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IN THE SUPREME COURT OF THE UNITED STATES

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AGUSTO NIZ-CHAVEZ,)

Petitioner,)

v.) No. 19-863

WILLIAM P. BARR, ATTORNEY GENERAL,)

Respondent.)

- - - - -

Washington, D.C.

Monday, November 9, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

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on behalf of the Petitioner.

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on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 19-863,
5 Niz-Chavez versus Barr.

6 Mr. Zimmer.

7 ORAL ARGUMENT OF DAVID ZIMMER

8 ON BEHALF OF THE PETITIONER

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

11 The statute's text and the changes
12 Congress made in IIRIRA unambiguously establish
13 that a notice to appear is a specific notice
14 document. As a textual matter, the government
15 simply cannot explain why Congress used the
16 phrase "a notice" if what it really meant was
17 simply notice in the abstract. Even more
18 remarkably, though, the government all but
19 concedes that accepting its interpretation means
20 that Congress made significant changes to the
21 statute in IIRIRA for no reason at all.

22 Before IIRIRA, the statute authorized
23 the very two-step notice process the government
24 defends here. It required an order to show
25 cause that allowed the government to provide the

1 time and place of the hearing "in the order to
2 show cause or otherwise."

3 By the time of IIRIRA, Congress had
4 good reasons to rethink that two-step notice
5 process. It burdened immigration courts, which
6 were forced to resolve disputes about whether
7 the government properly served the separate
8 hearing notice, and, as this Court noted in
9 *Pereira*, it confused non-citizens by forcing
10 them to piece together information across
11 multiple documents that could be served years
12 apart.

13 So, in IIRIRA, Congress created a new
14 form of notice, a notice to appear. Congress
15 largely copied the pre-IIRIRA notice provisions,
16 but, crucially for this case, Congress cut the
17 language authorizing the government to provide
18 time and place information in a separate hearing
19 notice and made that information a required part
20 of a notice to appear.

21 The government, however, refused for
22 many years to comply with that change, and to
23 avoid the consequences of that refusal, it now
24 asks this Court to read that change out of the
25 statute entirely and deprive Congress's explicit

1 rejection of the two-step notice process of any
2 meaning.

3 This Court, however, should give
4 meaning to IIRIRA's changes and should hold that
5 a notice to appear, like an order to show cause,
6 is a specific notice document that includes all
7 of the information specified in the statute.
8 That is the only way to make sense of the
9 statute's text and structure, and it is the only
10 way to read the statute that is consistent with
11 IIRIRA.

12 CHIEF JUSTICE ROBERTS: Mr. Zimmer,
13 would the stop-time rule be triggered if the
14 alien received the two documents in two
15 different envelopes at the same -- on the same
16 day?

17 MR. ZIMMER: I mean, yes, Your Honor,
18 certainly, if it's not in the same document, we
19 -- we don't think it -- sorry, I guess no is the
20 answer, that if it's in two different documents,
21 it does not trigger the stop-time rule.

22 And I think that the point of that is
23 that there's no way to distinguish that
24 situation from the situation like my client's,
25 where he received the notice two months later,

1 or the situation in Pereira, where the
2 government tried to serve it a year later but,
3 you know, didn't even serve it correctly, or the
4 situation in Camarillo, where the government
5 served a hearing notice two years later.

6 I think what Congress was doing was
7 trying to create a clear, firm rule that
8 required that all the information be provided
9 together.

10 CHIEF JUSTICE ROBERTS: Well, I think
11 you're probably right that there's no way to
12 distinguish it, but, if it gets to -- to that
13 absurd result that you've got two envelopes and
14 you put them together, you get them on the same
15 day, and it's got all the information that
16 you're entitled to, that that's nonetheless not
17 a notice to appear.

18 MR. ZIMMER: Well, Your Honor, I -- I
19 -- I don't think it's absurd in the sense that
20 -- that Congress -- that -- that the whole
21 point, if you -- if you -- that what Congress
22 was trying to solve was the -- the -- the
23 hypothetical assumes that everything works
24 effectively.

25 And -- and I think that -- that often,

1 as the -- as the House report shows, these
2 hearing notices weren't being served, weren't
3 being properly served --

4 CHIEF JUSTICE ROBERTS: Yeah, I know.
5 That's --

6 MR. ZIMMER: -- and that under --

7 CHIEF JUSTICE ROBERTS: I think you're
8 just fighting the hypothetical. Certainly, if
9 -- if that were what it had done -- it had done,
10 that they were received at the same day, I doubt
11 that that would have attracted -- attracted
12 Congress's interest.

13 What -- what if there are two separate
14 documents in the same envelope?

15 MR. ZIMMER: Well, I think, if it's
16 all provided together, it's effectively the same
17 document. So I think, if it's in the same
18 envelope, then it -- then it -- then it is one
19 document, and it -- and it would -- it would be
20 a notice to appear.

21 But I think that what -- what Congress
22 was doing here, you know, the problem that
23 Congress was trying to solve, was the -- the
24 problems that were caused when this information
25 was served separately. And so it created this

1 firm rule.

2 And I don't -- I think that it's very
3 clear from the changes that Congress made in
4 IIRIRA that that -- that that's what it was
5 doing, and it wasn't distinguishing --

6 CHIEF JUSTICE ROBERTS: So it's not --
7 but I thought your answer was to the effect that
8 it's not a firm rule. You have two separate
9 documents. The fact that you get them in the
10 same envelope, I don't -- it seems to be a
11 functional analysis, whether or not notice has
12 been given as -- as a matter of reality.

13 MR. ZIMMER: Well, I -- I -- I guess
14 our position is that it all has to be provided
15 together. And I think if it's all in the same
16 envelope, it's provided together.

17 I mean, I think that's sort of what
18 the idea of a document is. Whether it's on one
19 page or two pages I don't think is the question.
20 But, if it's all in the same envelope, I mean,
21 it is for all intents and purposes a -- a single
22 document in a way that it's not if it -- if it's
23 -- if it's coming separately.

24 But, again, you know, I don't think
25 that what -- what Congress was doing here, this

1 idea, if the government can serve two envelopes
2 that arrive on the same day, then surely it can
3 just put all of the information in one document
4 and provide it together. And I think that's
5 clearly what Congress intended that the
6 government do here.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas.

10 JUSTICE THOMAS: Thank you, Mr. Chief
11 Justice.

12 Mr. Zimmer, let's look -- let's go
13 back to 1229(a) for a second. The -- there's no
14 definition of a notice of appeal -- or a notice
15 to appear, I'm sorry. The definition is written
16 notice. And it says, parenthetically, in this
17 section referred to as "a notice of appeal" --
18 of appeal -- "notice to appear."

19 So -- and you seem to put quite a bit
20 of -- of weight on "a notice to appear." What
21 if that was not there at all, that parenthetical
22 did not appear there?

23 MR. ZIMMER: Right. So I think this
24 would be a very different case, and I -- and I
25 think our -- our -- our textual argument would

1 -- would be -- would be a much more difficult
2 one.

3 And I think that that point, there
4 probably would be ambiguity in that provision.
5 I still think at that point that the history
6 here, sort of the -- the -- the actions that
7 Congress took in IIRIRA and the changes that it
8 made, would still be a compelling -- a
9 compelling reason that we're right, but I think
10 we would have a much harder argument.

11 But, of course, this Court has
12 repeatedly made clear in cases like Gustafson
13 and Bond that -- that it is appropriate to -- it
14 is appropriate to consider the defined term
15 itself in understanding definitional language.
16 And that's why the phrase "a notice to appear"
17 is particularly important here.

18 JUSTICE THOMAS: But the -- again, I
19 go back to what the statute says. The statute
20 refers to written notice, and it -- it defines
21 written notice. It does not define the
22 parenthetical. The -- the -- the parenthetical
23 simply says "referred to as." It didn't say
24 that that is what was being defined.

25 So it would seem that you would have

1 to rely on the reference, not the definition.

2 MR. ZIMMER: Right. Well, the -- I
3 think that under -- the way Pereira described
4 this provision is that you have a defined term,
5 a notice to appear, and then the definition is
6 written notice specifying that information.

7 And, again, I think under cases like
8 Gustafson and Bond, when you're -- when you're
9 trying to understand the definition, you know, I
10 think that the definition, sort of the written
11 notice language that you're talking about, could
12 be read either way.

13 I think that, in context, it doesn't
14 explicitly require a specific notice document,
15 but nor does it explicitly authorize the
16 government to use multiple notice documents.

17 And that's why, you know, under this
18 Court's precedent, it -- it's necessary to look
19 to other contextual clues like the defined term
20 itself, like the other statutory provisions that
21 -- that really don't make any sense if you're
22 not talking about a specific notice document,
23 and like the history and like what Congress
24 actually did in IIRIRA.

25 So we're not arguing that absent the

1 parenthetical the statute would be unambiguous.
2 I think it -- it -- it's unclear. But I think
3 that the defined term and these other statutory
4 provisions and the history of this provision
5 really resolves that ambiguity and makes it
6 clear that what Congress was talking about here
7 was a specific notice document.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: I have the same
12 question as Justice Thomas. If you have
13 anything else you want to say, go ahead.

14 MR. ZIMMER: Well, if I could just
15 sort of --

16 JUSTICE BREYER: I have no comment.

17 MR. ZIMMER: Yeah, if I could just
18 sort of emphasize then the historical point
19 which I think is really the most -- the most
20 revealing aspect of -- of why the sort of any
21 ambiguity in 1229(a)(1) really has to be -- sort
22 of has to be resolved in our favor, in the sense
23 that the statute used to authorize the
24 government to use multiple -- to -- to -- to
25 provide notice over the course of multiple

1 documents.

2 It used to define an order to show
3 cause as notice of specific information that did
4 not include the time and place of the hearing.
5 And that had a separate provision that
6 authorized the government to provide time and
7 place information in the order to show cause or
8 otherwise.

9 And in IIRIRA, Congress specifically
10 cut the language authorizing that the government
11 provide a separate hearing notice and required
12 that time and place information be provided as
13 part of the notice to appear itself.

14 And on the government's view, that's
15 significant -- on the government's
16 interpretation of the statute, that significant
17 change to the statute's notice provisions
18 accomplished practically nothing. It didn't
19 change the government's notice requirements at
20 all.

21 And this Court's precedents plainly
22 require that -- that significant changes to the
23 statute be given a real and meaningful effect.
24 And the government's -- the government's
25 interpretation would deprive it of that. And I

1 think that's really the clearest reason why any
2 ambiguity in the phrase "written notice" needs
3 to be resolved in -- in -- is necessarily
4 resolved in favor of -- of requiring a specific
5 notice document which is, of course, consistent
6 with the defined term itself.

7 JUSTICE BREYER: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Alito.

9 JUSTICE ALITO: What if it turns out
10 that the government has great difficulty at the
11 time when notices to appear are issued in
12 setting a -- an appearance date that will be
13 complied with in most cases?

14 So suppose they put down appearance
15 dates that are like 10 percent likely to hold
16 up. Would that be sufficient?

17 MR. ZIMMER: Yes, absolutely. I think
18 that -- that as long as there's a date, you
19 know, once the date is put down on the -- on the
20 notice, then it becomes the date at which the
21 non-citizen's required to appear.

22 JUSTICE ALITO: What if in 95 percent
23 of the cases that turns out not to be the date?

24 MR. ZIMMER: Yeah, I mean, I still
25 think that -- I don't think that there's a --

1 there's sort of -- the non-citizen would have an
2 opportunity to sort of, you know, bring some
3 sort of statistical analysis as to whether it's
4 likely to be the date. But I think that -- that
5 there's still a real important purpose served in
6 having a date put on the notice to appear.

7 JUSTICE ALITO: Well, was the answer
8 to that -- was the answer to that yes or no? If
9 it's 95 percent likely --

10 MR. ZIMMER: Oh.

11 JUSTICE ALITO: -- to be changed, is
12 that sufficient, or can that be challenged?

13 MR. ZIMMER: No, I don't think it can
14 be challenged. I think that's sufficient.

15 JUSTICE ALITO: What if it's
16 99 percent likely not to be the real date?

17 MR. ZIMMER: Yeah, I -- no, I still
18 think that's sufficient. We're not arguing that
19 there's any kind of -- if -- if there's a date
20 that's down on the piece of paper that is a date
21 at which the hearing, you know, technically
22 could -- could -- could take place, then the
23 non-citizen's required to appear at that date,
24 and by definition, that is at that point in time
25 the date and time of the hearing.

1 But there's a real --

2 JUSTICE ALITO: All right. Can -- can
3 I take you just back to the Chief Justice's
4 question? So, as I understood your answer, if
5 the document that's labeled notice to appear and
6 another document that sets the appearance date
7 arrive at the same time in two separate
8 envelopes, that's not sufficient, but, if
9 they're in the same envelope, that's okay then?

10 MR. ZIMMER: Well, yeah. I mean, I
11 think -- yes, I think if the information's
12 provided together in one place, then that --
13 then that's accomplishing exactly what Congress
14 was trying to accomplish by moving the time and
15 place information from an optional part of the
16 order to show cause to a required part of the
17 notice to appear.

18 I -- I think that's exactly what
19 Congress was trying to do and to avoid these
20 types of disputes about whether the hearing
21 notice was properly served. And -- and, you
22 know, I'll note, just to get back to your
23 initial hypothetical, that -- that it is really
24 very much a hypothetical in the sense that the
25 government has told this Court in its brief that

1 it can comply and that it is largely -- it is
2 now largely complying with the statute's
3 requirement and it's providing information about
4 the actual hearing date upfront, and -- and --
5 and that's not surprising. You know --

6 JUSTICE ALITO: Well, if Congress want
7 --

8 MR. ZIMMER: -- this Court addressed
9 this --

10 JUSTICE ALITO: -- if Congress was
11 determined for the alien to get all of this
12 information in one document, why does the
13 statute allow the government to keep changing
14 the actual date of the hearing?

15 MR. ZIMMER: Well, I -- I think it
16 would be -- I mean, I think that that's sort of
17 just a necessary function of the fact that --
18 that there are going to be times when the
19 hearing has to change for -- for a whole host of
20 reasons.

21 And I -- and I think it would have
22 been unrealistic to say that, you know, once
23 there's a date put down on the initial notice
24 document the government doesn't have -- you
25 know, that that's sort of set in stone and can't

1 be altered. But having --

2 JUSTICE ALITO: Thank you, counsel.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Justice

5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, can you
7 explain why the individual -- the individual
8 information that's required by the statute to be
9 in the notice of appeal, why each piece doesn't
10 have independent value?

11 And by that, I mean, what is the --
12 what is the damage that Congress -- that you
13 believe Congress was trying to avoid in doing
14 piecemeal notices?

15 MR. ZIMMER: Sure.

16 JUSTICE SOTOMAYOR: The fundamental
17 question that I think some of my colleagues have
18 asked you so far is, if each of the pieces of
19 information have independent value, why would
20 Congress have wanted to specify it in one
21 document?

22 MR. ZIMMER: Right. So -- so let me
23 give maybe three answers to that, Justice
24 Sotomayor.

25 I mean, as a -- as a big picture

1 matter, if you look at the -- the specific
2 pieces of information that are required, they're
3 all closely related in the sense that they're
4 connected to the information that a non-citizen
5 needs to defend herself against removal charges.

6 You know, you have things like the --
7 the acts or conduct alleged to be in violation
8 of law and -- and the charges against the -- the
9 alien and the statutory provisions alleged to
10 have been violated. You know, to start
11 providing the acts of conduct in one document
12 and then, a year later, to provide the charges
13 and then, a year later, to provide the hearing
14 obviously makes -- makes little sense and -- and
15 -- and could be -- could be incredibly
16 confusing.

17 To -- but to be a bit more specific as
18 to the -- the -- the time and place information
19 itself, I think there were -- there were two
20 concerns that were motivating the changes that
21 Congress made in IIRIRA. The first one was that
22 Congress was sick of immigration courts having
23 to resolve unnecessary disputes about whether
24 this hearing notice was properly served.

25 And you can see that in the House

1 Judiciary Committee report, which specifically
2 identifies this as a problem Congress was trying
3 to solve. And you can see it if you look at
4 pages 8 to 18 of the amicus brief submitted by
5 the -- the former immigration judges and BIA
6 members, which explains in detail the massive
7 administrative problems that are caused by the
8 two-step notice process. So I think Congress
9 was trying to solve -- solve those problems.

10 And then this Court specifically noted
11 in *Pereira* that providing time and place
12 information separately from the rest of the
13 information in the statute can cause confusion,
14 and it -- and it's cleaner and more
15 straightforward for non-citizens to receive one
16 document with all this information that they can
17 take to a lawyer or analyze themselves and not
18 require them to sort of piece together assorted
19 piece -- information about their removal
20 proceeding that are served over time.

21 JUSTICE SOTOMAYOR: And so why is it
22 that the -- why is it that the ability of the
23 government, because it's specified by -- by
24 statute, to change the time and place by telling
25 the alien that, why doesn't that destroy your

1 argument?

2 MR. ZIMMER: Sure. Well, so -- so,
3 first of all, I think it's just necessary to
4 have some ability to change the hearing date.
5 But also having some sort of date certain on the
6 initial notice is extremely valuable because it
7 means that you -- if the -- if the subsequent
8 hearing notice -- so imagine there's no date on
9 the initial notice. Then, if there's a problem
10 serving the subsequent hearing notice, then the
11 person's in limbo and there's no date at which
12 they'll ever show up in immigration court.

13 But, if there's a date on the initial
14 hearing notice, even if it gets changed, imagine
15 it gets changed and that subsequent -- that
16 subsequent hearing notice isn't properly served,
17 well, then the non-citizen still has to show up
18 on the initially noticed date. And when that
19 person arrives in immigration court, any
20 confusion can be resolved and the person can
21 then be given in-person notice of the new date.

22 JUSTICE SOTOMAYOR: And that person
23 already knows all the rights that the notice to
24 appear has given them?

25 MR. ZIMMER: Exactly. That person

1 already knows all the other information --

2 JUSTICE SOTOMAYOR: Thank you,
3 counsel.

4 MR. ZIMMER: Yes.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: Mr. Zimmer, if -- if I
7 could start right there, because I'm not quite
8 sure I understand the point. As I understood
9 it, you said, well, the -- it -- it's less
10 confusing because, if the second -- if the
11 change in date never arrives, at least there's
12 the date on the initial hearing notice.

13 But -- I mean, that could happen, but
14 I would think what's more likely is that a
15 change in date does arrive -- arrive, and that
16 seems more confusing, to have the date change
17 and maybe change more than once.

18 So who are we helping here really?

19 MR. ZIMMER: Well, so I think the
20 first -- you know, I -- frankly, I think that
21 Congress was most concerned with helping
22 immigration courts and making sure -- and then
23 sort of ending this two-step notice process that
24 -- that was causing significant problems, was
25 causing all of these unnecessary fights, because

1 non-citizens would show up in court and say I
2 never received a hearing notice.

3 If there's a date on the initial
4 notice, you can't say that because, at the very
5 least, you're required to show up on that date.
6 So I think that, frankly, was what Congress's
7 primary goal was.

8 In terms of the -- the -- but I do
9 think that Congress was also intending to help
10 non-citizens in the sense that, yes, the hearing
11 date can change. But I don't think there's any
12 reason to think that if the government does its
13 job, does what it, frankly, has -- has told this
14 Court it is already now doing in light of
15 Pereira, if the government does its job, then in
16 -- in a lot of cases, the hearing date won't
17 change and you will have a -- you will have a --
18 a notice document that has all the information,
19 including the date of the hearing.

20 I just think it would have been too
21 much to ask, understandably, that the
22 government, once they put a hearing date on, you
23 know, that there's nothing they could do to
24 change it. So -- so I think that's just sort of
25 bowing to reality, that you could have hearing

1 notices, but I certainly think it's still very
2 helpful to have all this information in one
3 place.

4 JUSTICE KAGAN: And -- and, Mr.
5 Zimmer, you seem to be assuming that, on the
6 first document, you know, if your position is
7 accepted, the government will put a date on the
8 first document.

9 But how about if it doesn't? How
10 about if the government responds to a decision
11 in your favor by saying: Look, we're going to
12 send the first document without the date, and
13 sometime down the road, when we know the date,
14 we'll send another document and it will be maybe
15 a document with the date, with the old document
16 stapled to it, or maybe we'll just take the old
17 document and stamp the date on it. So --

18 MR. ZIMMER: Right.

19 JUSTICE KAGAN: -- you know, would
20 that be permissible?

21 MR. ZIMMER: I think it would be
22 permissible. I think that -- you know, I -- I
23 don't think it's what Congress would have
24 expected the government to do, given that this
25 -- this process has a history going back to the

1 1950s, and -- and I think it's important to keep
2 in mind that for 20 years, from the 1950s to the
3 1970s, the initial notice -- notice document was
4 required to have a date. The government doesn't
5 dispute that, and it complied with that
6 requirement. So, you know, it didn't do this
7 kind of two-step put-the-date-on-later thing.

8 So I think Congress -- yes, it would
9 be permissible. I don't think it's what
10 Congress would have -- sort of the way Congress
11 anticipated that the system would work.

12 And, again, I note that if you look at
13 pages 41 to 42 of the government's brief, that's
14 not what the government's doing. It is actually
15 doing exactly what I described and providing,
16 you know, an accurate date up-front.

17 JUSTICE KAGAN: Thank you, Mr. Zimmer.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning,
21 Mr. Zimmer, and welcome back.

22 MR. ZIMMER: Thank you.

23 JUSTICE GORSUCH: It sure seems a
24 little bit like Pereira groundhog day to me. I
25 guess I'm curious what your argument -- what

1 your response is to the government's argument
2 that it should just win under Chevron step 2 at
3 a minimum. No harm, no foul. Good enough for
4 government work. If it's ambiguous, the tie
5 goes to the government.

6 Why -- why -- why -- why should we --
7 why should we care?

8 MR. ZIMMER: Sure. So let me give two
9 responses.

10 The first -- the first, Justice
11 Gorsuch, is that it's not ambiguous, and I think
12 that the -- that if you just look at what
13 Congress --

14 JUSTICE GORSUCH: Put -- put -- put
15 that one aside for the moment now.

16 MR. ZIMMER: Got it. Yeah. So then I
17 think that the -- assuming there is some
18 ambiguity, I think our -- my primary argument
19 would be that what you have here is under -- you
20 know, under Encino Motorcars, the agency can't
21 just sort of flip-flop back and forth between
22 positions without explaining itself and yet
23 claim deference. And that's exactly what's
24 going on here.

25 If you look at the post-IIRIRA

1 rulemaking -- and this is at page 53a of our
2 statutory and regulatory appendix -- it
3 specifically -- right after IIRIRA, the
4 government in rulemaking stated that the
5 language of the amended Act indicates that the
6 time and place of the hearing must be on the
7 notice to appear. And that's notice to appear
8 with capitals, which the government admits is a
9 specific notice document.

10 And then, in Matter of Camarillo, the
11 BIA says the same thing, that it's a specific
12 notice document. In Matter of Ordaz, the BIA
13 says the same thing again. And then, in
14 Mendoza-Hernandez, after Pereira, suddenly it
15 reaches the opposite conclusion, but BIA doesn't
16 even acknowledge these prior decisions. It
17 addresses them in a -- in a -- in a largely
18 unexplained footnote, Footnote 8, which just
19 describes them as flawed.

20 And I think this is a classic example
21 where the agency has -- has made an unexplained
22 change of position and -- and is not entitled to
23 deference. Just its latest decision is not
24 entitled to deference.

25 I also think that the reasoning in

1 Mendoza-Hernandez is really just based almost
2 entirely -- it basically ignores the statute's
3 text. It completely ignores the statute's
4 history. It doesn't even acknowledge the
5 changes that IIRIRA made, even though those
6 changes were addressed in the -- in the agency
7 dissent.

8 And that type of reasoning just --
9 it's not the type of reasonable approach to
10 statutory interpretation that this -- that this
11 Court requires and is -- and shouldn't be
12 entitled to deference for those reasons too.

13 And then, last, although, you know, I
14 don't think the Court needs to reach this
15 question given all these other issues, but we do
16 think that, if necessary, as we explained in our
17 brief, that the Court could reconsider and
18 should reconsider whether sort of deference to
19 an administrative -- to the BIA's interpretation
20 of pure questions of statutory interpretation
21 should really ever be entitled to deference
22 since it doesn't really have any advantage over
23 this Court in interpreting statutes.

24 And this is a proceeding that
25 basically takes place in secret. This is an

1 opinion that basically came out of the blue. No
2 one other than the parties knew that the agency
3 was even considering this question. There was
4 no opportunity for public input, let alone --
5 you know, public input as to whether the agency
6 was going to change its longstanding position on
7 this.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Thank you.

12 And good morning, Mr. Zimmer. I want
13 to pick up on what Justice Thomas was saying.
14 The statute requires written notice, and, as I
15 understand it, your client did receive written
16 notice of everything in Section 1229(a).

17 So why doesn't that end the case?

18 MR. ZIMMER: Right. Because -- so I
19 think that if you read that language in context,
20 I don't think it -- that even if you sort of
21 take out everything else, I think that if you're
22 talking about written notice specifying a set of
23 interrelated information about the initiation of
24 a legal proceeding, I don't think that that
25 language is entirely clear.

1 I think you can read it as requiring
2 -- you can read it either way, as requiring a
3 specific notice document or as allowing the
4 government to use multiple documents. And
5 that's why it's so important to look to these
6 other -- other interpretive tools like looking
7 to the defined term, itself where it talks about
8 a notice to appear, and like the history.

9 And I -- I note, Justice Kavanaugh,
10 that this phrase "written notice" was copied
11 directly from the pre-IIRIRA statute, so it was
12 copied directly from the prior definition of an
13 order to show cause. And I really don't think
14 there's any way to read that statute as not
15 requiring a specific notice --

16 JUSTICE KAVANAUGH: Well, let me --

17 MR. ZIMMER: -- document.

18 JUSTICE KAVANAUGH: I'm sorry to
19 interrupt, but --

20 MR. ZIMMER: No, no, please.

21 JUSTICE KAVANAUGH: -- you're --
22 you're relying, obviously, on a notice to appear
23 and the parenthetical, which does not, as
24 Justice Thomas said, necessarily account for the
25 term "written notice" in the text.

1 I take your point about the context
2 and the history. But, also, the -- the problem,
3 I think, that the Chief Justice and Justice
4 Alito and Justice Sotomayor were raising or
5 asking about was that, how does this make much
6 sense in the real world? Let me just follow up
7 on their questions.

8 If you gave notice with everything,
9 including the time and place, and then sent a
10 second document with a new time and place,
11 that's okay, correct?

12 MR. ZIMMER: Yes, that -- that's
13 specifically allowed by the statute, yes.

14 JUSTICE KAVANAUGH: Exactly. So --
15 but, if you send a notice without the time and
16 place and then send the second document with the
17 new time and place, that's not okay in your
18 view?

19 MR. ZIMMER: Absolutely. And -- and
20 that -- but that makes perfect sense given what
21 Congress -- you know, what Congress -- the
22 changes that Congress made in IIRIRA, because
23 the whole problem that was being addressed here
24 was that there were all of these unnecessary
25 disputes, that Congress was sick of these

1 disputes about whether that sort of thing --

2 JUSTICE KAVANAUGH: Weren't the
3 disputes arising for -- on removal in absentia
4 proceedings?

5 MR. ZIMMER: Exactly. Yeah. That's
6 exactly right. But -- but that's the whole
7 point here, because what would happen is there
8 would be no time and place in the initial notice
9 document, and then the government would try to
10 serve a separate hearing notice, and then there
11 would be a fight about whether that hearing
12 notice was properly -- you know, basically, the
13 person would claim they didn't get the hearing
14 notice and that's why --

15 JUSTICE KAVANAUGH: Congress was
16 trying --

17 MR. ZIMMER: -- they didn't show up.

18 JUSTICE KAVANAUGH: -- to -- trying --
19 Congress was trying to cut off avenues for
20 immigrants to argue against removal in absentia.

21 MR. ZIMMER: Well, I think it was
22 trying to avoid those fights. And I think -- I
23 think it was -- I don't -- I'm not sure that's
24 exactly right, Your Honor. I think it was
25 trying to avoid --

1 JUSTICE KAVANAUGH: One -- one last
2 question, I just want to get it in --

3 MR. ZIMMER: Yes, please.

4 JUSTICE KAVANAUGH: -- which is you've
5 relied a lot on the history, the legislative and
6 statutory history, but the conference report
7 says that this section is designed to "restate
8 the provisions" of current law.

9 MR. ZIMMER: Right. Right. I -- I
10 mean, it largely does, but I don't think that
11 there's any way you can read -- I mean, there
12 are clearly, as Pereira makes clear -- I mean,
13 Pereira explicitly addressed this -- there are
14 some changes that were made, and you can't just
15 read those changes out of the statute.

16 So, in general, I think all -- in
17 almost all respects, it does restate the
18 provisions of the prior law. But the one
19 significant change it made is moving -- removing
20 this language authorizing the two-step notice
21 process.

22 And I think, if Congress wanted to
23 allow the government to keep doing what it was
24 doing, there's no reason it would have cut the
25 language that explicitly authorized that

1 practice from the statute.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Barrett.

5 JUSTICE BARRETT: So, counsel, I take
6 it that under the government's approach, there's
7 no dispute that the stop-time rule starts
8 running when notice is complete, so I -- when
9 the non-citizen receives the time and place of
10 the hearing, is that correct?

11 MR. ZIMMER: Are -- sorry, just to
12 make -- are you saying that we're not disputing
13 that under the government's rule, our client --
14 under the government's rule, our client received
15 the notice? Is that what you're asking?

16 JUSTICE BARRETT: Right. So I'm
17 saying under the government's approach, the
18 stop-time rule runs when notice is complete and
19 when the time and place are received?

20 MR. ZIMMER: That -- that's right,
21 yeah.

22 JUSTICE BARRETT: Okay. So here's my
23 question: Justice Alito was saying, and -- and
24 you agreed, that the stop-time rule would run
25 when notice was complete, even if the government

1 used a dummy date or a date that was 99 percent
2 certain to be changed in the initial notice that
3 contained everything.

4 So why isn't this rule actually worse
5 for non-citizens because it'll mean that the
6 stop-time rule starts running earlier?

7 MR. ZIMMER: Right. Well, so, Your
8 Honor, this is -- so this is exactly the issue
9 that this Court addressed in Pereira. And I
10 think the -- the Court correctly recognized that
11 there -- that the government is not going to
12 provide arbitrary -- arbitrary dates, but, you
13 know -- and that Congress wouldn't have assumed
14 that the government would provide arbitrary
15 dates but would --

16 JUSTICE BARRETT: You told Justice
17 Alito that that would -- I mean, even if it's --

18 MR. ZIMMER: Well --

19 JUSTICE BARRETT: -- 85 percent not
20 likely to happen, you told Justice Alito that
21 would satisfy the rule.

22 MR. ZIMMER: I -- it -- no, no, it
23 absolutely would. And I -- and I'm not changing
24 that. I'm just talking about in terms of why
25 Congress would have set up this -- this -- this

1 system.

2 And I think the reason is that it
3 would have -- that -- that the government
4 generally does not sort of provide arbitrary
5 information to -- to people. And it -- it
6 generally doesn't stop the --

7 JUSTICE BARRETT: Well, I think that's
8 true. But, if DHS really can't coordinate with,
9 you know, immigration courts because it can't
10 put things on their docket, it may have no
11 choice, you know, if the software doesn't handle
12 things in every situation, but to give a date
13 that it hopes for, but this rule would force
14 them to put that date down.

15 Let me -- let me go back to Justice
16 Kagan's question. So she pointed out that
17 another way to satisfy this rule would be to
18 send essentially what would be a draft notice
19 containing all information except time and place
20 the first time around, and then later, once the
21 time and place was set, send the notice that
22 would actually trigger the stop-time rule that
23 contained all the information.

24 And you conceded that would be
25 sufficient, but you resisted it. And I'm

1 wondering why you're resisting it, because
2 wouldn't it be better under Justice Kagan's
3 hypothetical for the immigrant to have more
4 information and to know in the beginning, well,
5 this is what's coming? We're going to be
6 initiating, you know, removal proceedings based
7 on this information, and you can expect to hear
8 the time and date late -- later, and that's when
9 the stop-time rule will -- will happen.

10 Why do you resist --

11 MR. ZIMMER: Well --

12 JUSTICE BARRETT: -- Justice Kagan's
13 scenario when it would result in the non-citizen
14 getting more information?

15 MR. ZIMMER: Sure. I mean, I don't --
16 I don't resist it in the sense that I think that
17 it's clear that Congress preferred that to what
18 the government is doing now.

19 I think that I resisted it only in the
20 sense that I -- I -- I don't think that there's
21 any reason to think that the government can't
22 just provide accurate information in the first
23 place, which is, you know, exactly what this
24 Court said in *Pereira*. And, again, if you look
25 at pages 41 to 42 of the government's brief,

1 they're basically doing that now.

2 So -- so I didn't -- I certainly don't
3 resist it in the sense that it is far preferable
4 to what's happening now because the non-citizen
5 does receive at some point all the information
6 together.

7 I just -- I don't think it's even
8 necessary for the government to do that in the
9 sense that it's told the Court it can provide
10 accurate information that already, in light of
11 Pereira, is already largely providing accurate
12 information in the initial notice.

13 JUSTICE BARRETT: Thank you, counsel.

14 CHIEF JUSTICE ROBERTS: A minute to
15 wrap up, Mr. Zimmer.

16 MR. ZIMMER: Thank you, Mr. Chief
17 Justice.

18 In conclusion, Congress could not have
19 been clearer in IIRIRA that the statute used to
20 authorize a two-step notice process: an order
21 to show cause followed by hearing information in
22 the order to show cause or otherwise.

23 And in IIRIRA, Congress cut the
24 language authorizing the separate hearing notice
25 and required the time and place information be

1 included in the notice to appear itself.

2 That change only makes sense if both
3 the order to show cause and the notice to appear
4 are specific notice documents. Accepting our
5 interpretation of the statute simply requires
6 that the government do what IIRIRA clearly
7 commands, and, as I've been describing, the
8 government plainly can do this.

9 Indeed, as I was just mentioning to
10 Justice Barrett, it told the Court in -- in its
11 brief at pages 41 to 42 that it has already
12 largely done it.

13 Accepting the government's position,
14 by contrast, would allow the government to
15 reverse the progress it has made since Pereira
16 and continue indefinitely with the very
17 multi-step notice process that IIRIRA explicitly
18 cut from the statute, a process that leads to
19 precisely the notice lapses and confusion that
20 Congress sought to avoid.

21 Thank you very much.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Yang.

25

1 ORAL ARGUMENT OF ANTHONY A. YANG

2 ON BEHALF OF THE RESPONDENT

3 MR. YANG: Mr. Chief Justice, and may
4 it please the Court:

5 The Board of Immigration Appeals
6 adopted the best reading of the INA in
7 concluding that Section 1229(a)'s written notice
8 requirement permits written notice to be
9 provided in two documents: an NTA form and a
10 notice of hearing. That conclusion flows
11 directly from the statutory text.

12 Section 1229(a)(1) offered a text,
13 specified both the content and the form of the
14 required notice. The content is listed in the
15 subparagraphs of paragraph 1. And with respect
16 to form, the statute specifies that it must be
17 in writing and must be served personally or by
18 mail.

19 Congress otherwise left the form of
20 the notice up to the government, and there is no
21 dispute here that Petitioner received written
22 notice in that manner conveying all of the
23 relevant information.

24 No sound reason exists for precluding
25 the use of a separate document to specify the

1 time and date of an initial hearing.

2 The government's rule treats similarly
3 situated aliens similarly. If an alien receives
4 all the required notice at the same time as
5 another, it does not matter if the form of that
6 notice is in one document or two.

7 It reflects the standard rule of
8 notice provisions, the purpose of which is
9 simply to provide adequate notice.

10 Petitioner, by contrast, would treat
11 differently two aliens who received notice of
12 all the required categories of information at
13 the same time based now on whether it's on one
14 envelope or two.

15 That rule is nonsensical, and it is
16 wholly out of step with the result in the design
17 of IIRIRA. This Court in *Pereira* rejected the
18 idea that the form of a notice document labeled
19 notice to appear should control, holding instead
20 that the proper focus is on the substance of the
21 information required by statute.

22 The Court should do the same here by
23 holding that the statutory text shows the
24 substance of the notice, not its form as one or
25 two documents controls.

1 CHIEF JUSTICE ROBERTS: Mr. Yang, you
2 can fix this whole problem or at least moot the
3 dispute simply by sending a copy of the notice
4 to appear when you send a notice of when the new
5 hearing date is or when a hearing date is?

6 MR. YANG: I -- by Petitioner's
7 concession, that would satisfy his test,
8 although there are some practical difficulties,
9 and if I can explain those.

10 EOIR issues hearing notices as the
11 adjudicator of the charges, and serving an alien
12 with an NTA form containing those charges has
13 traditionally been viewed as a prosecutorial
14 function, not one performed by the neutral
15 adjudicator. For DHS, once EOIR issues a
16 hearing notice, it would be administratively
17 difficult to act with sufficient speed to
18 combine the NTA form with that notice and
19 re-serve both on the alien. And --

20 CHIEF JUSTICE ROBERTS: But why -- why
21 would that -- I'm sure you understand the
22 intricacies more than I do, but whoever is
23 sending out the updated notice to appear or the
24 original notice to appear, you know, just has to
25 attach what they've -- someone has already sent,

1 which is the original notice, notice to appear.

2 Now, if it's the fact that the
3 immigration office has to -- to take the
4 prosecutorial information and staple it together
5 or the other way around, it doesn't seem to me
6 that that should be terribly administratively
7 burdensome.

8 MR. YANG: Well, on the immigration
9 court side, I think that it has traditionally
10 been viewed, and I think they would view their
11 position as not being one to serve the charges,
12 to facilitate charges.

13 But, for DHS, this is -- this is the
14 issue. Recall the hearing has to be set no
15 earlier than the date of the service of the
16 written notice. And if the written notice is
17 the stapled document, that's what we're going
18 by.

19 DHS would have to re-serve it. DHS's
20 NTA form is in the alien's physical A-file. The
21 -- the physical A-file has to be retrieved. And
22 it's not infrequently sent to the National
23 Records Center in Missouri. It has to move from
24 place to place depending on what's been going
25 on.

1 If the alien, for instance, seeks some
2 benefit, it's sent to USCIS to adjudicate the
3 benefit. It then might be sent back to the
4 records center. So it's not uncommon that this
5 is not local when the notice is issued.

6 Now we're not saying this can't be
7 done, but it would be burdensome. Now remember
8 --

9 CHIEF JUSTICE ROBERTS: Thank you.
10 Thank you for that information.

11 Do you argue that the error is
12 harmless here or at least will be harmless in
13 many cases?

14 MR. YANG: We're not arguing harmless
15 error here because the question is when the top
16 -- stop-time rule stops, when -- when the time
17 stops, not whether there was an error. There
18 would be harmless error arguments in, for
19 instance, if a hearing was held without adequate
20 notice, as determined by this Court. We could
21 have a harmless error in that instance.

22 But, in the stop-time rule, we're not
23 asserting that argument.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas.

2 JUSTICE THOMAS: Thank you, Mr. Chief
3 Justice.

4 Mr. Yang, can you give me an example
5 of other places in the U.S. Code or in your
6 practices where you send multiple notices?

7 MR. YANG: Multiple notices? Well, I
8 -- I think -- I don't have a specific instance
9 in the U.S. Code, but oftentimes there are
10 notice and supplemental notice when there's new
11 information that -- that is -- wasn't originally
12 available.

13 And I think that's the kind of
14 situation that we have here in many contexts.
15 Although, in certain non-retained cases, we can
16 issue and do issue a notice to appear with
17 hearing dates, that's not the case. And it's
18 not this case; it's with many cases. And if I
19 could explain why it's administratively
20 difficult, at the time you're issuing an NTA
21 form to -- to -- I'm sorry, Chief Justice, I
22 didn't mean to interrupt. I'm hearing --

23 CHIEF JUSTICE ROBERTS: No, I think
24 you can proceed.

25 MR. YANG: Okay. So it's

1 administratively difficult, particularly for
2 aliens arrested without a warrant. And this is
3 a very frequent event, particularly at our
4 borders.

5 There are two considerations that are
6 relevant there. First, it's the timing and the
7 hearing and the location of the immigration
8 court. Those things can depend on two things:
9 whether the alien is on the detained docket or
10 the non-detained docket -- the detained docket
11 has to move much more quickly because they're
12 detained -- and where the alien will be located
13 during the -- the removal proceedings.

14 The second factor is that the
15 government has to promptly issue an NTA with
16 charges to the arrested alien, which DHS informs
17 us often occurs before it has the detention and
18 location information. So, for instance, on page
19 42 of our brief, we explain that DHS, by
20 regulation, normally has to decide whether to
21 issue the NTA within 48 hours, and it will serve
22 it on the alien shortly thereafter.

23 It's important to let an alien know,
24 an individual who you have detained in the
25 United States, why they are being detained.

1 But, when the border patrol arrests the alien
2 and it's the one that issues the NTA because
3 it's the investigating agency and it has -- has
4 knowledge of the charges, the government's
5 detention decision is normally then made by ICE
6 because the border patrol doesn't detain the
7 individual, ICE has to, and it has to make the
8 determination based on its resources.

9 So then ICE has to make the
10 determination, and that's after the NTA is
11 issued. And we even don't know at that point
12 whether the alien will get bond from an
13 immigration judge. So --

14 JUSTICE THOMAS: So, Mr. Yang, the --
15 I understand the logistical problems, but the --
16 could you -- are you limited to just sending two
17 or three documents? Could you send seven or
18 eight or nine different documents?

19 MR. YANG: There's nothing that
20 textually limits us, but there are practical
21 considerations. As we explained, remember,
22 we're talking about a volume here of, like,
23 500,000 NTAs per year. That's about 10,000 a
24 week or 2,000 a day on average.

25 There is no interest in the government

1 to balkanize the notice, the written notice it
2 has to provide, because it multiplies our effort
3 and introduces all kinds of potential for error.

4 The only -- and there's never been any
5 indication that the government ever does this,
6 except for the hearing notice. The hearing
7 notice --

8 JUSTICE THOMAS: Thank you, Mr. Yang.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: As far as I
12 understand this, there's a statute and it says
13 written notice, which means a notice to appear,
14 a notice to appear, shall be sent to the alien,
15 containing a number of things, and one of them
16 is the time and the place of hearing. It seems
17 to me, if you read it, it says send a notice, a
18 notice, not four notices, a notice to appear
19 which contains the following.

20 All right? And if you look at it
21 practically, you say, well, if you -- if you
22 have more than one document with some of this
23 information, people are going to get mixed up.
24 The aliens might get mixed up.

25 On the other hand, it's more

1 burdensome to the government. So I see things
2 on both sides of the practicalities of it, so
3 why don't we just go with the language?

4 MR. YANG: Well, I guess there's a few
5 things that you've asked there. One is about
6 the practicalities, and I can address that
7 second because I actually think Petitioner's
8 solution is worse than saying -- providing clear
9 indication that you're going to have a second
10 notice with time and date information and --
11 because you're going to have a -- a date that's
12 not correct. So I think his solution is
13 actually the -- the -- the worse for aliens.

14 But the -- the main point is the text.
15 The text is not quite as -- as I think you may
16 have suggested in -- in the question. The text
17 says that in removal proceedings, written notice
18 in the section referred to as a notice to
19 appear. So I want to read this section. This
20 is a definitional, you know, shorthand. In the
21 section referred to as a notice to appear shall
22 be given containing the information.

23 The written -- the operative text
24 doesn't have an A. It simply provides that
25 written notice is required. We don't think the

1 A really matters either way, but Petitioner's
2 argument hinges on it.

3 But, if you look at the next
4 paragraph, the next paragraph -- in paragraph 2,
5 Congress talks about requiring a written notice.
6 Now, if that's true, Congress's omission of --
7 in the operative text in -- in 1 certainly must
8 have import under Petitioner's theory, but --
9 but, clearly, it does not.

10 Not only that, if you look to just the
11 way that collective singular terms are used when
12 we're talking about collections of information,
13 it's quite typical for Congress to have used "a
14 notice to appear" because that can naturally
15 refer to multiple documents.

16 We cited a Oregon Supreme Court
17 decision called Bonds. It talks about multiple
18 documents comprising a notice to arbitrate. We
19 -- we cite that not because the -- the case is a
20 holding of a statute. It just illustrates that
21 this is a typical way to -- to refer to
22 informational singular terms.

23 And it would be pretty backwards for
24 Congress to say written notice is required in
25 the section referred to as a notice to appear

1 and have that article intended to
2 unambiguously -- as Petitioner said, that
3 article unambiguously shows that you need one
4 document versus two?

5 It just doesn't seem to be within the
6 realm of certainly not unambiguous, but the much
7 better argument is -- is the otherwise, which is
8 that written notice is required. And when --
9 that's particularly true when you look at the
10 function of the stop-time rule.

11 Congress wanted to stop the accrual of
12 time that aliens were collecting during removal
13 proceedings and make sure that the government
14 was serious enough by providing notice both of
15 the charges and the scheduled hearing. But that
16 function isn't served by saying whether it's in
17 one document or two.

18 All it requires, like any notice
19 requirement, is that you give notice to the
20 alien. And if the alien doesn't get notice, the
21 alien has a remedy. The alien -- if there is an
22 in absentia proceeding, the alien can come in at
23 any time, immediately stops the removal --
24 removal, and the alien can show that the alien
25 didn't receive the required notice.

1 We are --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Alito.

5 JUSTICE ALITO: Mr. Yang, I gather
6 that the decision in this case will be important
7 for a number of cases that arose before Pereira
8 and maybe for some time after that, but what is
9 the importance of a question for cases going
10 forward?

11 Mr. Zimmer says that the government is
12 now providing time and place in the notice to
13 appear. So what is the significance of this
14 case for future cases?

15 MR. YANG: So the pipeline cases,
16 there's about 1.2 million cases pending before
17 the EOIR at this point, but with respect to the
18 prospective cases, the problem is that we are
19 not providing the hearing information on our NTA
20 form for a substantial number. We don't have --
21 we don't track this, but the best estimates that
22 we have are, in any given month or so, maybe a
23 third of the -- the non-detained cases, only
24 non-detained cases, will have NTAs.

25 Remember, I was -- as I think I was

1 discussing with Justice Thomas, there are
2 problems about issue -- when you issue the NTA,
3 you don't have information -- for -- for an
4 arrested alien, you have to issue that NTA
5 promptly -- this is at page -- we cite the reg
6 at 287.3(d) at 42 of our brief -- you have to
7 issue that notice to appear promptly, but the
8 border patrol is not going to be able to
9 determine at that time whether the alien is
10 going to be detained, whether -- where the alien
11 will be and what -- and as a result, whether you
12 put them on the detained or non-detained docket.

13 Now, the non-detained docket moves
14 much more slowly. The detained docket, for good
15 reason, has to move quickly. If we had to put
16 everybody in our -- temporarily in our custody
17 on the detained docket, that would risk clogging
18 the detained docket with all of these cases with
19 aliens that simply are no longer detained, and
20 it would slow the whole process down for aliens
21 who actually are detained.

22 And when -- this is again at page 42
23 of our brief. EOIR attempted to have the
24 automative scheduling system operate for its
25 detained docket, but, as we explain in our

1 brief, the operational logistics were impossible
2 to overcome because of the fluctuation in the
3 detained population.

4 JUSTICE ALITO: Well, Mr. Zimmer says
5 you have an easy solution. You could just
6 ascertain what is the average time between the
7 serve -- between the service of a notice to
8 appear and the date and the time and place and
9 put that on the notice to appear, and that would
10 invoke the stop-time rule. If it turns out to
11 be inaccurate even 99 percent of the time, that
12 doesn't bother him.

13 MR. YANG: No, I understand that
14 position, but I think that just highlights how
15 absurd this all is, because, if Petitioner's
16 problem is solved by setting a date, say, three
17 years in the future or something and then
18 resetting the date with the hearing notice, they
19 -- they still have to get notice of the -- the
20 served hearing notice, and that should solve the
21 problem.

22 His -- he seems to -- his -- his --
23 the legislative history, which does not support
24 the proposition, he thinks that Congress was
25 concerned about disputes about the hearing

1 notice. But the legislative history doesn't
2 resolve that.

3 Congress specifically addressed
4 everything that, you know, it thought was
5 important without changing -- without providing
6 any kind of clear one-document rule. It
7 provided remedy for the alien if there was a
8 problem with service. It provided for
9 substantive information that must be provided
10 before the hearing or certainly before an in
11 absentia removal or, in this case, to trigger
12 the stop-time rule.

13 JUSTICE ALITO: Thank you. Thank you,
14 Mr. Yang.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Mr. Yang, I -- it
18 is somewhat an unusual situation because it's
19 not as if the rule that you're -- the other side
20 is asking us to implement stops the alien from
21 being detained or changes the course of his or
22 her hearing. Everything goes on.

23 The only issue is whether the
24 government gets the benefit of the stop-gap
25 rule. And, there, the other side says there is

1 an inherent value in having all of the
2 information that is necessary -- that is
3 specified under the -- under the statute
4 explicitly. It says a notice of appeal -- a
5 notice -- a notice to appear must include these
6 six or seven or eight items, and that's what
7 entitles you to the benefit the statute confers
8 against the alien and on the government.

9 And you haven't really answered for me
10 why that makes no sense and why your argument
11 that you would be entitled to send out seven or
12 eight pieces of paper, each one containing the
13 individual items required under the statute, and
14 then, when you got to the end of all of them,
15 the stop-gap rule comes into effect, but the
16 alien can't really know because it can't control
17 you from sending those notices out a month, two
18 months, three months apart, six months apart,
19 eight months apart. At some point, the alien's
20 not going to know what you're talking about when
21 you send the piece of paper.

22 So please tell me why your logic makes
23 more sense than the commonsense logic of the
24 statute says a notice to -- to appear must have
25 all of these items in it.

1 MR. YANG: Well, I think one of the
2 premises is quite wrong, which is that Congress
3 was intending this just to apply to in absent --
4 the question of the stop-time rule.

5 The notice requirements apply much
6 more broadly. And the stop-time rule, remember,
7 only applies, at most, to affect 4,000 aliens
8 per year. The more critical thing is in
9 absentia removal. In absentia removal is also
10 triggered by the written notice required in
11 subsection -- in paragraph 1, and Congress was
12 concerned there with making sure that aliens
13 could be removed in absentia. That's a very --

14 JUSTICE SOTOMAYOR: Well, that's the
15 point. Isn't that the point, though? Wouldn't
16 it -- that's exactly what your adversary's
17 saying.

18 MR. YANG: No, it's exactly the
19 opposite. Congress wanted to remove aliens and
20 provided a remedy if they didn't get the notice.
21 The remedy is that you can come in and you can
22 say, I didn't require -- obtain the -- the
23 notice that was required.

24 JUSTICE SOTOMAYOR: They still -- they
25 -- they still have that remedy. But, if you

1 give them that information all at once, they no
2 longer have a defense if they fail to show up at
3 the specified hearing date. That's what your
4 adversary's saying.

5 MR. YANG: No --

6 JUSTICE SOTOMAYOR: Congress was
7 intending to cut that argument off.

8 MR. ZIMMER: There were 10 hearing
9 notices in this case. That's not terribly
10 unexceptional. All right? Things get
11 rescheduled. The date and time is going to
12 change in almost every immigration hearing.

13 There's usually a master calendar
14 hearing that starts off, and they schedule
15 different hearings later. The idea that you
16 would have to have it all in one document,
17 particularly when Congress in 1229(a)(2)
18 provides for separate hearing notice later, is
19 -- is an odd argument, particularly when the
20 requirement is simply that of written notice.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Kagan.

25 JUSTICE KAGAN: Mr. Yang, your answer

1 to Justice Thomas suggests to me that your
2 statutory interpretation must be wrong, in other
3 words, the idea that the government could
4 separate out notice into seven different
5 documents if it wanted to, you know, the nature
6 of the proceedings would be in one document, and
7 the charges would be in another document, and so
8 forth and so on.

9 I -- I mean, that just seems wrong to
10 me, and -- and -- and so that makes me look
11 harder at the statutory language. And, indeed,
12 the statutory language seems to cut very much
13 against you, that there is a definition here of
14 the phrase "notice to appear." And the
15 statutory definition says that that phrase means
16 written notice specifying the following things.

17 And if we do what we usually do with a
18 statutory definition, we just sort of plug in
19 the definition in place of the defined term, we
20 get a pretty clear answer on the stop-time rule,
21 that that -- that the period of presence ends
22 when the alien is served a, and then you
23 substitute this language, a written notice
24 specifying the following.

25 And that seems pretty clear to me.

1 It's a written notice specifying the following,
2 one piece of paper specifying the following.

3 MR. YANG: Justice Kagan, I think it's
4 exactly backwards. The defined term is notice
5 to appear. The definition does not have the
6 article "a."

7 JUSTICE KAGAN: No, and --

8 MR. YANG: The definition is --

9 JUSTICE KAGAN: No, but the definition
10 doesn't have the article "a," but the stop-time
11 rule does have the article "a." In other words,
12 the definition -- the defined phrase is simply
13 notice to appear, and notice -- and so then you
14 would put in written notice specifying the
15 following.

16 You already have the article "a" in
17 the defined term, the -- in -- in the -- in the
18 operative statute. Then the definition comes
19 after that "a." But, if you read it as a whole,
20 it's a written notice specifying the following.

21 MR. YANG: But, Justice Kagan, that
22 "a" is in the parenthetical that talks about in
23 the section referred to as a notice to appear.

24 JUSTICE KAGAN: It is not. I mean, it
25 -- the -- the quotation marks are only around

1 notice to appear. That's the defined term. And
2 so.

3 MR. YANG: Even Petitioner --

4 JUSTICE KAGAN: -- that's what you
5 plug in.

6 MR. YANG: Even Petitioner is not
7 making that argument, Justice Kagan. The -- the
8 --

9 JUSTICE KAGAN: Whatever the
10 Petitioner is making, that's the right way to
11 read this definition.

12 MR. YANG: Well, no, I think that's
13 not quite right. If -- if you take the
14 parenthetical for what it's worth, it says "in
15 this section referred to as a notice to appear,"
16 right?

17 JUSTICE KAGAN: Notice to appear is
18 the thing in quotes. That's what you're
19 substituting written notice specifying the
20 following for.

21 MR. YANG: No, I understand that, but,
22 if you look -- obviously, "a" with the quotes
23 notice to appear, Congress included the article
24 there. And the idea that Congress, when it
25 would put the article again in front of that

1 defined term, it does later on in the stop-time
2 rule, it doesn't add anything to this. It's
3 simply the same --

4 JUSTICE KAGAN: But the way you read
5 it --

6 MR. YANG: -- thing with the quotes.

7 JUSTICE KAGAN: -- I mean -- I mean,
8 it seems to me this is perfectly clear. The way
9 you want us to read it, you would say, well, you
10 could -- when the alien is served a -- "a"
11 notice to appear.

12 But, anyway, I -- I -- I think it's
13 pretty clear, Mr. Yang. But I'll -- I'll -- let
14 me -- if you said a notice of appeal, right, do
15 you think that you could -- let -- let's say
16 that there was language that said that the
17 losing party in a lawsuit has to provide written
18 notice appealing a decision within 30 days.

19 If -- and -- and even that, so this is
20 without the parenthetical, and suppose somebody
21 said: Okay, I'm going to send you two pieces of
22 paper. On the first piece of paper, I'm going
23 to give you my name. In the second piece of
24 paper, I'm going to give you the judgment that
25 I'm appealing from.

1 How would that work out?

2 MR. YANG: Well, actually, I think
3 that's a fairly helpful hypothetical for us
4 because this Court has already addressed notices
5 to appeal, and when they omit the signature
6 requirement that was required to be on it, the
7 Court determined that that's okay. You can do
8 that after the fact and that the essential
9 question is whether notice is adequately
10 conveyed. And, here --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Gorsuch.

14 JUSTICE GORSUCH: Mr. Yang, I'd like
15 to just step back a moment and I guess I'm
16 curious why the government is pursuing this at
17 all given Pereira. I know it doesn't squarely
18 address this, but I would have thought the
19 government might have taken the hint from an
20 eight-justice majority in Pereira that notice of
21 appeal means what it -- what it seems to mean.

22 MR. YANG: Well, if we had thought
23 that Pereira actually says that, we would accept
24 it, but we -- we don't think it does, and we
25 think the text supports our position best.

1 And, in addition, although we can
2 provide a hearing date on certain non-detained
3 aliens, for instance, an alien who's not going
4 to be detained because they've already been in
5 the country and they apply for a benefit and
6 it's denied and it, as a matter of course, was
7 --

8 JUSTICE GORSUCH: The government --
9 the government, Mr. Yang, doesn't have to argue
10 every -- every possible jot and tittle of -- of
11 a statute. It -- it can -- it -- it has
12 discretion here. It's just interesting to me
13 that it's chosen to exercise it the way it has.

14 Let me ask you this: What if -- what
15 if I had a law clerk and I said in my manual --
16 in my law clerk manual I want a bench memorandum
17 analyzing the facts, the law, and your proposed
18 disposition, and instead of providing that, my
19 law clerk provided three separate memos, each
20 detailing various views of the facts, four more
21 on the law, and then, I don't know, a couple on
22 proposed dispositions.

23 Would that be a bench memorandum?

24 MR. YANG: You know, it might be, but
25 I think, in the context, that would probably --

1 JUSTICE GORSUCH: Would an --

2 MR. YANG: -- fit that --

3 JUSTICE GORSUCH: -- ordinary speaker
4 of the English memorandum think that's a bench
5 memorandum?

6 MR. YANG: Maybe not, but you could
7 certainly say a notice could be provided by
8 telling you when -- you know, which memo to
9 write and then, in a separate instruction, when
10 to provide it. That --

11 JUSTICE GORSUCH: Let me ask you this
12 about -- the government has actually mustered
13 the courage to make a Chevron step 2 argument
14 here, which is interesting to me.

15 Why should the government get -- if
16 there's ambiguity here at the end of the day,
17 after we exhaust everything, why should the
18 government presumptively win? What about Saint
19 Cyr and the deportation canon that suggests that
20 ambiguity should be resolved in favor of a
21 presumptively free individual?

22 MR. YANG: We -- we don't think that
23 Saint Cyr actually stands for that proposition.
24 In Saint Cyr, the Court concluded that the
25 presumption against retroactivity eliminated all

1 the ambiguity and that -- you know, and, in
2 addition, you know, as -- there's a very -- one
3 sentence that mentioned some immigration
4 principle for -- to benefit the alien. But we
5 don't think in the cases that the Court has
6 addressed in the Chevron context, the -- the
7 canon or the -- the principle that the
8 Petitioner relies on just doesn't resolve the
9 case. It is a tie-breaking rule.

10 JUSTICE GORSUCH: Okay. Last -- last
11 -- last question then, from -- arises from that
12 is how much ambiguity do we need to have, in the
13 government's view, before we resort to Chevron
14 step 2? A tie? You know, do you want us to use
15 some adjectives? Grievous?

16 MR. YANG: Well, this Court's --

17 JUSTICE GORSUCH: Irreconcilable?
18 What's the government's view on when Chevron
19 step 2 is triggered?

20 MR. YANG: Well, Chevron step 2, the
21 Court has repeatedly said that it just requires
22 ambiguity on the question, and then that goes to
23 the agency. The question then is whether the
24 agency reasonably resolves it, and
25 particularly --

1 JUSTICE GORSUCH: Thank you, Mr. Yang.
2 Thank you, counsel.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Good morning,
6 Mr. Yang. I just want to make sure I understand
7 the ramifications here of each side's position.
8 If you were to lose, the IJ, the immigration
9 judge, could still reject cancellation of
10 removal and remove the non-citizen; it would
11 just be discretionary rather than mandatory. Is
12 that correct?

13 MR. YANG: That -- that is -- that is
14 true, but I would hesitate to note that one of
15 Congress's key purposes in imposing these
16 limitations on eligibility is to remove the
17 ability for executive discretion.

18 This Court previously addressed
19 suspension of deportation, which is the
20 predecessor provision that cancellation of
21 removal replaced, and narrowed the eligibility
22 requirements in a case called INS versus
23 Phinpathya at 464 U.S. 183. And at page 185,
24 the Court said that the eligibility provisions
25 were adopted "specifically to restrict the

1 opportunity for discretionary administrative
2 action." And then the Court goes on to say
3 construing the act to broaden that discretion is
4 "fundamentally inconsistent with that intent."

5 And when Congress in 1996 then
6 ratcheted down eligibility yet further, Congress
7 certainly was not intending to just throw to the
8 wind those eligibility requirements when it's
9 possible that the executive could exercise its
10 discretion in the same way. It had that choice
11 in '96 but chose not to go that route.

12 JUSTICE KAVANAUGH: To follow up on
13 something Justice Thomas raised and then Justice
14 Kagan followed up on, and just to make sure I
15 understand your answer on the six or seven
16 notices point, I understood you to say, but
17 correct me if I'm wrong, that the actual
18 operation of the system and the structure of the
19 overall statute operates as a -- a deterrent on
20 the government doing any such thing because it
21 just makes no sense for the government to do
22 that.

23 I think that's what I understood you
24 to say. And I want to make --

25 MR. YANG: Exact --

1 JUSTICE KAVANAUGH: -- make sure I
2 understand that.

3 MR. YANG: I think that's exactly
4 right. Remember, now we're talking about a
5 system that has to process about 500,000 notices
6 to appear per year. That's about 2,000 per day.
7 And the idea that we would, you know, take what
8 is a pre-set form with everything except a
9 hearing date, which -- because we can't always
10 provide the hearing date effectively practically
11 when we're doing that at an early stage, and all
12 of a sudden break it into, you know, eight or 10
13 different documents, each of which -- remember,
14 we have to document we served the alien, so we
15 have to keep evidence of service of all of these
16 things, proper service, that we then have the
17 burden of establishing when we want to remove
18 the alien who doesn't appear in absentia. It's
19 fanciful to think that the government would ever
20 do that. We want to do this as a --

21 JUSTICE KAVANAUGH: Okay, but one last
22 thing -- I'm sorry. One last thing, Mr. Yang.
23 I think Justice Kagan was suggesting that if
24 your textual argument were right, the quote mark
25 should be around "a notice to appear," not just

1 around "notice to appear."

2 Can you follow up on that?

3 MR. YANG: Yeah, I mean, I -- I -- I
4 see the point that she makes, but I don't think
5 that the -- that Congress, by providing a notice
6 to appear, it's simply a reference. And so,
7 whether it included the "a" in the quote or not,
8 it simply said in the section referred to as a
9 notice to appear. When Congress did that and
10 then later in -- you know, first of all, it's in
11 this section, so the stop-time rule is not in
12 this section.

13 And this Court determined that
14 1229b(b)(5), which is the stop-time rule, that
15 was a reference -- it says a notice to appear --
16 served a notice to appear under Section 1229(a).
17 It's no --

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Barrett.

21 JUSTICE BARRETT: Mr. Yang, I want to
22 go back to the difficulty that you described
23 when aliens are detained by border agents. You
24 were talking about this in response to some
25 questions by Justice Thomas. And you said, in

1 that case, you have to issue the NTA
2 immediately, within 48 hours, but you don't
3 necessarily know at that point where the
4 detention facility will be.

5 So here's my question. I mean,
6 presumably, now you're handling that by, within
7 48 hours, issuing a notice to appear that has
8 all information except the time and the place of
9 the hearing.

10 Why can't you then, once the alien is
11 put in a detention facility, at that point issue
12 an NTA that has all the information because now
13 they're in a detention facility and you know
14 where they are?

15 MR. YANG: So we would then be issuing
16 two notices to appear, but one with a hearing
17 date later. The reason we -- and I'm not saying
18 that's not possible, but the reason that it's
19 difficult is because the marrying up of written
20 notices with the physical A file, the NTA form
21 and doing that on the volumes that we're talking
22 about, plus within the timeline. Remember, if
23 -- if you want to schedule these hearings
24 promptly, you can do it within 10 days of
25 service of the written notice under 1229(a).

1 But when the immigration court sets a
2 hearing date, it may not know how long it's
3 going to take to get that service to appear.

4 JUSTICE BARRETT: No, no, no. I'm not
5 saying you rely on the immigration courts
6 setting the date. I'm saying that once a
7 non-citizen is put in a detention facility,
8 can't DHS at that point -- you know, Justice
9 Alito talked about issuing notices to appear
10 that maybe have estimated dates.

11 I mean, couldn't you do that at that
12 point?

13 MR. YANG: It -- you could, but you
14 still have the additional problem that, one, the
15 aliens -- well, I -- I take it -- take it back.
16 In theory you could. You have the additional
17 problem that aliens will bond out and you will
18 have holes in the docket.

19 The second problem is just logistical.
20 EOIR, the -- the immigration court, had tried to
21 put the detained docket on an automated system
22 and they just found the -- the obstacles too
23 great because of the fluctuations in the
24 population.

25 The -- they tell me that the -- the

1 real issue is efficiently scheduling these
2 hearings close together. If you have all these
3 gaps, you end up having inefficient allocation
4 and that results in people waiting longer for
5 hearings.

6 So the EOIR would have to change its
7 system to automate it back to the system that
8 they already determined -- this is on page 42 of
9 our brief -- was not practicable with respect to
10 the detained docket.

11 Now, once they're non-detained, I
12 guess you could do it again but you've got the
13 same problem because these two --

14 JUSTICE BARRETT: Counsel, before my
15 time expires, let me ask you one other question.
16 You said that part of the problem in having the
17 immigration court issue the complete notice to
18 -- to appear that would have the time and date
19 is that the immigration court doesn't like
20 issuing the charges. So part of this seems to
21 derive from the separation between DHS and then
22 having the immigration courts housed within DOJ.

23 But is that just reluctance on the
24 part of the immigration court? Couldn't the
25 immigration court simply include a copy of what

1 you've already sent to the -- the non-citizen,
2 and then on a separate document notice the time
3 and place of the hearing and put them in the
4 same envelope?

5 MR. YANG: Certainly if we were to
6 lose that case, that would have to be
7 considered. But I can say, I mean, we have gone
8 through this very clearly with the EOIR on this,
9 and there is a strong view as the neutral
10 adjudicator they should not be taking steps that
11 facilitate the prosecution.

12 CHIEF JUSTICE ROBERTS: Thank you.
13 Mr. -- Mr. Yang, would you take a minute for
14 rebuttal.

15 MR. YANG: Thank you, Mr. Chief
16 Justice.

17 Congress specified in 1229(a) that
18 written notice should be required, and Congress
19 specified both the form and the substance of the
20 notice. The form is that it has to be in
21 writing and it has to be served either
22 personally or by mail.

23 There is no dispute that Petitioner
24 received written notice of all of the
25 information required in 1229(a). That should be

1 the end of the matter.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.
3 Yang.

4 Mr. Zimmer, you have three minutes for
5 rebuttal.

6 MR. ZIMMER: Thank you, Mr. Chief
7 Justice.

8 REBUTTAL ARGUMENT OF DAVID ZIMMER
9 ON BEHALF OF THE PETITIONER

10 MR. ZIMMER: I think ultimately it's
11 revealing what the government does and does not
12 say about the statute. I mean, ultimately the
13 government effectively admits that its position
14 would allow it to chop this -- all of this
15 information up however it wants.

16 I mean, it could provide, as we
17 explained in our brief, if the government's
18 right that all it has to do is provide written
19 notice in some form, it could provide all of the
20 non-case specific information to every single
21 non-citizen who enters the country and leave
22 that out when it provides the -- the specific
23 charging information.

24 And ultimately all the government can
25 say is, well, trust us not to do that. And

1 that's generally not, you know, the way that
2 this Court, you know, would interpret statutes
3 to sort of -- to have absurd results that --
4 that just because you trust the -- trust the
5 government not to sort of carry out those
6 results.

7 And then ultimately much of Mr. Yang's
8 argument is just what was -- just focused on the
9 fact that this is hard to do. But ultimately
10 maybe this is hard to do. I mean, I -- I can't
11 dispute much of what he said. But the
12 government doesn't get to avoid doing things
13 just because they are hard to do.

14 And if -- if prior to IIRIRA the
15 government -- the -- the statute specifically
16 authorized the government to use the system it's
17 defending here. It specifically told the
18 government it could provide this time and place
19 information in a separate hearing document.

20 And in IIRIRA, for whatever reason,
21 Congress changed its mind and it moved that time
22 and place information from an optional part of
23 the order to show cause to a required part of
24 the notice to appear.

25 And, again, as I emphasized before,

1 the government has known this from day one on --
2 in its post-IIRIRA rule-making -- and this is at
3 page 53A of our statutory appendix -- in
4 interpreting IIRIRA, the government itself
5 stated, and this is a direct quote, it
6 recognized "the language of the amended act
7 indicating that the time and place of the
8 hearing must be on the notice to appear."

9 So maybe this was a hard problem. But
10 it was a hard problem that the government knew
11 from day one it was required by the statute to
12 solve. And if -- if the government ultimately
13 decided that it couldn't solve that problem, its
14 response was not to make the unilateral decision
15 to ignore what it conceded to be Congress's
16 clear instructions.

17 It's solution was to go back to
18 Congress and ask it to change the statute back
19 to what it had said before.

20 The government can -- should not be
21 able to now ask this Court to effectively bail
22 it out from its failure to do what it knew it
23 required by asking this Court to adopt exactly
24 the opposite interpretation of the statute that
25 the government itself gave it right after it was

1 enacted.

2 Thank you very much.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

5 (Whereupon, at 11:10 a.m., the case
6 was submitted.)

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