No. 22-884

IN THE

Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,

v.

RAUL DANIEL MENDEZ-COLÍN,
Respondent.

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

BRIEF FOR RESPONDENT
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QUESTION PRESENTED

Per 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 move to reopen an *in absentia* removal order. Although a "paragraph (1)" notice requires information about the time of a hearing, the purported "paragraph (1)" notices sent to respondents in this case did not contain such information.

The question presented is whether a noncitizen may move to reopen an *in absentia* removal order because he "did not receive notice in accordance with paragraph (1)," even if the Government later sent the noncitizen information about the time of his hearing.

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INTRODUCTION

For decades, the United States government failed to follow the Immigration & Nationality Act's clear command that documents initiating removal proceedings must include the time and place of the noncitizen's hearing. Twice before, the Government has asked this Court to excuse that failure, arguing that the notice it gave to noncitizens was good enough even though it did not comply with the statute. And each time, this Court has made clear that good enough won't do: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021); *see also Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

The Government now comes before this Court a third time, yet again asking to be excused from the consequences of failing to comply with the plain text of the statute. Again, the Government protests that the notice it gave the noncitizens in the three cases currently before this Court was good enough. And again, it asks the Court to excuse its failure. This time, the Government requests that the Court not simply deny discretionary relief to noncitizens, as it requested in the two prior cases, but impose the far harsher penalty of removing noncitizens *in absentia*, without allowing them to make any case against removal, no matter how meritorious.

This Court should reject the Government's arguments here for the same reasons it did the last two times. On the Government's reading, the statute requires entry of an *in absentia* removal order if a noncitizen did not give the Government his address,

even if the Government never told him he had to do so. It requires *in absentia* removal even if the Government never gave the noncitizen any notice of the charges against him. And it requires *in absentia* removal even if the Government initiated proceedings by issuing the noncitizen a blank piece of paper labeled "Notice to Appear." That cannot be right.

This Court should affirm the decision below.

STATEMENT OF THE CASE

A. Statutory background.

1. The Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, requires that the Government "shall" provide "a 'notice to appear'" (NTA) in all "removal proceedings." *Id.* § 1229(a)(1). The NTA is sometimes shorthanded as a "paragraph (1)" notice because it is described in paragraph (1) of Section 1229(a). *See id.*

The statute also mandates the contents of an NTA. The NTA must advise the noncitizen of the time and place at which the removal hearing will be held and the consequences of failing to appear. 8 U.S.C. § 1229(a)(1)(G). Six other subprovisions of Section 1229(a)(1) require providing other critical information, such as the charges against the noncitizen, that the noncitizen has the right to be represented by counsel, and the requirement to provide the Attorney General with an address and phone number. *Id.* § 1229(a)(1)(A)-(F).

If there is a "change or postponement in the time and place of such proceedings," Section 1229(a)(2) requires another "written notice." 8 U.S.C. § 1229(a)(2)(A). The statute refers to this document as a "Notice of [C]hange." *Id.* § 1229(a)(2). It is also

sometimes shorthanded a "paragraph (2)" notice, because it is described in paragraph (2) of Section 1229(a). *See id.* The Notice of Change (NOC) advises the noncitizen of the "new time and place of the proceedings." *Id.* § 1229(a)(2)(A)(i). An NOC must include the consequences of failing to appear but does not need to provide the other information that an NTA must already have provided. *Id.* § 1229(a)(2)(A)(ii).

2. For many years, the Government did not comply with the statute's mandate that the NTA include "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). Instead, the Government issued documents it called NTAs that listed "to be set" or some equivalent phrase in lieu of the actual time and date of a hearing. The Government would instead provide time and date information, as well as the consequences of failing to appear, on a later, separate form that the Government labeled a "notice of hearing" (NOH). *E.g.* J.A. 17. The immigration statute does not mention a "notice of hearing."

In two recent cases, this Court held that a document that failed to include the time and place for a removal hearing does not qualify as an NTA. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Those cases interpreted the notice provisions in the context of a form of discretionary relief for noncitizens.

First, in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), this Court held that a noncitizen served a document that does not specify a time for a hearing is not served a "'notice to appear.'" *Id.* at 2114-15. To support its conclusion, the Court looked to the NOC

provision and explained that "[b]y allowing for a 'change or postponement' of the proceedings to a 'new time or place,'" that provision "presumes" that the NTA had already specified an original time and date. *Id.* at 2114. "Otherwise, there would be no time or place to 'change or postpon[e].'" *Id.* (alteration in original) (quoting 8 U.S.C. § 1229(a)(2)).

Second, in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), this Court held that a noncitizen given an incomplete NTA (one without the time and date of the hearing) followed by a second document containing the time and date is still not served a "notice to appear." *Id.* at 1486. This Court held that the pair of documents does not add up to an NTA, emphasizing that the statute referred to "'*a*' notice containing all the information Congress has specified," rather than permitting notice "by installment." *Id.* at 1480, 1481 (emphasis added).

3. This case concerns the requirements for *in absentia* removals where the Government has failed to provide a valid NTA. Two additional statutory provisions are implicated.

First, Section 1229a(b)(5)(A) specifies the circumstances in which a noncitizen "shall be ordered removed *in absentia*." 8 U.S.C. § 1229a(b)(5)(A). As relevant here, the Government must show by "clear, unequivocal, and convincing evidence" that "written notice required under paragraph (1) or (2) of section 1229(a) of this title"—that is, notice required under the NTA or NOC provisions—"has been provided." *Id.* The Government must further show that the noncitizen "d[id] not attend a proceeding." *Id.* Finally, the Government must establish that the noncitizen is removable. *Id.*

Section 1229a(b)(5)(A) mandates that an *in absentia* removal order be entered in such circumstances, with no exceptions. As a result, *in absentia* removal orders have been entered, for instance, "against individuals who arrived in court minutes after the entry of the removal order, were present in the courthouse (but not the courtroom), and even against individuals with mental incompetence who failed to follow the judge's directives." Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. Cal. L. Rev. 181, 218-19 (2017).

Second, Section 1229a(b)(5)(C)(ii) governs when noncitizens are eligible to move to reopen an *in absentia* removal order. Noncitizens are eligible under Section 1229a(b)(5)(C)(ii) to move to reopen "at any time" if they can demonstrate that they "did not receive notice in accordance with paragraph (1) or (2)" of Section 1229(a). 8 U.S.C. § 1229a(b)(5)(C)(ii).[1]

Section 1229a(b)(5)(A) (the entry-of-*in-absentia*-removal-order provision) differs in several respects from Section 1229a(b)(5)(C)(ii) (the eligibility-to-move-to-reopen provision). For instance, whereas the former focuses on whether the Government "provided" the written notice, the latter focuses on whether the noncitizen "received" the written notice. *Compare* 8 U.S.C. § 1229a(b)(5)(A), *with id.* § 1229a(b)(5)(C)(ii). A noncitizen may thus be eligible

[1] Section 1229a(b)(5)(C)(ii) also allows some noncitizens in Federal or State custody to move to reopen their *in absentia* removal orders. That portion of Section 1229a(b)(5)(C)(ii) is not at issue in this case.

to move to reopen even if his *in absentia* removal order was validly entered in the first place.

If a noncitizen satisfies the criteria laid out in Section 1229a(b)(5)(C)(ii), his removal order "*may* be rescinded." 8 U.S.C. § 1229a(b)(5)(C) (emphasis added). That is, even if a noncitizen satisfies the criteria in Section 1229a(b)(5)(C)(ii), rescission is not automatic. Department of Justice regulations limit the number of motions to reopen that a noncitizen can file and direct an immigration judge to consider, for instance, whether the noncitizen "exercised diligence in pursuing the motion to reopen" and whether the noncitizen has a compelling case for relief. 8 C.F.R. § 1003.23(b)(1), (b)(3), (b)(4)(v).

Even if the immigration judge grants rescission of the *in absentia* removal order, the noncitizen is still not automatically entitled to remain in the United States. *See* 8 U.S.C. § 1229a(c)(4)(A). Instead, rescission of the removal order only grants the noncitizen a new hearing, at which he can present his case against being removed. *Id.*

B. Factual background.

1. Respondent Raul Daniel Mendez-Colín became a lawful permanent resident of the United States over thirty years ago. *Mendez-Colín* A.R. 57. He married a U.S. citizen and has three U.S. citizen children. *Id.* 20.

In 2001, Mr. Mendez-Colín attempted to bring a noncitizen friend and her sick child into the United States. *Mendez-Colín* A.R. 12, 132. He was stopped at the San Luis, Arizona port of entry and served with a document labeled "Notice to Appear." *Id.* 12. The

purported NTA listed the date and time for his removal hearing as "To be set." *Id.* 167-68.

The Government subsequently scheduled multiple hearings for 2001 and 2002, which Mr. Mendez-Colín or his attorney attended. *Mendez-Colín* A.R. 50. To schedule these hearings, the Government used forms it denominated as "Notice[s] of Hearing." *See, e.g.*, J.A. 36-43. Those NOHs did not use any of the key words from 8 U.S.C. § 1229(a)(2), such as "change," "postpone[]," or "new." The forms instead used language like: "Please take notice that the above captioned case has been scheduled"—not "change[d]" or "postpone[d]"—"for a Master hearing before the Immigration Court on Jan-15-2002 at 1:00 pm at: 200 E. Mitchell Dr., Suite 200, Phoenix, AZ 85012." J.A. 36 (capitalization altered).

On July 23, 2002, following Mr. Mendez-Colín's fourth hearing, the Government sent Mr. Mendez-Colín's attorney yet another form denominated a Notice of Hearing, using similar language, scheduling a further hearing for September 15, 2003, at 9:00 a.m. *Mendez-Colín* A.R. 157.

Mr. Mendez-Colín was late to the hearing because he believed it was to take place later in the day. *Mendez-Colín* A.R. 66. In the meantime, the immigration judge issued an *in absentia* removal order. *Id.* 156.

2. As relevant here, in 2020 Mr. Mendez-Colín moved to reopen his *in absentia* removal order. *Mendez-Colín* A.R. 3. The Board of Immigration Appeals denied his motion. *Id.*

Mr. Mendez-Colín petitioned for review in the Ninth Circuit. Pet. App. 54a. The court of appeals granted Mr. Mendez-Colín's petition "[f]or the

reasons explained in" another case, decided the same day, *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022). Pet. App. 54a. In *Singh*, the Ninth Circuit held that the noncitizen satisfied the requirements of Section 1229a(b)(5)(C)(ii) because he received neither "notice in accordance with paragraph (1)" (as his case-initiating document did not include time and date information and so was not a valid NTA) nor "notice in accordance with paragraph . . . (2)" (as the document supplying date and time information did not qualify as an NOC). Pet. App. 9a (citation omitted); *id.* 11a-12a.

In so holding, the Ninth Circuit rejected the Government's argument that a notice of hearing served after a deficient NTA amounted to an NOC. Pet. App. 6a. Such an interpretation, it held, "contravenes the unambiguous statutory text and the Supreme Court's decision in *Niz-Chavez*." *Id.*

As to the statutory text, the Ninth Circuit explained that Section 1229(a) makes clear there can be no NOC without a prior complete NTA. Pet. App. 10a. "Th[e] text presupposes—and common sense confirms—that the Notice to Appear provided in paragraph (1) must have included a date and time because otherwise, a 'change' in the time or place is not possible." *Id.* It also explained that the "statutory structure" of Section 1229(a) "resolves any doubt" because the NTA requires many pieces of information that the NOC does not, making clear that NOCs "are additions to, and not alternatives to, the Notice to Appear." Pet. App. 11a.

As to precedent, the Ninth Circuit explained *Niz-Chavez* had already "rejected the government's two-step approach to providing notice because that

approach was inconsistent" with the statute's requirements for an NTA. Pet. App. 7a.

The Ninth Circuit denied rehearing en banc. Pet. App. 82a-83a.

3. The United States sought review in this Court, and this Court granted certiorari. Mr. Mendez-Colín's case has been consolidated with two other cases, *Campos-Chaves v. Garland* and *Garland v. Singh*.[2]

SUMMARY OF THE ARGUMENT

I. Section 1229a(b)(5)(A) allows the Government to obtain an *in absentia* removal order "after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided." The Government concedes that the "written notice required under paragraph (1)" was not provided in this case. The only question is whether "the written notice required under paragraph (2)" was provided. It was not.

A. The plain text of the statute and this Court's precedent make clear that there can be no "paragraph (2) notice" if there has been no "paragraph (1) notice." The immigration statute mandates that a "paragraph (1) notice"—that is, a notice to appear or NTA—"shall be given" in every removal proceeding. 8 U.S.C. § 1229(a)(1). The statute does not treat a "paragraph (2) notice"—that is, a Notice of Change or NOC—as an alternative to

[2] The noncitizens are respondents in two of the three cases and petitioner in the third. To avoid confusion, this brief refers to "the noncitizens," rather than "petitioner" or "respondents," when referencing arguments made in all three cases.

the NTA but rather as a supplement to an NTA. An NOC is given only "in the case of any change or postponement in the time and place" of the proceedings. 8 U.S.C. § 1229(a)(2)(A). When "[t]he alien never got an *initial* 'time or place'"—that is, when, as in this case, the NTA did not list an initial time or place—there was "nothing to 'change.'" *Rodriguez v. Garland*, 31 F.4th 935, 937 (5th Cir. 2022) (Duncan, J., concurring in the denial of rehearing en banc) (emphasis in original).

This Court's decisions in *Pereira* and *Niz-Chavez* confirm this reading of the statute. Those cases make clear that an NTA is an indispensable part of a removal proceeding. Lest there be any doubt, the noncitizens' reading avoids absurd results and is consistent with the history of the statute.

B. The Government's counterarguments are meritless. For instance, the Government argues that "change" in Section 1229(a)(2) can simply mean "alteration" or "modification," such that going from "time and place information TBD" to a specific time and place constitutes a "change or postponement." U.S. Br. 28-31. But that's simply not how ordinary English works. When this Court issues an argument calendar, for example, it hasn't "changed" the date of an oral argument, even though at the moment of a certiorari grant, each litigant knows that his argument will be held at some point to be determined.

C. The Government's arguments that two features of Mr. Mendez-Colín's case compel a different outcome lack merit.

First, the Government argues that "even if the first NOH that follows a defective NTA does not

count as a 'change' in the time and place, the same cannot be said of a subsequent NOH, which obviously 'change[s] or postpone[s]' the time in the prior NOH." U.S. Br. 31. But because the first notice of hearing did not set a new hearing, as far as the statute is concerned, the second and subsequent notices of hearing could not have changed the hearing. Moreover, the Government has no argument that the notice specifying Mr. Mendez-Colín's September 15, 2003, hearing "change[d] or postpone[d] . . . the time and place" of any "proceedings"—the four prior hearings had been completed before the final notice was sent.

Second, the Government argues that, by attending his hearings, Mr. Mendez-Colín treated each of the prior notices of hearing as valid. But the *in absentia* removal provision doesn't say that a removal order shall be entered "after written notice required under paragraph (1) or (2) *or actual attendance*"; it demands the "written notice required under paragraph (1) or (2)," without inquiring whether the noncitizen attended any prior hearings. *See* 8 U.S.C. § 1229a(b)(5)(A).

II. Even if a Notice of Change without a proper Notice to Appear could be the basis for an *in absentia* removal order under Section 1229a(b)(5)(A), Mr. Mendez-Colín is still entitled to move to reopen under Section 1229a(b)(5)(C)(ii). Section 1229a(b)(5)(C)(ii) makes a noncitizen eligible for reopening if he "did not receive notice in accordance with paragraph (1) *or* (2)." 8 U.S.C. § 1229a(b)(5)(C)(ii) (emphasis added). That wording is most naturally read to render a noncitizen eligible if he *either* did not receive "notice in accordance with" paragraph (1) *or* did not receive

"notice in accordance with" paragraph (2). Because Mr. Mendez-Colín undisputedly "did not receive notice in accordance with paragraph (1)"—that is, he received no valid NTA—he is thus entitled to move for reopening. It does not matter what he received under paragraph (2).

The Government advances two responses, neither availing. First, the Government assumes that Section 1229a(b)(5)(A) (the standard for entering an *in absentia* removal order in the first place) and Section 1229a(b)(5)(C)(ii) (the provision regarding eligibility to move to reopen an *in absentia* removal order) should be treated identically. U.S. Br. 39-40. But the two contain significant differences. Second, the Government urges that the word "or" in Section 1229a(b)(5)(C)(ii) means that "eligibility to seek rescission" of an *in absentia* removal order "depends on whether the noncitizen received whichever form of notice is relevant to the proceeding the noncitizen did not attend." U.S. Br. 32-33. But the statute doesn't say that a noncitizen is eligible to move to reopen only if he can show he "did not receive notice *of the hearing he missed* in accordance with paragraph (1) or (2)."

III. If any doubt remains, two canons of construction require affirming the decision below. First, ambiguities in deportation statutes should be construed in favor of the noncitizen. Second, the Government's position would raise serious constitutional issues that the noncitizens' interpretation avoids. By contrast, the Government's preferred tiebreaks—deference to agency action, legislative history and policy considerations—either have no force or cut in Mr. Mendez-Colín's favor.

ARGUMENT

I. Mr. Mendez-Colín is eligible to move to reopen his *in absentia* removal order because he did not receive a valid Notice of Change.

Section 1229a(b)(5)(A)—the entry-of-*in-absentia*-removal-order provision—allows the Government to obtain an *in absentia* removal order by showing that the "written notice required under paragraph (1)" (the Notice to Appear provision) "or paragraph (2)" (the Notice of Change provision) "has been provided" to the noncitizen. *Id.* Section 1229a(b)(5)(C)(ii)—the eligibility-to-move-to-reopen provision—makes a noncitizen eligible to rescind that *in absentia* removal order "if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2)." *Id.*

There is no dispute that the Government failed to issue a valid NTA in Mr. Mendez-Colín's case. *See* U.S. Br. 24-26. "Written notice required under paragraph (1)" thus was not "provided" to Mr. Mendez-Colín for purposes of the entry-of-*in-absentia*-removal-order provision. 8 U.S.C. § 1229a(b)(5)(A). And Mr. Mendez-Colín also did not "receive notice in accordance with paragraph (1)" for purposes of the eligibility-to-move-to-reopen provision. 8 U.S.C. § 1229a(b)(5)(C)(ii).

Nor is there any dispute that, if the Government *also* did not issue a valid NOC in Mr. Mendez-Colín's case, no *in absentia* removal order should have entered, and Mr. Mendez-Colín is eligible to move to reopen.

That leaves the Government arguing that the "Notices of Hearing" that it provided Mr. Mendez-

Colín were, in fact, NOCs, such that he was provided the "written notice required under paragraph . . . (2)" and "received notice in accordance with paragraph . . . (2)." *See* 8 U.S.C. §§ 1229a(b)(5)(A), (b)(5)(C)(ii); U.S. Br. 24-26.

The Government is wrong. The plain text and structure of the statute, as well as this Court's cases, make clear that there can be no paragraph (2) notice (that is, no NOC) without a paragraph (1) notice (that is, an NTA). The Government's arguments to the contrary are unavailing. And nothing about Mr. Mendez-Colín's particular case changes that conclusion.

A. The statute's text and this Court's precedents make clear there can be no Notice of Change without a Notice to Appear.

The Government begins with the text of Section 1229a(b)(5)(A) and focuses on the word "or": Entry of an *in absentia* removal order can occur so long as the noncitizen was provided the "written notice required under paragraph (1) *or* (2)." *Id.* But the proper place to start is Section 1229, which defines the notices required under paragraphs (1) and (2) and makes clear that the "notice required under paragraph . . . (2)" *cannot* be issued if the "notice required under paragraph (1)" has not been provided. That is, there cannot be an NOC without an NTA. In this case, therefore, the Government provided *neither* the "notice required under paragraph (1)" *nor* the "notice required under paragraph . . . (2)."

1. To start, the plain text of Section 1229 makes clear that an NTA must be given in every case.

The statute specifies that "[i]n removal proceedings under section 1229a of this title, written notice (in this section referred to as a 'notice to appear') *shall be given*." 8 U.S.C. § 1229(a)(1) (emphasis added). The NTA is mandatory; it must be given in *all* removal proceedings under 8 U.S.C. § 1229a. Nowhere does the statute suggest that an NTA need not be given if the noncitizen receives time and date information some other way.

The NTA is also the only document that must give the noncitizen critical information such as the charges against them and "the statutory provisions alleged to have been violated"; that the noncitizen "may be represented by counsel"; and "[t]he requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number." 8 U.S.C. §§ 1229(a)(1)(D), (a)(1)(E), (a)(1)(F)(i). No other provision of the statute requires that this critical information be provided to the noncitizen—further confirmation that Congress intended an NTA to issue in every case.

The statute also specifies that the noncitizen "be permitted the opportunity to secure counsel." 8 U.S.C. § 1229(b)(1). To enforce that provision, the statute says that "the first hearing date in proceedings . . . shall not be scheduled earlier than 10 days after the service of the notice to appear." *Id.* That's the only provision of the statute that guarantees the noncitizen time to secure counsel, and it—like the rest of the statute—makes no sense unless the noncitizen is given an NTA.

2. The Notice of Change cannot make up for a faulty NTA. An NOC doesn't contain much of the

information required in an NTA (for instance, it doesn't tell a noncitizen of his right to counsel, his obligation to supply his address to the Government, or the charges against him). And there's no requirement that an NOC be issued any particular length of time before a hearing. *Compare* 8 U.S.C. § 1229(a)(1), *with* 8 U.S.C. § 1229(a)(2).

Unsurprisingly, then, the statute doesn't treat the NOC as an alternative to the NTA. Instead, the statute treats an NOC as a "supplemental notice" that can only be given *after* an NTA. *See Niz-Chavez*, 141 S. Ct. at 1485. An NOC is given only "in the case of any change or postponement in the time and place" of the proceedings. 8 U.S.C. § 1229(a)(2). Where "[t]he alien never got an *initial* 'time or place'"—when, as in this case, the NTA did not list an initial time or place—there was "nothing to 'change.'" *Rodriguez v. Garland*, 31 F.4th 935, 937 (5th Cir. 2022) (Duncan, J., concurring in the denial of rehearing en banc) (emphasis in original).

Lest there be any doubt, Section 1229(a)(2)(A)(i) requires that the NOC detail "the *new* time or place of the proceedings." *Id.* (emphasis added). Paired with the "change" and "postponement" language of Section 1229(a)(2)(A), the word "new" requires that there was an "old"—that is, prior—time or place that is being modified. *See* Pet. App. 10a; *Rodriguez*, 31 F.4th at 937 (Duncan, J., concurring in the denial of rehearing en banc). An NOC, therefore, functions only to modify a previously set time or place, not to set the date and time for a hearing in the first instance.

3. This Court's decisions in *Pereira* and *Niz-Chavez* both buttress the noncitizens' plain-text

reading of the governing provisions here. Four portions of those decisions are particularly relevant.

First, *Niz-Chavez* makes clear that an NTA is an indispensable part of a removal proceeding. As this Court put the point: "A notice to appear serves as the basis for commencing a grave legal proceeding," akin to the "indictment in a criminal case" or a "complaint in a civil case." *Niz-Chavez*, 141 S. Ct. at 1482. Thus, only *"once the government serves a compliant notice to appear*," does the statute "permit[] it to send a supplemental notice amending the time and place of an alien's hearing if logistics require a change." *Id.* at 1485 (emphasis added). That is, the "'compliant notice to appear' is not an optional part of the statutory structure." *Lazo-Gavidia v. Garland*, 73 F.4th 244, 252 (4th Cir. 2023) (discussing *Niz-Chavez*, 141 S. Ct. at 1485). There can be no NOC unless it follows a valid NTA.

Second, this Court interpreted the phrase "change or postponement" in Section 1229(a)(2) to accord with the noncitizens' reading. As this Court explained in *Pereira*, "[b]y allowing for a 'change or postponement' of the proceedings to a 'new time or place,' paragraph (2) presumes that the Government has already served a 'notice to appear under section 1229(a)' that specified a time and place." 138 S. Ct. at 2114.

Third, this Court made clear that it would be an untenable result to allow the Government to provide the information required by paragraph (1) in "a series of letters," which "might trail in over the course of weeks, months, maybe years, each containing a new morsel of vital information[, a]ll of which the individual alien would have to save and compile in

order to prepare for a removal hearing." *Niz-Chavez*, 141 S. Ct. at 1485. *Niz-Chavez* thus makes clear that the statute's goal was not only to require that a noncitizen be provided with all the necessary information, but that he be provided with that information in a certain format—seven critical pieces of information on one document (the NTA), with a separate document (the NOC) coming into play only for changes or postponements.

Fourth, this Court was well aware that its understanding of the statutory structure in *Pereira* and *Niz-Chavez* affected the *in absentia* provisions as well as the stop-time provisions. *See Pereira*, 138 S. Ct. at 2111. And the Court provided no indication that its conclusions held any less force in the *in absentia* provision.

4. The consequences of reading the statute to allow *in absentia* removal without a proper NTA are untenable. An NOC need only include "the new time or place of the proceedings" and the consequences of a failure to appear. 8 U.S.C. §§ 1229(a)(2)(A)(i)-(ii). An NTA, by contrast, must also include six other categories of information including the charges against the noncitizen and the right to counsel. *Id.* §§ 1229(a)(1)(A)-(G). The statute does not distinguish between the time requirement of the NTA and any of its other requirements. And no other provision of the statute requires the Government to provide information about the charges against the noncitizen or the noncitizen's right to counsel.

If the Government were correct that an NOC can exist without a complete NTA, then the statute itself would provide no barrier to the Government issuing a purported NTA that lacks other critical

information—the charges against a noncitizen, for instance, or his right to counsel. On the Government's reading, just so long as it eventually issued some second notice setting a hearing date, the statute would allow the Government to remove the noncitizen *in absentia* without ever notifying the noncitizen of the charges against him or of his right to counsel. The Government points to nothing about the statute itself that, on its reading, would prevent that outcome—an outcome that, the Government must agree, would be intolerable.

4. The history of Section 1229(a) quells any lingering doubt. Prior to 1996, removal proceedings were initiated by an "order to show cause," the predecessor to the NTA. 8 U.S.C. § 1252b(a)(2)(A) (1994). Information about the time and place of a hearing could be provided either "in the order to show cause" itself "*or otherwise*." *Id.* (emphasis added).

In 1996, Congress amended the statute to relabel the "order to show cause" as a "notice to appear." The NTA is required to contain most of the same information as the "order to show cause" with one notable addition: The "time and place" of the proceedings must now be provided as part of the NTA. 8 U.S.C. § 1229(a)(1)(G)(i). Finding that the statute allows for the time and place to be provided to the noncitizen outside of the NTA would thus nullify Congress's deliberate decision to make time and place information a required, rather than optional, part of the NTA.

B. The Government's arguments to the contrary have no merit.

1. Begin with the Government's focus on the word "or" in Section 1229a(b)(5)(A). The Government rightly notes that the word "or" in that provision is disjunctive. U.S. Br. 27 (citation omitted). But that's entirely consistent with the noncitizens' argument in this case. The noncitizens argue that no *in absentia* removal order may be entered because the Government provided *neither* the "written notice required under paragraph (1)" of the statute (as the Government concedes, it did not provide an NTA) *nor* the "written notice required under paragraph . . . (2)" of the statute (as just explained, the documents that the noncitizens received were not actually Notices of Change; they were nothing more than extra-statutory "Notices of Hearing").

2. Next, the Government argues that "change" in Section 1229(a)(2) can simply mean "alteration" or "modification," U.S. Br. 29, such that the government who "change[s] the time from 'To Be Set' or 'TBD' to a specific time," *id.* 28, has made a "change or postponement," 8 U.S.C. § 1229(a)(2)(A). *See generally* U.S. Br. 29-31. This Court, however, has *already* interpreted the word "change" in Section 1229(a)(2), finding that language "presumes that the Government has already served a 'notice to appear under section 1229(a)' that specified a time and place." *Pereira*, 138 S. Ct. at 2114.

Even if it were an open issue, the Government's proposed reading simply doesn't accord with how ordinary English speakers would use the word "change." As the Third Circuit put the point: "No reasonable diner would expect to get seating for two

by calling a restaurant to 'change' a reservation he never made. Confusion, not a boarding pass, would follow a traveler's request to 'change' a flight from business to first class when no seat of any kind had been purchased." *Madrid-Mancia v. Att'y Gen. of the United States*, 72 F.4th 508, 519 (3d Cir. 2023).

The Government responds that a "change" has occurred "when an indeterminate time is superseded by a specific one." U.S. Br. 18. But again, that defies how ordinary speakers would use the word. Let's say a bride-to-be announces her engagement on Facebook. We'd still call the card she sends pinning down the date a "save the date," not a "change the date." And when this Court issues an argument calendar, it doesn't "change" the date of an oral argument, even though, at the moment of a certiorari grant, each litigant knows that their argument will be held at some point to be determined. In each case, an "indeterminate time" of an event (the wedding or the oral argument) is "superseded by a specific time" (the time in the save-the-date card or this Court's calendar). But no one would describe the argument calendar or the save-the-date card as "changing" the date.

The Government's argument regarding the meaning of the word "new" in Section 1229(a)(2) is equally flawed. The Government suggests that the word "new" doesn't necessarily "impl[y] that there was an 'old'—that is, prior—time or place." U.S. Br. 30 n.3. Per the Government, the word "new" "equally describes something that has 'originated or occurred lately'" or is "novel." U.S. Br. 30 n.3 (citation omitted). But those definitions don't seem to have any salience here. The notices provided to the

noncitizens don't necessarily reference a hearing that "has originated or occurred lately." And it's hard to see what would be "novel" about setting a hearing.

3. The Government argues that the noncitizens' reading of the statute "conflates *when* the Government must issue a paragraph (2) notice—in the case of a change or postponement of a hearing time—with *what* that notice must contain—the new time or place of the hearing." U.S. Br. 28 (citation and internal quotation marks omitted). But the statute isn't merely concerned with "*what* that notice must contain." It doesn't say that *in absentia* removal is allowed if the noncitizen "*receives the information contained* in paragraph (2)." Instead, the statute is concerned with "*when* the Government must issue a paragraph (2) notice": It asks whether the noncitizen was provided the notice "*required* under paragraph . . . (2)." 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). And notice is only "required under paragraph . . . (2)" *when* there is a "change or postponement" to the hearing. *Id.* § 1229(a)(2)(A).

4. The Government next lists a series of "related statutory provisions," but each, it turns out, supports the noncitizens' reading of the statute. *See* U.S. Br. 40-44.

a. Start with Section 1229a(b)(5)(C)(i). That provision allows a noncitizen to move to reopen an *in absentia* removal order within 180 days if the noncitizen "demonstrates that the failure to appear was because of exceptional circumstances," such as "serious illness." 8 U.S.C. §§ 1229a(b)(5)(C)(i), (e)(1).The Government claims the high bar set by this provision "greatly undermines the view that rescission is routinely available" under Section

1229a(b)(5)(C)(ii). U.S. Br. 41. But of course, Congress *didn't* intend for rescission under Section 1229a(b)(5)(C)(ii) to be "routinely available." It assumed the Government would follow the clear command of the statute and provide proper NTAs when initiating removal proceedings, such that most noncitizens would be unable to rely on Section 1229a(b)(5)(C)(ii). And remember, Section 1229a(b)(C)(ii) only establishes eligibility to move to reopen. There are several steps between that eligibility and actually remaining in the United States. *Supra* at 6.

If anything, the "exceptional circumstances" provision, Section 1229a(b)(5)(C)(i), reinforces the noncitizens' reading of the statute. Section 1229a(b)(5)(C)(i) provides a remedy where the noncitizen is the one who didn't do what he was supposed to. In those cases, Congress set a high bar: Any motion to reopen must be filed within 180 days and must be based on "exceptional circumstances." *Id.* Section 1229a(b)(5)(C)(ii), by contrast, allows the noncitizen to ask for a remedy where *the Government* is at fault, such as where it fails to comply with the statute's notice requirements or where it does not deliver a noncitizen that it has in custody. Congress had no reason to penalize the noncitizen in this latter group of cases; noncitizens can thus file motions to reopen "at any time." 8 U.S.C. § 1229a(b)(5)(C)(ii). Whereas Congress strictly limited other categories of motions to reopen *in absentia* removal orders, it imposed no such conditions on Section 1229a(b)(5)(C)(ii).

b. Next consider Section 1229(a)(2)(B). That provision specifies that "a written notice shall not be

required under this paragraph"—that is, paragraph (2), the Notice of Change provision—"if the alien has failed to provide the address required under paragraph (1)(F)." 8 U.S.C. § 1229(a)(2)(B). Again, that provision reinforces the noncitizens' reading that, without a proper NTA, there can be no *in absentia* removal order.

Imagine the Government sent a noncitizen a document that—like the initial document served to Mr. Mendez-Colín in this case—contained six of the seven pieces of information required under Section 1229(a)(1). Instead of omitting the "time and place of the proceedings," as it did in this case, the Government omitted the information required under Section 1229(a)(1)(F)(i)—the requirement that the noncitizen provide his address to the Attorney General. The noncitizen therefore doesn't supply any address. Under Section 1229(a)(2)(B), he's therefore entitled to no paragraph (2) notice whatsoever.

On the noncitizens' reading, there can be no *in absentia* removal order in this case. After all, the Government did not provide "notice in accordance with paragraph (1)," because it did not tell the noncitizen he was obliged to provide an address. There can therefore be no "notice in accordance with paragraph (2)," since there has never been "notice in accordance with paragraph (1)." *Supra* at 14-19. But on the Government's reading, there would be no problem with entering an *in absentia* removal order against the noncitizen. "Notice in accordance with paragraph (2)," per the Government, doesn't require a complete NTA. And if no NTA is required for "notice in accordance with paragraph (2)," the noncitizen in this case received all the notice due

under paragraph (2)—that is to say, no notice, per Section 1229(a)(2)(B), because the noncitizen failed to supply an address. That cannot be correct.

5. Finally, the Government claims *Pereira* and *Niz-Chavez* have no bearing on the question here presented. As an initial matter, the plain text of the statute resolves this case, with or without *Pereira* and *Niz-Chavez*. Nor does the Government provide any rational reason why Congress would have mandated issuance of a proper NTA to stop the clock for purposes of discretionary relief—the issue in *Pereira* and *Niz-Chavez*—but would not have required issuance of a proper NTA before the Government undertakes the far more severe sanction of removing a noncitizen from the United States without even an opportunity to be heard.

In any event, the portions of *Pereira* and *Niz-Chavez* that the noncitizens rely on were integral to the holdings of those cases. For instance, *Pereira*'s holding that a document that does not contain time and place information is not an NTA was "bolster[ed]" by its understanding that an NOC could not provide time and place information in the first instance. *See* 138 S. Ct. at 2114. Far from "resolv[ing] in passing important questions of statutory interpretation not directly at issue," U.S. Br. 39, the Court was well aware that its opinion would affect the interpretation of the *in absentia* removal provisions. *See Pereira*, 138 S. Ct. at 2111.

The Government also points to the *Niz-Chavez* dissent's suggestion that "two-document notice"—that is, a purported NTA that lacks time and place information followed by an NOH that contains time and place information—"could justify removal in

absentia." U.S. Br. 39 (discussing *Niz-Chavez*, 141 S. Ct. at 1491 (Kavanaugh, J., dissenting)). But the *Niz-Chavez* dissenters believed that "two-document notice" added up to a *paragraph (1)* notice. That is, the *Niz-Chavez* dissenters would say Mr. Mendez-Colín was provided the "notice required under paragraph (1)." *Niz-Chavez*, 141 S. Ct. at 1491 (Kavanaugh, J., dissenting). The Government doesn't make that argument here; it concedes that it did not provide Mr. Mendez-Colín the "notice required under paragraph (1)" and instead argues that it provided him the "notice required under paragraph (2)." *See* U.S. Br. 24-26. The *Niz-Chavez* dissent did not endorse that possibility.

C. Nothing about Mr. Mendez-Colín's case counsels a different result.

1. The Government argues that "even if the first NOH that follows a defective NTA does not count as a 'change' in the time and place, the same cannot be said of a subsequent NOH, which obviously 'change[s] or postpone[s]' the time in the prior NOH." U.S. Br. 31 (internal quotation marks omitted). The Government is wrong. The second or subsequent notices of hearing in Mr. Mendez-Colín's case no more counted as "notice required under paragraph . . . (2)," 8 U.S.C. § 1229a(b)(5)(A), than the first NOH.

a. First, the statute contemplates only two ways that a hearing can be calendared—an NTA and an NOC. The "first NOH that follows a defective NTA," U.S. Br. 31, is neither an NTA nor an NOC. It's obviously not an NTA, as it does not include all of the information required in an NTA. And it's not an NOC, either: Because there was no previous time

calendared, it couldn't have changed the time. *Supra* at 16-17. So the "first NOH that follows a defective NTA" does nothing to calendar a hearing.

A "subsequent NOH" thus isn't an NOC, either. The "first NOH that follows a defective NTA" did not calendar a hearing, so there's no hearing for the "subsequent NOH" to "change." As the Fourth Circuit put the point, such an "unknown notice . . . complies with neither Paragraphs (1) or (2) and the statutory safeguards those provisions contain, and flies in the face of *Niz-Chavez*'s admonishment against conveying the statutorily prescribed information 'piecemeal' across multiple notices." *Lazo-Gavidia*, 73 F.4th at 250 n.4 (citation omitted).

As far as the statute is concerned, the Government may as well have sent a text message to the noncitizen telling him to show up at a particular time and place but giving him no other information. If the noncitizen did, in fact, show up, perhaps a judge would go ahead with the hearing. But the noncitizen presumably couldn't be removed *in absentia* for failing to heed the text message's invitation. The text message didn't calendar "the time and place" of the proceedings. And that result doesn't change if the Government issues a subsequent document purporting to be an NOC. That subsequent document could not "change or postpone[]" the "time and place" of the proceedings because the text message didn't calendar a "time and place" to begin with. 8 U.S.C. § 1229(a)(2)(A).

The statute's text accords with that result. Notice is "required under paragraph (2)" when there is a "change or postponement in the time *and* place of such proceedings." 8 U.S.C. § 1229(a)(2)(A) (emphasis

added). At first blush, that seems a strange way for Congress to put the point. Let's say the Government keeps the time of a hearing the same but changes the location from Phoenix to Tucson. The Government didn't change *both* "the time *and* place," 8 U.S.C. § 1229(a)(2)(A), of the hearing. But presumably, Congress still intended the Government to issue a paragraph (2) notice.

But Congress's choice of phrase ("the time *and* place") makes sense if we think of it as a reference to the NTA provision. That provision requires that every NTA include "the time *and* place at which proceedings will be held." *See* 8 U.S.C. § 1229(a)(1)(G)(i) (emphasis added). Section 1229(a)(2)'s concern about a "change or postponement in the time *and* place of such proceedings" is quoting Section 1229(a)(1)(G)(i) and is a clear reference back to a required element in the NTA. Any subsequent notice may list a "new time *or* place of the proceeding" but does not replace "the time *and* place" element from the NTA. The NOH issued to Mr. Mendez-Colín was not a "paragraph (2) notice" because it could not have changed "the time and place of such proceedings"—the NTA issued in his case did not contain the "time and place" element.

Admittedly, that reading of the notice provisions "focuse[s] on a single word, a small one at that." *See Niz-Chavez*, 141 S. Ct. at 1486. But the noncitizens' reading is also the only option that comports with statutory structure. Remember that an NTA "shall be given" in every removal proceeding. 8 U.S.C. § 1229(a)(1); *supra* at 14. Allowing a noncitizen to be removed based on a "subsequent NOH" with no NTA undermines that requirement. And the statute

clearly divides notice requirements between the documents that set hearings in the first instance (NTAs) and the documents that update a hearing time or place (NOCs). The "subsequent NOH" may be able to *update* a hearing time or place, but it cannot set one in the first instance. Only an NTA can do that.

That reading of the statute also makes good sense. The Government offers no reason why a statute would forbid the Government from removing a noncitizen *in absentia* if it sends only one extra-statutory NOH but allow the Government to remove a noncitizen *in absentia* if it sends multiple extra-statutory NOHs, particularly since the latter scenario would, in many cases, be far *more* confusing for a noncitizen. *See* BIO 6 (discussing facts of *Singh* case).

b. One final note: Search the Government's brief and you'll find *no* argument that the notice specifying Mr. Mendez-Colín's September 15, 2003, hearing "change[d] or postpone[d] . . . the time and place" of any "proceedings." Per the Government, the question is whether a noncitizen received notice of the "proceeding that he d[id] not attend." U.S. Br. 24 (internal quotation marks omitted). The "proceeding" that Mr. Mendez-Colín "did not attend" was a September 15, 2003, hearing. The notice for that hearing was sent on July 23, 2002, after Mr. Mendez-Colín had attended multiple hearings. J.A. 17-19; *Mendez-Colín* A.R. 50.

That notice couldn't have "changed or postponed" any hearing—the multiple prior hearings had been completed before the final notice was sent. *See* J.A. 17-35; *Mendez-Colín* C.A. Br. 4; *Mendez-Colín* A.R. 50. Let's say a group of friends holds four movie

nights to watch the first four installments of the *Die Hard* franchise. If someone wants to *set* a time to watch the fifth, it would utterly confuse the group to receive a text saying, "Can we change or postpone our movie night?" Four movie nights have already occurred; one has yet to be set; and it doesn't make sense to describe any of the movie nights as being "change[d] or postpone[d]."

So, too, in Mr. Mendez-Colín's case. He attended the prior hearings; an additional one had not yet been set; and so the document mailed to him on July 23, 2002, was not a document sent "in the case of any change or postponement in the time and place of such proceedings." *See* 8 U.S.C. § 1229(a)(2)(A).

By contrast, if the group of friends had announced at the outset that it expected to complete its *Die Hard* marathon in one sitting, a text message announcing that it was going to take more than one night might plausibly count as a "change." So, too, in the immigration context: Had the NTA announced that Mr. Mendez-Colín's proceedings were expected to take place at one particular time, a subsequent notice adding additional hearing dates and times might count as a "change." But because there was no initial announcement in this case, there could be no "change."

2. The Government makes one final argument as to Mr. Mendez-Colín. By attending his hearings, the Government argues, Mr. Mendez-Colín "treated each of those prior NOHs as valid." U.S. Br. 31-32. Conspicuously absent from the Government's brief is any citation for that proposition. The *in absentia* removal provision doesn't say that a removal order shall be entered "after written notice required under

paragraph (1) or (2) *or actual attendance*;" it demands the "written notice required under paragraph (1) or (2)," without inquiring whether the noncitizen attended any prior hearings. *See* 8 U.S.C. § 1229a(b)(5)(A). The written notices required under paragraphs (1) (which "shall be given" in any "removal proceedings") and (2) (which "shall be given" in "the case of any change or postponement in the time and place of such proceedings") are no less required because a noncitizen attended a prior hearing. *See* 8 U.S.C. § 1229(a)(1), (a)(2)(A).

Nor do this Court's precedents lend support to the Government's argument. Mr. Niz-Chavez, for instance, attended "all of the actual hearings" in his case, U.S. Br. at 7, *Niz-Chavez*, 141 S. Ct. 1474 (No. 19-863), yet this Court did not find that he somehow "treated" the NTA in his case as "valid."

To be sure, Mr. Mendez-Colín's attendance at his hearings may have forfeited some complaints. For instance, after attending his first hearing and lodging no objection to the purported NTA, Mr. Mendez-Colín may not be able to argue that the hearing violated Section 1229(b)(1)'s prohibition on scheduling a first hearing "earlier than 10 days after the service of the notice to appear." But Mr. Mendez-Colín could not have raised any challenge to an *in absentia* order that had not yet been issued.

Ultimately, the Government's argument on this score boils down to a protest that Mr. Mendez-Colín may have *in fact* known about the hearing. But *Niz-Chavez* already rejected the argument that the immigration statute is concerned only with whether the noncitizen received the required information, rather than with the form in which he received it.

The statute doesn't look for just "notice" or even "adequate notice." It specifically looks for the "written notice *required under* paragraph (1) or (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). And whether or not Mr. Mendez-Colín attended his hearings, the Government cannot point to any document that is either the "notice required under paragraph (1)" or the "notice required under paragraph (2)."[3]

II. Mr. Mendez-Colín is eligible to move to reopen his *in absentia* removal order because he did not receive a valid Notice to Appear.

Recall that two provisions related to *in absentia* removal are at issue in this case. One provision, Section 1229a(b)(5)(A), allows entry of an *in absentia* removal order against a noncitizen who misses a hearing "after written notice required under paragraph (1) or (2) . . . has been provided to the alien or the alien's counsel of record." 8 U.S.C. § 1229a(b)(5)(A). The second provision, Section 1229a(b)(5)(C)(ii), allows a removal order to be rescinded "upon a motion to reopen . . . if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2)." 8 U.S.C.

[3] The Government also notes that Mr. Mendez-Colín's counsel "affirmatively stated that there was 'no issue' with the NOH that preceded the hearing where the in absentia removal order was entered." U.S. Br. 32. But telling the court there was "no issue regarding notice of hearing," *Mendez-Colín* A.R. 77, is not the same as saying that the notice of hearing amounted to a Notice of Change, which is what the Government must show to establish that the document was the "notice required under paragraph (2)" of the statute.

§ 1229a(b)(5)(C)(ii). The entry-of-*in-absentia*-removal-order provision and the eligibility-to-move-to-reopen provision contain different requirements.

As explained *supra* at 14-19, no paragraph (2) notice was issued in Mr. Mendez-Colín's case. The statute thus did not allow entry of an *in absentia* removal order under Section 1229a(b)(5)(A), and Mr. Mendez-Colín is eligible to move to reopen the *in absentia* removal order under Section 1229a(b)(5)(C)(ii).

But even if this Court were to disagree and conclude that Mr. Mendez-Colín was given a valid paragraph (2) notice, he is still eligible to move to reopen. That's because no one disputes that Mr. Mendez-Colín did not receive a proper paragraph (1) notice, and that is enough to satisfy the eligibility-to-move-to-reopen provision, Section 1229a(b)(5)(C)(ii).

1. Section 1229a(b)(5)(C)(ii) makes a noncitizen eligible for reopening if he "did not receive notice in accordance with paragraph (1) *or* (2)." 8 U.S.C. § 1229a(b)(5)(C)(ii) (emphasis added). That wording is most naturally read to render a noncitizen eligible if he *either* did not receive "notice in accordance with" paragraph (1) *or* did not receive "notice in accordance with" paragraph (2).

Consider some everyday analogues of Section 1229a(b)(5)(C)(ii). If the return policy of a favorite online shopping site states, "You do not need to pay for your purchase if your delivery does not arrive at the correct time or location," we would understand that we don't need to pay if the delivery arrived at *either* the wrong time *or* the wrong location. Similarly, if a teacher says, "Raise your hand if you did not receive your exam booklet or answer sheet,"

we would raise our hands if we *either* did not receive our exam booklet *or* did not receive our answer sheet.

When the statute says a noncitizen can move to reopen if he "did not receive notice in accordance with paragraph (1) or (2)," then, it means that he can move to reopen if he *either* did not receive "notice in accordance with paragraph (1)" *or* did not receive "notice in accordance with paragraph . . . (2)." Respondents here indisputably did not receive "notice in accordance with paragraph (1)" and so can move to reopen.[4]

2. To the extent that provision is susceptible to multiple readings, consider the absurd results that would follow from the Government's reading that a noncitizen must prove *both* that he "did not receive notice in accordance with paragraph (1)" *and* that he "did not receive notice in accordance with paragraph . . . (2)." Imagine a noncitizen who receives notice in accordance with paragraph (1), that his

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[4] One judge has suggested that the "disjunctive negative proof" *requires* that Section 1229a(b)(5)(C)(ii) be read to require both proof that the noncitizen "did not receive notice in accordance with paragraph (1)" *and* proof that the noncitizen "did not receive notice in accordance with paragraph . . . (2)." *Lazo-Gavidia*, 73 F.4th at 256 (Rushing, J., dissenting) (internal quotation marks omitted). But as the United States has explained in another case this Term, "[f]or better or for worse," the negative proofs from formal logic do not necessarily translate into ordinary language. U.S. Br. at 14-18, *Pulsifer v. United States*, No. 22-340 (S. Ct. 2023). And, as evidenced by the examples of the online shopping site or the teacher in class, in this case, the "disjunctive negative proof" simply doesn't map onto how we'd ordinarily think about a sentence like the one in Section 1229a(b)(5)(C)(ii).

hearing will be held on November 1. But suppose that the hearing is then moved up to October 1; that USPS loses the paragraph (2) notice that would have informed the noncitizen of the change; and that the noncitizen therefore misses the hearing and is ordered removed *in absentia*. If the Government's reading of the statutory provision is correct, the noncitizen would not be eligible under Section 1229a(b)(5)(C)(ii) to move to reopen because he received notice in accordance with paragraph (1), even though he never received notice in accordance with paragraph (2). The noncitizen has no recourse, even though no one disputes that he had no knowledge of the hearing he missed.

To avoid that illogical outcome, the Government insists that the notice that matters for Section 1229a(b)(5)(C)(ii) is notice of the "proceeding" the noncitizen did not attend. U.S. Br. 32-33. But the Government makes that argument based on the phrase "such proceeding" in Section 1229a(b)(5)(A). *Id.* No such phrase appears in Section 1229a(b)(5)(C)(ii).

And the Government's reading would still allow for a result that is anathema to the statute. Recall our hypothetical noncitizen who was never told he needed to tell the Attorney General his address and so did not do so. *Supra* at 24-25. He's owed no notice under paragraph (2) of the statute, so he can't argue that he "did not receive notice in accordance with . . . paragraph (2)." *See* 8 U.S.C. § 1229a(b)(5)(C)(ii). Under the Government's theory, that noncitizen would not be eligible to move to reopen his *in absentia* removal order.

Under the noncitizens' reading, by contrast, the noncitizen must prove *either* that he did not receive notice "in accordance with paragraph (1)" *or* that, even if he did receive a valid NTA, he did not receive notice "in accordance with paragraph (2)." A noncitizen who did not receive a proper NTA can always take advantage of Section 1229a(b)(5)(C)(ii), because notice "in accordance with paragraph (1)" is required in every proceeding. If the date and time provided on the NTA is "change[d] or postpone[d]," then the requirement of "notice in accordance with paragraph . . .(2)," *id.* § 1229a(b)(5)(C)(ii), is no notice at all. And if there *was* a "change or postponement" and the noncitizen did not receive paragraph (2) notice, he is eligible to move for rescission under Section 1229a(b)(5)(C)(ii) because he did not receive "notice in accordance with paragraph . . . (2)."

3. The Government raises two counterarguments, neither availing.

a. First, the Government assumes that the standard for entering an *in absentia* removal order in the first place under Section 1229a(b)(5)(A) and the standard regarding eligibility to move to reopen an *in absentia* removal order under Section 1229a(b)(5)(C)(ii) must be identical. U.S. Br. 39-40. But that's not right.

There are important differences between the two provisions. The entry-of-*in-absentia*-removal-order provision asks only whether the noncitizen "has been *provided*" the statutorily required notice, whereas the eligibility-to-move-to-reopen provision asks whether the noncitizen actually "*receive[d]*" the notice. *Compare* 8 U.S.C. § 1229a(b)(5)(A), *with* 8 U.S.C. § 1229a(b)(5)(C)(ii). The former provision specifies

that notice may be "provided to the alien's counsel of record," whereas the latter does not. *Id.* For the entry-of-*in-absentia*-removal-order provision, "[t]he written notice . . . shall be considered sufficient for purposes *of this subparagraph*" (that is, for purposes of the entry-of-*in-absentia*-removal-order provision only) "if provided at the most recent address provided under section 1229(a)(1)(F)." 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). There's no equivalent presumption for the eligibility-to-move-to-reopen provision. *Id.* § 1229a(b)(5)(C)(ii). To take a final example: Whereas Section 1229a(b)(5)(A) specifies criteria for when a noncitizen "*shall* be ordered removed," *id.*, Section 1229a(b)(5)(C)(ii) specifies criteria for when an *in absentia* removal order "*may* be rescinded," *id.*

Taken together, these textual differences reflect a congressional choice. Congress surely wanted to make it straightforward for the Government to obtain *in absentia* removal orders where a noncitizen doesn't show up to tell his side of the story. The Government must show only that it put the required notice(s) in the mail, and then it gets the benefit of presumptions about what notice is sufficient. *See* 8 U.S.C. § 1229a(b)(5)(A). But Congress *also* wanted to make sure that any noncitizen who ultimately came forward did not face a heavy hurdle to at least be eligible for reopening. A noncitizen can show, for instance, that notwithstanding the government's attempt to mail the notice to the address on record, a mail snafu prevented delivery, such that the noncitizen did not in fact receive the notice. *See id.* § 1229a(b)(5)(C)(ii).

The point is this: Congress provided that there would be at least some occasions where the Government properly obtains an *in absentia* removal order under Section 1229a(b)(5)(A) only to have a noncitizen be eligible to rescind that order under Section 1229a(b)(5)(C)(ii). Indeed, if that weren't so, there would be no reason to have a reopening provision.

b. The Government also urges that the word "or" in the Section 1229a(b)(5)(C)(ii) eligibility-to-move-to-reopen provision means eligibility to reopen "depends on whether the noncitizen received whichever form of notice is relevant to the proceeding the noncitizen did not attend." U.S. Br. 32-33. To start, even if that's correct, an NTA is "relevant" to *every* proceeding. Without information about the charges against him or the legal authority under which the Government is proceeding, a noncitizen can't prepare for a hearing. *See* 8 U.S.C. § 1229(a)(1)(C)-(D).

In any event, the Government's proposed rule yet again lacks any basis in the statutory text. The statute doesn't say that a noncitizen is eligible to move to reopen only if he can show he "did not receive notice *of the hearing he missed* in accordance with paragraph (1) or (2)." Nor does the statute specify that eligibility is reserved for a noncitizen who can show he "received notice in accordance with *neither* paragraph (1) *nor* paragraph (2)." Instead, Congress used the locution "did not receive notice in accordance with paragraph (1) or (2)," which, as explained *supra* at 33-34, most naturally lends itself to an understanding that a noncitizen who proves he did not receive notice "in accordance with paragraph (1)" is eligible to move to reopen.

In sum, even if the Government were correct that it could obtain an *in absentia* removal order under Section 1229a(b)(5)(A) without providing an NTA, then a noncitizen like Mr. Mendez-Colín is still entitled to move for reopening under Section 1229a(b)(5)(C)(ii).

III. If any doubt remains, the relevant canons of construction require affirming the decision below.

The clear text of the statute resolves this case. But to the extent there is any lingering ambiguity, this Court's longstanding rule that deportation statutes should be construed in favor of the noncitizen and the canon of constitutional avoidance mandate affirmance here. The Government's suggested tiebreaks—deference to agency action, legislative history, and policy considerations—either have no force or cut in Mr. Mendez-Colín's favor.

1. a. To the extent there are any "lingering ambiguities," the "longstanding principle of construing" such ambiguities "in deportation statutes in favor of the alien" should resolve this case. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *see also Kawashima v. Holder*, 565 U.S. 478, 489 (2012). Because "deportation is a drastic measure and at times the equivalent of banishment or exile," this Court should not "assume that Congress meant to trench on aliens' freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Costello v. INS*, 376 U.S. 120, 128 (1964); *see also* Transcript of Oral Argument at 57:45, *Niz-Chavez*, 141 S. Ct. (No. 19-863), https://perma.cc/S2LB-D8A8 (Gorsuch, J.) ("[I]f there's ambiguity here at the end of the day, after we

exhaust everything, why should the government presumptively win? What about *St. Cyr* and the deportation canon that suggests that ambiguity should be resolved in favor of a presumptively free individual?") (cleaned up).

b. Interpreting the statute the way the Government suggests would also raise serious constitutional concerns. The Government concedes that it would be an untenable result if it could remove a noncitizen from the United States without ever telling the noncitizen of the charges against him. U.S. Br. 53. As it must: Noncitizens are constitutionally "entitled to notice of the nature of the charge" against them. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993).

But on the Government's reading, the INA itself would *require* that unconstitutional outcome. The statute says that a noncitizen "*shall* be ordered removed in absentia" if "written notice required under paragraph (1) or (2) of section 1229(a) . . . has been provided" and the noncitizen does not attend their hearing. 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). If the Government is right that there can be paragraph (2) notice without paragraph (1) notice, then the Government need only provide the noncitizen with the information required by paragraph (2) (*i.e.* the time and date of his hearing and the consequences of failing to appear). *See supra* at 18-19. Even if it never sent the noncitizen information about the charges against him, the statute would still require *in absentia* removal.

The Government protests that in *this* case, it gave Mr. Mendez-Colín notice of the charges against

him. U.S. Br. 53. But regardless of "the presence or absence of constitutional concerns in [any] individual case," the Court must construe statutes to avoid "constitutional doubts regarding other litigants or factual circumstances." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). And the Government does not explain how, on its reading, the statute avoids the unconstitutional outcome of *in absentia* removal of a noncitizen who never knew the charges against him.

2. The Government ignores both of those canons and instead posits three tiebreaks in its favor. None is availing.

a. The Government first argues that the Board of Immigration Appeals' interpretation of the statute is "entitled to deference." U.S. Br. 55-59. It is not.

To start, deference to agency interpretation should kick in only after all of the usual canons of construction are exhausted. That includes the "principle of construing any lingering ambiguities in deportation statutes in favor of" the noncitizen. *See St. Cyr*, 533 U.S. at 320. In *St. Cyr*, for instance, this Court declined to defer to the BIA, because after applying that canon of construction, "there is, for *Chevron* purposes, no ambiguity . . . for [the] agency to resolve." *Id.* at 320-21 n.45.

Moreover, this Court should be particularly hesitant to defer to the Board in this case because of the Board's history of flouting the clear command of Congress and this Court. Prior to *Pereira*, the Board of Immigration Appeals excused the executive branch from complying with the text of 8 U.S.C. § 1229(a) simply because it believed "it is often not practical to include" time and place information. *Matter of Camarillo*, 25 I. & N. Dec. 644, 648 (BIA 2011). This

Court found that the "practical considerations" the BIA relied on "are meritless and do not justify departing from the statute's clear text." *Pereira*, 138 S. Ct. at 2118. Undeterred, the BIA doubled down, asserting that the statute's "purpose can be satisfied" by an NTA that lacks date and time information so long as a subsequent notice of hearing provides that information. *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, 531-32 (BIA 2019). Again, this Court rejected the BIA's decision: "[A]s this Court has long made plain, pleas of administrative inconvenience and self-serving regulations never justify departing from the statute's clear text." *Niz-Chavez*, 141 S. Ct. at 1485. That the BIA attempts, yet a third time, to excuse the Government from the consequences of non-compliance with the statute should have no bearing on this Court's decision.

Finally, this Court should be all the more hesitant to defer to the Board of Immigration Appeals because the justification for administrative deference is at its nadir when it comes to agency adjudications, as opposed to regulations. Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron's *Domain*, 70 Duke L.J. 931, 938 (2021). Adjudication "involves a narrow set of parties and, consequently, substantially less public input and data"; if the purpose of deference is "to allow more politically accountable agencies to bring their expertise to bear," adjudication does not advance those goals in the same way as rulemaking. *Id.* at 938-39. And "the theoretical foundations for *Chevron* deference are perhaps most precarious with respect to immigration adjudication." Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron

Deference in Immigration Adjudication, 70 Duke L.J. 1197, 1242 (2021).

b. The Government next points to the legislative history of the statute. U.S. Br. 46-51. Of course, "ambiguous legislative history" cannot "muddy clear statutory language." *See, e.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

Regardless, that legislative history supports the noncitizens' reading of the statute, not the Government's. True, the 1996 amendments to the immigration statute were "aimed at closing procedural loopholes" and at "expediting removal of noncitizens." U.S. Br. 49. But, as the very same report the Government cites puts the point, the *reason* for those "procedural loopholes" was a history of "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 122 (1996) (1996 House Report).

In other words, the *way* Congress chose to "clos[e]" the "procedural loophole" it identified was to "simplify procedures for initiating removal proceedings," so that the Government was certain to provide notice in every case. *Id.* at 159. Part of that simplification was the requirement that there be a single NTA, containing all of the information a noncitizen needed. *Id.* To prevent a situation where immigration judges refused to remove a noncitizen *in absentia* because of worries about due process concerns, Congress came up with a system where there could *be* no such concerns, because noncitizens would be notified at the outset of the case of all the information they needed. Yet in this case—indeed, in most cases in recent years—the Government has

ignored that clear congressional command by failing to provide a valid NTA.

c. Finally, the Government resorts to policy arguments. It protests that, if the noncitizens are correct, "the flexibility created by the ability to supplement an NTA with an NOH is largely illusory," because "[e]ven a minor defect in an NTA" would render subsequent notices invalid. U.S. Br. 51. "[A]s this Court has long made plain, pleas of administrative inconvenience . . . 'never justify departing from the statute's clear text.'" *See Niz-Chavez*, 141 S. Ct. at 1485 (quoting *Pereira*, 138 S. Ct. at 2118).

In any event, there's a simple solution for the Government: Just issue a new NTA—one that complies with the plain text of the statute. This Court has already (twice) required the Government to issue new NTAs, in *Pereira* and *Niz-Chavez*, and the Government presumably will issue proper NTAs going forward. Indeed, the Government acknowledges that it "would have to issue a new NTA to commence removal proceedings" if the NTA omitted the charges against the noncitizen. U.S. Br. 53. It's not clear why it isn't obligated to do the same if the NTA omitted the time and place information; the statute doesn't distinguish among the various pieces of information required in an NTA.

The Government also ignores the policy arguments in favor of the noncitizens' reading. Recall that even if a noncitizen is able to move to reopen an *in absentia* removal order, an immigration judge must decide whether to rescind the order and must still evaluate whether he is eligible to remain in the United States. In other words, a noncitizen who is

not eligible to stay in the United States will still be removed. The noncitizens who are most prejudiced by the Government's rule are thus those who have a strong case for remaining in this country.

In addition, as this Court has explained, allowing the Government to get away with omitting time and place information from notices to appear would "confuse and confound noncitizens." *Pereira*, 138 S. Ct. at 2119. "On the government's account, it would be free to send a person who is not from this country—someone who may be unfamiliar with English and the habits of American bureaucracies—a series of letters" containing, piecemeal, the information that the noncitizen needed to prepare for his hearing. *Niz-Chavez*, 141 S. Ct. at 1485. So long as somewhere in that series of letters, all the information from Section 1229(a) existed, the Government argues, it could then remove the noncitizen *in absentia*. *See* U.S. Br. 54. But that's precisely the argument that *Niz-Chavez* rejected: In *Niz-Chavez*, no one doubted that the noncitizen received "all the information required by Section 1229(a)." This Court said that wasn't enough; the information had to be provided in the form contemplated by the statute.

It gets worse. The Government concedes that "[i]f DHS simply provided a noncitizen with a blank document titled 'Notice to Appear,' and nothing else," the Government would not be able to obtain *in absentia* removal. U.S. Br. 53-54. But on the Government's reading of the statute, nothing in the INA itself commands that outcome. On the Government's reading, just so long as it eventually sends some document that contains the time and

place information and the consequences of nonappearance, it doesn't matter whether it ever provided a noncitizen with the information required in an NTA. *See* U.S. Br. 24-26.

In the end, the Government suggests this Court should simply trust it: Even if the statute doesn't mandate it provide key information to noncitizens, "[m]uch of the information required to be included in the NTA" (though not, importantly, the individualized charges against the noncitizen) "is included, in standardized language, on the NTA form used by DHS." U.S. Br. 53. This is a "familiar plea: There is no reason to mistrust [the Government's] sweeping reading" because the Government "will act responsibly." *Dubin v. United States*, 599 U.S. 110, 131 (2023). To this, the Court should "give[] a just-as-familiar response": It should not construe a statute "on the assumption that the government will use it responsibly." *Id.*

CONCLUSION

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

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