SUPREME COURT
OF THE UNITED STATES

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.)

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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:

DAVID ZIMMER, ESQUIRE, Boston, Massachusetts;
on behalf of the Petitioner.
ANTHONY A. YANG, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

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

Mr. Zimmer.

ORAL ARGUMENT OF DAVID ZIMMER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ZIMMER: -- and that under --

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

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

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

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

firm rule.

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

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

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

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

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

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

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

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

So it would seem that you would have

to rely on the reference, not the definition.

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

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

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

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

So we're not arguing that absent the

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

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

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

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

JUSTICE BREYER: I have no comment.

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

documents.

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

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

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

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

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

JUSTICE BREYER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

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

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

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

MR. ZIMMER: Oh.

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

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

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

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

But there's a real --

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

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

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

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

JUSTICE ALITO: Well, if Congress want --

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

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

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

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

be altered. But having --

JUSTICE ALITO: Thank you, counsel. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

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

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

MR. ZIMMER: Sure.

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

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

I mean, as a -- as a big picture

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

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

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

And you can see that in the House

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

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

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

argument?

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

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

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

MR. ZIMMER: Exactly. That person

already knows all the other information --

JUSTICE SOTOMAYOR: Thank you, counsel.

MR. ZIMMER: Yes.

CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

So who are we helping here really?

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

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

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

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

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

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

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

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

MR. ZIMMER: Right.

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

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

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

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

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

JUSTICE KAGAN: Thank you, Mr. Zimmer.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

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

MR. ZIMMER: Thank you.

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

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

Why -- why -- why -- why should we -- why should we care?

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

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

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

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

If you look at the post-IIRIRA

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

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

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

I also think that the reasoning in

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

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

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

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

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

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you.

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

So why doesn't that end the case?

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

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

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

JUSTICE KAVANAUGH: Well, let me --

MR. ZIMMER: -- document.

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

MR. ZIMMER: No, no, please.

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

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

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

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

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

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

disputes about whether that sort of thing --

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

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

JUSTICE KAVANAUGH: Congress was trying --

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

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

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

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

MR. ZIMMER: Yes, please.

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

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

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

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

practice from the statute.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Barrett.

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

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

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

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

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

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

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

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

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

MR. ZIMMER: Well --

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

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

system.

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

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

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

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

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

Why do you resist --

MR. ZIMMER: Well --

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

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

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

they're basically doing that now.

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

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

JUSTICE BARRETT: Thank you, counsel.

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

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

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

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

included in the notice to appear itself.

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

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

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

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Yang.

ORAL ARGUMENT OF ANTHONY A. YANG

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

time and date of an initial hearing.

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

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

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

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

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

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

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

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

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

which is the original notice, notice to appear.

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

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

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

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

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

MR. YANG: Okay. So it's

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

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

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

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

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

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

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

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

There is no interest in the government

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

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

JUSTICE THOMAS: Thank you, Mr. Yang.

CHIEF JUSTICE ROBERTS: Justice Breyer.

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

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

On the other hand, it's more

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

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

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

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

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

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

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

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

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

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

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

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

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

We are --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Alito.

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

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

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

Remember, I was -- as I think I was

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

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

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

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

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

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

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

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

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

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

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

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

MR. YANG: No --

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

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

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

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Kagan.

JUSTICE KAGAN: Mr. Yang, your answer

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

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

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

And that seems pretty clear to me.

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

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

JUSTICE KAGAN: No, and --

MR. YANG: The definition is --

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

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

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

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

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

MR. YANG: Even Petitioner --

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

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

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

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

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

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

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

JUSTICE KAGAN: But the way you read it --

MR. YANG: -- thing with the quotes.

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

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

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

How would that work out?

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Gorsuch.

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

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

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

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

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

Would that be a bench memorandum?

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

JUSTICE GORSUCH: Would an --
MR. YANG: -- fit that --
JUSTICE GORSUCH: -- ordinary speaker of the English memorandum think that's a bench memorandum?
MR. YANG: Maybe not, but you could certainly say a notice could be provided by telling you when -- you know, which memo to write and then, in a separate instruction, when to provide it. That --
JUSTICE GORSUCH: Let me ask you this about -- the government has actually mustered the courage to make a Chevron step 2 argument here, which is interesting to me.
Why should the government get -- if there's ambiguity here at the end of the day, after we exhaust everything, why should the government presumptively win? What about Saint Cyr and the deportation canon that suggests that ambiguity should be resolved in favor of a presumptively free individual?
MR. YANG: We -- we don't think that Saint Cyr actually stands for that proposition. In Saint Cyr, the Court concluded that the presumption against retroactivity eliminated all

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

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

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

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

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

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

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

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

MR. YANG: Exact --

JUSTICE KAVANAUGH: -- make sure I understand that.

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

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

around "notice to appear."

Can you follow up on that?

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Barrett.

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

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

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

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

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

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

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

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

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

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

The -- they tell me that the -- the

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

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

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

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

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

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

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

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

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

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

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

the end of the matter.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang.

Mr. Zimmer, you have three minutes for rebuttal.

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

REBUTTAL ARGUMENT OF DAVID ZIMMER
ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

And, again, as I emphasized before,

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

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

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

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

enacted.

Thank you very much.

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

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