No. 19-863

IN THE
Supreme Court of the United States

AGUSTO NIZ-CHAVEZ
Petitioner,
v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth 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," the government can end those periods of continuous residence by serving "a notice to appear under section 1229(a)," which, in turn, defines "a 'notice to appear'" as "written notice … specifying" specific information related to the initiation of a removal proceeding. *Id.* §§ 1229b(d)(1), 1229(a)(1). In *Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018), this Court held that only notice "in accordance with" section 1229(a)'s definition triggers the stop-time rule.

The question presented in this case is:

Whether, to serve notice in accordance with section 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.

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Department of Homeland Security, *Yearbook of Immigration Statistics 2018* (FY 2018), https://www.dhs.gov/immigration-statistics/yearbook/2018/table6 27

Executive Office for Immigration Review, United States Department of Justice, *Statistics Yearbook* (FY 2018), https://www.justice.gov/eoir/file/1198896/download..... 27

Office of the Chief Immigration Judge, Executive Office for Immigration Review, United States Department of Justice, *Uniform Docketing System Manual* (rev. Dec. 2013), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual_12_2013.pdf..... 29, 30

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Amicus National Immigrant Justice Center ("NIJC") agrees with Petitioner on the correct interpretation of the statute. Section 1229b(d)(1) provides that an immigrant's residency clock stops only when (as relevant here) the government "serve[s] a notice to appear under section 1229(a)." Section 1229(a) defines a "notice to appear" as "written notice … specifying" (among other things) "[t]he time and place at which the proceedings will be held." That means, to trigger the stop-time rule, the government must *actually serve* "a notice" containing all the required information. Until then, the immigrant's "period of continuous residence or continuous physical presence" is not "deemed to end." 8 U.S.C. § 1229b(d)(1).

The statute does not permit the government to stop an immigrant's residency clock via the cobbled-together process the government has invented instead, under which the Department of Homeland Security serves a document entitled "notice to appear" (but lacking the time and place of the hearing) and the immigration court then issues a "notice of hearing" (but lacking all the *other* information the statute requires, including the "charges against the alien," the immigrant's right to counsel, and

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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 *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

a "list of counsel," *id.* § 1229(a)(1)). Immigrants facing removal from what may be the only country they have ever known are entitled to the "notice to appear" that Congress by statute required, not a constructive notice existing only in the government's imagination.

NIJC, however, writes to draw attention to a broader problem. The courts considering the interpretation given to the statute by the Board of Immigration Appeals ("BIA") have done so under the rubric of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Likewise, the government in its Brief in Opposition has asked for *Chevron* deference. Br. in Opp. 13. NIJC agrees with Petitioner that the Court should reconsider, if necessary, whether deference is *ever* due to the BIA's interpretations of the INA. Pet. Br. 51-54. But even if *Chevron* principles apply in general, the courts and judges that have endorsed the BIA's position have—at every turn—failed to provide the scrutiny *Chevron* demands.

In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), Justice Kennedy sounded the alarm that in "according *Chevron* deference to the BIA[] …, some Courts of Appeals have engaged in cursory analysis" that "suggest[ed] an abdication of the Judiciary's proper role." *Id.* at 2120 (Kennedy, J., concurring). So great was Justice Kennedy's concern that he suggested that it might be "necessary and appropriate to reconsider … the premises that underlie *Chevron* and how courts have implemented that decision." *Id.* at 2121. Since then, this Court has repeatedly reaffirmed that *Chevron* is not a rubber stamp. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18

(2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358–59 (2018).

Yet in immigration cases, the Courts of Appeals all too often still fail to heed those mandates. At *Chevron* Step 1, the controlling Sixth Circuit decision disregarded this Court's instruction that "deference is not due unless a court" finds ambiguity after "employing traditional tools of statutory construction." *Epic Sys.*, 138 S. Ct. at 1630. Those traditional tools include a statute's history. Yet neither the BIA, nor any of the judges who have endorsed its reading, have addressed a critical piece of history: In drafting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress expressly jettisoned the two-step process that prevailed under the prior law—under which the government first served an "order to show cause," and the immigration court later sent notice of the hearing's time and place—and replaced it with a single "notice to appear." A court that ignores a statute's history is doomed to misconstrue its meaning.

Likewise, none of the courts that have embraced the BIA's position have addressed the canon that ambiguities in deportation statutes must be construed in favor of the noncitizen. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001). Yet this Court has reiterated that "[w]here … the canons supply an answer, *Chevron* leaves the stage." *Epic Sys.*, 138 S. Ct. at 1630.

Reviewing courts have also abandoned the scrutiny *Chevron* requires at Step 2. The Sixth Circuit held that so long as the statute was ambiguous, it had to defer

under *Chevron*. *Garcia-Romo v. Barr*, 940 F.3d 192, 205 (2019). But as *Judulang v. Holder*, 565 U.S. 42 (2011), explained, courts must ensure that the BIA's interpretation is *reasonable*. And this reasonableness standard has teeth—requiring, among other things, that the agency's interpretation be "based on a consideration of the relevant factors," including relevant canons of interpretation and "the purposes and concerns of the immigration laws." *Id.* at 53, 64. An interpretation that is "unmoored from" those considerations cannot stand, even if the text does not foreclose it. Here, however, the BIA ignored the governing canons of construction, disregarded the important purpose that Congress sought to further by requiring notice *in one document*, and ignored the critical "humanitarian" purpose cancellation of removal serves. *INS v. Errico*, 385 U.S. 214, 225 (1966).

Indeed, the BIA and the Sixth Circuit also ignored how their interpretations conflict with the governing regulations. Under those regulations, *only* designated DHS "officers … may issue a notice to appear," and the list does not include immigration courts or immigration judges. 8 C.F.R. § 239.1. The result, as the BIA previously recognized, is that "a notice of a hearing issued by the Immigration Court" cannot be "a constituent part of a notice to appear, the charging document issued *only* by the DHS." *Matter of Camarillo*, 25 I. & N. Dec. 644, 648 (B.I.A. 2011). Yet under the BIA's newfound interpretation, it is immigration courts and immigration judges that issue notices to appear, by providing the time and place information rendering the notices complete. The BIA

has never so much as acknowledged this inconsistency, much less justified it. For this reason, too, the Sixth Circuit erred in deeming the BIA's interpretation "reasonable."

NIJC has a deep understanding of these issues, and a significant interest in correcting these errors. 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

I.A. As Petitioner shows, the government can stop an immigrant's residency clock only by serving "a notice to appear." 8 U.S.C. §1229b(d)(1). "[A] notice to appear" means a single notice providing all required information, not a collection of different documents, sent by different entities, perhaps years apart.

B. The Sixth Circuit, and the other courts and judges to endorse the BIA's reading, have failed to heed

this Court's mandate to consider at *Chevron* Step 1 all the traditional tools of statutory construction.

C. For one thing, these courts and judges have ignored Congress's considered choice to replace the two-step notice process that prevailed before IIRIRA with "a notice to appear" containing all required information. This history is core Step 1 evidence. For another, these courts and judges have ignored the history of the "notice to appear" as a *charging* document. The BIA has long understood, and DHS's regulations expressly provide, that only prosecutorial officers can issue this document—and immigration courts cannot.

D. In immigration cases, circuit courts routinely fail to provide the scrutiny this Court's cases demand. It is thus essential to reaffirm the rigor of *Chevron*'s first step.

E. The Sixth Circuit also erred by failing to apply, at Step 1, the canon that ambiguities in deportation statutes must be construed in favor of immigrants.

II.A. The Sixth Circuit erred at *Chevron* Step 2 by asking only whether the BIA's interpretation was linguistically possible. Deference is due at Step 2 only if an interpretation is "reasonable."

B. The BIA's interpretation is unreasonable, first, because it failed to consider the deportation canon—which is at least a relevant consideration at Step 2.

C. The BIA's interpretation is also "unmoored from the purposes and concerns of the immigration laws." *Judulang*, 565 U.S. at 64. The BIA failed to consider the important purposes served by providing notice *in one*

document, as well as cancellation-of-removal's critical humanitarian purposes.

D. The government cannot prevail by claiming that the BIA's two-step approach is more convenient. Cheapness alone can never save an agency policy. Moreover, the government is perfectly capable of providing all the required information in a single "notice to appear" and has previously created systems to do so.

E. Last, the BIA unreasonably failed to consider how its new interpretation violates the governing regulations and the BIA's own decisions reiterating that the "notices of hearing" issued by immigration courts cannot serve as any part of "a notice to appear."

ARGUMENT

I. THE SIXTH CIRCUIT ERRED AT *CHEVRON* STEP 1 BY FAILING TO APPLY THE TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION.

A. The Text, Structure, And History Of The Stop-Time Rule Resolve This Case In Petitioner's Favor.

If an immigrant has ten years of continuous U.S. presence (for non-permanent residents) or seven years of continuous residence (for permanent residents), he or she is entitled to apply for cancellation of removal. As relevant here, the "stop-time rule" ends the immigrant's accrual of time when the government has served the immigrant "a notice to appear." 8 U.S.C. § 1229b(d)(1); *see id.* § 1229b(a)-(b). The statute defines a notice to appear as a "written notice … specifying" certain

information, including the "nature of the proceedings against the alien," the "charges against the alien and the statutory provisions alleged to have been violated," a statement that the "alien may be represented by counsel" along with "a current list of counsel," and "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1); *see Pereira* 138 S. Ct. at 2116 (calling this section "quintessential definitional language").

The Department of Homeland Security (DHS) ignored this aspect of the statute for many years and proceeded on the premise that, to trigger the stop-time rule, notices to appear need not include this information. Instead, DHS determined that its notices to appear would provide the "time, place and date" only "where practicable"—which turned out to be practically never. *Pereira* rejected this approach, holding that a "putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a),' and so does not trigger the stop-time rule." 138 S. Ct. at 2113-14.

Two years later, however, DHS continues to resist serving "a notice to appear" that meets the requirements Congress by statute imposed. Instead, DHS serves a document *entitled* "notice to appear" that continues to lack the time and place of the hearing. Then, perhaps months or years later, the immigration court issues what it calls a "notice of hearing," which lacks all the *other* information the statute requires of a "notice to appear," including the charges, the immigrant's right to counsel, and a list of lawyers the immigrant may consult. 8 U.S.C. § 1229(a)(1). So, when immigrants—whose English may be limited—receive

the document telling them where they must appear to fight for their lives in this country, they may have no idea about the nature of the charges, the right to an attorney, or where an attorney may be found. Yet nonetheless, DHS contends that its putative (but defective) "notice to appear" combines with the immigration court's "notice of hearing" to become a "notice to appear under section 1229(a)." The BIA agrees.

NIJC agrees with Petitioner that the statute unambiguously forecloses this 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). And "a notice to appear" means a single notice providing all required information, not a collection of different documents, sent by different entities, perhaps months or years apart that—when amalgamated—provide the necessary information.

NIJC, however, writes to highlight a larger issue. In endorsing the approach of DHS and the BIA, the Sixth Circuit—and other courts and judges reaching the same result—have failed to provide the scrutiny this Court's caselaw demands at *Chevron* Step 1.

B. At *Chevron* Step 1, Courts Must Apply All The Traditional Tools Of Statutory Interpretation.

Each court and judge to endorse the BIA's position has applied similar reasoning. When the statute requires "a notice to appear," these courts and judges read this phrase as not "necessarily" requiring "that the notice be given in a single document"—meaning it is linguistically possible to give "a" notice in multiple

documents. *E.g.*, *Garcia-Romo*, 940 F.3d at 201. And providing the required information in multiple documents, these courts and judges add, serves Congress's purpose well enough. *Id.* On that basis, these courts and judges have either deferred to the BIA under *Chevron* or affirmatively embraced the BIA's interpretation. *Id.* at 201, 204; *see Pierre-Paul v. Barr*, 930 F.3d 684, 691 (5th Cir. 2019), *cert. denied*, 206 L. Ed. 2d 854 (2020); *Lopez v. Barr*, 925 F.3d 396, 407, 409 (9th Cir. 2019) (Callahan, J., dissenting), *reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020); *accord Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, 531 (B.I.A. 2019) (a two-step process fulfills the "fundamental purpose of … convey[ing] essential information to the alien").

This is not how *Chevron* Step 1, or statutory construction, works—in immigration cases or any others. *Chevron*'s first step commands courts to use all "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). Those tools include not just the plain meaning of the narrowest textual phrase at issue—here, "a notice"—but also the statute's structure, context, history, and purpose. *See id.* at 449.

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. The Court did not, at that point, reflexively defer to the BIA. Nor did it make its own best guess based on which dictionary definition it believed was superior. Instead, the Court 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.

C. The Sixth Circuit Erred By Ignoring The History Of Notices To Appear.

Here, the courts and judges that have embraced the BIA's position overlooked a host of traditional tools of interpretation, as detailed at length in Petitioner's brief. NIJC, however, wishes to focus the Court's attention on one omission in particular: The failure to consider the *history* of the phrase "a notice to appear."

Elimination of two-step notice. First, the Sixth Circuit failed to consider that, in creating "a notice to appear," Congress deliberately replaced the two-step notice process that prevailed before.

As Petitioner explains, the "notice to appear" was a revision to the pre-IIRIRA system, under which removal proceedings began with an order to show cause that did not have to contain the time and place of the

immigrant's hearing. *See* 8 U.S.C. § 1252b(a)(1) (1994). Before IIRIRA, the statute defined an order to show cause in almost the same terms as the current "notice to appear"—except for one key difference: The statute did not require the order to show cause to identify the time and place at which the proceedings would be held. 8 U.S.C. § 1252b(a)(2)(A) (1994). Rather, that information could be provided "in the order to show cause, *or otherwise*." *Id.* (emphasis added). This yielded a two-step notice process under which the government first served an "order to show cause" and the immigration court later sent the time and place of the hearing. Pet. Br. 35-38.

In IIRIRA, Congress explicitly rejected this two-step notice system. Congress amended the statute to add "[t]he time and place at which the proceedings will be held" to the list of items the notice document must specify, and changed it from an order to show cause to the current "notice to appear." 8 U.S.C. § 1229(a)(1). This enactment changed the time and place information from something that *could* be provided in the order to show cause into a *required* part of the new "notice to appear." Indeed, in post-IIRIRA regulatory preambles, the government itself recognized that IIRIRA changed the statute to require a single notice document. Pet. Br. 13.

This history is core Step 1 evidence of Congress's intent. *E.g.*, *Cardoza-Fonseca*, 480 U.S. at 427-32 (relying heavily on Congress's 1980 revisions to the Immigration and Nationality Act to conclude, at Step 1, that Congress intended a "well-founded fear" of persecution in Section 208(a) and a "clear probability of

persecution" in Section 243(h) to have different meanings). Yet remarkably, neither the BIA itself, nor any of the courts or judges who have endorsed the BIA's position, have said *one word* about this history (and not because they were unaware of the history, as it featured heavily in the dissenting BIA opinion). This badly disregards this Court's admonition that courts must, at Step 1, use all the "traditional tools of statutory construction" before endorsing an agency's interpretation. *Cardoza-Fonseca*, 480 U.S. at 448.

Charging document. The Sixth Circuit also failed to consider another aspect of the history of the "notice to appear."

Before IIRIRA, the "order to show cause" was understood as a *charging* document issued by *prosecutors*, reflecting an exercise of prosecutorial discretion. *See In re Tijam*, 22 I. & N. Dec. 408, 421 (B.I.A. 1998) ("The Service acts as the prosecutor …, and has authority to … to issue the … Order To Show Cause or the current Notice to Appear (Form I-862) and …to file the charging document with the Immigration Court"); *Matter of G-N-C-*, 22 I. & N. Dec. 281, 288 (B.I.A. 1998) (whether to issue an "Order to Show Cause … is … within the Service's prosecutorial discretion"); *see also Matter of Quintero*, 18 I. & N. Dec. 348, 350 (B.I.A. 1982) (similar); *accord Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (characterizing decision to initiate removal proceedings as involving "prosecutorial discretion"). When Congress created the "notice to appear," it did not change this basic function—as this Court, the BIA, and the Solicitor General all recognized. *Pereira*, 138 S. Ct. at 2116 n.7;

Tijam, 22 I. & N. Dec. at 421 (Rosenberg, Board Member, concurring in part, dissenting in part); *see* Transcript of Oral Argument at 40:8-9, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-459_00m5.pdf (Solicitor General's statement that "a Notice to Appear is a charging document").

That history spotlights another reason that the BIA's interpretation cannot be right. Charging documents are issued by prosecutors, not courts. Yet under the BIA's two-step approach, it is *immigration courts* that issue notices to appear—by issuing the time and place information completing the notice. It beggars belief to claim that Congress intended for non-prosecuting entities to issue these charging documents.

DHS's regulations have correctly understood "notices to appear" the same way. Those regulations define who may issue a notice to appear, and identify only officers *within the agency*. *See* 8 C.F.R. § 239.1. The regulation specifies that "the following officers, or officers acting in such capacity, may issue a notice to appear"—and then lists forty-six types of DHS officers authorized to issue notices to appear. *Id.* Immigration courts and immigration judges are nowhere listed. *Id.* Then, those regulations reiterate that notices to appear are "issu[ed] … by an immigration officer" and then "fil[ed] with the immigration court"—not issued *by* the immigration court. 8 C.F.R. § 1239.1(a). These regulations correctly recognize that Congress did not intend for immigration courts to issue charging documents as part of a two-step "notice to appear."

Indeed, the BIA itself has reiterated that "[n]o authority … supports the contention that a notice of a hearing issued by the Immigration Court is a constituent part of a notice to appear, the charging document issued *only* by the DHS." *Camarillo*, 25 I. & N. Dec. at 648.

The Sixth Circuit, however, did not consider the history and function of "notices to appear." In this respect, too, it failed to provide the scrutiny *Chevron* Step 1 demands.

D. In Immigration Cases, Circuit Courts Have Made A Habit Of Failing To Apply The Scrutiny This Court's Cases Demand At *Chevron* Step 1.

The Sixth Circuit's error is especially troubling because it is not an isolated mistake, and it is not the first time. 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. This has occurred, and continues to occur, in immigration cases generally. *See, e.g.*, *Diaz-Quirazco v. Barr*, 931 F.3d 830, 840 (9th Cir. 2019) (two paragraphs comparing the use of the words "conviction" and "conduct"); *Man v. Barr*, 940 F.3d 1354, 1356 (9th Cir. 2019) (agreeing with the BIA that the statute is ambiguous without conducting an independent examination of statutory text, structure, and history), *petition for cert. filed*, 89 U.S.L.W. 3010 (U.S. July 8, 2020) (No. 19-1477); *Garcia v. Barr*, No. 19-60097, __ F.3d __, 2020 WL 4458772, at *2 (5th Cir. Aug. 4, 2020) (one-paragraph analysis finding term "crime of child

abuse" ambiguous because the statute left it "undefined" and it has no "widely accepted definition").

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 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). Just as terse was the opinion this Court 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). The same was true again in *Pereira*, where the First Circuit thought it was enough to proceed to Step 2 that the statute's express terms did not "explicitly" answer whether the date and time of the hearing must be included in a notice to appear in order to trigger the stop-time rule. *Pereira v. Sessions*, 866 F.3d 1, 5 (1st Cir. 2017).

Unlike the Sixth Circuit (and the Fifth Circuit, and Judge Callahan), the courts that have considered the relevant history have sided with Petitioner. *See Lopez*, 925 F.3d at 402-05; *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1153-54 (11th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961-62 (7th Cir. 2019); *Mendoza-Hernandez*, 27 I. & N. Dec. at 538-39 (Guendelsberger, Board Member, dissenting).

Underscoring *Chevron*'s rigor is especially important 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. *E.g.*, *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*'s bite dulls, agencies across the government will gain new license to give short shrift to the laws that Congress enacted.

E. The Sixth Circuit Also Erred By Failing To Apply, At *Chevron* Step 1, The Rule That Ambiguities In Deportation Laws Must Be Construed In Favor Of Immigrants.

Among the "traditional tools of statutory construction" that the Sixth Circuit failed to apply at *Chevron* Step 1 is "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *St. Cyr*, 533 U.S. at 320 & n.45; *see Kawashima v. Holder*, 565 U.S. 478, 489-90 (2012) (Court has "construed ambiguities in deportation statutes in the alien's favor"). This principle applies here because BIA's interpretation renders removal a certainty, eliminating Niz-Chavez's right, which he would otherwise possess, to seek discretionary relief. *See St. Cyr*, 533 U.S. at 319.

This canon of construction ensures that the harsh consequences resulting from deportation are visited only upon those whom Congress truly intended to be removed. 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 standard principles of 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). As this Court recently reiterated, "[w]here … the canons supply an answer, *Chevron* leaves the stage." *Epic Sys.*, 138 S. Ct. at 1630.

This is the only sensible approach. "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 canons 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. 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 the Court applies the deportation canon here, then both that canon and *Chevron* govern in their proper domains. When the BIA interprets an ambiguous *non-deportation* statute, deference will be due if the BIA's interpretation is reasonable. Even under deportation statutes, particular interpretations of ambiguous provisions 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; *see, e.g.*, *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 75 (2014).

This case, however, is at the core of the deportation canon's application. To the extent the notice to appear provisions are ambiguous, the deportation canon dictates resolving that ambiguity in immigrants' favor.

II. AT *CHEVRON* STEP 2, THE SIXTH CIRCUIT ERRED BY DEFERRING TO THE BIA.

Even if the statute remained ambiguous after applying all the traditional tools of construction, an agency's interpretation must be *reasonable* to receive deference at *Chevron* Step 2. Here, again, the Sixth Circuit shirked the required scrutiny.

A. Under *Judulang*, Deference Is Due At *Chevron* Step 2 Only If The BIA's Interpretation Reasonably Accounts For Relevant Considerations.

Judulang v. Holder, 565 U.S. 42 (2011), underscored that deference is due at *Chevron* Step 2 only if the agency's interpretation reflects "reasoned decisionmaking." *Id.* at 53. Hence, reviewing courts must assess "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In particular, the BIA's interpretation of an immigration statute is arbitrary and capricious—and unreasonable at Step 2—if that interpretation is not tied "to the purposes of the immigration laws or the appropriate operation of the immigration system." *Id.* at 55.

Judulang involved the BIA's "comparable grounds" rule, which the Board 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 Board answered this question 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. The comparable-grounds rule was unreasonable 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-grounds rule [was] unmoored from the purposes and concerns of the immigration laws." *Id.* at 64.

The Sixth Circuit, however, did not provide the scrutiny *Judulang* requires at *Chevron* Step 2. For the Sixth Circuit, what mattered—and all that mattered—was that it believed the BIA's interpretation was linguistically permissible. On that basis alone, the Sixth Circuit deferred at *Chevron* Step 2. *See Garcia-Romo*, 940 F.3d at 205. But as *Judulang* makes clear, *Chevron* Step 2 is not so meek a guardian.

B. The Interpretations Of The Sixth Circuit And The BIA Failed To Reasonably Account For Relevant Considerations.

In at least three ways, the Sixth Circuit—and the BIA—failed to account for relevant considerations.

1. The Deportation Canon Is, At Minimum, A Relevant Consideration The BIA And The Sixth Circuit Were Required To Weigh.

Even if the deportation canon did not resolve this case at *Chevron* Step 1, that canon was—at minimum—a "relevant factor[]" the BIA and the Sixth Circuit were required to weigh at *Chevron* Step 2. *Judulang*, 565 U.S. at 53.

The deportation canon reflects important values. As this Court has recognized, removal is among the harshest consequences the law can inflict, "at times the

equivalent of banishment [or] exile." *Fong Haw Tan*, 333 U.S. at 10. The ability "to remain in the United States may be more important ... than any ... jail sentence." *St. Cyr*, 533 U.S. at 322. Hence, a 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*, 333 U.S. at 10.

When the BIA interprets deportation statutes, and when circuit courts review the BIA's interpretations, they do not do their jobs if they neglect this canon and the values it embodies. Even if the BIA believes that other considerations outweigh these values in a particular case, the deportation canon is a "relevant factor[]" that—if ignored—renders the BIA's interpretation arbitrary and capricious. *Judulang*, 565 U.S. at 53. Hence, Justices of this Court, circuit courts, and commentators have repeatedly recognized that the canons of construction are relevant at *Chevron* Step 2. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring) (explaining that "deference is not abdication," and that given the presumption against extraterritoriality, it was "not reasonable" to read the statute as the agency did), *superseded by statute as stated in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Massachusetts v. U.S. Dep't of Transp.*, 93 F. 3d 890, 893 (D.C. Cir. 1996) (concluding, at *Chevron* Step 2, that the Department of Transportation's interpretation was unreasonable given the presumption against preemption in areas of traditional state control); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 710-11 (D.C. Cir. 2008) (canon of constitutional avoidance

rendered Secretary of the Interior's interpretation "unreasonable"); *accord* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64 (2008).

Here, however, neither the BIA nor the Sixth Circuit so much as mentioned—let alone analyzed—the deportation canon. This was error.

2. Neither The BIA Nor The Sixth Circuit Adequately Considered The "Purposes And Concerns Of The Immigration Laws."

The BIA and the Sixth Circuit also violated *Judulang*'s command that BIA interpretations are impermissible when they are "unmoored from the purposes and concerns of the immigration laws." 565 U.S. at 64. They failed to adequately account for both the *specific* purpose of the "notice to appear" provisions and the *general* purposes of cancellation.

i. The BIA And Sixth Circuit Ignored The Importance Of Providing All Necessary Information In A Single "Notice To Appear."

As *Pereira* observed, an important purpose of IIRIRA's "notice to appear" provisions is to provide effective notice. *See Pereira*, 138 S. Ct. at 2115. The BIA believed that so long as the government's notices allow the immigrant to *show up*, and at some point convey the required information (even if via a "combination of documents"), the notices serve their purposes. *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. at 531.

But it is by now a commonplace of statutory interpretation that a particular provision often reflects "multiple … purposes." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906-07 (2019). And here, the BIA (and the Sixth Circuit) utterly ignored the important purposes that Congress pursued by requiring the government to provide all required information in *one document*.

The purpose of the "notice to appear" is, quite clearly, not just to ensure that the immigrant shows up at a particular time and place. The notice also requires the government to provide the core information that immigrants need to prepare for what may be the most important legal proceeding of their lives, including the "nature of the proceedings," the "charges … and the statutory provisions alleged to have been violated," and a statement that the immigrant "may be represented by counsel" and a "list of counsel." 8 U.S.C. § 1229(a)(1).

It matters, intensely, whether the government provides this information in a single document or scattered across many. Under the BIA's two-step approach, months or even years may pass between the initial "notice to appear" and the subsequent "notice of hearing." In both *Pereira* and *In re Camarillo*, the government provided a putative "notice to appear" (lacking time and place information) and then waited *over a year* before providing a document containing *only* time and place information, and not any of the other information that Congress by statute required. *Pereira*, 138 S. Ct. at 2112; *Camarillo*, 25 I. & N. Dec. at 644-45 & n.1. Moreover, on the government's theory, it can issue as many different documents as it wishes—the charges

in one, the right to counsel in a second, the list of counsel in a third, and the time and place in a fourth and fifth, respectively. As *Pereira* observed, such piecemeal notices are likely to "'confuse and confound' noncitizens." 138 S. Ct. at 2119.

To be sure, if the government issued these documents to Fortune 500 companies, the companies would of course carefully file away the initial notices and carefully aggregate any subsequent documents that add pieces to the puzzle. So, too, the companies would immediately analyze the charges set forth in the notice and begin preparing their defenses. But Fortune 500 companies are not the immigration system's targets. And those who find themselves enmeshed in the immigration system often have limited English proficiency and face obstacles in connecting an initial "notice to appear" with a hearing document that may issue years later. When the time for the hearing draws near, will the immigrant even still *have* the list of counsel who can provide assistance? Will that list still be up to date? Hopefully, the answer to those questions is yes—but sometimes the answer will be no. Congress sought to mitigate these problems by moving from a two-step "order to show cause" to a single "notice to appear." Yet neither the BIA, nor any of the courts or judges that have endorsed its interpretation, have considered the important purposes served by providing notice in a single document. That failure, too, renders the BIA's interpretation unreasonable at *Chevron* Step 2.

ii. The BIA And The Sixth Circuit Ignored The Humanitarian Purpose Of Cancellation.

The BIA, and the courts and judges that have endorsed its interpretation, also failed to account for the more general purpose that cancellation serves. That failure again renders this interpretation unreasonable at *Chevron* Step 2.

Cancellation of removal's humanitarian purpose is well-established. Cancellation 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 U.S. citizens. 8 U.S.C. § 1229b(b)(1)(A)-(D).

Congress created this type of discretionary relief to inject equity into removal proceedings. 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. 533 U.S. at 295. Under a statutory predecessor to cancellation, waiver of deportation under section 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.[2]

The stop-time rule, in turn, creates a narrow exception to the general availability of cancellation. Congress added the stop-time rule to solve a specific problem in the mechanisms for discretionary relief that existed before 1996. 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

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[2] Today, the grant rate for cancellation of removal is opaque. *Compare* 8 U.S.C. § 1103(d)(2) (mandating public reports on "the number of applications filed and granted for cancellation of removal"), *with* DHS, *Yearbook of Immigration Statistics 2018* (last published Jan. 6, 2020), https://www.dhs.gov/immigration-statistics/yearbook/2018/table6 (reporting on applications granted but not applications filed); Exec. Off. for Immigr. Rev., U.S. Dep't of Justice, *Statistics Yearbook* 32 (FY 2018), https://www.justice.gov/eoir/file/1198896/download (same). Comparing grant numbers against estimates of annual cancellation applications yields a grant rate of 22-26%. *See Agency Information Collection Activities*, 84 Fed. Reg. 17,891, 17,892 (Apr. 26, 2019).

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, the BIA failed to account for how its interpretation undermines the general humanitarian purpose of cancellation (by narrowing its availability) while failing to advance the stop-time rule's anti-gaming purpose. If the BIA followed the statute and required the government to issue a single "notice to appear," it would establish a routine procedure that the government would have to follow in every case. Individuals cannot "draw out" that process; rather, triggering the stop-time rule is entirely in the government's hands.

iii. Administrative Convenience Cannot Justify The Failure Of The Sixth Circuit And The BIA To Account For These Purposes.

The government can be expected to argue, as in *Pereira*, that providing information in multiple documents is *easier*. For three reasons, this argument cannot salvage the decision below.

First, even if administrative convenience were a permissible consideration, that would not excuse the BIA and reviewing courts from failing to take into

account all the *countervailing* considerations. *Judulang*, 565 U.S. at 53.

Second, 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 "unmoored from the purposes and concerns of the immigration laws," *Judulang*, 565 U.S. at 64, or that is otherwise arbitrary and capricious. 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.

Third, the government cannot plausibly claim that providing a single "notice to appear," with all the information that Congress required, is unduly burdensome. That is so, for one thing, because DHS has every ability to schedule hearings in advance of sending out the *initial* notice to appear. As the government "concede[d]" in *Pereira*, "a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates." 138 S. Ct. at 2119 (quoting Br. for Respondent). In particular, the immigration courts developed an "interactive scheduling system," or "ISS," that "enable[d] the Department of Homeland Security to access the … system data base to enter case data and to schedule the initial master calendar hearing." Off. of the Chief Immigr. Judge, Exec. Off. for Immigr. Rev., U.S. Dep't of Just., *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 [had] been interactively scheduled by the DHS [bore] the date and time of the initial hearing." *Id.* at I-8. While the government has discontinued that system, it is a poor excuse for departing from Congress's intended form of notice that two executive branch agencies have chosen not to put forth the effort necessary to carry out Congress's commands. *See Pereira*, 138 S. Ct. at 2119 ("Given today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear.").

To the extent the government has decided that the costs of coordination are too high, it *still* has multiple alternatives that do not involve disregarding Congress's commands.

One, if the government does not wish to provide a date and time in its charging document, it can simply send a second "notice to appear" that provides both the time and place and all the other information that Congress by statute required of a "notice to appear." So long as this notice is an actual charging document, issued by DHS, that contains all required information, it will stop the clock. The modest price the government must pay is that the immigrant's residency clock does not stop until service of the single document Congress required.[3]

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[3] For the same reason, the BIA was wrong to assert that under Petitioner's approach, "there can be no way to perfect a notice to appear that is insufficient under section 239(a)." *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. at 528-29. The DHS can issue

Alternatively, if the government sets an initial date and time that proves infeasible, the government can *change* that date: The "time-and-place information specified in the notice to appear" is not "etched in stone"; rather, "§ 1229(a)(2) expressly vests the Government with power to change the time or place of a noncitizen's removal proceedings so long as it provides 'written notice … specifying … the new time or place of the proceedings' and the consequences of failing to appear." 138 S. Ct. at 2119.

In no sense, then, can administrative convenience overcome the important purposes Congress sought to achieve by providing for a single "notice to appear" providing all the information the statute requires.

C. Neither The Sixth Circuit Nor The BIA Considered That The BIA's Interpretation Violates The Governing Regulations.

Finally, the BIA's interpretation is unreasonable because it violates the government's own regulations. As this Court recently reiterated, agencies' valid regulations are—until changed—just as "legally binding" as Congress's statutes. *Kisor*, 139 S. Ct. at 2434. And as explained above, DHS's regulations allow only DHS officers—not immigration courts—to issue notices to appear, as the BIA itself recognized in *Camarillo*. Yet contrary to those regulations and

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a superseding notice to appear that contains all the information required by § 1229a, much like a superseding indictment or amended complaint. *See, e.g.*, *Beltre-Veloz v. Mukasey*, 533 F. 3d 7, 8 (1st Cir. 2008) (reflecting issuance of "superseding notice to appear"); *cf. Matter of Ordaz*, 26 I. & N. Dec. 637, 640 (B.I.A. 2015) (BIA's assertion that there is "no need" for superseding notices).

Camarillo, the BIA's approach makes the "notice of hearing issued by the Immigration Court" a "constituent part"—indeed, the decisive part—"of a notice to appear." 25 I. & N. Dec. at 648. Moreover, instead of being issued "*only* by the DHS," *id.*, that notice is issued by the immigration court.

Agencies of course may (within statutory limits) change their regulations and their interpretations of those regulations. But they must *actually* change those regulations, "display awareness that [they are] changing position," and provide a "reasoned explanation" for their change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Here, however, DHS has never amended its regulations. And while the BIA has recognized that it has departed from *aspects* of *Camarillo*, *see Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, it has never acknowledged or explained its departure from *Camarillo*'s interpretation of DHS's regulations. The BIA's failure to provide any explanation for this shift is all the more reason that its interpretation is arbitrary and capricious.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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