

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

WESCLEY FONSECA PEREIRA,)
)
) Petitioner,)
)
) v.) No. 17-459
)
) JEFFERSON B. SESSIONS, III,)
)
) Attorney General,)
)
) Respondent.)
)

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-459, Pereira versus Sessions.

Mr. Zimmer.

ORAL ARGUMENT OF DAVID J. ZIMMER

ON BEHALF OF THE PETITIONER

MR. ZIMMER: Thank you, Mr. Chief Justice, and may it please the Court:

The stop-time rule at issue in this case specifies exactly what the government must do in order to end an immigrant's period of continuous presence. The government must serve a notice to appear under Section 1229(a), and as the name notice to appear suggests, the government cannot serve a notice to appear without telling an immigrant when and where to appear.

Specifically, Section 1229(a) defines a notice to appear as notice that provides specific information, including the time and place at which proceedings will be held. Notice that lacks that required information and does not tell an immigrant when and where to

1 appear is not a notice to appear under Section
2 1229(a) and does not trigger the stop-time
3 rule.

4 JUSTICE KAGAN: Mr. Zimmer, you just
5 said defines the notice of appear. Why do you
6 think that those 10 requirements of what have
7 to be in a notice to appear define a notice to
8 appear? You could imagine a case where
9 somebody says, well, look, Requirement 7 isn't
10 in the notice. That was a mistake. So it's a
11 flawed notice to appear, but it's still a
12 notice to appear. It doesn't become not a
13 notice to appear because there's a flaw in it.

14 MR. ZIMMER: Well, right. So the
15 answer to that, Justice Kagan, is -- is the way
16 that the statute is written. And because
17 Section 1229(a) doesn't just -- doesn't just
18 state what a notice to appear shall contain, it
19 does define what a notice to appear is because
20 of the language Congress used.

21 And it's specifically the phrase in
22 this section referred to as a notice to appear.
23 And that is definitional language. It is
24 definitional -- sorry, definitional language
25 that Congress uses routinely throughout the

1 U.S. Code to give substantive meaning to
2 specific terms. And we give a number of
3 examples of this on page 4 of the reply brief,
4 including one particularly clear example where
5 Congress actually referred to this language as
6 definitional.

7 And so, unlike a provision that just
8 states what -- if -- if -- unlike a provision
9 that just stated what a notice to appear shall
10 contain, this provision states that the
11 document in this section referred to as a
12 notice to appear is written notice that
13 specifies the required information.

14 JUSTICE GINSBURG: And if any one on
15 the list, any one is left out, then it's not a
16 notice to appear?

17 MR. ZIMMER: Well, yes, that's right,
18 Justice Ginsburg. But I think it's important
19 to recognize that most of the information on
20 that list will not vary from case to case.
21 It's -- it's standard information that's simply
22 on the notice to appear form.

23 And so what we're really talking about
24 in this case are really only two types of
25 information. It's the charges, the factual and

1 legal charges against the immigrant, and the
2 time and place of the hearing.

3 And so those are really the two pieces
4 of information that are really required that --
5 that there's any chance would ever be omitted,
6 and it's entirely reasonable that Congress
7 insisted that those two pieces of information
8 be included in a notice in order to stop the
9 time, because those are the two pieces of
10 information that show that the government is
11 serious, is -- is -- is committed to going
12 forward with an actual removal proceeding.

13 And, indeed, the -- the fact that
14 those two pieces of information are required is
15 supported by the only reason that's identified
16 in the legislative history for which Congress
17 actually enacted this rule. Prior to 1996,
18 there was no stop-time rule and immigrants
19 continued to accrue permanent residence -- or,
20 permanent presence all the way up until the
21 point that they were actually removed from the
22 country.

23 JUSTICE ALITO: Do you think that your
24 interpretation is so clear that it wouldn't be
25 necessary for us to get beyond step one of

1 Chevron?

2 MR. ZIMMER: Yes, I --

3 JUSTICE ALITO: Why is that so?

4 MR. ZIMMER: So it's -- it's so
5 because of the definitional language in Section
6 1229(a).

7 JUSTICE ALITO: But I -- I don't see
8 definitional language in there. Where --
9 where's the definitional language?

10 MR. ZIMMER: It's -- Justice Alito,
11 it's the "in this section referred to as"
12 language. And that is language that, again, is
13 used throughout the U.S. Code in order to
14 define terms. When -- when Congress states
15 that the document "in this section referred to
16 as" a notice to appear is written notice that
17 specifies that information, that means that if
18 the government serves written notice that does
19 not specify that information, it has not served
20 a notice to appear.

21 And, again, this is not a unique
22 provision. That language appears throughout
23 the U.S. Code and is used to -- to do exactly
24 what it does in Section 1229(a), to define
25 terms to have a specific substantive meaning.

1 And, again --

2 JUSTICE SOTOMAYOR: What do you do
3 with the government's position that using the
4 word "under" in the notice to appear
5 definitional section is different than what was
6 done in other provisions -- parts of this that
7 said "in accordance with" or "required under"?

8 MR. ZIMMER: Right.

9 JUSTICE SOTOMAYOR: So there is a
10 difference of usage. So why should we give it
11 this -- "under" the same meaning?

12 MR. ZIMMER: Sure. So two
13 responses --

14 JUSTICE SOTOMAYOR: Doesn't that in --
15 in and of itself create an ambiguity?

16 MR. ZIMMER: So -- so two responses to
17 that, Justice Sotomayor. The first is that the
18 government's argument -- even the government
19 admits that Congress was not consistent in how
20 it identified all the information required by
21 Section 12 -- by the notice to appear
22 definition because, as your question suggested,
23 Congress at one time uses "notice in accordance
24 with" and one time "required under." So
25 there's no -- there's no real dispute that --

1 that Congress was not consistent in this way.

2 But the other important difference is
3 that in those provisions -- those provisions
4 also referred to the notice required under
5 Section 1229(a)(2), and there's no defined term
6 in 1229(a)(2).

7 And that's really the key difference,
8 because the stop-time rule is only referring to
9 the notice to appear. And notice to appear is
10 a defined term. It's a term that's defined to
11 mean the notice of the specific information
12 listed in Section 1229(a)(1), and because it's
13 a defined term, there is no additional language
14 needed to convey -- to convey the --

15 JUSTICE SOTOMAYOR: If I -- if we were
16 to disagree with you that there -- and -- and
17 say there's ambiguity, where does that leave
18 your argument? Do you lose?

19 MR. ZIMMER: Well, no, Your Honor. I
20 mean --

21 JUSTICE SOTOMAYOR: Because of Chevron
22 and deference to the government?

23 MR. ZIMMER: Right. Well, no. I
24 mean, as we explained in the brief, we also
25 believe that the -- you know, we also argue and

1 -- and believe that BIA's interpretation is
2 unreasonable under Chevron's second step.

3 But -- but certainly as to the first
4 step, the fact that Section 1229(a) does use
5 the defined phrase -- the defined term notice
6 to appear and that the stop-time rule
7 specifically is triggered only on service of a
8 notice to appear under Section 1229(a),
9 invoking that document, that that does
10 unambiguously require that the government
11 actually serve the document that is identified
12 in Section 1229(a).

13 JUSTICE GINSBURG: How -- how does the
14 -- the logistical problem -- at least if I
15 understand it correctly. So there's this
16 notice to appear, but at the time, the
17 department doesn't know when the immigration
18 court is going to be able to slot this case in.

19 So it doesn't have the -- it wants to
20 stop the clock on accumulating years in the
21 United States, so it sends this notice and then
22 -- and time to be determined. How -- how --
23 how is the department supposed to determine the
24 time?

25 MR. ZIMMER: Well, so, as the

1 government admits, and this is on page 50, Note
2 15 of its brief, the government actually had a
3 system, it was using a system that did allow it
4 to identify the time and include it on the
5 notice to appear.

6 And, in fact, this is explained in
7 even more detail in the amicus brief submitted
8 by former BIA chairman and Immigration Judge
9 Schmidt, who -- who explains that this system
10 allowed coordination between the Department of
11 Homeland Security and the immigration courts,
12 such that individual DHS officers could
13 identify a time that could be included on the
14 notice to appear.

15 And Judge Schmidt explains, again, in
16 great detail, why that system not only worked
17 but made the immigration courts function more
18 effectively. And the government, again, admits
19 on page 50 of its brief that it had this system
20 and simply states that it stopped using it.
21 There's no explanation as to why.

22 So this is not an insurmountable
23 problem. And it's not something -- and, in
24 fact, it's not even a problem at all because
25 the government had a system that actually did

1 this.

2 And it's no surprise that the
3 government had a system that did this given
4 that police officers from -- in municipal
5 governments all across the country are able to
6 include hearing dates on -- on traffic tickets.
7 When they pull someone over, they can use, you
8 know, any kind -- the system -- any kind of
9 electronic system to identify the next
10 available hearing date and include it on the
11 ticket.

12 So this is not a problem. It's not a
13 problem at all. This is just the way that DHS
14 has chosen to implement its system. And that
15 choice that --

16 JUSTICE GINSBURG: You say we don't
17 know why they abandoned that system?

18 MR. ZIMMER: Well, no, the government
19 has never explained. They do not explain in
20 their brief. It's, as far as we know, they've
21 never explained. And, again, Judge Schmidt's
22 amicus brief -- and, again, this is from the
23 perspective of an immigration judge who is
24 actually using and benefiting from the system
25 -- he had no idea. And he -- as he explains in

1 his brief, the system actually worked. It made
2 the immigration courts work more effectively
3 because there are serious logistical problems
4 that are caused by not including this
5 information in the notice to appear.

6 JUSTICE ALITO: Well, would it be
7 better to include a date, even if in the great
8 majority of cases the date is going to be
9 changed, which can be done?

10 MR. ZIMMER: So, yes, the date
11 certainly can be changed, and yes -- and yes,
12 it is better to include a date in the initial
13 notice anyway. And let me give three reasons
14 why that's true.

15 The first is that requiring the
16 government to include a date ensures that when
17 the time is stopped, when the immigrant is
18 prevented from accruing additional time, the
19 government is actually serious about proceeding
20 with -- with a -- with a removal proceeding, of
21 going forward with the proceeding.

22 And if you look at a case like
23 Camarillo, you can see why that's important,
24 where the government served one of these
25 notices that did not include the time and

1 place, and then just sat on it for over two
2 years without doing anything at all.

3 And it's totally reasonable that in
4 that context Congress thought that that time
5 should continue to accrue on behalf of the
6 immigrant.

7 JUSTICE ALITO: Well, I don't see how
8 your rule would change that. So they include a
9 date and then, after a period of time, when
10 they are not ready to -- to proceed on that
11 date, the date is changed. And they just keep
12 changing the date.

13 MR. ZIMMER: Well, Your Honor --

14 JUSTICE ALITO: What is achieved?

15 MR. ZIMMER: So I think the system
16 does assume a certain degree of good faith on
17 the government's part to not put a date that it
18 knows -- knows to be false. So that -- I think
19 Congress certainly did not anticipate that the
20 government would simply lie.

21 JUSTICE ALITO: I thought your --

22 MR. ZIMMER: But --

23 JUSTICE ALITO: -- I thought the
24 example you just gave us was an example of bad
25 faith.

1 MR. ZIMMER: Oh, I don't -- no. I
2 think that what happened in Camarillo was not
3 bad faith. They just served the notice at the
4 time they were not ready to go forward at --
5 with the proceeding.

6 And, you know, there's nothing
7 inherently wrong with doing that, with serving
8 notice of charges and saying we're going to go
9 forward with a proceeding at some indefinite
10 time in the -- indefinite time in the future.
11 But the point is that the statute Congress
12 wrote makes clear that the -- that the result
13 of that decision is that the time does not stop
14 until the government is actually ready to go
15 forward with a hearing.

16 And that makes sense, especially
17 looking at the legislative history of why
18 Congress actually enacted this rule. And the
19 reason that was, was that Congress wanted to
20 make sure that immigrants were not able to --
21 to avoid or delay proceedings in order to
22 manufacture additional time.

23 So, prior to 1996, there was --
24 Congress thought that there was a problem
25 because, because time continued to accrue until

1 the person was actually removed from the
2 country, that created an -- an incentives --
3 incentive for immigrants to file motions and to
4 avoid proceedings, to draw out proceedings and
5 gain additional time.

6 So what the stop-time rule does is it
7 says at the time there's an actual hearing,
8 when the government is prepared to go forward
9 with the hearing and schedules a hearing that
10 could be avoided or delayed, then time stops.
11 But until that time, until an actual hearing
12 has been scheduled that could be avoided or
13 delayed, then the delay is rightfully with the
14 government. And governmental delays have
15 always historically counted towards an
16 immigrant's accrual of additional residence.

17 JUSTICE ALITO: Well, what if they
18 send a notice that specifies a date and then
19 let's say two weeks later they send another
20 notice that says that the -- the proceeding on
21 that date is canceled and a new date will be
22 set at some time in the future? What would
23 happen then?

24 MR. ZIMMER: I mean, I think in that
25 context -- I mean, that's an interesting

1 question, Your Honor. I think in that context
2 the -- the initial notice -- I mean, certainly,
3 as of the time that the initial notice was
4 sent, it would trigger the stop-time rule
5 because there was a date on the notice and that
6 satisfies the statute.

7 I mean, if the government then sort of
8 rescinded the date and didn't provide another
9 date -- I mean, I'm not actually sure that the
10 statute allows the government to do that
11 because the Section 1229(a)(2) allows for a
12 change in the hearing. But I'm not sure it
13 allows for a change in the hearing to no date
14 at all.

15 And so I'm not sure the government
16 would actually have --

17 JUSTICE SOTOMAYOR: I think the
18 provision requires in writing a change of date,
19 doesn't it?

20 MR. ZIMMER: It does. And -- and I
21 don't think anything in that provision would
22 allow the government to change the date to no
23 date. I think that once the government
24 provides a date, the statute only authorizes it
25 to change that to a -- to a different date.

1 CHIEF JUSTICE ROBERTS: Well, but it's
2 -- it's -- it's an important practical question
3 because there are a lot of hearings and there
4 are limited numbers of people available to
5 conduct the hearing. I mean, what if it just
6 says, okay, our normal process, we try to get
7 you in, you know, the third day of the second
8 month or something, we always try, and then it
9 turns out they're not going to be able to, so
10 they say, okay, we'll try again.

11 I mean, it's like when you get a
12 traffic ticket and want to challenge it. They
13 say here is the time you go up, and the officer
14 is never there, and they say, well, then come
15 -- come back later, and the officer is not
16 there, and eventually it shows up, but, I
17 mean --

18 MR. ZIMMER: Right.

19 CHIEF JUSTICE ROBERTS: -- it -- it --
20 it -- I don't see what's different from that.

21 And it seems to take great -- or
22 practical considerations do have some role to
23 play.

24 MR. ZIMMER: Well, yes. And that's
25 why in the situation you're describing, Mr.

1 Chief Justice, the first notice would -- the
2 notice with the first date would trigger the
3 stop-time rule, because the government has
4 shown that it's ready to go forward with
5 proceedings. And there's no question --

6 CHIEF JUSTICE ROBERTS: I thought you
7 were suggesting that they couldn't keep -- they
8 couldn't put it off until the next time, or --

9 MR. ZIMMER: No, they can change --
10 they can definitely change the date to another
11 date. What they can't do is say that date --
12 we're -- we're rescinding that date and we're
13 not giving you an additional date.

14 JUSTICE SOTOMAYOR: Can I go back and
15 -- and ask how this works? And I was a little
16 confused by what happened here. They don't
17 give you a date. Then they give you -- they
18 mail something to you, giving you a date, or --
19 or --

20 MR. ZIMMER: In general.

21 JUSTICE SOTOMAYOR: What happened
22 here? They didn't give him a date.

23 MR. ZIMMER: That's correct.

24 JUSTICE SOTOMAYOR: They then sent a
25 change of date to -- to the -- to the wrong

1 address, essentially.

2 MR. ZIMMER: Correct.

3 JUSTICE SOTOMAYOR: And so he didn't
4 get notice of the change of -- of address, and
5 he was then deported, correct?

6 MR. ZIMMER: Well, he was -- a -- a
7 final order of removal was entered. He was not
8 deported, but yes.

9 JUSTICE SOTOMAYOR: Yeah, a final --

10 MR. ZIMMER: Yeah.

11 JUSTICE SOTOMAYOR: -- order of
12 removal. I guess my question is, if you don't
13 show up because you're not told when to show
14 up, do you still have an obligation to tell
15 them where to mail the notice to?

16 MR. ZIMMER: Yes, but -- yes, you --
17 you absolutely do, but what happened here is --
18 is Mr. Pereira did tell them where to mail the
19 notice to and they didn't send it to that
20 address. And I don't think --

21 JUSTICE SOTOMAYOR: So why are we here
22 at all, because -- since they didn't -- I -- I
23 -- I -- I'm just asking as a practical
24 question.

25 Wouldn't the -- the final order have

1 to be vacated because he was never given proper
2 notice of the change of address?

3 MR. ZIMMER: So that notice was
4 vacated, Your Honor.

5 JUSTICE SOTOMAYOR: I see.

6 MR. ZIMMER: And then later another --

7 JUSTICE SOTOMAYOR: Okay. It's just
8 the stop time that's --

9 MR. ZIMMER: Exactly. So the issue is
10 when -- when the government actually began
11 removal proceedings in 2013, well after Mr.
12 Pereira had accrued the -- the 10 years of
13 continuous --

14 JUSTICE SOTOMAYOR: Got it.

15 MR. ZIMMER: -- presence, then he
16 tried to apply for --

17 JUSTICE SOTOMAYOR: I had forgotten
18 that.

19 MR. ZIMMER: Okay. Yeah. So -- but
20 to get back to the -- to the -- to the
21 question, to the logistical questions, the
22 point -- to get back to Mr. Chief Justice's
23 question, when the government is actively
24 trying to go forward with proceedings, and as,
25 you know, then the fact that there may be some

1 delay in actually scheduling those proceedings
2 doesn't count against -- doesn't count against
3 the government and doesn't change the stop-time
4 trigger, because the government is actually
5 going forward with proceedings.

6 But the issue is when the government
7 sends a notice that doesn't have a hearing at
8 all and says we will provide a hearing in the
9 future, that allows the government to -- it --
10 it basically stops the process. The government
11 isn't going -- actually going forward with
12 removal proceedings. In Camarillo --

13 CHIEF JUSTICE ROBERTS: No, I under --
14 I understand. It's just a question of the
15 practical significance. It seems the
16 government can do one thing, which is saying,
17 okay, we know we have to -- we're -- you know,
18 we're interested in taking this action against
19 you. We don't quite know when we're going to
20 have the, you know, available hearing officers
21 and all that, and we'll let you know.

22 Or you simply say, all right, okay,
23 we're going to do it this day, and it turns
24 out, well, an officer is not available that
25 day. We'll try in two more months. Not -- not

1 a big -- you know, is there any practical
2 difference?

3 MR. ZIMMER: Well, yes, there's a big
4 practical difference because, in a case like
5 Camarillo, they're not trying to do that. And
6 I think that's the point.

7 When the government serves these --
8 when the government serves an initial notice,
9 it doesn't actually necessarily represent the
10 government's intention to go forward with a
11 proceeding at that time. And that's why I was
12 pointing out that, in Camarillo, after the
13 government served this, it's not that it
14 couldn't find a hearing to be scheduled for two
15 years. The government didn't file the notice
16 with the immigration court for two years. It
17 just sat somewhere with the government doing
18 nothing about it.

19 And there's no reason to think that --
20 in fact, there's every reason to think that
21 Congress believed that in that situation that
22 time would not count for the government, that
23 that would continue -- that residence would
24 continue to accrue because the government
25 hadn't taken the trouble to even try to

1 schedule a hearing.

2 But, of course, as soon as Congress
3 tries to schedule a hearing, and schedules a
4 hearing and provides notice of it, time stops,
5 even if the next available hearing isn't for a
6 year or two.

7 JUSTICE GORSUCH: I --

8 JUSTICE ALITO: I mean, that sounds
9 like some sort of --

10 JUSTICE GORSUCH: No, go ahead.

11 JUSTICE ALITO: -- some sort of bad
12 faith exception. But I still don't understand
13 what would be achieved.

14 So presume -- let's assume that
15 there's a reason, and we will ask Mr. Liu this,
16 why they -- why they've adopted this new
17 policy, but -- why they've adopted this policy,
18 but if, in fact, they have difficulty
19 ascertaining the date, and we were to adopt
20 your rule, then what -- they could say, well,
21 all right, on average, these would be held a
22 certain number of days after the notice goes
23 out, so we'll put that date down, but, you
24 know, two weeks before then or a week before
25 then or whatever, if we see that we're not

1 going to be able to do it on that date, then
2 we're going to, you know, extend it for 30
3 days, and they keep doing this.

4 What is the difference between that
5 and the situation here? I just don't
6 understand it.

7 MR. ZIMMER: Well, if I understand
8 your question correctly, Justice Alito, again,
9 I think that the -- that the difference is that
10 -- I mean, in that situation, the government
11 could, of course, solve the problem by just
12 simply providing the date. Maybe I'm not
13 understanding your -- your question, but that
14 if it -- as soon as the government --

15 JUSTICE GORSUCH: I think -- I think
16 the concern that, if I'm correct, that -- that
17 my colleagues are expressing is are -- would --
18 we may be creating a perverse incentive here
19 for the government to issue earlier notices to
20 appear on dates that it actually has no
21 intention of proceeding in order to stop the
22 clock on clients like yours, rather than being
23 more forthright and saying we don't know when
24 we're going to be able to do it, but here's a
25 notice to stop the clock.

1 We're going to wind up in the same
2 place perhaps, and it's just a paper exercise.

3 MR. ZIMMER: Well, Your Honor --

4 JUSTICE GORSUCH: That's the concern,
5 I think.

6 MR. ZIMMER: Right. So -- but I -- so
7 I don't think that that's actually a concern.
8 And, in fact, I think the concern goes the
9 other way because, again, the government --
10 there's no reason to think that the government
11 is going to lie on one of these --

12 JUSTICE GORSUCH: Oh, no, no, no, no,
13 no.

14 MR. ZIMMER: But -- but your --

15 JUSTICE GORSUCH: We wouldn't go that
16 far, counsel.

17 (Laughter.)

18 JUSTICE GORSUCH: It -- it just is a
19 matter of administrative convenience that we're
20 going to list it for the first Tuesday on the
21 second month, and maybe we'll get there and
22 maybe we won't. And then we'll just send out a
23 new notice, and a new notice, and a new notice,
24 and a new notice, until we get to the date.

25 So what's the difference between that

1 regime and the regime we currently have? And
2 why -- why is one better for your client than
3 the other?

4 Sometimes when courts require
5 additional procedures to aid a criminal
6 defendant or an immigrant, they wind up
7 perversely creating the opposite, unintended
8 effect. Why isn't your case one of those?

9 MR. ZIMMER: Well, it certainly
10 wouldn't create an adverse effect. And, in
11 fact, I think because there's real prejudice to
12 immigrants from these -- these notices that
13 don't include the date and time because it
14 creates this -- this level of uncertainty, that
15 they don't know, is the government actually
16 going to go forward, are they going to file in
17 immigration court, are they ever going to seek
18 a hearing? Will it be tomorrow? Will it be in
19 two years? Whereas, if there's a date, if
20 there are actual proceedings ongoing, then at
21 least you encourage the government to -- you
22 know, to -- to go forward with the -- with the
23 -- with the proceeding; whereas, if they don't
24 even have to provide a date, then you get cases
25 like Camarillo and like this case.

1 Even in this case, the government did
2 not file the notice in immigration court for
3 over a year after it was initially served.
4 Even putting aside all of the problems they
5 later -- later had serving the hearing notice,
6 the government didn't try to get a hearing for
7 over a year.

8 CHIEF JUSTICE ROBERTS: So the --
9 JUSTICE GORSUCH: Were there any
10 remedy for your -- for -- for your client in a
11 circumstance like the one I've described that
12 you can think of?

13 MR. ZIMMER: Where they keep -- keep
14 scheduling the hearing? Well, what the -- what
15 the client could do is if -- if he or she
16 wanted the hearings to proceed, she could go
17 into immigration court and attempt to -- to
18 actually have a hearing held instead of having
19 that uncertainty. Or no -- I mean, no, once
20 the government is actively moving forward with
21 proceedings, then the stop-time rule has been
22 triggered, but, of course, that's the whole
23 point.

24 JUSTICE SOTOMAYOR: Could your client
25 go to immigration court before it's filed in

1 immigration court?

2 MR. ZIMMER: No.

3 JUSTICE SOTOMAYOR: Meaning -- so the
4 start of your client's ability to force the
5 government to give it a hearing doesn't start
6 until it's filed in the immigration court?

7 MR. ZIMMER: That's correct, Your
8 Honor. There's -- there's -- until -- in fact,
9 often these notices do not even say which
10 immigration court it will be filed at.

11 JUSTICE SOTOMAYOR: And, in fact, the
12 -- the B -- I call it the BIA; I don't know
13 what it's called today --

14 MR. ZIMMER: It is called the BIA.

15 JUSTICE SOTOMAYOR: -- in Ordaz, said
16 that the notice to appear is not valid until
17 it's actually filed with the immigration court.

18 MR. ZIMMER: That's correct.

19 JUSTICE SOTOMAYOR: And so, if an
20 order to show cause is served today but not
21 filed, it's not valid; it doesn't stop the
22 clock, correct, under the BIA's own reading?

23 MR. ZIMMER: If -- if it's never filed
24 --

25 JUSTICE SOTOMAYOR: And a second

1 notice to appear?

2 MR. ZIMMER: That's correct.

3 JUSTICE SOTOMAYOR: All right. So, in
4 answer, I'm assuming, to Justice Gorsuch's
5 question is your client can make no choices
6 until the immigration court is notified?

7 MR. ZIMMER: That's correct. Yeah.
8 That's correct. That -- and that's one of the
9 reasons that that's a key moment, the -- when
10 the -- when a hearing is actually scheduled,
11 that that's a key trigger.

12 And, again, this goes back to the --
13 to the history as to why this rule was created
14 in the first place, which was in order to
15 prevent immigrants from extending their
16 proceedings in order to avoid -- sorry, to
17 extend their qualifying residence by avoiding
18 or delaying proceedings.

19 And until a hearing is actually
20 scheduled, until the government actually mails
21 notice of a proceeding, that concern simply
22 doesn't come into effect because there's
23 nothing an immigrant can do to avoid or delay a
24 proceeding that has not been scheduled.

25 And I also think it's important to

1 recognize that the government's approach, the
2 government's interpretation, would allow the
3 government actually to -- to end -- end time,
4 to trigger the stop-time rule long before it
5 really has any intent at all of going forward,
6 because it could serve notices to appear on the
7 merest suspicion that someone might be
8 removable without even identifying charges and
9 without even identifying a hearing date.

10 And there's no reason to think that
11 that's what Congress intended, that Congress --
12 that Congress would have intended the
13 Department of Homeland Security, on the
14 slightest suspicion that someone was removable,
15 to stop their time by handing out a form that
16 didn't even identify why the -- why the person
17 was removable.

18 JUSTICE KAGAN: Mr. Zimmer, can I take
19 you back to the language of the statute and
20 just ask about your assertion that this is
21 clearly definitional in nature? I mean, one
22 question is, is that necessary to your
23 argument? And then the other question is, you
24 know, here's an alternative view of this
25 language, which is this language is a -- it's

1 -- it's -- it's a notice of shorthand, it's --
2 you know, we need to call this thing something,
3 this -- this thing which tells you to appear in
4 -- at removal proceedings, and this is what
5 we're going to call it.

6 But it doesn't suggest that everything
7 that we say about this document is -- defines
8 what a notice to appeal is. So, you know,
9 respond to that, and then tell me whether it's
10 crucial that I agree with your response to
11 that.

12 MR. ZIMMER: So I guess I don't -- I
13 think maybe the word "definitional" -- I mean,
14 what the -- this document is called a notice to
15 appear, which in and of itself implies some
16 indication that it -- that it will tell someone
17 when, where, and why to appear.

18 JUSTICE KAGAN: Yes. I mean, it's
19 obvious that the document is called a notice to
20 appear. But the question is whether, if the
21 document is flawed in some way, that it becomes
22 not a notice to appear, as opposed to just a
23 notice to appear which is flawed in some way.

24 MR. ZIMMER: Well, so I -- I think the
25 way the language -- the statute is written -- I

1 mean, it's certainly -- our argument is not
2 that there cannot be a flaw. So, certainly,
3 there can be mistakes that can be corrected.

4 But the way the statute is written --
5 and I -- I'm not sure that there's really much
6 of a definition in terms of our argument --
7 much of a difference in terms of our argument
8 between a definition and shorthand. But I
9 think what the phrase "notice to appear" means
10 under Section 1229(a) is a document that
11 provides that notice.

12 It doesn't have to provide -- it can
13 have mistakes in it. It's not that it has to
14 be -- it can't be corrected later, but it has
15 to give the information in that -- it has to
16 give the information listed in Section 1229(a)
17 in order to be a notice to appear that would
18 trigger the stop-time rule as a notice to
19 appear under Section 1229(a).

20 And if the statute could allow the
21 government --

22 JUSTICE KAGAN: I mean, nobody had any
23 doubt that what was filed here or what was sent
24 here was a notice to appear, isn't that right?

25 MR. ZIMMER: Well, it had the words

1 "notice to appear" written on top of the page.
2 It's a little bit odd, again, to say that it
3 was a notice to appear when it didn't tell
4 Mr. Pereira to appear at any particular time.

5 I mean, so I think the name -- it's
6 hard to see that it could be a notice to appear
7 when it didn't actually tell Mr. Pereira when
8 to appear and when to do anything.

9 JUSTICE ALITO: Suppose the -- the
10 parenthetical "(in this section referred to as
11 a "notice to appear")" were deleted. Would
12 that make a difference?

13 MR. ZIMMER: Yes, absolutely. It
14 would be a very different statute. And, I
15 mean, we may be making the same argument
16 outside of Chevron, but I think for purposes of
17 why the statute is unambiguous, I think that
18 parenthetical language is incredibly important.

19 And, again, the "in this section
20 referred to as" language is definitional
21 language that is used throughout the U.S. Code,
22 and it's language that Congress has actually
23 recognized as definitional. And, again, that's
24 on page 4 of our reply brief.

25 JUSTICE ALITO: I mean, the rules of

1 this Court and -- and the rules of appellate
2 procedure say a brief shall contain certain
3 things. Do you think that's definitional?

4 MR. ZIMMER: Well, no. That's
5 definitely -- that's absolutely not
6 definitional. And -- and that's very
7 different. To say that a document shall
8 contain A, B, and C is very different than
9 saying the document in this section referred to
10 as a notice to appear shall contain -- or,
11 sorry, the --

12 JUSTICE ALITO: Well, there's no
13 provision defining what a brief means because
14 everybody knows what a brief is, but suppose
15 that there were a section that says that a
16 document filed by the parties setting out the
17 parties' argument is -- shall be referred to as
18 a brief, so then anything -- any document
19 that's filed that omits anything that's
20 required by rule to be included would not be --
21 would not be a brief any longer?

22 MR. ZIMMER: I mean, if the rules were
23 written that way, yes. But I -- but, of
24 course, the rules aren't written that way, and
25 they're not written that way for a reason. And

1 I think that's why -- exactly why it's
2 important to recognize that this language,
3 which is not the way these rules are normally
4 written, that this language actually has real
5 meaning, that Congress chose this language for
6 a reason, and this is definitional language
7 Congress routinely uses.

8 If there are no further questions at
9 this time, I'd like to reserve the rest of my
10 time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. ZIMMER: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Liu.

15 ORAL ARGUMENT OF FREDERICK LIU
16 ON BEHALF OF THE RESPONDENT

17 MR. LIU: Mr. Chief Justice, and may
18 it please the Court:

19 The question in this case is whether
20 the stop-time rule may be triggered by a notice
21 to appear that doesn't contain a hearing date.
22 The answer is yes.

23 The statutory text reflects the
24 judgment that an alien shouldn't be able to
25 continue claiming credit for being in the

1 United States once the government tells -- has
2 told the alien that it intends to remove him.

3 With or without a hearing date, a
4 notice to appear does just that. It tells the
5 alien that the government intends to remove
6 him. And so the BIA reasonably concluded --

7 JUSTICE SOTOMAYOR: We don't know that
8 until it's filed with the immigration court.

9 MR. LIU: I think that --

10 JUSTICE SOTOMAYOR: Because you
11 already -- your agency has already said that in
12 Ordaz.

13 MR. LIU: I don't think --

14 JUSTICE SOTOMAYOR: That a notice to
15 appear is invalid unless it's filed with the
16 immigration courts.

17 MR. LIU: Well, I think that point
18 actually cuts against my friend, because if it
19 turns out at the end of the day that the
20 government isn't serious about pursuing those
21 charges, then it won't file the notice to
22 appear, and under Ordaz, that notice to appear
23 won't be given any stop-time effect.

24 JUSTICE GORSUCH: How is it that under
25 Ordaz a notice to appear isn't a notice to

1 appear if it -- if it's not filed, as Justice
2 Sotomayor pointed out? An extra-statutory
3 requirement that I -- I can't -- I don't see
4 this -- in the language of this statute. Maybe
5 you can tell me where I can find it.

6 MR. LIU: Well, the --

7 JUSTICE GORSUCH: But -- but yet a
8 document that contains some of the elements
9 that are required by this statute should
10 qualify? That seems to me to have it sort of
11 backwards. Help me out.

12 MR. LIU: Well, the question in Ordaz,
13 Justice Gorsuch, was about what happens when
14 there are basically two notices to appear,
15 where there are changes to an existing notice
16 to appear. That question is distinct from the
17 one before the Court today.

18 JUSTICE GORSUCH: I understand that.
19 But -- but the BIA, in its wisdom, has said
20 that a notice to appear isn't a notice to
21 appear if it lacks something that the statute
22 doesn't require, but it is a notice to appear
23 if it lacks something the statute does require.

24 MR. LIU: Right.

25 JUSTICE GORSUCH: And I am thoroughly

1 confused by that.

2 MR. LIU: Well --

3 JUSTICE GORSUCH: Maybe you can help
4 me out.

5 MR. LIU: Well, let -- let me take the
6 second part first, which is why it is the case
7 that a notice to appear that lacks a date and
8 time is still a notice to appear.

9 And I -- I think the framework this
10 Court should approach that case with is the
11 framework it applied in Edelman versus
12 Lynchburg College. If you look at the statute
13 there, it's set up exactly the same way. Title
14 VII says a charge under this section shall be
15 filed within a certain time period with the
16 EEOC.

17 In the same section, it said a charge
18 shall be in writing and under oath. And the
19 Court said in Edelman that doesn't provide a
20 definition.

21 JUSTICE GORSUCH: So -- so what is the
22 definition of a notice to appear? It doesn't
23 have to have a date. It doesn't have to have a
24 time. Does it have to have the charges? Does
25 it have to have the facts? I mean, when does

1 the emperor have no clothes? At what point?

2 MR. LIU: A notice to --

3 JUSTICE GORSUCH: A blank page with --
4 with the title notice to appear, would that
5 suffice?

6 MR. LIU: A blank page -- a blank page
7 would not be a notice to appear. And that's
8 because a notice to appear is a charging
9 document. It's like an indictment in a
10 criminal case, a complaint in a civil case.

11 What it needs to do is tell the alien
12 what proceedings he must appear for and why he
13 must appear for them.

14 JUSTICE SOTOMAYOR: Mr. Liu, help me.
15 I -- I -- I'm simple-minded. Notice to appear
16 seems to ask me when, where, and why. Those
17 are the three material elements of, to my
18 simplistic way of thinking, of the words notice
19 to appear. When am I appearing, and for what?
20 That -- that -- those seem the two most
21 critical components of that word -- of those
22 words.

23 MR. LIU: Well, I don't -- I don't
24 think Congress had that view. A notice to
25 appear is shorthand for a notice to appear for

1 removal proceedings. So what makes it a notice
2 to appear is that it tells the alien he must
3 appear for those removal proceedings --

4 JUSTICE SOTOMAYOR: But not when?

5 MR. LIU: -- and why. But not when.
6 And -- and we have very good evidence that
7 Congress thought the when and the where wasn't
8 part of the essential function.

9 JUSTICE GORSUCH: Well, okay. But if
10 that's true, then surely we don't need to worry
11 about the charges or the law or the facts
12 either. It just could say we're going to --
13 we're going to come after you at some point,
14 some indefinite point about something having to
15 do with immigration. That would be a notice to
16 appear under your definition, wouldn't it?

17 MR. LIU: Well, in our -- in our view,
18 the -- the charges are crucial to the function
19 of a charging document. And, Justice Gorsuch,
20 you may disagree with me on where to draw the
21 line between --

22 JUSTICE GORSUCH: Well, I'm just
23 wondering where the government would have us
24 draw the line --

25 MR. LIU: Well, we would draw the line

1 --

2 JUSTICE GORSUCH: -- and why.

3 MR. LIU: -- we would draw the line,
4 as -- as I say, that -- that the -- the notice
5 to appear is a notice to appear so long as it
6 tells the alien that he must appear for removal
7 proceedings.

8 JUSTICE GORSUCH: Okay. So that's the
9 nature of the proceeding. So we've got (A).

10 MR. LIU: Sure.

11 JUSTICE GORSUCH: We've got to have
12 that. How about the legal authority --

13 MR. LIU: Yes.

14 JUSTICE GORSUCH: -- got to have that?

15 MR. LIU: Yes, and (C) and (D).

16 JUSTICE GORSUCH: Okay. And how about
17 (C) and (D)?

18 MR. LIU: (C) and (D).

19 JUSTICE GORSUCH: So it's only the
20 date and time that's -- we don't have to have.
21 Everything else is good.

22 MR. LIU: No, no, no, (E) through (G).

23 JUSTICE GORSUCH: (E) through (G), no,
24 none of those?

25 MR. LIU: No, because those have to do

1 with the mechanics of subsequent proceedings.
2 The reason why (A) through (D) are essential is
3 because (A) through (D) are about --

4 JUSTICE GORSUCH: So you don't --
5 don't need to tell them they need counsel, for
6 example. That's -- that's not required?

7 MR. LIU: No.

8 JUSTICE GORSUCH: Okay.

9 MR. LIU: Because that -- that's an
10 advisal about the mechanics of future
11 proceedings. What's special about (A) and (D)
12 isn't that they're labeled (A) and (D) in the
13 statute, but because they happen to be the
14 essential function of a charging document,
15 which is -- this is to tell you the nature of
16 the proceedings, the charges against you --

17 JUSTICE GORSUCH: Doesn't Congress get
18 to decide what's the essential function of a
19 charging document? I would have thought that,
20 you know, I don't see a distinction between (A)
21 and (D) versus (E) through (G) in -- in this --
22 in this statute. I mean, Congress could have
23 done that. These are the really important ones
24 --

25 MR. LIU: Well, I --

1 JUSTICE GORSUCH: -- (A) through (D)

2 --

3 MR. LIU: -- I think, actually --

4 JUSTICE GORSUCH: -- (E) through (G),
5 forget about those.

6 MR. LIU: I think Congress actually
7 told us in 1996 and then again in NACARA in
8 1997, and these provisions are at the statutory
9 appendix at 69a.

10 In 1996, when Congress enacted this
11 very statute, it said that the stop-time rule
12 should apply to notices to appear issued before
13 the effective date.

14 The question arose, there were no
15 notices to appear because there were only
16 orders to show cause. So what could Congress
17 have been talking about?

18 It went through the trouble the
19 following year to clarify that those notices to
20 appear that they were talking about were the
21 old orders to show cause. And the old orders
22 to show cause didn't have to require a date and
23 time.

24 So that's proof right there in the
25 statutory history that Congress thought about

1 what's necessary to -- to be a notice to appear
2 and what's not, and it drew the line right
3 where the government is drawing it.

4 JUSTICE KAGAN: But, Mr. Liu, this
5 might be the same question and, if so, I -- I
6 apologize for beating you over the head with
7 it, but a -- a notice to appear, it's a special
8 kind of charging document. It's telling you
9 that the government wants you to appear.

10 And then, if the government wants you
11 to appear, the first thing you need to know is,
12 where am I supposed to appear? When am I
13 supposed to appear? So that there will be
14 somebody who will do what they want to do with
15 me when I appear.

16 So it's -- I mean, it would -- it
17 would seem actually even more than the charges
18 itself that a notice to appear, you know, the
19 sine qua non is telling you where you should
20 appear.

21 MR. LIU: Well, I think that's not the
22 -- the essential function of a charging
23 document. It's not the essential --

24 JUSTICE KAGAN: Well, you talk about
25 it as a charging document. And I hate to

1 interrupt you, but I'll just -- it's not any
2 old charging document. It's a notice to
3 appear, which means somebody has to know where
4 they're supposed to appear and when.

5 MR. LIU: And the government doesn't
6 dispute that the notice to -- to appear -- that
7 that type of notice needs to be provided to the
8 alien if the government is ever going to
9 effectuate a removal in these removal
10 proceedings.

11 JUSTICE BREYER: So why -- just in
12 case -- I mean, it's possible we will agree
13 with you. I mean, it does say that the clock
14 starts -- stops ticking when the alien is
15 served a notice to appear under Section 12.
16 Then you look at the section, and it says a
17 notice to appear shall specify nine things,
18 including the time and place at which you're
19 supposed to appear.

20 And in the government's view -- I
21 looked at the notice to appear here -- every
22 one of those things is included on the
23 document, except not notice to appear -- I
24 mean, where you're supposed to appear. And
25 that seems odd, but assume you're right.

1 We then get to step 2 of Chevron, and
2 step 2 says that the agency decision has to be
3 reasonable. So I looked for the reason.

4 What's the reason that they don't want
5 to put in a notice to appear? And I notice the
6 former chairman of the BIA said there used to
7 be a process called -- it was called
8 interactive scheduling.

9 MR. LIU: Right.

10 JUSTICE BREYER: It meant that a human
11 being who was over at DHS would go to his
12 computer, find out what dates were available,
13 and fill them in the notice to appear.

14 Now that wouldn't seem too tough. We
15 do have computers today. It would seem to be
16 possible. And yet what he says, the former
17 chairman, is it eventually fell out of use,
18 that system. And "he does not know exactly
19 why."

20 Okay. So I think to have a reasonable
21 agency decision you would have to say not just
22 that there are other things that don't appear,
23 that you say have to appear, but you'd have to
24 have a reason why this, which says does appear,
25 doesn't appear.

1 So what is the reason?

2 MR. LIU: The reason is that -- is
3 because of the -- the structure of the statute
4 and the regulations.

5 JUSTICE BREYER: No, no, not because
6 of the structure. The -- the -- I mean, why
7 did the DHS or the BIA or the EOIR or the DOJ
8 --

9 MR. LIU: Sure.

10 JUSTICE BREYER: -- why did some group
11 of those people stop doing --

12 MR. LIU: Right. Because --

13 JUSTICE BREYER: -- what would have
14 eliminated the problem in this case?

15 MR. LIU: Simple --

16 JUSTICE BREYER: Why?

17 MR. LIU: -- simple answer. Because
18 -- because it didn't work.

19 JUSTICE BREYER: Why didn't it work?

20 MR. LIU: The old -- the old system
21 had three problems.

22 JUSTICE BREYER: Yeah.

23 MR. LIU: Number one, it wasn't
24 allocating workload fairly among immigration
25 judges, which is crucial in -- in a system

1 where IJs are notoriously overburdened.

2 Number two, it wasn't capable of
3 prioritizing cases. This is also key in an
4 immigration system because you want to give
5 priority to aliens who are detained as opposed,
6 for example, to aliens who are not.

7 And third, the old system was limited
8 access. Really, the only people who had access
9 to it were what we called legacy INS officials,
10 people who had access to the account because
11 they happened to work for the INS before
12 Congress changed the structure.

13 JUSTICE BREYER: As to the third,
14 could you not invent a system today that would,
15 in fact, allow people to know what hearing
16 dates were available?

17 As to the second, I have no view. I
18 don't know why. But as to the second and the
19 first, where does it say that?

20 MR. LIU: Well, I think, Justice
21 Breyer, to take your last part first, I think
22 it's -- you know, it's not theoretically
23 impossible to devise this system. My point is
24 just that it would be a completely new system
25 that basically --

1 JUSTICE BREYER: All right. The
2 question is you gave me three reasons.

3 MR. LIU: Right.

4 JUSTICE BREYER: The third one I'm
5 rather dubious about. The first two I'm
6 incapable of evaluating at the moment, so I
7 want to know where those reasons appear.

8 MR. LIU: Well, they --

9 JUSTICE BREYER: In what document
10 shall I read the reasons that the BIA or
11 whatever these organizations were, why they did
12 change the old system, and I will find there
13 what you just said, so I will be able to think
14 about it, what document says that?

15 MR. LIU: Well, there's no -- there's
16 no document I can point to you, other than the
17 BIA's decision in this case --

18 JUSTICE BREYER: No, I didn't find
19 those reasons there. Are they there?

20 MR. LIU: The BIA didn't specify --

21 JUSTICE BREYER: Okay.

22 MR. LIU: -- reasons why --

23 JUSTICE BREYER: Well, it used to be
24 -- there was a famous hot oil case, which you
25 know, and they discovered that the reasons or

1 the agency rule and so forth was in somebody's
2 desk at the Interior Department and had never
3 been published. So are we to, in fact -- that
4 was the end of that case, by the way. But did
5 -- did --

6 (Laughter.)

7 JUSTICE BREYER: Did -- did they, in
8 fact, publish this anywhere? No is the answer.
9 And so, if they don't really give a reason, and
10 I have a hard time understanding it, am I -- is
11 there a basis --

12 MR. LIU: Well --

13 JUSTICE BREYER: -- on which I'm
14 supposed to find it reasonable under
15 Chevron's statute?

16 MR. LIU: Well, but I think the reason
17 given in the BIA's -- in the BIA's decision is
18 the reason I am giving, which is, was -- it was
19 infeasible for the DHS officers to be able to
20 access the immigration court's docket to put
21 the date in at this time.

22 JUSTICE GINSBURG: What do we do with
23 the immigration judge who tells us it was
24 working fine; I don't know why they stopped it?

25 MR. LIU: Well, the -- he doesn't know

1 why he stopped it. I'm -- I'm telling you the
2 reason why -- why we stopped it is because the
3 reason didn't work.

4 I -- I think what the -- I think what
5 step 2 of Chevron does, though, is say that the
6 statute doesn't rule out the system that the
7 government has. In fact, we think it's the
8 better reading of the statute.

9 But that doesn't mean that -- that the
10 fact that we haven't pointed in the record to
11 precisely these reasons --

12 JUSTICE SOTOMAYOR: Mr. Liu?

13 MR. LIU: -- means that we're not
14 entitled to Chevron deference.

15 JUSTICE KENNEDY: What -- what
16 percentage --

17 JUSTICE SOTOMAYOR: Mr. Liu, you're
18 not --

19 JUSTICE KENNEDY: What percentage of
20 notices to appear omit the time and date of the
21 proceeding over the last three years, say?

22 MR. LIU: The vast --

23 JUSTICE KENNEDY: Over a given -- a
24 given period?

25 MR. LIU: The vast majority omit,

1 so --

2 JUSTICE KENNEDY: The vast majority
3 omit --

4 MR. LIU: -- almost 100 percent.
5 Almost 100 percent. And I -- I think our
6 experience in the Third Circuit shows that the
7 fact that this is impractical is -- is -- is --
8 is genuine.

9 JUSTICE SOTOMAYOR: Mr. Liu, is it
10 impractical? You just said there was a system;
11 it did have some flaws. Justice Breyer asked
12 you, however, whether alternatives giving the
13 date were considered. That you don't know.

14 MR. LIU: Whether alternatives --

15 JUSTICE SOTOMAYOR: Designs were
16 considered that would give the date?

17 MR. LIU: Well, like I said, the --
18 the system that was in place in 1996 and in
19 2006 and today isn't one that was going to
20 allow for dates and times to be put on the vast
21 majority of --

22 JUSTICE SOTOMAYOR: I do look at
23 legislative history, and the prior language
24 with respect to order to show cause basically
25 said you can give those dates if practical.

1 I look at that, and Congress knew what
2 the BIA was doing or not doing.

3 MR. LIU: Right.

4 JUSTICE SOTOMAYOR: And then it
5 defines this notice to appear and drops those
6 "as practical." To me, that's a very telling
7 -- that's not -- that's legislative history but
8 not in terms of what members said but what they
9 did.

10 MR. LIU: Right. And -- and --

11 JUSTICE SOTOMAYOR: And, to me, that's
12 often fairly convincing. Why isn't the
13 dropping "as practical" --

14 MR. LIU: Because --

15 JUSTICE SOTOMAYOR: -- inclusive of
16 your argument?

17 MR. LIU: Well --

18 JUSTICE SOTOMAYOR: Against your
19 argument?

20 MR. LIU: Well, two -- two points.
21 The change that Congress made does mean that
22 the notice to appear without the date is
23 complete. But that just raises the question,
24 which is the premise of the question presented,
25 which is: Is that document that omits that

1 date still a notice to appear?

2 My second point is that if you -- that
3 that -- that's only half the story. If you
4 read the end of the story, Justice Sotomayor,
5 you'll see Congress reaching back and making
6 express in the text of the statute that those
7 old orders to show cause that didn't include
8 the hearing date do qualify as notices to
9 appear and should be given stop-time effect.

10 So Congress, while, yes, it did give
11 -- move the notice of -- of the date
12 requirement into a different subsection, at the
13 very same time said: We still want the old
14 documents to be given stop-time effect.

15 JUSTICE BREYER: Do you want to -- do
16 you want to -- my questions were rather mean,
17 but they were designed to uncover something.

18 MR. LIU: Right.

19 JUSTICE BREYER: And -- and it is
20 actually a very interesting question. I didn't
21 mean them to be so mean, I'm sorry, but -- but
22 the -- the fact is that there is an interesting
23 Chevron question that's difficult, and that is:
24 How much of a reason does an agency have to
25 give?

1 MR. LIU: And I --

2 JUSTICE BREYER: Can it just say
3 something like not practical, which is denied
4 by their former chairman? Do they have to go
5 into it in some depth?

6 MR. LIU: And --

7 JUSTICE BREYER: To what extent do
8 they have to? You see that?

9 MR. LIU: And -- and -- right.

10 JUSTICE BREYER: Because it's not just
11 a rubber stamp job.

12 MR. LIU: Well, and, Justice Breyer, I
13 think if you look at this Court's past cases,
14 it hasn't required this sort of administrative
15 reason. I mean, you look at -- look at
16 Martinez Gutierrez in 2012. That was a Chevron
17 Step 2 case. There was actually even a
18 question about whether the agency thought it
19 was bound by a prior decision or was exercising
20 its administrative judgment. And the Court
21 said: Well, it's clear enough that the agency
22 was exercising its administrative judgment.
23 That's entitled to deference.

24 I would say the same thing here. And
25 here we have something even more because we do

1 have the BIA saying expressly that it's -- it's
2 picking this reasonable interpretation over the
3 other precisely because this one is better from
4 an administrative perspective.

5 CHIEF JUSTICE ROBERTS: Suppose if you
6 -- if, you know, you say this doesn't allocate
7 workload, which is very important for the
8 overburdened judges, it -- it -- it doesn't
9 prioritize, all sorts of things, it's
10 impracticable, then I suppose if we rule
11 against you, you'll just say: Okay, we'll put
12 a date in, and if it turns out we can't make
13 that date, we'll move it back another six
14 months. If it turns out we can't do that, and
15 -- and -- in short, I'm not sure what that
16 would accomplish.

17 MR. LIU: Well, I'm not sure what it
18 would accomplish either. And we actually
19 believe telling the alien transparently that a
20 date is to be set is better than telling the
21 alien a date where we have maybe a 20 percent
22 confidence level that that's going to be the
23 actual date, but we know that, well, there's an
24 80 percent chance that it's -- it's going to be
25 moved.

1 And that's because I think there
2 actually is more certainty to knowing, hey,
3 look, it's a date to be set, you -- we put a
4 bunch of advisals in the notice to appear to
5 keep your address relevant. And I think the
6 fact that it's a date to be set reinforces the
7 importance of that.

8 It's telling the alien: Look, nothing
9 -- this isn't set in stone. We really do mean
10 it when we say keep in touch with us.

11 Putting the transparent date avoids
12 sort of misplaced reliance on the old date,
13 because these dates can not only move forward
14 but can also move back --

15 JUSTICE KAGAN: Mr. Liu --

16 JUSTICE GINSBURG: One question about
17 --

18 MR. LIU: -- as in paragraph 2.

19 JUSTICE GINSBURG: -- the proceeding
20 here. So, when the immigration judge ordered a
21 removal in absentia, was the court aware that
22 Pereira hadn't received any notice of the
23 hearing place and date?

24 MR. LIU: I believe the answer is no.
25 I -- I -- I admit the record, the

1 administrative record, we have is not
2 exceptionally clear on that point, but my
3 understanding is that in 2007, when that
4 initial removal order was issued, that the IJ
5 assumed that Pereira had received notice.

6 Now, when it turned out later that
7 Pereira hadn't received that notice, the IJ --
8 actually turned out to be the same IJ, reopened
9 those proceedings. And -- and so that's the
10 precise consequence that Congress attached to
11 the failure to give the date and time. You see
12 it play out in the very facts of this case.

13 This is the (b) (5) consequence. When
14 Congress said you need to get notice in
15 accordance with paragraph 1 or 2 of Section
16 1229(a), this was the consequence it had in
17 mind. You can't get removed in absentia, and
18 you have the authority to rescind it.

19 Now my friend says the date is
20 important because it reflects the seriousness
21 with which we're -- we're proceeding with --
22 with -- with the process. That argument was
23 raised and rejected in a very similar context
24 in Edelman. There, the -- the question was
25 whether the requirement that a charge with the

1 EEOC be -- be under oath or affirmation was
2 part of what a charge was.

3 And the Court said the point of that
4 verification requirement was to ensure that the
5 -- the complainant was serious enough and sure
6 enough to support the complaint. That's why
7 there was an oath -- an oath requirement.

8 And the Court said that provision is
9 not part of the definition of a charge.
10 Neither provision incorporates the other so as
11 to give a definition by necessary implication.
12 And the Court said that to -- to recharge as
13 incorporating the under oath requirement as
14 part of its definition was "a structural and
15 logical leap."

16 JUSTICE KAGAN: Could we go back,
17 Mr. Liu, to the text of the statute, and could
18 you tell me what your best response is to
19 Mr. Zimmer's argument about this parenthetical
20 "(in this section --

21 MR. LIU: Right.

22 JUSTICE KAGAN: -- referred to as a
23 "notice to appear)", which he says makes it
24 clear that everything that follows is part of
25 the definition of a notice to appear.

1 MR. ZIMMER: Right. I -- I think that
2 parenthetical is just identifying the type of
3 document that is. It's an easy shorthand to
4 say the document that initiates the
5 proceedings, and that's the title of 1229,
6 Initiating Removal Proceedings, the document
7 that does so is referred to as the notice to
8 appear.

9 I think it's just giving a -- an
10 identifying --

11 JUSTICE KAGAN: So then what do we
12 look to? When you were giving your sense of it
13 has to include this, but it doesn't have to
14 include that --

15 MR. LIU: Right.

16 JUSTICE KAGAN: -- if -- if -- if we
17 don't look to that parenthetical for the reason
18 that you said, what do we look to to decide
19 what is definitionally part of a notice to
20 appear?

21 MR. LIU: Right. Well, I think the
22 Court applies the same functional approach that
23 it's applied in Becker, in Scarborough with
24 respect to fee applications, in Gonzalez v.
25 Thaler with -- with respect to certificates of

1 appealability, in Edelman with respect to
2 charges filed with the EEOC. And I think the
3 -- the Court does have to have some
4 understanding of what the function of that
5 document is.

6 The statute here makes plain what the
7 function of this document is. It is to
8 initiate removal proceedings.

9 I think it's also fair to look at the
10 function of the stop-time rule, and the
11 function of the stop-time rule is to basically
12 say to the alien: Look, while it's true that
13 being physically present in the United States
14 builds some sort of reasonable reliance
15 interests up to a point, it's no longer
16 reasonable to rely on being in the United
17 States once the government has given you a -- a
18 notice to appear that tells you that the
19 government intends to remove you.

20 It was the point of the stop-time rule
21 to make the stop-time determination turn on the
22 beginning of the proceedings, not at things
23 that would happen later.

24 And if you're looking at legislative
25 history, Justice Sotomayor, this is 143

1 Congressional Record S12266, where Congress,
2 again, amending the statute to make clear that
3 the old orders to show cause that lacked a date
4 would qualify, said the reason we're doing this
5 isn't because of some housekeeping measure but
6 for the substantive reason, the affirmative
7 reason, that we think the stop-time calculation
8 should be made at the very beginning of the
9 proceedings and shouldn't be affected by things
10 like how crowded the immigration courts are,
11 which could affect the timing of the hearing
12 and, in turn, the -- the timing of the hearing
13 notice.

14 I -- I think my -- my friend in the
15 reply brief puts a lot of weight on the word
16 "under" and -- and says that the word "under"
17 should be read to mean in accordance with.

18 You know, this Court has said "under"
19 is a chameleon and it must be understood in its
20 context. And if there's one meaning of "under"
21 that the context here rules out, it is the "in
22 accordance" definition because, as I have said,
23 (b) (5), Congress used those exact words. So we
24 know that, when it wanted to express something
25 different, it used a different word, as it did

1 here.

2 If there are no further questions, we
3 ask that the judgment be affirmed.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Zimmer, three minutes.

7 REBUTTAL ARGUMENT OF DAVID J. ZIMMER

8 ON BEHALF OF THE PETITIONER

9 MR. ZIMMER: Thank you.

10 I think the main point here that I
11 want to make is just that the statute actually
12 doesn't distinguish at all between these
13 provisions in Section 1229(a), between the
14 types of notice that are listed. And the
15 government now wants to get up and say: Oh,
16 well, we think certain ones are important and
17 certain ones are unimportant.

18 And, you know, the most
19 straightforward response to that is that
20 Congress treated them all identically and so,
21 if any are required, which the government
22 admits that some are, they must all be
23 required.

24 And, indeed, the BIA even recognized
25 this. The BIA did not pick and choose. The

1 BIA -- the BIA recognized it was either/or:
2 Either they were all required or none were
3 required. And the BIA held that there were no
4 substantive requirements on a notice to appear
5 to trigger the stop-time rule.

6 Now, to the extent we want to pick and
7 choose between these, it seems like the one
8 thing that should be included in a notice to
9 appear is when to appear. And so it's hard to
10 see if the real inquiry here should be not what
11 the BIA did but which of these are the most
12 important, how the government can just pick,
13 for instance, the nature of the proceedings
14 against the alien, which is on the form, it's
15 just a line on the top of the form that just
16 says in removal proceedings under 240 of the
17 Act. But the government doesn't need to
18 actually tell the immigrant when and where to
19 appear in a notice to appear.

20 And, again, it's hard to see why
21 that's what Congress would have intended,
22 especially given that, in 1996, the same
23 Congress that adopted the stop-time rule
24 amended the statute to specifically include the
25 time and place of proceedings in the notice to

1 appear and, in fact, named that document a
2 notice to appear. A notice to appear.

3 So the Congress that adopted this
4 stop-time rule knew that this was a document
5 that included this -- the time and place of
6 proceedings and, in fact, specifically it
7 required that that be provided upfront.

8 And, again, the government also notes
9 that the -- the Congress would have wanted the
10 stop-time rule to be triggered on the -- at the
11 beginning of proceedings. But it's unclear why
12 the proceedings begin at a time where the
13 government has simply served a document on an
14 immigrant without a time of hearing that has
15 never even been filed in court.

16 You would never say that a civil
17 proceeding had begun when one party shared a
18 draft complaint with the other party. The
19 proceeding is begun when it's filed in court.

20 And -- and so, in this case, the
21 government is arguing that the proceeding --
22 that the stop-time rule should be triggered
23 long before the proceeding starts. In fact, in
24 Camarillo's case, two years before the
25 proceeding was started. In this case, over one

1 year before the proceeding was started.

2 JUSTICE GINSBURG: But when he -- when
3 he had notice that the government was going to
4 attempt to remove him?

5 MR. ZIMMER: Well, that the government
6 might attempt to remove him. The government
7 does not always even file these notices in
8 immigration court. If you look at data, public
9 data from DHS and the immigration courts,
10 approximately 10 percent of notices to appear
11 that are issued are never even filed in
12 immigration court at all.

13 So there's not even a guarantee that
14 when one of these documents is served, is
15 actually served on an immigrant, the government
16 could choose -- it could exercise prosecutorial
17 discretion and never file it in immigration
18 court.

19 That's certainly something that DHS
20 could do and it's something that DHS does. And
21 that's why Congress triggered the rule on an
22 actual proceeding, when government -- when the
23 government was ready to go forward with an
24 actual proceeding, when there were charges
25 identified and when there was a time and place

1 of the proceeding identified, not at the time
2 the -- that the government expressed some
3 abstract intention of possibly seeking removal
4 in the future.

5 Thank you very much.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:59 a.m., the case
9 was submitted.)

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