No. 19-863

In the Supreme Court of the United States

AGUSTO NIZ-CHAVEZ, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the government must provide written notice under 8 U.S.C. 1229(a)(1), which is required to trigger the stop-time rule, 8 U.S.C. 1229b(d)(1)(A), in a single document.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the Federal Reporter but is reprinted at 789 Fed. Appx. 523. The decisions of the Board of Immigration Appeals (Pet. App. 16a-25a) and the immigration judge (Pet. App. 26a-40a) 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. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that, in removal proceedings, "written notice" be provided to the alien of several categories of information, including, as relevant here, "[t]he time and place at which the proceedings will be held." 8 U.S.C. 1229(a)(1)(G)(i). If an alien is served such notice under Section 1229(a)(1), one of the consequences concerns his accrual of ten years of continuous physical presence in the United States, which is necessary for an alien like petitioner who is not a lawful permanent resident to qualify for the discretionary relief of cancellation of removal. 8 U.S.C. 1229b(b)(1)(A). Under the stop-time rule, the accrual of continuous presence is "deemed to end" when the alien has been given the notice required by Section 1229(a)(1). 8 U.S.C. 1229b(d)(1).

In *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), this Court determined Section 1229b(d)(1)(A)'s stop-time rule is triggered only when the government serves an alien "'written notice (in [Section 1229] referred to as a "notice to appear")'" of the time and place of the removal proceedings, not by mere service of a standard-form "document that is labeled 'notice to appear'" but that does not contain that information. *Id.* at 2109-2110 (quoting 8 U.S.C. 1229(a)(1)). The question in this case is whether "written notice" of the information required by Section 1229(a)(1) must be served in a single document in order to trigger the stop-time rule, or whether such notice may be served in two documents that together convey all the required information.

1. a. Two paragraphs in Section 1229(a), which Congress enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, specify the

statutory notice required in removal proceedings. *Id.* § 304(a)(3), 110 Stat. 3009-587. Paragraph (1) of Section 1229(a) provides:

> 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 [several categories of information].

8 U.S.C. 1229(a)(1). That information includes "[t]he nature of the proceedings against the alien"; "[t]he charges against the alien and the statutory provisions alleged to have been violated"; "[t]he time and place at which the proceedings will be held"; and "[t]he consequences" of "fail[ing], except under exceptional circumstances, to appear at such proceedings." *Ibid.*

In order to provide the alien "the opportunity to secure counsel before [his] first hearing date," the initial "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear," unless the alien requests an earlier date. 8 U.S.C. 1229(b)(1).

Regulations promulgated in 1997, after IIRIRA, established a standardized form, Form I-862, that is itself entitled "Notice to Appear." 8 C.F.R. 299.1 (1998); see 62 Fed. Reg. 10,312, 10,393-10,394 (Mar. 6, 1997). That form, which this brief refers to as an NTA, must by regulation include "administrative information" for "the Immigration Court" (including the alien's registration number, alleged nationality and citizenship, and language), 8 C.F.R. 1003.15(c); 8 C.F.R. 3.15(c) (1998) (same), as well as most of the information listed in Section 1229(a)(1), except the time and place of the initial hearing, 8 C.F.R. 1003.15(b); 8 C.F.R. 3.15(b) (1998)

(same). Cf. 8 U.S.C. 1229(a)(1)(A)-(F). The regulations instead provide that, "where practicable," the Department of Homeland Security (DHS) shall provide in "the Notice to Appear" the "time, place and date of the initial removal hearing," but "[i]f that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for * * * providing notice to the government and the alien of the time, place, and date" of that hearing. 8 C.F.R. 1003.18(b); 8 C.F.R. 3.18(b) (1998) (same); see 8 C.F.R. 1001.1(c).

Paragraph (2) of Section 1229(a) applies if "any change or postponement in the time and place of [removal] proceedings" occurs. 8 U.S.C. 1229(a)(2)(A). In those circumstances, "a written notice" must be provided specifying "(i) the new time or place of the proceedings" and "(ii) the consequences [of failing to attend]." *Ibid.*

b. Section 1229a, in turn, provides that if an alien does not attend his removal proceeding "after written notice required under paragraph (1) or (2) of section 1229(a) * * * has been provided to the alien or the alien's counsel," then the alien "shall be ordered removed in absentia," but only if DHS "establishes by clear, unequivocal, and convincing evidence" that "the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). Such an order may later be rescinded upon "a motion to reopen filed at any time" if, *inter alia*, the alien shows that he "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

An alien ordered removed in absentia will be ineligible for various forms of relief for ten years if the alien also was "provided oral notice" of the time and place of

his proceedings and the consequences of failing to appear "at the time of the [written] notice described in paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(7).

c. Finally, "written notice" under Section 1229(a)(1) triggers Section 1229b(d)(1)'s stop-time rule, which can render the alien ineligible for cancellation of removal. See 8 U.S.C. 1229b(d)(1)(A).

In 1996, when Congress enacted Section 1229(a)'s written-notice requirements, it also replaced suspension-of-deportation relief under 8 U.S.C. 1254 (1994) with Section 1229b's more "limit[ed]" cancellation-of-removal provisions that authorize relief for narrower "categories of illegal aliens" and impose greater restrictions on the "circumstances under which [relief] may be granted." H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996) (1996 Conf. Report); see IIRIRA § 304(a)(3), 110 Stat. 3009-594 to 3009-596. Under Section 1229b, the Attorney General has discretion to cancel the removal of certain removable aliens who are statutorily eligible for relief. 8 U.S.C. 1229b(a) and (b). The alien bears the burden of establishing both his statutory eligibility and that a favorable exercise of discretion is warranted. 8 U.S.C. 1229a(c)(4)(A).

To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must show that (A) he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [his] application"; (B) he "has been a person of good moral character during such period"; (C) he "has not been convicted of [certain] offense[s]"; and (D) his "removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child, who is a citizen of the United

States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(A)-(D).

The continuous-physical-presence requirement is subject to Section 1229b(d)(1)'s "stop-time rule." *Pereira*, 138 S. Ct. at 2110. As relevant here, the stop-time rule provides that "any period of * * * continuous physical presence in the United States shall be deemed to end * * * when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1)(A).

2. In February 2005, petitioner, a native and citizen of Guatemala, unlawfully entered the United States. Pet. App. 26a-27a; J.A. 6, 17.

On March 23, 2013, DHS served petitioner with an NTA, *i.e.*, the standard-form document entitled "Notice to Appear." J.A. 5-11 (NTA); Administrative Record (A.R.) 425-426 (same). The NTA informed petitioner of the "removal proceedings" being initiated, the charges against him, and the other information required by Section 1229(a)(1), J.A. 5-6, 8-10, except an initial hearing date and time, stating instead that the hearing would be "on a date to be set" and "a time to be set." J.A. 6 (emphasis omitted).

Two weeks later, on or about April 8, 2013, petitioner transmitted to the immigration court a change-of-address form to update his mailing address. A.R. 424 (form with Detroit, Michigan immigration court received stamp).

On May 24, 2013, DHS filed the NTA with the immigration court. A.R. 425. On May 29, consistent with regulations providing that the immigration court is "responsible for scheduling the initial removal hearing and providing notice to the government and the alien of [its] time, place, and date" if "that information is not contained in the Notice to Appear," 8 C.F.R. 1003.18(b), the immigration court served petitioner at his new address

with a document labeled Notice of Hearing, informing him of his 8:30 a.m. hearing on June 25, 2013. J.A. 12; A.R. 422.

Petitioner attended that initial hearing, J.A. 15-19, and conceded the charges, J.A. 17. The proceedings were continued for adjudication of petitioner's three requests for relief: statutory withholding of removal, withholding of removal under regulations implementing the Convention Against Torture, and, alternatively, voluntary departure. J.A. 18-19.

From June 2013 to October 2017, the immigration court issued nine additional Notices of Hearing setting separate hearing dates, five of which were rescheduled. J.A. 20, 32, 37, 39, 48, 53, 56, 59, 62. Petitioner attended all of the actual hearings. J.A. 25-31, 42-47; A.R. 166-216, 217-224.

In November 2017, the immigration judge (IJ) found petitioner removable as charged, Pet. App. 38a; denied withholding of removal and related protection, *id.* at 33a-38a; and granted voluntary departure, *id.* at 38a-39a. Petitioner appealed to the Board of Immigration Appeals (Board). A.R. 99-101.

3. a. While that administrative appeal was pending, this Court issued its 2018 decision in *Pereira*, *supra*. In *Pereira*, the government had served Pereira with an NTA that "included all of the information required by [Section] 1229(a)(1)" except "the date and time of Pereira's removal proceedings," and Pereira "never received" the subsequent notice sent to inform him of "the specific date and time of his hearing" before he accrued ten years of physical presence in the United States. 138 S. Ct. at 2112-2113. This Court stated that the case presented the "narrow question" whether service of "a document that is labeled 'notice to appear,'" but that

fails to specify the time or place of removal proceedings, is itself "a 'notice to appear under section 1229(a)'" as that phrase is used in Section 1229b(d)(1)(A)'s stop-time rule. *Id.* at 2109-2110. The Court answered no, holding that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." *Id.* at 2110. The fact that a document may be "styled as a 'notice to appear,'" the Court explained, is insufficient to provide the requisite notice "in [Section] 1229(a)(1)" of the substantive information required by statute, including the "'time and place at which the proceedings will be held.'" *Id.* at 2113 & n.5 (quoting 8 U.S.C. 1229(a)(1)(G)(i)).

In a concurring opinion, Justice Kennedy explained that an "emerging consensus" on the question presented in *Pereira* had originally arisen in the courts of appeals before it was "abruptly dissolved" in the wake of the Board's decision in *In re Camarillo*, 25 I. & N. Dec. 644 (2011), which held that an NTA that did not contain the date and time of the initial hearing was itself sufficient to trigger the stop-time rule. See *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). Justice Kennedy identified *Guamanrrigra* v. *Holder*, 670 F.3d 404 (2d Cir. 2012) (per curiam)—which "h[e]ld that the stop-time rule is triggered upon service of a Notice to Appear that (alone or in combination with a subsequent notice) provides the notice required by [Section 1229](a)(1)," *id.* at 410—and similar decisions as illustrating the courts' initial determination that "the notice necessary to trigger the stop-time rule" is "not 'perfected' until the immigrant receive[s] all the information listed in [Section] 1229(a)(1)." *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (quoting *Guamanrrigra*, 670 F.3d at 410).

Justice Kennedy found it "troubling" that the lower courts had diverted from that consensus. *Ibid.*

b. Petitioner subsequently filed his brief to the Board. A.R. 63-83. He later moved the Board to remand his case to the IJ in light of *Pereira* so that he could submit an application for cancellation of removal. A.R. 16-20; see A.R. 26-33 (proposed application).

c. The Board, in a nonprecedential decision (Pet. App. 16a-25a), affirmed. *Id.* at 17a-21a. The Board also denied petitioner's motion to remand. *Id.* at 21a-23a. The Board stated that a remand motion must present "new facts to be considered" and "be supported by affidavits or other evidentiary materials." *Id.* at 21a (citing 8 C.F.R. 1003.2(c)(1)). The Board concluded that a remand to allow petitioner to file a cancellation-of-removal application was "unwarranted" because he had failed to proffer "any [new] material evidence" that "establishes his prima facie eligibility for the relief requested." *Id.* at 22a-23a.[1]

In a footnote, the Board additionally concluded that petitioner failed to "establish[] that he has been physically present in the United States for a continuous period of 10 years" as required to be eligible for cancellation, because he had "first entered the United States in February of 2005" and "received the notice of hearing for his June 25, 2013, hearing" after having been placed in removal proceedings. Pet. App. 23a n.3.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-15a. As relevant here, the court of appeals held (*id.* at 11a-15a) that the Board "did

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[1] Petitioner attached two short letters to his motion. J.A. 68-70 (A.R. 36-37). Petitioner relies (Br. 18) on five additional letters (J.A. 67, 71-75), which are not in the Administrative Record and cannot be considered on judicial review. 8 U.S.C. 1252(b)(4)(A).

not abuse its discretion" in denying petitioner's remand motion, *id.* at 15a.

The court of appeals explained that it had recently held in *Garcia-Romo* v. *Barr*, 940 F.3d 192 (6th Cir. 2019), petition for cert. pending, No. 19-1316 (filed May 22, 2020), that "the government can trigger the stop-time rule by satisfying the requirements of a notice to appear through multiple documents," so long as it provides notice of "all the information required under 8 U.S.C. 1229(a)(1)." Pet. App. 14a. The court therefore concluded that "the stop-time rule was triggered for [petitioner] on May 29, 2013, when he received information concerning the time and place of the immigration proceedings against him, which occurred prior to him accruing [the] ten years of continuous physical presence in the United States" necessary to be "eligible for cancellation of removal." *Ibid.*

SUMMARY OF ARGUMENT

A. The Board adopted the best reading of the INA in concluding that "written notice" under Section 1229(a)(1), which triggers Section 1229b(d)(1)(A)'s stop-time rule, may be provided in one document or two so long as the documents convey all the information required by Section 1229(a)(1).

1. a. The text of Section 1229(a)(1) specifies how the government must provide notice of Section 1229(a)(1)'s categories of substantive information, and it imposes only two requirements: That notice must be "written" and must be served in person or, if not practicable, by mail. There is no question that the government served petitioner with all required categories of information in precisely that manner by serving him with an NTA and, later, a hearing notice. And because nothing in Section 1229(a)(1)'s text imposes a further requirement that all

information must be provided in one "document," that should be the end of the matter.

b. Petitioner seeks to rest his atextual one-specific-document rule in Section 1229(a)(1)'s instructions governing "written notice (in this section *referred to as a 'notice to appear'*)," 8 U.S.C. 1229(a)(1) (emphasis added), by focusing on the singular form of the article "a" before "notice to appear." But because Congress *defined* the phrase "a 'notice to appear'" when used in Section 1229 to mean "written notice" (*ibid.*) as required under Section 1229, *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2116 (2018), petitioner errs by focusing on the defined term rather than its definition. In any event, the Dictionary Act, and the common grammatical use of such singular terms to refer to collections of information, both show that two documents conveying all statutorily required substantive information can provide "a notice to appear."

2. The stop-time rule reinforces that conclusion. That rule puts all similarly situated aliens on equal footing with respect to cancellation-of-removal relief once they have been served with notice of all of the information specified by Section 1229(a)(1), which shows that the government is committed to moving forward with their removal. That notice function does not turn on whether notice is provided in one or two documents. Petitioner's contrary rule would lead to perverse results, treating aliens who received notice of the same information at the same time differently based on whether the information was conveyed in one document or two. Such elevation of form over function is precisely what this Court rejected in *Pereira*. Petitioner's rule also would turn the limited scope of cancellation relief on its

head by conferring discretion on the Executive that Congress enacted IIRIRA to eliminate.

3. The broader statutory context points in the same direction. The provisions that turn on written notice under Section 1229(a)(1) all show that Congress intended the provision as a mechanism for conveying substantive information that does not turn on whether the information is conveyed in one document or two.

4. The legislative and regulatory history reflects no intent to depart from that common-sense conclusion. Petitioner invokes snippets of history taken out of context, relies on a 1997 notice of proposed rulemaking (NPRM) that does not adopt the rule petitioner advances, and focuses on pre-IIRIRA practice that does not show that Congress in 1996 intended to adopt petitioner's one-document rule.

5. Finally, practical considerations warrant no departure from Section 1229(a)(1)'s text. Petitioner is wrong that the requisite notice could be served before enforcement action is taken; other INA provisions address potential issues with written notice; and the government has a strong incentive to ensure that notice is properly and promptly served on aliens.

B. The Board's interpretation of the INA is, at the very least, a reasonable one entitled to deference. The Board sufficiently explained why its interpretation was different from its prior stop-time-rule decision that this Court abrogated in *Pereira*. And according *Chevron* deference to the Board's interpretation firmly rests on the Court's longstanding interpretation of the INA's broad delegation to the Attorney General to make rulings which "shall be controlling" with respect to "all questions of law," 8 U.S.C. 1103(a)(1), and the primary role of the political branches in the immigration context.

ARGUMENT

THE STOP-TIME RULE IS TRIGGERED WHEN THE GOVERNMENT SERVES AN ALIEN WITH "WRITTEN NOTICE" OF THE SUBSTANTIVE INFORMATION REQUIRED BY SECTION 1229(a)(1), WHETHER THAT NOTICE IS PROVIDED IN ONE DOCUMENT OR TWO

A nonpermanent-resident alien who is unlawfully present in the United States is eligible for cancellation of removal only if he can establish, *inter alia*, ten years of continuous physical presence in the United States. 8 U.S.C. 1229b(b)(1)(A). Under the stop-time rule, that continuous presence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1)(A). That reference to "a notice to appear under section 1229(a)," *ibid.*, "specifies where to look to find out what 'notice to appear' means." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2114 (2018). Section 1229(a)(1) then "defines" that term (*id.* at 2116) by providing that an alien must be served with "written notice (in this section referred to as a 'notice to appear')" specifying several categories of information. 8 U.S.C. 1229(a)(1). The Board has interpreted the "'written notice'" triggering the stop-time rule to mean notice in either "a single document" or "a combination of documents" conveying all "the essential information" required by statute. *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520, 531 (2019).

The Board's interpretation embodies the best reading of the INA's text in light of the statutory context, structure, history, and purpose. At a minimum, it reflects a reasonable interpretation that is entitled to deference. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

A. Under The Best Reading Of The Statute, The Stop-Time Rule Can Be Triggered By "Written Notice" In Two Documents Conveying The Information Required By Section 1229(a)(1)

"The beginning point" in statutory construction "is the relevant statutory text." *United States* v. *Quality Stores, Inc.*, 572 U.S. 141, 145 (2014). Courts "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (citation omitted). "All those tools"—"not to mention common sense," *ibid.*—show that the Board adopted the best reading of the statute in concluding that Section 1229b's stop-time rule was triggered when petitioner was properly served—in an NTA and a subsequent hearing notice—with all the "written notice" required by Section 1229(a)(1). See Pet. App. 23a n.3.

1. Section 1229(a)(1)'s text supports the Board's interpretation

Section 1229(a)(1) specifies both the substance of the notice that the government must provide to an alien and the manner in which it must do so. The provision's seven separate subparagraphs identify the substantive information to be conveyed, see 8 U.S.C. 1229(a)(1)(A)-(G), while its introductory text specifies how to convey it. That text shows that Congress required "written notice" of the relevant information through personal service or service by mail, without precluding the government from serving that notice, as it did in this case, in two documents.

a. The operative portion of Section 1229(a)(1)'s introductory text provides that "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" the categories of substantive information in Subparagraphs (A) through (G). 8 U.S.C. 1229(a)(1). That text plainly imposes two—and only two—requirements for how the government must provide notice. First, the notice must be "written." *Ibid.* And second, it must be given "in person to the alien" if practicable, but otherwise through service "by mail" either to "the alien" or his "counsel of record." *Ibid.*

There is no dispute that the government provided such notice to petitioner. The government personally served on him an NTA, a written document conveying all the requisite categories of information in Section 1229(a)(1)(A)-(G), except the date and time of his initial hearing. J.A. 5-11. The government then served petitioner by mail a second written notice providing notice of the date and time of that hearing. J.A. 12, 14; A.R. 422. Petitioner does not dispute that he received "written notice" of all the required information, much less deny that the government effectuated "service" as prescribed by statute. See 8 U.S.C. 1229(a)(1). Having received that notice, petitioner personally attended his initial removal hearing, J.A. 15-19, and has never suggested that the government failed to provide him any required information.

That should be the end of the matter. The government provided petitioner all of the information for which Section 1229(a)(1) requires notice. And it did so in precisely the manner the text specifies: "written notice" by personal service and service by mail.

b. Petitioner contends (Br. 24-33) that Section 1229(a)(1) requires all of the specified information to be provided in one document. That contention finds no basis in the statute.

i. Petitioner first contends (Br. I, 24-25) that Section 1229(a)(1) unambiguously requires that all requisite information be provided in one "specific notice document." Despite his repetition of that phrase, Br. 1-2, 13, 16, 19, 21-22, 31-32, 34-36, 39, 43-44, 49, 52, petitioner fails to identify any analogous language in actual statutory text. If Congress had intended to require that all notice be contained in one document, it could have easily enacted language to that effect. But Congress did not do so, opting instead simply to require "written notice."

ii. Petitioner attempts to ground his position in Section 1229(a)(1)'s text by relying (Br. 24-25) on the fact that the provision states that "written notice (in this section *referred to as a* '*notice to appear*')" must be provided to an alien in removal proceedings, 8 U.S.C. 1229(a)(1) (emphasis added). Petitioner then places (Br. 24-25) particular emphasis on the presence of the singular indefinite article "a" before "notice to appear," which he views as unambiguously reflecting his single-document requirement. Petitioner is incorrect, and his narrow focus on the word "a" fails, for multiple reasons.

First, Congress *defined* "a 'notice to appear'" in Section 1229(a)(1) to mean the "written notice" required by the provision's remaining text. Section 1229(a)(1) states —in a parenthetical phrase—that the "written notice" it requires is "in this section *referred to* as a 'notice to appear.'" 8 U.S.C. 1229(a)(1) (emphasis added). As *Pereira* holds, Section 1229(a)(1) uses "quintessential definitional language" for "the term 'notice to appear,'" and it "defines the term" solely by reference to the "'written notice'" required by Section 1229(a)(1)'s operative text. *Pereira*, 138 S. Ct. at 2116 (citation omitted). Petitioner errs by focusing on the defined term (notice

to appear), rather than its definition. See *Digital Realty Trust, Inc.* v. *Somers*, 138 S. Ct. 767, 776 (2018) ("'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning.") (quoting *Burgess* v. *United States*, 553 U.S. 124, 130 (2008)). The text defining that term, as explained above, simply requires "written notice" without requiring it to be provided in one "document."

Second, even assuming *arguendo* that the phrase "a 'notice to appear'" were relevant here, petitioner's focus (Br. 24-25) on the singular article "a" would be unavailing. The Dictionary Act, 1 U.S.C. 1, instructs that, unless context indicates otherwise, Congress's use of "words importing the singular include and apply to several * * * things." *Ibid.* As a result, the words "a 'notice to appear,'" while importing the singular, "apply" to "several" things, namely here, written notice provided in several documents. Nothing in Congress's use of the singular "a" before "notice to appear" therefore shows, much less unambiguously shows, that two documents that collectively contain all of the information required by Section 1229(a)(1) cannot constitute a "notice to appear."

The information-conferring context of Section 1229(a)(1)'s "written notice" requirement reinforces that conclusion. Even putting the Dictionary Act aside, the phrase "a notice to appear" itself encompasses, as a matter of common parlance, notice communicated in installments. When a noun that describes a collection of information—like "a notice" that consists of the multiple items of information specified in Section 1229(a)(1)(A)-(G)—is used in ordinary language, the indefinite article "a" is properly used when describing that collection as

a whole, even when the information may be furnished in more than one installment. Thus, as the court of appeals below recognized, the argument that petitioner makes here "gives too cramped a reading to the meaning of the indefinite article 'a,'" because "[w]hen the word 'a' precedes a noun such as 'notice,' describing a written communication," "multiple communications * * * when considered together" will "constitute 'a notice.'" *Garcia-Romo* v. *Barr*, 940 F.3d 192, 201 (6th Cir. 2019), petition for cert. pending, No. 19-1316 (filed May 22, 2020).

The examples of singular collective terms abound in similar contexts. For example, in ordinary parlance, a writer may provide "a manuscript" to his publisher by providing some chapters before the others. See *Garcia-Romo*, 940 F.3d at 201 (similar examples). "A story" not infrequently is published in a periodical over multiple issues. A paper carrier regularly delivers "a newspaper" in two parts by, for instance, delivering certain portions of a Sunday paper (*e.g.*, the classifieds, comics, and other sections) before delivering the balance on Sunday itself. A candidate for employment will submit "an application" by submitting an initial portion before the rest (*e.g.*, reference letters or transcripts). In business, "a file" may be transmitted in full or in several parts. "An encyclopedia" or "a treatise" may each be prepared, and distributed, in discrete portions as they are available. And in legal terminology, "[a] contract may be established by multiple documents," *Secretary of U.S. Air Force* v. *Commemorative Air Force*, 585 F.3d 895, 901 (6th Cir. 2009), just as "multiple documents [can constitute] part of * * * a notice" to arbitrate, *Bonds* v. *Farmer Ins. Co.*, 240 P.3d 1086, 1092 (Or. 2010) (en banc). Section 1229(a)(1)'s use of the

indefinite article "a" together with "notice to appear," which it defines as "written notice" composed of multiple informational elements, is no different.

Petitioner does not seriously dispute that common linguistic pattern, much less show it to be unambiguously wrong or contrary to the statutory text. He states (Br. 25) that "it is not at all clear" that the article "a" is commonly used in that manner, suggesting that the recipient of information might "frown," or be "surprised," if it is delivered in multiple installments. There is no reason to predict such a reaction in the examples cited above. But such a prediction would not undermine the linguistic conclusion that the word is commonly and properly used in precisely that manner. The fact that a recipient of applications may later clarify that an application must be fully submitted at one time, or that a publisher may ask to review an entire manuscript, underscores that the word "a" does not do the work that petitioner suggests. Petitioner's proffer (Br. 26) of purported counter examples—"a piano," "a car," and "a Big Mac"—likewise fails to grapple with the informational context here, focusing instead on inapposite tangible items that are not understood as collectives.[2]

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[2] If the word "a" were relevant to whether "written notice" of information under Section 1229(a)(1) may be provided in more than one document, petitioner would have yet another textual problem. Section 1229(a)(1) directs that "written notice" (without the word "a") shall be provided, but the very next paragraph states that "a written notice" shall be provided if a hearing date is changed or postponed. 8 U.S.C. 1229(a)(2)(A). To the extent that such use of the word "a" may sometimes suggest a singular requirement, Congress's inclusion of such "language in one [provision]" and its "omi[ssion]" of that language from Section 1229(a)(1)'s operative text would show Congress's intent to *omit* that requirement from the latter. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

iii. Petitioner contends (Br. 27-28) that the categories of information for which notice is required under Section 1229(a)(1)(A) through (G) are "interconnected" and "interdependen[t]," suggesting that all such information must be provided in a single document. That is a *non sequitur*. All the required information relates to an alien's removal hearing, and Congress intended that an alien be served with "written notice" of all that information. It does not follow that the notice must be provided in a single document.

iv. Straying yet further from the text, petitioner contends (Br. 26-27) that Section 1229(a)(1)'s definitional reference to "a 'notice to appear'" should be understood to refer to "a charging document," which like a civil "complaint" or other "court filings," purportedly constitutes only a single document. That analogy is inapt in the statutory context here.

Nothing in Section 1229(a)(1) or the INA more broadly defines the requirements for a "charging document" filed in removal proceedings. It is instead regulations that define what constitutes agency charging documents. See, *e.g.*, 8 C.F.R. 1003.13. As a general matter, agency regulations incorporate the statutory definitions contained "in section 101 of the [INA, 8 U.S.C. 1101]," as baseline definitions for parallel regulatory terms, see *e.g.*, 8 C.F.R. 1001.1(a); 8 C.F.R. 1.1(a) (1998), but the incorporated provisions do not define "notice to appear."

The standard form entitled "Notice to Appear" (the NTA) that is specified by regulation functions as a charging document, but not in a way that aids petitioner. An NTA form serves multiple purposes. First, of course, the form may be served on an alien to provide Section 1229(a)(1)'s statutorily required notice because

the NTA can contain much or all of the information for which notice is required. See 8 C.F.R. 1003.15(b), 1003.18(b); see 8 C.F.R. 3.15(b), 3.18(b) (1998) (same). But second, the NTA is identified in regulations as one type of "[c]harging document" issued by DHS, *i.e.*, a "written instrument which initiates a proceeding before an Immigration Judge," 8 C.F.R. 1003.13 (emphasis omitted), when DHS later "file[s] [it] with the Immigration Court," 8 C.F.R. 1003.14(a). See 8 C.F.R. 3.13, 3.14(a) (1998) (same); cf. 8 C.F.R. 239.2(a) and (c). Regulations therefore require that the NTA include "administrative information" specifically for "the Immigration Court" that has nothing to do with the statutory requirement of "written notice" to an alien under Section 1229(a)(1)—including the alien's registration number, alleged nationality and citizenship, and language. 8 C.F.R. 1003.15(c); 8 C.F.R. 3.15(c) (1998) (same). And third, again by regulation, the NTA serves the further function of being "evidence of [the alien's] registration," 8 C.F.R. 264.1(b); see 8 U.S.C. 1302(a), which an adult alien must at "all times carry * * * and have in his personal possession," 8 U.S.C. 1304(d) and (e). Petitioner's NTA thus states that "[*t*]*his copy* of the Notice to Appear" is "evidence of your alien registration" and must be "carr[ied] * * * at all times." J.A. 8 (emphasis added).

The fact that an NTA by regulation serves the function of a charging document does not speak to the distinct statutory requirements for "written notice" under Section 1229(a)(1). Thus, even if petitioner's charging-document analogy suggested that court pleadings—which do not notice hearings and can themselves be amended—were always one document, it would not inform the statutory requirement for "written notice."

Pereira itself rejected the contention that the mandatory components of the "notice to appear" in Section 1229(a)(1) should be interpreted in light of the contention that such notice could be used as a "'charging document,'" finding no "convincing basis" for doing so "in the statutory text." *Pereira*, 138 S. Ct. at 2115 n.7. That is because Section 1229(a)(1) defines the term "'notice to appear'" only for purposes of the term's use "in this section," 8 U.S.C. 1229(a)(1), which relates to the *notice* that the government must give an alien in removal proceedings. See 8 U.S.C. 1229. The "'essential character'" of that notice is to convey to the alien certain "integral *information* like the time and place of removal proceedings," not to specify the features of an administrative charging document. See *Pereira*, 138 S. Ct. 2116-2117 (citation omitted; emphasis added); *id.* at 2115 (explaining that "[c]onveying such time-and-place information" is an "essential function" of that notice).

v. Petitioner argues (Br. 16, 32-33) that, although *Pereira* did not "explicitly" address the issue, it contemplated a "specific notice document," Br. 32, because it stated that "the dissent's interpretation" in that case would have allowed "notices that lack any information about [hearing] time and place," which would "'confuse and confound' noncitizens," 138 S. Ct. at 2119. The relevant passage in *Pereira* was a response to the dissent's concern that the Court's decision could create confusion by "requiring the Government to specify the time and place of removal proceedings, while allowing the Government to change that information," which might encourage DHS to furnish "'arbitrary dates and times'" that would "'confuse and confound'" recipients. *Ibid.* (citation omitted). The Court explained that subsequent "written notice to the noncitizen" announcing such a

change "mitigate[d] any potential confusion." *Ibid.* So too here, there was no such confusion because the NTA expressly notified petitioner that his hearing would be held at a date and time "to be set" later, J.A. 6, and then the notice of hearing specifically furnished petitioner that very information.

2. Section 1229b(d)(1)(A)'s stop-time rule supports the Board's interpretation

The function that Section 1229(a)(1) performs in Section 1229b's cancellation-of-removal provisions confirms that understanding. Service of written notice under Section 1229(a)(1) places similarly situated aliens in removal proceedings on the same footing with respect to the availability of cancellation-of-removal relief. Once an alien has been served with written notice under Section 1229(a)(1)—the substance of which "inform[s] the noncitizen that the Government is committed to moving forward with removal proceedings at a specific time and place," *Pereira*, 138 S. Ct. at 2115 n.6—the alien can no longer rely on his ongoing presence in this country to provide any further ground for relief. That function does not depend on whether the substantive information required by Section 1229(a)(1) is served on the alien in one or two documents; it simply requires that all such information be conveyed. Petitioner's contrary one-document rule would lead to perverse results significantly undermining the limited character of Section 1229b relief.

a. Congress enacted Section 1229b to create "a new discretionary remedy, known as 'cancellation of removal,' which is available in [only] a narrow range of circumstances" to certain statutorily eligible aliens. *Judulang* v. *Holder*, 565 U.S. 42, 48 (2011). A nonpermanent-resident alien like petitioner must (*inter alia*) accrue at

least ten years of continuous physical presence in the United States to be eligible for relief. 8 U.S.C. 1229b(b)(1)(A). The stop-time rule provides that such presence is deemed to end "when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1)(A). That statutory reference "specifies where to look to find out what 'notice to appear' means," directing the reader back to the term's definition in Section 1229(a)(1). *Pereira*, 138 S. Ct. at 2114. And as explained, Section 1229(a) requires written notice of categories of substantive information relevant to removal proceedings that show the government's "commit[ment]" to "moving forward with [such] proceedings," *id.* at 2115 n.6.

Congress enacted cancellation-of-removal authority "to replace and modify the relief of suspension of deportation [previously available under 8 U.S.C. 1254 (1994)]," and ensure that, going forward, "[r]elief from deportation will be more strictly limited." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 108, 232 (1996) (1996 House Report). Although Congress increased the length of the continuous-physical-presence requirement, it was particularly concerned that "some Federal courts [had] permit[ted] aliens to accrue time toward the [prior] seven year threshold even after they ha[d] been placed in deportation proceedings." *Id.* at 122. That allowed aliens to "abuse[]" "[s]uspension of deportation" relief, *ibid.*, by "exploiting administrative delays to 'buy time' during which they accumulate[d] periods of continuous presence." *Pereira*, 138 S. Ct. at 2119 (citation omitted).

Congress could have relied on the Attorney General to deal with that problem. This Court had previously held that the Attorney General could reject a request to reopen proceedings to consider suspension-of-deportation

relief where the aliens had accrued the seven years of presence needed for statutory eligibility "during the pendency of [their] appeals," which ultimately lacked merit. *INS* v. *Rios-Pineda*, 471 U.S. 444, 449-450 (1985). And even if an alien had reached the seven-year threshold while his initial deportation proceedings were pending, Congress had left decisions about whether to grant suspension of deportation to the "unfettered discretion of the Attorney General," such that an Executive decision granting such relief was "in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956).

But rather than rely on the Executive Branch, Congress enacted multiple provisions to curtail the Attorney General's exercise of discretion, which could vary with changing Executive Branch priorities. Cf. 1996 Conf. Report 213-214 (disagreeing with "administrative decisions" expanding suspension relief and discussing new limits on authority). Those provisions removed many cases from the realm of Executive discretion by "limit[ing] the categories of illegal aliens eligible for [cancellation] relief and the circumstances under which [the Attorney General] may * * * grant[] [it]." *Id.* at 213.

The stop-time rule is one of those provisions.[3] The rule places similarly situated aliens on the same footing by terminating the accrual of additional time needed to be eligible for relief as soon as written notice of all information required by Section 1229(a)(1) has been served

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[3] Among other things, Congress also raised substantially the legal standard of "hardship" that nonpermanent-resident aliens must prove to establish their statutory eligibility, 1996 Conf. Report 213-214; see 8 U.S.C. 1229b(b)(1)(A) and (D), and provided that "the Attorney General may not cancel the removal" of more than "4,000 aliens in any fiscal year," 8 U.S.C. 1229b(e)(1).

on the alien. An alien so served has "an incentive to obtain counsel and prepare for his hearing," *Pereira*, 138 S. Ct. at 2115 n.6, knowing, *inter alia*, that the proceedings are to commence and the charges that he will face, 8 U.S.C. 1229(a)(1)(C) and (D). At that point, no subsequent actions permit the further accrual of time for the ten-year physical-presence requirement, nor should they. Aliens served with all the information that Congress deemed necessary, and that reflect the commitment to move forward with removal proceedings, should be judged equally before the law.

Whether the required notice is served in one document or two provides no proper basis for deciding whether an alien should be eligible for discretionary relief. An alien who receives service in one document is in no better or worse position than another who receives the same information in two documents. And Congress has accounted for the timing of the notice in a manner that puts all affected aliens on equal footing, because *all* aliens will have been given the "written notice" required by Section 1229(a)(1), and the stop-time rule will have been triggered, when they have been served with *all* of the information required by law.

b. Petitioner argues (Br. 44-46) that because cancellation of removal is discretionary relief, statutory limits on eligibility should be "strict[ly] interpret[ed]." That novel rule would erroneously undermine the very function of congressionally imposed eligibility requirements like the stop-time rule, which Congress enacted to curtail Executive Branch discretion to grant relief. See pp. 24-25, *supra*.

Petitioner's only authority for his contention does not, as he asserts (Br. 44), "narrowly interpret[]" a limitation on cancellation relief. In *Moncrieffe* v. *Holder*,

569 U.S. 184 (2013), the Court applied the categorical approach to determine that a conviction under a state statute that would criminalize simple possession of a "small amount of marijuana" with intent to distribute without remuneration, *id.* at 187, would not be a felony under federal drug laws and thus did not constitute the "aggravated felony" under the INA of "illicit trafficking in a controlled substance," 8 U.S.C. 1101(a)(43)(B). See 569 U.S. at 190, 192-195. The Court discounted concerns about the "practical effect" of its decision by observing that the Attorney General could always deny discretionary cancellation relief to an actual drug trafficker. *Id.* at 203-204 (citation omitted). Nothing in that observation suggests that statutory text must itself be narrowly construed.

c. Petitioner's rule would turn on its head Congress's purpose of limiting cancellation relief and treating similarly situated aliens the same, regardless of the timing of their removal proceedings. For instance, under petitioner's one "specific notice document" rule, Pet. Br. i, 24-25, an alien who is served with one document containing all the required categories of information after having been in the United States for nine years would immediately cease accruing time and would be ineligible for cancellation relief. But a similarly situated alien who *on the same day* received *both* an NTA document with the same substantive information except his hearing time and date *and* a separate hearing-notice document conveying that remaining information would, under petitioner's theory, continue to accrue time throughout his removal proceedings and become eligible for relief one year later. Worse yet, under petitioner's theory, petitioner himself has even today never stopped accruing time under the stop-time rule, even

though, by May 2013, he had been served with all the information required by statute. See J.A. 12 (notice of hearing); J.A. 5-11 (NTA). The Congress that enacted Section 1229b specifically to *restrict* the availability of such discretionary relief did not sanction such nonsensical results.

Petitioner suggests (Br. 43) that his rule would still allow the Executive Branch to prevent "gamesmanship" by aliens intentionally delaying proceedings. But petitioner ignores Congress's purpose of curtailing Executive authority in this context. Petitioner's rule would improperly return to the Executive Branch the very discretionary authority to grant relief that Congress in Section 1229b(d)(1)(A)'s stop-time rule sought to eliminate. If, for instance, the government were as a matter of policy to prohibit any NTA from including the date and time of an initial hearing but also require that a separate DHS document entitled "notice of hearing" conveying that hearing information be served at the same time (perhaps in the same envelope), the stop-time rule under petitioner's position would never be triggered for any alien. Although the Attorney General would still have discretionary authority to deny cancellation relief, that authority would extend well beyond the statutory limits that Congress sought to impose in Section 1229b.

Such elevation of form over function is precisely what this Court eschewed in *Pereira* when interpreting the same provisions. *Pereira* specifically rejected the contention that service of a "document that is *labeled* 'notice to appear,'" but that failed to provide the time-and-place information required by Section 1229(a)(1)(G), could itself "trigger the stop-time rule," holding instead that "the substantive time-and-place criteria required

by § 1229(a)" define the notice required by statute. *Pereira*, 138 S. Ct. at 2110, 2116 (emphasis added). The same holds true here. Service in writing of all the substantive information required by Section 1229(b)(1) satisfies that provision, regardless whether it takes the form of one document or two.

3. The broader statutory context shows that Section 1229(a)(1) is designed to convey information to the alien, with no reason for it to be in one document

a. The statutory function performed by Section 1229(a)(1)'s "written notice" in the INA's broader context further confirms that the notice may be served in two documents. The INA adjudicatory provisions that build upon that notice illustrate that, as with notice provisions more generally, Congress designed Section 1229(a)(1) to provide an alien with actual (or constructive) notice of substantive information, whether or not conveyed in one document.

First, Section 1229(b)(1) affords the alien an "opportunity to secure counsel before [his] first hearing date" by providing that the "hearing date" shall not be scheduled "earlier than 10 days after the service of the notice to appear." 8 U.S.C. 1229(b)(1). Because "written notice" under Section 1229(a)(1) is "in * * * section [1229] referred to as a 'notice to appear,'" 8 U.S.C. 1229(a)(1), that provision requires that an initial hearing date be set no earlier than ten days after service of written notice under Section 1229(a)(1), which must "at the very least" specify "the 'time and place' of the removal proceedings." *Pereira*, 138 S. Ct. at 2114-2115. The function in Section 1229(b)(1) of serving such notice is plainly to provide a mechanism for delivering the information so that the alien has the "time and incentive to plan accordingly." *Id.* at 2115.

Second, the role of written notice in Section 1229a(b)(5)'s in absentia provisions is similar. If an alien who has provided his address to DHS fails to attend his removal hearing, he will be "ordered removed in absentia" but only if, as relevant here, DHS establishes by "clear, unequivocal, and convincing evidence that the *written notice* [required by Section 1229(a)(1)] *was so provided*." 8 U.S.C. 1229a(b)(5)(A) (emphases added); cf. 8 U.S.C. 1229a(b)(5)(B) (exception for alien who fails to provide his address). If such an alien is ordered removed in absentia, he may reopen his proceedings by showing that he "did *not receive* [such] notice." 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added).

Third, Section 1229a(b)(7)'s ten-year bar on certain types of relief that applies to an alien who has been ordered removed in absentia applies only if the alien was "provided oral notice * * * of the time and place of the proceedings and of the consequences * * * of failing * * * to attend" when he was given "the notice described in" Section 1229(a). 8 U.S.C. 1229a(b)(7). Those consequences thus apply only if the alien "specifically *received* [such] oral notice" in addition to having been "*given* [written] notice of at least the time and place of their removal proceedings." *Pereira*, 138 S Ct. at 2118 (emphases added).

Those provisions show that the statutory contexts in which Section 1229(a)(1)'s notice requirements have effect all focus solely on service or the ultimate fact of notice itself. None contains any language that turns on the particular format of the written notice, underscoring that Section 1229(a)(1)'s statutory function is simply to convey specific information, evidenced in writing.

Whether the information is conveyed in one document or two has no bearing on the fulfillment of that function.

b. Petitioner nonetheless contends (Br. 30-31) that Section 1229a(b)(7) and Section 1229(e) show that Section 1229(a)(1)'s written notice must be provided in one document. He misreads both provisions.

In petitioner's view (Br. 30), the INA suggests a single notice document served at one point in time, because Section 1229a(b)(7)'s ten-year bar on relief applies only if the alien "was provided oral notice * * * of the time and place of the proceedings and of the consequences" of failing to attend "*at the time* of the notice described in paragraph (1) *or* (2) of section 1229(a)," 8 U.S.C. 1229a(b)(7) (emphases added). Section 1229a(b)(7)'s text and legislative history, however, demonstrate that the provision is most naturally read to require such "oral notice" at the same time as written notice of a hearing time and place, regardless whether that information is conveyed in a document that is one component of the written notice described in Section 1229(a) or in a document also conveying the other information required by that Section.

Section 1229a(b)(7)'s text requires oral notice only of a particular type of information: the "time and place" of a hearing and the "consequences" of failing to attend. 8 U.S.C. 1229a(b)(7). It requires such oral notice at the time of the written notice "described" in either Paragraph (1) "or" Paragraph (2) of Section 1229(a). *Ibid.* Paragraph (2), like the oral notice, requires "written notice" only of an alien's rescheduled hearing time and place and the consequences of failing to appear, *i.e.*, an updated hearing notice. 8 U.S.C. 1229(a)(2)(A). Paragraph (1) likewise requires "written notice" of the initial

hearing time and place and such consequences as an essential category of information that must be served on an alien, 8 U.S.C. 1229(a)(1)(G), which the government frequently serves in a notice of hearing separate from an NTA. The written notice "described" in both paragraphs is therefore properly understood in context to be notice of the *same type* of information, whether it be conveyed in an NTA or a hearing notice (under Paragraph (1)), or an updated notice (under Paragraph (2)) served at any time thereafter. The relevant committee report thus focuses on the use of a hearing notice, explaining that "[a]t the time of the service of *notice of hearing*, or at any time thereafter, an alien must be provided [the pertinent] oral notice." 1996 House Report 159 (emphasis added).

Petitioner's reliance (Br. 31) on Section 1229(e) is also misplaced. That provision—which concerns the protections in 8 U.S.C. 1367 for certain battered, abused, and trafficked aliens—provides that, in certain circumstances, "the Notice to Appear shall include a statement that the provisions of section 1367 * * * have been complied with." 8 U.S.C. 1229(e)(1). Even if Section 1229(e)'s capitalized reference to "the Notice to Appear" were to mean Section 1229(a)(1)'s "written notice" (which it does not, see *infra*), requiring that written notice to "include a statement" showing compliance with Section 1367 would not imply that each required category of information under Section 1229(a)(1) must be included in one document. It would merely require that the statement be included in one of the documents constituting the required "written notice."

Moreover, Congress's decision to enact Section 1229(e)'s compliance-statement provision as a distinct subsection, rather than add it to Section 1229(a)(1)'s list

of categories of information for which written notice is required, shows that the statement was not required to be part of that statutory "written notice." And the failure to include Section 1229(e)'s statement with that notice would have no legal effect, because all of the statutory consequences flowing from "written notice" concern only notice required *by Section 1229(a)*. See pp. 24, 29-30, *supra*.

In fact, Section 1229(e)'s reference to "the Notice to Appear" instead is to the NTA form filed with the immigration court to initiate removal proceedings. Section 1229(e) applies only if "enforcement action *leading to a removal proceeding*" has been taken. 8 U.S.C. 1229(e)(1) (emphasis added). When Congress enacted that provision in 2006, it was well established that removal proceedings do not begin until DHS files in an immigration court the standard-form document entitled "Notice to Appear." See p. 21, *supra*. The capitalized phrase "the Notice to Appear" logically refers to the regulatory document having that capitalized *title*, which, when so filed, initiates proceedings against an alien.[4] Section 1229(e) thus requires "the Notice to Appear issued *against the alien*" to include information allowing "immigration judges" to dismiss "[r]emoval proceedings *filed* in violation of [Section 1367]." 151 Cong.

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[4] The Senate, which added the phrase "the Notice to Appear," H.R. 3402, 109th Cong., 1st Sess. § 825(c), at 272 (Dec. 16, 2005), capitalizes words referring to an official "form" like the NTA "when [the words are] part of the title," *U.S. Government Printing Office Style Manual* Ch. 4, at 47 (2000), https://go.usa.gov/xGy4a, because it "follow[s] the Government Printing Office Style Manual on questions of capitalization," United States Senate, *Legislative Drafting Manual* § 305(a) (1997).

Rec. 29,335 (2005) (statement of Rep. Conyers) (emphases added); see H.R. Rep. No. 233, 109th Cong., 1st Sess. 121 (2005) (similar).

4. The relevant legislative and regulatory history does not reflect an intent to require all categories of information identified in Section 1229(a)(1) to be served in one document

Petitioner relies (Br. 10-14, 21-22, 34-39, 41-42) on legislative and regulatory history to support his contention that Congress required Section 1229(a)(1)'s "written notice" to be provided in one document. That history provides petitioner no meaningful support.

a. First, petitioner relies on quotes from a committee report to argue that "Congress abandoned the option of sending a hearing notice after the initial notice document" because it had caused "'lapses . . . in the procedures for notifying aliens'" and because the "existing notice procedures led to unnecessary disputes about whether noncitizens received hearing notices." Br. 12, 22, 40 (citing 1996 House Report 122, 159). That contention is wrong and illustrates the hazards of relying on snippets of history taken out of context.

Petitioner's contention that Congress desired to "'simplify procedures for initiating removal proceedings' by requiring a 'single form of notice'" to address such purported lapses, Br. 22, 40-41 (quoting 1996 House Report 159), is misplaced. Section 304 of IIRIRA created "a single streamlined 'removal proceeding'" for "all inadmissible and deportable aliens" to replace the prior two-track system of "exclusion proceedings" for aliens seeking admission and "deportation proceedings" for those present in the United States. 1996 House Report 158; see 8 U.S.C. 1229a(e)(2); *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982) (discussing prior system). And

because the prior two-track system used different forms of notice for exclusion proceedings, 8 C.F.R. 235.6(a) (1995), and deportation proceedings, 8 U.S.C. 1252(a) (1994), "Section 304 *also* * * * simplif[ied] procedures for initiating removal proceedings" by specifying "a single form of notice" for both inadmissible and deportable aliens. 1996 House Report 159 (emphasis added). Nothing in that history suggests that the "single form of notice" was adopted to prevent notice of the specified information in more than one document. To the contrary, the history reflects that Section 1229 was designed to "restate[] the provisions of [prior law] * * * regarding the provision of written notice" for aliens in deportation proceedings by "conform[ing] [them] to the establishment of a single removal hearing." 1996 Conf. Report 211; see 1996 House Report 230 (same).

Likewise, the congressional concern with "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings" was that "some immigration judges [had] decline[d] to exercise their authority to order an alien deported in absentia." 1996 House Report 122. And the concern about "disputes concerning whether an alien has been provided proper notice of a proceeding" was that they could make it difficult "to secure in absentia deportation orders" and could be used for unwarranted motions "to reopen." *Id.* at 159. Significantly, the history makes quite clear that Congress specifically "addresse[d] these problems" by imposing four "new requirements" governing both inadmissible and deportable aliens, none of which concerns whether notice is sent in two documents: Congress (1) directed the "establish[ment]" of "a central address file"; (2) provided that "service by mail of the required notice of hearing [to the address provided by the

alien] is sufficient"; (3) authorized in absentia orders upon "proof of attempted delivery at this address"; and (4) narrowed the ability to rescind in absentia orders to only those aliens who have provided a proper "address." *Ibid.* Those provisions, in 8 U.S.C. 1229(a)(3) and (c), and 8 U.S.C. 1229a(b)(5)(A), (B) and (C)(ii), have nothing to do with Section 1229(a)(1)'s "written notice" requirement.

b. Petitioner's reliance (Br. 2, 13, 31-32, 42, 52) on a preamble to a 1997 notice of proposed rulemaking (NPRM) is also unavailing. The relevant passage stated that "[t]he *charging document* which commences removal proceedings * * * will be referred to as the Notice to Appear, Form I-862," 62 Fed. Reg. 444, 449 (Jan. 3, 1997) (emphasis added), which, as noted, is provided for by regulation and is used for several purposes. See pp. 20-21, *supra*. Without identifying or analyzing any relevant provisions, the passage added that the proposed rule "implement[ed] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear" and explained that it would not be possible to do so using an "automated scheduling" system in every context. *Ibid.* The proposed rule itself provided that "the time, place and date of the initial removal hearing" should be included "in the Notice to Appear" only "where practicable" and, if not included, "the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to * * * the alien." *Id.* at 457 (proposing 8 C.F.R. 3.18(b) (1998)). That is precisely what happened here. The preamble's observation that automated scheduling would not be possible in certain "situation[s] (e.g., power outages, computer crashes/downtime[])" does not mean that those examples describe the full scope of the regu-

latory instruction that hearing times be included on an NTA only "where practicable." *Id.* at 449, 457.

c. Petitioner next argues (Br. 10-12, 34-38) that regulatory provisions predating IIRIRA show that Section 1229(a)(1) requires that all required categories of information must be served in one document, because Congress largely modeled Section 1229(a)(1) on 8 U.S.C. 1252b(a)(1) (1994), which petitioner contends itself required similar written notice in one document. That contention relies on multiple antecedent propositions that are themselves incorrect.

i. Petitioner first relies (Br. 36) on former Section 1252b(a)(1), which provided that "written notice (in this section referred to as an 'order to show cause')" must be given to an alien specifying several categories of information, 8 U.S.C. 1252b(a)(1) (1994). Petitioner contends (Br. 36) that former Section 1252b(a)(1) required that its "written notice" be provided in one document because, before Congress enacted that provision, the former Immigration and Naturalization Service had used a regulatory form entitled "Order to Show Cause," 8 C.F.R. 242.1(b) (1988). Section 1252b(a)(1), however, imposed no *statutory* requirement that its "written notice" be in one document. Like Section 1229(a)(1), it simply required "written notice," and it provided that such notice was elsewhere *in Section 1229b* "referred to as" an "order to show cause," using the same definitional language to facilitate statutory references to that "written notice" that this Court interpreted in *Pereira*. Just as Section 1229(a)(1)'s text imposes no statutory single-document rule, neither did Section 1252b.

ii. Petitioner next observes (Br. 34-35) that Section 1252b(a)(1)'s primary list of information for which "written notice" was required did not include the "time

and place" of the initial hearing and the "consequences" of failing to attend, 8 U.S.C. 1252b(a)(2)(A) (1994). That initial hearing information was instead addressed in Section 1252b(a)(2)(A), which stated that "written notice" of that initial hearing information must be provided "in the order to show cause or otherwise." *Ibid.* Petitioner then asserts (Br. 35) that the phrase "'or otherwise'" would "have been meaningless" if Section 1252b(a)(1) did not itself require a single order-to-show-cause document. That too is incorrect for at least two reasons.

First, the phrase "or otherwise" is fully consistent with providing the "written notice" required by Section 1252b(a)(1) (which the balance of Section 1252b referred to as an "order to show cause") in two documents. If two documents had collectively conveyed that information, Section 1252b(a)(2)(A)'s hearing information would have been included "in the order to show cause" if it was included in either document. And that initial hearing information could alternatively be conveyed "otherwise" in a separate document. Second, the phrase "in the order to show cause or otherwise" was itself superfluous in Section 1252b(a)(2)(A), because it added nothing to the provision's instruction to provide "written notice" of initial hearing information. The apparent function of that (superfluous) phrase was simply to underscore that, at the time, in absentia deportation required notice *only* of the time and place of the hearing and the consequences of failure to attend in Section 1252b(a)(2), and *not* the other categories of information for which notice was referred to as an "order to show cause." See 8 U.S.C. 1252b(c)(1) and (3)(B) (1994) (authorizing that consequence after written notice under "subsection (a)(2)"). By emphasizing that such initial

hearing information could be provided "in the order to show cause or otherwise," Congress made clear that only the hearing notice mattered in that important context.

iii. When Congress in IIRIRA later added initial hearing information to the other categories of information for which Section 1229(a)(1) now requires "written notice," it simultaneously modified the provisions governing in absentia removal to be triggered by notice of *all* of Section 1229(a)(1)'s required categories of information, not just specific hearing information. 8 U.S.C. 1229a(b)(5)(A) and (C)(ii). That change ensured that in absentia removal would be ordered only if an alien had been served with notice of the full panoply of information that Congress deemed requisite. Petitioner's suggestion (Br. 38) that the government's position would "nullify" Congress's addition of initial hearing information to the other categories in Section 1229(a)(1) simply ignores these corresponding changes giving real-world effect to that addition.[5]

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[5] Petitioner erroneously asserts (Br. 38-39) that the government "conce[ded]" in *Pereira* that Congress had "abandoned" the flexibility to serve the hearing notice in a separate document. The government noted that the *petitioner* (Pereira) had asserted as much. Gov't Br. at 43, *Pereira*, *supra* (No. 17-459). But the government then separately observed that Pereira had argued that Congress would have been "'aware that a "notice to appear" [under Section 1229(a)] must include the time and place of the hearing.'" *Ibid.* (quoting Pereira's brief). The government answered that *latter* contention by stating that it was "true but beside the point" in the stop-time context. *Ibid.*

5. Practical considerations warrant no departure from the best reading of the text

Petitioner erroneously relies (Br. 29, 40-41, 52) on supposed practical considerations to support his contention that the statutory text imposes his one-document rule.

a. Petitioner first suggests (Br. 29, 40-41) that allowing the government to "divide up" notice into several documents could allow the government to provide some required information to all aliens "entering the country" and then, "years later," omit that required information when it decides to remove the alien. Not so. Section 1229(a)(1) requires that written notice shall be given to the alien "in removal proceedings" and specifically requires information of the "charges *against the alien*." 8 U.S.C. 1229(a)(1)(D) (emphasis added). That notice must be given before adjudicatory proceedings proceed in immigration court, but the nature of the notice reflects that it must be provided only *after* a decision is made to assert those charges.

b. Petitioner argues (Br. 40-41) that in some cases, like *Pereira*, a subsequent hearing notice is sent to the wrong address, a problem he contends his one-document rule could reduce. But Congress provided the remedy for that situation: Any resulting in absentia removal order can later be rescinded by a motion to reopen "filed at any time" by showing that the alien (who provided his address as required) "did not receive [such] notice." 8 U.S.C. 1229a(b)(5)(C)(ii). That is exactly what happened in *Pereira*. See 138 S. Ct. at 2112.[6]

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[6] Even where, as here, an alien changes his address before an NTA is filed with an immigration court, a statutorily required centralized address file, 8 U.S.C. 1229(a)(3), allows the government to track the alien and provide a subsequent hearing notice to the new

c. Petitioner incorrectly suggests (Br. 52) that the government almost never serves a single document with hearing information and Section 1229(a)(1)'s other categories of information. In the years immediately preceding *Pereira*, nearly all NTAs served on aliens did omit initial hearing information because of technical difficulties. See *Pereira*, 138 S. Ct. at 2111. But after *Pereira*, "[the Executive Office for Immigration Review (EOIR)] began providing [set hearing] dates and times [through January 31, 2019] directly to DHS" for "use on NTAs for some non-detained cases." EOIR, *Policy Memorandum 19-08: Acceptance of Notices to Appear and Use of the Interactive Scheduling System* 1-2 (Dec. 21, 2018), https://go.usa.gov/xGkzP. For a time, while that practice was in effect, large numbers of aliens sometimes appeared for hearings on the same day. See Amici Br. of Former IJs 18-19, 23. By late December 2018, however, EOIR had taken additional action to provide DHS components that serve NTAs direct access to EOIR's Interactive Scheduling System, thereby allowing DHS itself to set initial-hearing dates in cases involving aliens who are not detained and "reflect those scheduled hearings on NTAs." *Policy Memorandum 19-08,* at 2. In mid-2019, EOIR integrated that system (renamed DHS Portal) into its case-management and filing system. See EOIR, *EOIR Courts & Appeals System, Summary of ECAS Enhancements DHS Users* 2 (July 2019), https://go.usa.gov/xGkuy. DHS components now use DHS Portal to schedule—and include on NTAs—hearing dates for non-detained aliens. See Kevin McAleenan, Acting Secretary of Homeland Secu-

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address. EOIR, *AILA-EOIR Liaison Agenda Questions and Answers* 7 (Mar. 22, 2006), https://go.usa.gov/xGUqc.

rity, *Responses to Senator Whitehouse QFRs*, *The Secure and Protect Act: Hearings Before the Senate Judiciary Comm.* 3 (2019) (*QFR Response*) (Question 14), https://go.usa.gov/xGkun.

Before *Pereira*, EOIR's interactive scheduling system had not been used to schedule hearings for detained aliens, *Policy Memorandum 19-08*, at 1 n.1, which proceed much more expeditiously and are scheduled by local immigration courts.[7] EOIR attempted to extend the system to those aliens after *Pereira*, but it "found the operational logistics impossible to overcome" in light of "continual fluctuations in the detained population." *Ibid.* EOIR's stated policy is therefore to "provide[] hearing dates directly to DHS for use on NTAs for detained cases," *ibid.*, which requires that DHS "work[] directly with EOIR to obtain a hearing date" for aliens in detention. *QFR Response* 3. Where EOIR provides such a date, DHS will include it on the NTA; otherwise DHS will issue NTAs for aliens held in its custody with "TBD dates and times." *Ibid.*; cf. 8 C.F.R. 287.3(d) (requiring determination whether to issue NTA within 48 hours, absent "an emergency or other extraordinary circumstance," for aliens arrested without a warrant).

d. Finally, the contention (Br. 43) that "little else" other than the stop-time rule "incentivizes the government to comply with [S]ection 1229(a)" is incorrect. Grants of cancellation of removal—which can never exceed 4000 aliens annually, 8 U.S.C. 1229b(e)(1)—are at best the tip of the tail of the dog. Section 1229(a)(1) notice is necessary in *all* full removal proceedings, and in FY2019 alone, over 500,000 new immigration cases

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[7] EOIR, *Adjudication Statistics: Median Completion Times for Detained Cases* (2019), https://go.usa.gov/xGUZf (listing 7- to 46-day median completion times for detained-alien cases).

(most initiated by NTAs) were filed.[8] That notice is also essential to the government's ability, for instance, to conduct proceedings in absentia, which resulted in over 90,000 removal orders in FY2019.[9] And as a practical matter, the government has a strong incentive to ensure that all required notice is completed at once, except when not practicable with respect to initial hearing information. Providing serial notices can waste precious enforcement resources by requiring agents to revisit the same matter. Illustrating that reality, petitioner identifies no instance of providing more than two notices and in no instance other than to provide separate hearing information.

In any event, those proffered considerations provide no sound basis to supplement the statutory text with petitioner's atextual one-document rule. The Board adopted the best reading of Congress's instruction to serve "written notice" specifying all required categories of substantive information in Section 1229(a)(1) by concluding that such notice may be provided in two documents. When the alien has been properly served with all such information, the stop-time rule terminates his accrual of physical presence for cancellation-of-removal relief.

B. The Board's Reasonable Interpretation Is Entitled To Deference

As explained above, the Board's interpretation of the "written notice" required to trigger the stop-time rule reflects the best reading of the statute. At the very least,

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[8] EOIR, *Adjudication Statistics: New Cases and Total Completions* (2020), https://go.usa.gov/xGQhj.

[9] EOIR, *Adjudication Statistics: In Absentia Removal Orders* (2020), https://go.usa.gov/xGQSd.

however, the Board's interpretation is a reasonable one entitled to *Chevron* deference. See, *e.g.*, *Aguirre-Aguirre*, 526 U.S. at 424. Petitioner asserts (Br. 50) that it would not be reasonable to reject his one-document rule for the same reasons he contends the statutory text is unambiguous, but, as explained above, those reasons lack merit. Petitioner further argues (Br. 48-51) that deference is unwarranted because of the manner in which the Board came to its interpretation, but that contention likewise lacks merit.

1. Petitioner primarily contends (Br. 48-51) that the Board failed to sufficiently explain its departure from prior agency interpretations. But petitioner's suggestion (Br. 49) that the preamble to an NPRM interpreted the INA to require his one-document rule is wrong for reasons previously stated. See pp. 36-37, *supra*. Petitioner therefore relies (Br. 49-51) on two Board decisions as reflecting prior contrary positions, only one of which—*In re Camarillo*, 25 I. & N. Dec. 644 (2011)—is pertinent. The Board in *Mendoza-Hernandez*, *supra*, however, reasonably explained why *Camarillo*—which this Court abrogated in *Pereira*—was wrong.

In *Camarillo*, the Board concluded that Section 1229b(d)(1)'s stop-time rule was triggered by service of an NTA—*i.e.*, a "document" styled as a "notice to appear"—even if the NTA "d[id] not include the date and time of the initial hearing." 25 I. & N. Dec. at 647, 652. Although the Board stated that an "equally plausible" reading would require notice to an alien that "compl[ies] with all of the provisions of section [1229](a)(1)," the Board ultimately concluded that the distinct reference in Section 1229b(d)(1) to a "notice to appear" merely "specifie[d] the document the DHS must serve" to trigger the stop-time rule, *i.e.*, an NTA. *Id.* at 647. The

Board rejected the contention that "two [particular] documents, the [NTA] and the notice of hearing, [would] combine" to produce the "notice to appear" needed under Section 1229b(d)(1), because, it reasoned, the type of "notice to appear" that triggers the stop-time rule is a "charging document issued only by DHS," and "a notice of hearing issued by the Immigration Court" was not "a constituent part" of it. *Id.* at 648. Cf. Pet. Br. 15, 32, 49-50 (discussing *Camarillo*). *Camarillo* thus rejected the then-prevailing view in the courts of appeals that the stop-time rule needed to be triggered by providing all information specified by Section 1229(a)(1), which could be accomplished in a "two-step process" using an NTA and later notice of hearing. See *Mendoza-Hernandez*, 27 I. & N. Dec. at 527-528; *id.* at 524, 534 (discussing the early consensus in the courts of appeals); see also p. 8, *supra*.

Pereira, of course, rejected *Camarillo's* conclusion that Section 1229b(d)(1) refers to a "document that is labeled 'notice to appear'" and instead determined that it refers to the substantive notice required by Section 1229(a)(1). *Pereira*, 138 S. Ct. at 2110, 2114-2115. The Board in *Mendoza-Hernandez* recognized as much, explaining that this Court had focused on "the notice requirements in section [1229](a)(1)." 27 I. & N. Dec. at 527. Under the text of Section 1229(a)(1), the Board explained, the requisite "'written notice' [need not] be in a single document," "so long as the essential information is conveyed in writing." *Id.* at 531. The Board thus determined that *Camarillo's* Section 1229b(d)(1)-focused analysis was "flawed," and that the written notice required under Section 1229(a)(1) may be conveyed in an NTA and a notice of hearing, because a hearing

notice "is not part of the [NTA]," but rather is "a separate notice, served in conjunction with the [NTA], that satisfies the requirements of section [1229](a)(1)(G)." *Id.* at 525 & n.8; see *id.* at 535. That explanation more than sufficiently explains the Board's post-*Pereira* abandonment of *Camarillo*.[10]

2. Petitioner further contends (Br. 46-47) that ambiguities in immigration statutes should be construed to favor the alien and preclude *Chevron's* second-step analysis at which the Board's reasonable construction of statutory ambiguity is entitled to deference. But this Court has repeatedly applied the *Chevron* framework to sustain the Board's interpretation of ambiguous INA provisions, including provisions addressing relief from removal. See, *e.g.*, *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591-598 (2012); *Aguirre-Aguirre*, 526 U.S. at 424-432. See also *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56-75 (2014) (plurality opinion); *id.* at 76-79 (Roberts, C.J., joined by Scalia, J., concurring in the judgment). Those decisions resolving ambiguities by according deference to the agency's position refute petitioner's suggestion that uncertainty must be resolved in his favor. If that view were correct, those and other cases applying *Chevron* in this setting would be wrong.

Petitioner identifies no case in which that interpretive tool of last resort was invoked to displace a reasonable decision of the Board. Petitioner's reliance (Br. 46) on decisions predating *Chevron* by decades are plainly

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[10] Petitioner also relies (Br. 15, 32, 49) on a footnote in *In re Ordaz-Gonzalez*, 26 I. & N. Dec. 637, 640 n.3 (B.I.A. 2015), which adds nothing to *Camarillo*. Citing *Camarillo*, that footnote stated—in dicta—that Section 1229b(d)(1) "affords 'stop-time' effect to a single instrument—the [NTA] that is the subject of the proceedings." *Ibid.*

inapposite. And although petitioner heavily relies (Br. 46-47) on *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the Court there rested its holding on the presumption against retroactivity, concluding that its application left "no ambiguity" under *Chevron* for the Board to resolve. *Id.* at 321 n.45; see *id.* at 315-320. The Court remarked in a single sentence that its "retroactiv[ity]"-based interpretation of the statute was "buttressed" by the tie-breaking rule petitioner invokes, *id.* at 320, without suggesting that the rule could be determinative if statutory ambiguity were otherwise to require consideration of *Chevron* deference.

3. Petitioner's contention (Br. 51-52) that deference should not extend to questions of statutory construction or formal agency adjudicatory decisions fundamentally misunderstands the "theoretical foundations" of deference. *Chevron* deference applies where Congress has delegated authority to an agency to "speak with the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001); see, *e.g.*, *City of Arlington* v. *FCC*, 569 U.S. 290, 316-317 (2013) (Roberts, J., dissenting). "[A] very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorization[] to engage in the process of * * * adjudication that produces * * * rulings for which deference is claimed." *Mead Corp.*, 533 U.S. at 229. And this Court in *Mead* specifically identified deference to the Board as a prototypical application of the doctrine, *id.* at 230 n.12 (citing *Aguirre-Aguirre*, 526 U.S. at 423-425), because Congress has expressly vested the Attorney General with authority to conduct removal proceedings, 8 U.S.C. 1103(g), 1229a(a), and has specifically provided that "the 'determination and ruling by the Attorney General

with *respect to all questions of law shall be controlling*,'" *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)) (emphasis added). Not only does that expansive statutory delegation itself make it "clear that principles of *Chevron* deference" apply, *ibid.*; "deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) (citation omitted); see *CASA de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 251 & n.6 (4th Cir. 2020) (Wilkinson, J.) (explaining that the principles "underlying *Chevron* are at their zenith in the context of immigration, a field that the Constitution assigns to the political branches").[11]

[11] Petitioner suggests in passing (Br. 52-53) that the application of *Chevron* in the immigration context might be reconsidered. But given the express and longstanding conferral of interpretive authority on the Attorney General and the "well settled" application of *Chevron* deference to the Board as the Attorney General's delegee, *Negusie*, 555 U.S. at 516-517, petitioner's limited submission falls far short of providing the "special justification" needed to warrant overruling this Court's numerous relevant precedents. *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (citation omitted); *id.* at 799 (citing *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

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APPENDIX

1. 8 U.S.C. 1229 (INA § 239) provides:

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 pargraph 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. 8 U.S.C. 1229a (INA § 240) provides in pertinent part:

Removal proceedings

(a) Proceedings

(1) In general

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

* * * * *

(b) Conduct of 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.

* * * * *

(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.

* * * * *

(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.

(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. 8 U.S.C. 1229b (INA § 240A) provides in pertinent part:

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

* * * * *

(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.

* * * * *

(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.

* * * * *

4. 8 U.S.C. 1252b (1994) provided in pertinent part:

Deportation procedures

(a) Notices

(1) Order to show cause

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

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

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

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

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

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

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1252 of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a

written record of any change of the alien's address or telephone number.

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

(2) Notice of time and place of proceedings

In deportation proceedings under section 1252 of this title—

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

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

(ii) the consequences under subsection (c) of this section of the failure, except under exceptional circumstances, to appear at such proceedings; and

(B) in the case of any change or postponement in the time and place of such proceedings, written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) of—

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

(ii) the consequences under subsection (c) of this section of failing, except under excep-

tional circumstances, to attend such proceedings.

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under subsection (a)(1)(F) of this section.

(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 1252 of this title and will be provided, in accordance with subsection (b)(1) of this section, a period of time in order to obtain counsel and a current list described in subsection (b)(2) of this section.

(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).

(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 1252 of this title, the hearing date shall not be scheduled earlier than 14

days after the service of the order to show cause, 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 1252 of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(c) Consequences of failure to appear

(1) In general

Any alien who, after written notice required under subsection (a)(2) of this section has been provided to the alien or the alien's counsel of record, does not attend a proceeding under section 1252 of this title, shall be ordered deported under section 1252(b)(1) of this title in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable. The written notice by the Attorney General shall be considered sufficient for purposes of this paragraph if provided at the most recent address provided under subsection (a)(1)(F) of this section.

(2) No notice if failure to provide address information

No written notice shall be required under paragraph (1) if the alien has failed to provide the address required under subsection (a)(1)(F) of this section.

(3) Rescission of order

Such an order may be rescinded only—

(A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

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

The filing of the motion to reopen described in subparagraph (A) or (B) shall stay the deportation of the alien pending disposition of the motion.

(4) Effect on judicial review

Any petition for review under section 1105a of this title of an order entered in absentia under this subsection shall, notwithstanding such section, be filed not later than 60 days (or 30 days in the case of an alien convicted of an aggravated felony) after the date of the final order of deportation and shall (except in cases described in section 1105a(a)(5) of this title) be confined to the issues of the validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether or not clear, convincing, and unequivocal evidence of deportability has been established.

* * * * *

(e) Limitation on discretionary relief for failure to appear

(1) At deportation proceedings

Any alien against whom a final order of deportation is entered in absentia under this section and who, at the time of the notice described in subsection (a)(2) of this section, 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 (f)(2) of this section) to attend a proceeding under section 1252 of this title, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the entry of the final order of deportation.

* * * * *

(f) Definitions

In this section:

* * * * *

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

5. 8 C.F.R. 1003.13 provides in pertinent part:

Definitions.

As used in this subpart:

* * * * *

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

* * * * *

6. 8 C.F.R. 1003.14 provides:

Jurisdiction and commencement of proceedings.

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

* * * * *

7. 8 C.F.R. 1003.15 provides:

Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 1003.26.

(c) *Contents of the Notice to Appear for removal proceedings.* In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) *Address and telephone number.* (1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address

and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR 33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR 33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

8. 8 C.F.R. 1003.18 provides:

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.

9. 8 C.F.R. 1003.20 provides:

Change of venue.

(a) Venue shall lie at the Immigration Court where jurisdiction vests pursuant to § 1003.14.

(b) The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, after the charging document has been filed with the Immigration Court. The Immigration Judge may grant a change of venue only after the other party has been given notice and an opportunity to respond to the motion to change venue.

(c) No change of venue shall be granted without identification of a fixed street address, including city, state and ZIP code, where the respondent/applicant may be reached for further hearing notification.