Nos. 22-674, 22-884

IN THE

Supreme Court of the United States

MORIS ESMELIS CAMPOS-CHAVES,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

(For Continuation of Caption, See Inside Cover)

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH AND NINTH CIRCUITS

BRIEF OF AMICI CURIAE NATIONAL IMMIGRATION LITIGATION ALLIANCE, BUILDING ONE COMMUNITY—THE CENTER FOR IMMIGRATION OPPORTUNITY, IMMIGRANT LEGAL DEFENSE, NORTHWEST IMMIGRANT RIGHTS PROJECT, PANGEA LEGAL SERVICES, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, THE FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, AND THE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER CAMPOS-CHAVES AND RESPONDENTS SINGH AND MENDEZ-COLÍN

KRISTIN MACLEOD-BALL
TRINA REALMUTO
NATIONAL IMMIGRATION LITIGATION ALLIANCE
10 Griggs Terrace
Brookline, MA 02446

THOMAS G. SPRANKLING
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306
(650) 858-6062
thomas.sprankling@wilmerhale.com

ADDITIONAL COUNSEL LISTED ON SIGNATURE PAGE

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,

v.

VARINDER SINGH AND RAUL DANIEL MENDEZ-COLÍN,
Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTORY PROVISIONS

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici are nonprofit organizations dedicated to safeguarding the rights of noncitizens, as well as ensuring that the executive branch honors the protections afforded by federal immigration law.

The National Immigration Litigation Alliance ("NILA") is a not-for-profit membership organization that seeks to realize systemic change in the immigrant rights arena through litigation—by engaging in impact litigation to eliminate systemic obstacles that noncitizens routinely face and by building the capacity of immigration attorneys to litigate in federal court through its strategic assistance and co-counseling programs. NILA and its members have a direct interest in ensuring that noncitizens are not deprived of their ability to seek rescission and reopening of in absentia orders.

Building One Community—The Center for Immigration Opportunity, founded in 2011, is a nonprofit organization in Stamford, Connecticut that advances the successful integration of immigrants and their families into the community, including providing free legal counsel and representation for asylum seekers and newly-arrived immigrants in removal proceedings.

Immigrant Legal Defense ("ILD") is a nonprofit organization based in Oakland, California, dedicated to providing legal services to marginalized immigrant communities primarily in California and throughout the United States. Among those that ILD represents and

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation of submission of this brief.

advocates for are individuals facing removal proceedings before the Executive Office for Immigration Review, both before the immigration courts and the Board of Immigration Appeals, and the federal courts. Collectively, ILD attorneys have been representing noncitizens in all aspects of their removal proceedings for more than two decades. ILD strives to pursue robust due process protections and governmental transparency for these individuals.

Northwest Immigrant Rights Project ("NWIRP") is a nonprofit organization that represents low-income immigrants who have been placed in removal proceedings or who are applying for immigration benefits. It is the largest provider of direct representation services to persons in immigration proceedings in the state of Washington. NWIRP staff regularly represent individuals who are issued Notices to Appear that do not contain the proper hearing date and location information, as well as individuals with in absentia removal orders. Additionally, NWIRP engages in systemic advocacy to defend and promote the rights of immigrants. This case thus has wide implications for NWIRP's clients and work.

Pangea Legal Services ("Pangea") is a nonprofit organization that provides low-cost and free legal services to immigrants facing removal. In addition to direct legal services, Pangea also advocates on behalf of the immigrant community through policy advocacy, education, and legal empowerment efforts. Pangea represents many individuals who were not provided a statutorily-compliant notice to appear, including those who were ordered removed in absentia because they were not notified of the time and place of their removal hearing. Pangea has an interest in ensuring that the statute is interpreted consistently with Congress's intent to ensure proper notice, and believes its clients' stories and

experiences should be taken into account in resolving the issues in this case.

Rocky Mountain Immigrant Advocacy Network ("RMIAN") is a nonprofit organization based in Westminster, Colorado, that seeks justice for adults and children in removal proceedings. RMIAN promotes knowledge of legal rights; provides zealous, no-cost legal representation in removal proceedings; elevates the importance of universal representation, given the critical consequences resulting from lack of access to counsel for under-resourced people in removal proceedings; and advocates for a humane, functional, and efficient immigration system. RMIAN has a deep interest in ensuring immigration proceedings uphold fundamental fairness, which includes ensuring that litigants have all the information necessary to pursue their legal rights, including the ability to reopen and rescind in absentia orders of removal.

The Florence Immigrant & Refugee Rights Project ("Florence Project") provides free legal and social services to adults and children detained in immigration custody in Arizona. Every year, the Florence Project provides free legal services to thousands of noncitizens facing removal. Since its founding in 1989, the Florence Project has sought to ensure that all people facing removal have access to counsel, understand their rights, and are treated fairly and humanely. As such, the Florence Project has a direct interest in ensuring both that noncitizens receive adequate notice regarding their hearings before facing the severe consequences of in absentia removal and that the United States government not be allowed to disregard rules that are designed to ensure fairness of removal proceedings.

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP seeks to improve the quality of justice for immigrants and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. IDP has submitted amicus curiae briefs in many key cases before this Court and Courts of Appeals involving the rights of immigrants in the criminal legal and immigration systems. *See, e.g.*, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017); *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Vartelas* v. *Holder*, 566 U.S. 257 (2012); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010); *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 322-323 (2001) (citing IDP brief).

Although amici have distinct goals and purposes, all have a strong interest in the fundamental issue in this case—ensuring that the Department of Homeland Security ("DHS") and the Executive Office for Immigration Review ("EOIR"), comply with their legal obligations to provide adequate notice before holding a removal hearing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before an Immigration Judge can conduct removal proceedings without a noncitizen present, DHS must establish that the noncitizen received proper written notice of the time and place of the hearing as "required under paragraph (1) or (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(A). DHS can establish written notice in

compliance with Section 1229(a)(1) or (2) in two interrelated ways.[2]

Most notably, DHS can include the time-and-place information in the Notice to Appear, the charging document that initiates removal proceedings. *See* 8 U.S.C. § 1229(a)(1). A Notice to Appear is not valid unless it includes the time-and-place information in the same document that provides the other case-opening information required under Section 1229(a)(1). *See Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1478, 1486 (2021) (statute requires Notice to Appear to be "a single document containing all the information an individual needs to know about his removal [proceeding]").

In addition, if the time or place of the hearing is altered after the issuance of a Notice to Appear, DHS or EOIR can provide the requisite information in a later document (hereinafter, a "Notice of Change"). *See* 8 U.S.C. § 1229(a)(2). Specifically, Section 1229(a)(2), which is entitled "Notice of change in time or place of proceedings," states that the government can provide "a written notice" specifying "the new time or place of the proceedings." This notice must also notify the noncitizen of the consequences of their failure to appear, *see id.* § 1229(a)(2)(A)(ii), but need not contain the other elements included in the Notice to Appear (*e.g.*, the legal authority for the proceedings, the alleged unlawful conduct, or the right to secure counsel). Accordingly, Section 1229(a)(2) "expressly contemplate[s]" that the government will "issu[e] notices to appear with all the information § 1229(a)(1) requires—and then amend[] the time or place

[2] DHS includes Customs and Border Patrol ("CBP") and Immigrations and Customs Enforcement ("ICE"), both of which may serve Notices to Appear.

information if circumstances require[] it." *Niz-Chavez*, 141 S. Ct. at 1479.

For all the reasons explained in the briefs filed by Mr. Singh, Mr. Mendez-Colín, and Mr. Campos-Chaves, Section 1229(a)(2) cannot reasonably be read to be satisfied when DHS had not first filed a valid Notice to Appear in conformity with Section 1229(a)(1). Amici write separately to highlight two points that support the noncitizens' reading of Section 1229(a)(2): the statutory history and practical problems created by the government's interpretation.

First, amici agree with the noncitizens' position that the statutory text is clear and thus dispositive of the question presented. The statutory history, moreover, bolsters the noncitizens' interpretation and is "an important part of" the context of the text. *United States* v. *Hansen*, 599 U.S. 762, 775-776 (2023); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) (endorsing use of "*statutory* history—the statutes repealed or amended by the statute under consideration" as part of statutory interpretation).

Here, the statutory history strongly supports the noncitizens' interpretation of the Notice of Change provision. The law that preceded the Immigration Reform and Immigrant Responsibility Act (IIRIRA) clearly permitted the kind of notice that the government now seeks to read into Section 1229(a)(2)—*i.e.*, a notice issued as a separate document after the initial order to appear that provides the time and place of the hearing for the first time. Congress's decision to excise clear statutory language endorsing the government's approach weighs against reading the remaining statutory language to permit it.

Second, the government's proposed interpretation would raise practical problems. It would be both difficult to administer and would lead to the removal of noncitizens who have done their utmost to "turn square corners when they deal[t]" with DHS while DHS itself has failed to play by the same rules. *Niz-Chavez*, 141 S. Ct. at 1486. Amici briefly discuss several noncitizens' stories that illustrate the inequitable nature of the government's reading of the statute.

ARGUMENT

I. THE STATUTORY HISTORY STRONGLY SUPPORTS THE NONCITIZENS' READING OF 8 U.S.C. § 1229(a)

A. The Government's Interpretation Of Section 1229(a)(2) Would Read Back In Language That Congress Deleted Over Twenty-Five Years Ago

When Congress passed IIRIRA in 1996, it fundamentally reshaped immigration law by heightening the consequences of removal proceedings. For example, the new law expanded the list of aggravated felonies that *inter alia* render a noncitizen removable and disqualified from many forms of relief. *See INS* v. *St. Cyr*, 533 U.S. 289, 296-297 & n.4 (2001). It imposed substantial bars on reentry for many noncitizens who reside in the country unlawfully prior to their removal. *See Berrum-Garcia* v. *Comfort*, 390 F.3d 1158, 1167 (10th Cir. 2004). It vastly expanded the agency's authority to reinstate removal orders, allowing summary removal of noncitizens who have reentered unlawfully after they were removed for any reason. *See Arevalo* v. *Ashcroft*, 344 F.3d 1, 5 (1st Cir. 2003). And it precluded noncitizens subject to reinstatement from being eligible for most forms of relief.

See Fernandez-Vargas v. *Gonzales*, 548 U.S. 30, 35 (2006).

As IIRIRA made the consequences of removal more severe, it also required the government to provide clearer notice when a noncitizen could be subject to removal. Among "the change[s] IIRIRA wrought," *Vartelas* v. *Holder*, 566 U.S. 257, 272 (2012), was the method by which noncitizens must be notified about pending removal proceedings.

Specifically, before IIRIRA, federal law did not require the government to include time-and-place information in the case-initiating notification laying out the allegations against the noncitizen. Rather, the initial notification—called the "Order to [S]how [C]ause"—only needed to contain six elements: (A) the nature of the proceedings, (B) the legal authority under which the proceedings are conducted, (C) the alleged unlawful conduct, (D) the charges against the noncitizen and the statutory provisions allegedly violated, (E) a notice that the noncitizen may be represented by counsel, and (F) a notice that the noncitizen was to provide the U.S. Attorney General with his or her most recent contact information. *See* 8 U.S.C. § 1252b(a)(1)(A)-(F) (1994). A *separate* provision entitled "Notice of time and place of proceedings" addressed the requirement to provide time-and-place information; it expressly permitted the government to provide "[n]otice of time and place of proceedings" "in the order to show cause *or otherwise*." *Id.* § 1252b(a)(2)(A) (1994) (emphasis added). That separate provision also drew a distinction between the initial notice of the time and place of a hearing and subsequent notifications. It included a distinct subsection providing that "in the case of any change or postponement in the time and place of such proceedings, written notice shall be given in person to the [noncitizen] … of (i) the new

time or place of the proceedings[.]" *Id.* § 1252b(a)(2)(B) (1994).

IIRIRA changed this structure—jettisoning the multi-document approach to notifying a noncitizen about removal proceedings—by requiring the government to provide time-and-place information in the initial notice of a proceeding and delineating that *first* notice from any *subsequent* notice of a change to the time or place of the proceeding.

Under Section 1229(a)(1), the case-initiating notification—now known as a "Notice to Appear"—must contain all of the information previously required to be contained within an Order to Show Cause *and* a notice of the time and place of proceedings. *See* 8 U.S.C. § 1229(a)(1). Put slightly differently, before IIRIRA "the law expressly authorized the government to specify the place and time for an alien's hearing 'in the order to show cause *or otherwise*.' … Now time and place information must be included in a notice to appear, not 'or otherwise.'" *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1484 (2021). This decision to omit the "or otherwise" option "presumably connotes a change in meaning." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012). Just as the deletion of the words "'and expert witness fees'" from a statute "providing for an award to the prevailing party of 'attorney's fees and expert witness fees'" would leave a litigant with no basis to argue that the term "attorney's fees *include* reimbursement of the attorney's expenditures for expert witnesses," *id.*, the government has no basis to read a free-floating "or otherwise" requirement into Section 1229(a)(1). *Cf. BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893, 907 (2019) (Gorsuch, J., dissenting) (rejecting a statutory interpretation that "read back into the law words … that Congress deliberately removed").

In addition to moving the requirements pertaining to the *initial* notice of the time and place of a proceeding into the Section 1229(a)(1) Notice to Appear provision, IIRIRA *also* moved the requirements pertaining to notice of a *change* in the time or place of a proceeding into Section 1229(a)(2). Section 1229(a)(2)—which applies "in the case of any change or postponement in the time and place of such proceedings," 8 U.S.C. § 1229(A)(2), and was thus described in *Niz-Chavez* as the "supplemental notice" provision, 141 S. Ct. at 1485—only comes into effect *after* the issuance of a Notice to Appear. In other words, Section 1229(a)(2) plays the same statutory role that 8 U.S.C. § 1252b(a)(2)(B) (1994) had played prior to IIRIRA. Indeed, the two provisions are practically identical. Section 1252b(a)(2)(B) (1994) stated:

> in the case of any change or postponement in the time and place of such proceedings, written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's
> counsel of record, if any) of—
>
> (i) the new time or place of the proceedings,
>
> (ii) the consequences under subsection (c) of this section of failing, except under exceptional circumstances, to attend such proceedings

Section 1229(a)(2) adds just a few, non-substantive words (italicized below):

> *In removal proceedings under section 1229a of this title,* in the case of any change or postponement in the time and place of such proceedings,

> *subject to subparagraph (B)* a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—
>
> (i) the new time or place of the proceedings, and
>
> (ii) the consequences under *section 1229a(b)(5)* of this *title* of failing, except under exceptional circumstances, to attend such proceedings.[3]

The most natural inference to draw from Congress's repetition of the prior supplemental notice language in Section 1229(a)(2)—particularly when read in light of Congress's decision to change critical "or otherwise" language in the initial notice provision—is that Congress did not intend to create in Section 1229(a)(2) a new and more expansive method of providing the requisite notice than the method outlined in Section 1229(a)(1). After all, "reenacting precisely the same language would be a strange way to make a change." *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988); *see also* Scalia & Garner, *Reading Law* 323 (noting, in the analogous context of the reenactment canon, that when old and new statutes "use[] the very same terminology[,] … it is reasonable to believe that the terminology bears a consistent meaning"). In turn, reading Section 1229(a)(2) as having created a method of notice that does not depend in any way on the prior issuance of a valid Notice to Appear (and that is thus much easier for the government to satisfy

[3] The phrase "subject to subparagraph (B)" refers to the rule that supplemental written notice is not required if the noncitizen failed to provide his or her contact information in response to the original Notice to Appear. *See* 8 U.S.C. § 1229(a)(2)(B). The same exception appears in an unnumbered subsection of the old Section 1252b(a)(2)(B) (1994).

than Section 1229(a)(1)), amounts to "'not a construction of a statute, but, in effect, an enlargement of it by [a] court'"—a power that "'transcends the judicial function.'" *West Va. Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991) (Scalia, J.).

Notably, the only real change between Section 1229(a)(2) and its predecessor is the title of the provision, which cuts in favor of the noncitizens' reading. *See Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." (quotation marks and citation omitted)). Under the pre-IRRIRA regime, the provisions laying out both the requirements for the initial notice and the supplemental notice were grouped under the same general title: "Notice of time and place of proceedings." 8 U.S.C. § 1252b(a)(2) (1994). Under the modern statute, however, Section 1229(a)(2) has been given its own, narrower title that refers to a "notice of change" (indicating that it only applies once a time and place has been set).

This understanding of the statutory history—*i.e.*, that Congress did not intend Section 1229(a)(2) to *sub silentio* restore a power to DHS that Congress had made a deliberate decision to withdraw from Section 1229(a)(1)—is supported by two interpretive clues.

First, reading Section 1229(a)'s notice requirements narrowly is consistent with the broader history of the law governing in absentia removal, which has trended towards requiring more notice of a hearing before removal can be ordered. Prior to 1990, the government had the authority (but not the duty) to order a noncitizen removed in absentia so long as the noncitizen was "given 'a reasonable opportunity to be present at [the]

proceeding,'" and without reasonable cause fails or refuses to attend. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) (quoting 8 U.S.C. § 1252(b)); *see also*, *e.g.*, *Patel* v. *INS*, 803 F.2d 804, 805 (5th Cir. 1986). IIRIRA's predecessor statute changed the law by making removal mandatory if the noncitizen did not attend a scheduled hearing, but in turn installed a heightened notice requirement in 8 U.S.C. § 1252b(a)(2) (1994)—*i.e.*, requiring the government to provide the noncitizen with a specific list of information before removal proceedings could begin. In other words, "because [the] consequences of [a noncitizen's] failure to appear are more severe under [Section 1252b(a)(2)], notice requirements under that section were 'strengthened.'" *Fuentes-Argueta* v. *INS*, 101 F.3d 867, 870 (2d Cir. 1996) (per curiam) (citing *United States* v. *Perez-Valdera*, 899 F. Supp. 181, 185 (S.D.N.Y. 1995)); *see also Lahmidi* v. *INS*, 149 F.3d 1011, 1016 (9th Cir. 1998) ("Congress intended that the new notice rules, including the procedures for orders to show cause and notices of hearing, would come into effect at the same time to ensure that any [noncitizen] subject to the stricter penalties would first receive the enhanced notice."). It is only logical that Congress would have made the same basic trade-off when transitioning from the old Section 1252b(a) to the IIRIRA notice standard in Section 1229(a). As IIRIRA made the consequences of removal (and thus, the consequences of removal without a hearing) harsher, *see supra* pp. 6-7, it also made the notice procedures more exacting—namely, by requiring that a single initial document include all information about the case-opening hearing, including time and place.

Although the Court need not rely on it, the legislative history "confirm[s]" that IIRIRA's change to the notification requirements was both deliberate and

intended to offset stricter removal rules. *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596 (2004). Specifically, the IIRIRA House Committee Report recognized that, under the pre-IIRIRA system, there had been "lapses (perceived or genuine) in the procedures for notifying [noncitizens] of deportation proceedings'" that had "le[]d some immigration judges to decline to exercise their authority to order a [noncitizen] deported in absentia." H.R. Rep. No. 104-469, pt. I, at 122-123 (1995). At least part of the solution, a later section of the Report explained, was to strengthen the notice requirement to create "a single form of notice" regarding removal proceedings in order to "avoid protracted disputes concerning whether [a noncitizen] has been provided proper notice of a proceeding." *Id.* at 159.

Second, the broader statutory context supports the noncitizens' reading of Section 1229(a)(2). In particular, Section 1229(b)(1)—which gives the noncitizen a set window of time in which to secure counsel prior to an immigration court hearing—provides that "the first hearing date in proceedings under section 1229a ["Removal Proceedings"] … shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date." 8 U.S.C. § 1229(b)(1). This provision's predecessor—Section 1252b(b)(1) (1994)—had provided that "the first hearing date in proceedings under section 1252 … shall not be scheduled earlier than 14 days after the service of the order to show cause, unless the alien requests in writing an earlier hearing date." *Id.* § 1252b(b)(1) (1994) (emphasis added).

IIRIRA thus made the notable change of pegging the timing of the removal hearing to the service of a document that must (under *Niz-Chavez*) contain time-and-place information. At a minimum, this provision makes

little sense under the government's interpretation of Section 1229a(b)(5)—if the Notice to Appear need not provide information about the time and place of the hearing, why key the hearing date to its receipt? Moreover, if a removal hearing cannot permissibly be held until the noncitizen receives a Notice to Appear, that suggests a hearing date cannot be triggered by a barebones Notice of Change. The government identifies no reason why Congress would have deliberately introduced such uncertainty into a process where even a minor mistake by a noncitizen can result in a sanction that is "often [the equivalent of] banishment or exile." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1213 (2018) (plurality op.).[4]

B. The Government's Alternative History Of The Notice Provisions Is Meritless

While the government's brief (at 46-51) purports to discuss the statutory history of Section 1229(a), its analysis is incomplete.

Most notably, the government does not have a clear answer for why Congress would have deleted the crucial "or otherwise" language from the initial notice provision in Section 1229(a)(1) while also expecting that language to be read into Section 1229(a)(2) *sub silentio*. *See supra* pp. 8-10. At most, the government appears to argue that

[4] The government suggests that Section 1229(b)(1) has no bearing on the question presented because it does not directly address the "substance or validity" of a supplemental notice issued under Section 1229(a)(2). U.S. Br. 36. This argument both misses the point and is in conflict with the government's assertion a few pages later that "'related statutory provisions' can … illuminate the meaning of 'the statute's text,'" U.S. Br. 40-41. Section 1229(b)(1) helps show how Congress intended the broader statutory scheme to work—*i.e.*, that proceedings would be triggered only by a Notice to Appear under Section 1229(a)(1).

the deletion of "or otherwise" is immaterial for the purposes of Section 1229a(b)(5) because the government also retained the authority to provide the requisite time-and-place information in a later Notice of Change pursuant to Section 1229(a)(2). U.S. Br. 51. But this argument assumes that this Court adopts the government's interpretation of the interplay between Section 1229(a)(2) and Section 1229a(b)(5), which is the very question at issue in this case. Moreover, the government has no explanation for why (1) the IIRIRA Congress would have understood the Notice of Change provision to function in this way, when the pre-IIRIRA statute's initial notice provision already expressly permitted the information required in the Notice to Appear to be provided across multiple documents; or (2) why Congress would have intended such a significant change in the scope of the Notice of Change provision without including any substantive textual amendment to Section 1229(a)(2). *See supra* pp. 8-11.

Nor does the government have a satisfying explanation for why it previously took the position that in absentia removal can "'be ordered only if [a noncitizen would have] been served with notice of the full panoply of information that Congress deemed requisite'" in Section 1229(a)(1). *See* U.S. Br. 39, *Niz-Chavez*. That level of notice cannot be satisfied with a bare Notice of Change, which—under both the pre-IIRIRA regime and current law—does not require anything more than time-and-place information and a warning of the consequences if the noncitizen does not appear. *See supra* pp. 9-10. The only response (buried in a footnote on the sixth-to-last page of the government's brief) is that—under the three specific factual scenarios implicated by this case—the noncitizen did receive a Notice to Appear that lacked only the proper time-and-place information. *See* U.S. Br.

54 n.6. That argument ignores the sweeping implications of the government's interpretation going forward, which would permit in absentia removal in situations where a noncitizen receives a Notice to Appear containing nothing other than a field for time and place labeled "TBD" followed by a Notice of Change with the time-and-place information. In other words, the government's approach would permit in absentia removal in situations where the noncitizen is never informed of the nature of the proceedings, the legal authority for the proceedings, the fact that he or she may be represented by counsel, or any of the other rights and responsibilities to which he or she is entitled—in contravention of the statutory trade-off between notice and harsher removal consequences.

Rather, the government's statutory history argument appears to boil down to the following: It is reasonable to read Section 1229(a)(2) as providing an (easier to satisfy) alternative form of notice because the concern motivating Congress in enacting IIRIRA was that noncitizens were finding improper procedural loopholes to avoid in absentia removal under the existing regime. U.S. Br. 46-48. This argument relies heavily on statements from a single House Committee Report, which as noted above this Court need not consider. *See supra* p. 13; *see also Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) ("Unable to muster support for its position in the statutory text or structure, the government … invit[es] us to follow it into the legislative history. … But legislative history is not the law.").

Regardless, the government does not explain why Congress's purported pursuit of a broad and abstract goal (increasing removals) requires taking the specific approach that the government advocates for in this case (loosening the notice requirements). The very

legislative history the government relies upon suggests that while Congress may have been trying to streamline the removal process, it heightened the notice requirements in an attempt to *avoid* the due process problems that could arise from improper in absentia removals. H.R. Rep. No. 104-469, pt. I, at 159 (noting that, under the status quo, there were "protracted disputes concerning whether a [noncitizen] has been provided proper notice"). And even if the House Report could be read to show a congressional desire to increase in absentia removals in particular (as opposed to removals more generally), Congress struck a deliberate trade-off both in IIRIRA and its predecessor notice statute: enhanced notice requirements regarding the hearing's time and place in exchange for increasing the overall number of in absentia removals. *See supra* pp. 11-12. Again, this view is supported by the government's legislative history, which notes that "a single form of notice" was required *precisely to avoid* procedural arguments that might allow the noncitizen to avoid removal. H.R. Rep. No. 104-469, pt. I, at 159.

II. THE GOVERNMENT'S INTERPRETATION WOULD RAISE PRACTICAL PROBLEMS AND UNDERMINE THE VERY POINT OF NOTICE

The government's interpretation of Section 1229(a)(2)—and its insistence that *Niz-Chavez* has no relevance here—means that a defective Notice to Appear provides insufficient information for one purpose (the stop-time rule) but would provide sufficient information for another (constituting proper notice for an in absentia removal order). This makes scant sense as a textual matter. "[T]he normal rule of statutory interpretation [is] that identical words used in different parts of

the same statute … generally … have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005).

Even setting aside the fundamental presumption that Congress uses the same language in a consistent manner, Scalia & Garner, *Reading Law* 170-173, the government's atextual interpretation will allow DHS (and its component parts, such as CBP and ICE) to continue their piecemeal approach to serving Notices to Appear. That approach will only further confuse noncitizens who are attempting to navigate federal regulations to comply with their obligations—people who are "not from this country … who may be unfamiliar with English and the habits of American bureaucracies"—all to further the "bureaucratic flexibility" that this Court has rejected. *Niz-Chavez*, 141 S. Ct. at 1484-1485.

The harm and confusion caused or exacerbated by DHS's failure to comply with a basic statutory requirement is far from hypothetical. Amici represent and support noncitizens who have personally suffered the harm caused by DHS's failure to abide by the plain meaning of Section 1229(a)'s notice requirement. These noncitizens have had to navigate various bureaucracies within DHS and EOIR and many learn that they have received in absentia orders only after filing and obtaining the results of FOIA requests, prompting them to move to rescind the orders. Providing complete Notices to Appear as required by statute (and, by the same token, eliminating the use of Notices of Change to provide the initial time-and-place information) could reduce litigation in immigration courts about whether there was sufficient notice to justify in absentia removal orders—consistent with Congress's desire for straightforward, one-step notice.

For instance, many noncitizens facing removal proceedings must navigate a complicated set of interactions

with multiple immigration agencies, including hearing dates before an immigration court and check-in appointments with ICE. Where noncitizens receive initial notice that provides appointment dates *only* for ICE check-ins (*i.e.*, because their Notices to Appear do not include time-and-place information), this can create confusion about whether they are *also* required to attend—or communicate with—the immigration court. *Cf.* Eagly & Shafer, *Measuring* In Absentia *Removal in Immigration Court*, 168 U. Pa. L. Rev. 817, 861 (2020) (recounting stories of how noncitizens have confused "check-in appointments with ICE" with "their court date and then miss their actual court date"). Indeed, this is precisely what happened to one noncitizen named O.C., who entered the United States in 2018.[5] When O.C. first entered the United States, he did not speak or read English fluently. He was served with a Notice to Appear "at a place to be set" and "on a date to be set at a time to be set." CBP officers released O.C. on his own recognizance but informed him he was required to check in with ICE in New York City. O.C. attended his ICE check-in meetings as required and provided the ICE officer with an updated address in writing. But O.C. did not understand the difference between ICE check-ins and immigration court and was unaware that he needed to also update his address with an immigration court. And even if he had understood the distinction, DHS had not yet specified which immigration court would hear O.C.'s case. In fact, it had not even filed the putative Notice to Appear with an immigration court. O.C. could

[5] O.C.'s case and all following accounts are drawn from filings with immigration courts and correspondence between amici and counsel or former counsel for the noncitizens involved. Amici use initials and/or pseudonyms to protect the individuals' privacy. All documentation is on file with counsel for amici.

not have known, therefore, where he was supposed to file a change of address form, nor would an immigration court have accepted any such form. An immigration court in New York City ordered O.C. removed despite the fact that O.C. was not provided notice of his hearing date and location and in the face of his best efforts to comply with agency requirements.

Unrepresented noncitizens are especially disadvantaged. One study indicated that "only 15% of those *removed in absentia* had attorneys, 86% of those who were not *removed in absentia* at the time of the immigration judge decision had attorneys." Eagly & Shafer, 168 U. Pa. L. Rev. at 841. And DHS's refusal to abide by the statutory requirement to provide a valid Notice to Appear means that noncitizens may not realize the urgency of obtaining legal representation. For instance, when B.C. fled domestic violence and arrived in the United States with her four-year-old daughter in 2019, she was served a Notice to Appear that did not contain a date or time for her immigration court. Although she was unrepresented from 2019 to 2021, and like many noncitizens did not fluently speak English or Spanish (she primarily spoke a Mayan language called Kekchi), B.C. dutifully attended her ICE check-in meetings in person—even during COVID—with the ICE office in Hartford, Connecticut. Like O.C., B.C. notified ICE of her change of address in writing, but she was unaware that she separately needed to notify the immigration court. While she searched for an attorney to represent her in immigration court, she learned that she already had been ordered removed in absentia by the Hartford immigration court. Eventually, she found representation and moved to rescind the in absentia order. Her motion was granted, and she and her daughter are now seeking

protection from removal based on fear of persecution and torture.

DHS's failure to comply with its statutory obligation to produce Notices to Appear with time-and-place information also can create enormous consequences for noncitizens due to simple human error by DHS or EOIR employees. Amici have been involved in numerous cases where DHS agencies or EOIR have not properly recorded noncitizens' addresses. For example, K.P. and her husband were taken into custody after arriving in the United States and served Notices to Appear without a date or time. CBP officers called a relative in Illinois to obtain the address where the family would reside but incorrectly recorded the name of the town. As a result, K.P. and her husband received no notice of the hearing or any other correspondence regarding removal proceedings and were ordered removed in absentia. Had K.P. and her husband received a Notice to Appear that included time-and-place information, they would have known to attend the removal hearing and could have corrected the confusion regarding their address at that time.

Such human errors have far-reaching consequences beyond issuance of in absentia orders. For instance, when L.B. was first detained after fleeing from Honduras and entering the United States, she was issued a Notice to Appear that did not include the date or time of her immigration court hearing. Later, an immigration court incorrectly recorded the zip code in a letter she provided updating her address. The immigration court sent a Notice of Change—and an in absentia removal order—to an address at a different zip code, which L.B. never received. Unaware that she had been ordered removed, L.B. left the United States. It was only upon her attempted return—after facing persecution based on

her gender—that she learned of the removal order. Because of the prior removal order, an immigration judge determined that she is not eligible to apply for asylum. Had L.B. received the time-and-place information in her original Notice to Appear, she could have attended her removal hearing and preserved her ability to obtain asylum.

More broadly, Notices to Appear that lack time-and-place information thwart the efforts of noncitizens who are attempting to comply with their obligations under immigration law. For example, E.R. entered the United States after fleeing death threats in Guatemala. She intended to apply for asylum in immigration proceedings and explained to CBP officers that she was fleeing persecution. E.R. provided CBP with her address and, after receiving a Notice to Appear that lacked time-and-place information, regularly checked the mail because the officers had told her she would receive that information in a subsequent hearing notice by mail. When she received a document from immigration court in the mail, she brought it to a family member to translate, believing it was a notice of her hearing. In fact, she learned she had been ordered removed in absentia—without ever having received notice of that removal hearing. Even after learning of the removal order, E.R. attended the ICE check-ins for which she *did* receive notice. After filing a motion to reopen and rescind, E.R. was granted asylum. Had her Notice to Appear included complete time-and-place information, she would have been able to attend her hearing and would not have been ordered removed in absentia. More broadly, a complete Notice to Appear would have avoided the expenditure of time and resources on a motion to reopen—consistent with the IIRIRA Congress's intent to streamline removal

proceedings by guaranteeing adequate notice. *See supra* pp. 11-13.

Similarly, DHS's failure to issue valid Notices to Appear can compound other challenges noncitizens face. For example, A.G. entered the United States after fleeing persecution. CBP officers obtained her address from her brother, with whom she planned to live, and provided her with paperwork, including a Notice to Appear without the time or date of her hearing. Although she did not understand much of what occurred because the officers spoke to her in English, she knew to look for a notice by mail about her case. A.G.'s family regularly checked the mail for notices, but A.G. did not receive any. A hearing was thus held without her knowing about it and she was ordered removed by the San Antonio immigration court. In the ensuing years, A.G. was prevented from finding out about the status of her immigration case by an abusive spouse, who stopped her from obtaining legal help, and a scam by the attorney she eventually contacted, who charged her thousands of dollars to file inaccurate paperwork. When she finally obtained information about the in absentia order against her, the immigration court granted her motion to reopen to allow her to apply for, *inter alia*, asylum, based on the persecution she experienced before arriving in the United States—which she could have presented earlier if her Notice to Appear had been complete and she had the opportunity to appear in person. A.G. ultimately was granted relief from removal.

Finally, that some noncitizens may move to rescind in absentia orders does not absolve DHS of its initial obligation to provide a valid Notice to Appear. Requiring a motion to rescind places another procedural hurdle in front of noncitizens—one that unjustly requires them to bear the costs of DHS's inability to comply with the rules

that Congress did lay out. Even when noncitizens did not receive actual notice of removal proceedings because of DHS's errors, their motions to rescind in absentia removal orders are not necessarily granted. This is what happened to K.P., whose case is discussed above. After learning, through a FOIA request, that she and her husband had been ordered removed in absentia years earlier, K.P. and her husband moved to rescind the orders. The cases were heard by two different immigration judges. Although K.P.'s husband's motion was granted, K.P.'s motion was denied. Had the Notice to Appear she received in person contained the date and time, as required by the statute, neither K.P. nor her husband would have been ordered removed in absentia. Other noncitizens remain in limbo. L.B., whose case is discussed above, had her motion to reopen denied by the San Francisco immigration court in 2018, and her case remains pending on appeal.[6]

A common thread runs through all of these stories: Had DHS served a Notice to Appear with a set hearing time and location, the noncitizens would have known when to report to immigration court—and which court to report to. Instead, DHS applied the kind of piecemeal approach to notification that Congress rejected in enacting IIRIRA. Amici respectfully submit that these practical problems created by DHS's proposed interpretation are an additional reason why it should be rejected.

---

[6] O.C., whose case is also discussed above, spent months seeking an attorney and access to his immigration files through FOIA. He ultimately obtained counsel and filed a motion to reopen. That motion remains pending.

CONCLUSION

For the foregoing reasons, the judgment as to Mr. Campos-Chaves should be reversed, and the judgment as to Mr. Singh and Mr. Mendez-Colín should be affirmed.

Respectfully submitted.

KRISTIN MACLEOD-BALL
TRINA REALMUTO
NATIONAL IMMIGRATION LITIGATION ALLIANCE
10 Griggs Terrace
Brookline, MA 02446

JOSHUA M. FEINZIG*
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

* Admitted to practice only in Washington, D.C. Supervised by members of the firm who are members of the New York Bar.

THOMAS G. SPRANKLING
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306
(650) 858-6062
thomas.sprankling@wilmerhale.com

DONNA FARAG
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037

OCTOBER 2023