No. 17-459

IN THE
Supreme Court of the United States

WESCLEY FONSECA PEREIRA,
Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
Respondent.

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

BRIEF FOR *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Immigration Lawyers Association ("AILA") is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and this Court.

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP seeks to improve the quality of justice for immigrants and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), timely notice was provided to counsel of record for all parties, and this brief is accompanied by the written consent of all parties.

and statutory rights. IDP has submitted *amicus curiae* briefs in many key cases before this Court and Courts of Appeals involving the rights of immigrants in the criminal legal and immigration systems. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Vartelas v. Holder*, 566 U.S. 257 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief to highlight important aspects of the statutory and legislative history of the governing law that the BIA, the court below, and respondent have either ignored or misconstrued.

The "stop-time" rule at issue in this case determines whether many noncitizens facing deportation after years of residence in the United States are eligible for a discretionary form of relief called "cancellation of removal." Such relief is open only to the most deserving of applicants. To be eligible, a noncitizen who is not a lawful permanent resident must show that he is a person of "good moral character"; that he has not been convicted of any of a broad range of criminal offenses; that he has an immediate family member who is a U.S. citizen or lawful permanent resident who would suffer "exceptional and extremely unusual hardship" if he were deported; and, finally, that he has maintained a ten-year period of continuous residence in the United States. 8 U.S.C. § 1229b(b)(1).

The "stop-time" rule was created as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 and governs when this ten-year period of continuous residence ends. The statute provides that the period ends upon service of a specific document: a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). And Section 1229(a) requires that this document "shall" specify a list of information about the nature of the impending removal proceedings, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(G).

As the petitioner's brief details, the plain language of the statute is unambiguous and unequivocal: To trigger the stop-time rule, the government must serve a notice to appear that contains specific information required by the statute, including the time and place of removal proceedings. That is, the "notice to appear" must, unsurprisingly, inform the noncitizen when and where to appear. Accordingly, the incomplete document the government served on petitioner, that—in accordance with all-too-common government practice—failed to include the time and place of his removal proceedings, was not a "notice to appear under section 1229(a)" for purposes of triggering the stop-time rule or any other provision of the INA.

Instead of following the plain text of the statute, the court below deferred to the BIA's atextual interpretation, which permits the service of *any document* to trigger the rule, even if the document contains none of the information required by statute to be included in a "notice to appear under section 1229(a)."

The BIA justified its approach by reference to the "statutory structure," its interpretation of the legislative history, and administrative concerns.

Each of the BIA's justifications is entirely arbitrary and meritless on its own terms—but as this brief highlights, the BIA's approach also ignores the history of the statutory sections at issue, and the 1996 Act's relevant legislative history. Before 1996, the INA did not provide for a document called a "notice to appear" to initiate removal proceedings.[2] Instead, it provided for one document referred to as an "order to show cause," and a *separate document* specifically titled a "notice of time and place of proceedings." The statute thus expressly permitted the government to issue one notice with a subset of pertinent information, and then to send a separate notice communicating the time and place of proceedings. The *only change* IIRIRA made to those statutory provisions was to require all of the very same information to be provided in a *single document*, rather than two.

The legislative history confirms that Congress was concerned that errors and complexities in the pre-1996 system of providing notice of impending proceedings had led to intolerable confusion and delay. Congress's solution was just what the text and history of the statute suggest: to require a "single form of notice" to initiate removal proceedings. H.R. Rep. 104-469(I), 1996 WL 168955 at *159.

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[2] Prior to 1996, the proceedings at issue here were referred to as "deportation proceedings"; they are now termed "removal proceedings." For simplicity this brief refers to "removal proceedings" throughout.

The government's primary argument in support of the BIA's approach is that IIRIRA's legislative history shows that Congress created the stop-time rule to address concerns that some immigrants were intentionally delaying proceedings in order to accrue ten years of continuous residence. That is true, but utterly irrelevant to the question at issue in this case. The existence of a stop-time rule based on the government's service of a notice to appear eliminates any possibility of immigrant-caused delays. The question at issue is what *type of notice* is required, and regardless of the outcome of this case, *the government* is wholly in control of the timing and type of notice it issues and therefore when the period of continuous residence ends. And every relevant indicator of Congress's intent concerning the requisite type of notice unambiguously confirms that a notice to appear must be a single notice that includes all the information a noncitizen needs to know at the outset, including when and where to appear. The government's contrary approach simply seeks to cling to the piecemeal notice system permitted under the prior legislative scheme, recreating the very inefficiencies and confusion that Congress specifically sought to eliminate in 1996 by requiring a single, comprehensive form of notice.

A document that does not inform a noncitizen of all the information required by statute, including the "time and place at which the proceedings will be held," is not a "notice to appear under § 1229(a)."

The decision below should be reversed.

ARGUMENT

I. THE STATUTORY AND LEGISLATIVE HISTORY OF IIRIRA CONFIRM THE TEXT'S REQUIREMENT THAT THE DATE AND TIME OF REMOVAL PROCEEDINGS BE INCLUDED IN A NOTICE TO APPEAR

A. The Plain Text Of The INA Requires A Notice To Appear To Include The Date And Time Of Removal Proceedings In Order To Trigger The Stop-Time Rule

On its face, the text of the INA demonstrates that to trigger the stop-time rule, a notice to appear must contain the date and time of removal proceedings.

As noted above, one requirement for eligibility for cancellation of removal is that a noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the" cancellation application. 8 U.S.C. § 1229b(b)(1)(A). Under the stop-time rule, that period of continuous residence ends upon service of a single, specific document: a "notice to appear under section 1229(a)." *Id.* § 1229b(d)(1).[3] Sec-

[3] Section 1229b(d)(1) also provides that the stop-time rule is triggered when an immigrant commits certain enumerated crimes. Specifically, continuous residence is deemed to end upon service of the "notice to appear under 1229(a)" or "when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." 8 U.S.C. § 1229b(d)(1). This portion of the provision is not at issue in this case, but it provides support for petitioner's reading of the stop-time rule: It makes no sense to read out the

tion 1229(a), in turn, defines a "notice to appear" as a "written notice . . . specifying" certain information, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(A)-(G). Thus, Congress provided in § 1229(a) for a single "notice to appear" containing all information relevant to the newly-initiated removal proceedings, whose receipt by a noncitizen terminates his period of continuous residence.

The question of statutory interpretation at issue in this case is straightforward: whether the government can trigger the stop-time rule, cutting off a noncitizen's period of continuous residence, by serving a purported "notice to appear" that *lacks* a central element of section 1229(a)'s statutorily mandated definition of what constitutes a notice to appear. The plain text of § 1229b(d)(1) provides a clear answer: the government can only effectively trigger the stop-time rule by serving a "notice to appear *under section 1229(a)*." *Id.* § 1229b(d)(1) (emphasis added). And section 1229(a) plainly defines a "notice to appear" as a document that "shall" contain every piece of information Congress deemed relevant to the initiation of removal proceedings, including the "time and place at which the proceedings will be held." *Id.* § 1229(a)(1)(G). There is no ambiguity. A document that does not inform a noncitizen of the "time and place at which the proceedings will be held" is not a "notice to appear under § 1229(a)." Indeed, a document lacking that information fails to

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substantive content of one statutorily enumerated provision ("under section 1229(a)") but continue to give weight to others in the same statute ("referred to in section 1182(a)(2)").

convey the one thing that would seem most central to any document titled a "notice to appear," namely, *when and where to appear*.

"Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise." *Caminetti v. United State*s, 242 U.S. 470, 485 (1917); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment) (collecting cases for the "venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity"). The plain text of the statute requires reversal.

B. Statutory History Confirms That Congress Intended For The Notice To Appear To Be A Single Document Including Date And Time Of Proceedings

The plain meaning of the text—that Congress intended for the government to issue a single "notice to appear" with all relevant information the noncitizen requires regarding his removal proceedings, specifically including the date and time of proceedings—is confirmed by the statutory history. Prior to the enactment of IIRIRA in 1996, the governing statute clearly provided for two separate notices regarding the initiation of removal proceedings.

The statute first provided for a notice called an "Order to show cause," which was required to include much of the information in the current § 1229(a), including "[t]he nature of the proceedings against the alien," "[t]he legal authority under which the proceedings are conducted," "[t]he acts or conduct al-

leged to be in violation of law," "[t]he charges against the alien and the statutory provisions alleged to have been violated," that "[t]he alien may be represented by counsel," "[t]he requirement that the alien must immediately provide (or have provided) the Attorney General with a written record" of their contact information and any change in that contact information, and "[t]he consequences . . . of failure to provide" such information. 8 U.S.C. § 1252b(a)(1)(A)-(F) (repealed 1996). But the order to show cause was *not* required to include the time and date of proceedings.

Instead, in a second, separate subsection, the statute explicitly provided for a second type of notice: a "Notice of time and place of proceedings." 8 U.S.C. § 1252b(a)(2) (repealed 1996). That notice was required to convey "the time and place at which the proceedings will be held," and the consequences of failing to appear. *Id.* The government was permitted, but not required, to combine that document with the order to show cause. *Id.* § 1252b(a)(2)(A) (repealed in 1996) (notice of time and place to be provided "in the order to show cause *or otherwise*" (emphasis added)); *see also Santos-Quiroa v. Lynch*, 816 F.3d 160, 162 n.2 (1st Cir. 2016) ("Although it could do so, an [order to show cause] did not have to set forth the hearing date, notice of which could be sent separately."). The statute also provided certain requirements for "[e]ach order to show cause *or other notice under this subsection*," confirming again that the statute contemplated separate notices. 8 U.S.C. § 1252b(a)(3) (repealed 1996) (emphasis added).

When Congress passed IIRIRA, it directly replaced the two separate notices with a single notice, the "notice to appear." The statute now requires the notice to appear to contain *all* of the exact same information that was required in an "order to show cause," *compare id.* § 1252b(a)(1)(A)-(F) (repealed 1996), *with id.* § 1229(a)(1)(A)-(F), but also contains one conspicuous change: IIRIRA *deletes* the separate subsection providing for a "notice of time and place of proceedings" and instead requires that the "time and place at which the proceedings will be held" be included in the single notice to appear. *Id.* § 1229(a)(1)(G). The amendment, in other words, condensed the dual-notice structure of the prior scheme into a single notice that now *explicitly requires* the date and time to be included along with all of the preexisting requirements. IIRIRA made what was optional in the order to show cause a requirement for a notice to appear.

Indeed, the government itself appeared to recognize that requirement initially: When it updated its form order to show cause to be a "notice to appear" in compliance with IIRIRA, the government added a space for the time and place of hearing to be entered. *Compare* Department of Justice, INS Order to Show Cause and Notice of Hearing Form I-221, https://www.justice.gov/eoir/ins-order-show-cause-and-notice-hearing-form-i-221 (lacking a field for date and time) *with* Department of Justice, DHS Notice to Appear Form I-862, https://www.justice.gov/eoir/dhs-notice-appear-form-i-862 (containing a field for the date and time). Yet

in practice the government simply leaves that space blank.

Congress's change in the statutory structure was presumptively deliberate and intended to effect real change, particularly given that it was the only change in an otherwise identical provision. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *compare* 8 U.S.C. § 1252b(a)(1)(A)-(F) (repealed 1996), *with id.* § 1229(a)(1)(A)-(G). And the change confirms again the plain language of the statute: Congress explicitly and deliberately required a single document to initiate removal proceedings properly, and that document must contain the date and time those proceedings will commence. The statutory history therefore further refutes any suggestion that the statute is ambiguous on this point. If Congress wanted to allow the government to provide notice of date and time of the removal hearing separately from the notice to appear, it could have said so. Indeed, Congress conspicuously removed from the pre-IIRIRA statute language permitting just that approach. That statutory history confirms the plain text's command that a notice to appear must be a single document containing the date and time of proceedings.

C. Legislative History Confirms That Congress Deliberately Required A Single Notice Including All Relevant Information

The legislative history of IIRIRA confirms again that Congress's decision to require a single form of

notice to initiate removal proceedings, as opposed to the multiple-notice regime that previously prevailed, was deliberate, purposeful, and designed to foreclose the type of government practice at issue in this case.

One of Congress's primary aims in enacting IIRIRA was to streamline and simplify removal proceedings. *See, e.g.*, H.R. Rep. 104-469(I), 1996 WL 168955 at *157 (describing reform of removal procedures as "streamlin[ing] rules and procedures . . . to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens"). That aim manifested in several areas of the statute. For example, Congress combined various forms of proceedings into a single form of proceeding called "removal." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 349-50 (2005). Congress also limited judicial review of those proceedings. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

Congress's choice to replace the dual-notice system and to instead require the government to provide all of the information related to a noncitizen's removal proceedings in a single notice was another specific manifestation of that general goal of streamlining and simplifying removal proceedings. Part of Congress's goal in passing the statute was to reduce administrative inefficiency and delay. For example, during a hearing concerning potential reforms, Representative Lamar Smith voiced the need to "encourage changes that need to be made at the INS and EOIR to make our removal system credible" and "look at legislative reforms to streamline the removal process." *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and*

Claims, 104th Cong. 1 (1995) (statement of Chairman Lamar Smith); *see also* 142 Cong. Rec. H2374 (March 19, 1996) (statement of Rep. Dreier) (highlighting the need to "[s]treamline [the] deportation process to reduce time to process cases").

Congress was concerned, in part, with procedural issues in notifying immigrants about hearings that led to delays in proceedings and immigration judges declining to order removal of immigrants who failed to appear for hearings. A report of the Judiciary Committee of the House of Representatives outlined several procedural issues that the legislation would address, including the fact that "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [have led] some immigration judges to decline to exercise their authority to order an alien deported in absentia." H.R. Rep. 104-469(I), 1996 WL 168955 at *122. Such lapses were due in large part to the piecemeal notice system in place prior to IIRIRA, and judges' resulting hesitance in issuing in absentia orders could only have been a result of legitimate concerns that immigrants did not receive adequate notice of their hearing.

In order to address these concerns, Congress replaced the preexisting dual-notice system with a single notice to appear that must contain all required information in one document. The House Judiciary Committee Report described the proposed legislative reforms, including the specific change from the old older to show cause scheme to the new notice to appear statute, as follows: "[Section 1229] also will simplify procedures for initiating removal proceedings against an alien. *There will be a single form of*

notice. . . ." H.R. Rep. 104-469(I), 1996 WL 168955 at *159 (emphasis added). Congress's concern over procedural delays thus motivated its choice to streamline the multiple initiating notices into a single document.

To be sure, Congress also created the stop-time rule itself as part of IIRIRA to address concern over immigrants drawing out hearings in order to accrue the requisite continuous residency to qualify for relief from removal. *See, e.g.*, H.R. Rep. 104-469(I), 1996 WL 168955 at *122 (describing attempts by noncitizens "to delay proceedings" for that purpose); Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief? The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(a) of the Immigration and Nationality Act,* 15 GEO. IMMIGR. L.J. 1, 2 (2000) ("Congress enacted the 'stop-time' rule because of dilatory tactics employed by aliens in acquiring the minimum period of residence necessary for relief eligibility."). But as explained *infra* at Part II.C, although the government has relied on that general congressional purpose for creating the stop-time rule, that purpose has nothing to do with the issue in this case. Here, the question is what *type of notice* suffices to trigger that stop-time rule. There is now a stop-time rule, whose operation the government controls entirely. And the only legislative history pertinent to the actual question in this case is the material just discussed, which confirms that Congress also intended to impose new procedures *on the government* in order to improve efficiency and streamline the overall hearing process, including by specifically requiring the government to provide a

single form of notice to initiate removal proceedings. Indeed, in requiring the government to serve a single notice, Congress recognized that part of streamlining removal meant ensuring that immigrants had all the relevant information necessary in a single document to seek advice and then to prepare for and attend their removal proceedings.

This legislative history thus reaffirms the clear text of the statute: Congress intended for the notice to appear to be a single document containing all relevant hearing information, including the date and time of proceedings.

II. THE RULE ENDORSED BY THE COURT BELOW IS INCORRECT

For all of the foregoing reasons, the First Circuit's conclusion that the statute was ambiguous, and therefore that the BIA's reading was entitled to deference, was erroneous. The statutory text and other interpretive guides confirm beyond any doubt that to initiate removal proceedings and trigger the stop-time rule, the government most serve a notice containing all of the statutorily required components of a "notice to appear under section 1229(a)." Because there is no ambiguity—even without resort to other important interpretive tools such as the rule requiring that ambiguities in removal statutes be construed in favor of aliens—the BIA is not entitled to deference. *See, e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (*citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

The specific arguments the First Circuit and BIA advanced in support of the contrary result are all severely misguided.

A. The First Circuit Improperly Concluded That The Statutory Text And Structure Create An Ambiguity

1. The BIA relied on a puzzling misreading of the clear text of the INA to conclude that the statute is ambiguous. The BIA reasoned that while it is "plausible" that the phrase "notice to appear" under section 1229(a) means that a notice must contain all of the statutorily enumerated requirements to trigger the stop-time rule, it also could be "simply definitional." *Matter of Camarillo*, 25 I. & N. Dec. 644, 647 (BIA 2011). That is, the BIA read § 1229b(d)(1) as merely "specif[ying] the document the DHS must serve on the alien to trigger the 'stop-time' rule," but not imposing *any* "substantive requirements for a notice to appear to be effective in order for that trigger to occur." *Id.* The First Circuit summarily agreed that the language was ambiguous, holding that § 1229b(d)(1)'s "reference to a notice to appear 'under' § 1229(a) does not clearly indicate whether the rule incorporates the requirements of that section." Pet. App. 9a. Of course, that is precisely what § 1229b(d)(1) does: It "clearly indicate[s]," *id.*, that in order to trigger the stop-time rule, the government must serve a notice to appear "*under* 1229(a)," that is, a notice to appear as defined by that section. 8 U.S.C. § 1229b(d)(1) (emphasis added). There would have been no reason to specify that the stop-time rule is triggered by service of a "notice to appear under section 1229(a)"—as opposed to, say, "a

notice"—if the statute were in fact satisfied by the service of any document at all.

Indeed, the BIA's reading unavoidably leads to just that absurd result, further indicating that it is contrary to Congress's intent. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd. . . . We do not assume that Congress, in passing laws, intended such results.") (internal citations omitted). Because the government's interpretation reads the "specifying" clause out of the statute, it necessarily means that a "written notice" of *anything or nothing at all* could qualify as a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The Third Circuit raised this issue, noting that "[t]aken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information whatsoever as a 'stop-time' trigger, permitting the government to fill in the blanks (or not) at some unknown time in the future." *Orozco-Velasquez v. Lynch*, 817 F.3d 78, 84 (3d Cir. 2016).

The court of appeals below dismissed this concern in a footnote, suggesting that though "this case does not require [the court] to define the boundaries of [their] deference to the agency's statutory construction," *some* of the information "specified" in section 1229(a) might be required in order to trigger the stop-time rule, just not the date and time of the removal hearing. Pet. App. 8a-9a n.5. This suggestion is meritless: The "specifying" clause either has force or not, and both the plain text of the statute and common sense dictate that it does. That the BIA's

reading has unavoidable implications so absurd that the First Circuit realized the necessity of disclaiming them, but could offer no rationale whatsoever for doing so, is reason enough to reverse the decision below.

2. The BIA and the First Circuit also pointed to the "statutory structure," and in particular the purported "breadth" of § 1229b(d)(1)'s "reference to the entirety of" § 1229(a) rather than specifically to § 1229(a)(1). *Camarillo*, 25 I. & N. Dec. at 647. Section 1229(a)(1) defines the necessary requirements for a notice to appear, including the date and time. 8 U.S.C. § 1229(a)(1). But the BIA asserted that because § 1229(a) also includes § 1229(a)(2), which "outlin[es] the procedures to follow when notice must be given of" *changes* in the date and time, the stop-time rule should not be read to refer to the substantive requirements of 1229(a)(1). *Camarillo*, 25 I. & N. Dec. at 647-48.

The conclusion simply does not follow from the premise. Although the stop-time rule refers to § 1229(a) generally, it specifically states that the time of accrual of physical presence "shall be deemed to end ... when the alien is served *a notice to appear*." 8 U.S.C. § 1229b(d)(1) (emphasis added). Section 1229(a)(1) defines a notice to appear. Section 1229(a)(2) does not. Section 1229(a)(2) governs only a "notice of *change* in time or place of proceedings," and is therefore irrelevant to the requirements for triggering the stop-time rule. The BIA also noted that "Congress envisioned that circumstances beyond the control of the DHS would require a change in the hearing date and specifically provided that

such notification could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 648. True enough. But it does not follow that Congress thus did not intend for "a notice to appear under 1229(a)" to include all of the requirements specified in § 1229(a)(1) in order to trigger the stop-time rule. If anything, that Congress envisioned the potential for a *change* in date and time of which the government would have to provide notice indicates that Congress assumed the notice to appear would *already have communicated* an initial date and time.

Notably, although they did assert these misguided arguments about the "statutory structure," neither the court below nor the BIA addressed the statutory *history* of section 1229(a). As described *supra* in Part I.B, that history clearly confirms Congress's intent to unify the pre-existing, piecemeal notice structure and create a single notice to appear containing all the relevant hearing information.

B. "Administrative Context" Does Not Support The Government's Rule

The BIA next relied on what the court below called "administrative context," which includes DHS regulations and administrative practice, to support its counter-textual reading of the stop-time rule. According to the BIA, a DHS regulation "further supports [its] reading because it expressly provides that the time, place, and date of an initial removal hearing shall be provided in the notice to appear only where practicable." *Camarillo*, 25 I. & N. Dec. at 648 (internal quotations omitted); *see also* 8 C.F.R. § 1003.18(b). That regulation, however, is invalid, because it conflicts with the text of the INA, which *re-*

quires that a "notice to appear" specify the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i); *see also supra*, Part I.

Indeed, the regulation is an obvious attempt to preserve the specific feature of the pre-1996 regime that Congress specifically eliminated—namely that it allowed, but did not require, an order to show cause to include the date and time of an initial removal hearing. Notably, the regulatory language on which the government relies to justify its continued adherence to the piecemeal notice system was added only *after* Congress enacted IIRIRA and the requirement of a single, unified initiation notice. *Compare* Aliens and Nationality, Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931 (1987), *with* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312 (1997). The government cannot circumvent a statutory command simply by enacting a regulation that defies it.

The BIA and the First Circuit also asserted that the government's administrative practices supported its interpretation of the statute. "While DHS drafts and serves the notice to appear," the First Circuit explained, "the immigration court sets the date and time of the hearing." Pet. App. 12a; *see also* 8 C.F.R. § 1003.18(a). As a result, the BIA noted, "DHS frequently serves [notices to appear] where there is no immediate access to docketing information," so "it is often not practical to include the date and time of the initial removal hearing on the notice to appear." *Camarillo*, 25 I. & N. Dec. at 648 (internal quotation

and citation omitted). The court below concluded that "[a]n interpretation of the statute that allows the stop-time rule to take effect without requiring separate action by the immigration courts would, therefore, accommodate these practical constraints." Pet. App. 12a.

Those observations provide no justification for the government's rule. First, administrative practices that contravene Congress's clear directives are just as irrelevant as a regulation that does so. Further, for these asserted "practical constraints" to be relevant to interpreting the statute, there must at least be some basis to believe Congress could have foreseen them. But that is simply not the case here.

As BIA noted, DHS frequently serves notices to appear "where there is no immediate access to docketing information," *Camarillo*, 25 I. & N. Dec. at 648 (internal quotation and citation omitted), because the date and time of the hearing is set by the immigration courts, a separate entity—the Executive Office for Immigration Review—housed in a separate agency—the Department of Justice. But this split did not occur until 2003, when Congress created the Department of Homeland Security, disbanded the Immigration and Naturalization Service (INS), and moved the INS's enforcement and removal operations over to DHS. *See* Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135. When Congress passed IIRIRA in 1996, the enforcement and removal operations of DHS were functions of the INS, which was, at the time, part of the same agency as the immigration courts. In other words, the

"practical concerns" the government cites *did not exist* when Congress passed IIRIRA in 1996.

Even if such administrative concerns were relevant to the interpretation of the stop-time rule, they are surely surmountable. Practical experience and common sense confirm that government agencies are able to coordinate with one another to serve a notice of judicial proceedings with a time and place for a hearing, from parking ticket enforcement agencies to police departments issuing summons. DHS—a federal agency with a discretionary budget of more than $42 billion[4]—should be able to do the same.

C. The Government's Rule Is Contrary To The Legislative History And Reintroduces Precisely The Problem Congress Aimed To Cure In The 1996 Reform

1. *The court below relied on legislative history that actually contradicts its conclusion.*

The court below recounts BIA's reliance on legislative history showing that the stop-time rule was created in response to concern over immigrants delaying removal proceedings in order to accrue sufficient continuous residency to be eligible for relief from removal. Pet. App. 12a-13a.

That legislative history is entirely irrelevant to the question in this case, which is not whether there

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[4] Department of Homeland Security, Fact Sheet: The Fiscal Year 2017 Budget (May 15, 2017), https://www.dhs.gov/news/2017/05/15/fact-sheet-fiscal-year-2017-budget-0.

should be a stop-time rule—because of IIRIRA, there is—but rather what type of notice should *trigger* that rule. The stop-time rule was indeed designed to prevent immigrants from delaying removal proceedings in the hopes of satisfying the requisite period of continuous residency. *Id.*; *see also supra* Part I.C. But petitioner's rule does not allow immigrant-caused delay, and the government's rule does nothing to prevent it—whoever wins this case, *the government* is entirely in control of when the continuous residence clock stops. Under either party's approach, the government's actions alone determine when the stop-time rule is triggered. The BIA disregarded the clear text of the statute—requiring a single, complete notice to appear in order to trigger the stop-time rule—to address a problem that was already solved.

The appropriate rule should, however, reflect Congress's overarching purpose in enacting IIRIRA: to address concerns over delay and inefficiency in removal proceedings more broadly. The court below correctly noted that "[t]he legislative history reflects Congress's concern about delay and inefficiency in the immigration process that it sought to address through the enactment of IIRIRA." Pet. App. 13a. Indeed, the court below highlighted the House Judiciary Committee Report described above, which notes how "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [had led] some immigration judges to decline to exercise their authority to order an alien deported in absentia." *Id.* (quoting H.R. Rep. 104-469(I), 1996 WL 168955 at *122.) The court then noted, however,

that "[t]he creation of the 'notice to appear' was intended to prevent 'protracted disputes concerning whether an alien has been provided proper notice of a proceeding' *by informing aliens that they are required to notify the government of any changes in their contact information*." *Id.* at 13a-14a (emphasis added). But that cannot have been the purpose of the new "notice to appear," because orders to show cause were *already required* to tell immigrants the very same thing. 8 U.S.C. § 1252b(a)(1) (repealed 1996). What the pre-IIRIRA statute did *not* include, that IIRIRA explicitly added, was the requirement that the notice to appear contain the date and time of proceedings. *See supra* Part I.B. Thus, the legislative history indicates that Congress intended to prevent protracted disputes concerning proper notice by creating a single, streamlined notice process that includes the date and time of proceedings.

2. *The government's rule reintroduces precisely the problem the 1996 reform was designed to solve.*

The court below concluded that "[g]iven Congress's intent in enacting IIRIRA to prevent notice problems from dragging out the deportation process, it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS." Pet. App. 14a. That reasoning is backwards. Given Congress's desire "to prevent notice problems from dragging out the deportation process," *id.*, it would make little sense for Congress to have

endorsed a rule *that would do just that*. The government's rule creates perverse incentives that encourage the government to drag out the removal process: If the government can stop the clock on the continuous residence requirement by sending a document without a hearing date, it reduces the imperative to calendar matters and move the process along. That incentive to delay is especially concerning in light of the absence of any legal requirement ensuring prompt proceedings: Unlike in the criminal context, where the Speedy Trial Act ensures prompt prosecution of charges, *see* 18 U.S.C. §§ 3161-3174, and unlike in litigation governed by the Federal Rules of Civil Procedure, immigration law provides no assurance that the government will carry removal proceedings forward expeditiously.

In short, the BIA's approach is itself directly at odds with Congress's general intent to streamline and expedite the removal process. That approach does nothing at all to serve that intent, but instead simply penalizes deserving immigrants for *the government's delay* and failure to provide the unified, adequate notice required by the statute. If the government were to follow the plain command of the statute, that in itself would expedite the removal process: The statute provides incentives to timely calendar removal hearings in order to provide the unified notice required by statute to trigger the stop-time rule.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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