative history, the Board claimed that the "fundamental purpose" of a "notice to appear" is to "create[] a reasonable expectation of the alien's appearance at the removal proceeding," and that this purpose can be achieved with a multi-step notice process. *Menodza-Hernandez*, 27 I. & N. Dec. at 531.

That conception of the statute's purpose is transparently incomplete. To be sure, *Pereira* described this as *one* "essential function" of a "notice to appear," and thus concluded that creating such an expectation is *necessary*. 138 S. Ct. at 2115. But that does not mean that creating such an expectation is *sufficient*, and the statute itself makes clear that it is not. After all, if providing a reasonable expectation of appearance were the *only* purpose of "a 'notice to appear,'" then its requirements would begin and end with telling a noncitizen when and where to appear. The statute, however, requires that time-and-place information be provided together with the other information that, collectively, allows a noncitizen to meaningfully appear and defend herself.

2. Interpreting section 1229(a) to require a specific notice document is also consistent with the purpose of the stop-time rule. As discussed, pp. 8-9, *supra*, that rule was created to avoid gamesmanship—*i.e.*, to prevent noncitizens from "exploiting administrative delays to 'buy time' during which they accumulate periods of continuous presence." *Pereira*, 138 S. Ct. at 2119. The rule thus gives the government the power to stop the accrual of continuous residence and prevent such abuses, but requires that the government comply with section 1229(a)'s notice requirements in order to do so. *Id.*

Nothing about interpreting section 1229(a) to require a specific document permits the type of gamesmanship the stop-time rule was intended to avoid. There is nothing an immigrant could do to delay the government's compliance with the statute's notice requirements. And as soon as the government complies with those requirements, the immigrant stops accruing qualifying time. Thus, "[r]equiring the Government to furnish time-and-place information in a notice to appear … is entirely consistent with [the stop-time rule's] objective because, once a proper notice to appear is served, the stop-time rule is triggered, and a noncitizen would be unable to manipulate or delay removal proceedings to 'buy time.'" *Id.*

It was perfectly reasonable for Congress to require that the government comply with its statutory notice requirements to trigger the stop-time rule. There is little else in the statute (if anything) that incentivizes the government to comply with section 1229(a). And if the government does *not* comply with section 1229(a) before the noncitizen meets the rele-

vant durational requirement, that does not entitle the immigrant to cancellation of removal; there are numerous other demanding requirements for what is ultimately a *discretionary* form of relief. *See* pp. 44-45, *infra*.[11]

D. Other interpretive principles confirm the statute's plain meaning.

Two important and related interpretive principles confirm that the government must provide a specific notice document with the required information in order to serve "a notice to appear" that is "in accordance with" section 1229(a), and hence triggers the stop-time rule.

1. The fact that the stop-time rule involves only a threshold question of eligibility for a discretionary form of relief, not entitlement to relief, strongly supports a strict interpretation of the statutory text and history. *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).

Cancellation for nonpermanent residents, like Mr. Niz-Chavez, is particularly limited. A nonpermanent resident must not only have a "spouse, parent, or child" who is a U.S. citizen or lawful permanent resident, but also show that his deportation would cause "exceptional and extremely unusual hardship" to that family member. 8 U.S.C. § 1229b(b)(1)(D). He

---

[11] This is especially true given that predecessors to cancellation of removal had durational requirements with no stop-time rule at all for nearly eighty years. *See* pp. 7-8, *supra*.

must prove that he has "good moral character." *Id.* § 1229b(b)(1)(B). He cannot have any criminal conviction that makes him inadmissible or removable—including almost any drug crime. *Id.* § 1229b(b)(1)(C); *see id.* §§ 1182(a)(2), 1227(a)(2). He cannot pose a security risk. *Id.* § 1229b(c)(4); *see id.* §§ 1182(a)(3), 1227(a)(4). And he cannot have committed removable immigration fraud. *Id.* § 1229b(b)(1)(C); *see id.* § 1227(a)(3). Even meeting these 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 does not deserve a green card.

The standard for cancellation eligibility is demanding even for a permanent resident. A permanent resident is ineligible if she "committed" any criminal offense that would make her inadmissible during her required five years of lawful permanent residence and seven years of continuous residence. *Id.* § 1229b(d)(1) (emphasis added); *see id.* § 1182(a)(2). She is also ineligible if she poses a security risk or has committed an aggravated felony—a term that itself encompasses a broad range of criminal offenses, including many drug crimes. *Id.* §§ 1229b(a)(3), 1229b(c)(4); *see id.* §§ 1101(a)(43), 1182(a)(3), 1227(a)(4). And, as with a nonpermanent-resident applicant, these criteria only establish eligibility for discretionary relief—an applicant still must show that the equities favor allowing her to remain in the country. *See Matter of Sotelo-Sotelo*, 23 I. & N. Dec. 201, 203 (BIA 2001).

Given these restrictions, the only people for whom the stop-time question in this case will matter will be the most deserving immigrants—nonpermanent res-

idents 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. And entitlement to relief is still a matter of discretion—discretion that is itself limited by the annual cap on the number of immigrants who can receive cancellation. 8 U.S.C. § 1229b(e).

2. The "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). That "accepted principle[] of statutory construction" rests on the Court's longstanding recognition that "deportation is a drastic measure and at times the equivalent of banishment or exile." *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *see also INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Padilla* v. *Kentucky*, 559 U.S. 356, 373-374 (2010). Courts should "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." *Costello*, 376 U.S. at 128.

Narrow construction is particularly necessary 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. This Court has identified "preventing the breaking up of families" as precisely the type of "humanitarian" purpose that warrants construction in favor of noncitizens. *Id.*; *cf. also Dean* v. *United*

States, 556 U.S. 568, 584-585 (2009) (Breyer, J., dissenting) (explaining that lenity is particularly important when interpreting provisions that remove adjudicatory discretion).

The Court can apply this interpretive canon at *Chevron*'s first step. Courts must apply "normal tools of statutory interpretation" before deeming a statute "ambiguous" for *Chevron* purposes. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1569, 1572 (2017); *see also Kisor*, 139 S. Ct. at 2415. The principle that ambiguous deportation provisions should be read to have the "narrowest of several possible meanings" is precisely such an "accepted principle[] of statutory construction." *Costello*, 376 U.S. at 128.

The Court recognized this exact point in *St. Cyr*. In that case, it was "ambiguous" from the statute's text whether the repeal of a certain form of deportation relief applied retroactively. 533 U.S. at 314-315. Despite this facial ambiguity, this Court refused to defer to the BIA, concluding that deference only applies if a statute is ambiguous after "applying the normal 'tools of statutory construction.'" *Id.* at 320 n.45 (quoting *Chevron*, 467 U.S. at 843). The Court identified two relevant interpretive tools: "[t]he presumption against retroactive application" and "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Id.* at 320. After applying these tools, the Court concluded that "there is, for *Chevron* purposes, no ambiguity … for [the] agency to resolve." *Id.* at 320 n.45.

As in *St. Cyr*, the statute's text, confirmed by its history and traditional interpretive canons, unambiguously resolves this case.

II. Even if the statute contains some ambiguity, this Court should reject the Board's interpretation.

Even if the statute's text, structure, history, and purpose left some room for uncertainty, the Board's reading of the statute is not the best one—indeed, it does not even "fall within the bounds of reasonable interpretation." *Kisor*, 139 S. Ct. at 2416 (quotation marks omitted). The Board abandoned prior agency positions with no explanation and adopted a rule that conflicts with the statute's goal of simplifying the notice process and avoiding confusion—all in a transparent attempt to allow the government to circumvent statutory notice requirements and save itself the bother of developing a calendaring system it previously deemed both necessary and feasible. Deference to such results-oriented agency adjudication is plainly inappropriate. Indeed, if necessary, this Court should reconsider what (if any) deference it owes to the Board's interpretation of the INA.

1. Even applying standard deference principles, the agency's unexplained about-face and single-minded focus on accommodating DHS's preferred notice practices fall far outside the permissible bounds of reasoned interpretation.

a. "Agencies are free to change their existing policies," but they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). If an agency cannot "show that there are good reasons for the new policy," its decision "receives no *Chevron* deference." *Id.* at 2126; *see also INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). The BIA failed to satisfy this basic requirement here.

There is no question that the Board's decision conflicts with prior Department of Justice interpretations of the statute. *See* 8 U.S.C. § 1103(g)(2). INS and EOIR explicitly read section 1229(a) to require a specific notice document and enacted regulations based on that understanding. *See* pp. 13-14, *supra*. INS similarly did not authorize the immigration court to issue notices to appear, and thus clearly did not understand the hearing notice from the immigration court to be part of the notice to appear. *See* 62 Fed. Reg. 10,312, 10,367-10,368 (March 6, 1997); 8 C.F.R. § 239.1(a). And the Board itself both described "the notice to appear" as "a single instrument," *Ordaz*, 26 I. & N. Dec. at 640 n.3, and explicitly rejected the notion that "two documents" can "combine together to comprise the requisite service of a notice to appear," *Camarillo*, 25 I. & N. Dec. at 648.

The Board cast this all aside in *Mendoza-Hernandez* with practically no explanation. *See* 27 I. & N. Dec. at 525 n.8. The Board did not acknowledge the INS/EOIR rulemaking. And it dismissed its own prior decisions in a brief footnote, calling them "flawed" on the theory that a "notice of hearing is *not part of the notice to appear*" but is instead a "separate notice, served *in conjunction with the notice to appear*, that satisfies the requirements of section [1229(a)(1)(G)]." *Id.* (emphasis added). Far from providing "good reasons" for the change in position, that statement undermines the Board's position by recognizing that a notice of hearing is *not* part of the notice to appear. Such an unjustified about-face is inherently unreasonable and not entitled to deference. *See Cardoza-Fonseca*, 480 U.S. at 446 n.30 (refusing to defer to the BIA given "the in-

consistency of the positions the BIA has taken through the years").

b. Even putting aside the Board's garbled explanation for its change of heart, the Court need not defer to its newfound approach. As described above, pp. 24-39, *supra*, statutory text and context actually *foreclose* the BIA's interpretation. And the BIA's piecemeal approach undermines Congress's goal—manifest in the statute's text, structure, and history—of simplifying the notice process through the provision of a single notice document. *See* pp. 39-42, *supra*. Even if the Board's approach is not unambiguously incorrect, therefore, at minimum it is "[un]reasonable in light of the text, nature, and purpose of the statute," *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2142 (2016), and hence "does not merit deference," *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 321 (2014).

Remarkably, the BIA hardly engaged with the statute's text, structure, or history, and its decision is devoid of any meaningful attempt to interpret section 1229(a)(1). Instead, the Board's "interpretation" appears to be grounded in little more than a desire to allow the government to follow its preferred, extra-statutory notice practices without facing the stop-time consequences of that decision.

This administrative-convenience rationale first appeared in the Board's (pre-*Pereira*) *Camarillo* decision. Ignoring section 1229(a)'s text almost completely, the Board explained that "it is often not practical to include [time-and-place information] on the notice to appear." 25 I. & N. Dec. at 648. Therefore, the Board held, the government should be able

to trigger the stop-time rule without providing that information. *E.g.*, *id.* at 650.

After this Court rejected *Camarillo*, the Board doubled down on its administrative-convenience rationale in *Mendoza-Hernandez*. Once again, the Board largely ignored the statute's text and completely ignored its history, even in the face of a dissent that relied heavily on both. And once again, the Board bent over backwards to allow the government to shirk its responsibility under IIRIRA to provide hearing information on the notice to appear while still triggering the stop-time rule by declaring the government's practice consistent with a transparently incomplete understanding of the statute's "purpose." 27 I. & N. Dec. at 531; *see* p. 42, *supra*.

In short, the Board's motivating concern has not been to identify the best reading of the statute, but to find a way to allow the government to follow its extrastatutory notice practice while still triggering the stop-time rule. That is not the type of reasoned decisionmaking that the law expects of administrative agencies—much less the type of reasoned decisionmaking that warrants *Chevron* deference.

2. The BIA's decisions at issue in *Pereira* and this case also provide a strong basis, if necessary, for reconsidering this Court's deference to the Board's interpretations of the INA.

"[T]he theoretical foundations for *Chevron* deference are perhaps most precarious with respect to immigration adjudication." Wadhia & Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 Duke L.J. (forthcoming 2021) (manu-

script at 36).[12] After all, *Chevron*'s concern that "[j]udges are not experts in the field," 467 U.S. at 865, has little application given that most reviewable Board decisions involve "pure question[s] of statutory construction," *Cardoza-Fonseca*, 480 U.S. at 446, on which judges *are* experts. *See Da Silva* v. *Attorney General*, 948 F.3d 629, 635 (3d Cir. 2020) (questioning whether *Chevron* should apply to the Board's resolution of a "pure question of statutory construction"). *Chevron*'s deliberative-process justification is similarly inapplicable, as the Board often publishes decisions with enormous ramifications—and potentially retroactive effect—with *no* public input (as it did in *Mendoza-Hernandez*). *See* Wadhia, *supra*, at 21-27; *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1146-1147 (10th Cir. 2016) (Gorsuch, J., concurring).

The Board's decision here highlights these issues. After INS and EOIR interpreted section 1229(a) to require a specific notice document and issued regulations premised on that understanding, the government decided it did not want to follow the statute—or even the regulations. The government did not provide time-and-place information "in the Notice to Appear … where practicable" (excluding that information only in the event of a "power outage" or a "computer crash[]," 8 C.F.R. § 1003.18(b); 62 Fed. Reg. at 449)—instead, it almost *never* provided that information in the "notice to appear" *at all*. *Pereira*, 138 S. Ct. at 2111. The government then sought to avoid the stop-time consequences of this practice not through notice-and-comment rulemaking (which could be publicly challenged), but by convincing the

---

[12] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3662827.

Board to reject the very interpretation of the statute that INS and EOIR had adopted in their rulemaking. This Court should not be tied to the agency's most recent interpretation of section 1229(a) if it differs from how this Court would interpret that provision in the first instance.

This Court has, of course, applied *Chevron* to Board decisions. *E.g.*, *Cardoza-Fonseca*, 480 U.S. at 446-447. But traditional stare decisis principles have little application to the judge-made deference rule at issue here, especially given that this Court has deferred to Board decisions relatively infrequently and there are few (if any) reliance interests at stake. *See Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). Especially given the complex constitutional questions always raised by deferring to incorrect agency interpretations of federal statutes—*see, e.g.*, *Pereira*, 138 S. Ct. at 2120-2121 (Kennedy, J., concurring); *Michigan* v. *EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring)—there is no reason this Court should continue to defer in a context in which the justifications for such deference are so weak.

Ultimately, however, the Court need not reach this issue. The Board's decision is precluded by the statute's text, structure, history and purpose, and at the very least falls far outside the bounds of reasonable interpretation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SUFEN HILF
HILF & HILF, PLC
1775 W. Big Beaver Rd.
Troy, MI 48084

BENJAMIN HAYES
GOODWIN PROCTER LLP
1900 N St. NW
Washington, DC 20036

DAVID J. ZIMMER
Counsel of Record
GERARD J. CEDRONE
GABRIEL ROSSMAN
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
dzimmer@goodwinlaw.com
(617) 570-1000

Counsel for Petitioner

August 6, 2020

APPENDIX

APPENDIX CONTENTS

Page

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. § 1229a provides:

§ 1229a. Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority

(under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place— (i) in person, (ii) where agreed to by the parties, in the absence of the alien, (iii) through video conference, or (iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide

the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or

in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of

the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or

falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

---

[1] So in original.

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[2] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates

[2] So in original.

extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[3] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

---

[3] So in original. A closing parenthesis probably should appear.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

3. 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).

4. 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.

5. Section 242 of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 209 (codified at 8 U.S.C. § 1252 (1958)), provides, in relevant part:

* * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the

proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States

under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

* * *

6. 21 Fed. Reg. 97 (Jan. 6, 1956) (codified at 8 C.F.R. § 242.1 (1957)), provides in relevant part:

* * *

§ 242.1 *Order to show cause and notice of hearing—*

(a) *Commencement.* Every proceeding to determine the deportability of an alien in the United States is commenced by the issuance and service of an order to show cause by the Service. In the proceeding the alien shall be known as the respondent. Orders to show cause may be issued by district directors, deputy district directors, district officers who are in charge of investigations, or officers in charge of sub-offices,

(b) *Statement of nature of proceeding.* The order to show cause will contain a statement of the nature of the proceeding, the level authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before a special inquiry officer for hearing at a time and place stated in the order, not less than seven days, after the service of such order, except that where the issuing officer, in his discretion, believes that the public interest, safety, or security so requires, he may provide in the order for a shorter period. The issuing officer may, in his discretion, fix a shorter period in any other case at the request of and for the convenience of the respondent.

(c) *Service.* Service of the order to show cause shall be made by having a copy delivered to the respondent by an immigration officer or by mailing it to the respondent at his last known address by registered, return receipt requested. Delivery of a copy within this rule means: handing it to the respondent or leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. The post office return receipt or the certificate by the officer serving the order by personal delivery setting forth the manner of said service shall be proof of service.

* * *

7. 43 Fed. Reg. 36,238 (Aug. 16, 1978) (codified at 8 C.F.R. § 242.1 (1979)), provides in relevant part:

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

Setting of Hearing Dates in Deportation Proceedings

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations of the Immigration and Naturalization Service respecting the setting of hearing dates in deportation proceedings. The amendment will provide that the date and place of the hearing may be specified in the order to show cause or specified at a later time. The regulation is necessary because the existing rule requires the date and place of the hearing to be specified at the time the order to show cause is issued. Very often for reasons which arise subsequently, it is not possible to hold the hearing as specified in the order to show cause, and it is then necessary to postpone and reschedule the hearing. This rule is necessary and intended to enable the Service to schedule deportation hearings more systematically and effectively and to eliminate the need for the correspondence and other paperwork incidental to the rescheduling of hearings which the existing rule often requires.

EFFECTIVE DATE: August 16, 1978.

* * *

SUPPLEMENTARY INFORMATION: Reference is made to the notice of proposed rulemaking published on December 16, 1977, at 42 FR 63426, in which the Service proposed to amend its regulations at 8 CFR 242.1(b) respecting the setting of hearing dates in deportation proceedings.

Existing 8 CFR 242.1(b) requires the time and place of the alien's deportation hearing to be stated in the order to show cause. The Service has found that this requirement often results in the necessity to postpone hearings because, for various reasons, they cannot be held at the time specified in the order to show cause. This situation requires the Service to reschedule the hearings, generating much correspondence and paperwork as a result. Based on these considerations the Service issued this notice of proposed rulemaking in which it was proposed to amend this rule to provide that the date and place of the hearing may be stated in the order to show cause or be later specified and that the respondent should be notified of the time and place of the hearing no less than 7 days prior to the hearing. The Service invited submission of representations on this proposed rule. A number of representations were received and they have all been carefully considered. Based on a consideration of these representations and the administrative needs of the Service it has been determined that the proposed regulation should be adopted without change. It is our intention that this revised procedure for the setting of hearing dates will provide the Service greater flexibility in the scheduling of hearings. In addition, this increased flexibility in scheduling hearings will benefit the respondents and their attorneys and representatives. It will eliminate uncertainty as to when the hearing will

actually be set and alleviate much of the inconvenience by permitting the Service to set the hearing dates in a manner in which the convenience of all parties may be served.

In the light of the foregoing, chapter I of title 8 of the Code of Federal Regulations is hereby amended as set forth below.

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

In part 242, § 242.1(b) is amended by revising the text of the third sentence and dividing it into two separate sentences. As amended, § 242.1(b) reads as follows:

§ 242.1 Order to show cause and notice of hearing.

. . . . .

(b) *Statement of nature of proceeding.* The order to show cause will contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before an immigration judge for a hearing at a time and place which may be stated in the order or may be later specified. Respondent shall be notified of the time and place of the hearing not less than 7 days before the hearing date except

that where the issuing officer, in his discretion, believes that the public interest, safety, or security so requires, he may schedule the hearing on shorter notice. The issuing officer may, in his discretion, schedule the hearing on shorter notice in any other case at the request of and for the convenience of the respondent.

* * *

8. 52 Fed. Reg. 2,931 (Jan. 29, 1987) (codified at 8 C.F.R. § 242.1 (1988)), provides in relevant part:

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

* * *

In § 242.1, paragraphs (a) and (b) are revised to read as follows:

§ 242.1 Order to show cause and notice of hearing.

(a) *Commencement.* Every proceeding to determine the deportability of an alien in the United States is commenced by the filing of an Order to Show Cause with the Office of the Immigration Judge. In the proceeding the alien shall be known as the respondent. Orders to Show Cause may be issued by District Directors, Acting District Directors, Deputy District Directors, Assistant District Directors, for Investigations, and Officers in Charge at Agana, GU; Albany, NY; Charlotte Amalie, VI; Cincinnati, OH; Hammond, IN; Memphis, TN; Milwaukee, WI; Norfolk, VA; Oklahoma City, OK; Pittsburgh, PA; Providence, RI; Salt Lake City, UT; St. Louis, MO; and Spokane, WA.

(b) Statement of Nature of Proceedings. The Order to Show Cause shall contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of the law, and a designation of the charge against the respondent and of the statutory provisions alleged to have been violated.

The Order shall require the respondent to show cause why he should not be deported. The Order shall call upon the respondent to appear before an Immigration Judge for a hearing at a time and place which shall be specified by the Office of the Immigration Judge.

* * *

9. Section 545 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5061 (codified at 8 U.S.C. § 1252b (1994)), provides in relevant part:

SEC. 545. DEPORTATION PROCEDURES; REQUIRED NOTICE OF DEPORTATION HEARING; LIMITATION ON DISCRETIONARY RELIEF.

(a) IN GENERAL.—Chapter 5 of title II is amended by inserting after section 242A the following new section:

"DEPORTATION PROCEDURES

"SEC. 242B. (a) NOTICES.—

"(1) ORDER TO SHOW CAUSE.—In deportation proceedings under section 242, 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, upon request, the alien will be provided a 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 242.

"(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 failure to provide address and telephone information pursuant to this subparagraph.

"(2) NOTICE OF TIME AND PLACE OF PROCEEDINGS.—In deportation proceedings under section 242—

"(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 the failure 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 failing, except under exceptional circumstances, to attend such proceedings.

"(3) FORM OF INFORMATION.—Each order to show cause or other notice under this subsection—

"(A) shall be in English and Spanish, and

"(B) shall specify that the alien may be represented by an attorney in deportation proceedings under section 242 and will be provided, in accordance with subsection (b)(1), a period of time in order to obtain counsel and a current list described in subsection (b)(2).

"(4) 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).["]

* * *

(e) CONFORMING AMENDMENT.—The 8th sentence of section 242(b) (8 U.S.C. 1252(b)) is amended to read as follows: "Such regulations shall include requirements consistent with section 242B."

* * *

10. Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, 3009-587 (codified at 8 U.S.C. § 1229) provides in relevant part:

SEC. 304. REMOVAL PROCEEDINGS; CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS; VOLUNTARY DEPARTURE (REVISED AND NEW SECTIONS 239 TO 240C).

(a) IN GENERAL.—Chapter 4 of title II is amended—

* * *

(3) by inserting after section 238 the following new sections:

"INITIATION OF REMOVAL PROCEEDINGS

"SEC. 239. (a) NOTICE TO APPEAR.—

"(1) IN GENERAL.—In removal proceedings under section 240, 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 240.

"(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 240(b)(5) 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 240(b)(5) 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 240, 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 240(b)(5) 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).["]

* * *

11. 62 Fed. Reg. 444 (Jan. 3, 1997) (final rule codified at 8 C.F.R. § 3.18 (1998)), provides in relevant part:

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service and Executive Office for Immigration Review

* * *

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures

AGENCY: Immigration and Naturalization Service, Justice, and Executive Office for Immigration Review, Justice.

ACTION: Proposed rule.

* * *

The Notice to Appear (Form I-862)

The charging document which commences removal proceedings under section 240 of the Act will be referred to as the Notice to Appear, Form I-862, replacing the Order to Show Cause, Form I-221, that was used to commence deportation proceedings and the Notice to Detained Applicant of Hearing Before an Immigration Judge, Form I-110. The Notice to Appear must contain nearly all of the information that was required to be in the Form I-221. The regulations reflect the fact that section 304 of IIRIRA did not retain the requirement that the Notice to Appear be provided in Spanish; that the mandatory period between service of a Notice to Appear and the date of an individual's first hearing is 10 days rather than the 14 days required for the Order to Show Cause; that service of

the Notice to Appear by ordinary mail, rather than certified mail, is sufficient if there is proof of attempted delivery to the last address provided by the alien and noted in the Central Address File; and that no written notice need be provided if the alien has failed to provide his or her address as required under the amended Act.

In addition, the proposed rule implements the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear. The Department will attempt to implement this requirement as fully as possible by April 1, 1997. Language has been used in this part of the proposed rule recognizing that such automated scheduling will not be possible in every situation (e.g., power outages, computer crashes/downtime.)

* * *

Section 3.18 is revised to read as follows:

§ 3.18 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.

* * *