Nos. 22-674 and 22-884

In the Supreme Court of the United States

MORIS ESMELIS CAMPOS-CHAVES, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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v.

VARINDER SINGH AND RAUL DANIEL MENDEZ-COLÍN

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

REPLY BRIEF FOR THE ATTORNEY GENERAL

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A noncitizen who receives notice of the time and place of his removal hearing under paragraph (2) of 8 U.S.C. 1229(a), and then fails to attend that hearing, cannot avoid in absentia removal by later claiming that he lacked notice of the hearing he missed. The text of 8 U.S.C. 1229a(b)(5), the surrounding statutory context, and common sense all dictate that result. And if any ambiguity remained after considering those traditional tools of statutory interpretation, longstanding rules of deference to the Executive's authority over the immi-

gration system would resolve the uncertainty in the government's favor.

The noncitizens here resist those conclusions. They argue that in any case where the government provides a Notice to Appear (NTA) listing the time for a noncitizen's initial hearing as "to be determined" or "TBD," no subsequent notice can ever provide a "new" hearing time, or "change" a "to be determined" time into a determined one. That argument depends on unduly restrictive interpretations of the terms "new" and "change." The noncitizens' alternative contention that it does not matter whether they received valid hearing notices under paragraph (2) is even less defensible. It decouples the showing that the government must make to obtain in absentia removal from the showing that a noncitizen must make to seek rescission of the resulting order. And it converts Section 1229a(b)(5)(C)(ii) from a limited, notice-based defense into a sweeping exception that would shield from removal even those noncitizens who were undoubtedly aware of the removal hearings they failed to attend.

The noncitizens portray these cases as a rerun of *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474 (2021). But they ignore the fundamental differences between those cases and the present dispute. *Pereira* and *Niz-Chavez* were about the information required to make an NTA complete. The present dispute is about the consequences of an incomplete NTA for purposes of the in absentia removal provisions. Neither of the earlier decisions resolved that issue.

The noncitizens' interpretation would call into question the validity of potentially hundreds of thousands of in absentia removal orders, some of which were entered

decades ago. The Court should reject the noncitizens' effort to distort and disrupt the immigration laws, reverse the judgments of the Ninth Circuit, and affirm the judgment of the Fifth Circuit.

A. The Text Of Section 1229a(b)(5) Bars Rescission For Lack Of Notice When A Noncitizen Receives Notice Under Paragraph (2) Of Section 1229(a)

Because the noncitizens received notice in accordance with paragraph (2) of 8 U.S.C. 1229(a) of the hearings they failed to attend, their in absentia removal orders are not subject to rescission. The Ninth Circuit's contrary holding is wrong, and the noncitizens' efforts to defend it lack merit.

1. a. The noncitizens do not dispute that the government sent each of them a notice of hearing (NOH) specifying the time and place of the hearings the noncitizens failed to attend.[1] But they contend that those NOHs were invalid because the earlier NTA that each of them received had been incomplete. The statutory text refutes that assertion. Section 1229(a) creates two distinct forms of notice used in two distinct circumstances: the NTA under paragraph (1), which begins the removal process, and the NOH under paragraph (2), which ad-

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[1] The noncitizens contend (*e.g.*, Campos-Chaves Br. 3 n.1) that the term "notice of change," rather than "Notice of Hearing," should be used to refer to the notice provided under Section 1229(a)(2), citing the title of that paragraph. The government uses the title on the form that provides the notice of the new hearing information. See, *e.g.*, J.A. 7. The parties' disagreement over nomenclature does not affect the outcome of these cases. See *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (statutory titles "cannot undo or limit that which the [statute's] text makes plain") (quoting *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 529 (1947)).

justs hearing logistics. See 8 U.S.C. 1229(a)(1) and (2). Nothing in those provisions establishes that the validity of an NOH turns on the validity of the preceding NTA.

The noncitizens' contrary argument hinges on the Ninth Circuit's assertion that an NOH cannot "change" the time of a hearing if the NTA set that time as "to be determined" or "TBD." *Singh* Pet. App. 10a. But "[t]he mention of 'change or postponement' does not define what constitutes adequate notice under paragraph (2)." *Lazo-Gavidia* v. *Garland*, 73 F.4th 244, 259 (4th Cir. 2023) (Rushing, J., dissenting) (citation omitted). See Gov't Br. 28. Section 1229(a)(2) requires only that the government give notice of "(i) the new time or place of the proceedings," and "(ii) the consequences * * * of failing * * * to attend such proceedings." 8 U.S.C. 1229(a)(2)(A)(i) and (ii). The NOHs here contained the requisite new-time and consequences information, and were therefore provided "in accordance with" the requirements of paragraph (2). 8 U.S.C. 1229a(b)(5)(C)(ii).

In contending otherwise, the noncitizens claim that a "new" hearing time must necessarily replace a preexisting one. See, *e.g.*, Mendez-Colín Br. 16. But that is not the only permissible use of the term "new." See Gov't Br. 30 n.3; Campos-Chaves Br. 18-19 (acknowledging that "new" "has 'many dictionary definitions'" (quoting *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010)). There would be nothing unusual about commending a recent college graduate for starting her "new job" even when it is her first paid position; or speaking of a relative's "new baby" that is someone's first child; or congratulating first-time homebuyers on their "new house." Similarly, an ordinary speaker of English can sensibly refer to the hearing time in an NOH as "new"

even when an earlier NTA had said the time was "to be determined."

In any event, as we and the Ninth Circuit dissenters explained, see Gov't Br. 28-30; *Singh* Pet. App. 42a, even if an NOH must "change" the time or place of a hearing to be valid, the government's position is perfectly consistent with the ordinary meaning of "change" as "modification," "alteration," or "substitution." The government's position does not "effectively read[] the word 'change' out of the statute," contra Campos-Chaves Br. 19; it simply respects the full breadth of that word's ordinary meaning. Thus, Singh concedes (Br. 19, 27) that "change" "may carry a broader meaning" than the one accepted by the Ninth Circuit.

The noncitizens' hypothetical examples of changes to not-yet-scheduled doctor's appointments, restaurant reservations, airline flights, and weddings do not compel a different interpretation. See Campos-Chaves Br. 17; Mendez-Colín Br. 20-21. At most, those examples show that in some instances a "change" does not encompass going from an indeterminate state to a definite one. But the word "is certainly able to have a different import" in other scenarios. *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 231 (2014) (discussing varied meanings of "change"). For example, an individual who is registered as an unaffiliated voter could "change" her party affiliation by formally aligning with a particular political party. That broader understanding of "change" is commonly used in statutes and rules where the government is imposing a mandatory requirement. See Gov't Br. 29-30 (citing examples). There is no sound reason to apply a different, narrower definition in the removal context, where the government has likewise

imposed requirements—like the requirement to attend hearings—that the noncitizen cannot simply opt out of.

Congress's express grant of authority for the government to make (and then give notice of) "*any* change" to the time and place of a hearing dispels any lingering uncertainty. 8 U.S.C. 1229(a)(2)(A) (emphasis added). "Any" means all possible changes, including changes from an uncertain time and place to a fixed one. Gov't Br. 30. The noncitizens suggest (*e.g.*, Campos-Chaves Br. 22) that "any change" is implicitly limited to changes that move a scheduled hearing backward or forward in time. But the statute implies no such limitation. In fact, the opposite is true, as illustrated by its treatment of changes of address. Noncitizens are required to report "any change" in their address and telephone number, even in circumstances where the noncitizen previously had none to report. 8 U.S.C. 1229(a)(1)(F)(i) and (ii); see Gov't Br. 30-31.

Campos-Chaves suggests (Br. 21-22) that "change" has a different meaning in Section 1229(a)(1)(F)(ii) than it does in Section 1229(a)(2). To be sure, the same statutory term may sometimes "take on distinct characters from association with distinct statutory objects calling for different implementation strategies," *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 320 (2014) (quoting *Environmental Defense* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007)). But that principle carries the most force in situations where applying a consistent meaning would "render [the statute] unworkable as written." *Ibid.* Campos-Chaves does not even attempt to show that interpreting "change" the same way in Sections 1229(a)(1)(F)(ii) and 1229(a)(2) would lead to unworkable results.

Taking a different tack, Singh contends (Br. 35-36) that the government's interpretation of Section 1229(a)(1)(F)(ii) would render Section 1229(a)(1)(F)(i) surplusage. That argument misunderstands the functions of the two provisions. Subsection (F)(i) requires a noncitizen who receives an NTA to provide contact information, "if any," "immediately." 8 U.S.C. 1229(a)(1)(F)(i). Even if a noncitizen has no address or telephone number at that point and responds with nothing or with "Not Available," he is still obligated by the next clause to "provide the Attorney General immediately with a written record of any change of * * * address or telephone number." 8 U.S.C. 1229(a)(1)(F)(ii). Such changes would include a change from previously unavailable information to a definitive new address or telephone number. Understood in this manner, both reporting requirements have meaning, and neither is surplus.

b. Even if the noncitizens' artificially narrow interpretation of "change" were correct, it would not help Mendez-Colín or Singh. Each of them received multiple NOHs before the hearing that he failed to attend; each of those later NOHs necessarily changed a "time" that had previously been set. See Gov't Br. 25-26.

Mendez-Colín resists that conclusion, arguing (Br. 29) that the final NOH he received "couldn't have 'changed or postponed' any hearing" because each of "the multiple prior hearings had been completed before the final notice was sent." That new argument ignores the fact that all the NOHs Mendez-Colín received were issued as part of the same "removal proceedings under section 1229a." 8 U.S.C. 1229(a)(2)(A); see Gov't Br. 24 n.2 (explaining that the INA uses "proceedings" to refer both to specific hearings and the overall removal pro-

cess). The additional NOHs set new times for, or changed the time of, "such proceedings," 8 U.S.C. 1229(a)(2)(A), making them valid notices under paragraph (2).

Mendez-Colín's argument also makes little sense as a practical matter. Under his interpretation, Section 1229(a)(2) would not give the government *any* mechanism to schedule an additional hearing after the initial hearing; the entire removal process would need to be accomplished in a single hearing. But many noncitizens benefit from the opportunity to participate in multiple hearings. That includes Mendez-Colín himself, whose September 15, 2003 hearing (the one he missed) was scheduled at the request of his attorney to permit consideration of Mendez-Colín's application for the discretionary relief of cancellation of removal. See Gov't Br. 13-14.

Mendez-Colín relatedly argues (Br. 27-28) that it was impossible for an NOH to change the "time and place" of his removal proceedings because "the NTA issued in his case did not contain the 'time and place' element." That argument, like many of Mendez-Colín's others, depends on the mistaken premise that an NOH must "replace" (Br. 28) one definite time and place with another definite time and place. Moreover, as Mendez-Colín acknowledges (*ibid.*), Section 1229(a)(2) does not require the government to change *both* the time and place of a hearing; it may change the hearing "time *or* place." 8 U.S.C. 1229(a)(2)(A)(i) (emphasis added). That is what the final NOH sent to Mendez-Colín did: change the date and time, but not the place that been given in the prior NOHs, see J.A. 45-46.

2. The noncitizens alternatively contend that it does not matter whether they received valid NOHs because

the lack of definitive time-and-place information in their NTAs is itself dispositive. No court has embraced that interpretation of Section 1229a, and this Court should not be the first.

The noncitizens base their argument on the portion of Section 1229a permitting a motion to reopen when a noncitizen demonstrates that he "did not receive notice in accordance with paragraph (1) or (2) of [Section] 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii). In the noncitizens' view, use of the disjunctive word "or" in that provision is dispositive. The relevant question, however, is not whether the word "or" is disjunctive, but in what sense the statute uses "or" disjunctively: Does "or" create two separate avenues for a noncitizen to challenge an in absentia removal order on lack-of-notice grounds ("prove you did not receive an NTA or prove you did not receive an NOH") or does it simply acknowledge two potentially relevant routes for a notice-based challenge ("prove you did not receive an NTA or NOH, whichever preceded the hearing you missed")? In context, only the latter interpretation is plausible.

An "essential element of context that gives meaning to words" is the "evident purpose of what a text seeks to achieve." Antonin Scalia & Bryan A. Garner, *Reading Law* 20 (2012). The evident purpose of Section 1229a(b)(5)(C)(ii) is to create a defense to in absentia removal in cases where notice "did not reach the [noncitizen]" and "the [noncitizen] cannot be properly charged with receiving it." *In re G-Y-R-*, 23 I. & N. Dec. 181, 189 (B.I.A. 2001) (en banc). The government's interpretation preserves Section 1229a(b)(5)(C)(ii)'s role as an important, but limited, notice-based defense. The noncitizens' maximally disjunctive interpretation, by contrast, would expand that defense to include nonciti-

zens who plainly have notice of their removal hearing and choose not to attend.

The noncitizens and a group of amici accuse the government of adding words to Section 1229a by focusing on the hearing the noncitizen missed. *E.g.*, Mendez-Colín Br. 38; Linguists Amicus Br. 31-33. But the statute already makes that focus clear by specifying that, before an immigration judge may issue an in absentia removal order, the government must prove that "*the* written notice" was provided to the noncitizen. 8 U.S.C. 1229a(b)(5)(A) (emphasis added). By using the definite article "the," Congress confirmed that eligibility for an in absentia removal order depends on the provision and receipt of "a discrete thing," *Niz-Chavez*, 141 S. Ct. at 1483—specifically, the notice that preceded the relevant hearing, which is the one that the noncitizen "d[id] not attend," 8 U.S.C. 1229a(b)(5)(A). When such notice was provided under paragraph (2), as it was in each of these cases, the government's failure to have provided a complete paragraph (1) notice is not a basis for rescission.

The statutory context and common sense also distinguish Section 1229a(b)(5)(C)(ii) from Mendez-Colín's examples (Br. 33-34) involving online shopping (refunds for deliveries that do "not arrive at the correct time or location") and school examinations (identification of students who fail to receive their "exam booklet or answer sheet"). In those examples, the failure to satisfy either one of the listed conditions will be sufficient to cause harm (by preventing the customer's receipt of the ordered item or the student's ability to complete the test). In subparagraph (C)(ii), by contrast, the omission of time-and-place information in a noncitizen's initial NTA is irrelevant to his ability to attend the particular hear-

ing at which he failed to appear after receiving further notice containing time-and-place information—as the facts of these cases well illustrate.

3. Singh contends (Br. 23 n.4) that Congress imposed a requirement that the government give noncitizens actual notice of removal hearings by including the words "did not *receive* notice" when describing the noncitizens' burden for obtaining reopening. 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added).[2] Singh is incorrect. When Congress wants to require actual notice, it says so. See Gov't Br. 34 & n.4. And it plainly did not say so in Section 1229a. Instead, Congress expressly stated, in multiple places, that constructive notice (through service on a noncitizen's last known address or attorney) is sufficient to support in absentia removal. See *id.* at 35; *In re G-Y-R-*, 23 I. & N. Dec. at 189. There is no good reason to think that the standard for rescinding an in absentia removal order is different.

Singh's "actual notice" argument is not just atextual, it is unworkable. A noncitizen could always claim—as Singh does here, see Br. 50—that some "failure of the inner workings of the household" prevented him from actually receiving the government's notice, and on that basis resist in absentia removal after the fact. But the amendments that created the current in absentia removal process were designed to "frustrate," not to further, the ability of noncitizens to "forestall[] departure by [such] dilatory tactics." *Stone* v. *INS*, 514 U.S. 386, 399 (1995) (quoting *Foti* v. *INS*, 375 U.S. 217, 224

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[2] Mendez-Colín hints at an actual notice requirement, see Br. 36-37, but ultimately does not advocate for one. An actual notice requirement would not help Mendez-Colín because he received a copy of the relevant NOH from his attorney and then "signed the bottom" of the NOH. *Singh* Pet. App. 76a.

(1963)). In light of that purpose, and the statutory text, "[i]t is not reasonable to allow [a noncitizen] to defeat service" and avoid removal "by neglecting or refusing to collect his mail." *In re M-D-*, 23 I. & N. Dec. 540, 547 (B.I.A. 2002).

4. Section 1229(b)(1) provides that, absent a noncitizen's consent, an initial removal hearing "shall not be scheduled earlier than 10 days after the service of the notice to appear." 8 U.S.C. 1229(b)(1). The noncitizens contend that that provision "makes no sense" under the government's interpretation. Mendez-Colín Br. 15. In their view, an NTA lacking time-and-place information is not a true NTA, and therefore any hearing that is later noticed by an NOH "would not have been 'scheduled earlier than 10 days'" after service of an NTA. Campos-Chaves Br. 25. As *Pereira* explained, however, the function of Section 1229(b)(1) is simply to ensure that the noncitizen has the "time and incentive to plan" for his hearing "by informing the noncitizen that the Government is committed to moving forward with removal proceedings at a specific time and place." 138 S. Ct. at 2215 & n.6; see Mendez-Colín Br. 15 (noting that the 10-day window also "guarantees the noncitizen time to secure counsel"). The NOHs that the government provided to the noncitizens here served that purpose because they were provided weeks or months before the hearings in question. See J.A. 1-3, 17-19, 50-52. Any violations of Section 1229(b)(1)'s literal terms (if the incomplete NTAs are disregarded entirely) were therefore harmless.[3]

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[3] Singh suggests (Br. 37) that noncitizens need not show prejudice to obtain relief where an agency violates a rule protecting a fundamental statutory or constitutional right. The concept of harmless error, however, is a fundamental feature of both civil litigation and

The noncitizens' effort to manufacture statutory inconsistency where none exists also proves too much. Taken to its logical conclusion, their interpretation of Section 1229(b)(1) would mean that *every hearing* that occurs in a removal proceeding after the issuance of an incomplete NTA is invalid, rendering the entirety of the removal proceeding a nullity—even if it does not culminate in an in absentia removal order. Consistent with that position, Campos-Chaves contended below that because his NTA did not include a time and place for an initial hearing, "jurisdiction in this matter did not properly vest with the Immigration Court." Campos-Chaves C.A. Br. 10; cf. Singh Br. 29-30 (contending that "without a properly filed notice to appear, there is no adjudicative authority with the power to proceed in absentia") (emphasis omitted). Although that argument is beyond the scope of the question presented in this Court by either Campos-Chaves's petition or the government's, it illustrates the sweeping implications of the position the noncitizens advocate.[4]

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judicial review of administrative decisionmaking. See *Shinseki* v. *Sanders*, 556 U.S. 396, 406-408 (2009). And in applying that rule, this Court has "warned against * * * the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." *Id.* at 407. That instruction is equally applicable to the removal context.

[4] Campos-Chaves conceded that his jurisdictional argument was foreclosed by precedent in the court of appeals holding that EOIR's regulations governing the initiation of removal proceedings create a claim-processing rule, not a jurisdictional rule. See Campos-Chaves C.A. Br. 10 (citing *United States* v. *Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), cert. denied, 140 S. Ct. 2769 (2020)); *Pierre-Paul* v. *Barr*, 930 F.3d 684, 692 (5th Cir. 2019), cert. denied, 140 S. Ct. 2718 (2020)). Several other courts of appeals, as well as the Board, have adopted a claim-processing interpretation of the regulations. See, *e.g.*, *Martinez-Perez* v. *Barr*, 947 F.3d 1273, 1278-1279 (10th Cir.

5. *Pereira* and *Niz-Chavez* do not preordain the outcome in these cases. Gov't Br. 36-39.

The noncitizens seek to reinvent *Pereira* as a case about the requirements for a valid NOH, citing the Court's statement that an NOH "presumes that the Government has already served" an NTA. *Pereira*, 138 S. Ct. at 2114. As explained in the government's opening brief (at 37), the Court, in making that statement, did not express any views about the implications of an incomplete NTA under the in absentia removal provisions. The opinion in *Pereira* referenced portions of Section 1229a(b)(5) in its opinion. But the Court's holding concerned only the operation of "the so-called 'stop-time rule' " set forth in 8 U.S.C. 1229b(d)(1)(A). 138 S. Ct. at 2109. That provision is housed in a different part of the INA and has nothing to do with the in absentia removal process. And the Court repeatedly emphasized that the issue it resolved was "narrow"—"much narrower," even, than the question presented, which had asked generally about which of the "items listed" in Section 1229(a)(1) needed to be included in the NTA to trigger the stop-time rule. *Id.* at 2110, 2113 & n.5 (citation omitted).

The noncitizens also seize on the statement in *Niz-Chavez* describing an NOH as "amending" the time and place of a hearing. *E.g.*, Mendez-Colín Br. 17 (quoting *Niz-Chavez*, 141 S. Ct. at 1485). But *Niz-Chavez* "did

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2020); *Perez-Sanchez* v. *U.S. Att'y Gen.*, 935 F.3d 1148, 1154-1157 (11th Cir. 2019); *United States* v. *Cortez*, 930 F.3d 350, 358-362 (4th Cir. 2019); *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 962-965 (7th Cir. 2019); *In re Rosales Vargas*, 27 I. & N. Dec. 745, 748-749 (B.I.A. 2020). See also *In re Fernandes*, 28 I. & N. Dec. 605, 606-616 (B.I.A. 2022) (explaining that Section 1229(a)(1) is also a claim-processing rule).

not address the specific question presented here," Singh Br. 20, and the Court's "paraphrase of the statute," *Van Buren* v. *United States*, 141 S. Ct. 1648, 1660 (2021), does not replace the actual statutory terms. As discussed above and in our opening brief, those terms comfortably encompass the government's interpretation. And even if an NOH must be understood as "amending" a hearing date, that requirement is satisfied under the government's position. To "amend" is "to change or modify in any way," *Webster's Third New International Dictionary* 68 (1993) (def. 3.c(1)), or "to alter * * * formally by modification, deletion, or addition," *ibid.* (def. 3.c(2)). Those definitions easily capture the process of going from an indeterminate state to a fixed one. In litigation, for example, a party can amend its complaint to replace a demand for "all appropriate relief" with a request for a specific damages amount. Similarly, the government can use an NOH to amend the hearing logistics for a noncitizen's removal proceedings, even when a date certain for the initial hearing has not previously been set.

The noncitizens further contend that their position is more consistent with the policy considerations they glean from *Pereira* and *Niz-Chavez*. They note that in both cases, the Court expressed concern that the government's proposed interpretation of the NTA requirements could lead to confusion on the part of noncitizens due to the government's provision of "piecemeal" notice. See *Pereira*, 138 S. Ct. at 2119; *Niz-Chavez*, 141 S. Ct. at 1479, 1485. Unlike with an NTA, however, Section 1229(a)(2) expressly permits the government to use an NOH to adjust hearing logistics as many times as is necessary, either on the government's own initiative or (as happened in Mendez-Colín's case, see J.A. 17-19) in

response to a request for a continuance from the noncitizen. The upshot is that many noncitizens will be required to keep track of multiple documents even in cases where the NTA contains a specific time and place for the initial hearing. In such cases, the government is not impermissibly "spread[ing]," Singh Br. 36, information across multiple documents; it is giving accurate, up-to-date scheduling information as it become available —exactly as Section 1229(a)(2) contemplates.

To the extent they are relevant here, *Pereira*'s and *Niz-Chavez*'s concerns about confusion cut in favor of the government's reading. When removal proceedings commence, a noncitizen can be certain that one or more removal hearings will be held. The question is when and where the hearing (or hearings) will be held. Under the government's interpretation, the "when and where" question can be answered by an NOH that informs a noncitizen of the time and place for a hearing. Under the noncitizens' interpretation, by contrast, the answer to the "when and where" question depends on the noncitizen's independent assessment of the NTA's completeness. If, for example, a noncitizen concludes that the NTA inadequately "specif[ies] * * * [t]he nature of the proceedings against" him, 8 U.S.C. 1229(a)(1)(A), the rule advocated by the noncitizens here would invite him to treat any NOH he later receives—and hence his participation in the removal process—as optional. That approach would result in more, not less, confusion and collateral litigation for noncitizens.

B. Statutory Context And Common Sense Foreclose The Noncitizens' Interpretation

1. Multiple aspects of the broader statutory scheme confirm that noncitizens cannot seek rescission when

they received notice of the hearing they missed. Gov't Br. 39-46.

Sections 1229a(b)(5)(A) and (b)(5)(C)(ii) outline the standards for the government to obtain, and for noncitizens to seek rescission of, in absentia removal orders. The government's position reads those provisions as a unitary whole, focused on the same "notice" and the same "proceeding" throughout. See Gov't Br. 40-41; *Dacostagomez-Aguilar* v. *U.S. Att'y Gen.*, 40 F.4th 1312, 1316 (11th Cir. 2022), cert. dismissed, 143 S. Ct. 1102 (2023). The noncitizens' position reads those provisions as at war with each other. The government can obtain an in absentia removal order under Section 1229a(b)(5)(A) when a noncitizen does not attend a hearing; but if the noncitizen can point to some defect, however minor, in the NTA, he is automatically entitled under Subsection (b)(5)(C)(ii) to seek rescission of the order for lack of notice, even if he in fact knew about the hearing.

The noncitizens dismiss the interplay between Subsections (b)(5)(A) and (b)(5)(C), suggesting (*e.g.*, Campos-Chaves Br. 30; Mendez-Colín Br. 5) that the considerations for obtaining an in absentia order need not mirror those for rescinding such an order. While Congress could reasonably provide for reopening in some cases where the government properly obtained an in absentia removal order, that does not mean that rescission was meant to be available where, as here, a noncitizen lacks any argument that the omission of specific time-and-place information in an NTA contributed in any way to his failure to appear.

Sections 1229a(b)(5)(C)(i) and (c)(7)(C)(i) impose a general 90- or 180-day time limit on filing a motion to reopen, but they exempt a motion that is filed based on

a lack of notice, which can be filed "at any time." That exemption would make little sense if the alleged lack of notice could arise from a defect in the NTA, because such a defect will have been known to the noncitizen well before the usual 90- or 180-day limit has run. See Gov't Br. 43-44. The noncitizens offer no response to that point, other than to reiterate the importance of "the government's duty" to provide notice. *E.g.*, Campos-Chaves Br. 32. The government carried out that duty here, providing each noncitizen with the exact time and place of the critical removal proceeding that led to the in absentia removal order.

Section 1229a(b)(5)(C)(i) permits noncitizens to move to reopen in absentia removal orders based on "exceptional circumstances." As we explained, and the noncitizens agree, the exceptional-circumstances provision indicates that Congress intended to set a high bar for seeking and obtaining rescission. See Gov't Br. 41; Mendez-Colín Br. 22. Subsection (b)(5)(C)(ii) separately allows for rescission due to lack of notice, but it would be incongruous to lower the bar in cases, like these, where the noncitizens' reasons for missing the hearing—assuming any reasons are even offered—were far from exceptional.

The noncitizens attempt to address that incongruity by arguing that Subsection (b)(5)(C)(ii) permits broader relief than the preceding clause because it addresses circumstances "where *the Government* is at fault" for the noncitizen's failure to appear. Mendez-Colín Br. 23. But that argument does not advance the noncitizens' cause. Nothing the government did contributed to their failures to attend their removal proceedings at the appointed times.

Sections 1229(a)(2)(B) and 1229a(b)(5)(B) state that the government is not required to provide any hearing notice when a noncitizen has failed to comply with the requirement to provide contact information. Those provisions underscore Congress's intention to limit the ability of noncitizens to contest removal when they do not follow their obligations within the removal process, including the obligation to attend hearings of which they have been given notice. See Gov't Br. 42-43.

Mendez-Colín suggests (Br. 24-25) that the government's interpretation of Subsection (a)(2)(B) would permit an in absentia order to be entered against a noncitizen who was never informed of the requirement to provide an address. Mendez-Colín misinterprets the provision. The government is excused from giving notice only when the noncitizen "has failed to provide the address required under section 1229(a)(1)(F)." 8 U.S.C. 1229a(b)(5)(B). If the noncitizen never received an NTA informing him of the requirement to provide contact information, then the requirement imposed "under section 1229(a)(1)(F)" never attached. See *In Re G-Y-R-*, 23 I. & N. Dec. at 187 (noncitizen "cannot provide a 'section 239(a)(1)(F)' address (or 'have provided' it and therefore not need to change it) unless the [noncitizen] has been advised to do so"). But where a noncitizen receives an NTA that includes the contact-information requirement, he must comply with it, just as he must comply with the requirement to attend removal hearings for which he receives notice.

2. "The rules of legal interpretation are rules of *common sense*." *The Federalist* No. 83, at 559 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Here, common sense weighs decisively against the noncitizens' position. See Gov't Br. 44-46. Simply put, an interpreta-

tion that permits a noncitizen who knew about an upcoming removal hearing to deliberately skip that hearing and then avoid the consequences of that decision defies "common sense as to the manner in which Congress" legislates in the immigration context. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Mendez-Colín's case demonstrates the fundamental illogic of the noncitizens' position. The omission of a specific hearing time in his NTA was rendered irrelevant five times over by the provision of NOHs scheduling additional hearings that Mendez-Colín or his attorney personally attended. See Gov't Br. 31-32; J.A. 20-40. Yet he now insists that he is entitled to seek rescission of his in absentia order, 18 years after it issued, due to the immaterial defect in his NTA. Denying Mendez-Colín (and others like him) the ability to reopen the removal proceedings under those circumstances does not allow a later NOH to "make up for," Mendez-Colín Br. 15, an incomplete NTA. It merely recognizes that, notwithstanding the omission of specific time-and-place information in an NTA, the multiple NOHs that Mendez-Colín received still performed their "essential function" of "[c]onveying * * * time-and-place information" and "facilitat[ing] appearance at th[e] proceedings." *Pereira*, 138 S. Ct. at 2115.[5]

Mendez-Colín's attorney admitted as much when he told the Immigration Court that there was "no issue" with the NOH issued for the hearing Mendez-Colín did not attend. *Mendez-Colín* Administrative Record 77.

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[5] Mendez-Colín's claim that he "was late to the hearing because he believed it was to take place later in the day," Mendez-Colín Br. 7, was deemed not credible by the immigration judge, see *Singh* Pet. App. 76a, and is entitled to no weight in this Court.

Mendez-Colín now says (Br. 32 n.3) that counsel's concession was "not the same as saying that the notice of hearing amounted to a Notice of Change" under paragraph (2). But even if one accepts that parsing of counsel's statement, the key fact remains that Mendez-Colín was aware of every one of his removal hearings and of the need to attend them. Under those circumstances, the omission of a specific date in the original NTA cannot be a defense to in absentia removal.

C. Statutory History And Purpose Undermine The Noncitizens' Interpretation

The INA amendments that created the current in absentia removal process were adopted to prevent noncitizens from "frustrat[ing] removal through taking advantage of certain procedural loopholes," H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 122 (1996) (1996 House Report), including the expedient of "fail[ing] to appear for their deportation hearing[s]," *ibid*; see also *In re Grijalva*, 21 I. & N. Dec. 27, 31 (B.I.A. 1995) (summarizing evidence of "congressional intent to prescribe stricter and more comprehensive deportation procedures, particularly for in absentia hearings, to ensure that proceedings are brought to a conclusion with meaningful consequences"). Permitting noncitizens who indisputably had notice of their removal hearings to invoke a defense premised on lack of notice would defeat that core purpose.

The noncitizens contend (*e.g.*, Mendez-Colín Br. 23) that Congress, in amending the INA, assumed that the government would serve NTAs containing the required information. But whether Congress expected perfect compliance with the NTA requirement is beside the point. Whatever assumptions Congress made, they do not answer the question here, which is whether the

omission of a specific time and place in the NTA renders a noncitizen immune from in absentia removal. Under a straightforward reading of the statutory text, in absentia removal is permitted even when an NTA does not contain the time and place of an initial hearing.

The noncitizens also emphasize that IIRIRA eliminated the government's ability to provide notice of an initial hearing through an "order to show cause" "or otherwise," and instead required time-and-date information for the initial hearing to be included in the NTA. Mendez-Colín Br. 19 (quoting 8 U.S.C. 1252b(a)(2)(A) (1994)). But accepting the government's interpretation would not "nullify" that change, as Mendez-Colín (Br. 19) and Singh (Br. 21) assert. Rather, it would respect Congress's choice, in Section 1229(a)(2), to let the government provide *additional* hearing information using an NOH. If Congress had intended for the NTA to serve as the only document that would provide a noncitizen with information about hearing logistics, there would have been no reason to create the separate form of notice in paragraph (2). See Gov't Br. 51.

D. The Noncitizens' Policy Concerns Are Misplaced

Policy concerns cannot displace a statute's clear text. In any event, the policy arguments that the noncitizens raise are misplaced.

1. The noncitizens primarily object (*e.g.*, Mendez-Colín Br. 40-41) that, under the government's view, an in absentia removal order could be entered even where the NTA that initiated the proceedings did not contain *any* of the information required under Section 1229(a)(1). But the government's interpretation "does not produce the horribles [they] parade[]." *United States* v. *Hansen*, 599 U.S. 762, 782 (2023).

To begin with, the government *agrees* that if a noncitizen can prove that no notice whatsoever was provided, rescission of any in absentia order would be appropriate based on the lack of notice. See Gov't Br. 53. The government is not arguing, for example, that DeMorgan's theorems (see Campos-Chaves Br. 37), or any other linguistic rules, require reading Section 1229a(b)(5)(C)(ii) to mandate that noncitizens show they did not receive valid notice under *both* paragraph (1) and paragraph (2). A desire to avoid an improbable result the government has repeatedly disclaimed is not a reason to accept the noncitizens' interpretation.

Mendez-Colín complains that 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." Mendez-Colín Br. 41 (emphasis omitted). Here is how: In the fanciful scenario Mendez-Colín posits, the government could not satisfy its statutory burden of proving by "clear, unequivocal, and convincing evidence" that the noncitizen was provided with "written notice required under paragraph (1)." 8 U.S.C. 1229a(b)(5)(A). Nor could the government show that the noncitizen "is removable," *ibid.*, because making that showing necessarily requires an assessment of the charges against the noncitizen. Indeed, a document without any charging information could not even be used to commence a removal proceeding. See 8 C.F.R. 1003.14 (requiring the government to file a "charging document" in the immigration court). Sending the noncitizen a subsequent NOH with specific time-and-place information would not solve the government's problem; there would still not be any "removal proceedings under section 1229a," 8 U.S.C. 1229(a)(2)(A), pending against the noncitizen.

Accordingly, the government would be unable to give notice of a "change or postponement in the time and place of such proceedings," *ibid.*, and unable to ask the immigration judge to enter an in absentia removal order on account of the noncitizen's failure to "attend a proceeding," 8 U.S.C. 1229a(b)(5)(A).

Setting aside those statutory constraints, the noncitizens also overlook the gatekeeping role played by immigration judges, who "must conduct [immigration] hearings in accord with due process standards of fundamental fairness." *Bouchikhi* v. *Holder*, 676 F.3d 173, 180 (5th Cir. 2012) (citation omitted). In speculating that noncitizens could be removed based on a text message, Mendez-Colín Br. 27, a blank document, *id.* at 2, or with no notice at all, the noncitizens assume that immigration judges and reviewing courts will ignore such considerations. Their arguments thus run counter to the presumption that executive-branch officials will follow their duty to "faithfully execute[]" our laws." Art. II, § 3; see *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (presumption of regularity ensures that the "integrity of the administrative process" is appropriately respected).

Given those statutory and constitutional safeguards, it is unsurprising that the noncitizens fail to identify a single real-world example in the nearly 30 years since IIRIRA's enactment where a noncitizen was removed based solely on an NTA that lacked charging information or other vital details. At most, the noncitizens and their amici point to instances where the government sent notices containing all of the required information, but one or more of those notices did not reach the noncitizen due to human error. *E.g.*, Singh Br. 45; National Immigration Litigation Alliance Amicus Br.

20-25; Former Immigration Judges Amicus Br. 13-20.[6] Notably, in many of those cases, the noncitizens were able to successfully reopen their removal proceedings under Section 1229a(b)(5)(C)(ii). See, *e.g.*, *Shogunle* v. *Holder*, 336 Fed. Appx. 322, 324-325 (4th Cir. 2009) (per curiam) (cited at Singh Br. 45-46). Regardless, those isolated examples do not justify reading the provision in a manner that would allow reopening of an in absentia removal order even for a noncitizen who has no valid claim to lack of notice of the hearing from which he was absent.

2. The noncitizens further argue that the government overstates the negative implications of their interpretation. They observe (Mendez-Colín Br. 6, 23; Singh Br. 22-23) that Section 1229a(b)(5)(C)(ii) states only that an immigration judge "*may*" grant a motion to reopen for lack of notice, and they suggest that, because "rescission is not automatic," Mendez-Colín Br. 6, some of those who file such motions will not ultimately succeed in obtaining reopening of their proceedings. But even if such motions could be denied for reasons apart from notice concerns, the availability of a motion to reopen in any removal proceedings that began with a defective NTA would further burden an immigration sys-

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[6] The Former Immigration Judges claim (Amicus Br. 15) that in a case where there is a delay between the issuance of an NTA and its filing with the immigration court, a noncitizen has "no way of updating her change of address." That is incorrect. EOIR guidance specifically provides that change-of-address forms (referred to as EOIR-33/ICs) "are accepted even if no Notice to Appear has been filed." EOIR, *Uniform Docketing System Manual* II-7 (Feb. 2021), https://www.justice.gov/eoir/reference-materials/UDSM122020/download. That is consistent with the statute's recognition that the noncitizen may already "have provided" an address when the NTA is served. 8 U.S.C. 1229(a)(1)(F)(i).

tem that already has a backlog of more than two million cases. See EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (July 13, 2023).[7] In the Ninth Circuit alone, "potentially tens of thousands" of noncitizens who have already been ordered removed could seek to undo those orders, regardless of how many NOHs they received or how many hearings they actually attended. *Singh* Pet. App. 50a (Collins, J., dissenting from the denial of rehearing en banc).

3. Finally, the noncitizens invoke concepts of fairness. They note, for example, that noncitizens must be given an "opportunity to be heard" during removal proceedings. Campos-Chaves Br. 31; Mendez-Colín Br. 25. But the noncitizens here *were* given that opportunity—repeatedly, in Mendez-Colín's case. The dispute before the Court is about the consequences when a noncitizen is provided the opportunity to be heard but declines to take advantage of it.

The noncitizens also contend that the government must "turn square corners" when it deals with noncitizens. Mendez-Colín Br. 1 (quoting *Niz-Chavez*, 141 S. Ct. at 1486). But the quoted passage of *Niz-Chavez* recognized that noncitizens, too, must "turn square corners when they deal with the government." 141 S. Ct. at 1486. The noncitizens' position would undermine that rule. Indeed, it perversely places noncitizens who follow the rules of the removal process and attend their removal hearings in a *worse* position than those who blatantly violate those rules by refusing to attend a hearing on the basis of a superseded flaw in an earlier document. Under their approach, the rule-following

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[7] https://www.justice.gov/media/1174681/dl?inline.

noncitizens can be removed at the conclusion of the proceedings, but the willfully absent noncitizens could request a do-over by claiming a technical lack of notice. See Gov't Br. 49.

E. Alternatively, The Board's Reasonable Interpretation Is Entitled To Deference

The Board of Immigration Appeals (Board) has adopted the same interpretation of Section 1229a(b)(5)'s in absentia removal provisions we advocate above. See Gov't Br. 55-58. That interpretation represents the best reading of the statute. To the extent the statute is ambiguous, however, the Board's interpretation is a reasonable one entitled to *Chevron* deference. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). The noncitizens' assorted arguments against deference are unpersuasive.

1. The noncitizens argue (*e.g.*, Campos-Chaves Br. 44-45) that the Court should not defer to the Board's interpretation here because the Court previously disagreed with the Board's interpretation of the NTA provisions in *Pereira* and *Niz-Chavez*. The noncitizens do not cite any authority supporting their "two strikes and you're out" theory of administrative deference, and there is none. Nor should an agency's previous loss on one question be deemed a basis to disregard its views about another question, particularly where, as here, its current position falls well within "the bounds of reasonable interpretation." *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013).

Moreover, and contrary to the noncitizens' assertions, this is not a situation in which the Board has "flout[ed]," Mendez-Colín Br. 41, the Court's prior decisions. The Board acknowledged the Court's opinions in *Pereira* and *Niz-Chavez* and explained why, notwith-

standing the analysis in those opinions, a noncitizen cannot seek to reopen an in absentia removal order after receiving notice of a hearing under paragraph (2) of Section 1229(a). See, *e.g.*, *In re Pena-Mejia*, 27 I. & N. Dec. 546, 547 (B.I.A. 2019) (stating that *Pereira* "did not hold that [an NTA lacking specific time-and-place information] is invalid for all purposes"); *In re Laparra-DeLeon*, 28 I. & N. Dec. 425, 431 (B.I.A. 2022) (noting that Section 1229a(b)(5) was "[u]nlike the provisions at issue in *Niz-Chavez*"), vacated in part, 52 F.4th 514 (1st Cir. 2022). See also Gov't Br. 55-58 (summarizing history of Board decisions).

2. The noncitizens further argue that the Board's decisions are entitled to lesser deference because they were announced in the context of agency adjudications. That argument misunderstands the "justification for administrative deference." Mendez-Colín Br. 42. *Chevron* deference applies where Congress has delegated authority to an agency to "speak with the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). And "a very good indicator" of such a delegation is "express congressional authorization[] to engage in the process of * * * adjudication that produces * * * rulings for which deference is claimed." *Ibid.* In *Mead*, the Court specifically identified deference to the Board's adjudicative decisions as a paradigmatic application of the doctrine. *Id.* at 230 n.12 (citing *Aguirre-Aguirre*, 526 U.S. at 423-425). Congress has expressly vested the Attorney General with authority to conduct removal proceedings, 8 U.S.C. 1103(g), 1229a(a), and has specifically provided that "the 'determination and ruling by the Attorney General with respect to all questions of law shall be controlling,'" *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)). That express

delegation of authority, which the noncitizens do not dispute, makes it "clear that principles of *Chevron* deference" apply to the Board "as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *Id.* at 424-425 (citation omitted); see *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009) (remanding to permit the Board to "exercise[] its *Chevron* discretion to interpret the statute").

3. Finally, the noncitizens contend that ambiguities in immigration statutes should be construed in favor of noncitizens, either generally or in the context of removal proceedings. According to the noncitizens, that principle trumps the application of *Chevron*. Their argument, however, is inconsistent with this Court's past practice in immigration cases. Courts have long recognized that "deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Negusie*, 555 U.S. at 517 (citation omitted); see *CASA de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 251 & n.6 (4th Cir. 2020) (explaining that the principles "underlying *Chevron* are at their zenith in the context of immigration, a field that the Constitution assigns to the political branches"). Accordingly, this Court has repeatedly applied the *Chevron* framework to uphold the Board's reasonable interpretations of ambiguous INA provisions, even in cases involving the removal process. See, *e.g.*, *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591-598 (2012); *Aguirre-Aguirre*, 526 U.S. at 424-432. See also *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56-75 (2014) (plurality opinion); *id.* at 76-79 (Roberts, C.J., joined by Scalia, J., concurring in the judgment). The noncitizens do not acknowledge those decisions, let alone attempt to rec-

oncile them with their view that *Chevron* is inapplicable in the removal context.

The noncitizens also overstate the weight that their interpretive principle has been given in prior decisions. The decision in *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013), was not about deference at all. There, the Court applied the categorical approach to determine that a conviction under a state statute that would criminalize simple possession of a "small amount of marijuana" with intent to distribute without remuneration, *id.* at 187, would not be a felony under federal drug laws and thus did not constitute the "aggravated felony" under the INA of "illicit trafficking in a controlled substance," 8 U.S.C. 1101(a)(43)(B). See 569 U.S. at 190, 192-195. In reaching that conclusion, the Court discounted concerns about the "practical effect" of its decision by observing that the Attorney General could always deny discretionary cancellation relief to an actual drug trafficker. *Id.* at 203-204 (citation omitted). Nothing in that observation suggests that statutory text must *always* be construed in favor of noncitizens when removal is a possibility.

The other cases on which the noncitizens primarily rely, *Costello* v. *INS*, 376 U.S. 120 (1964), and *INS* v. *St. Cyr*, 533 U.S. 289 (2001), are also distinguishable.

Costello was a pre-*Chevron* case holding that a statute providing for deportation on the basis of certain convictions did not apply to someone who was a U.S. citizen at the time of conviction, but was later denaturalized. 376 U.S. at 127-128. The Court relied in part on the fact that the statute provided that a conviction would not be a ground for deportation if the sentencing court recommended, at the time of sentencing or shortly thereafter, "that such alien not be deported." *Id.* at 126. The Court

explained that the ability to seek such a recommendation from the sentencing judge was "an important part of the legislative scheme," but that it would be a "dead letter" to someone who was a naturalized citizen at the time of his conviction, because the judge would have had no reason to make a nondeportation recommendation for a citizen. *Id.* at 127. *Costello* thus rejected a statutory interpretation that would have effectively eliminated noncitizens' right to seek statutory relief. Here, by contrast, the government's interpretation of Section 1229a(b)(5)(C) preserves a lack-of-notice defense for noncitizens who did not receive notice of the relevant hearing.

The Court in *St. Cyr* based its holding on the presumption against retroactivity, concluding that application of that presumption left "no ambiguity" under *Chevron* for the Board to resolve. 533 U.S. at 320 n.45; see *id.* at 315-320. In a single sentence, the Court added that its "retroactiv[ity]"-based interpretation of the statute was "buttressed" by the tie-breaking rule that the petitioner invoked. *Id.* at 320. The Court did not, however, suggest that a presumption in favor of noncitizens could displace *Chevron* deference in a case where some statutory ambiguity persisted after application of the traditional tools of statutory interpretation. Cf. *Pugin* v. *Garland*, 599 U.S. 600, 610 (2023) (declining to apply the "rule of lenity" in the immigration context because no "'grievous ambiguity'" remained after the Court had applied "the traditional tools of statutory interpretation") (citation omitted).

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals in *Campos-Chaves* v. *Garland*, No. 22-674, should be

affirmed, and the judgments of the court of appeals in *Garland* v. *Singh* and *Garland* v. *Mendez-Colín*, No. 22-884, should be reversed.

Respectfully submitted.

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