No. 22-884

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,

Petitioner,

v.

VARINDER SINGH,

Respondent.

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under 8 U.S.C. § 1229a(b)(5)(C)(ii), a noncitizen who can show that he "did not receive notice in accordance with paragraph (1) or (2)" of 8 U.S.C. § 1229(a), may seek rescission of an *in absentia* removal order. It is undisputed that paragraph (1) notice under § 1229(a)(1), referred to as a notice to appear, must include, among other things, information about the time and place of a hearing. It is also undisputed the respondent here never received that information. Instead, he was later sent paragraph (2) notice that included only the missing information.

The question presented is whether a noncitizen must show *both* that he did not receive notice under paragraph (1) *and* paragraph (2), in order to qualify for rescission, despite the plain text of the statute to the contrary.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

TABLE OF AUTHORITIES – Continued

INTRODUCTION

If at first you don't succeed, try, try and try again. "Today's case represents the next chapter in the same story," a story all but resolved twice over. *Niz-Chavez v. Garland,* 141 S.Ct. 1474, 1479 (2021). Yet, once again, the government comes to the High Court seeking permission to continue benefiting from its original statutory sin of providing defective, incomplete notices to appear. For a constellation of compelling reasons, the Court should–for the third time–find that the government cannot benefit from its failure to follow the commandment of the statute.

The executive agency responsible for enforcing the country's immigration laws ignored the statute because it found compliance with the law to be too burdensome, inconvenient, perhaps. But as this Court has made clear, "pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'" *Niz-Chavez*, 141 S.Ct. at 1485 (quoting *Pereira v. Sessions*, 138 S.Ct. 2105, 2118 (2018)).

A noncitizen who fails to attend a removal hearing after receiving the required written notice shall be ordered removed *in absentia.* 8 U.S.C. § 1229a(b)(5)(A). For today's purposes, the written notice is provided to the noncitizen in a species of "charging document" known as a "notice to appear," which among other required information, must include the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). After the service of a notice to appear, if there is "any change or postponement in the time and

place" of the proceedings, the noncitizen must be provided with "a written notice" specifying the "the new time or place of the proceedings." 8 U.S.C. § 1229(a)(2). Despite a clear directive from Congress that the time and place of the proceedings must be included in the notice to appear, the government promulgated regulations that allow the time-and-place information in the notice to appear only "where practicable." 8 C.F.R. § 1003.18(b). But "[i]f Congress has defined a term, then an implementing regulation cannot re-define that term in a conflicting way." *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961 (7th Cir. 2019). In closely neighboring regulatory provisions, it is clear not only that Congress intended a complete notice to appear containing time and place information, but also that the agency understood that to be the case.

The question before the Court is whether a noncitizen can be ordered removed *in absentia* if he received a defective notice to appear lacking information about the time and place of the hearing, even if that missing information is later provided in a separate written notice. The statutory text, structure, context, history, and the regulatory architecture all make clear that a noncitizen cannot be ordered removed *in absentia* if he did not receive the time-and-place information in a single, discrete notice to appear. Differences between a notice to appear and a separate written notice under Section 1229(a)(2) confirm that a written notice under Section 1229(a)(2) cannot replace a defective notice to appear.

The notice to appear was created as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996. *See* Pub. L. No. 104-208, 110 Stat. 3009-587. "When Congress acts to amend

a statute," this Court "presume[s] [Congress] intends its amendment to have real and substantial effect." *Stone v. INS,* 514 U.S. 386, 397 (1995) (*citation omitted*). Before IIRIRA was enacted, deportation proceedings were launched with the issuance of a document called an "[o]rder to show cause," which contained the same information as a notice to appear with one notable exception—the time-and-place information was optional. 8 U.S.C. § 1252b(a)(1)(A)-(F) (repealed 1996). Forging a different path, IIRIRA explicitly requires time-and-place information in a notice to appear, as the prior two-step notice process was inefficient, caused lapses in notifying noncitizens of their hearings, and created too many disputes about whether noncitizens were provided valid notices. The legislative history confirms that "[t]he creation of 'notice to appear' was intended to prevent 'protracted disputes concerning whether an alien[1] has been provided proper notice of a proceeding' by informing aliens that they are required to

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[1] As Circuit Judge Bea of the Ninth Circuit Court of Appeals recently observed:

> Words matter. Our federal immigration statutes concern themselves with aliens. This word is not a pejorative nor an insult . . . Alien is a statutory word defining a specific class of individuals. And when used in its statutory context, it admits of its statutory definition, not those definitions with negative connotations that can be plucked at will from the dictionary.

Avilez v. Garland, 48 F.4th 915, 931, n.2 concurring (9th Cir. 2022). "Alien" is a legal term in the Immigration and Nationality Act, referring to "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Although the term is considered by some to be pejorative, in order to cite congressional statutes and published opinions as written, the term may be used in

notify the government of any changes in their contact information." *Pereira v. Session*, 866 F.3d 1, 7 (1st Cir. 2017) (quoting H.R. Rep. 104-469, Pt. at 122 (1996)), *overruled* on other grounds by *Pereira v. Session*, 138 S.Ct. 2105 (2018).

The judgment of the court of appeals concluding, "[b]ecause the government did not provide Singh with statutorily compliant notice before his removal hearing, Singh's in absentia removal order is subject to rescission pursuant to 8 U.S.C. § 1229A(b)(5)(C)(ii)" should be affirmed. *Singh v. Garland*, 24 F.4th 1315, 1319 (9th Cir. 2022).

STATEMENT OF THE CASE

Philosophers will debate the relationship between language and reality: *Does language create, or merely describe reality?*[2] While the words of a statute matter, their meaning should be assessed and ultimately resolved in their application to the real world, where the interpretational rubber meets the road. And so today, we start at the beginning of the removal process itself and explain how it influences the meaning of the text's notice provisions. In particular, how Sections

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some portions of this brief. This use should not be construed as approval of the term.

[2] "The limits of my language mean the limits of my world." Ludwig Wittgenstein, *Tractatus Logico-Philosophicus,* Preface at 3, PROPOSITIONS 5.6 (1922), *cited in Interval Licensing LLC v. AOL, Inc.,* 896 F.3d 1335, 1356 (Fed. Cir. 2018) (CJ Plager, concurring-in-part, dissenting-in-part).

1229(a)(1) and (2) influence the straightforward meaning of Sections 1229a(b)(5)(A) and (C); by doing so, we reveal that Congress carefully amended the statute and fully intended that the authority to remove *in absentia* come only after a discrete statutorily compliant notice to appear, in light of how removal proceedings are set in motion.

The Department of Homeland Security ("DHS") has prosecutorial discretion to begin removal proceedings against a noncitizen. *See* 8 C.F.R. § 239.1(a) (2011). Removal proceedings commence when the DHS files "a charging document" with the Immigration Court, with service on the noncitizen, "the opposing party." 8 U.S.C. § 1229; 8 C.F.R. § 1239.1; 8 C.F.R. § 1003.14(a). Jurisdiction then vests with the Immigration Judge once the charging document is filed with the Immigration Court. *Id.* Until a charging document has been properly filed with the Immigration Court, the noncitizen is not in removal proceedings at all, as such proceedings have simply not yet "commence[d]." 8 C.F.R. § 1003.14 (a).

1. a. The principal charging document in removal proceedings is called a "notice to appear." 8 U.S.C. § 1229(a)(1). Section 1229(a)(1) provides that 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. *Ibid*. Thus, the statute manifestly preferences (and mandates) personal service on the noncitizen; but where actual, personal service is "not practicable," the statute alternatively and parenthetically authorizes service "by mail" on the noncitizen or his "counsel of record, if any." *Id.* The notice to appear must, *among*

other things, provide "[t]he time and place at which the proceedings will be held" and the "consequences" for "failure" to appear "except under exceptional circumstances." 8 U.S.C. § 1229(a)(1)(G)(i)-(ii). The Court has already held that "[i]f the three words 'notice to appear' mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, *i.e.,* the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place." *Pereira,* 138 S.Ct. at 2115.

The notice to appear also requires that the noncitizen provide the Attorney General with a "written record of an address and telephone number (if any) at which the alien may be contacted," and further obliges the noncitizen to "immediately" provide a "written record of any change of the alien's address or telephone number." 8 U.S.C. § 1229(a)(1)(F)(i)-(ii). Paragraph (2) of Section 1229(a), entitled: "Notice of Change in Time or Place of Proceedings," unsurprisingly applies when there is "any change or postponement in the time and place" of the removal proceedings. 8 U.S.C. § 1229(a)(2)(A). When this occurs, "a written notice" must be issued specifying only "(i) the new time or place of the proceedings, and (ii) the consequences" of failing to attend the hearing. *Id.* The statute again preferences actual, personal service on the noncitizen, with a parenthetical allowance for service by mail on the noncitizen or their counsel, where "personal service is not practicable." *Id.* And while personal service is the preferred statutory default, regular mail may be used to serve the notice to appear and the notice of

any change in time and place of the proceedings, provided there is "proof of attempted delivery to the last address provided by the" noncitizen. 8 U.S.C. § 1229(c).

b. Section 1229a(b)(5)(A) enumerates the consequences to a noncitizen who "does not attend a proceeding under this section." Simply stated, those consequences are that the noncitizen "shall be ordered removed *in absentia* if the Service establishes by clear and convincing evidence" that the noncitizen received "written notice required under "paragraph (1) or (2) of section 1229(a)" and the noncitizen is proven to be removable as charged. 8 U.S.C. § 1229a(b)(5)(A). The "written notice" to the noncitizen is deemed "sufficient for purposes" of entering an *in absentia* order "if provided at the most recent address provided under section 1229(a)(1)(F) of this title." *Ibid.* And "[n]o written notice shall be required" if the noncitizen "has failed to provide the address required under section 1229(a)(1)(F) of this title." 8 U.S.C. § 1229a(b)(5)(B).

8 U.S.C. § 1229(a)(1)(F) imposes two obligations on noncitizens and one on the Attorney General. Subsection (F)(i) obliges the noncitizen to "immediately provide" 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 1229(a) of this title"; subsection (F)(ii) requires the noncitizen to "provide the Attorney General immediately with a written record of any change of the alien's address or telephone number"; and subsection (F)(iii) orders the Attorney General to admonish the noncitizen in the notice to appear of the "consequences under section 1229a(b)(5)" for failing to abide both (i) and (ii). But after IIRIRA, the precise identity of the "Attorney General" was not always

clear. Subsection (F)(i), for example, may not ultimately refer to the same entity or agency, as the "Attorney General" reference in (F)(ii) because subsection (i) mentions contacting the noncitizen "*respecting* proceedings," implying a universe *preceding* the noncitizen being in removal proceedings (before the notice to appear vests jurisdiction with an Immigration Judge). Subsection (F)(ii), on the other hand, refers more broadly to "any changes," suggesting an ongoing obligation on the noncitizen both before and after proceedings "commence."

c. An *in absentia* removal order "may be rescinded" if the noncitizen moves to reopen "within 180 days after the date of the order of removal" and "demonstrates that the failure to appear was because of exceptional circumstances . . . " 8 U.S.C. § 1229a(b) (5)(C)(i). An *in absentia* order may also be rescinded "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 of State custody and the failure to appear was through no fault of the alien." 8 U.S.C. § 1229a(b)(5)(C)(ii). The latter section of 1229a(b)(5) (C)(ii) exonerates a noncitizen who fails to appear because they were "in Federal or State custody" and they establish the nonappearance was not their "fault." Moving to rescind under either subsection invokes a mandatory "stay [of] the removal of the" noncitizen pending its adjudication by the Immigration Judge. *Id.*

d. Before IIRIRA's enactment in 1996, the INA encompassed two distinct proceedings: exclusion proceedings for noncitizens seeking entry into the United States; and deportation proceedings for those who had

entered the United States. *See Landon v. Plasencia*, 459 U.S. 21, 25 (1982). IIRIRA "abolished the distinction and created a uniform proceeding known as removal." *Vartelas v. Holder*, 566 U.S. 257, 262 (2012). Deportation proceedings began with the issuance of a document called an "order to show cause." *See* 8 U.S.C. § 1252b, *et seq.* (1995). The order to show cause mandated inclusion of the same information as a notice to appear, *with one notable exception*—the predecessor statutory scheme did not require the order to show cause provide information about the time and place hearing to the noncitizen. 8 U.S.C. § 1252b(a)(1)(A)-(F). The predecessor statute allowed time and place information to be provided "in the order to show cause *or otherwise*" (*emphasis added*), under Section 1252b(a)(2)(A).

In deportation proceedings, too, the government needed to *personally* serve an order to show cause on the noncitizen; but if personal service was "not practicable," the government was parenthetically permitted to serve it by "certified mail to the alien or his counsel of record, if any . . . " 8 U.S.C. § 1252b(a)(1). Likewise, "in the case of any change or postponement in the time and place of such proceedings, written notice" was "given in person to the alien" or, if personal service was "not practicable," such notice could be given by "certified mail to the alien or to the alien's counsel of record, if any . . . " 8 U.S.C. § 1252b (a)(2)(B). Thus, the predecessor statute required either personal service or service by certified mail, two secure methods assuring notice on the noncitizen.

While relaxing the *alternative* service requirements for notices to appear (authorizing service by regular mail in place of certified mail), IIRIRA also strengthened the *primary* service requirements in two ways: by

maintaining the personal service requirement as the preferred method of service; *and also mandating* that time and place be included in the initial document that set streamlined removal proceedings in motion. The inclusion of time and place served as a proxy for the government's intentions.[3] So while the statute does not mandate that the notice to appear ever be filed with the Immigration Court, regulations require that as part of the contents of the notice to appear, the charging document must at least include the "address of the Immigration Court where the Service *will file* the . . . Notice to Appear." 8 C.F.R. § 1003.15(b)(7) (*emphasis added*). This will at least give the noncitizen some information about the venue of future proceedings. But without date and time information, the noncitizen is left in a sort of administrative Dantean Ante-Purgatory, with feet held firmly to the fire for an uncertain amount of time, unable to begin their penance in proceedings (which may or may not ever be commenced).

Under the prior statute, a noncitizen who failed to attend a hearing "after written notice required under [8 U.S.C. § 1252b(a)(2)]" was provided, would be ordered removed *in absentia* if the government established by "clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien" was deportable. 8 U.S.C. § 1252b(c)(1). Such an order could be rescinded by a motion to reopen filed within 180 days of the order if the alien demonstrated

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[3] Only 8 U.S.C. § 1229(d)(1) contemplates "prompt initiation" of proceedings, stating that in the case of a noncitizen "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."

that the "failure to appear was because of exceptional circumstances . . . " 8 U.S.C. § 1252b (c)(3)(A). An *in absentia* deportation order could also be rescinded "upon a motion to reopen filed at any time if the alien demonstrate[d] that the alien did not receive notice in accordance with subsection [1252b](a)(2), which was entitled, "[n]otice of time and place of proceedings." 8 U.S.C. § 1252b(c)(3)(B). And once again, that statutory provision expressly authorized the time and place information to be provided to the noncitizen "in the order to show cause or otherwise." 8 U.S.C. § 1252b(a)(2).

2. a. Varinder Singh is a native and citizen of India. He is a practicing Sikh and supporter of the Shiromani Akali Dal Amritsar, a Sikh nationalist political party in India. J.A. 62. Mr. Singh fled his native country after he was attacked several times by members of an opposing political party whose members threatened to kill him because of his political opinion. J.A. 63.

Mr. Singh entered the United States without inspection at or near Calexico, California on October 19, 2016. He was apprehended by the United States Customs and Border Protection. A.R. 133. He was then referred to an Asylum Officer after he stated a fear of returning to his native country. *Id*. An asylum officer conducted an interview and determined that Mr. Singh's asylum claim was credible. A.R. 141.

On November 30, 2016, the government served Mr. Singh with a notice to appear that charged him with removal because he was present in the United States without inspection. J.A. 10-16. The notice to appear provided neither a date nor time to appear for a hearing. Instead, it merely stated that the date and time were "to be set." J.A. 11. The address listed on

the notice to appear was the detention facility where Mr. Singh had been detained. J.A. 10. The notice to appear incorrectly alleged that Mr. Singh was provided "oral notice in the Punjabi language of the time and place of his or her hearing and the consequences of failure to appear as provided" in 8 U.S.C. § 1229a(b)(7). J.A. 16. Since there was no hearing scheduled, he was not of course given any notice of the "time and place of his or her hearing."

On December 2, 2016, Mr. Singh was released from immigration custody after he posted bond. A.R. 134. He provided the government with the most reliable address where he could be reached, a friend's house in Dyer, Indiana. *Id*. Mr. Singh then travelled to Hammond, Indiana, to stay with a family friend.

On December 6, 2016, the Immigration Court in Imperial, California mailed a hearing notice that directed Mr. Singh to appear for a master calendar hearing on January 29, 2021, in Imperial, California, about 2,000 miles from his stated residence. J.A. 7-9. In March 2017, Mr. Singh hired an immigration attorney in New York to represent him. A.R. 107. This attorney told Mr. Singh that he did not have to "worry too much" about the hearing because it was still four years away. A.R. 99. More than a year later, on October 29, 2018, the Immigration Court in Imperial, California, mailed a hearing notice to Mr. Singh's Dyer, Indiana address directing him to appear at a master calendar hearing on November 26, 2018. J.A. 4-6. Mr. Singh did not receive the hearing notice because his friend living at the Dyer address did not forward the mail to him. J.A. 65. Mr. Singh did not appear at the hearing, but because the attorney for the government was not prepared to proceed, the Immigration Judge reset the

matter to December 12. 2018. A second notice was mailed to Mr. Singh's Dyer address directing him to appear for a master calendar on December 12, 2018. J.A. 1-3.

b. On December 12, 2018, the Immigration Judge ordered Mr. Singh removed *in absentia* after he failed to appear at this master calendar hearing. Pet. App. 24a-25a. A copy of the Immigration Judge's decision was mailed to Mr. Singh's Dyer, Indiana, address. *Id.* Mr. Singh was unaware of this removal order until February 16, 2019, when his friend in Indiana mailed a copy to him. J.A. 65.

3. a. On April 22, 2019, less than two months later, Mr. Singh moved to reopen and rescind his *in absentia* removal order for lack of proper notice under Section 1229a(b)(5)(C)(ii), and alternatively due to exceptional circumstances under Section 1229a(b)(5)(C)(i). A.R. 80-96. Mr. Singh argued that reopening was warranted under Section 1229a(b)(5)(C)(ii) because he did not receive notice under Section 1229(a)(1), specifically, because his notice to appear lacked the "time and place" information explicitly required by Section 1229(a)(1)(G)(i). In *Pereira*, this Court held that a putative notice to appear lacking time-and-place information did not stop the accrual of time towards the noncitizen's "continuous residence or continuous physical presence in the United States." 138 S.Ct. at 2109-2110. Although the specific question presented in *Pereira* was "narrow," the thrust of Court's holding was that "when the term 'notice to appear' is used elsewhere in the statutory section, including as the trigger for the stop-time rule, it carries with it the substantive time-and-place criteria required by [Section 1229(a)]." *Pereira*, 138 S.Ct. at 2116. Looked at another

way, the government cannot fairly reap the adverse consequences of *in absentia* removal (any more than it can the stop-time-rule), unless it first complies with the statutory mandate of time and place. A document "styled" as a notice to appear that does not include all the substantive information, including time and place of the proceedings, is "not a 'notice to appear under section 1229(a)'" and cannot provide valid notice. *Id.* at 2110, 2113 & n.5.

b. The Immigration Judge, though, concluded that Mr. Singh received proper notice under Section 1229a(b)(5)(C)(ii) and his failure to attend his hearing was not due to exceptional circumstances under Section 1229a(b)(5)(C)(i). Pet. App. 17a-23a. Mr. Singh appealed to the Board of Immigration Appeals ("Board"). A.R. 14-59.

c. The Board affirmed the Immigration Judge's decision in a nonprecedential opinion. Pet. App. 13a-16a. In affirming the Immigration Judge's decision, the Board relied on its precedential decision, *In re Pena-Mejia*, 27 I. & N. Dec. 546 (BIA 2019), which held that an *in absentia* order may not be rescinded where the notice to appear lacked information about the date and time of the hearing if the missing information was later provided in a subsequent notice of hearing. The Board also agreed with the Immigration Judge that reopening was unwarranted under Section 1229a(b)(5)(C)(i), because exceptional circumstances did not prevent Mr. Singh from attending the hearing. Pet. App. 15a-16a.

4. a. While the petition for review was pending in the Ninth Circuit, this Court issued its opinion in *Niz-Chavez v. Garland*, 141 S.Ct. 1474 at 1486, which held that only a complete, statutorily compliant notice

to appear containing all the required information triggered the stop-time rule. The Court rejected the government's argument that a putative notice to appear lacking date and time information could be cured by a later notice of hearing. *Id*. at 1479-82. The Court held it was clear from the statutory text that a notice to appear must be "a single compliant document" conveying all the information to the noncitizen rather than "a constellation of moving pieces." *Id*. at 1484. Under Section 1229b(d)(1), the Court explained, the stop-time rule is triggered when the government serves the alien with "a" notice to appear under Section 1229(a), and [Section] 1229(a)(1) in turn defines "written notice" as "a 'notice to appear." *Id*. at 1480. The use of the indefinite article "a" in both statutory provisions supports the conclusion that Congress "contemplated 'a' single document." *Id*. And, the Court continued, the text and structure of Section 1229(a)(2) informs the Court's understanding of Section 1229(a)(1); 1229(a)(2) requires the government to serve "*a* written notice" in a single document when there is a change in the time or place of the proceedings. *Id*. at 1483-1484 (*emphasis in the original*). If "a" written notice under Section 1229(a)(2) "anticipates a single document," then "why the phrase 'a notice to appear' found next door in § 1229(a)(1) should operate differently" is "not exactly obvious." *Id*.

The Court also explained that IIRIRA's statutory history shows that the government must provide all the required information in a single document. *Id*. at 1484. Before IIRIRA, the Court explained, the "law expressly authorized the government to specify the time and place for an alien's hearing 'in the order to show cause *or otherwise*.'" *Id*., *citing former* 8 U.S.C.

§ 1252b(a)(2)(A) (1994 ed.) (emphasis in the original). The Court reasoned that "[a] rational Congress could have thought that measuring an alien's period of residence against the service date of a discrete document was preferable to trying to measure it against a constellation of moving pieces." *Id*.

b. Following this Court's decision in *Niz-Chavez*, the Ninth Circuit granted Mr. Singh's petition for review in a published opinion. Pet. App. 1a-12a. The court of appeals held that a notice to appear lacking the time and date information is grounds for rescission of an *in absentia* order under Section 1229a(b)(5)(C)(ii). The court explained that this result was compelled by "the text and structure of the statutory provisions governing *in absentia* removal orders and Notices to Appear," and by this Court's reasoning in *Niz-Chavez*, which conducted a statutory analysis of Section 1229(a) separate from its analysis of the stop-time rule. Pet. App. 6a.

The Ninth Circuit did not defer to the Board's decision in *In re Laparra*, 28 I. & N. Dec. 425 (BIA 2021), which held that "the government should be permitted to follow the two-step notice process in the *in absentia* removal context, even though the Supreme Court rejected that two-step notice process in the stop-time rule context." Pet. App. 7a-8a. Consistent with *Pereria*, the court of appeals emphasized that Paragraph (2) of Section 1229(a) presumes that the government has already served a complete notice to appear on the alien. Pet. App. 10a. "Thus, the 'or' in Section 1229a(b)(5)(C)(ii) accounts for situations in which the government needs to change or postpone [an alien's] removal hearing; it does not provide a textual

backdoor to circumvent the written-notice requirements enumerated in [Section 1229(a)(1)]." Pet. App. 10a.

SUMMARY OF THE ARGUMENT

Statutory text, structure, context, history, and this Court's reasoning in *Pereira* and *Niz-Chavez*, all compel the conclusion that entry of an *in absentia* order depends on a statutorily compliant notice to appear. Section 1229a(b)(5)(A) cites Section 1229(a) for the definition of "written notice," and Section 1229(a)(1) defines written notice as a notice to appear—a discrete document that must contain among other enumerated information, the time and place of the removal hearing. *See Niz-Chavez*, 141 S.Ct. at 1480. The requirements of Section 1229(a)(1) are "definitional" and time-and-place information is "unquestionably" part of a notice's "essential character." *Pereira*, 138 S.Ct. at 2116-17. A notice to appear that excludes the time and place where the proceedings will be held hardly qualifies as legitimate notice; while the noncitizen may have some notice of *where* to appear (even if it is thousands of miles from his stated address), that information is of little benefit if the noncitizen has no clue *when* to appear. It inflicts an informational injury that is likely to generate an *in absentia* order of removal. Paragraph (2) of Section 1229(a), referred to by title as "notice of change in time or place of proceeding," provides information about the "new time or place" of the proceedings and the "consequences" of non-appearance. 8 U.S.C. § 1229(a)(2)(A)(i)-(ii). The differences between a notice to appear and a notice of "any change or postponement" demonstrate that notice of change does not replace a notice-deficient notice to appear.

1. a. Words in a statute, "unless otherwise defined," take their "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). But the "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Paragraph (2) states that "in the case of any change or postponement in the time and place" of the proceedings, "a written notice shall be given to the alien" specifying "the *new* time or place of the proceedings." 8 U.S.C. § 1229(a)(2)(A)(i) (*emphasis added*). "By allowing for a change or postponement of the proceedings to a new time or place," a notice of change "presumes" that the "[g]overnment has already served" a notice to appear "that specified a time and place as required by § 1229(a)(1)(G)(i)." *Pereira*, 138 S.Ct. at 2114 (*internal quotation marks omitted*). To be sure, the word "change," when considered in isolation, may carry a broader meaning; but here, notice of change is preceded immediately by Section 1229(a)(1), which expressly requires the time-and-place information in the notice to appear. The word "change" in this structural context presupposes the existence of an earlier hearing date in the notice to appear.

b. There is no merit to the government's contention that the court of appeals below interpreted the word "change" in an unduly restrictive manner. To the contrary, under the statutory context, "[a]ny reasonable reader would understand [notice of change's] use of 'change' to mean a change from something to a different something—not from nothing to something." *Madrid-Mancia v. Attorney General*, 72 F.4th 508, 518 (3d Cir. 2023) (*citation omitted*). Similarly, another clue,

the word "new" modifying "time or place of the proceedings" also implies the existence of a prior time and place of the hearing in the notice to appear.

c. Neither text, structure, or the history of Section 1229(a) supports the government's contention (Br. 18) that Section 1229(a) creates two distinct forms of notices, which are not dependent on the completeness of a notice to appear. This Court has explained that the text and structure of Paragraph (2) "presumes" that the noncitizen was already served with a notice to appear that "specified a time and place" of the proceedings as required by the statute. *Pereira*, 138 S.Ct. at 2114. "Otherwise, there would be no time or place to 'change or postpon[e].'" *Id*. Although *Niz-Chavez* did not address the specific question presented here, the Court "conducted a statutory analysis of [Section 1229(a)] separate from its analysis of the stop-time rule." Pet. App. 7a. That analysis makes clear that "written notice" referred to in Section 1229a(b)(5)(A) is a notice to appear specifying the "time and place at which the proceedings will be held," and Paragraph (2) is only a supplemental notice specifying the "new time or place of the proceedings." *Id*.

2. Statutory history reaffirms that only a complete, compliant notice to appear constitutes written notice under Section 1229a(b)(5)(A). Before Congress enacted IIRIRA in 1996, the government was not required to specify the time and place of the proceedings in the order to show cause. 8 U.S.C. § 1252b(a)(1)(A)-(F) (repealed 1996). The statute expressly authorized legacy Immigration and Naturalization Service (INS) to provide the time and place of the proceedings "in the order to show cause or otherwise." 8 U.S.C. § 1252b (a)(2)(A). In enacting IIRIRA, Congress replaced this

permissive two-step notice scheme with a single notice called the notice to appear, which together with all the other required information in the order to show cause, mandatorily requires inclusion of "the time and place of the proceedings." 8 U.S.C. § 1229 (a)(1)(G)(i). This change in the statutory structure presumes that Congress acted deliberately, especially because it was the only change in otherwise identical provisions. The government's interpretation would nullify this statutory shift. The Court should refuse to interpret this amendment "in a way that negates" this "revision, and indeed would render it a largely meaningless exercise." *See Rumsfeld v. Forum for Acad. & Institutional Rights Inc.*, 547 U.S. 47, 57-58 (2006).

3. The two-step notice process advocated by the government would frustrate Congressional intent of streamlining and simplifying "procedures for initiating removal proceedings" by providing "a single form of notice." H.R. Rep. 104-469, 1996 at *158-159. The pre-IIRIRA two-step notice process caused "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [that led] some immigration judges to decline to exercise their authority to order an alien deported *in absentia*." H.R. Rep. 104-469, 1996 at *122. By requiring the government to file statutorily complaint notices to appear with the Immigration Court, IIRIRA's one-step notice process was designed to make removal proceedings fairer and more efficient. A defective notice to appear puts noncitizens in limbo because DHS can take months or years before filing a notice to appear with the Immigration Court. And all the while, the noncitizen has no easy way of updating his address under Section 1229(a)(1)(F) because there is no record of the

noncitizen's case in the Immigration Court. That is why a notice to appear must contain the date and place of the hearing to satisfy basic due process concerns.

4. Even if the Court were to conclude that a notice of change following on the heels of a defective notice to appear can provide the basis for entry of an *in absentia* order, the disjunctive structure of Section 1229a(b)(5)(C)(ii) allows for discretionary rescission of that order if the noncitizen did not receive a proper notice to appear. Section 1229a(b)(C)(ii) authorizes reopening "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)" (*emphasis added*). 8 U.S.C. § 1229a(b)(5)(C)(ii). The plain text of this provision makes clear that a noncitizen is eligible for reopening if he *either* did not receive a valid notice to appear, *or* did not receive a valid notice of change. The Immigration Judge is given broad discretionary authority whether to rescind an order.

Finally, noncitizens such as Mr. Singh who did not actually receive date and time information in the mail are eligible for rescission under Section 1229a (b)(C)(ii). This is because unlike Section 1229a(b)(5)(A), which allows for entry of a removal order if the government mailed the required notice to noncitizen's most recent address, Section 1229a(b)(C)(ii) makes reopening contingent upon "not receiv[ing]" that notice. It is axiomatic that "[w]here Congress includes particular language in one section of a statute but omits it in another" section, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation and

internal quotation marks omitted). The difference in language between the mandatory removal and the discretionary recession provisions demonstrates that a noncitizen who "did not receive" the relevant notice of change is eligible to seek reopening under Section 1229a(b)(5)(C)(ii).

B. Statutory text, structure, history, this Court's precedent, and policy reasons all support the Ninth Circuit's decision. The Attorney General exaggerates the effect of the Ninth Circuit's otherwise modest holding on an overburdened immigration system. But this handwringing is inapposite for several reasons, most importantly because the Ninth Circuit's interpretation simply results in the removal order being *subject* to rescission; it is not substantive relief. Rescinding an order of removal only permits the noncitizen to appear and defend against removal. The Attorney General then has the ultimate discretionary authority whether to grant or deny such relief.[4]

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[4] Because Mr. Singh did not attend any hearings, this Court need not address whether, or under what circumstances, a noncitizen might waive any objection to a deficient notice to appear or notice of change of hearing by actually attending a hearing. Moreover, because Mr. Singh did not *actually* receive the notice of change of hearing, this Court can rule in his favor without addressing whether a noncitizen who did in fact receive such a notice, is entitled to move for rescission.

ARGUMENT

I. The Statute Prohibits Entry of an *In Absentia* Removal Order When the Noncitizen Does Not Receive a Discrete Statutorily Compliant Notice to Appear That Specifies the Time and Place of the Hearing.

"[A]fter written notice required under paragraph (1) or (2) of section 1229(a)" has been provided, a noncitizen who "does not attend a proceeding under this section, shall be ordered removed *in absentia* if two important conditions are met: the government establishes removability; and the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided." 8 U.S.C. § 1229a(b)(5)(A). And mirroring this *mandatory* provision, Section 1229a(b)(5)(C) introduces a wholly *discretionary* provision governing the conditions under which such an order may be rescinded by an immigration judge. They are threefold: an order may be rescinded if filed "within 180 days after the date of the order of removal" and the failure to appear "was because of exceptional circumstances," elsewhere defined; when filed "at any time" where the noncitizen shows they were in Federal or State custody and thus the "failure to appear was through no fault of the" noncitizen; and finally, the focus of our attention, when filed "at any time" and the noncitizen shows they "did not receive notice in accordance with paragraph (1) or (2)" of Section 1229(a). 8 U.S.C. 1229a(b) (5)(C)(i) and (ii).

Thus, while an Immigration Judge "shall" proceed *in absentia* when certain conditions are met, he "may" undo that order under three distinct circumstances–and in undoing that order, the Immigration Judge is given free rein in which to do so. Paragraph (1) notice, of course, requires a notice to appear that contains all the information defined at 8 U.S.C. § 1229 (a)(1)(A) through (G) in a "single statutorily compliant document." *Niz-Chavez,* 141 S.Ct. at 1481. None of the noncitizens here before the Court received valid paragraph (1) notice. J.A. 11, 46, 54. And a "notice to appear 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 does not trigger the draconian consequences brought by changes in the statutory text under IIRIRA. *Pereira,* 138 S.Ct. at 2110.

The problem with the government's construction of the statute is that it assumes too much; it assumes that both administrative entities-the one issuing the notice to appear (DHS), and the one adjudicating removal cases (Department of Justice "DOJ")-operate with perfect information. A notice to appear (Paragraph (1) notice) is always issued by a duly authorized officer or employee of the DHS, such as Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), or Immigration and Customs Enforcement (ICE). *See* 8 C.F.R. § 239.1(a). But "[j]urisdiction vests, and [removal] proceedings before an [I]mmigration [J]udge commence, [*only*] when a [notice to appear] is filed with the Immigration Court by the [DHS]." 8 C.F.R. § 1003.14(a). Once removal proceedings commence, all later notices are issued by the Immigration Court. This is important because by

separating out these functions over two agencies, the DHS and DOJ, the new regime amplifies the likelihood of miscommunication, as there are now multiple entities that must coordinate. All of this underscores congressional wisdom in requiring a consummated notice to appear as a tradeoff for imposition of the adverse consequences on noncitizens, which include application of the stop-time rule and authority to enter *in absentia* orders of removal.

A. Under the Best Reading of the Statutory Text, Structure, and Undergirding Regulatory Schema, an *In Absentia* Removal Order May Not Validly Issue If the Noncitizen Did Not Receive a Statutorily Compliant Notice to Appear Vesting Jurisdiction in an Immigration Court.

1. Notice Under Paragraph (2) of Section 1229(a) Is Valid Only If the Government Served a Statutorily Compliant Notice to Appear.

Since "words are how the law constrains power," the natural starting point for a statutory analysis is the governing text. *Niz-Chavez,* 141 S.Ct. at 1486; *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). "[T]he meaning of a statute is to be looked for, not in a single section, but in all the parts together and in their relation to the end in view." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo. J., dissenting). Here, "all the parts" includes both the statutory text and the nuances of the removal

process it seeks to implement. Under Section 1229a(b)(5)(A), a noncitizen shall be removed *in absentia* if he was provided written notice "required" under paragraph (1) or (2) of § 1229(a). Paragraph (1) of Section 1229(a) requires that "written notice" called "a 'notice to appear'," "shall" be given "in person" to the noncitizen and it must specify several types of information. 8 U.S.C. § 1229(a)(1)(A)-(G). Paragraph (2) of Section 1229(a), entitled, "[n]otice of change in time and place of proceedings," in turn requires "a written notice" also "in person" specifying the "new time and place of the proceedings" when there is "any change or postponement in the time and place of such proceedings." 8 U.S.C. § 1229(a)(2)(A)(i)-(ii). The differences between a notice to appear and a notice of change make clear that Paragraph (2) cannot operate independently of Paragraph (1).

"[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S.Ct. 2492 (2015). In isolation, the word "change" can have a broad meaning; but in the context of Section 1229(a)(2)'s structure, the word "change" presupposes an earlier date and time in the notice to appear. In part, this is because Section 1229(a)(2) is entitled "[n]otice of change in time or place of proceedings," and it is immediately preceded by a statutory subsection mandating inclusion of the "time and place at which proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). In addition, Section 1229(a)(2)(A)(i) requires the government to provide written notice of "the *new* time or place of the proceedings" 8 U.S.C. § 1229(a)(2)(A)(i) (*emphasis added*). The adjective "new" gives the word "change" a "more precise content" by implying that there was an old or

a prior "time or place of the proceedings" to begin with. *Life Techs. Corp. v. Promega Corp.*, 137 S.Ct. 734, 740 (2017). Thus, the best reading of "change" in this statutory context is a change from an existing date and time to a *new* one.

This interpretation of "change" also aligns with *Pereira*, which read the word "change" in Section 1229(a)(2) "to refer to 'the substitution of one thing for another' or 'the succession of one thing in place of another.'" *Laparra-Deleon v. Garland*, 52 F.4th 514, 520 (1st Cir. 2022) (citing Oxford English Dictionary, 11th ed. (2019). The Court explained that "[b]y allowing for a 'change or postponement' of the proceedings to a new time or place," Section 1229(a)(2) "presumes" that a notice to appear specifying the time-and-place information was "already" served on the alien because "[o]therwise, there would be no time or place to change or postpone[]." *Pereira*, 138 S.Ct. at 2114. This is incontrovertible when one considers that, as noted above, Paragraph (2) notice is only issued by the Immigration Court after the commencement of removal proceedings and an Immigration Judge being vested with jurisdictional authority to proceed with the penalties for failing to appear—an *in absentia* order of removal.

The title of Section 1229(a)(2) itself ("*Notice of change in time or place of proceedings*") lends additional support to the argument that paragraph (2) notice must follow a fully compliant notice to appear. While titles or headings of statutory provisions cannot override the plain words of the statute, they can be "useful navigational aids" in resolving ambiguities in text. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 221-224 (2012). Here, the use of "change" in both the title and

the text of the statutory provision is a strong indicator that written notice under Section 1229(a)(2) must follow a real and preexisting time and place in the notice to appear (even setting aside the question of jurisdiction vesting). Before IIRIRA, written notice (of time and place) was simply called "*[n]otice of time and place of proceedings*," and the government was *not required* to provide the time and place information in the order to show cause. 8 U.S.C. § 1252b(a)(2)(A) (repealed 1996). By amending the statute and retitling it as "*[n]otice of change in time or place of proceedings*," Congress manifested its intent that Section 1229(a)(2) is only a supplement to a compliant notice to appear. Congress could have left the heading as before ("*Notice of time and place of proceedings")* and in that way, signaled that paragraph (a)(2) notice could also refer to an initial setting (after defective paragraph (1) notice), as the government now suggests. But Congress obviously understood that paragraph (1) notice would include time and place. "Comparing the terms of the old and new statutes helps to shed a good deal of light on the parties' position." *Murphy v. Smith*, 138 S.Ct. 784, 789 (2018).

A straightforward contextual reading of paragraphs (1) and (2) of Section 1229(a) makes clear that written notice under Section 1229a(b)(5)(A) contemplates the service of a consummated notice to appear, followed by a notice of change, if necessary. To beat an already dead and cold horse, since Section 1229(a)(1) makes inclusion of time and place mandatory in a notice to appear, any "change" contemplated by Section 1229(a)(2) presupposes a *new* and different hearing *not* an initial setting. And this is largely because without a properly filed notice to appear, there

is no adjudicative authority with the power to proceed *in absentia*. The regulations make clear that the Immigration Court is "responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. § 1003.18(a). It was understood that legacy INS and EOIR would cooperate to comply with the changes brought about by IIRIRIA—and that cooperation would have been simplified when both agencies were under the same department, the DOJ.

In a Proposed Rule published on January 3, 1997, both INS *and* EOIR made crystal clear they understood a notice to appear necessarily required time and place, yet they first failed, and later refused, to take any actions carrying out that obligation and now find themselves back before the Court asking again to be let off the hook. In January 1997, EOIR and INS stated:

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

62 Fed. Reg. 444, 449 (Jan. 3, 1997).

To be sure, the changes brought about by IIRIRA were significant. In this same rulemaking effort, the agencies lamented,

> Congress directed that the provisions of Title III–A of IIRIRA take effect on April 1, 1997, and also directed that the Attorney General publish implementing regulations by March 1, 1997. A five-month period is an extremely short time frame for completing the regulatory process for a rule of this magnitude, given the time needed to draft the rule, coordinate with interested agencies, complete the regulatory review process by OMB pursuant to Executive Order 12866, and allow time for public comment.

Id. at 444.

But that is now nearly 30 years ago. That the government now finds itself staring down the barrel of "potentially hundreds of thousands of noncitizens . . . seek[ing] rescission of removal orders that may be decades old," (Br. 20) is a problem of the Attorney General's own creation. Having violated the statute as to "potentially hundreds of thousands of noncitizens" is a reason to hold for the noncitizens here, and say, again, for a third time, that the Attorney General must–at long last–comply with the statute.

8 C.F.R. § 1003.18(b), too, presupposes a level of cooperation that simply never came to fruition; it provides that where the "time, place and date of the initial removal hearing" is "not contained in the [n]otice to [a]ppear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice" to both parties. But this self-serving regulation simply gave the agency a means to evade the strict requirements of the statute and needlessly inflict uncertainty on noncitizens. The government's intentional sidestepping of the statute

through rulemaking is not a justification to find in its favor. Moreover, leaving little doubt, both Sections 1229(a)(1) and (a)(2) apply only to noncitizens "[i]n removal proceedings," and those proceedings do not "commence" until jurisdiction "vests" with an immigration judge. 8 C.F.R. § 1003.14(a). And while there are variants of orders of removal that may be entered outside of a removal proceeding by other than an immigration judge, *see, e.g.,* 8 U.S.C. § 1225(b)(1)(A)(i), an *in absentia* order of removal may only issue in a removal proceeding by an Immigration Judge. Therefore, the Ninth Circuit reasonably concluded that "there can be no valid notice under Paragraph (2) without valid notice under Paragraph (1)." Pet. App. 10a.

2. Government's contrary interpretation conflicts with statutory text, structure, and context

a. The government contends that nothing in the statutory text or structure suggests that the validity of written notice under Section 1229(a)(2) is conditioned on the validity of the notice to appear. In the government's view, "Section 1229(a) creates two distinct forms of notice" (Br. 17-18) and by using the disjunctive term "or" in both Section 1229a(b)(5)(A) and Section 1229a(b)(5)(C)(ii), Congress made clear that both the entry of an *in absentia* order and the alien's ability to seek rescission of that order turn on whether the alien received notice of the missed hearing and not on whether the alien received a complete notice to appear.

i. This argument lacks merit because applying the literal meaning of the conjunction "or" to define written notice under Sections 1229a(b)(5)(A) and

(C)(ii) would conflict with the text and structure of Section 1229(a), and it would be contrary to *Pereira's* construction of Section 1229(a)(2). "The word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956) (citations omitted). The word "or" in a statute should not "be accepted for its disjunctive connotation," if such a "construction will frustrate legislative intent." *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979).

The text and structure of Section 1229(a) illustrate why notice under Paragraph (2) can never replace a defective notice to appear under Paragraph (1). All noncitizens in removal proceedings must receive a notice to appear under Paragraph (1); it is in the act of filing that document with the immigration court that proceedings exist at all. But notice under Paragraph (2) is required only "in case of any change or postponement in the time and place of such proceedings," again, presupposing a notice to appear vesting jurisdiction with an Immigration Judge who has the authority to dispense the consequences imposed by the statute. 8 U.S.C. § 1229(a)(2)(A). The notice to appear in Paragraph (1) must contain an exhaustive list of information including, time and place of the proceedings. 8 U.S.C. § 1229(a)(1)(A)-(G). The notice of change in Paragraph (2), on the other hand, must only contain the "new time or place of the proceedings" and the "consequences" of non-attendance. 8 U.S.C. § 1229(a)(2)(A)(i)-(ii). "These textual and structural differences demonstrate the distinct purposes of paragraph (1) and (2)." *Madrid-Mancia*, 72 F.4th at 517 (citation omitted). The government's contention—that the

validity of written notice under Section 1229(a)(2) does not depend on a complete notice to appear—would have the perverse effect of removing a noncitizen who never received any of the information in the notice to appear. Such a reading of the statute would nullify Section 1229(a)'s requirement that certain enumerated information "shall" be provided in the notice to appear. 8 U.S.C. § 1229(a).

The best reading of "or" in Section 1229a(b)(5)(A) requires entry of an *in absentia* order after the government provided the noncitizen with a "compliant" notice to appear or, "in the case of any change or postponement, a compliant [notice to appear] plus a second notice that informs [the noncitizen] of the new time or place of the proceedings." *Madrid-Mancia*, 72 F.4th at 518 (internal quotation marks omitted). The statutory text, "by using 'or' ensures" that a noncitizen "is not free to ignore the 'written notice' required in the case of 'any change or postponement' in the 'time or place' of removal proceedings that the 'notice to appear' under [Section 1229(a)(1) previously set forth." *Laparra-Deleon*, 28 I. & N. Dec. at 521.

ii. The government contends that (Br. 30) that the noun "change" in Section 1229(a)(2) should be interpreted expansively because it comes after the indefinite term "any." In government's view, the word "any" means "a change of whatever kind." But this interpretation of the phrase "any change" in Section 1229(a) does not consider the statutory context, which supports a narrow reading of "change." Written notice under Section 1229(a)(1) is required in all removal proceedings but written notice under Section 1229(a)(2) is required only "in the case of *any change* or postponement in the time and place of such proceedings."

In this statutory context, the phrase "any change" reaffirms the conclusion that notice under Section 1229(a)(2) is preceded by earlier notice under Section 1229(a)(1). Thus, a "narrow definition of 'change' fits best within paragraph (2)." *See Madrid-Mancia*, 72 F.4th at 518.

iii. The government cities (Br. 30-31) to the word "change" in Section 1229(a)(1)(F)(ii) as an example of "change" that is not preceded by an existing condition. 8 U.S.C. § 1229(a)(1)(F)(ii). Section 1229(a)(1)(F)(ii) requires a noncitizen to provide the Attorney General "with a written record of any change of the alien's address or telephone number." In the government's view, (Br. 31) the "any change" language in Section 1229(a)(1)(F)(ii) presumes, in at least some situations, "a change from something that was not yet determined to something specific."

But the government misapprehends the application of § 1229(a)(1)(F)(ii) and violates "a cardinal principle of statutory construction" that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Section 1229(a)(F)(ii) applies when a noncitizen moves from one address to another address. Section 1229(a)(F)(ii) does not govern situations where the noncitizen lacks an address or telephone number. The latter situation is governed by Section 1229(a)(1)(F)(i) which states 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" with respect to the removal proceedings. 8 U.S.C.

§ 1229(a)(1)(F)(i). The government's proposed construction of Section 1229(a)(1)(F)(ii) would render Section 1229(a)(1)(F)(i) superfluous and unnecessary.

iv. In the alternative, the government contends that even if Section 1229(a)(2) requires an earlier time and place of the hearing, the initial notice of "change" followed by a defective notice to appear qualifies as "change" under Section 1229(a)(2). But this type of reasoning "flies in the face of *Niz-Chavez*'s admonishment against conveying the statutorily prescribed information 'piecemeal' across multiple notices." *Lazo-Gavidia v. Garland*, 73 F.4th 244, 251 n.4 (4th Cir. 2023) (citing *Niz-Chavez*, 141 S.Ct. at 1479). If the time and place information cannot be spread across two documents, it would be perverse to allow the government to spread such information across three or more documents.

v. The government argues further (Br. 41-42) that the Ninth Circuit's interpretation of Section 1229a (b)(5)(A) diverges from the various overlapping provisions in the INA that limit the noncitizen's ability to contest an *in absentia* order when nonattendance was within the noncitizen's control. The government asserts, for instance, that Section 1229a(b)(5)(C)(i) allows for rescission of an absentia order only if the noncitizen demonstrates "exceptional circumstances" for not attending the hearing, and Section 1229a(b)(5)(C)(ii) allows for recession of an *in absentia* order if "the alien was in Federal or State custody and the failure to appear was through no fault of the alien." 8 U.S.C. § 1229a(b)(5)(C)(ii). And Section 1229a(b)(5)(B), for example, exempts the government from providing the noncitizen with written notice if "the alien has failed to provide" his "address" as "required" under Section

1229(a)(1)(F). The government contends (Br. 44) that these provisions and common sense undermine the Ninth Circuit's interpretation, especially when the missing information in the notice to appear was not relevant to why the noncitizen missed his hearing.

To begin, this argument ignores the plain text of Section 1229a(b)(5)(A), which "mandates issuance of a removal order" only when the noncitizen receives a statutory compliant notice. *Laparra-Deleon*, 52 F.4th at 523. In addition, an agency's violation of rules designed "to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief." *Leslie v. Attorney General*, 611 F.3d 171, 178 (3d Cir. 2010). As the government correctly points out (Br. 41), the notice requirement under Section 1229a(b)(5)(A) was designed to protect a noncitizen's right to procedural due process in removal proceedings, which includes the right to be present in person at the hearing in which the loss of one's life, liberty, or property is being determined. Accordingly, Section 1229a(b)(5)(C)(ii) imposes no time limits on moving to reopen when the noncitizen does not receive notice in accordance with the statute. The lack of time limitation on filing a motion to reopen under Section 1229a(b)(5)(C)(ii) operates as a check on the government's compliance with the clear mandate of Congress to furnish a statutory compliant notice to the noncitizen.

Moreover, the overlapping statutory provisions in the INA reinforce Congress's intention that the government must provide noncitizens with a statutorily compliant notice under Section 1229a(b)(5)(A). Compared to a motion to reopen not premised on lack of notice, an *in absentia* motion has a more generous

filing deadline, and there is no statute of limitation if the noncitizen claims lack of proper notice. Also, unlike all other types of motions to reopen under the INA, the statute provides for an automatic stay of removal pending disposition of an *in absentia* motion. 8 U.S.C. § 1229a(b)(5)(C). All of the statutory provisions cited by the government presume receipt of a statutorily compliant notice before subjecting the noncitizen to adverse consequences.

B. Statutory History, Purpose, and the Undergirding Regulatory Architecture — Indeed the Very Nature of the Removal Process—All Confirm That Entry of an *In Absentia* Order Is Inextricably Tied To the Issuance and Filing of a Valid Notice To Appear.

Statutory history and purpose reinforce what the plain text of the statute already shows—that a statutorily compliant notice to appear specifying time and place of the proceedings is central to the notice requirement under Section 1229a(b)(5)(A). Before IIRIRA was enacted in 1996, the INA itself allowed the government to use a two-step notice process for informing noncitizens of their deportation hearings. But this process proved tedious and inefficient because of poor interdepartmental coordination between the legacy INS, the agency responsible for initiating deportation proceedings, and the Immigration Courts responsible for adjudicating them. Under the predecessor schema, delays in notifying noncitizens of their deportation hearings caused protracted disputes over whether noncitizens received proper hearing notices and consumed considerable administrative and judicial resources. Congress created notices to

appear requiring time-and-place information to streamline removal proceedings and to create a more reliable system of notifying noncitizens of their hearings. The Attorney General, unfortunately, disregarded this statutory amendment and promulgated regulations that required "the time, place and date of the initial removal hearing" to be included in the notice to appear only "where practicable." 8 C.F.R. § 1003.18(b). That may have been a rational decision at the time, but it should have been temporary, while the agencies crafted a functional solution.

1. The date and time information in the notice to appear is an essential part of the notice requirement.

In 1996, Congress amended the INA once more and replaced "orders to show cause" with "notices to appear." The notice to appear must now nonnegotiably provide the noncitizen with "the time and place at which the proceedings will be held" and the "consequences" of not attending the hearing. 8 U.S.C. § 1229(a)(1)(G)(i)-(ii). IIRIRA made time-and-place information–an optional requirement in an order to show cause–a mandatory requirement for a notice to appear. By mandating the charging document include the time-and-place information, IIRIRA explicitly rejected the two-step notice process that existed before the amendment. The Attorney General, however, treated this mandatory requirement in the statute as if it were permissive. But the Attorney General had "no power to rewrite the text of a statute." *Ortiz-Santiago*, 924 F.3d at 961 (citing *Chevron v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842-43 (1984).

To understand what Congress was trying to accomplish by including the time-and-place information in the notice to appear, one must consider how removal proceedings are initiated. In 1996, the INS, which was within the DOJ, was responsible for initiating removal proceedings by serving noncitizens with notices to appear and filing them with an Immigration Court, which was responsible for adjudicating such matters. But in 2003, Congress dissolved the INS and created the DHS, the agency now responsible for *both* initiating and prosecuting removal cases. Today, "[t]he DHS is invested with the sole discretion to commence removal proceedings" against a noncitizen. *In re Avetisyan*, 25 I. & N. Dec. 688, 690-91 (BIA 2012) (citing 8 C.F.R. §§ 239.1(a), 235.6(a).

Removal proceedings "commence" only when DHS files a notice to appear with the Immigration Court. 8 C.F.R. § 1003.14(a). Simply serving the noncitizen with a notice to appear does not affect the DHS's ultimate decision whether to launch removal proceedings because DHS has unfettered discretion to cancel a notice to appear any time before (or after) it is filed with the Immigration Court. 8 C.F.R. §§ 239.2(a), 1239.2(a) (2011). And as discussed above, until an Immigration Court is vested with jurisdictional authority, an *in absentia* order of removal is a legal and factual impossibility. Therefore, removal proceedings legally begin and jurisdiction vests in the Immigration Court when the DHS has both served the notice to appear on the noncitizen and filed it with the Immigration Court.

Before DHS files the notice to appear with the Immigration Court, the noncitizen must keep DHS

appraised of his address but not the Immigration Court. *See Fuentes-Pena v. Barr*, 917 F.3d 827, 831 (5th Cir. 2019). This is because until DHS lodges a notice to appear with the Immigration Court, no case is docketed, and no record of the noncitizen's immigration proceedings exist with the Immigration Court. *Id*. Consequently, the noncitizen's obligation under Section 1229(a)(1)(F) to update his address with the Immigration Court applies only after the notice to appear is filed with the Immigration Court. (To reiterate, subsection (F)(i) refers to an address where the noncitizen may be contacted "respecting proceedings," suggesting this section could apply before or after the notice to appear has been filed. But the noncitizen is under no obligation to notify the Immigration Court of an address until after jurisdiction vests.).

By enacting IIRIRA, Congress intended to make removal proceedings more efficient and fair to noncitizens because only a complete notice to appear assured prompt initiation of removal proceedings and reduced the risk of noncitizens not receiving hearing notices (because all of that information was in a single document). The act of including time and place on the notice to appear connotes communication between both agencies. When IIRIRA was enacted, both the INS and the Immigration Court were part of DOJ, so including the time-and-place information in the notice to appear was ostensibly not as laborious a process (and presumably simplified coordination). Now, as two agencies are involved (DOJ and DHS), logistics and rulemaking are complicated, as the regulations of one agency would not be binding on another. But it is never too late to do the right thing.

The legislative history confirms that IIRIRA was designed to address "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [which caused] some immigration judges to decline to exercise their authority to order an alien deported *in absentia*." H.R. Rep. 104-469, 1996 at *122. The Committee was particularly concerned with "lack of accurate information on alien's addresses," which "often" led to "protracted disputes concerning whether an alien has been provided proper notice of a proceeding." H.R. Rep. 104-469, 1996 at *159. This "impair[ed] the ability of the government to secure *in absentia* deportation orders in cases where aliens fail[ed] to appear for their hearing" because they claimed that "they never received proper notice." *Id.* We now see that this failure to abide the clear mandate of the statute has led to the very challenges the amendment was designed to avert.

2. Government violated Congressional mandate by serving defective notices.

The government contends (Br. 46) that the court of appeals' interpretation of Section 1229a(b)(5)(A) is inconsistent with statutory history and purpose, which was allegedly designed "to expand, not limit, the government's ability to obtain *in absentia* removal" orders. But even if the government is correct, its own self-serving actions in providing notice-deficient notices to appear stymied that effort. The statutory history shows that while Congress increased penalties for noncitizens who failed to attend their hearings, it also ensured that *in absentia* orders be entered only after the government established by "clear, unequivocal, and convincing evidence" that the noncitizen received statutorily compliant notice. 8 U.S.C. § 1225a(b)(5)(A).

By requiring the government specify the time and place of the hearing in the notice to appear, Congress envisioned a system that was both efficient and fair to noncitizens. When a notice to appear contains time-and-place information, it signifies that the notice to appear was (or will be) filed with the Immigration Court; it credibly suggests the agencies have cooperated and the noncitizen is at least given a fixed time and place in which to appear. Under the presumption of regularity, courts assume that executive branch officers and employees are lawfully and consistently discharging their duties. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926).

Yet when a notice to appear does not specify time-and-place information, it is impossible for noncitizens to know *when* or *if* it will ever be filed with the Immigration Court, adding a layer of uncertainty to an already fraught and complex process. It may take weeks, months, or even years before removal proceedings commence in the Immigration Court.[5] Such

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[5] *See, e.g.,* Kathleen H. Pierre, Jennifer Aronsohn, Brandon Slotkin, and John Donley, *The ICE Trap: Deportation Without Due Process,* 70 UCLA L. REV. DISC. 136, 139-141 (2022) ("Before ICE files the NTA, a noncitizen is required to keep ICE, but not the immigration court, apprised of any changes to their address. This is because the immigration courts would not have any way to record the address change, as there is no docketed case to reference. It is only after ICE serves the NTA on a noncitizen *and* files it with the immigration court that the noncitizen is required to keep the immigration court apprised of changes to their address using EOIR's change-of-address form, Form EOIR-33. Until then, ICE is responsible for keeping track of any address updates provided by the noncitizen and for providing those updates to the immigration courts. However, it can take years before ICE finally files the NTA with the immigration court, and this delay contributes to deprivation of due process for noncitizens."). *See*

bureaucratic delays put noncitizens in limbo because they have no way of updating their addresses with the Immigration Court, increasing the odds that they will miss their hearings when they occur. The possibility also exists that DHS may exercise prosecutorial discretion and cancel a notice to appear after it is served on the noncitizen; but in that eventuality, should the noncitizen nevertheless appear for a hearing that is no longer calendared and over which the Immigration Court no longer has jurisdiction, he can be informed of this turn of events by court personnel. By requiring the government to serve a statutorily compliant notice to appear, Congress wanted to end the uncertainty associated with the two-step notice process that preexisted IIRIRA.

"When Congress amends legislation, courts must presume it intends [the change] to have real and substantial effect." *Ross v. Blake*, 578 U.S. 632, 641-42 (2016) (quoting *Stone v. INS*, 514 U.S. at 397). The statutory history, the nature of the removal process, and legislative history confirm that Congress demanded strict compliance with the contents of a notice to appear as a precondition for entering an absentia order because the two-step notice process was too problematic, caused bureaucratic delays, and resulted in too many evidentiary disputes about whether noncitizens received proper notice. When time-and-place information is missing from a notice to appear, the noncitizen is relegated to a state of uncertainty with no idea where to go or when to go there. And unless the noncitizen is ordered to report regularly to

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also 8 C.F.R. § 1003.15(c) ("[T]he Service shall provide [certain] administrative information to the Immigration Court," including the noncitizen's address).

ICE officers while the decision whether to file the notice to appear is made, no idea where to report any changes of address.

The government contends that Congress did not intend to invalidate an *in absentia* removal order that was not relevant to the noncitizen's reason for missing his hearing. But a non-compliant notice to appear makes the entire notice process unfair. The facts of *Shogunle v. Holder*, 366 Appx. 322 (4th Cir. 2009) illustrate the perils of an untimely-filed notice to appear, one of the problems Congress was trying to correct by requiring time and place to begin with. Shogunle was personally served a notice to appear that directed him to appear at an Immigration Court on January 3, 2007. When Shogunle appeared as directed, he learned that the Immigration Court lacked jurisdiction over his case because the notice to appear had not been filed. On February 1, 2007, Shogunle moved to a new address and immediately informed DHS of his new address. On February 13, 2007, after DHS filed the notice to appear with the Immigration Court, a hearing notice was mailed to Shogunle's last address, which directed him to appear for a hearing on April 11, 2007. Shogunle did not receive that hearing notice and was ordered removed *in absentia* after he failed to attend this hearing. In granting the petition for review, the Fourth Circuit provided the following explanation:

> The notice with which he was served named a hearing date, and Shogunle showed up to court on that hearing date. However, the court did not have jurisdiction as of that date. Because the immigration court did not yet have jurisdiction, it could not order

> Shogunle to do anything. Indeed, it was still within the discretion of DHS whether to file the notice with immigration court, and it was possible that the court might never have jurisdiction. Therefore, the logical entity with which to lodge a change of address would be DHS, since it controlled whether the action would even proceed any further. Granted, DHS did file the notice to appear with the immigration court prior to Shogunle's move . . . However, Shogunle was unaware of this development, and we cannot say that it was Shogunle's burden to keep in constant contact with the court to determine when, if ever, the court would have jurisdiction.

Id. at 324.

Statutory history and intricacies of the removal process make clear the purpose behind Congress's requirement of time-and-place information. The one-step notice process through a complete notice to appear was designed to streamline removal proceedings, and to avoid evidentiary disputes over the propriety of notice. By disregarding the statute's clear mandate, the Attorney General only postponed the inevitable.

C. The Plain Text and Structure of Section 1229a(B)(5)(C)(ii) Establishes That Non-citizens Who Did Not Receive a Valid Notice to Appear Can Move to Reopen an *In Absentia* Order.

Even if the Court were to conclude that notice under Paragraph (2) of Section 1229(a), in the absence of proper notice under Paragraph (1), may nevertheless justify entering an *in absentia* removal order under

Section 1229a(b)(5)(A), noncitizens such as Mr. Singh remain eligible to apply for rescission under Section 1229a(b)(5)(C)(ii). This simple conclusion is compelled by the plain text of Section 1229a(b)(5)(C)(ii) and the differences between the removal and rescission provisions.

1. "*Conjunction Junction, what's your function? Hooking up words and phrases and clauses*."[6] Section 1229a(b)(5)(C)(ii) allows for reopening if the noncitizen "did not receive notice in accordance with [P]aragraph (1) or (2) of section 1229(a)." Unless otherwise specified, the language in a statute should be interpreted by its "ordinary meaning." *Artis v. District of Columbia*, 138 S.Ct. 594, 603 (2018). The text of § 1229a(b)(5)(C)(ii) is clear that a noncitizen is eligible for reopening *either* if he did not receive a valid notice to appear "in accordance with paragraph (1)" or if he did not receive notice "in accordance with" paragraph (2), of a valid "change or postponement in the time and place of such proceedings."

The following example illustrates this point. Suppose the teacher says, "Raise your hand if you did not receive your exam booklet or answer sheet." Students would naturally understand this to mean that they should raise their hand if they either did not receive the exam booklet *or* did not receive the answer sheet. Section 1229a(b)(5)(C)(ii) uncontroversially states that the noncitizen can move to reopen if he "did not receive notice in accordance with paragraph (1) or (2)." The most natural reading of this statutory provision is the obvious one: the noncitizen can move

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6 https://www.schoolhouserock.tv/Conjunction.html (as visited on October 8, 2023).

to reopen if he either did not receive "notice in accordance with paragraph (1)" or did not receive "notice in accordance with" paragraph (2). And, because Mr. Singh's notice to appear was defective for lack of time-and-place information, he is statutorily eligible for rescission of the order under Section 1229a(b)(5)(C)(ii).

This plain reading of Section 1229a(b)(5)(C)(ii) also reflects common sense. Suppose there is no dispute that a noncitizen received a valid notice to appear, but there is also no dispute that he never received a notice of the change of hearing. If the noncitizen is required to prove lack of notice under both paragraph (1) *and* paragraph (2) of Section 1229(a), he would not be eligible to reopen under Section 1229a(b)(5)(C)(ii) because he received notice in accordance with Paragraph (1)—even though he never received notice in accordance with Paragraph (2). Under this interpretation, the noncitizen would have no recourse even though it is undisputed that he did not receive notice of the hearing he missed. The text does not support such a reading.

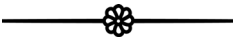
In sum, under the plain text and structure, a noncitizen who never received "notice in accordance with [P]aragraph (1)," is statutorily eligible to seek reopening under Section 1229a(b)(5)(C)(ii) "at any time." It is irrelevant under this provision whether the government provided the noncitizen with compliant notice under paragraph (2). Of course, because rescission is always discretionary, *see* 8 U.S.C. § 1229a(b)(5)(C) (" . . . may be rescinded . . . "), the Immigration Judge may consider extenuating and aggravating factors related to the noncitizen's rescission-eligibility as part of the discretionary calculation.

D. The Text and Interplay Between Section 1229a(b)(5)(A) and Section 1229a(b)(5)(C)(ii) Demonstrate That a Noncitizen Who Did Not Receive Actual Notice Is Eligible for Reopening.

Mr. Singh is eligible for reopening under Section 1229a(b)(5)(C)(ii) because he did not *actually* receive the date and time information sent by the Immigration Court to his address. Even if the government provides a noncitizen with both a statutorily compliant notice to appear and a valid notice of change, the noncitizen is eligible for reopening under Section 1229a(b)(5)(C)(ii) if he did not *actually receive* either document. Unlike Section 1229a(b)(5)(A), which authorizes entry of an *in absentia* order with proof that such notice was mailed to the "most recent address provided," Section 1229a(b)(5)(C)(ii) instead focuses on whether the notice was "not receive[]" by the noncitizen. *See Joshi v. Ashcroft*, 389 F.3d 732, 736 (7th Cir. 2004). "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Republic of Sudan v. Harrison*, 139 S.Ct. 1048, 1058 (2019) (quoting *Department of Homeland Security v. MacLean*, 135 S.Ct. 913, 190 (2015).

There is a presumption in Section 1229a(b)(5)(A) that written notice to the alien at his most recent address under Section 1229(a)(1)(F) is sufficient to satisfy the notice requirement. But that same presumption does not apply to Section 1229a(b)(5)(C)(ii), which focuses solely on whether the noncitizen received such notice. This statutory omission demonstrates that Congress intended to focus on actual receipt, not just on whether the government put the notice in the mail. (This interpretation makes sense in light of the

change from certified to regular mail.). Of course, a noncitizen who thwarts receipt of notice by failing to provide an address cannot reopen under Section 1229a(b)(5)(C)(ii). But a noncitizen who did not receive notice due to an innocent mistake, or as is the case here, some failure of the inner workings of the household, remains eligible for discretionary rescission. In sum, noncitizens who did not receive actual notice of whichever hearing they missed are eligible for discretionary reopening under Section 1229a(b)(5)(C)(ii).



CONCLUSION

For all these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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