No. 19-863

In the
Supreme Court of the United States

AGUSTO NIZ-CHAVEZ,
Petitioner,
v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years, the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

SUMMARY OF ARGUMENT

The Attorney General may withhold the removal of some aliens who have established a period of continuous presence in the United States. Under the "stop-time rule," such continuous presence ceases to accrue when the alien receives a notice to appear at a removal proceeding that contains statutorily required information, such as the time and place of the proceeding.

The use of multiple documents to provide that statutorily-required notice information should be upheld by this Court. The Immigration and Nationality Act ("INA") defines a notice to appear as

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[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

containing that information, but imposes no other requirements. The INA therefore does not bar a notice to appear that lists time and place to be determined, supplemented with a notice of hearing that provides the remaining required information, thereby perfecting the notice to appear and terminating the accrual of continuous presence. The interpretation of the Board of Immigration Appeals ("BIA") to this effect is thus a reasonable one, and as such entitled to deference.

Interpreting this Court's opinion in *Pereira v. Sessions* to preclude the use of multiple documents to provide aliens with written notice is incorrect. It impermissibly broadens the reach of *Pereira* beyond the narrow holding intended by this Court. Furthermore, current regulations make clear that the procedures to initiate proceedings before the immigration court require proof of service of notice, meaning that the agency generally cannot provide the time and date information to the alien on the initial, unperfected notice to appear.

ARGUMENT

I. *PEREIRA V. SESSIONS* DOES NOT PROHIBIT THE USE OF MULTIPLE DOCUMENTS TO SATISFY NOTICE REQUIREMENTS.

Under 8 U.S.C. § 1229b, the Attorney General has limited discretion to cancel the removal of otherwise inadmissible or deportable aliens. In addition to certain character requirements, eligibility for both permanent and non-permanent resident applicants requires that the alien applying for withholding

establish a period of continuous presence within the United States. *Id.* § 1229b(a)(2), (b)(1)(A). In what is known as the stop-time rule, the statute provides that "serv[ice] of a notice to appear under section [1229](a)" terminates an alien's accrual of the required continuous presence. *Id.* § 1229b(d)(1)(A). 8 U.S.C. § 1229(a) sets forth the required elements of a written notice to appear, including "the time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(G)(i).

Petitioner, a removable alien who illegally entered the country in 2005, was served a notice to appear in March 2013, followed by a notice of hearing in May 2013. Petitioner appeared at his June 2013 removal hearing, where he acknowledged receipt of both notice documents.

It is beyond the authority of the circuit courts to expand the ruling in *Pereira* beyond its scope. As this Court explained, its holding in *Pereira* that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a notice to appear under section 1229(a), and so does not trigger the stop-time rule," was a "narrow one." *Pereira v. Sessions*, 138 S. Ct. 2105, 2114-2115 (2018). Despite this avowedly narrow holding, some of the circuit courts have interpreted *Pereira* to apply to the broader issue contested in this case—whether a notice to appear that does satisfy § 1229(a), and so does trigger the stop-time rule, may be issued using multiple documents. *See*, *e.g.*, *Banuelos-Galviz v. Barr*, 953 F.3d 1176 (10th Cir. 2020); *Guadaupe v. AG of the U.S.*, 951 F.3d 161 (3d Cir. 2020).

While it is clear from *Pereira* that a defective notice alone cannot trigger the stop-time rule, *see Garcia-Romo v. Barr*, 940 F.3d 192, 200 (6th Cir. 2019) (noting that a notice to appear that is missing information regarding the time and place of upcoming proceedings "[i]s not . . . sufficient to trigger[] the stop-time rule"), there is nothing in this Court's opinion in *Pereira* that addresses whether such a notice can be perfected or cured by a subsequent notice of hearing that includes the statutorily required information. *Id.* ("[*Pereira*] does not answer the question of whether the government can meet its notice obligation . . . by sending . . . a second written communication . . . [with] time-and-date information."). *See also Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (B.I.A. 2018) ("Had the Court intended to issue a holding as expansive as the one advanced . . . presumably it would not have specifically referred to the question before it as being narrow.") (internal citation omitted).

Indeed, it would have been remarkable if this Court in *Pereira* had addressed whether a statutorily-sufficient notice to appear could be given using two documents. The petitioner in *Pereira* himself acknowledged that when he received the notice of hearing containing the time and date information for his hearing, the notice to appear was perfected and triggered the stop-time rule. *Pereira v. Sessions*, 866 F.3d 1, 3 (1st Cir. 2017) ("He asserted that he . . . continued to accrue time . . . until he received a notice of hearing . . . in 2013."). Even before this Court, Pereira did not deny or challenge the use of multiple documents, stating that "[w]hen the government does serve all the notice that together constitutes a notice to

appear under section 1229(a), then the immigrant's continuous residence is deemed to end." Petr.'s Reply Br. 19, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459). It is odd indeed to take this Court as having overridden this concession in order to reach and decide an issue that was never contested by the parties.

II. THE BIA'S INTERPRETATION OF THE STOP-TIME RULE IS REASONABLE

As explained above, the use of multiple documents to satisfy § 1229(a)'s notice requirements was not addressed in *Pereira*. For its part, the BIA has allowed for the use of multiple documents, and in doing so has rightly been upheld in federal Article III court.

Where an agency acts based on its reasonable interpretation of the statute it administers, such action is entitled to deference by the courts. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of the statutory scheme it is entrusted to administer"). An interpretation can be reasonable even where there are many potentially reasonable interpretations and even where the one chosen is not the "best." *Holder v. Martinez Guiterrez*, 566 U.S. 583, 591 (2012) ("[the BIA's] position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best"). In fact, where an agency interpretation meets the reasonableness standard, the analysis ends, and the court is not required to "decide if the statute permits any other construction." *Id.*

Deference to executive agencies is an important aspect of separation of powers principles, *see, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive"), and the proper role of the judiciary within our system of government. *Id*. ("But there is another concern at play, no less firmly rooted in our constitutional structure. That is the *obligation* of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do as well.") (emphasis added).

BIA decisions are eligible for such deference. As this Court has explained:

> It is clear that principles of *Chevron* deference are applicable to this statutory scheme. The INA provides that the Attorney General shall be charged with the administration and enforcement of the statute and that the determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (internal quotations omitted). *See also Garcia-Romo*, 940 F.3d at 205 ("When the BIA interprets the Immigration and Nationality Act, its interpretation is eligible for *Chevron* deference."). Because the BIA is "vested . . . with the power to exercise the discretion and authority conferred on the Attorney General," *Aguirre-Aguirre*, 526 U.S. at 425, it is within its power to interpret the INA as allowing for multiple documents to satisfy notice requirements, and it not

permissible for a court to replace the agency's reasonable decision-making with its own.

The BIA's decision in *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520 (B.I.A. 2019), as shown in *Garcia-Romo*, *supra*, is a reasonable interpretation of the INA. In *Mendoza-Hernandez*, the BIA determined that "that the notice necessary to trigger the 'stop-time' rule is 'perfected' when an alien is served with a notice of hearing containing the time and place information required." *Mendoza-Hernandez*, 27 I. & N. at 535. This holding is not contrary to the statute. As the *Garcia-Romo* court explained, the word "a" does not necessarily require the use of a single document:

> It gives too cramped a reading to the meaning of the indefinite article "a" as understood in ordinary English. When the word "a" proceeds a noun such as "notice," describing a written communication, the customary meaning does not necessarily require that the notice be given in a single document. Rather, there may be multiple communications that, when considered together, constitute "a notice."

Garcia-Romo, 940 F.3d at 201. And even assuming, *arguendo*, that "a" does denote a single document, there is no bar to interpreting the statute as permitting a (single) notice to appear to be perfected by a later document, at which time the former satisfies the notice requirements and triggers the stop-time rule.

Here, the BIA has made the reasonable interpretation that it is permissible to send out a notice

to appear with time and place information missing and send a second notice of hearing as soon as the agency receives hearing information from the immigration court. Therefore, even if there were reasons to disagree with this interpretation, it should be upheld.

III. CURRENT REGULATIONS ALLOWING FOR THE USE OF MULTIPLE DOCUMENTS TO SATISFY NOTICE REQUIREMENTS EFFECTUATE THE INTENT OF CONGRESS

All immigration proceedings begin when the government files a notice to appear with the immigration court. 8 C.F.R. § 1239.1(a). Current regulations require that the notice to appear include "the time, place and date of the initial removal hearing[] *where practicable*," 8 C.F.R. § 1003.18(b) (2018) (emphasis added). *See also Pierre-Paul v. Barr*, 930 F.3d 684, 690 (5th Cir. 2019) ("[P]roceedings before an immigration judge commence when a charging document is filed."). Often it is not possible to provide such information at the time the notice to appear is issued, in which case it is permissible for either the Department of Homeland Security or the immigration judge assigned to the case to provide such information. *Id*. *See also Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (B.I.A. 2018) (holding that a notice to appear that lacks time and place information "meets the requirements . . . so long as a notice of hearing specifying this information is later sent to the alien.").

Generally, the notice to appear is filed with the immigration court to initiate removal proceedings and only then is the time and date for an alien's hearing

made available. 8 C.F.R. § 1003.14(a) ("[P]roceedings before an Immigration Judge commence[] when a charging document is filed with the Immigration Court by the Service."). *See also In re Sanchez-Herbert*, 26 I. & N. Dec. 43, 44 (B.I.A. 2012) ("Once a notice to appear has been properly filed with the Immigration Court, jurisdiction vests."). For such jurisdiction to vest, a "charging document," commonly the notice to appear, must have been served on an applicant and notice of such service must be provided to the immigration court. 8 C.F.R. § 1003.14(a) ("The charging document must include a certificate showing service on the opposing party"). Hence, it is clear that the notice to appear must be served in order for the immigration court to set time and place information. It is, therefore, often not possible for the notice to appear to include such information.

Congress enacted the stop-time rule to prevent removable aliens, such as Niz-Chavez, from building up continuous presence due to the slow pace of the administrative process. *See In re Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004) ("Legislative history reflects that section 240A(d)(1) was enacted by Congress in order to restrict perceived abuses arising from the prior practice of allowing periods of continuous physical presence to accrue after service of a charging document."); *Guamanrrigara v. Holder*, 670 F.3d 404, 410 (2d Cir. 2012) ("This reading is consistent with the purpose of the stop-time rule, which is to eliminate the incentive for aliens to delay their deportation proceedings in order to attain [ten] years of continuous residence") (internal quotations omitted); S. Rep. No. 104-249, at 15 (1996) (the stop-time rule

"reduces an alien's incentive to delay an exclusion or deportation proceeding"). Both precedent and legislative history support the fact that "Congress intended for the stop-time rule to break an alien's continuous residence or physical presence . . . when the [government] serves the charging document."). *Matter of Camarillo*, 25 I. & N. Dec. 644, 650 (B.I.A. 2011). In fact, as the BIA explained, "there is no reason to conclude that Congress would have expected that scheduling delays in the Immigration Court resulting from pending caseloads or other administrative issues would affect when an alien's continuous residence or physical presence ends for purposes of eligibility for relief from removal." *Id.* Because the agency is required to file a notice to appear to start the process with the immigration court, *see* 8 C.F.R. 1239.1(a), it stretches credulity to think that Congress would have intended to slow down immigration proceedings by forcing the agency to wait until it had all the required notice information to send a single notice document to removable aliens.

Furthermore, the purpose of providing notice is to ensure that aliens are aware of the proceedings. "[T]he focus is on the contents of the notice and facilitating the alien's appearance." *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. at 532. There can be no doubt that use of multiple documents to convey the statutorily required notice information satisfies the recognized purposes of notice. *Id.* at 531 ("[T]he fundamental purpose of notice is to convey essential information to the alien, such that the notice creates a reasonable expectation of the alien's appearance . . . This purpose can be satisfied by a combination of

documents that jointly provided the notice required by statute."). Where, as here, an alien receives a notice to appear and a notice of hearing, and attends his removal hearing, the congressional purpose of such notice has clearly been achieved. *See Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (B.I.A. Aug. 31, 2018) ("The respondent in this case clearly was sufficiently informed to attend his hearings."). Because petitioner received his notice to appear in March 2013, and his notice of hearing in May 2013, he was successfully notified of the proceedings at which he appeared, and the purpose of notice was effectuated.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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