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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

RULES

CONGRESSIONAL REPORTS

OTHER AUTHORITIES

INTRODUCTION

In IIRIRA, Congress changed the notice requirements for initiating removal proceedings: It removed statutory language allowing the government to provide "the time and place at which the proceedings will be held" in a separate hearing notice, and instead required that this information be provided in the "notice to appear" itself. The government immediately recognized the importance of this change. In rulemaking implementing IIRIRA, the government acknowledged that, under "the language of the amended Act," "the time and place of the hearing must be on the Notice to Appear." 62 Fed. Reg. 444, 449 (Jan. 3, 1997). But the government has since refused to follow this conceded requirement.

In *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), this Court rejected the government's first attempt to avoid the stop-time consequences of that refusal, holding that the government cannot turn a document into "a 'notice to appear'" simply by giving it that label. The government's latest argument—that "a 'notice to appear'" is not actually a document at all, but merely an abstract collection of information—fares no better. The government cannot explain why the statute refers to "*a* notice" if it only requires "notice" in the abstract. And the government's argument conflicts with its longstanding recognition—reflected in agency rulemaking, BIA decisions, and statements to this Court—that the "notice to appear" (like the predecessor "order to show cause") is a specific charging document.

The government tries to disguise its about-face by claiming that its previous characterizations applied only to a *regulatory* document that happens to have

the same name as the statutory one. But even putting aside the absurdity of the government's contention that the regulatory "Notice to Appear" does not implement the statutory "notice to appear" requirement, the government explicitly told this Court in *Pereira* that the *statutory* notice to appear "is a charging document." Tr. of Oral Arg. 39.

Even the government cannot ultimately defend its textual position in light of the statute as a whole. The government originally insists that the statute imposes only two requirements: providing information in writing and serving that information in person or by mail. But to render its interpretation coherent, the government must then make up *other* requirements (*e.g.*, notice does not count until the government makes a charging decision) and concede that at least *some* of the required information must be served together. Petitioner's interpretation renders these interpretive gymnastics unnecessary.

If the statute itself left any doubt, its history resolves it. The government seems to agree that if the predecessor "order to show cause" was a specific document, then so, too, is a "notice to appear." And the "order to show cause" plainly was a specific document: The statutory "order to show cause" was modeled on the regulatory one, and the regulatory "order to show cause" was long understood to be a specific document. The government's view would also nullify Congress's decision to move time-and-place information from an *optional* part of the "order to show cause" to a *required* part of the "notice to appear."

The government's suggestion (at 27) that petitioner's interpretation does not treat "similarly situ-

ated aliens the same" is wrong. Noncitizens who receive time-and-place information after—at times, *years* after—the other required hearing information are *not* similarly situated to those who receive it at the same time. *See* Pet. Br. 40-41; IJ/BIA Br. 8-13; NIJC Br. 24-25. As this Court recognized, the former are far more likely to be "confuse[d]" by notices "that lack any information about the time and place of the removal proceedings." *Pereira*, 138 S. Ct. at 2119. Congress avoided such confusion by mandating that *all* noncitizens in removal proceedings receive *all* the required information together—a rule that, when followed, eliminates the possibility of differential treatment and streamlines removal proceedings. *See* IJ/BIA Br. 8-18.

ARGUMENT

I. "A 'notice to appear'" is unambiguously a specific notice document.

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

1. The government's position erroneously interprets the phrase "*a* notice" to mean "notice" generally.

a. The government's textual argument rests almost entirely on a series of inapposite colloquial examples. Gov't Br. 18-19. The government's chosen terms—"manuscript," "story," etc.—are all countable nouns that *always* take an article in the singular. (No one would say "I wrote manuscript" or "I told story.") In other words, whether a speaker is referring to a unitary item or a collection of discrete parts, there is only one choice of terminology: "a manuscript," "a story," etc.

"Notice," by contrast, exists as both a countable and uncountable noun. It is possible to speak of "a notice" (*e.g.*, "a notice of proposed rulemaking" or "a notice to quit") or just "notice" (*e.g.*, "notice consistent with Due Process"). Congress chose the former—invoking the specific *document* in which information is conveyed. The government's insistence that it really meant the latter rejects "[t]he most natural reading of this language." *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1056 (2019).[1]

More fundamentally, the government's colloquial examples avoid petitioner's actual argument: Regardless of whether the article "a" may *sometimes* designate a medley of constituent parts, the context in which that language arises here is inconsistent with that reading. Pet. Br. 26-27. Section 1229, entitled "Initiation of removal proceedings," sets forth the interrelated information that must be served on an opposing party to commence legal proceedings. And other statutes and rules governing the exchange of written information during legal proceedings—especially those governing case-initiating documents—consistently use the indefinite article to refer to a single, specific document: "*a* pleading," "*an* indictment," "*a* judgment," and so on. *See, e.g.*, Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief"); Fed. R. Crim. P. 7 ("an indictment"); *State* v. *Baker*, 893 N.E.2d 163, 164 (Ohio 2008) (holding that "a judgment of conviction" refers to a "single document").

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[1] The government's citation to *Bonds* v. *Farmers Ins. Co.*, 240 P.3d 1086 (Or. 2010) is misplaced: The case did not construe a statute containing the phrase "a notice," and the court *rejected* reliance on two documents. *Id.* at 1092.

The government does not contest that, when it comes to case-initiating pleadings, the article "a" denotes a specific document. Instead, the government denies (at 20) that "a 'notice to appear'" is like "a charging document" or "a civil 'complaint'"—as if petitioner simply invented the analogy. But it is the *government* that repeatedly drew that comparison (when it suited the government's purposes). In its post-IIRIRA rulemaking, the government explained that "the Notice to Appear" is "[t]he charging document which commences removal proceedings." 62 Fed. Reg. at 449. And in *Pereira*, the government told this Court point blank that "a Notice to Appear is a charging document," "like an indictment in a criminal case [or] a complaint in a civil case." Tr. of Oral Arg. 39.[2]

The government cannot explain why it has suddenly changed its mind. It tries to distinguish between the regulatory "Notice to Appear" and the statutory "notice to appear," claiming (at 20-21) that only the former is a charging document. That makes no sense. The agency's decision to use the term "notice to appear" to denote a charging document makes clear that the agency read section 1229(a)(1) to require a charging document that includes the required information—otherwise, why use the statutory term? That fact is confirmed by the agency's statement that "the language of the amended Act indicat[es] that the time and place of the hearing must

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[2] This statement unambiguously concerned the *statutory* notice. *Pereira* did not disagree that the statutory "notice to appear" is a type of charging document, *contra* Gov't Br. 22, but simply held that time-and-place information is no "less crucial" a part of that document than the other required information. 138 S. Ct. at 2115 n.7.

be on the Notice to Appear." 62 Fed. Reg. at 449. Such language recognizes that the *statute* requires that the regulatory charging document include time-and-place information because it is among the information listed in section 1229(a)(1)'s "notice to appear" definition.

b. Unable to reconcile its position with the phrase "a 'notice to appear,'" the government argues (at 16-17) that the Court must ignore that defined phrase and look only to the definitional language. But "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of [the] defined term" itself. *Bond* v. *United States*, 572 U.S. 844, 861 (2014); *see* Gov't Reply Br. 4, *Tanzin* v. *Tanvir* (No. 19-71) (making this argument).

This Court regularly rejects interpretations that conflict with a defined term's ordinary meaning where the definitional language does not compel a conflicting construction. In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), for instance, the Court emphasized that "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* at 11. And in *Gustafson* v. *Alloyd Co.*, 513 U.S. 561 (1995), the Court relied heavily on the established meaning of the word "prospectus," despite the statutory definition of that term, because it had acquired a "well understood" meaning at the time the statute was enacted. *Id.* at 574-576.

Here, too, any construction of section 1229(a)(1) must account for the phase "a 'notice to appear.'" Nothing in section 1229(a)'s definition explicitly authorizes the government to provide the required information seriatim. To the contrary, the interrelated nature of the required information, and its connec-

tion to the initiation of removal proceedings, refutes that approach. Pet. Br. 27-29; pp. 4-6, *supra*. Moreover, the phrase "a 'notice to appear'" comes with a "well understood" history—its definitional structure was copied from the prior definition of "an 'order to show cause,'" which was long understood to be a specific notice document. Pet. Br. 9-13; pp. 13-16, *infra*.

The government observes (at 19 n.2) that section 1229(a)(1)'s definition uses the phrase "written notice," while section 1229(a)(2) refers to "a written notice." But that is perfectly consistent with petitioner's position. Section 1229(a)(2) uses the term "a written notice" to mean a specific document; section 1229(a)(1) uses the term "written notice," which may or may not require a specific document, and then clarifies that a specific document is required with its use of "a notice" in the defined term. Petitioner's interpretation thus makes sense of *both* the defined term *and* the definition, while the government's interpretation does not.

c. The government's reliance (at 17) on the Dictionary Act is also unavailing. The Act provides that, "unless the context indicates otherwise[,] words importing the singular include and apply to several … things." 1 U.S.C. § 1. But the question in this case is not whether the government may serve "several" notices to appear—it is whether the contents of "a 'notice to appear'" can be split across multiple documents. Pet. Br. 27 n.4. The government ignores this argument.

Moreover, because the Dictionary Act's background presumptions yield to context, the Court has applied the act only on "rare occasions" when "doing so was necessary to carry out the evident intent of

the statute." *United States* v. *Hayes*, 555 U.S. 415, 422 n.5 (2009) (quotation marks omitted). This is not one of those rare cases: the "evident intent" of section 1229(a)(1)—as reflected in its text, structure, history, and purpose—resists the government's approach.

2. The government is ultimately unwilling to accept the implications of its core textual position. The government insists (*e.g.*, at 15) that the statute imposes "two—and only two—requirements": The required information must be in writing and served in person or by mail. But if that were right, the government could divide the required information literally however it wanted—it could, for instance, provide non-case-specific information to all noncitizens entering the country and then omit that information when bringing charges years later. Pet. Br. 29. Even for the government, that hypothetical is a bridge too far. *See* Gov't Br. 40.

To avoid that result, the government must invent an additional statutory requirement: Notice only counts if given "*after* a decision is made to assert th[e] charges" against the noncitizen. *Id.* The statute's text, however, includes no such temporal limitation. The government remarks (at 40) that the notice to appear must include "charges *against the alien*." But that does not explain why, on the government's theory, it could not serve *other* information—*e.g.*, information about the right to counsel—before specific charges were levied. And the government's observation (at 40) that notice is given "[i]n removal proceedings" merely specifies *why*, not when, the information must be provided.

Moreover, the government does not explain how anyone could know when it "deci[des]" to "assert

th[e] charges" such that notice begins to count. After all, under its two-step notice process, the government does not actually decide to "assert th[e] charges" until it *files* its initial notice with the immigration court, which it sometimes *never* elects to do.[3] *See* AILA Br. 19.

Petitioner's interpretation avoids any concededly unacceptable consequences without the need to impose such an atextual and amorphous inquiry.

3. The government also cannot reconcile its textual position with neighboring INA provisions.

a. Under section 1229a(b)(7), certain consequences attach if, "at the time" of "the notice described in paragraph (1) … of section 1229(a)" (*i.e.*, "the time" of the "notice to appear"), the government provides "oral notice" of the time and place of removal proceedings and the consequences of failure to appear. That language is incoherent unless a notice to appear is a document served at a discrete "time." Pet. Br. 30. The government effectively acknowledges that this provision makes sense only if the time-and-place information required by section 1229(a)(1)(G)(i) and the consequences of failure to appear required by section 1229(a)(1)(G)(ii) must be served at one "time"; but, it maintains, the rest of the information in section 1229(a)(1) can be served at a different "time." Gov't Br. 31-32. This argument suffers from two critical flaws.

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[3] Government data suggest that DHS does not file approximately ten percent of the notices to appear that it serves. *Compare* DHS, *Immigration Enforcement Actions: 2019*, tbl. 4 (https://tinyurl.com/NTAs-issued), *with* EOIR, *Statistics Yearbook: Fiscal Year 2018*, fig. 2 (https://tinyurl.com/NTAs-filed).

First, and most fundamentally, by conceding that at least *some* information in section 1229(a)(1) must be provided in a single document served at one "time," the government abandons its core argument that section 1229(a)(1) places no limitations on the number of documents it can use to provide the required information. The government cannot explain how section 1229(a)(1) requires that the information in subparagraphs (G)(i) and (G)(ii) be provided together, but allows the rest of the required information to be served separately.

Second, the government's reading of section 1229a(b)(7) has zero basis in the statute's text. The government argues (at 31-32) that section 1229a(b)(7)'s reference to "the time" of "*the notice* described in *paragraph (1)*" really means "the time" of "*notice of the information* described in *paragraphs (1)(G)(i) and (ii)*." If that is what Congress meant, that is what Congress would have written. Instead, the statute refers to "the time" of "the notice" encompassed by *all* of section 1229(a)(1)—confirming that section 1229(a)(1) requires a specific document served at a specific "time."

b. The government's interpretation is also inconsistent with section 1229(e). By instructing that "the Notice to Appear shall include a [specific] statement" under certain circumstances, that provision presupposes a document in which that statement could be "include[d]." *See* Pet. Br. 31. In other words, if "a 'notice to appear'" is only a collection of information, not a document, then mandating that a statement be "include[d]" in "the Notice to Appear" is no different than requiring that the statement be provided in the abstract.

The government responds (at 32) that section 1229(e) "require[s] that the statement be included in one of the documents constituting the required 'written notice.'" But here, again, the government abandons its core textual position. If the specific document in which the information is provided is irrelevant, then the statement required by section 1229(e) would be "include[d]" in the notice to appear even if it were provided in a standalone document. And that renders section 1229(e)'s reference to "the Notice to Appear" meaningless. *See* Pet. Br. 31.

As a fallback, the government claims (at 32-33) that the "Notice to Appear" in paragraph (e) of section 1229 is different than the "notice to appear" in paragraph (a) of that same section. The former, it argues, refers to the regulatory charging document. But section 1229(a) defines "a 'notice to appear'" as it appears "in this section"—*i.e.*, the *entire* section, including paragraph (e). 8 U.S.C. § 1229(a)(1). The government's argument thus rests on the implausible premise that, by capitalizing two letters, section 1229(e) avoids the defined statutory term and instead cross-references a document that exists *only* by virtue of regulations (which, of course, the agency could change). More likely, the capitalization reflects how clear it was, when Congress enacted section 1229(e) in 2006, that a notice to appear—whether statutory or regulatory—is a specific *document* in which the government could "include" the required certification. *Cf.* Gov't Br. 33 n.4.

c. Attempting to advance a competing structural argument, the government relies (at 29-31) on three provisions—sections 1229(b)(1), 1229a(b)(5), and 1229a(b)(7)—that cross-reference section 1229(a)(1).

But the language the government emphasizes does not address the question presented. Section 1229(b)(1), for example, provides that a hearing date may not be scheduled "earlier than 10 days after the service of the notice to appear." That is consistent with the government's interpretation, but it is equally (if not more) consistent with petitioner's. Even the government ultimately acknowledges (at 30) that the language it cites in these sections does not speak to the parties' dispute because it does not "turn[] on the particular format of the written notice."

4. Petitioner's interpretation of the statute has been confirmed by the government, the BIA, and this Court. Pet. Br. 31-33. The government claims (at 36-37) that its rulemaking did *not* interpret section 1229(a)(1) to require a specific notice document, but that is wrong. The rulemaking recognized that "*the language of the amended Act* indicat[es] that the time and place of the hearing must be on the Notice to Appear." 62 Fed. Reg. at 449 (emphasis added). In other words, because IIRIRA made time-and-place information a required part of the "notice to appear," the regulatory charging document *must* include time-and-place information to comply with the statute. The government ignores this language. The government also fails to explain why, if an immigration court's hearing notice is part of the statutory "notice to appear," the government never included the immigration court in regulations specifying who can issue "a notice to appear" (without capitalization). *See* 8 C.F.R. § 239.1; Pet. Br. 32; NIJC Br. 13-15.

B. The government's interpretation is irreconcilable with the statute's history.

Even if the statute itself left room for doubt, history debunks the government's view. Pet. Br. 34-39. First, section 1229(a)'s definitional language was copied almost verbatim from the pre-IIRIRA definition of "an 'order to show cause,'" which was unambiguously a specific document. Second, the government's interpretation renders meaningless Congress's decision to change time-and-place information from an *optional* part of "an 'order to show cause'" to a *required* part of "a 'notice to appear.'"

1. The government does not dispute that *if* section 1252b's definition of "an 'order to show cause'" required a specific document, then section 1229(a)'s definition of "a 'notice to appear'" does, too. *See* Pet. Br. 36-38 (describing textual overlap between the two definitions); Gov't Br. 37. That necessary concession is fatal, as section 1252b's text and history unmistakably demonstrate that "an 'order to show cause'" was a specific notice document.

a. The statute's text alone shows that "an 'order to show cause'" was a specific notice document. 8 U.S.C. § 1252b(a) (1994). Section 1252b(a)(1) defined "an 'order to show cause'" as written notice of specified information, which did *not* include time-and-place information. Section 1252b(a)(2) then required that the government provide time-and-place information either "*in the order to show cause or otherwise*" (emphasis added). The italicized phrase is key: It shows the "order to show cause" was a specific document, and that time-and-place information could either be included "in" that document or in some "other[]" document. *See* Pet. Br. 34-35.

The government's interpretation, by contrast, renders the italicized phrase incoherent. On the government's view, the "order to show cause" was an abstract collection of information, not a specific document; the notion that time-and-place information could be provided "in" the order thus makes little sense. To avoid this problem, the government claims (at 38) that time-and-place information was "in" the order if it was provided together with *any* of the other pieces of information required by section 1252b(a)(1). But that conflicts with the government's basic argument, which is that the document in which the information is provided is *irrelevant*. *See* p. 8, *supra*.

The government cannot explain what purpose the phrase "in the order to show cause or otherwise" served if the order was not a specific document "in" which time-and-place information could be included. Indeed, the government *agrees* (at 38-39) that, on its view, this phrase was "superfluous." But this Court is "reluctant to treat statutory terms as surplusage in any setting," and has emphasized the "cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quotation marks and brackets omitted).[4]

The only plausible reading of section 1252b's statement that time-and-place information could be provided "in the order to show cause or otherwise" is

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[4] The government claims (at 38-39) that this surplusage was needed to resolve confusion about whether an "order to show cause" was necessary for in absentia eligibility. But the statute permits no such confusion and, in any event, the surplusage at issue would not resolve it.

that "an 'order to show cause'" was a document in which such time-and-place information could, but need not, be included.

b. The regulatory background against which former section 1252b was enacted confirms petitioner's reading.

The government does not dispute that, for more than three decades leading up to Congress's enactment of section 1252b, an "order to show cause" was understood to be a specific notice *document*. Pet. Br. 9-12, 35-36. The agency created the "order to show cause" by regulation in 1956, and required that it include the "time and place" of the hearing. 8 C.F.R. § 242.1(b) (1957). In subsequent rulemaking, INS recognized that this "order to show cause" was a specific document that must specify time-and-place information. 43 Fed. Reg. 36,238, 36,238 (Aug. 16, 1978). INS found this requirement difficult to fulfill, and hence amended the regulation to state that time-and-place information "may be stated in the order [to show cause] or may be later specified." *Id.* INS thus maintained the "order to show cause" as a specific document, but made inclusion of time-and-place information in that document optional. *See id.*; 8 C.F.R. § 242.1(b) (1979). When Congress incorporated the "order to show cause" into the statute, therefore, it was well settled that it was a specific document.

This Court has repeatedly recognized that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998); *see also United States* v. *Hill*, 506 U.S. 546, 553-554 (1993). That presumption is par-

ticularly appropriate here given that Congress not only used the established regulatory phrase, but also largely adopted the *substance* of the prior regulations. Pet. Br. 36.

The government's only response (at 37)—that section 1252b "imposed no *statutory* requirement that its 'written notice' be in one document"—misses the point. The statutory definition of "an 'order to show cause'" was effectively imported from the prior regulatory ones; there was no single-document "requirement" in the regulations that the statute lacked. The government suggests (at 37) that the regulations, unlike the statute, somehow characterized the "Order to Show Cause" as a "form," but that is incorrect: The regulations never described the order to show cause as a "form," nor did they consistently use the capitalization on which the government so heavily relies. *E.g.*, 8 C.F.R. § 242.1 (1979) ("order to show cause"). The government simply cannot explain why Congress intended the term "order to show cause" to have an entirely different meaning than it had in decades of preceding regulations.

2. The government's interpretation would also nullify Congress's decision in IIRIRA to move time-and-place information from an *optional* part of the "order to show cause" to a *required* part of the "notice to appear." *See* Pet. Br. 38-39. The government does not dispute that, on its view, Congress's change to the government's notice requirements did not actually change those requirements *at all*. The government's reading thus improperly deprives these amendments of any "real and substantial effect." *Ross* v. *Blake*, 136 S. Ct. 1850, 1858 (2016).

According to the government (at 39), Congress amended the statute's notice requirements not to change those requirements, but to change the requirements for an in absentia removal order. Prior to IIRIRA, an in absentia order required "written notice required under subsection (a)(2)"—*i.e.*, notice of time-and-place information. 8 U.S.C. § 1252b(c)(1) (1994). Now, an in absentia order requires "written notice under paragraph (1) or (2) of section 1229(a)"—*i.e.*, a notice to appear or a notice of a change of hearing. 8 U.S.C. § 1229a(b)(5)(A). According to the government, Congress moved time-and-place information into the "notice to appear" to require that the government provide *all* of the information in section 1229(a) to trigger in absentia eligibility.

As an initial matter, the BIA recently rejected this argument: It held that, because an in absentia order requires notice under "paragraph (1) *or* (2)," a hearing notice under paragraph (2) triggers in absentia eligibility *regardless* of whether the noncitizen received a compliant "notice to appear" under paragraph (1). *Matter of Pena-Mejia*, 27 I. & N. Dec. 546, 548 (2019); *Matter of Miranda-Cordiero*, 27 I. & N. Dec. 551, 552-553 (2019). This is, of course, exactly what the statute required before IIRIRA. Thus, under the government's view, Congress's change to the statute's notice requirements does not currently have the one "real-world effect" that the government claims it had. Gov't Br. 39.

Moreover, if Congress merely wanted to change the in absentia trigger, it could have changed the in absentia provisions themselves: It could have left time-and-place information as an optional part of the

"notice to appear," while amending the in absentia provision to require *both* the notice to appear *and* the hearing notice. The fact that Congress instead changed the government's *actual notice requirements* shows that Congress intended to change *those* requirements—a change the government's interpretation would nullify.

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

Petitioner's interpretation advances Congress's stated purposes for changing the notice requirements and enacting the stop-time rule. Pet. Br. 39-44. The government largely ignores petitioner's argument and instead invokes its own purposes for the stop-time rule: avoiding administrative discretion and treating similarly-situated noncitizens the same. But these purposes, too, are perfectly consistent with petitioner's interpretation of the statute.

1. Petitioner's interpretation of the statute's notice requirements best accords with the purposes expressed in the House Judiciary Committee Report on IIRIRA. That Report specifically identifies "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings" as one of the problems Congress was trying to solve. H.R. Rep. No. 104-469, pt. I, at 122 (1996). The government concedes as much, explaining (at 35) that, prior to IIRIRA, immigration judges were reluctant to issue in absentia orders given the disputes about whether a noncitizen had received a hearing notice. The government does not contest that a multi-step notice process can lead to precisely these disputes, prejudicing noncitizens and burdening immigration courts.

Pet. Br. 40-41; IJ/BIA Br. 8-18. It therefore makes perfect sense that Congress, in IIRIRA, rejected the two-step notice process and required that time-and-place information be provided in the notice to appear itself. Pet. Br. 41-42.

The government responds (at 35-36) that Congress addressed the concern about notice "lapses" in another way: by making service by mail to the noncitizen's address of record sufficient to trigger in absentia eligibility. But, as the very page the government cites makes clear, those changes were intended to resolve a related but distinct concern about the "lack of accurate information on alien's addresses." H.R. Rep. No. 104-469, pt. I, at 159. And, even if the change regarding mail service was intended to address notice lapses, nothing suggests that this was the *only* change Congress directed at that concern. Notably, the government offers no *other* reason that Congress moved time-and-place information from an optional part of the "order to show cause" to a required part of the "notice to appear" (other than its flawed argument that Congress did not intend to change the government's notice requirements at all, *see* pp. 16-18, *supra*).

2. Petitioner's interpretation is also consistent with the expressed purposes of the stop-time rule. As this Court explained in *Pereira*, Congress enacted the stop-time rule to avoid gamesmanship by preventing noncitizens from "exploiting administrative delays" in removal proceedings to accrue additional continuous residence. 138 S. Ct. at 2119; *see also* H.R. Rep. No. 104-469, pt. I, at 122. The government does not dispute that petitioner's interpretation is consistent with this purpose because it gives the gov-

ernment the power to stop time from accruing whenever it wants by complying with the statute's notice requirements. Pet. Br. 43-44; Gov't Br. 28.

With no support in IIRIRA's actual legislative history, the government invents its own purpose of the stop-time rule: "curtail[ing] the Attorney General's exercise of discretion" to "treat[] similarly situated aliens the same." Gov't Br. 25, 27. The government cites practically nothing to support this theory, quoting only a snippet from the Conference Report that merely summarizes the stop-time rule.

The government's lack of support is unsurprising, as its concerns only arise if the government *refuses to comply with the statute*. The government effectively concedes this (at 28): Its purposive argument rests entirely on a hypothetical future Executive that violates the statute's notice requirements "as a matter of policy" to increase its own discretion. The government's need to resort to the threat of bad-faith Executive conduct is itself revealing. Moreover, a lawless, discretion-hungry Executive could achieve the same result under the government's interpretation—by, for instance, requiring that time-and-place information only be provided over the phone.

In addition, it is petitioner's interpretation, not the government's, that best treats similarly situated noncitizens the same. As this Court recognized in *Pereira*, providing time-and-place information after the other required information—at times, *years* after—can "confuse and confound" noncitizens. 138 S. Ct. at 2119; *see also* IJ/BIA Br. 9; NIJC Br. 24-25; AILA Br. 19-22. Noncitizens receiving such bifurcated notice are therefore *not* "similarly situated" to noncitizens who receive the required information to-

gether. That distinction may lessen the closer in time the separate notices are served, but Congress reasonably decided to treat "the same" only noncitizens who received all of the required information in exactly the same way—*i.e.*, in a specific notice document. So long as the government complies with that requirement, the government's concern about, for instance, differential treatment caused by the service of multiple documents on the same day will never arise.

In sum, the government's concerns result from the agency's refusal to do what it always knew the statute required, not from petitioner's statutory interpretation.

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

To the extent any slight ambiguities "linger[]," *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001), two interpretive principles resolve them. *See Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1569, 1572 (2017) ("normal tools of statutory interpretation" apply at *Chevron*'s first step); Pet. Br. 44-47; NIJC Br. 17-19.

1. In *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013), this Court interpreted a criminal bar to cancellation narrowly in part because cancellation's discretionary nature mitigated concerns with increased eligibility. *Id.* at 204. That principle applies here: Satisfying the statute's durational requirements does not itself entitle anyone to cancellation, but is one of many stringent eligibility requirements for discretionary relief. Pet. Br. 44-46. The government argues (at 27) that *Moncrieffe* did not establish a tiebreaking nar-

row-construction rule. But, even if true, *Moncrieffe* at least establishes that the durational requirement's role as a threshold eligibility criterion eliminates any concern that petitioner's interpretation would allow undeserving noncitizens to remain in the country.

2. The longstanding rule that ambiguities in removal provisions should be construed against the government likewise applies. The government argues (at 47) that this canon is not "determinative" in a *Chevron* case. But the question is not whether the canon is independently "determinative"—it is whether the canon plays a role at *Chevron*'s first step. The Court has already held that it does. *St. Cyr*, 533 U.S. at 320 & n.45. So when, as in this case, there are strong textual, structural, and historical arguments that the statute precludes the agency's interpretation, the principle of resolving ambiguities in removal statutes in favor of the noncitizen can "buttress[]" those arguments and resolve the case at *Chevron*'s first step, as it did in *St. Cyr*. *Id.* at 320.

II. The Board's decision is not entitled to deference.

For the reasons above, this case begins and ends with the traditional tools of statutory construction. But even if the Court were to discern some ambiguity, the Board's decision is not entitled to deference and should be rejected.

1. a. The Board's current interpretation of section 1229(a)(1) conflicts with at least two of its prior decisions—not to mention the position consistently reflected in the government's rulemaking. Pet. Br. 49-50. Yet the Board articulated no "good reasons" for that departure, *Encino Motorcars, LLC* v. *Navar-*

ro, 136 S. Ct. 2117, 2126 (2016), noting its reversal in a footnote that managed to be both conclusory and self-contradictory. *See* Pet. Br. 49.

In response, the government argues (at 44-46) that *Pereira* abrogated the Board's prior decisions. But while *Pereira* rejected the BIA's then-prevailing view that a document lacking time-and-place information qualifies as "a notice to appear under section [1229(a)]," *Matter of Camarillo*, 25 I. & N. Dec. 644, 647 (BIA 2011), it did *not* reject the Board's observation that "a notice to appear" is a *single document*—*i.e.*, "the charging document issued only by the DHS," *id.* at 648. To the contrary, this Court implicitly *endorsed* that view. Pet. Br. 32-33. Given the BIA's unexplained departure from its prior position, it is not entitled to deference.

b. The Board's interpretation is also unreasonable on its own terms. It not only conflicts with the statute, but stems from a transparent effort to allow the government to continue following its multi-step notice practice without facing the statutory consequences of that decision. Pet. Br. 50-51. The government does not deny that this results-driven rationale motivated the Board's decision—nor does it argue that pure administrative convenience warrants deference. Gov't Br. 43-47. As petitioner explained, it does not. Pet. Br. 50-51; NIJC Br. 28-31.

2. If necessary, this Court should reconsider whether the BIA's interpretations of the INA are entitled to deference. The Board possesses no special expertise in statutory interpretation, and its conclusions of law are not the product of a robust deliberative process. Pet. Br. 51-53.

The government does not meet these arguments head on. Instead, it asserts (at 47-48) that the INA delegates lawmaking authority to the Executive Branch. It relies in particular on 8 U.S.C. § 1103(a)(1), which provides that the Attorney General's rulings on "all questions of law shall be controlling." But the government removes that provision from its context: The statute merely makes the Attorney General's rulings binding "*within the Executive Branch*," *Matter of L-E-A-*, 27 I. & N. Dec. 581, 591 (BIA 2019) (emphasis added)—not upon a coordinate branch of government.

Regardless, the outcome here is clear: Traditional interpretive tools foreclose the Board's impermissible interpretation of the statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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