No. 17-459

IN THE
Supreme Court of the United States

WESCLEY FONSECA PEREIRA,
Petitioner,

v.

JEFFERSON B. SESSIONS III,
Respondent.

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

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* § 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," those periods end when the government serves a "notice to appear under section 1229(a) of this title." *Id.* § 1229b(d)(1)(A). Section 1229(a) defines a "notice to appear" as "written notice … specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1).

The question presented is:

Whether, to trigger the stop-time rule by serving a "notice to appear under section 1229(a)," the government must "specify" the items listed in § 1229(a)'s definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case concerns the mechanics of cancellation of removal. This relief "was designed to accomplish a humanitarian result." *INS v. Errico*, 385 U.S. 214, 225 (1966). It avoids the unduly harsh consequences that removal can yield and protects citizens who would suffer if an immigrant were removed. Reserved for the most deserving cases, this relief—as relevant here—is available only to non-permanent residents who have resided in this country for 10 years, who have good moral character, and for whom removal would be an "exceptional and extremely unusual hardship" for family members who are U.S. citizens. 8 U.S.C. § 1229b(b)(1)(A)-(D). And this relief is discretionary. Eligible immigrants are entitled to the chance to *apply*, but the government has discretion to deny relief.

The law governing eligibility for cancellation is overseen, in the first instance, by the Board of Immigration Appeals ("BIA"), which interprets and applies the governing statutes and rules subject to review by courts of appeals under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see Esquivel-Quintana v. Sessions*, 137 S. Ct.

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

1562, 1567 (2017). Judicial review of the BIA's decisions is critical to ensure that immigrants whom Congress directed would be eligible for relief *in fact* receive the chance to apply.

Below, the First Circuit blessed an interpretation that excludes Petitioner Wescley Fonseca Pereira from eligibility for cancellation. The "stop-time" rule halts an immigrant's period of residency in the United States, potentially precluding him or her from eligibility, when the government serves a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The First Circuit approved the BIA's interpretation that the government can use this tool to trigger the stop-time rule by issuing documents captioned "notice to appear" that *do not* contain the information required by § 1229(a). With this license, the government today routinely—and deliberately—issues notices omitting this required information.

Amicus agrees with Pereira that the BIA's interpretation is not entitled to deference. It violates the statute's clear text. It badly undermines cancellation's critical humanitarian purposes. And it does not advance Congress's limited intent in enacting the stop-time rule. That rule avoids the risk, present under prior law, that immigrants could game the system by delaying proceedings until they became eligible for relief. Thus, issuance of a lawful notice to appear now precludes immigrants from accruing time, even if proceedings drag on. Congress did not, however, enact the stop-time rule to give the government the chance to manipulate the rules by issuing notices that do not

comply with the statute yet treating them as triggering the stop-time rule.

Amicus submits this brief to draw the Court's attention to a broader concern: that in immigration cases, circuit courts have repeatedly failed to apply *Chevron*'s framework with the rigor this Court's precedents demand. At Step 1, the First Circuit ended its inquiry after concluding that the statute did not, in express terms, spell out an answer to the narrow question raised by this case—whether the BIA can decide that documents that do not meet the statute's requirements for notices to appear nontheless *function* as notices to appear for purposes of the stop-time rule. And the decision below does not stand alone in this approach. *Amicus* is concerned that other circuit courts, too, have pretermitted their Step 1 inquiry the moment they perceive any hint of textual doubt, without applying all the traditional tools of construction to resolve that doubt, as this Court's cases command. This has continued to occur, moreover, despite a slew of decisions from this Court modeling the careful analysis Step 1 requires. *Amicus* thus urges the Court to use this case as an opportunity to underscore the importance of rigorous statutory interpretation at Step 1.

Likewise, *Amicus* is concerned that, at Step 2, circuit courts then fail to consider whether the BIA's interpretation comports with the purposes of the immigration laws, despite *Judulang*'s admonition that the BIA may not adopt interpretations "unmoored from the purposes and concerns of the immigration laws." 565 U.S. 42, 64 (2011). The immigration laws are harsh enough without the BIA enacting *further* draconian

barriers that are grounded in neither statutory text nor the purposes of the immigration laws.

Amicus has a deep understanding, and a significant interest, in correcting these errors. The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of immigrants generally and as the leader of a network of pro bono attorneys who regularly represent immigrants.

SUMMARY OF ARGUMENT

When the courts of appeals review BIA decisions, they carry out their Article III-imposed "duty … to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Today, courts frequently carry out that duty using the two-step framework of *Chevron*. But in a number of cases, including here, the judicial deference that *Chevron* prescribes has become a judicial abdictation that the Constitution forbids. *Amicus* urges the Court to reverse, and in so doing, to make clear to circuit courts the demanding inquiry *Chevron* requires at both steps.

I.A. At Step 1, First Circuit erred in two ways. First, the First Circuit believed it was enough to proceed to Step 2 that the statute's express terms did not "explicitly" state an answer to the question directly posed here—whether "the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." Pet. App. 9a. *Chevron*, however, does not require magic words. This Court has emphasized the need to use *all* traditional tools of construction—text, structure, purpose, legislative history, relevant canons of construction, and so on—and has applied these tools to rigorously police BIA interpretations at Step 1. The First Circuit's failure to apply those tools at Step 1 is especially troubling because it is no isolated error. Repeatedly, courts of appeals have failed to give BIA interpretations the scrutiny Step 1 requires.

B. Second, the First Circuit erred by failing to apply "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quotation marks omitted). This principle recognizes that deportation is among the harshest consequences the law can inflict, akin to banishment. And because this principle is a background presumption against which Congress legislates, it applies at Step 1.

II. At *Chevron* Step 2, the First Circuit erred again. *Judulang v. Holder* held that the BIA's interpretations are arbitrary and capricious, and fail at Step 2, if they are not tied to "the purposes and concerns of the immigration laws." 565 U.S. 42, 52 n.7, 64 (2011). This case concerns cancellation of removal and the stop-time

rule. Congress created cancellation to serve critical humanitarian purposes—to avoid unduly harsh consequences for the most deserving of cases. The stop-time rule, for its part, is a narrow limit on cancellation designed to prevent immigrants from gaming the system by delaying until they accrue the time required for eligibility. But here, the BIA's interpretation badly undermines cancellation's humanitarian purposes yet does not advance the stop-time rule's anti-gaming purpose. Because the BIA's interpretation is unmoored from the relevant purposes of the immigration laws, it fails at Step 2.

The First Circuit and the BIA erred by relying on "administrative context"—in short, that the government has promulgated a regulation authorizing "notices to appear" that do not contain hearing dates and times, which the government believes is more convenient. "[C]heapness alone cannot save an arbitrary agency policy." *Judulang*, 565 U.S. at 64. And BIA's reliance on "administrative context" is especially arbitrary because a system *exists* that would allow the government to include hearing dates and times on notices to appear. Even if it did not, the relevant players—the Department of Homeland Security and immigration courts—are both executive agencies. They have every ability to coordinate systems to provide the information Congress mandated. If they choose not to do so, they cannot complain that the stop-time rule does not apply until they *actually* provide this information.

ARGUMENT

I. At *Chevron* Step 1, the First Circuit erred by finding the statute ambiguous without applying the governing canons of construction.

If an immigrant has 10 years of continuous U.S. presence (for non-permanent residents) or 7 years of continuous residence (for permanent residents), he or she is entitled to apply for cancellation of removal, unless (as relevant here) the "stop-time rule" ends this period via service of "a notice to appear." 8 U.S.C. § 1229b(d)(1); *see id.* § 1229b(a)-(b). The notice to appear "shall" provide "written notice … specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall,' … normally creates an obligation impervious to … discretion"). Nonetheless, the Department of Homeland Security ("DHS") has directed its vast bureaucracy to proceed on the premise that, to trigger the stop-time rule, notices to appear *need not* include this information. *See* 8 C.F.R. § 1003.18(b) (DHS will provide "time, place and date" only "where practicable"). So, when DHS serves a notice to appear that omits this information, as it did here, it is no clerical error or administrative snafu. It is DHS's deliberate and systematic choice.

Amicus agrees with Pereira that the statute unambiguously forecloses DHS's approach. An immigrant's clock stops only when he or she is "served a notice to appear *under section 1229(a)*." 8 U.S.C. § 1229b(d)(1) (emphasis added). And whatever label

DHS uses, a document is a notice to appear "under section 1229(a)," *id.*, only if it includes the information that section 1229(a) mandates that the "notice … shall … specify[]," including the hearing's date, place, and time, *id.* § 1229(a)(1). DHS cannot redefine by regulation statutory terms Congress has *already* defined. The Court should thus reverse.

But from *amicus*'s perspective, the errors in the First Circuit's method are also troubling. Its analysis at *Chevron* Step 1 consisted of a single slender page. Pet. App. 8a-9a. As explained below, the First Circuit's approach cannot be squared with the robust judicial oversight of questions of statutory interpretation that this Court's precedents demand. The First Circuit, however, is not the first court to abdicate this responsibility. In reversing, the Court should correct that error, which has continued in courts of appeals despite myriad decisions from this Court demonstrating the rigorous scrutiny *Chevron* requires.

A. The First Circuit erred by failing to apply the "traditional tools of statutory construction" at *Chevron* Step 1.

For the First Circuit, it was enough to proceed to *Chevron* Step 2 that the statute's express terms did not, in its view, "explicitly" state an answer to the question directly posed by this case—whether "the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." Pet. App. 9a. Thus, because the statute did not—via magic words—prohibit DHS from departing from the statute's command that the notice "shall" include this information, 8 U.S.C. § 1229(a)(1), the First

Circuit adjudged the statute "ambiguous" and "proceed[ed] to step two." Pet. App. 9a. Under this approach, any agency statutory interpretation will survive Step 1, and be judged under Step 2's reasonableness review, unless Congress has taken the extra step of telling the agency—in express terms—that the agency cannot adopt that interpretation.

That is not how *Chevron* Step 1 works, in immigration cases or any other. *Chevron* recognizes that the "judiciary is the final authority on issues of statutory construction." 467 U.S. at 843 n.9. And *Chevron*'s first step commands courts to use all the "traditional tools of statutory construction" to determine whether "'administrative constructions … are contrary to clear congressional intent.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (quoting *Chevron*, 467 U.S. at 843 n.9). Those traditional tools include not just the plain meaning of the narrowest textual phrase at issue, but also—among others—the statute's structure, context, history, purpose, and legislative history. *See id.* at 449.

This Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), illustrates the point. The dispute there was whether the term "sexual abuse of a minor" included statutory rape offenses committed against any victim younger than 18 (as the government contended), or whether it covered solely offenses defined to require that the victim be younger than 16 (as the immigrant argued). *Id.* at 1568. The immigrant cited legal dictionaries to support his interpretation. *Id.* at 1569. But the government responded with a dictionary of its own. *Id.* at 1569-70. If any bare linguistic

ambiguity was enough to end the Step 1 inquiry, as the First Circuit appeared to believe, those clashing dictionaries should have sent the Court to Step 2. But the Court did something else. It looked to the "structure of the INA"; how the government's interpretation fit with a "closely related federal statute, 18 U.S.C. § 2243," and "evidence from state criminal codes." *Id.* at 1570. Based on this robust analysis, and myriad traditional tools of interpretation, the Court concluded that "the statute, read in context, unambiguously forecloses the Board's interpretation." *Id.* at 1572.

Esquivel-Quintana is only the most recent example of this Court's rigorous scrutiny. Sometimes that scrutiny finds the statute is clear; other times, it finds ambiguity. But always, the review is searching, employing the full panoply of tools of construction. For example, *Cardoza-Fonseca* rejected the BIA's request for deference based on the Court's "analysis of the plain language of the Act"; an "examination of its history," including the statute's "symmetry" with a "United Nations Protocol"; a piece of unenacted legislation; and the statute's "legislative history." 480 U.S. at 432, 441-43, 449. These "ordinary canons of statutory construction," the Court found, "compell[ed]" rejecting the BIA's interpretation. *Id.* at 449.

The Court's statutory analysis was just as rigorous in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). There, the BIA had decided that a state-court drug paraphernalia conviction can "relat[e] to" a federal controlled substance—triggering removal under 8 U.S.C. § 1227(a)(2)—even if the paraphernalia was not *used* for any controlled substance specified in federal law (but

instead for Adderall that was a controlled substance only under state law). 135 S. Ct. at 1984. The Court rejected BIA's interpretation based on an examination of "the statute's text"; its "historical background"; and the Court's conclusion that the BIA's interpretation made "scant sense" and led to "consequences Congress could not have intended," contradicting the rule that "[s]tatutes should be interpreted as a symmetrical and coherent regulatory scheme." *Id.* at 1989-90 (quotation marks omitted).[2]

In *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012), the Court reached the opposite result but based on the same exacting scrutiny. The Court looked to "the statute's text," its "history and context," and its "purposes"—deferring to the BIA only after concluding that the statute, read in light of all these tools, did not require a contrary result. *Id.* at 591-92, 594.

None of these cases can be squared with what the First Circuit did below. After the First Circuit's truncated analysis at *Chevron* Step 1, it addressed critical interpretive tools like "[s]tatutory [s]tructure" and "legislative history" only at Step 2. Pet. App. 10a, 12a. The First Circuit then misused these tools, but the

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[2] While the Court did not expressly say that it reached this conclusion at *Chevron* Step 1, that is the only sensible reading of the Court's opinion. If the Court had perceived an ambiguity, it should have remanded the case so that the BIA could exercise its interpretive discretion in light of this Court's guidance. *See Negusie v. Holder*, 555 U.S. 511, 517 (2009). But the Court simply reversed. *Compare Melloui*, 135 S. Ct. at 1990-91 (reversing), *with Judulang*, 565 U.S. at 52 n.7, 64 (remanding after deeming the BIA's rule arbitrary and capricious).

key point for present purposes is that the First Circuit's entire approach was wrong.

Nor is this error merely a matter of "Same wine, different bottle." *Chevron*'s first step is about whether Congress's intent is "clear," *Cardoza-Fonseca*, 480 U.S. at 447-48 (quotation marks omitted), and the sources relevant there are sources that bear on Congress's intent. By contrast, *Chevron*'s second step asks whether "a particular agency interpretation is reasonable." *Negusie v. Holder*, 555 U.S. 511, 518 (2009). The First Circuit took this standard as license, at Step 2, to put weight on "[a]dministrative [c]ontext," Pet. App. 12a—namely, that the government has enacted a regulation specifying that, notwithstanding the statute, a notice to appear need include the "time, place and date of the initial removal hearing" only "where practicable." 8 C.F.R. § 1003.18(b). By relegating statutory structure and history to *Chevron* Step 2, the First Circuit short-circuited the inquiry into congressional intent, and it allowed these tools of interpretation (which *genuinely* bear on Congress's intended meaning) to be traded off against factors like "administrative context," convenience, and the like.

The First Circuit's error is especially troubling because it is not an isolated mistake. Despite this Court's clear guidance, decisions in the courts of appeals have repeatedly failed to rigorously analyze the indicia of Congress's intent using the "traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 448 (quotation marks omitted).

The other lower court opinions concerning the present split are a prime example. Their *Chevron* Step

1 analysis, like the First Circuit's, consists of just a few sparse sentences. *See, e.g.*, *Yi Di Wang v. Holder*, 759 F.3d 670, 674 (7th Cir. 2014) (statute does not explicit say that "a Notice to Appear, in order to function for the stop-time rule, must include the date and time of a hearing"); *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 238 (2d Cir. 2015) ("[t]he text of the stop-time rule does not clarify whether a notice to appear must comport with all of the procedural requirements contained in § 1229(a) in order to freeze an alien's period of continuous residence"); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014) (stating, without elaboration, that "[a]s to the first step, we agree with the BIA that the relevant statutory provision is ambiguous"). Whatever one thinks about the *merits* of this case, Congress's intent deserves vastly more consideration than these courts provide.

This Court has repeatedly been called upon to abrogate circuit court decisions that shortchanged congressional intent in this manner. When the Seventh Circuit considered the issue this Court resolved in *Esquivel-Quintana*—whether "sexual abuse of a minor" includes statutory rape offenses committed against any victim younger than 18—its Step 1 analysis consisted, in its entirety, of the assertion that "§ 1101(a)(43)(A) is open-ended." *Velasco-Giron v. Holder*, 773 F.3d 774, 777 (7th Cir. 2014).[3] Just as terse was the opinion this Court

[3] Even worse, the Seventh Circuit appeared to defer to the BIA on the Step 1 question of whether the statute was ambiguous in the first place. *See Velasco-Giron*, 773 F.3d at 777 (asserting that "*the Board was entitled to find* that Congress omitted a statutory reference from § 1101(a)(43)(A) precisely in order to leave

reversed in *Mellouli*, whose only Step 1 analysis was the observation that "the term 'relating to,' … reflects congressional intent to broaden the reach of the removal provision." *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013).[4]

The correct approach was that employed by the Eleventh Circuit in *Jian Le Lin v. U.S. Attorney*

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discretion for the agency" (emphasis added) (quotation marks omitted)).

[4] Further examples come from the BIA's interpretation of the removal ground for a "crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The BIA has held that this provision *also* authorizes removal based on conviction for "child endangerment"—a different, less serious crime against children that punishes conduct by any person that places a child at *some risk*. *Matter of Soram*, 25 I. & N. Dec. 378, 382 (B.I.A. 2010). When the Second Circuit weighed the BIA's interpretation, its Step 1 inquiry was limited to a terse paragraph whose analysis stopped after observing that "the statute does not define the term 'crime of child abuse,'" and that "state and federal statutes … offer varied definitions." *Florez v. Holder*, 779 F.3d 207, 211 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1450 (2016) (citation omitted). The Third Circuit, applying the same provision, was even more spare:

> The crime of child abuse is not defined in the INA. Moreover, the meaning of the phrase, "crime of child abuse," as used in § 1227(a)(2)(E)(i) is not plain and unambiguous. We therefore must view the term as ambiguous, *i.e.*, requiring interpretation, and proceed to the second step of the *Chevron* inquiry.

Mondragon-Gonzalez v. Att'y Gen. of the U.S., No. 17-1710, --- F. App'x ----, 2018 WL 618467, at *2 (3d Cir. Jan. 29, 2018) (citation omitted). Nowhere to be found is the searching Step 1 inquiry into plain meaning, statutory structure, history, and purpose that this Court had recently modeled in *Esquivel-Quintana*.

General, 681 F.3d 1236, 1240-41 (11th Cir. 2012), which considered whether immigrants can file motions to reopen from outside the United States. *Id.* at 1237. The government argued there, like the First Circuit found here, that "because IIRIRA does not *specifically address* the issue of an alien's physical presence in the United States, Congress has not spoken to the issue and thus the Attorney General is free to regulate in the statutory gap." *Id.* at 1240 (emphasis added). The Eleventh Circuit rejected that overbroad view of *Chevron* deference and held that the BIA's interpretation flunked Step 1 based on negative inferences from the statute's text, clues from its history, and the broader statutory structure. *Id.* at 1240-41. But although opinions like *Jin Le Lin* apply the proper model for *Chevron* analysis, a problem remains. Hence, *amicus* respectfully suggests that, in reversing the decision below, the Court should underscore to circuit courts the rigorous scrutiny *Chevron* demands.

Guidance is especially warranted because this error, if left uncorrected, will affect more than the immigration laws. The *Chevron* framework applies across the entire domain of the administrative state. *Cf. United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487-88 (2012) (relying on *Cardoza-Fonseca* to define scope of deference in tax case). Thus, if *Chevron* loses its bite, agencies across the government will gain new license to give short shrift to the laws that Congress passed.

B. The First Circuit erred by failing to apply, at *Chevron* Step 1, the rule that ambiguities in deportation laws must be construed in favor of immigrants.

The First Circuit erred by failing to meaningfully apply *any* of the "traditional tools of statutory construction" at *Chevron* Step 1. *Cardoza-Fonseca*, 480 U.S. at 447-48 (quotation marks omitted). But one omission merits special attention.

Even if other tools of construction would yield ambiguity, that ambiguity would be resolved by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *Cardoza- Fonseca*, 480 U.S. at 449); *see also Kawashima v. Holder*, 565 U.S. 478, 489-90 (2012) (Court has "construed ambiguities in deportation statutes in the alien's favor"); *Errico*, 385 U.S. at 225 (where deportation is consequence, "the doubt should be resolved in favor of the alien"). This principle applies here because BIA's interpretation renders removal a *certainty*, eliminating Pereira's right, which he would otherwise possess, to seek discretionary relief. *See St. Cyr*, 533 U.S. at 319 (applying canon in similar context).

This canon of construction ensures that the harsh consequences resulting from deportation are visited only upon those whom Congress truly intended to be subject to removal. Because "deportation is a drastic measure and at times the equivalent of banishment [or] exile," this Court "will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible

meanings of the [statute]." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

This canon, like the other normal principles of statutory construction, comes into play at *Chevron* Step 1. That step, as explained above, asks whether statutes are ambiguous after applying "traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 447-48 (quotation marks omitted). And this Court has described *this very presumption* as one of the "accepted principles of statutory construction." *Costello v. INS*, 376 U.S. 120, 128 (1964).

Indeed, applying such principles at *Chevron* Step 1 is the only sensible approach. That step is about discerning Congress's intent, and "Congress legislates with knowledge of [this Court's] basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Thus, if one of the standard principles of interpretation renders a statute clear, there is no occasion for proceeding to *Chevron*'s second step. *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (same result as to presumption against preemption); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (presumption against implied rights of action); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (presumption against reaching difficult constitutional questions).

Indeed, failing to apply the principle of construing deportation statutes in favor of the immigrant at *Chevron* Step 1 would nullify the principle. In removal cases, the immigrant's adversary is *always* the BIA. And if statutory ambiguity means that the agency's view prevails, courts will never apply this principle in any case where the Board has decided the question against

the immigrant. By contrast, if applied at Step 1, this principle and *Chevron* each govern within their assigned sphere. Ambiguities arise in many *non*-deportation cases, and when that occurs, deference is due when the BIA reasonably interprets the statute. Even in deportation cases, resolving an ambiguity may benefit some immigrants, but harm others—in which case there is no way to construe the "ambiguit[y] … in favor of the alien." *St. Cyr*, 533 U.S. at 320 (internal quotation marks omitted).[5] Moreover, if the Step 1 analysis is applied with real rigor, the other traditional tools of construction will sometimes *foreclose* the immigrant's position.

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[5] For example, a non-permanent resident is eligible for cancellation only if he has been physically present "for a continuous period of not less than 10 years," and "has been a person of good moral character during such period." 8 U.S.C. § 1229b(b)(1)(A)-(B). An applicant cannot show "good moral character" during a period when he has given false testimony or been convicted of certain crimes. *Id.* § 1101(f). The BIA has held that this good moral character period runs backwards from "entry of a final administrative decision"—instead of, say, the 10 years that preceded issuance of the notice to appear, or the application for cancellation. *Matter of Ortega-Cabrera*, 23 I. & N. Dec. 793, 798 (B.I.A. 2005). That rule helps some immigrants, but works to others' detriment. Under the Board's rule, an immigrant whose bad act occurred less than 10 years in the past can become eligible for cancellation if enough time passes before the final decision. But an immigrant who commits a bad act *after* the initiation of removal proceedings or an application for cancellation *cannot* make the required showing. *Compare Ortega-Cabrera*, 23 I. & N. Dec. at 798 (noncitizen benefited by Board's rule because ten years had passed since offense), *with Duron-Ortiz v. Holder*, 698 F.3d 523, 527 (7th Cir. 2012) (noncitizen barred from eligibility due to false testimony after application). By contrast, if the Board had decided to measure the period from, say, the application for cancellation, the situation would be reversed.

Hence, true ambiguities will be rarer, lenity will not apply, and the BIA's interpretation may prevail.

* * *

At *Chevron* Step 1, the First Circuit thus violated two imperatives. But when combined, their consequences are especially troubling. The reason courts construe deportation statutes in favor of immigrants, as just explained, is because removal can be "the equivalent of banishment [or] exile." *Fong Haw Tan*, 333 U.S. at 10. And by failing to apply any of the traditional tools of statutory construction *at all* at *Chevron* Step 1—this canon, or any other—the First Circuit gave the BIA latitude to inflict this life-destroying consequence with scant regard for the statute Congress wrote.

II. At *Chevron* Step 2, the First Circuit erred by failing to account for the purposes of the immigration laws, in contravention of *Judulang v. Holder*.

Even if the phrase "notice to appear under section 1229(a)" remained ambiguous after applying all the traditional tools of statutory construction, the First Circuit's task was not complete. At Step 2, a court must still consider whether the agency's interpretation is "arbitrary, capricious, or manifestly contrary" to the statute. *Chevron*, 467 U.S. at 844. The First Circuit did not carry out that task in the manner this Court's precedents demand.

A. *Judulang* required the First Circuit to account for the purposes of the immigration laws at *Chevron* Step 2.

This Court has provided clear guidance on how to conduct *Chevron* Step 2 review. In *Judulang*, this Court held that the BIA's interpretations of immigration statutes are arbitrary and capricious if they are not tied "to the purposes of the immigration laws or the appropriate operation of the immigration system." 565 U.S. at 55.[6] *Judulang* involved the BIA's "comparable-grounds" rule, which the BIA used to determine whether an immigrant who pleaded guilty to a deportable offense was eligible to seek for relief under section 212(c) of the Immigration and Nationality Act. The BIA went about this by determining whether the offense to which the immigrant had pled guilty was "substantially equivalent" to one of the offenses that would render an immigrant *excludable*.

This Court held that the comparable-grounds rule was arbitrary and capricious because it did not "rest on any factors relevant to whether an alien (or any group of aliens) should be deported." *Id.* at 58. "Rather than considering factors that might be thought germane to the deportation decision," the BIA made an immigrant's eligibility to seek relief depend on an irrelevant comparison to a different statute. *Id.* at 55. This was reversible error because "[t]he BIA's comparable-

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[6] While *Judulang* deemed the Administrative Procedures Act's "arbitrary and capricious" review to be a better fit for the question at issue there, it explained that the "analysis would be the same … under *Chevron* step two." 565 U.S. at 52 n.7.

grounds rule [was] unmoored from the purposes and concerns of the immigration laws." *Id.* at 64.

B. The stop-time rule serves as a narrow anti-gaming limit to cancellation of removal and the critical humanitarian purposes served by cancellation.

In light of *Judulang*, it was incumbent on the First Circuit to consider whether the BIA's interpretation accords with "the purposes of the immigration laws or the appropriate operation of the immigration system"—specifically, the combined purposes of cancellation of removal and the stop-time rule. *Id.* at 55. These purposes are well established.

Cancellation of removal is a discretionary form of relief "designed to accomplish a humanitarian result." *Errico*, 385 U.S. at 225. It is reserved for immigrants who have resided in this country for years, who have good moral character, and for whom removal would be an "exceptional and extremely unusual hardship" for the immigrant's family members who are citizens of the United States. 8 U.S.C. § 1229b(b)(1)(A)-(D).

Congress created this type of discretionary relief to inject equity into removal proceedings. As Congress and this Court have long recognized, "[d]eportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). For immigrants who have been in this country for many years—and particularly for those who have families in this country—"deportation may result in the loss 'of all that makes life worth living.'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S.

276, 284 (1922) (Brandeis, J.)). And for many immigrants, the only thing standing between them and this fate is the chance to seek cancellation of removal.

Discretionary relief has saved thousands of immigrants from this fate and kept thousands of families together over the years. As this Court acknowledged in *St. Cyr*, discretionary relief has "had great practical importance" for immigrants and their families. *St. Cyr*, 533 U.S. at 295. Under a statutory predecessor to cancellation, waiver of deportation under 212(c) of the Immigration and Nationality Act, the number of immigrants who depended on discretionary relief was "extremely large." *Id.* at 296. And a "substantial percentage" of the applications for deportation waivers—more than half—were granted between 1989 and 1995. *Id.* at 296 & n.5.

Congress added the stop-time rule to solve a very narrow problem in the mechanisms for discretionary relief that existed prior to 1996. The rule addressed "perceived abuses arising from the prior practice of allowing periods of continuous physical presence to accrue after service of the charging document." *Matter of Cisneros*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004). Before the stop-time rule, an immigrant's period of continuous presence or residence continued to run during the pendency of removal proceedings. This created an incentive, Congress believed, for immigrants to delay proceedings until they became eligible for cancellation. H.R. Rep. No. 104-469, pt. I, at 122 (1996). Thus, Congress was concerned that immigrants would often "request and obtain multiple continuances, in order to change the venue of their hearing, obtain an attorney, or

prepare an application for relief." *Id.* Congress added the stop-time rule to prevent immigrants from gaming the system by making it impossible for them to become eligible for cancellation through these "delay[ing] strategies." *Id.*

Here, as explained in the next two sections, the First Circuit erred by ignoring the broader humanitarian purposes of cancellation of removal, and then by misconstruing and misapplying the anti-gaming rationale of the stop-time rule.

C. The First Circuit and the BIA gave no consideration to the fundamental humanitarian purposes of cancellation of removal.

The First Circuit made no effort to construe the stop-time rule in light of the fundamental humanitarian purposes of cancellation. Neither did the BIA. *See Matter of Camarillo*, 25 I. & N. Dec. 644, 649-50 (B.I.A. 2011) (discussing the legislative history of the stop-time rule). This is a glaring omission. The stop-time rule—whose purposes the First Circuit misapplied—does not exist in a vacuum. It is an integral part of the process for seeking cancellation of removal, and all the critical humanitarian purposes that process serves.

That omission is reversible error in itself. Under *Chevron*, reviewing courts must ensure that agencies are considering all the relevant factors and the fundamental purposes of the statutes they interpret. *See Judulang*, 565 U.S. at 52 n.7, 55. Thus, this Court has consistently relied on the fundamental purposes of the immigration laws to resolve ambiguities in

immigration statutes. *See, e.g.*, *St. Cyr*, 533 U.S. at 320; *Errico*, 385 U.S. at 224-25. And the Court has held that the BIA and the lower courts err when they fail to account for these purposes. *See Judulang*, 565 U.S. at 64. The canon of construction discussed above, requiring ambiguous deportation statutes to be construed in immigrants' favor, reflects the importance of these purposes. *Supra* at 16-17. An interpretation of an ambiguous immigration statute cannot be "reasonable" under *Chevron* when it fails to consider these purposes. *Judulang*, 565 U.S. at 64. And in particular, no interpretation of an ambiguous statute implicating cancellation can be reasonable when it ignores the humanitarian purposes of that relief. *See id.*

Here, the First Circuit failed to consider how badly the BIA's interpretation undermines cancellation's humanitarian purposes. "Deportation is always a harsh measure." *Cardoza-Fonseca*, 480 U.S. at 449. Even when permitted by law, it severs families and sends immigrants into exile in a land that has ceased to be their home. *See, e.g.*, *Errico*, 385 U.S. at 225; *Fong Haw Tan*, 333 U.S. at 10; *Delgadillo*, 332 U.S. at 391. That is precisely why cancellation exists—it gives the government discretion to act mercifully in cases where these consequences would be exceedingly harsh.

The BIA's interpretation, however, excludes immigrants from this relief by making them ineligible to even seek it—for reasons irrelevant to whether they are deserving of relief. For example, Pereira is ineligible for discretionary relief because, and only because, the BIA has chosen to treat documents labeled "notice to appear" as effective to trigger the stop-time rule, when Congress

concededly did not mandate that result. Had the BIA adopted the opposite interpretation, as the government does not dispute it could have done, Pereira would have had his application adjudicated on the merits—receiving relief if deserved, and if not, not.

Indeed, the BIA's interpretation is especially unreasonable because it does not hinder the government's ability to remove immigrants when granting relief would *not* be consistent with cancellation's humanitarian purposes. Cancellation is discretionary. If any applicant has engaged in anything like the gaming activity targeted by the stop-time rule, an immigration judge or the Board would be well within their rights to simply deny the applicant relief in the exercise of discretion. Nor will rejecting the BIA's interpretation here meaningfully increase the burden on immigration courts. The government has never presented any evidence that a large number of immigrants are in Pereira's situation—not eligible for cancellation if the government's placeholder "notice to appear" triggered the stop-time rule, but eligible if their clocks continued to run until service of a genuine notice to appear. Indeed, if the government were *diligent* in promptly providing the hearing date and time, this situation would virtually *never* occur. And regardless, the government has no legitimate interest in *avoiding* deciding cancellation applications on their merits, unless Congress has directed that result.

D. The BIA's interpretation does not advance the anti-gaming rationale of the stop-time rule.

To be sure, the stop-time rule has its own purposes, and those purposes also have a claim on whether the

BIA's interpretation is reasonable. *Cf. Martinez Gutierrez*, 566 U.S. at 594 (While the goals of "'providing relief to aliens with strong ties to the United States' and 'promoting family unity' … underlie or inform many provisions of immigration law," these "are not the INA's only goals, and Congress did not pursue them to the *n* th degree"). But here, the BIA's interpretation does not advance the stop-time rule's purposes, either. The First Circuit erred in concluding otherwise.

The First Circuit acknowledged the stop-time rule's *actual* purpose: to prevent immigrants from intentionally delaying removal proceedings to gain eligibility for cancellation. Pet. App. 12a. But the BIA's interpretation here has nothing to do with that purpose. Whether a notice to appear complies with the statute's requirements is entirely within *DHS*'s discretion. Permitting DHS to rely on notices that do not comply with the statute in no way advances the stop-time rule's anti-gaming purpose.

Instead, the First Circuit concluded that the BIA's rule was reasonable in light of a more general concern about "delay and inefficiency" in the immigration process. Pet. App. 13a. According to the First Circuit, the creation of the notice to appear was meant to prevent "protracted disputes concerning whether an alien has been provided proper notice of a proceeding." Pet. App. 13a-14a (quoting H.R. Rep. 104-469, pt. I, at 159 (1996)).

On both counts, the First Circuit got it wrong. The stop-time rule's purpose is not simply to prevent delays *in general*. It is to prevent immigrants from becoming eligible for cancellation *by causing* those delays. *See* H.R. Rep. No. 104-469, pt. I, at 122. Receiving notice of

all the information listed in section 1229(a) in no way enables immigrants to benefit from causing such delays.

To the contrary, the only gaming here, and the only delays, are solely DHS's responsibility. As Pereira explains, when DHS serves documents captioned "notice to appear" with the hearing date and time "to be set" or "to be determined," immigrants obtain hearing dates and times only after DHS files the "notice to appear" with the immigration court, which in turn identifies the hearing date and time. J.A. 9; Pet. App. 3a; Pet'r's Br. 18. DHS, however, does not even view itself as obligated to file this "notice to appear" *promptly*. Instead, DHS often waits *years* to file the notice and proceed with removal.[7] Nothing in the stop-time rule's purposes supports allowing DHS, by the simple expedient of issuing a document captioned "notice to appear," to end an immigrant's residency clock years before it intends to actually *proceed* with showing that the immigrant is removable. *Cf.* 8 C.F.R. § 1239.1 (removal proceeding is commenced "by the filing of a notice to appear with the

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[7] *See, e.g.*, Pet. App. 3a (notice here filed "[m]ore than a year later"); *Camarillo*, 25 I. & N. Dec. at 644-45 & n.1 (notice to appear served in 2005 but not filed until 2007); *Matter of Mendoza-Orozco*, A096 193 299 - LOS, 2009 WL 3063499, at *1 (B.I.A. Sept. 4, 2009) ("[R]espondent was personally served with the Notice to Appear on January 21, 2003," but it "was not filed with the Immigration Court until November 18, 2007, almost 5 years later."); *Matter of Fernandes-De Oliveira*, A098 988 585 - ORL, 2014 WL 3795502, at *2 (B.I.A. June 16, 2014) ("DHS did not file the NTA with the Immigration Court until 2 years after issuing and serving the NTA"); *Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1002 (9th Cir. 2014) (two-year delay); *Le Bin Zhu v. Holder*, 622 F.3d 87, 89 (1st Cir. 2010) (notice to appear served in 2001 and filed in 2003).

immigration court"). Congress commanded the precise opposite: for DHS to serve a notice to appear, DHS must provide the immigrant his or her hearing date and time.

Congress's concern about avoiding "protracted disputes," invoked by the First Circuit, was about something else entirely. "[L]ack of accurate information on alien's addresses" meant that immigrants, after being ordered deported in absentia, often "petition[ed] to reopen … on the grounds that they never received proper notice." H.R. Rep. 104-469, pt. I, at 159. This problem and its solution have nothing to do with DHS's decision to systematically deviate from providing the information required by § 1229(a).

To the extent "protracted disputes" about the adequacy of notice are relevant to this case, they only underscore that DHS's interpretation is unreasonable and violates Congress's clear intent. Congress specifically enumerated the information that a notice to appear must provide. The notice dispute at issue here arose only because DHS has departed from the "single form of notice" established by Congress. H.R. Rep. 104-469, pt. I, at 159. A holding from this Court confirming that DHS must include *all* the information listed in § 1229(a) would end disputes of this sort.

On the other side, even if the BIA prevailed here, its interpretation ensures that protracted disputes will continue. If a notice to appear need not include *all* the information required by § 1229(a) to trigger the stop-time rule, myriad further disputes will follow. Are there any pieces of information that a notice to appear *must* contain? If so, what are they? And how can § 1229(a)'s requirements be sorted into truly mandatory

requirements, on the one hand, and optional requirements, on the other? It is hard to understand how the BIA's interpretation furthers the purpose of avoiding "protracted disputes" when, to affirm that interpretation, the First Circuit had to create a new category of "curable defects," Pet. App. 8a, 13a, leaving to future cases what defects might qualify. *Cf. Urbina*, 745 F.3d at 740 (notice triggered stop-time rule because it "substantially complied" with statute).

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The stop-time rule's anti-gaming rationale thus does not support the BIA's interpretation. But regardless, that would not excuse the BIA or the First Circuit from considering the "the purposes of the immigration laws" as a whole or "the appropriate operation of the immigration system." *Judulang*, 565 U.S. at 55. Yet the BIA and the First Circuit failed to do so, contravening this Court's precedents.

E. The First Circuit erred by ignoring the core purposes of the immigration laws in favor of "administrative context."

Rather than consider cancellation's critical humanitarian purposes, the First Circuit and the BIA relied on "administrative context" and the convenience of sending out notices without information about the time and date of an immigrant's initial hearing. But "administrative context" and convenience are no substitutes for the inquiry that *Judulang* demands.

To start, administrative convenience is not one of the purposes of the immigration laws. Although administrability may sometimes be a relevant factor

that the BIA can consider, it cannot rescue an interpretation that is otherwise arbitrary and capricious, or that is "unmoored from the purposes and concerns of the immigration laws." *Judulang*, 565 U.S. at 64. As *Judulang* explained, "cheapness alone cannot save an arbitrary agency policy." *Id.* Nor is an agency's existing practice a sufficient justification. "Arbitrary agency action becomes no less so by simple dint of repetition." *Id.* at 61.

The BIA's reliance on "administrative context" is especially arbitrary here. The crux of the BIA's "administrative context" rationale is that because "'DHS frequently serves [notices to appear] where there is no immediate access to docketing information'"—because the immigration court, rather than DHS, schedules cases—"'it is often not practical to include the date and time of the initial removal hearing on the notice to appear." Pet. App. 12a (alteration in original) (quoting *Camarillo*, 25 I. & N. Dec. at 648). Per the First Circuit, the BIA's interpretation was reasonable because it accommodated these "practical constraints." *Id.*

But first, it is simply *not true* that DHS has no ability to schedule hearings in advance of sending out notices to appear. The immigration courts have developed an "interactive scheduling system," or "ISS," that "enables the Department of Homeland Security to access the … system data base to enter case data and to schedule the initial master calendar hearing." U.S. Dep't of Justice Executive Office for Immigration Review, Office of the Chief Immigration Judge, Uniform Docketing System Manual at I-2 (Rev. Dec. 2013),

https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual_12_2013.pdf. Then, the "[c]harging documents that have been interactively scheduled by the DHS will bear the date and time of the initial hearing." *Id.* at I-8.

To be sure, *Amicus* is aware that the government has stated in an interrogatory response that "ISS has not been active since approximately May 2014."[8] But that only underscores the more fundamental problem with the BIA's "administrative context" rationale. Even if some logistical problem exists *today*, it is one entirely of the government's own making. DHS and the immigration courts are both executive branch agencies. No law of physics prevents DHS and immigration courts from working together to schedule hearings before sending a notice to appear. One hand just needs to know what the other hand is doing. Indeed, in many jurisdictions, even *traffic tickets* issued by police officers on the spot come with the date and time of an initial hearing.[9] The federal executive branch can surely do as

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[8] *See* Defendant Executive Office for Immigration Review's Responses to Plaintiffs' First Set of Interrogatories at 8, attached as Ex. F to Decl. of Glenda M. Aldana in Support of Motion for Summary Judgment, *Mendez Rojas v. Kelly*, No. 16-cv-1024 RSM (W.D. Wash. Oct. 30, 2017), ECF No. 58-1, https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/mendez-rojas_v_john_son_exhibits_in_support_of_plantiffs_motion_for_summary_pjudgement.pdf.

[9] *See, e.g.*, California Courts, *Traffic & Ticket Basics*, http://www.courts.ca.gov/8452.htm (last visited Feb. 26, 2018) ("Notice to Appear" includes "date given on the ticket"); City of New Orleans, *Municipal and Traffic Court of New Orleans*,

well with notices to appear issued by DHS. And if DHS needs better access to information from the immigration court to provide the information that Congress mandated in § 1229(a), DHS has every ability to obtain it. By contrast, it is a poor excuse indeed for departing from Congress's designated form of notice that two executive branch agencies have chosen not to put forth the effort necessary to carry out Congress's commands.

At bottom, the government's position here boils down to the claim that it is entitled to give short shrift to the plain text of § 1229(a) and § 1229b(d)(1), and the critical humanitarian purposes of cancellation, simply to gain some marginal administrative convenience for DHS. That conclusion is not entitled to deference under *Chevron*, at either Step 1 or Step 2. This Court should reverse.

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https://www.nola.gov/traffic-court/ (last visited Feb. 26, 2018) ("traffic citation … has written the … first appearance date").

CONCLUSION

The judgment of the First Circuit should be reversed.

Respectfully submitted,

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