

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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WESCLEY FONSECA PEREIRA,)

Petitioner,)

v.) No. 17-459

JEFFERSON B. SESSIONS, III,)

Attorney General,)

Respondent.)

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Washington, D.C.

Monday, April 23, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

DAVID J. ZIMMER, ESQ., Boston, Massachusetts; on behalf of the Petitioner.

FREDERICK LIU, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the 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 -- unlike a provision that
9 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 So there is a difference of usage. So why
9 should we give it the -- "under" the same
10 meaning?

11 MR. ZIMMER: So two responses --

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

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

25 But the other important difference is

1 that in those provisions -- those provisions
2 also referred to the notice required under
3 Section 1229(a)(2), and there's no defined term
4 in 1229(a)(2).

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

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

17 MR. ZIMMER: Well, no, Your Honor. I
18 mean --

19 JUSTICE SOTOMAYOR: Because of Chevron
20 and deference to the government?

21 MR. ZIMMER: Right. Well, no. I
22 mean, as we explained in the brief, we also
23 believe that the -- you know, we also argue and
24 -- and believe that BIA's interpretation is
25 unreasonable under Chevron's second step.

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

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

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

23 MR. ZIMMER: Well, so, as the
24 government admits, and this is on page 50, Note
25 15 of its brief, the government actually had a

1 system, it was using a system that did allow it
2 to identify the time and include it on the
3 Notice to Appear.

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

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

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

25 And it's no surprise that the

1 government had a system that did this given
2 that police officers from -- in municipal
3 governments all across the country are able to
4 include hearing dates on -- on traffic tickets.
5 When they pull someone over, they can use, you
6 know, any kind -- the system -- any kind of
7 electronic system to identify the next
8 available hearing date and include it on the
9 ticket.

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

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

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

1 because there are serious logistical problems
2 that are caused by not including this
3 information in the Notice to Appear.

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

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

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

20 And if you look at a case like
21 Camarillo, you can see why that's important,
22 where the government served one of these
23 notices that did not include the time and
24 place, and then just sat on it for over two
25 years without doing anything at all.

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

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

11 MR. ZIMMER: Well, Your Honor --

12 JUSTICE ALITO: What is achieved?

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

19 JUSTICE ALITO: I thought your -- I
20 thought the example you just gave us was an
21 example of bad faith.

22 MR. ZIMMER: Oh, no. I think that
23 what happened in Camarillo was not bad faith.
24 They just served the notice at the time they
25 were not ready to go forward with the

1 proceeding.

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

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

19 So, prior to 1996, there was --
20 Congress thought that there was a problem
21 because, because time continued to accrue until
22 the person was actually removed from the
23 country, that created an -- an incentives --
24 incentive for immigrants to file motions and to
25 avoid proceedings, to draw out proceedings and

1 gain additional time.

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

13 JUSTICE ALITO: What if they send a
14 notice that specifies a date and then let's say
15 two weeks later they send another notice that
16 says that the -- the proceeding on that date is
17 canceled and a new date will be set at some
18 time in the future? What would happen then?

19 MR. ZIMMER: I mean, I think in that
20 context -- I mean, that's an interesting
21 question, Your Honor. I think in that context
22 the -- the initial notice -- I mean, certainly,
23 as of the time that the initial notice was
24 sent, it would trigger the stop-time rule
25 because there was a date on the notice and that

1 satisfies the statute.

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

10 And so I'm not sure the government
11 will actually have --

12 JUSTICE SOTOMAYOR: I think the
13 provision requires in writing a change of date,
14 doesn't it?

15 MR. ZIMMER: It does. And -- and I
16 don't think anything in that provision would
17 allow the government to change the date to no
18 date. I think that once the government
19 provides a date, the statute only authorizes it
20 to change that to a -- to a different date.

21 CHIEF JUSTICE ROBERTS: Well, but it's
22 -- it's -- it's an important practical question
23 because there are a lot of hearings and there
24 are limited numbers of people available to
25 conduct the hearing. I mean, what if it just

1 says, okay, our normal process, we try to get
2 you in, you know, the third day of the second
3 month or something, we always try, and then it
4 turns out they're not going to be able to, so
5 they say, okay, we'll try again.

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

13 MR. ZIMMER: Right.

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

16 And it seems to take great -- or
17 practical considerations do have some role to
18 play.

19 MR. ZIMMER: Well, yes. And that's
20 why in the situation you're describing, Mr.
21 Chief Justice, the first notice would -- the
22 notice with the first date would trigger the
23 stop-time rule because the government has shown
24 that it's ready to go forward with proceedings.
25 And there's no question --

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

4 MR. ZIMMER: No, they can change, they
5 can definitely change the date to another date.
6 What they can't do is say that date, we're --
7 we're rescinding that date and we're not giving
8 you an additional date.

9 JUSTICE SOTOMAYOR: Can I go back and
10 -- and ask how this works? And I was a little
11 confused by what happened here.

12 MR. ZIMMER: Uh-huh.

13 JUSTICE SOTOMAYOR: They don't give
14 you a date. Then they give you -- they mail
15 something to you giving you a date, or -- or --

16 MR. ZIMMER: In general.

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

19 MR. ZIMMER: That's correct.

20 JUSTICE SOTOMAYOR: They then sent a
21 change of date to -- to the -- to the wrong
22 address, essentially.

23 MR. ZIMMER: Correct.

24 JUSTICE SOTOMAYOR: And so he didn't
25 get notice of the change of -- of address, and

1 he was then deported, correct?

2 MR. ZIMMER: Well, he was -- a -- a
3 final order of removal was entered. He was not
4 deported, but yes.

5 JUSTICE SOTOMAYOR: Yeah, a final --

6 MR. ZIMMER: Yeah.

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

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

17 JUSTICE SOTOMAYOR: So why are we here
18 at all, since they didn't -- I -- I -- I -- I'm
19 just asking as a practical question.

20 Wouldn't the -- the final order have
21 to be vacated because he was never given proper
22 notice of the change of address?

23 MR. ZIMMER: So that notice was
24 vacated, Your Honor.

25 JUSTICE SOTOMAYOR: I see.

1 MR. ZIMMER: And then later another --

2 JUSTICE SOTOMAYOR: Okay. It's just
3 the stop time that's --

4 MR. ZIMMER: Exactly. So the issue is
5 when -- when the government actually began
6 removal proceedings in 2013, well after Mr.
7 Pereira had accrued the -- the 10 years of
8 continuous --

9 JUSTICE SOTOMAYOR: Got it.

10 MR. ZIMMER: -- presence, then he
11 tried to apply for --

12 JUSTICE SOTOMAYOR: I had forgotten
13 that.

14 MR. ZIMMER: Okay. Yeah. So -- but
15 to get back to the -- to the -- to the
16 question, to the logistical questions, the
17 point -- to get back to Mr. Chief Justice's
18 question, when the government is actively
19 trying to go forward with proceedings, and as,
20 you know, then the fact that there may be some
21 delay in actually scheduling those proceedings
22 doesn't count against -- doesn't count against
23 the government and doesn't change the stop-time
24 trigger, because the government is actually
25 going forward with proceedings.

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

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

17 Or you simply say, all right, we're
18 going to do it this day, and it turns out,
19 well, an officer is not available that day.
20 We'll try in two more months. You know, is
21 there any practical difference?

22 MR. ZIMMER: Well, yes, there's a big
23 practical difference because, in a case like
24 Camarillo, they're not trying to do that. And
25 I think that's the point.

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

13 And there's no reason to think that --
14 in fact, there's every reason to think that
15 Congress believed that in that situation that
16 time would not count for the government, that
17 that would continue -- that residence would
18 continue to accrue because the government
19 hadn't taken the trouble to even try to
20 schedule a hearing.

21 But, of course, as soon as Congress
22 tries to schedule a hearing, and schedules a
23 hearing and provides notice of it, time stops,
24 even if the next available hearing isn't for a
25 year or two.

1 JUSTICE GORSUCH: I --

2 JUSTICE ALITO: And that sounds like
3 some sort of --

4 JUSTICE GORSUCH: Go ahead.

5 JUSTICE ALITO: -- some sort of bad
6 faith exception. But I still don't understand
7 what would be achieved.

8 So presume -- let's assume that
9 there's a reason, and we will ask Mr. Liu this,
10 why they -- why they've adopted this new
11 policy, but -- why they've adopted this policy,
12 but if, in fact, they have difficulty
13 ascertaining the date, and we were to adopt
14 your rule, then what -- they could say, well,
15 all right, on average, these would be held a
16 certain number of days after the notice goes
17 out, so we'll put that date down, but, you
18 know, two weeks before then or a week before
19 then or whatever, if we see that we're not
20 going to be able to do it on that date, then
21 we're going to, you know, extend it for 30
22 days, and they keep doing this.

23 What is the difference between that
24 and the situation here? I just don't
25 understand it.

1 MR. ZIMMER: Well, if I understand
2 your question correctly, Justice Alito, again,
3 I think that the -- that the difference is that
4 -- I mean, in that situation, the government
5 could, of course, solve the problem by just
6 simply providing the date. Maybe I'm not
7 understanding your -- your question, but that
8 if it -- I -- I think --

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

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

21 MR. ZIMMER: Well, Your Honor --

22 JUSTICE GORSUCH: That's the concern,
23 I think.

24 MR. ZIMMER: Right. So -- but I -- so
25 I don't think that that's actually a concern.

1 And, in fact, I think the concern goes the
2 other way because, again, the government --
3 there's no reason to think that the government
4 is going to lie on one of these --

5 JUSTICE GORSUCH: Oh, no, no, no, no,
6 no. We wouldn't go that far, counsel.

7 (Laughter.)

8 JUSTICE GORSUCH: It -- it just is a
9 matter of administrative convenience that we're
10 going to list it for the first Tuesday on the
11 second month, and maybe we'll get there and
12 maybe we won't. And then we'll just send out a
13 new notice, and a new notice, and a new notice,
14 and a new notice, until we get to the date.

15 So what's the difference between that
16 regime and the regime we currently have? And
17 why -- why is one better for your client than
18 the other?

19 Sometimes when courts require
20 additional procedures to aid a criminal
21 defendant or an immigrant, they wind up
22 perversely creating the opposite, unintended
23 effect. Why isn't your case one of those?

24 MR. ZIMMER: Well, it certainly
25 wouldn't create an adverse effect. And, in

1 fact, I think because there's real prejudice to
2 immigrants from these -- these notices that
3 don't include the date and time because it
4 creates this -- this level of uncertainty, that
5 they don't know, is the government actually
6 going to go forward, are they going to file in
7 immigration court, are they ever going to seek
8 a hearing? Will it be tomorrow? Will it be in
9 two years? Whereas, if there's a date, if
10 there are actual proceedings ongoing, then at
11 least you encourage the government to -- you
12 know, to -- to go forward with the -- with the
13 -- with the proceeding; whereas, if they don't
14 even have to provide a date, then you get cases
15 like Camarillo and like this case.

16 Even in this case, the government did
17 not file the notice in immigration court for
18 over a year after it was initially served.
19 Even putting aside all of the problems they
20 later -- later had serving the hearing notice,
21 the government didn't try to get a hearing for
22 over a year. So --

23 JUSTICE GORSUCH: Was there any remedy
24 for your -- for -- for your client in a
25 circumstance like the one I've described that

1 you can think of?

2 MR. ZIMMER: Where they keep -- keep
3 scheduling the hearing? Well, what the -- what
4 the client could do is if -- if he or she
5 wanted the hearings to proceed, she could go
6 into immigration court and attempt to -- to
7 actually have a hearing held instead of having
8 that uncertainty. Or no -- I mean, no, once
9 the government is actively moving forward with
10 proceedings, then the stop-time rule has been
11 triggered, but, of course, that's the whole
12 point.

13 JUSTICE SOTOMAYOR: Could your client
14 go to immigration court before it's filed in
15 immigration court?

16 MR. ZIMMER: No.

17 JUSTICE SOTOMAYOR: Meaning -- so the
18 start of your client's ability to force the
19 government to give it a hearing doesn't start
20 until it's filed in the immigration court?

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

25 JUSTICE SOTOMAYOR: And, in fact, the

1 -- the B -- I call it the BIA; I don't know
2 what it's called today --

3 MR. ZIMMER: It is called the BIA.

4 JUSTICE SOTOMAYOR: -- in Ordaz, said
5 that the Notice to Appear is not valid until
6 it's actually filed with the immigration court.

7 MR. ZIMMER: That's correct.

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

12 MR. ZIMMER: If -- if it's never
13 filed.

14 JUSTICE SOTOMAYOR: And a second
15 Notice to Appear?

16 MR. ZIMMER: That's correct.

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

21 MR. ZIMMER: That's correct. Yeah.
22 That's correct. That -- and that's one of the
23 reasons that that's a key moment, the -- when
24 the -- when a hearing is actually scheduled,
25 that that's a key trigger.

1 And, again, this goes back to the --
2 to the history as to why this rule was created
3 in the first place, which was in order to
4 prevent immigrants from extending their
5 proceedings in order to avoid -- sorry, to
6 extend their qualifying residence by avoiding
7 or delaying proceedings.

8 And until a hearing is actually
9 scheduled, until the government actually mails
10 notice of a proceeding, that concern simply
11 doesn't come into effect because there's
12 nothing an immigrant can do to avoid or delay a
13 proceeding that has not been scheduled.

14 I also think it's important to
15 recognize that the government's approach, the
16 government's interpretation, would allow the
17 government actually to -- to end -- end time,
18 to trigger the stop-time rule long before it
19 really has any intent at all of going forward,
20 because it could serve notices to appear on the
21 mere suspicion that someone might be removable
22 without even identifying charges and without
23 even identifying a hearing date.

24 And there's no reason to think that
25 that's what Congress intended, that Congress --

1 that Congress would have intended the
2 Department of Homeland Security, on the
3 slightest suspicion that someone was removable,
4 to stop their time by handing out a form that
5 didn't even identify why the -- why the person
6 was removable.

7 JUSTICE KAGAN: Mr. Zimmer, can I take
8 you back to the language of the statute and
9 just ask about your assertion that this is
10 clearly definitional in nature? I mean, one
11 question is, is that necessary to your
12 argument? And then the other question is, you
13 know, here's an alternative view of this
14 language, which is this language is -- it's --
15 it's a notice of shorthand, it's -- you know,
16 we need to call this thing something, this --
17 this thing which tells you to appear in -- at
18 removal proceedings, and this is what we're
19 going to call it.

20 But it doesn't suggest that everything
21 that we say about this document is -- defines
22 what a notice to appeal is. So, you know,
23 response to that, and then tell me whether it's
24 crucial that I agree with your response to
25 that.

1 MR. ZIMMER: So -- so I guess I don't
2 -- I think maybe the word "definitional" -- I
3 mean, what the -- this document is called a
4 Notice to Appear, which in and of itself
5 implies some indication that it -- that it will
6 tell someone when, where, and why to appear.

7 JUSTICE KAGAN: Yes. I mean, it's
8 obvious that the document is called a Notice to
9 Appear. But the question is whether, if the
10 document is flawed in some way, that it becomes
11 not a Notice to Appear, as opposed to just a
12 Notice to Appear which is flawed in some way.

13 MR. ZIMMER: Well, so I -- I think the
14 way the language -- the statute is written -- I
15 mean, it's certainly -- our argument is not
16 that there cannot be a flaw. So, certainly,
17 there can be mistakes that can be corrected.

18 But the way the statute is written --
19 and I -- I'm not sure that there's really much
20 of a definition in terms of our argument --
21 much of a difference in terms of our argument
22 between a definition and shorthand. But I
23 think what the phrase "Notice to Appear" means
24 under Section 1229(a) is a document that
25 provides that notice.

1 It doesn't have to provide -- it can
2 have mistakes in it. It's not that it has to
3 be -- it can't be corrected later, but it has
4 to give the information in that -- it has to
5 give the information listed in Section 1229(a)
6 in order to be a Notice to Appear that would
7 trigger the stop-time rule as a Notice to
8 Appear under Section 1229(a).

9 And if the statute could allow the
10 government --

11 JUSTICE KAGAN: I mean, nobody had any
12 doubt that what was filed here or what was sent
13 here was a Notice to Appear, isn't that right?

14 MR. ZIMMER: Well, it had the words
15 "Notice to Appear" written on top of the page.
16 It's a little bit odd, again, to say that it
17 was a Notice to Appear when it didn't tell
18 Mr. Pereira to appear at any particular time.

19 I mean, so I think the name -- it's
20 hard to see that it could be a Notice to Appear
21 when it didn't actually tell Mr. Pereira when
22 to appear and when to do anything.

23 JUSTICE ALITO: Suppose the -- the
24 parenthetical "in this section referred to as a
25 Notice to Appear" were deleted. Would that

1 make a difference?

2 MR. ZIMMER: Yes, absolutely. It
3 would be a very different statute. And, I
4 mean, we may be making the same argument
5 outside of Chevron, but I think for purposes of
6 why the statute is unambiguous, I think that
7 parenthetical language is incredibly important.

8 And, again, the "in this section
9 referred to as" language is definitional
10 language that is used throughout the U.S. Code,
11 and it's language that Congress has actually
12 recognized as definitional. And, again, that's
13 on page 4 of our reply brief.

14 JUSTICE ALITO: I mean, the rules of
15 this Court and -- and the rules of appellate
16 procedure say a brief shall contain certain
17 things. Do you think that's definitional?

18 MR. ZIMMER: Well, no. That's
19 definitely -- that's absolutely not
20 definitional. And -- and that's very
21 different. To say that a document shall
22 contain A, B, and C is very different than
23 saying the document in this section referred to
24 as a Notice to Appear shall contain -- sorry.

25 JUSTICE ALITO: Well, there's no

1 provision defining what a brief means because
2 everybody knows what a brief is, but suppose
3 that there were a section that says that a
4 document filed by the parties setting out the
5 parties' argument is -- shall be referred to as
6 a brief, so then anything -- any document
7 that's filed that omits anything that's
8 required by rule to be included would not be --
9 would not be a brief any longer?

10 MR. ZIMMER: If the rules were written
11 that way, yes. But I -- but, of course, the
12 rules aren't written that way, and they're not
13 written that way for a reason. And I think
14 that's why -- exactly why it's important to
15 recognize that this language, which is not the
16 way these rules are normally written, that this
17 language actually has real meaning, that
18 Congress chose this language for a reason, and
19 this is definitional language Congress
20 routinely uses.

21 If there are no further questions at
22 this time, I'd like to reserve the rest of my
23 time.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 MR. ZIMMER: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Liu.

3 ORAL ARGUMENT OF FREDERICK LIU
4 ON BEHALF OF THE RESPONDENT

5 MR. LIU: Mr. Chief Justice, and may
6 it please the Court:

7 The question in this case is whether
8 the stop-time rule may be triggered by a Notice
9 to Appear that doesn't contain a hearing date.
10 The answer is yes.

11 The statutory text reflects the
12 judgment that an alien shouldn't be able to
13 continue claiming credit for being in the
14 United States once the government tells -- has
15 told the alien that it intends to remove him.

16 With or without a hearing date, a
17 Notice to Appear does just that. It tells the
18 alien that the government intends to remove
19 him. And so the BIA reasonably concluded --

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

22 MR. LIU: I think that --

23 JUSTICE SOTOMAYOR: Because you
24 already -- your agency has already said that in
25 Ordaz.

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

2 JUSTICE SOTOMAYOR: That a Notice to
3 Appear is invalid unless it's filed with the
4 immigration courts.

5 MR. LIU: Well, I think that point
6 actually cuts against my friend, because if it
7 turns out at the end of the day that the
8 government isn't serious about pursuing those
9 charges, then it won't file the Notice to
10 Appear, and under Ordaz, that Notice to Appear
11 won't be given any stop-time effect.

12 JUSTICE GORSUCH: How is it that under
13 Ordaz a Notice to Appear isn't a Notice to
14 Appear if it -- if it's not filed, as Justice
15 Sotomayor pointed out? An extra-statutory
16 requirement that I -- I can't -- I don't see in
17 the -- in the language of this statute. Maybe
18 you can tell me where I can find it.

19 MR. LIU: Well, but --

20 JUSTICE GORSUCH: But -- but yet a
21 document that contains some of the elements
22 that are required by this statute should
23 qualify? That seems to me to have it sort of
24 backwards. Help me out.

25 MR. LIU: Well, the question in Ordaz,

1 Justice Gorsuch, was about what happens when
2 there are basically two Notices to Appear,
3 where there are changes to an existing Notice
4 to Appear. That question is distinct from the
5 one before the Court today.

6 JUSTICE GORSUCH: I understand that.
7 But -- but the BIA, in its wisdom, has said
8 that a Notice to Appear isn't a Notice to
9 Appear if it lacks something that the statute
10 doesn't require, but it is a Notice to Appear
11 if it lacks something the statute does require.

12 MR. LIU: Right.

13 JUSTICE GORSUCH: And I am thoroughly
14 confused by that.

15 MR. LIU: Well --

16 JUSTICE GORSUCH: Maybe you can help
17 me out.

18 MR. LIU: Well, let me take the second
19 part first, which is why it is the case that a
20 Notice to Appear that lacks a date and time is
21 still a Notice to Appear.

22 And I think the framework this Court
23 should approach that case with is the framework
24 it applied in Edelman versus Lynchburg College.
25 If you look at the statute there, it's set up

1 exactly the same way. Title VII says a charge
2 under this section shall be filed within a
3 certain time period with the EEOC.

4 In this same section, it said a charge
5 shall be in writing and under oath. And the
6 Court said in Edelman that doesn't provide a
7 definition.

8 JUSTICE GORSUCH: So -- so what is the
9 definition of a Notice to Appear? It doesn't
10 have to have a date. It doesn't have to have a
11 time. Does it have to have the charges? Does
12 it have to have the facts? I mean, when does
13 the emperor have no clothes? At what point?

14 MR. LIU: A notice to --

15 JUSTICE GORSUCH: A blank page with --
16 with the title Notice to Appear, would that
17 suffice?

18 MR. LIU: A blank page -- a blank page
19 would not be a Notice to Appear. And that's
20 because a Notice to Appear is a charging
21 document. It's like an indictment in a
22 criminal case, a complaint in a civil case.

23 What it needs to do is tell the alien
24 what proceedings he must appear for and why he
25 must appear for them.

1 JUSTICE SOTOMAYOR: Mr. Liu, help me.
2 I -- I -- I'm simple-minded. Notice to Appear
3 seems to ask me when, where, and why. Those
4 are the three material elements of, to my
5 simplistic way of thinking, of the words Notice
6 to Appear: When am I appearing, and for what?
7 That -- that -- those seem the two most
8 critical components of that word -- of those
9 words.

10 MR. LIU: Well, I don't -- I don't
11 think Congress had that view. A Notice to
12 Appear is shorthand for a notice to appear for
13 removal proceedings. So what makes it a Notice
14 to Appear is that it tells the alien he must
15 appear for those removal proceedings --

16 JUSTICE SOTOMAYOR: But not when?

17 MR. LIU: -- and why. But not when.
18 And we have very good evidence that Congress
19 thought the when and the where wasn't part of
20 the essential function.

21 JUSTICE GORSUCH: Well, okay. But if
22 that's true, then surely we don't need to worry
23 about the charges or the law or the facts
24 either. It just could say we're going to --
25 we're going to come after you at some point,

1 some indefinite point about something having to
2 do with immigration. That would be a Notice to
3 Appear under your definition, wouldn't it?

4 MR. LIU: Well, in our -- in our view,
5 the -- the charges are crucial to the function
6 of a charging document. And, Justice Gorsuch,
7 you may disagree with me on where to draw the
8 line between --

9 JUSTICE GORSUCH: Well, I'm just
10 wondering where the government would have us
11 draw the line --

12 MR. LIU: Well, we would draw the line
13 --

14 JUSTICE GORSUCH: -- and why.

15 MR. LIU: -- we would draw the line,
16 as -- as I say, that -- that the -- the Notice
17 to Appear is a Notice to Appear so long as it
18 tells the alien that he must appear for removal
19 proceedings.

20 JUSTICE GORSUCH: Okay. So that's the
21 nature of the proceeding. So we've got A.

22 MR. LIU: Sure.

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

25 MR. LIU: Yes.

1 JUSTICE GORSUCH: -- got to have that?

2 MR. LIU: Yes, and C and D.

3 JUSTICE GORSUCH: Okay. And how about
4 C and D?

5 MR. LIU: C and D.

6 JUSTICE GORSUCH: So it's only the
7 date and time that we don't have to have.
8 Everything else is good.

9 MR. LIU: No, no, no, E through G.

10 JUSTICE GORSUCH: E through G, no,
11 none of those?

12 MR. LIU: No, because those have to do
13 with the mechanics of subsequent proceedings.
14 The reason why A through D are essential is
15 because A through D are about --

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

19 MR. LIU: No.

20 JUSTICE GORSUCH: Okay.

21 MR. LIU: Because that -- that's an
22 advisal about the mechanics of future
23 proceedings. What's special about A and D
24 isn't that they're labeled A and D in the
25 statute, but because they happen to be the

1 essential function of a charging document,
2 which is to tell you the nature of the
3 proceedings, the charges against you --

4 JUSTICE GORSUCH: Doesn't Congress get
5 to decide what's the essential function of a
6 charging document? I would have thought that,
7 you know, I don't see a distinction between A
8 and D versus E through G in -- in this -- in
9 this statute. I mean, Congress could have done
10 that. These are the really important ones --

11 MR. LIU: Well, I --

12 JUSTICE GORSUCH: -- A through D --

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

14 JUSTICE GORSUCH: -- E through G,
15 forget about those.

16 MR. LIU: I think Congress actually
17 told us in 1996 and then again in NACARA in
18 1997, and these provisions are at the statutory
19 appendix at 69(a).

20 In 1996, when Congress enacted this
21 very statute, it said that the stop-time rule
22 should apply to Notices to Appear issued before
23 the effective date.

24 The question arose, there were no
25 Notices to Appear because there were only

1 orders to show cause. So what could Congress
2 have been talking about?

3 It went through the trouble the
4 following year to clarify that those Notices to
5 Appear that they were talking about were the
6 old orders to show cause. And the old orders
7 to show cause didn't have to require a date and
8 time.

9 So that's proof right there in the
10 statutory history that Congress thought about
11 what's necessary to -- to be a Notice to Appear
12 and what's not, and it drew the line right
13 where the government is drawing it.

14 JUSTICE KAGAN: But, Mr. Liu, this
15 might be the same question and, if so, I -- I
16 apologize for beating you over the head with
17 it, but a Notice to Appear, it's a special kind
18 of charging document. It's telling you that
19 the government wants you to appear.

20 And then, if the government wants you
21 to appear, the first thing you need to know is,
22 where am I supposed to appear? When am I
23 supposed to appear? So that there will be
24 somebody who will do what they want to do with
25 me when I appear.

1 So it's -- I mean, it would -- it
2 would seem actually even more than the charges
3 itself that a Notice to Appear, you know, the
4 sine qua non is telling you where you should
5 appear.

6 MR. LIU: Well, I think that's not the
7 -- the essential function of a charging
8 document. It's not the essential --

9 JUSTICE KAGAN: Well, you talk about
10 it as a charging document. I hate to interrupt
11 you, but I'll just -- it's not any old charging
12 document. It's a Notice to Appear, which means
13 somebody has to know where they're supposed to
14 appear and when.

15 MR. LIU: And the government doesn't
16 dispute that the Notice to Appear -- that that
17 type of notice needs to be provided to the
18 alien if the government is ever going to
19 effectuate a removal in these removal
20 proceedings.

21 JUSTICE BREYER: So why -- just in
22 case -- I mean, it's possible we will agree
23 with you. I mean, it does say that the clock
24 stops ticking when the alien is served a Notice
25 to Appear under Section 12. Then you look at

1 the section, and it says a Notice to Appear
2 shall specify nine things, including the time
3 and place at which you're supposed to appear.

4 And in the government's view, I looked
5 at the Notice to Appear here, every one of
6 those things is included on the document,
7 except not Notice to Appear -- I mean, where
8 you're supposed to appear. And that seems odd,
9 but assume you're right.

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

13 What's the reason that they don't want
14 to put in a Notice to Appear? And I notice the
15 former chairman of the BIA said there used to
16 be a process called -- it was called
17 interactive scheduling.

18 MR. LIU: Right.

19 JUSTICE BREYER: It meant that a human
20 being who was over at DHS would go to his
21 computer, found out what dates were available,
22 and fill them in the Notice to Appear.

23 Now that wouldn't seem too tough. We
24 do have computers today. It would seem to be
25 possible. And yet what he says, the former

1 chairman, is it eventually fell out of use,
2 that system. And "he does not know exactly
3 why."

4 Okay. So I think to have a reasonable
5 agency decision you would have to say not just
6 that there are other things that don't appear,
7 that you say have to appear, but you'd have to
8 have a reason why this, which says does appear,
9 doesn't appear.

10 So what is the reason?

11 MR. LIU: The reason is that -- is
12 because of the structure of the statute and the
13 regulations.

14 JUSTICE BREYER: No, no, not because
15 of the structure. The -- the -- I mean, why
16 did the DHS or the BIA or the EOIR or the DOJ
17 --

18 MR. LIU: Sure.

19 JUSTICE BREYER: -- why did some group
20 of those people stop doing what would have
21 eliminated the problem in this case?

22 MR. LIU: Simple --

23 JUSTICE BREYER: Why?

24 MR. LIU: -- simple answer. Because
25 -- because it didn't work.

1 JUSTICE BREYER: Why didn't it work?

2 MR. LIU: The old -- the old system
3 had three problems.

4 JUSTICE BREYER: Yeah.

5 MR. LIU: Number one, it wasn't
6 allocating workload fairly among immigration
7 judges, which is crucial in -- in a system
8 where IJs are notoriously overburdened.

9 Number two, it wasn't capable of
10 prioritizing cases. This is also key in an
11 immigration system because you want to give
12 priority to aliens who are detained as opposed,
13 for example, to aliens who are not.

14 And third, the old system was limited
15 access. Really, the only people who had access
16 to it were what we called legacy INS officials,
17 people who had access to the account because
18 they happened to work for the INS before
19 Congress changed the structure.

20 JUSTICE BREYER: As to the third,
21 could you not invent a system today that would,
22 in fact, allow people to know what hearing
23 dates were available?

24 As to the second, I have no view. I
25 don't know why. But as to the second and the

1 first, where does it say that?

2 MR. LIU: Well, I think, Justice
3 Breyer, to take your last part first, I think
4 it's -- you know, it's not theoretically
5 impossible to devise this system. My point is
6 just that it would be a completely new system
7 that basically --

8 JUSTICE BREYER: All right. The
9 question is you gave me three reasons.

10 MR. LIU: Right.

11 JUSTICE BREYER: The third one I'm
12 rather dubious about. The first two I'm
13 incapable of evaluating at the moment, so I
14 want to know where those reasons appear.

15 MR. LIU: Well, they --

16 JUSTICE BREYER: In what document
17 shall I read the reasons that the BIA or
18 whatever these organizations were, why they did
19 change the old system, and I will find there
20 what you just said, so I will be able to think
21 about it, what document says that?

22 MR. LIU: Well, there's no -- there's
23 no document I can point to you, other than the
24 BIA's decision in this --

25 JUSTICE BREYER: No, I didn't find

1 those reasons there. Are they there?

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

3 JUSTICE BREYER: Okay.

4 MR. LIU: -- reasons why --

5 JUSTICE BREYER: Well, it used to be
6 -- there was a famous hot oil case, which you
7 know, and they discovered the reasons or the
8 agency rule and so forth was in somebody's desk
9 at the Interior Department and had never been
10 published. So are we to in fact -- that was
11 the end of that case, by the way. But did --
12 did --

13 (Laughter.)

14 JUSTICE BREYER: Did -- did they, in
15 fact, publish this anywhere? No is the answer.
16 And so if they don't really give a reason, and
17 I have a hard time understanding it, am I -- is
18 there a basis --

19 MR. LIU: Well --

20 JUSTICE BREYER: -- on which I'm
21 supposed to find it reasonable under
22 Chevron's statute?

23 MR. LIU: Well, but I think the reason
24 given in the BIA's -- in the BIA's decision is
25 the reason I am giving, which is, was -- it was

1 infeasible for the DHS officers to be able to
2 access the immigration court's docket to put
3 the date in at this time.

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

7 MR. LIU: Well, the -- he doesn't know
8 why he stopped it. I'm -- I'm telling you the
9 reason why -- why we stopped it is because the
10 reason didn't work.

11 I think what the -- I think what Step
12 2 of Chevron does, though, is say that the
13 statute doesn't rule out the system that the
14 government has. In fact, we think it's the
15 better reading of the statute.

16 But that doesn't mean that -- that the
17 fact that we haven't pointed in the record to
18 precisely these reasons --

19 JUSTICE SOTOMAYOR: Mr. Liu?

20 MR. LIU: -- means that we're not
21 entitled to Chevron deference.

22 JUSTICE KENNEDY: What -- what
23 percentage --

24 JUSTICE SOTOMAYOR: Mr. Liu, you're
25 not --

1 JUSTICE KENNEDY: What percentage of
2 Notices to Appear omit the time and date of the
3 proceeding over the last three years, say?

4 MR. LIU: The vast --

5 JUSTICE KENNEDY: Over a given -- a
6 given period?

7 MR. LIU: The vast majority omit,
8 so --

9 JUSTICE KENNEDY: The vast majority
10 omit --

11 MR. LIU: -- almost 100 percent.
12 Almost 100 percent. And I -- I think our
13 experience in the Third Circuit shows that the
14 fact that this is impractical is -- is -- is
15 genuine.

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

21 MR. LIU: Whether alternatives --

22 JUSTICE SOTOMAYOR: Designs were
23 considered that would give the date?

24 MR. LIU: Well, like I said, the --
25 the system that was in place in 1996 and in

1 2006 and today isn't one that was going to
2 allow for dates and times to be put on the vast
3 majority of --

4 JUSTICE SOTOMAYOR: I do look at
5 legislative history. And the prior language
6 with respect to order to show cause basically
7 said you can give those dates if practical.

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

10 MR. LIU: Right.

11 JUSTICE SOTOMAYOR: And then it
12 defines this Notice to Appear and drops those
13 "as practical." To me that's a very telling --
14 that's not -- that's legislative history but
15 not in terms of what members said but what they
16 did.

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

18 JUSTICE SOTOMAYOR: And, to me, that's
19 often fairly convincing. Why isn't the
20 dropping "as practical"?

21 MR. LIU: Because --

22 JUSTICE SOTOMAYOR: Inclusive of your
23 argument?

24 MR. LIU: Well --

25 JUSTICE SOTOMAYOR: Against your

1 argument?

2 MR. LIU: Well, two points. The
3 change that Congress made does mean that the
4 Notice to Appear without the date is complete.
5 But that just raises the question, which is the
6 premise of the question presented, which is:
7 Is that document that omits that date still a
8 Notice to Appear?

9 My second point is that if you -- that
10 that -- that's only half the story. If you
11 read the end of the story, Justice Sotomayor,
12 you'll see Congress reaching back and making
13 express, in the text of the statute, that those
14 old orders to show cause that didn't include
15 the hearing date do qualify as Notices to
16 Appear and should be given stop-time effect.

17 So Congress, while, yes, it did give
18 -- move the notice of the date requirement into
19 a different subsection, at the very same time
20 said: We still want the old documents to be
21 given stop-time effect.

22 JUSTICE BREYER: Do you want to -- do
23 you want to -- my questions were rather mean,
24 but they were designed to uncover something.

25 MR. LIU: Right.

1 JUSTICE BREYER: And -- and it is
2 actually a very interesting question. I didn't
3 mean them to be so mean, I'm sorry, but -- but
4 the -- the fact is that there is an interesting
5 Chevron question that's difficult.

6 And that is: How much of a reason
7 does an agency have to give?

8 MR. LIU: And I --

9 JUSTICE BREYER: Can it just say
10 something like not practical, which is denied
11 by their former chairman? Do they have to go
12 into it in some depth?

13 MR. LIU: And --

14 JUSTICE BREYER: To what extent do
15 they have to? You see that?

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

17 JUSTICE BREYER: Because it's not just
18 a rubber stamp here.

19 MR. LIU: Well, and Justice Breyer, I
20 think if you look at this Court's past cases,
21 it hasn't required this sort of administrative
22 reason. I mean, you look at -- look at
23 Martinez Gutierrez in 2012. That was a Chevron
24 Step 2 case. There was actually even a
25 question about whether the agency thought it

1 was bound by a prior decision or was exercising
2 its administrative judgment. And the Court
3 said: Well, it's clear enough that the agency
4 was exercising its administrative judgment.
5 That's entitled to deference.

6 I would say the same thing here. And
7 here we have something even more because we do
8 have the BIA saying expressly that it's -- it's
9 picking this reasonable interpretation over the
10 other precisely because this one is better from
11 an administrative perspective.

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

24 MR. LIU: Well, I'm not sure what it
25 would accomplish either. And we actually

1 believe telling the alien transparently that a
2 date is to be set is better than telling the
3 alien a date where we have maybe a 20 percent
4 confidence level that that's going to be the
5 actual date, but we know that, well, there's an
6 80 percent chance that it's -- it's going to be
7 moved.

8 And that's because I think there
9 actually is more certainty to knowing, hey,
10 look, it's a date to be set, you -- we put a
11 bunch of advisals in the Notice to Appear to
12 keep your address relevant. And I think the
13 fact that it's a date to be set reinforces the
14 importance of that.

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

18 Putting the transparent date avoids
19 sort of misplaced reliance on the old date
20 because these dates can not only move forward
21 but can also move back --

22 JUSTICE GINSBURG: One question about
23 --

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

25 JUSTICE GINSBURG: -- the proceeding

1 here. So when the immigration judge ordered
2 removal in absentia, was the court aware that
3 Pereira hadn't received any notice of the
4 hearing place and date?

5 MR. LIU: I believe the answer is no.
6 I -- I -- I admit the record, the
7 administrative record, we have is not
8 exceptionally clear on that point, but my
9 understanding is that in 2007 when that initial
10 removal order was issued, that the IJ assumed
11 that Pereira had received notice.

12 Now, when it turned out later that
13 Pereira hadn't received that notice, the IJ --
14 actually turned out to be the same IJ, reopened
15 those proceedings. And -- and so that's the
16 precise consequence that Congress attached to
17 the failure to give the date and time. You see
18 it play out in the very facts of this case.

19 This is the (b)(5) consequence. When
20 Congress said you need to get notice in
21 accordance with paragraph 1 or 2 of Section
22 1229(a), this was the consequence it had in
23 mind. You can't get removed in absentia and
24 you have the authority to rescind it.

25 Now, my friend says the date is

1 important because it reflects the seriousness
2 with which we're -- we're proceeding with --
3 with the process. That argument was raised and
4 rejected in a very similar context in Edelman.
5 There, the -- the question was whether the
6 requirement that a charge with the EEOC be --
7 be under oath or affirmation was part of what a
8 charge was.

9 And the Court said the point of that
10 verification requirement was to ensure that the
11 -- the complainant was serious enough and sure
12 enough to support the claim. That's why there
13 was an oath -- an oath requirement.

14 And the Court said that provision is
15 not part of the definition of a charge.
16 Neither provision incorporates the other so as
17 to give a definition by necessary implication.
18 And the Court said that to -- to recharge as
19 incorporating the under oath requirement as
20 part it's definition was, quote, "a structural
21 and logical leap."

22 JUSTICE KAGAN: Could we go back,
23 Mr. Liu, to the text of the statute, and could
24 you tell me what your best response is to
25 Mr. Zimmer's argument about this

1 parenthetical --

2 MR. LIU: Right.

3 JUSTICE KAGAN: -- in this section
4 referred to as a Notice to Appear, which he
5 says makes it clear that everything that
6 follows is part of the definition of a Notice
7 to Appear.

8 MR. ZIMMER: Right. I -- I think that
9 parenthetical is just identifying the type of
10 document that is. It's an easy shorthand to
11 say the document that initiates the
12 proceedings, and that's the title of 1229,
13 initiating removal proceedings, the document
14 that does so is referred to as the Notice to
15 Appear.

16 I think it's just giving an
17 identifying --

18 JUSTICE KAGAN: So then what do we
19 look to? When you were giving your sense of it
20 has to include this --

21 MR. LIU: Right.

22 JUSTICE KAGAN: -- but it doesn't have
23 to include that.

24 MR. LIU: Right.

25 JUSTICE KAGAN: If -- if we don't look

1 to that parenthetical for the reason that you
2 said, what do we look to to decide what is
3 definitionally part of a Notice to Appear?

4 MR. LIU: Right. Well, I think the
5 Court applies the same functional approach that
6 it'S applied in Becker, in Scarborough with
7 respect to fee applications, in Gonzalez v.
8 Thaler with respect to certificates of
9 appealability, in Edelman with respect to
10 charges filed with the EEOC. And I think the
11 -- the Court does have to have some
12 understanding of what the function of that
13 document is.

14 The statute here makes plain what the
15 function of this document is. It is to
16 initiate removal proceedings.

17 I think it's also fair to look at the
18 function of the stop-time rule. And the
19 function of the stop-time rule is to basically
20 say to the alien: Look, while it's true that
21 being physically present in the United States
22 builds some sort of reasonable reliance
23 interests up to a point, it's no longer
24 reasonable to rely on being in the United
25 States once the government has given you a -- a

1 Notice to Appear that tells you that the
2 government intends to remove you.

3 It was the point of the stop-time rule
4 to make the stop-time determination turn on the
5 beginning of the proceedings, not at things
6 that would happen later.

7 And if you are looking at legislative
8 history, Justice Sotomayor, this is 143
9 Congressional Record S12266, where Congress,
10 again, amending the statute to make clear that
11 the old orders to show cause that lacked a date
12 would qualify, said the reason we're doing this
13 isn't because of some housekeeping measure, but
14 for the substantive reason, the affirmative
15 reason that we think the stop-time calculation
16 should be made at the very beginning of the
17 proceedings and shouldn't be affected by things
18 like how crowded the immigration courts are,
19 which could affect the timing of the hearing
20 and, in turn, the timing of the hearing notice.

21 I think my -- my friend in the reply
22 brief puts a lot of weight on the word "under"
23 and -- and says that the word "under" should be
24 read to mean in accordance with.

25 You know, this -- this Court has said

1 "under" is a chameleon and it must be
2 understood in its context. And if there is one
3 meaning of "under" that the context here rules
4 out, it is the "in accordance" definition
5 because, as I have said, (b)(5), Congress used
6 those exact words. So we know that when it
7 wanted to express something different, it used
8 a different word as it did here.

9 And if there are no further questions,
10 we ask that the judgment be affirmed.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Zimmer, three minutes.

14 REBUTTAL ARGUMENT OF DAVID J. ZIMMER
15 ON BEHALF OF THE PETITIONER

16 MR. ZIMMER: Thank you.

17 I think the main point here that I
18 want to make is just that the statute actually
19 doesn't distinguish at all between these
20 provisions in Section 1229(a) between the types
21 of notice that are listed. And the government
22 now wants to get up and say: Oh, well, we
23 think certain ones are important and certain
24 ones are unimportant.

25 And, you know, the most

1 straightforward response to that is that
2 Congress treated them all identically and so,
3 if any are required, which the government
4 admits that some are, they must all be
5 required.

6 And, indeed, the BIA even recognized
7 this. The BIA did not pick and choose. The
8 BIA -- the BIA recognized it was either/or,
9 either they were all required or none were
10 required. And the BIA held that there were no
11 substantive requirements on a Notice to Appear
12 to trigger the stop-time rule.

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

1 appear in a Notice to Appear.

2 And, again, it's hard to see why
3 that's what Congress would have intended,
4 especially given that in 1996 the same Congress
5 that adopted the stop-time rule amended the
6 statute to specifically include the time and
7 place of proceedings in the Notice to Appear
8 and, in fact, named that document a Notice to
9 Appear. A Notice to Appear.

10 So the Congress that adopted this
11 stop-time rule knew that this was a document
12 that included this -- the time and place of
13 proceedings and, in fact, specifically required
14 that that be provided upfront.

15 And, again, the government also notes
16 that the -- the Congress would have wanted the
17 stop-time rule to be triggered on the -- at the
18 beginning of proceedings. But it's unclear why
19 the proceedings begin at a time where the
20 government has simply served a document on an
21 immigrant without a time of hearing that has
22 never even been filed in court.

23 You would never say that a civil
24 proceeding had begun when one party shared a
25 draft complaint with the other party. The

1 proceeding is begun when it's filed in court.

2 And so in this case the government is
3 arguing that the proceeding -- that the
4 stop-time rule should be triggered long before
5 the proceeding starts. In fact, in Camarillo's
6 case, two years before the proceeding was
7 started. In this case, over one year before
8 the proceeding was started.

9 JUSTICE GINSBURG: But when he -- when
10 he had notice that the government was going to
11 attempt to remove him?

12 MR. ZIMMER: Well, that the government
13 might attempt to remove him. The government
14 does not always even file these notices in
15 immigration court. If you look at data, public
16 data from DHS and the immigration courts,
17 approximately 10 percent of Notices to Appear
18 that are issued are never even filed in
19 immigration court at all.

20 So there is not even a guarantee that
21 when one of these documents is served, is
22 actually served on an immigrant, the government
23 could choose, it could exercise prosecutorial
24 discretion and never file it in immigration
25 court.

1 That's certainly something that DHS
2 could do and it's something that DHS does. And
3 that's why Congress triggered the rule on an
4 actual proceeding, when -- when the government
5 was ready to go forward with an actual
6 proceeding, when there were charges identified
7 and when there was a time and place of the
8 proceeding identified, not at the time the --
9 that the government expressed some abstract
10 intention of possibly seeking removal in the
11 future.

12 Thank you very much.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 11:59 a.m., the case
16 was submitted.)

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