SUPREME COURT
OF THE UNITED STATES

          IN THE SUPREME COURT OF THE UNITED STATES

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MORIS ESMELIS CAMPOS-CHAVES,   )
               Petitioner,   )
          v.   ) No. 22-674
 MERRICK B. GARLAND,   )
 ATTORNEY GENERAL,   )
               Respondent.   )
- - - - - - - - - - - - - - - - - - -
 MERRICK B. GARLAND,   )
 ATTORNEY GENERAL,   )
               Petitioner,   )
          V.   ) No. 22-884
 VARINDER SINGH,   )
               Respondent.   )
- - - - - - - - - - - - - - - - - - -

Pages: 1 through 116

Place: Washington, D.C.

Date: January 8, 2024

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14    VARINDER SINGH,                       )
15                    Respondent.           )
16    - - - - - - - - - - - - - - - - - - -
17                    Washington, D.C.
18              Monday, January 8, 2024
19
20         The above-entitled matter came on for
21    oral argument before the Supreme Court of the
22    United States at 10:04 a.m.
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1   APPEARANCES:

2   CHARLES L. McCLOUD, Assistant to the Solicitor

3   General, Department of Justice, Washington, D.C.;

4   on behalf of the United States.

5   EASHA ANAND, ESQUIRE, Stanford, California; on behalf

6   of the Petitioner in Case 22-674 and on behalf of

7   the Respondent in Case 22-884.

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

2   (10:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument first this morning in Case 22-674,

5   Campos-Chaves versus Garland, and the

6   consolidated case.

7   Mr. McCloud.

8   ORAL ARGUMENT OF CHARLES L. McCLOUD

9   ON BEHALF OF THE UNITED STATES

10   MR. McCLOUD: Thank you, Mr. Chief

11   Justice, and may it please the Court:

12   Each of the non-citizens in these

13   cases failed to attend a removal hearing after

14   receiving written notice of the time and place

15   of that hearing. Under the rule adopted by the

16   Ninth Circuit, however, the non-citizens can

17   rescind their in absentia removal orders based

18   on a supposed lack of notice.

19   That holding defies text, context, and

20   common sense, and it threatens to unsettle

21   hundreds of thousands of in absentia orders that

22   have been entered over the course of nearly

23   three decades. In reaching that extraordinary

24   result, the Ninth Circuit misread the statutory

25   scheme and this Court's decisions in Pereira and

1   Niz-Chavez as to the statute.

2   The Ninth Circuit is wrong that the

3   omission of time and place information in a

4   notice to appear renders all subsequent notices

5   invalid. Congress created two distinct forms of

6   notice, and it made both of them potential

7   grounds for in absentia removal.

8   The removal orders in these cases were

9   based on notices of hearing that specified a new

10   time and place for the removal proceedings and

11   that warned the non-citizens of the consequences

12   of failing to attend those proceedings. That's

13   all Section 1229 requires for a notice of

14   hearing to be valid.

15   As to Pereira and Niz-Chavez, we

16   acknowledge that the Court is not writing on a

17   blank slate when it comes to notices to appear,

18   but Pereira and Niz-Chavez do not decide these

19   cases. The question presented today was not

20   briefed in those cases, it was not argued in

21   those cases, and was not necessary to resolve in

22   those cases. The Court's narrow decisions do

23   not create the sweeping defense to removal that

24   the non-citizens here seek.

25   I welcome the Court's questions.

1   JUSTICE THOMAS: Well, Mr. McCloud,

2   Pereira seems to work against you, so I think

3   you -- it would be good for you to spend a bit

4   of time on that.

5   MR. McCLOUD: Certainly, Your Honor.

6   So I think that the important thing about

7   Pereira is that it was a narrow decision that

8   decided a particular question presented, and

9   that question presented was about the

10   interaction between the stop-time rule in

11   1229b(d)(1) and the notice to appear

12   requirements.

13   And if I could point to where in the

14   Court's opinion that holding appears, it's at

15   the beginning of Part II B of the opinion. This

16   is on page 2114 of the Supreme Court Reporter

17   version if you have that available.

18   And at the beginning of the first

19   paragraph of that section of the opinion, the

20   Court says, "The statutory text alone is enough

21   to resolve this case." It then proceeds to

22   analyze the text of the two provisions that I

23   just referenced.

24   Now it's true that after this point in

25   the opinion, there is additional analysis, but I

1   think much of that additional analysis is dicta.

2   The Court said that that analysis supported or

3   bolstered or reinforced the conclusion it had

4   already reached. And I think that's

5   particularly true of the statements that the

6   non-citizens and the Ninth Circuit have relied

7   on in Pereira.

8   To go directly to the statement about

9   the -- the meaning of "change," the meaning of

10   "change" was not briefed in Pereira. It was not

11   argued in Pereira. And so the Court in Pereira

12   did not have before it the wealth of argument

13   and evidence that we have brought to bear on

14   that question in this case.

15   JUSTICE KAGAN: I take the point, Mr.

16   McCloud, but, you know, it is a very direct

17   statement. By allowing for a change or a

18   postponement to a new time or place, paragraph

19   (2) presumes that the government has already

20   served an NTA that specified a time and place as

21   required by (a)(1).

22   And I don't think we were looking to

23   reach out and decide a lot of questions that

24   weren't before us. I think -- and this was a --

25   you know, eight justices joined this opinion.

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 1    It just seemed the sort of obvious understanding
 2    of the statutory scheme.  So, you know, even if
 3    it's dicta, it reflected what eight people
 4    thought was pretty obvious when you looked at
 5    the statute.
 6              MR. McCLOUD:  So, Justice Kagan, if I
 7    can take that in -- in two pieces.
 8              So there are two sentences there.  The
 9    first one you referred to talks about a
10    presumption in the statute that the notice of
11    hearing will follow the notice to appear.  And I
12    agree, I -- I don't think that there is any
13    dispute that there is such a presumption in the
14    statute.  But identifying that presumption does
15    not answer the question in this case, which is
16    what happens when the presumption is not met and
17    the notice to appear did not contain the time
18    and place information.
19              Then the second statement, which I
20    acknowledge is a difficult statement for me, is
21    the statement about the meaning of "change."
22    And I do think that's dicta.  I also think it's
23    incorrect dicta, and it's not surprising the
24    Court got that incorrect because it just did not
25    have the evidence like the dictionary
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 1   definitions, like the contextual evidence about

 2   the meaning of "change" that we have brought to

 3   the Court's attention in our briefing in this

 4   case.

 5   JUSTICE SOTOMAYOR: Mr. McCloud, that

 6   -- that seems to beg the question. The finding

 7   in that case, and since I wrote it --

 8   (Laughter.)

 9   JUSTICE SOTOMAYOR: -- was that the

10   statutory presumption commanded by Congress, who

11   knew full well that the government was giving

12   notices with TBAs, time and place to be

13   announced, regularly, was contrary to that

14   history. They wanted these notices to be full

15   and complete. That's what we held.

16   And having held that, I think there's

17   a presumption that you have to look at the

18   statute in that context, that there will always

19   either -- they will always start with a proper

20   notice to appear, and if you're going to change

21   the time and place, you're going to give a new

22   time and place.

23   I -- I don't understand that a new

24   time and place is something different than what

25   you've already specified.

1   MR. McCLOUD: And, Justice Sotomayor,

2   in this case, we think that we did satisfy that

3   burden because we did provide a new time and

4   place. We told the non-citizens where their

5   removal hearings would be held, and so they had

6   the information they needed to attend.

7   And so I don't think that "change" is

8   actually the operative word in the statutory

9   scheme, but I don't want to fight you too hard

10   on that because I do think that even if you

11   think that a notice of hearing must change a

12   previously set time or place for the hearing,

13   that requirement is satisfied here because the

14   ordinary meaning of the word "change" is very

15   broad, and it encompasses the process of going

16   from --

17   JUSTICE SOTOMAYOR: So change is no

18   change? Meaning you haven't set a time and

19   place and we're going to change that and set

20   what? Another no time and place?

21   MR. McCLOUD: Your Honor, what we have

22   done --

23   JUSTICE SOTOMAYOR: You're saying no,

24   it's going to be a time and place now.

25   MR. McCLOUD: Your Honor, what we have

1   done in the TB NTAs is to tell the non-citizen

2   you're going to have a hearing. We don't know

3   when that hearing will be, but we have changed

4   from that placeholder time to a specific time.

5   And we think that under the ordinary

6   meaning of "change," particularly as it's used

7   in this statutory scheme, going from an

8   indeterminate time and place to a determined one

9   is a kind of change.

10   JUSTICE SOTOMAYOR: Mr. McCloud --

11   JUSTICE JACKSON: But didn't you lose

12   that --

13   JUSTICE SOTOMAYOR: I'm sorry.

14   JUSTICE JACKSON: Didn't you lose that

15   argument in Niz-Chavez? I mean, I -- I -- I

16   understand and take your point, but I thought

17   the Court said you really couldn't interpret the

18   statute in that way or the word "change" in that

19   way.

20   MR. McCLOUD: Respectfully, Justice

21   Jackson, I -- I don't agree. I think the only

22   issue that the Court decided in Niz-Chavez was

23   whether we could compile two documents together

24   to create "a" notice to appear, and the Court

25   said that that definite article "a" indicated

1   that the notice to appear needed to be a single

2   document.

3   And so we are not disputing for

4   purposes of these cases that the notices to

5   appear alone could not be the basis for in

6   absentia removal, but what's critical about this

7   case and what distinguishes this case from

8   Pereira and Niz-Chavez is that Congress here

9   created two forms of notice and it made both of

10   them relevant for purpose of in absentia removal

11   in a way that they are not relevant for purposes

12   of the --

13   JUSTICE JACKSON: Can you say more

14   about that --

15   JUSTICE BARRETT: Mr. --

16   JUSTICE JACKSON: -- two forms of

17   notice? What do you mean?

18   MR. McCLOUD: I mean that they created

19   both the paragraph (1) notice, the notice to

20   appear, and the paragraph (2) notice, the notice

21   of hearing or, as the other side refers to it,

22   the notice of change.

23   JUSTICE JACKSON: So you think those

24   --

25   JUSTICE BARRETT: Mr. --

           1   JUSTICE JACKSON: -- operate

           2   completely independently of one another?

           3   MR. McCLOUD: They're independent in

           4   the sense that they can both be independent

           5   valid bases for in absentia removal. I take the

           6   point that the notice to appear is what

           7   initiates the proceeding, and so, in some sense,

           8   you need to have a proceeding in order for there

           9   to be a notice of hearing to -- to alter that

          10   proceeding.

          11   But I don't think it is the case that

          12   the TBD status of the notice to appear in any

          13   way invalidates the later notice of hearing, and

          14   that's because the statute is very clear about

          15   the requirements for a valid notice of hearing.

          16   It needs to set the new time and place, and we

          17   did that in this case.

          18   JUSTICE BARRETT: Mr. McCloud, what

          19   would happen if the non-citizen showed up to the

          20   right time and place in response to the notice

          21   of hearing, but the NTA had been incomplete?

          22   Would that be grounds for the

          23   non-citizen objecting that the entire proceeding

          24   was invalid? Because, after all, the statute

          25   does say "shall," this following information

1   shall be provided. So, if the date and time was

2   omitted from the initial one, would that be

3   grounds for an invalidation of a proceeding?

4   MR. McCLOUD: No, Justice Barrett.

5   All of the courts of appeals that have

6   considered that issue and the Board when it has

7   considered that issue has said that the

8   requirements, both the statutory requirements

9   and the regulatory requirements, regarding the

10   notice to appear and the information it has to

11   contain are claims processing rules, they are

12   not jurisdictional rules, so they do not divest

13   the immigration court of jurisdiction if there

14   is information missing from the notice to

15   appear.

16   JUSTICE BARRETT: So is your position

17   -- let me try to state how I -- I don't think

18   you say it quite this way in your brief, but

19   this is what I take from your brief, and I want

20   to see if I'm understanding it correctly.

21   A notice of hearing presupposes that

22   there has been a notice to appear because,

23   otherwise, well, both because of the word

24   "change" and, otherwise, there would be no way

25   for the alien to receive it because you have to

1 know what address to send it at or have

2 personally served it, correct?

3   MR. McCLOUD: That's correct.

4   JUSTICE BARRETT: Okay. So is it your

5 position that once the notice of hearing arrives

6 telling the non-citizen where and when to show

7 up, even if there's some information lacking --

8 and let's say it's information that's even maybe

9 more significant than the date and time that the

10 government has been omitting and it's maybe an

11 incomplete statement of the grounds for removal.

12   That the alien, by versus -- by virtue

13 of the in absentia provision, has an obligation

14 to show up because he's on notice, it's not like

15 he's not aware that he is in contact with, you

16 know, Immigration and that there are removal

17 proceedings underway. But he has an obligation

18 created by the notice of a hear -- of hearing to

19 show up and at that point to register any

20 objections he may have to the incomplete NTA.

21   MR. McCLOUD: That is our position,

22 Justice Barrett. I want to make sure that I'm

23 clear, though, that we think there are a number

24 of safeguards that would prevent the result that

25 you're talking about or the blank document

1   hypothetical that the other side has raised, and

2   if I could go into those protections.

3   JUSTICE BARRETT: Sure.

4   MR. McCLOUD: The first is the

5   regulatory requirement that the notice to appear

6   contain the charging information. So, if we had

7   a blank document or a document that was missing

8   the charges against the non-citizen --

9   JUSTICE BARRETT: Don't you need --

10   sorry, don't you need the protection from the

11   statute itself? Because the regulatory

12   requirement can be subject to change. So I

13   think your better argument comes from the clear

14   and convincing evidence requirement in the

15   statute itself.

16   MR. McCLOUD: That was my second

17   response, Your Honor, which is we bear the

18   burden by clear and convincing evidence to prove

19   that the non-citizen both received notice and

20   that they are removable as charged. And so, if

21   you have a document that lacks charges, we could

22   not prove that the non-citizen actually is

23   removable.

24   And then the third --

25   JUSTICE KAGAN: Suppose -- I'm sorry.

1   MR. McCLOUD: Well, the third

2   protection I was going to refer to is the fact

3   that in absentia removal is not automatic.

4   There is an immigration judge who is sitting on

5   the other side of the bench and who has to

6   review the documents and decide whether in

7   absentia removal is appropriate.

8   And so I think it is highly unlikely

9   that an immigration judge in the circumstances

10   with a blank document or the document without

11   charges would enter in absentia removal.

12   JUSTICE KAGAN: Suppose the (a)(1)

13   notice didn't have the right to counsel in it.

14   MR. McCLOUD: So the -- the answer I

15   think is the same as before. We view the right

16   to counsel information obviously as an important

17   piece of information, but the lack of that

18   information does not affect the validity of the

19   proceedings.

20   So, if the -- the non-citizen --

21   JUSTICE KAGAN: Right. So it does

22   suggest -- I mean, you're -- you're not informed

23   of your right to counsel. Nonetheless, you have

24   to show up. And I don't see that any of your

25   safeguards actually protect the alien, the

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1    non-citizen, in that situation.
2              I mean, what's going to prevent the
3    non-citizen from being ordered removed, not
4    being able to reopen, notwithstanding that he's
5    never been told that he has a right to a lawyer?
6              MR. McCLOUD:  What prevents that
7    result, Your Honor, is the regulations that I
8    was referring to.  If the notice to appear does
9    not contain the information about the right to
10   counsel, that is an incomplete notice to appear
11   that would be rejected by the immigration court.
12             JUSTICE GORSUCH:  Well --
13             MR. McCLOUD:  I also want to emphasize
14   that --
15             JUSTICE GORSUCH:  -- counsel, let --
16   let me -- let me -- let me pause there.  Your
17   regulations are interesting because they -- they
18   suggest that a lot of things are required in a
19   notice to appear, except stuff that the
20   government finds inconvenient, like the hearing
21   date, and try to resuscitate the pre-statutory
22   regime that existed before where the government
23   could issue as many notices as it wanted.
24             So the regulations themselves may or
25   may not comply with the statute and they -- as
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1   Justice Barrett pointed out, they may or may not

2   change.

3   The only statutory hook I think you've

4   identified to save the problem is the clear and

5   convincing evidence requirement, but that's just

6   a clear and convincing evidence requirement that

7   the notice was given.

8   And, here, the notice would be the

9   Section 2 notice, the notice of change. So none

10   of that means that the NTA, the Section 1

11   notice, has to be complete or, in fact, anything

12   other than a blank document, right?

13   MR. McCLOUD: So, Justice Gorsuch, I

14   think, if we were in a world where we had

15   repealed our -- all our regulations and we have

16   somehow, you know --

17   JUSTICE GORSUCH: I'm not --

18   MR. McCLOUD: -- convinced the

19   immigration judge to --

20   JUSTICE GORSUCH: Forget about your

21   regulations. The law. Your -- your -- your --

22   your interpretation of the law has to hang

23   together and make sense of the law. Otherwise,

24   it is a "trust us" argument. Trust us. We will

25   -- we will have our own internal operating

1   procedures.

2   I'm asking you about statutory

3   interpretation. And we normally ask -- we think

4   statutes are coherent, sensible, not ridiculous.

5   You -- you invoked common sense in your opening

6   argument.

7   And, here, one consequence of your

8   argument, I think, is that the NTA can be a

9   blank document and that you can remove someone

10   in absentia based on a notice of change that

11   says show up on a date certain.

12   Nobody -- the immigrant may or may not

13   know that this is really the government. It's

14   just a date to show up in some place. It

15   doesn't have notice of charges or lawyers

16   against him.

17   And the government wins, right?

18   MR. McCLOUD: So, Just -- Justice

19   Gorsuch, I have several responses to that

20   question. The first is this is not a case where

21   we are simply asking you to trust us. This is a

22   statute that has been on the books for nearly 30

23   years --

24   JUSTICE GORSUCH: So let's talk --

25   MR. McCLOUD: -- and has been used --

1   JUSTICE GORSUCH: -- about the

2   statute. Let's --

3   MR. McCLOUD: --- hundreds of

4   thousands of times.

5   JUSTICE GORSUCH: Am I correct that

6   the clear and convincing evidence rule that

7   you're relying on as a matter of statutory

8   interpretation would allow the government to

9   remove somebody for a blank document, NTA, if

10   they failed to appear on a notice of change that

11   the government can prove by clear and convincing

12   evidence it issued a compliant notice of change?

13   MR. McCLOUD: Our position is that if

14   a non-citizen receives a paragraph (2) notice, a

15   notice of hearing saying show up at immigration

16   proceedings at this date and this time, then,

17   yes, the non-citizen needs to comply with that.

18   JUSTICE GORSUCH: Okay.

19   MR. McCLOUD: And if the non-citizen

20   doesn't attend, they could be removed.

21   JUSTICE GORSUCH: And so, if that

22   happens --

23   MR. McCLOUD: That's very far away

24   from the facts of these cases.

25   JUSTICE GORSUCH: -- if -- if that

1   happens -- if that happens, if that's the

2   consequence of your statutory interpretation, we

3   have to ask whether that fits with common sense,

4   you say. Okay.

5   One common-sense consequence might be

6   this: That if the government can issue blank

7   notices to appear, which it has found rather

8   inconvenient in the past to -- to comply with

9   that provision, need only file notice of changes

10   and then remove people who fail to show up, why

11   wouldn't it proceed in exactly that fashion

12   going forward as a consequence of a decision in

13   the government's favor in this case when, as I

14   understand it, and my figures may not be exact,

15   about a third of cases in immigration

16   proceedings are in absentia removals, so

17   failures to appear.

18   So why not issue a blank NTA because

19   they're hard -- they're -- they're a pain, we've

20   found them difficult, then issue a compliant

21   notice of change, show up on a date certain, and

22   then remove about a third of the aliens in this

23   country without any notice of the charges

24   against them or their right to counsel or

25   anything else, and then deal with the remainders

1   and file compliant notices to appear in those

2   cases?

3   MR. McCLOUD: So, Justice Gorsuch, we

4   do not do that and have never done that --

5   JUSTICE GORSUCH: I'm not asking

6   you --

7   MR. McCLOUD: -- for several reasons.

8   JUSTICE GORSUCH: Let's put aside the

9   "trust us" arguments. What would prevent the

10   government from following where the incentives

11   of that decision might lead as a matter of law?

12   MR. McCLOUD: And -- and, Justice

13   Gorsuch, what I'm disputing is that we would

14   have any incentive ever to do that because, if

15   we did that, if we used the blank document,

16   there would not be a removal proceeding under

17   our own regulations in which to order the

18   non-citizen removed. So we have no --

19   JUSTICE SOTOMAYOR: Mr. McCloud, I --

20   I have a problem, which is I think I don't have

21   to go as far as Justice Gorsuch. You could

22   continue what you're doing. We have two prior

23   decisions telling the government a notice to

24   appear is inadequate that doesn't have the time

25   and place. Despite that, and despite the fact

1   that there's ample proof that it can be done, it

2   hasn't been done. It continues to issue these

3   TBA notices to appear.

4   If we rule in your favor, we're giving

5   you an incentive to continue that practice,

6   because you can do it continuously. You don't

7   have to pay any attention to the statute. You

8   can continue doing TBAs and continue your

9   practice. As Justice Gorsuch said, those people

10   who show up, you give them a compliant one when

11   they show up. Those people who don't, you

12   remove them in absentia, and they can't ever

13   come back and complain about your process.

14   That's really the incentive here.

15   MR. McCLOUD: So, Justice Sotomayor, I

16   have two responses to that.

17   First, I want to talk a little bit

18   about our current practices. We have made very

19   significant progress in the years since Pereira

20   and Niz-Chavez in reducing the number of TBD

21   NTAs that are still issued. There are

22   technological and operational reasons why we're

23   not down to zero yet, and I'm happy to talk

24   about those if Your Honor is interested. But I

25   do want to assure the Court that we take very

 1   seriously the obligation to comply with this

 2   Court's decisions and to comply with the

 3   statute.

 4   The -- the bigger problem is, assuming

 5   we could issue NTAs that had time and date

 6   information going forward, it does not do

 7   anything about the hundreds of thousands of

 8   cases that have already been closed where

 9   removal orders were already issued --

10   JUSTICE SOTOMAYOR: So let's go to the

11   practical problems. You started by saying

12   there's an entitlement to reopen. There isn't.

13   It is the right to make a motion to reopen, but

14   it's still discretionary for the BIA to decide

15   whether to reopen. Is that correct?

16   MR. McCLOUD: So that is the way that

17   we read the statute. That's not the way that

18   some courts, in particular the Ninth Circuit,

19   have read the statute. They have suggested that

20   if a non-citizen files a motion and they can

21   prove that they -- they got the defective NTA --

22   JUSTICE SOTOMAYOR: Well, that's a

23   separate legal issue. The way the statute is

24   risen -- written, it is not mandatory to reopen.

25   It -- there -- they can take into account what

1   happened in one of these three cases where a --

2   a litigant showed up. And I don't know, did you

3   forfeit that argument in -- was that the last

4   case that's before us, the Mendez-Colin case?

5   MR. McCLOUD: In the Mendez-Colin

6   argument?

7   JUSTICE SOTOMAYOR: Yes. He showed up

8   a number of times and then left, correct?

9   MR. McCLOUD: That is correct, and we

10   did not make a specific waiver or forfeiture

11   argument if that's what Your Honor is referring

12   to.

13   JUSTICE SOTOMAYOR: That --

14   MR. McCLOUD: We highlighted the facts

15   of his case for two reasons. The first is

16   because it shows --

17   JUSTICE SOTOMAYOR: But you could have

18   made that argument?

19   MR. McCLOUD: I suppose we could have,

20   Your Honor. But it wouldn't, I think, address

21   some of the problems with the other side's

22   position, in particular --

23   JUSTICE SOTOMAYOR: Why?

24   MR. McCLOUD: -- the other side's --

25   JUSTICE SOTOMAYOR: If -- if you had

1   raised that argument, do you have any doubt the

2   BIA would have said you forfeited because you

3   had notice of these proceedings and your rights

4   and the time and place?

5   MR. McCLOUD: So there are two

6   problems with relying on waiver or forfeiture in

7   this context. The first is it still allows

8   these motions to be filed. And if even some

9   significant fraction of the hundreds of

10   thousands of old in absentia orders are injected

11   back into the immigration system, that could

12   have a very significant impact on a system that

13   is already dealing with a backlog of 3 million

14   cases.

15   The second problem is that waiver or

16   forfeiture actually heightens the perverse

17   incentives that the non-citizens rule creates.

18   Mendez-Colin would have been better off just

19   never showing up. And so their rule creates a

20   circumstance where non-citizens are encouraged

21   to flout the rules of the removal process by

22   failing to appear.

23   JUSTICE SOTOMAYOR: But, if you comply

24   with the statute, they won't be in that

25   position. This is about past people who have

1   already chosen to abscond after they know about

2   hearings. They can't unring the bell.

3   MR. McCLOUD: And that's our

4   significant concern, Your Honor. There are a

5   huge number of these past people who have gotten

6   in absentia orders after failing to appear, and

7   we don't have any way to remedy that going

8   forward. And if the Ninth Circuit's rule stands

9   --

10   JUSTICE KAGAN: I mean, I appreciate

11   the force of the point, Mr. McCloud, but there

12   are so many people because the government was

13   out of compliance with this statute for so long.

14   And so, at a certain point, it's just -- you

15   can't sort of ask us to read the statute against

16   what the statute says because we've created a

17   world in which kind of we've long since

18   forgotten what the statute says.

19   MR. McCLOUD: So, respectfully,

20   Justice Kagan, that's not what we're asking.

21   We're asking you to apply the statute as it's

22   written, and that is a statute that permits in

23   absentia removal when a non-citizen received

24   notice either -- under either paragraph (1) or

25   paragraph (2). And all the non-citizens here

1   got the paragraph (2) notice. They haven't

2   contested that they received notice of when and

3   where to show up.

4   JUSTICE KAGAN: I think that's what

5   most fundamentally I find a little bit

6   discomfiting about your argument, this idea that

7   there are two forms of notice, take your pick.

8   If one is good, who cares about the other.

9   I mean, it seems to me that if you

10   read the statute fairly, it's quite clearly --

11   and this is what we said in our two prior cases

12   -- you know, (a)(1) is the notice. That's the

13   notice. And what (a)(2) -- it tells you what

14   you have to put in it, all the things that you

15   have to do. Here are the charges. Here is your

16   right to counsel. And here is when you're

17   supposed to show up.

18   And what (a)(2) is about is Congress

19   understood that there were going to be times

20   when you were told to show up on March 15th and

21   then it turned out that March 15th was

22   impracticable or impossible for any of a number

23   of reasons, and it was a mechanism to say, okay,

24   we don't mean March 15th; instead, show up on

25   August 15th.

 1   But that's what the function of (a)(2)

 2   is.   It's not some completely distinct form of

 3   notice that you can say, hey, look, we did that

 4   one.

 5   MR. McCLOUD: I -- I just disagree,

 6   Your Honor.   I think that the (a)(2) notice

 7   serves a distinct purpose, and that purpose is

 8   to provide the non-citizen with the information

 9   they need to know in order to decide whether

10   they want to attend the removal hearing or not.

11   JUSTICE JACKSON: Doesn't it also --

12   MR. McCLOUD: And all of it --

13   JUSTICE JACKSON: -- doesn't it also

14   serve the purpose of giving the government the

15   right to remove them in absentia?   I mean, the

16   thing that's a little concerning to me about the

17   way the government has constructed its argument

18   here is the suggestion that we ignore

19   1229(a)(5)(A), which requires the government to

20   give the person notice as a prerequisite for the

21   government's ability to take advantage of the

22   procedure of removing them without a hearing.

23   So I guess I'm a little concerned that

24   what you're suggesting is that we should presume

25   that the -- that the removal is proper, the

1   removal order is proper, even if the notice was

2   defective, and now it's on the non-citizen to

3   say something or it shifts to his burden to

4   prove, you know, that he should not be removed

5   under those circumstances.

6   MR. McCLOUD: A couple of responses,

7   Your Honor.

8   First, we are not asking you to read

9   out of the statute the -- the paragraph (2)

10   notice or to ignore the paragraph (1) notice.

11   We're saying both of those notices are relevant

12   for purposes of in absentia removal. And we

13   bear the burden as the government of proving

14   that the non-citizen got notice. But that

15   notice can be in the form of the paragraph (1)

16   notice or the paragraph (2) notice.

17   JUSTICE JACKSON: But how do you

18   square that with the -- the prior cases? I

19   don't understand your distinction. Maybe I

20   would understand it if we hadn't already looked

21   at this same circumstance to determine whether a

22   notice is defective and what is the consequence

23   of that.

24   So, in Pereira, we said, if it doesn't

25   have the time or place, the notice to appear,

1   then it's defective. And as I read Niz-Chavez,

2   we say the government can't cure that deficiency

3   for the purpose of the stop-gap -- stop-time

4   rule by providing a paragraph (2) notice.

5   So the government, I think, has to say

6   there's something different about this scenario,

7   the removal scenario in -- in absentia, than the

8   top -- the stop-time rule scenario.

9   MR. McCLOUD: And there are two

10   significant differences, Your Honor.

11   JUSTICE JACKSON: Okay.

12   MR. McCLOUD: One is textual and one

13   is based on -- on legislative history and

14   drafting.

15   So the textual difference is that for

16   purposes of the stop-time rule, the only notice

17   that is relevant is the notice to appear. That

18   is the only notice that is referred to in that

19   provision.

20   JUSTICE JACKSON: Why -- why do you

21   say that? I'm sorry.

22   MR. McCLOUD: Because, when you look

23   at the text of the stop-time rule --

24   JUSTICE JACKSON: Yeah.

25   MR. McCLOUD: -- it says it is

 1   triggered based on the service of a notice to

 2   appear. There is no reference to the notice of

 3   hearing.

 4   JUSTICE JACKSON: But it says a notice

 5   to appear under Section 1229(a) of this title,

 6   and the notice of hearing is under Section 20 --

 7   1229(a) of this title as well, right?

 8   MR. McCLOUD: Well, Your Honor, that's

 9   the argument we made in Pereira that the Court

10   rejected. The Court said that for purposes of

11   that provision, only the notice to appear is

12   relevant. So, even though it refers generally

13   to 1229, the notice to appear is the only notice

14   that's being referred there -- to there.

15   And that is very different textually

16   from the in absentia removal provision, which

17   refers to notice under either paragraph (1) or

18   paragraph (2). And so --

19   JUSTICE JACKSON: What's the

20   legislative history reason?

21   MR. McCLOUD: The legislative history

22   reason is that Congress clearly, when it was

23   adopting these provisions, the in absentia

24   removal provisions, wanted to cut down on

25   procedural gamesmanship and the abuse of

1   loopholes by non-citizens that could be used to

2   avoid removal. So it makes sense that Congress

3   would want to be expansive in in absentia

4   removal in a way it wouldn't necessarily have

5   wanted to do for purposes of stop time.

6   CHIEF JUSTICE ROBERTS: Thank you,

7   counsel.

8   Justice Thomas?

9   Justice Alito?

10   JUSTICE ALITO: What do you think

11   would happen if the government proceeded along

12   the lines that Justice Gorsuch has outlined?

13   MR. McCLOUD: I think we would create

14   a mess for ourselves because we would not have

15   any proceedings in which to remove non-citizens.

16   JUSTICE ALITO: Would that be subject

17   to challenge under any provision of federal law?

18   MR. McCLOUD: Yes. It would be

19   subject to challenge under our own regulations.

20   I assume that non-citizens would challenge it

21   under this statute as well. And I think the

22   fact that this has never happened in more than

23   500,000 in absentia removals is proof that we

24   have no incentive whatsoever to do that.

25   JUSTICE ALITO: Would aliens have an

1   incentive to challenge that as a due process

2   violation?

3   MR. McCLOUD: They could. We haven't

4   taken a position on the due process issue, but I

5   think that's a viable argument that they could

6   at least raise.

7   JUSTICE ALITO: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9   Sotomayor?

10   JUSTICE SOTOMAYOR: No.

11   CHIEF JUSTICE ROBERTS: Justice Kagan?

12   JUSTICE KAGAN: I mean, the reason I

13   asked earlier about suppose not a blank piece of

14   paper, but suppose you just stopped telling

15   people about their right to counsel, how that

16   would be cured, what would prevent it, because

17   that kind of thing seems both more likely to me

18   and more difficult to remedy through anything --

19   any of the supposed safeguards that you've

20   talked about.

21   MR. McCLOUD: So, Justice Kagan, if I

22   can maybe address the question about whether

23   that's more likely, I think it's important to

24   recognize that the notice to appear is a form

25   document. It's not as though the notice to --

1   JUSTICE KAGAN: Well, it is now, but

2   it doesn't have to be. And, you know, maybe

3   somebody will say, why are we -- why are we

4   telling people that they have this right?

5   MR. McCLOUD: So, Justice Kagan, if --

6   you know, non-citizens don't have the right to

7   have counsel during these proceedings, they have

8   the right to be informed that they could obtain

9   counsel.

10   JUSTICE KAGAN: Yeah.

11   MR. McCLOUD: If a non-citizen is --

12   JUSTICE KAGAN: Right. But, you know,

13   that's a useful thing for a non-citizen to know.

14   MR. McCLOUD: And I'm not disputing

15   that. And that's why we put that in the -- the

16   notice to appear.

17   JUSTICE KAGAN: And so tomorrow you

18   decide not to.

19   MR. McCLOUD: If we were to decide not

20   to put that information into the notice to

21   appear, I would still say that that notice to

22   appear can validly be used to start the removal

23   proceeding, but the non-citizen, if they come to

24   the hearing, as they should, can say, I was

25   never informed of the right to counsel and,

 1   therefore, I shouldn't have been -- you know, I

 2   should get that opportunity.

 3   JUSTICE KAGAN: Not that we have to

 4   start all over again? That's -- I mean, what

 5   law would -- would the non-citizen at that point

 6   invoke under -- under your theory of the

 7   statute?

 8   MR. McCLOUD: So the regulations and

 9   the statute have been interpreted as a claim

10   processing rule. If we don't comply with all of

11   the requirements of the claim processing rule,

12   there are questions about exactly what the

13   remedy is. Some courts have said the remedy is

14   a new proceeding. Some courts have said that

15   the remedy is that the government gives an

16   opportunity to cure.

17   So, in your scenario, I think the

18   remedy would be that we give the non-citizen

19   time to obtain counsel and we inform them of

20   their right.

21   JUSTICE KAGAN: Thank you.

22   CHIEF JUSTICE ROBERTS: Justice

23   Gorsuch?

24   JUSTICE GORSUCH: I'm not sure if I

25   understand in the first place your -- your

1 response to Justice Thomas and -- and -- and

2 Justice Sotomayor about Pereira and particularly

3 the most troublesome language for you about

4 "change" meaning something other than what the

5 government is currently suggesting.

6 As I understand it, we would have to

7 say, first, that's dicta and, second, it's

8 incorrect, is that right?

9 MR. McCLOUD: Yes. And that's exactly

10 the analysis the Court undertook in the

11 Kirtsaeng case, where it confronted a very

12 similar statement.

13 JUSTICE GORSUCH: Got it, okay. I --

14 I understand my hypotheticals about a blank

15 sheet are hypotheticals, but it's not

16 hypothetical that the government has long issued

17 NTAs that are non-compliant and that it concedes

18 it did so in the cases presently before us,

19 right?

20 MR. McCLOUD: That's correct.

21 JUSTICE GORSUCH: And then I wanted to

22 ask you about the provision in the in absentia

23 removal statute that says that you can remove

24 somebody if they've -- an alien if -- if he has

25 failed to supply his address.

1   Doesn't that fairly suggest that the

2   alien has first received a compliant notice to

3   appear telling him, as the statute requires,

4   that he must supply his address?

5   MR. McCLOUD: Yes, Your Honor, and

6   that's what the Board held in the In re G-Y-R-

7   decision that's cited in our reply brief. It

8   said, if you never received a notice that

9   informed you of that requirement, you can't be

10   ordered in absentia --

11   JUSTICE GORSUCH: I -- I understand

12   that's your response, that, oh, don't worry.

13   Okay?

14   But I think the logic of your argument

15   is, if he fails to appear for a notice of change

16   hearing, your -- and -- and the notice of change

17   statement notice was itself compliant, forget

18   about the NTA, you're good to go in absentia

19   removal. That's -- that's the -- that's how

20   you're asking us to read the statute presently.

21   Now you're adding a qualifier and

22   saying: Well, not with respect to addresses if

23   the NTA didn't ask him for his address. But

24   where in the statute does that come from?

25   When I look at the in absentia removal

     1   provision as you read it, if I'm to take your

     2   logic seriously, that's irrelevant. Now it's

     3   nice that you have a Board decision and -- and

     4   -- or a regulation, but I'm again asking you as

     5   a matter of statutory interpretation how that

     6   argument hangs together.

     7   MR. McCLOUD: And the answer as a

     8   matter of statutory interpretation is that if

     9   you look at 1229(b)(B), it refers to --

    10   JUSTICE GORSUCH: 1229?

    11   MR. McCLOUD: (b)(B).

    12   JUSTICE GORSUCH: (b).

    13   MR. McCLOUD: Little b, big B.

    14   JUSTICE GORSUCH: Little b, big B,

    15   okay.

    16   MR. McCLOUD: It says that no written

    17   notice shall be required under subparagraph (a)

    18   if the alien has failed to provide the address

    19   required --

    20   JUSTICE GORSUCH: Yes.

    21   MR. McCLOUD: -- under Section

    22   1229(a)(1)(F).

    23   JUSTICE GORSUCH: Yes, which just

    24   repeats what's -- what 1229(a) says and what

    25   a(B)(5)(b) and what 1229(a)(2)(B) say. It's --

1   there it is again. But it doesn't say anything

2   about limitations on in -- in absentia removal.

3   It just simply says the notice to appear

4   should -- should contain this information --

5   MR. McCLOUD: Well, what --

6   JUSTICE GORSUCH: -- and you should

7   provide it and --

8   MR. McCLOUD: -- what the Board has

9   said is that --

10   JUSTICE GORSUCH: Forget about what

11   the Board has said. As a matter of statutory

12   interpretation, you pointed me to one provision.

13   It doesn't work. What else have you got?

14   MR. McCLOUD: If I could finish my

15   answer about why that provision does work, it's

16   the words "required under Section

17   1229(a)(1)(F)."

18   JUSTICE GORSUCH: Yes, which refers us

19   all the way back up, I got that.

20   MR. McCLOUD: Which refers us back up

21   to (a) --

22   JUSTICE GORSUCH: Yeah.

23   MR. McCLOUD: -- (a)(1).

24   JUSTICE GORSUCH: Yeah.

25   MR. McCLOUD: And so, if you never

 1   received information in (a)(1) that said you

 2   have this obligation, you don't have an

 3   obligation to update the information.

 4   JUSTICE GORSUCH: Fair enough. But

 5   where does it follow that in absentia removal

 6   for a failure to appear for a notice of change

 7   hearing depends upon any of that? I don't see

 8   that in the statute.

 9   MR. McCLOUD: I -- I think that

10   follows from the text of (b)(5)(A) and

11   (b)(5)(B), Your Honor.

12   JUSTICE GORSUCH: That's what you've

13   got?

14   MR. McCLOUD: That's what I've got.

15   JUSTICE GORSUCH: All right. Thank

16   you.

17   CHIEF JUSTICE ROBERTS: Justice

18   Kavanaugh?

19   JUSTICE KAVANAUGH: I think you were

20   interrupted when you were saying correcting the

21   NTAs going forward doesn't do anything about the

22   hundreds of thousands who previously received

23   NTAs without the time and date, so can you just

24   finish your answer on that? Like, what will

25   happen to those hundreds of thousands of cases?

1   MR. McCLOUD: Certainly, Justice

2   Kavanaugh. So, as the Ninth Circuit has

3   interpreted this provision, all of those

4   hundreds of thousands of individuals have a

5   right to seek rescission. And as I was

6   discussing with some members of the Court

7   earlier, at least in the Ninth Circuit and some

8   other courts, that right is essentially

9   automatic.

10   And so we are very concerned that

11   those hundreds of thousands of cases could be

12   injected back into the immigration system. And

13   we have already seen some evidence of that in

14   the wake of the Ninth Circuit's panel decision

15   in Singh. So, in 2021, the year prior to the

16   Singh panel decision, there were 380 motions to

17   rescind in absentia orders filed nationwide. In

18   2022, the year of the Singh decision, that had

19   risen to over 6,000. And in 2023, that had

20   risen to over 11,000.

21   So I think, if this Court sides with

22   the Ninth Circuit, that already substantial

23   increase we have seen is going to turn into an

24   avalanche.

25   JUSTICE KAVANAUGH: And then how do we

1　think about the context of the stop-time rule

2　versus the context of in absentia removal in

3　thinking about the particular statutory

4　provisions here, or is that different context

5　not relevant?

6　　　　MR. McCLOUD:　No, I think it is

7　relevant in this respect, Your Honor.　So one of

8　the concerns that the petitioner in Pereira

9　brought and that I think the Court latched onto

10　in Pereira was that the stop-time rule gives the

11　government a procedural advantage, and there was

12　a sense that it was unfair to allow the

13　government that procedural advantage if it had

14　never committed to moving forward with removal

15　proceedings and process.

16　　　　JUSTICE KAVANAUGH:　What's the

17　procedural advantage?　Just spell that out.

18　　　　MR. McCLOUD:　The procedural advantage

19　is that the non-citizen does not accrue years

20　toward cancellation of removal.　And so it makes

21　it easier for the government to remove someone

22　if we can trigger the stop-time rule.　So there

23　was a sense of -- of unfairness, I think, or at

24　least an allegation of unfairness there.

25　　　　That's very different from this

1   context. In the in absentia removal context,

2   the unfairness, I think, would come from giving

3   non-citizens who knew they were in removal

4   proceedings and who knew they had an obligation

5   to go to their hearings and who knew when and

6   where the hearings were the chance to claim a

7   lack of notice when they clearly had notice.

8   And that disadvantages other

9   non-citizens who did follow the rules, who

10   complied and went to their removal proceedings,

11   because those non-citizens could be removed at

12   the end of their proceedings, but someone like

13   Mendez-Colin, who just decides, I don't want to

14   show up, has this in absentia order, but it

15   could always be rescinded under the Ninth

16   Circuit's rule.

17   JUSTICE KAVANAUGH: So you're better

18   off not showing up?

19   MR. McCLOUD: You are. You're

20   absolutely better off not showing up.

21   JUSTICE KAVANAUGH: Yeah. Thank you.

22   CHIEF JUSTICE ROBERTS: Justice

23   Barrett?

24   JUSTICE BARRETT: Mr. McCloud, could

25   you tell me what the distinction is between the

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 1      notice to appear and the charging document that

 2      the government begins to file the removal

 3      proceedings?

 4              MR. McCLOUD:  For purposes of removal

 5      proceedings, there is no distinction.  Charging

 6      document in the regulations is defined to

 7      include other documents that can start other

 8      kinds of immigration proceedings.

 9              JUSTICE BARRETT:  And it's defined

10      exclusively in the regulations --

11              MR. McCLOUD:  It's defined in the

12      regulations.

13              JUSTICE BARRETT:  -- and the statute?

14              MR. McCLOUD:  That's correct.

15              JUSTICE BARRETT:  Okay.  So -- and

16      that "clear and convincing" portion of the in

17      absentia removal proceeding part of the statute,

18      it says you have to show by clearing and --

19      clear and convincing evidence that the written

20      notice was provided and by clear and convincing

21      evidence that the non-citizen is removable.

22              MR. McCLOUD:  Correct.

23              JUSTICE BARRETT:  Okay.  So a big

24      concern and I think the -- the worst part for

25      you is this blank document hypothetical or
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1   hypothetical that omits crucial information like

2   the right to counsel or the grounds for removal.

3   What would the IJ do -- and -- and I'm

4   going to toe the Justice Gorsuch line here --

5   don't refer me to the regulations. As a matter

6   of the statutory language, for purposes of

7   determining whether the non-citizen by clear and

8   convincing evidence is removable, is it possible

9   if only the notice of hearing has been provided

10   for the IJ to make that determination?

11   I mean, I guess, according to the

12   statute, the government could simply say and

13   launch into a whole new explanation that wasn't

14   included in any NTA about why the alien or the

15   non-citizen is removable.

16   MR. McCLOUD: So I -- I think the

17   answer is it is not possible because

18   removability requires an assessment of the

19   charges against the non-citizen. So, if all the

20   IJ had was the notice of hearing that says this

21   is the time for the proceeding and the

22   consequences for not attending --

23   JUSTICE BARRETT: But the charging

24   document, you told me, isn't defined in the

25   statute, so it could say something different

1   than the NTA.

2   MR. McCLOUD: So, if we are in a world

3   where the government has supplemented the

4   charges against the non-citizen I guess orally

5   or they've appended them to the notice of

6   appearing, I suppose the immigration judge could

7   look at that document and decide that it

8   complies --

9   JUSTICE BARRETT: We're imagining the

10   world of the worst-case hypothetical where it's

11   a blank document for the NTA and then the notice

12   of hearing that tells the non-citizen where and

13   when to show up and the nightmare hypothetical

14   that then the non-citizen can be ordered

15   removable when he was never informed what the

16   charges against him were, the grounds of

17   removability.

18   MR. McCLOUD: And I guess where I'm

19   struggling in the hypothetical is with the idea

20   that the -- the immigration judge would even be

21   able to say that the non-citizen is removable if

22   there are no charges.

23   JUSTICE BARRETT: Well, that's my

24   question too, so that's why I asked you what the

25   distinction between the NTA and whatever

1   document is necessary to initiate the removal

2   proceeding is, because it seems to me that if

3   they are distinct documents and they are

4   different, the nightmare scenario can unfold

5   with the safeguard of the regulations.

6   MR. McCLOUD: Maybe I was unclear in

7   my -- my answer --

8   JUSTICE BARRETT: Okay.

9   MR. McCLOUD: -- to your first

10   question. For purposes of removal, the charging

11   document is the notice to appear. That's why

12   the notice to appear has to contain the charges

13   in order for it to be a notice to appear that

14   starts a removal proceeding.

15   So, in the blank document

16   hypothetical, where there's no charges

17   whatsoever, there was no charging document, and

18   so there was no proceeding, and there's no way

19   for the immigration judge to assess removability

20   because they can't see the charges against the

21   --

22   JUSTICE BARRETT: Okay. So, when you

23   told Justice Gorsuch -- he -- he said all you

24   need to show by clear and convincing evidence is

25   that the notice was served, and you agreed with

 1   him, are you amending that answer?

 2   MR. McCLOUD: I may have misunderstood

 3   his question. I thought the question that I was

 4   asked by Justice Gorsuch was assume away all of

 5   those protections in the regulation and assume

 6   away the fact that the notice has to contain the

 7   charges, what result then? And I -- I think the

 8   answer then is the notice of hearing alone would

 9   be sufficient, but that's just a million miles

10   away from the reality of this statutory scheme

11   that we're looking at.

12   JUSTICE BARRETT: Okay. So your

13   answer is that the non-citizen cannot be found

14   removable unless the government shows by clear

15   and convincing evidence that the notice was

16   provided and that he is removable, and you're

17   saying that there's no way to show that he's not

18   removable if the NTA has not been served? So at

19   least that much information would have to be

20   there?

21   MR. McCLOUD: If there's no document

22   that contains charges against the non-citizen,

23   there's no way to show that they're removable.

24   JUSTICE BARRETT: Okay. So it doesn't

25   eliminate Justice Kagan's hypothetical of right

1   to counsel not being included, but it would

2   eliminate the hypothetical of the entirely blank

3   document?

4   MR. McCLOUD: I think that's fair.

5   JUSTICE BARRETT: Okay. Thank you.

6   CHIEF JUSTICE ROBERTS: Justice

7   Jackson?

8   JUSTICE JACKSON: Can we go back to

9   the distinction, if any, between the stop-time

10   rule and in absentia removal? I understood you

11   to respond to Justice Kavanaugh by saying that

12   the government's position is that the stop-time

13   rule gives the government a procedural

14   advantage, the ability to thwart the accrual of

15   time, and so that's why the government has to

16   dot all the I's and -- and cross all the T's

17   with respect to that.

18   But I guess I see this as exactly --

19   "this" meaning in absentia removal -- as exactly

20   the same thing, because, ordinarily, a

21   non-citizen would be entitled to a hearing where

22   he or she could make an argument and advocate

23   for themselves about removal, and the statute

24   allows the government to get around that in a

25   sense by allowing the -- the government to get a

1   removal order in the absence of adversarial

2   presentation by the person who doesn't show up.

3   And so I guess what I'm trying --

4   still struggling with is why we would have a

5   world in which a statute that requires the

6   government to give notice in order to be able to

7   get a removal in absentia order would allow for

8   that notice to be deficient in any way.

9   Justice Barrett talked about the

10   different ways in which it might be deficient,

11   but why -- why could the government give

12   deficient notice in order to get the benefit of

13   in absentia removal when we've already held that

14   the government can't give deficient notice to

15   get the benefit of the stop-time rule?

16   MR. McCLOUD: I have a couple of

17   responses to that, Justice Jackson.

18   The first is we agree that

19   non-citizens get the opportunity to present

20   their case in the way that Your Honor suggested,

21   and they get that opportunity by showing up at

22   the hearing. So the facts of these cases are we

23   told the non-citizens when and where to show up

24   to present their case and they failed to do

25   that.

1   JUSTICE JACKSON: Yeah, but the

2   statute --

3   MR. McCLOUD: That still leaves --

4   JUSTICE JACKSON: -- the statute

5   doesn't say, if the non-citizen doesn't show up,

6   the government gets the removal order. The

7   statute says, if the non-citizen doesn't show up

8   and the government proves that through clear and

9   convincing evidence they got notice and the

10   person is removable, then the government gets

11   the order.

12   So I don't think the government can

13   rely on the fact that the person didn't show up

14   as the basis for the validity of their removal

15   order. And my question remains, if the

16   government doesn't actually prove that they gave

17   the notice that the statute requires, why should

18   the government be entitled to getting the

19   removal order in this case when the government

20   would not have been able to get the stop-time

21   order under our prior precedents?

22   MR. McCLOUD: And I think my answer is

23   similar to the one that I gave you before, which

24   is, for purposes of in absentia removal, there

25   are two notices that are relevant and can be a

1   basis for in absentia removal, and --

2   JUSTICE JACKSON: No, you're just

3   saying that the notice isn't deficient. If --

4   let's assume that the notice is deficient. My

5   question is, if the notice is deficient, you're

6   suggesting that there's something about removal

7   that would make it okay for the government to

8   still get the order in that situation, when

9   we've said, if a notice is deficient in the

10   stop-time rule scenario, that the government

11   can't stop the time.

12   And I see that parallel and I'm

13   worried about whether or not you're really

14   asking us to implicitly overrule Pereira or

15   Niz-Chavez in the analysis if we hold for you in

16   this case in the way that you are setting

17   forward.

18   MR. McCLOUD: No, Your Honor. We're

19   asking you to take Pereira seriously when it

20   said that it was a narrow decision about the

21   intersection between the stop-time rule and the

22   notice to appear requirements.

23   We are not saying that if a

24   non-citizen gets absolutely no notice

25   whatsoever, they can be ordered removed in

1   absentia. In these cases, it is true that the

2   notice to appear lacked certain information, but

3   that missing information was supplied by the

4   notices of hearing that the non-citizens

5   received.

6   JUSTICE JACKSON: But you don't -- you

7   don't dispute that that missing information in

8   this case is the same mission -- missing

9   information that was in Pereira and Niz-Chavez,

10   right? We're not talking about two different

11   kinds of missing information that might allow

12   you to make this distinction?

13   MR. McCLOUD: I don't dispute that the

14   information is the same. I dispute that the

15   relevance is the same because, in Pereira and in

16   Niz-Chavez, for purposes of the stop-time rule,

17   there was a concern, if we never told the

18   non-citizen when and where to show up for the

19   proceedings, they weren't going to be able to

20   figure out what to do.

21   Here, the information was provided to

22   the non-citizens, so they had --

23   JUSTICE JACKSON: All right. Let me

24   ask you just two more really quick things. One

25   is, is in absentia removal the only way the

1   government can remove a non-citizen? I -- I

2   didn't understand your response to Justice Alito

3   about that. You can -- you can remove a

4   non-citizen without in absentia removal, right?

5   MR. McCLOUD: Correct. If a

6   non-citizen goes to their removal proceeding,

7   they can be found removable. So I didn't mean

8   to suggest that in absentia is the --

9   JUSTICE JACKSON: Or if you find them

10   and you arrest them and you bring them for

11   removal, they can be removed, right?

12   MR. McCLOUD: That's the way that an

13   ordinary removal proceeding works, and that's

14   the way that these removal proceedings were

15   initiated as well. What's different about these

16   cases is the non-citizens just didn't finish out

17   the process.

18   JUSTICE JACKSON: All right. And,

19   finally, with respect to the catastrophic nature

20   of a ruling in the favor of the other side, you

21   said that the Ninth Circuit finds that there's

22   automatic reopening and whatnot.

23   So couldn't we agree with the Ninth

24   Circuit's holding related to the deficiency of

25   the notice here but maybe disagree that there's

1   automatic reopening for all the people who have

2   previously had this problem?

3   MR. McCLOUD: So I guess what I would

4   say is the question of what is the remedy and

5   whether it's automatic or not is not before you.

6   I don't think it's fairly included as part of

7   the question presented, but --

8   JUSTICE JACKSON: But if we were to --

9   true, true. But what I'm just saying is it's --

10   it's not necessarily the case that we would have

11   this catastrophic result because we could have a

12   separate remedy question that we could disagree

13   with the Ninth Circuit.

14   MR. McCLOUD: That -- that is true,

15   you could have a later remedy case, but I would

16   still caution that even if it's not automatic, a

17   significant number of these motions are likely

18   to be granted because the non-citizens are

19   saying we did not get notice. And so, if they

20   are granted and if they are injected back into

21   the immigration system, that is going to have

22   significant impacts on that system.

23   JUSTICE JACKSON: Thank you.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel.

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 1                    MR. McCLOUD:  Thank you.
 2                    CHIEF JUSTICE ROBERTS:  Ms. Anand.
 3                    ORAL ARGUMENT OF EASHA ANAND
 4             ON BEHALF OF THE PETITIONER IN CASE 22-674
 5          AND ON BEHALF OF THE RESPONDENT IN CASE 22-884
 6                    MS. ANAND:  Thank you.  Thank you, Mr.
 7     Chief Justice, and may it please the Court:
 8                    This is the third time the government
 9     has come before this Court and asked to be
10     relieved of the consequences of flouting the
11     plain text of the INA.
12                    For a third time, the government says
13     the notice it gave is good enough.  Just as it
14     did in Pereira and Niz-Chavez, this Court should
15     reject the government's argument here.
16                    Indeed, the government's position in
17     these cases is more extreme than its position in
18     Niz-Chavez.  In Niz-Chavez, the government said,
19     so long as the government -- so long as the
20     non-citizen gets all of the information listed
21     in paragraph (1), it doesn't matter what format
22     it comes in.
23                    In these cases, the government seems
24     to be arguing that if you have a paragraph (2)
25     notice, it does not matter if the non-citizen
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1   never gets any of the information in paragraph

2   (1). And just to slightly amend the kind of

3   nightmare hypothetical we're talking about, it's

4   where the government sends the non-citizen a

5   blank piece of paper but nonetheless gives the

6   immigration judge information about, for

7   instance, the charges against the non-citizen.

8   In that circumstance, the government

9   can prove by clear and convincing evidence

10   removability, the non-citizen has no clue what

11   the charges against him are.

12   And where, as in Niz-Chavez, the

13   argument was that a deficient NTA was

14   nonetheless sufficient to stop the clock for

15   discretionary relief, here, the government is

16   arguing that same deficient NTA is somehow

17   sufficient for the far more draconian sanction

18   of removing a non-citizen without ever hearing

19   their side of the story.

20   Because the statute doesn't

21   contemplate that result, because it requires a

22   complete valid paragraph (1) notice in every

23   case, and contemplates a paragraph (2) notice

24   only as a supplement to that valid paragraph (1)

25   notice, this Court should reject the

1   government's arguments again.

2   I welcome this Court's questions.

3   JUSTICE THOMAS: What's your best

4   textual argument for your last point?

5   MS. ANAND: So, Your Honor, we think

6   that there's two buckets of textual evidence.

7   The first is about the sort of centrality of the

8   NTA. So it's the fact that it shall be issued

9   in every removal proceeding, the fact that it

10   contains a bunch of information that's not in

11   paragraph (2), and the fact that the statute

12   says that a hearing can't be held less than 10

13   days from the NTA. So there's a presumption of

14   the NTA.

15   The second bucket is the language of

16   1229 paragraph (2), which says that a -- a

17   notice of change must be given only in the case

18   of a change in the time and place of the

19   proceeding. And we believe that the -- the

20   combination of those two, the centrality of the

21   NTA, the change language that this Court has

22   already interpreted in Pereira, adds up to our

23   position.

24   JUSTICE THOMAS: I think it says "any

25   change," and that "any change" language seems to

1   be broad enough for the change here.

2   MS. ANAND: So, Your Honor, again,

3   that "any change" language is the same language

4   that was interpreted in Pereira, and I don't

5   think it's broad enough to encompass what

6   happened here.

7   If I could take the example from the

8   government's reply brief of the voter

9   registration form and the change of party

10   affiliation form, if you mess up your voter

11   registration form, if it's invalid in the same

12   way here the NTAs were invalid, it doesn't

13   matter how many change of party affiliation

14   forms you file. Until you fix that voter

15   registration form, filing a change form won't do

16   any good.

17   The same thing is true here. Because

18   the NTA initially was invalid because it had the

19   TBD language, it doesn't matter how many times

20   you say, I'm trying to change that. Until

21   you've got the valid NTA, there's no change to

22   be had.

23   JUSTICE KAGAN: Could I just have a

24   clarification of your position, Ms. Anand?

25   Suppose that you have -- a non-citizen

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 1        has a paragraph (1) notice and there's nothing

 2        wrong with the date and time.  So the government

 3        fills out the date and time correctly, but it

 4        does something else wrong.  It doesn't tell the

 5        non-citizen about the charges, or it doesn't

 6        tell the non-citizen about the right to counsel

 7        or so forth.  And then there's a paragraph (2)

 8        notice because there needs to be a change in the

 9        date and time.

10                Now, at that point, what happens?  Is

11        -- is -- is -- could the non-citizen reopen?

12                MS. ANAND:  So no, Your Honor, and

13        that's sort of for the reason I just

14        articulated.  So we think that in this case, the

15        change language is wrong for two reasons.  One

16        is we think TBD to date and time is not actually

17        a change, but the other reason is what I --

18                JUSTICE KAGAN:  Right.  So I've just

19        taken that out.

20                MS. ANAND:  Right.

21                JUSTICE KAGAN:  Right?

22                MS. ANAND:  So the second --

23                JUSTICE KAGAN:  And I'm saying so --

24        so now you can't rely anymore on the textual

25        hook of what the word "change" means.
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1   MS. ANAND: Right.

2   JUSTICE KAGAN: Do you still have an

3   argument?

4   MS. ANAND: Yes, Your Honor, because

5   it's not just a change. It's a change to the

6   time and place of the proceeding. And if

7   there's never been a time and place of the

8   proceeding set, because the NTA is invalid,

9   right, it's not doing its function of initiating

10   a proceeding, then there can't be a change to

11   the time and place.

12   JUSTICE KAGAN: No, no. Maybe I'm not

13   making myself clear. I was assuming that in

14   your -- in -- there's -- there's no problem in

15   the first notice with the time and date. So,

16   you know, you don't get the textual hook of

17   saying, oh, that's not a change because it

18   hasn't gone from to be determined to March 15th.

19   It's gone from February 15th to March 15th.

20   But there's some other problem.

21   There's some other problem about the charges or

22   about the right to counsel. It seems to me that

23   you've now lost your textual hook for the

24   non-citizen to be able to say that they have a

25   right to reopen.

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1                    Am I wrong about that?
2                    MS. ANAND:  I think you're wrong, and
3        that's, again, because of -- I'll go back to the
4        voter registration hypothetical.
5                    So, if the initial document is
6        invalid, right, you never actually registered to
7        vote, you can't just file -- fill out a change
8        of party affiliation form even if you had a
9        party listed in the registration form.
10                   And the same thing is true here.  The
11       NTA is invalid if it's missing some of the
12       information in paragraph (1).  And so it's not
13       actually doing any work.
14                   Now --
15                   JUSTICE GORSUCH:  So you would say --
16                   MS. ANAND:  -- you know, I think it's
17       overdetermined in this case because --
18                   JUSTICE ALITO:  Well, do you think as
19       a --
20                   JUSTICE GORSUCH:  I just want to
21       make -- before we leave this, I just want to
22       make sure I understand it too.  I'm sorry to
23       interrupt.
24                   But you would just say there's simply
25       no NTA, and so it isn't something that's
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 1      remedied by Section 2, which has to do with time

 2      and place information.  You just need to file a

 3      compliant NTA and then off you go.  Is that --

 4               MS. ANAND:  That's exactly right.

 5      Now, again, in this case, it's overdetermined

 6      because we also have the --

 7               JUSTICE GORSUCH:  The change, yeah.

 8               MS. ANAND:  -- TBD date change

 9      language and because sort of the square holding

10      of Pereira is that it --

11               JUSTICE GORSUCH:  I just wanted to

12      make sure I understood.  Thank you.

13               MS. ANAND:  Thank you.

14               JUSTICE GORSUCH:  Sorry to interrupt.

15               JUSTICE ALITO:  Do you dispute the

16      proposition that just as a matter of ordinary

17      language, there can be a change from an

18      indeterminate time or place to a determinate

19      time or place?

20               MS. ANAND:  So, yes, Your Honor, we

21      think that ordinary speakers of English don't

22      use "change" to refer to indeterminate time to

23      determinate time.  So we give the example of a

24      bride who announces she's going to get married.

25      We don't know the date yet.  When she sends out
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1      her cards telling you the date, we call that a

2      Save the Date, not a Change the Date, for

3      instance.

4                JUSTICE ALITO:  Well, I mean, if the

5      -- the bride says, I'm going to get married, and

6      a friend says, oh, when is that going to happen,

7      and the bride says, well, we don't know yet,

8      then the other person says, well, let me know if

9      there's any change, do you think that's an

10     unusual use of language?

11               MS. ANAND:  So I do, Your Honor, and I

12     think that's particularly so in this case

13     because of the kind of validity point I've been

14     making.  So that is to say when in the -- when

15     the initial document is invalid --

16               JUSTICE ALITO:  No, no, I'm not

17     talking about the intricacies of this statute.

18     I'm just talking about ordinary language.  I

19     could give you many examples of exactly the same

20     thing.  It doesn't seem to me -- you have an

21     interpretation of change, but do you really want

22     to say that this is outside of the realm of --

23     reasonable realm of possibility that people can

24     talk about a change in that way?

25               MS. ANAND:  So I don't know if it's
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 1    outside of the reasonable realm, but when
 2    combined with the language from Pereira, sort of
 3    not quite holding but clearly sort of central to
 4    the discussion is this interpretation of the
 5    exact same language, and when combined with the
 6    other structural clues that an NTA is central to
 7    the whole administration of this statute, I
 8    think our interpretation of "change" is the
 9    better one.
10              JUSTICE JACKSON:  How do you respond
11    to the government's suggestion that the NTA is
12    really not central?  I mean, the government says
13    we are looking at the statute and it says, you
14    know, we can get an in absentia removal order if
15    we have issued (1) or (2).
16              And so I guess the government's point
17    is that suggests that (1) is really not pivotal
18    in the way that you are putting forward.
19              MS. ANAND:  So I think that's wrong,
20    Your Honor, for two reasons.
21              The first is that the "or" in the in
22    absentia context doesn't define the relationship
23    between (a)(1) and (a)(2).  That's done in the
24    statute defining those two provisions.
25              And so, again, to go back to the voter
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1   registration hypothetical, you could have a

2   sentence saying, you know, send the voter the

3   primary ballot for the party listed in their

4   voter registration form or their change of party

5   affiliation form. That wouldn't mean that

6   somehow the voter registration form is

7   irrelevant just because you have the word "or"

8   in that sentence.

9   And so I think what you have to do is

10   look at paragraphs (1) and (2) and the

11   relationship between them, and it's clear both

12   from the mandatory language of paragraph (1),

13   from the fact that, as this Court explained in

14   Niz-Chavez, it's the one place that tells you

15   all the information you need to defend yourself

16   in a removal proceeding, and the fact that

17   (a)(2) is structured as a change or a

18   supplement, that those two documents are not

19   interchangeable.

20   JUSTICE BARRETT: Ms. Anand, I -- I

21   want to make sure I understand your answer to

22   Justice Kagan about change. So you're saying

23   that, you know, just because you file a change

24   of party affiliation form doesn't make your

25   initial voter registration valid. I -- I get

 1   that.

 2   But, in the statute, it says, "change

 3   of time or place of proceedings." So it's not,

 4   you know, referring generally. I'm just

 5   wondering where you get the statutory hook,

 6   because that presumes that there is an NTA.

 7   But, if it's defective in some way, if, as

 8   Justice Kagan said, we take the defect in time

 9   and place out of it, why couldn't it be that

10   there is an NTA that's defective in some way,

11   but the statute imposes an obligation on the

12   non-citizen who knows the time and place he's

13   supposed to show up to make an appearance at

14   that proceeding and raise whatever objection

15   there is to the defect?

16   MS. ANAND: So --

17   JUSTICE BARRETT: And maybe -- maybe

18   the objection -- and I'm thinking of analogy to

19   a Rule 55 civil, you know, default judgment

20   proceeding.

21   It may well be that whatever objection

22   that the non-citizen raises at that point is

23   fatal to the government's case. You know, maybe

24   it's missing some vital piece of information.

25   Maybe it can be remedied if it's omitted the

1   right to counsel by giving him time to obtain

2   counsel. If there's some problem in the

3   description of the charges, the grounds for

4   removal, then maybe the entire thing has to be

5   dismissed and the government has to start again.

6   But why wouldn't it be consistent with

7   the statutory scheme for the non-citizen to have

8   to show up to the removal proceeding and

9   register whatever objection the non-citizen has?

10   I'm not saying that that's right, but it seems

11   to me -- I -- I just want to understand why

12   that's ruled out on your understanding of the

13   statutory language.

14   MS. ANAND: Sure, Your Honor. So the

15   statute doesn't ask about notice generally or

16   notice of the time of the hearing. It asks

17   about notice in accordance with the specific

18   statutory provisions.

19   And that's a contrast to the pre- --

20   JUSTICE BARRETT: Or, though, right?

21   MS. ANAND: So that's correct. But

22   our position is that there's been neither a

23   paragraph (1) notice nor a paragraph (2) notice.

24   JUSTICE BARRETT: But I guess I don't

25   understand why -- where in the statute you can

1   say there has not been a paragraph (1) notice if

2   there's been a defective paragraph (1) notice?

3   There's been a paragraph (1) notice. And, here,

4   I'm not talking about the blank piece of paper.

5   I'm just saying it's missing some piece of

6   information other than date and time.

7   Why isn't that just a defective NTA?

8   MS. ANAND: So I think that's sort of

9   the square holding of Pereira. So, again,

10   Pereira reserved the question of missing other

11   pieces of information, but the statute puts them

12   all on par. And Pereira says it's not just that

13   this is a deficient document. It says no notice

14   to appear has been served, right? That's the

15   language that Pereira was interpreting.

16   JUSTICE BARRETT: But stop -- well,

17   I'm sorry. Go ahead.

18   MS. ANAND: So -- so Pereira is

19   interpreting has a notice to appear been served

20   under paragraph (1). It says no notice to

21   appear has been served if it's missing one of

22   these pieces of information.

23   JUSTICE SOTOMAYOR: Counsel, can I --

24   I'm not cutting you off?

25   JUSTICE BARRETT: No, I'm done.

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1                   JUSTICE SOTOMAYOR:  I -- then I'll
2       jump into that.  I have -- I want to follow up
3       on Justice Barrett's question because she seems
4       to be seeing a difference between a
5       jurisdictional flaw and a claim processing flaw,
6       which is what Mr. McCloud has been calling this.
7                   And I do think that we -- you have to
8       address that question.  It seems to me that the
9       clear holding of our precedent -- prior
10      precedents is that it's jurisdictional, that if
11      you don't have a proper notice of appeal -- of
12      -- of appearance, that that's a jurisdictional
13      defect.  They can't order you -- they can't
14      invoke the stop-gap rule, but they also can't
15      order you removed until they provide you with
16      the proper document, correct?
17                  MS. ANAND:  So I think that's right.
18      I want to be a little bit careful because I
19      think "jurisdictional" is a little bit of a
20      slippery word.
21                  JUSTICE SOTOMAYOR:  It is.
22                  MS. ANAND:  So --
23                  JUSTICE SOTOMAYOR:  That's the
24      problem.
25                  MS. ANAND:  Right.  So --
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1   JUSTICE SOTOMAYOR: So -- but so is

2   using claim processing in this kind of context.

3   MS. ANAND: So our position is that if

4   you show up at the hearing, as Justice Barrett

5   articulated, you can say this was defective.

6   And until the government cures that defect, they

7   can't go forward. Congress also provided an

8   express remedy for where there's a defective

9   notice and you're removed in absentia.

10   There is no remedy in the statute for

11   where there's a defective notice and a removal

12   order was entered after a hearing. So we're not

13   saying that someone who attended their hearing,

14   had the chance to object to the notice to

15   appear, and was nonetheless removed gets to

16   reopen because Congress hasn't provided that

17   remedy.

18   JUSTICE SOTOMAYOR: All right. So --

19   MS. ANAND: Congress has, however, in

20   --

21   JUSTICE SOTOMAYOR: -- could -- before

22   -- I'm sorry. Before we end -- you end today, I

23   -- I want to take head-on the draconian

24   consequences that a ruling in your favor that

25   the government is painting, and I want you to

        1   answer that. So -- but I cut off a colleague

        2   who had --

        3   CHIEF JUSTICE ROBERTS: We may as well

        4   go with that now.

        5   (Laughter.)

        6   MS. ANAND: So -- so two responses,

        7   Your Honor, right? So the first is the

        8   government came to you in Pereira and Niz-Chavez

        9   and also articulated a parade of horribles. And

       10   this Court said those sorts of raw

       11   consequentialist calculations have no place,

       12   particularly where, as Justice Kagan noted,

       13   those consequences are a function of the

       14   government ignoring the text of the statute over

       15   many cases and many years.

       16   The second is, you know, I -- I -- I

       17   don't want to dispute that there will be an

       18   increase in the volume of these motions, but I

       19   do want to be clear about who exactly has an

       20   incentive to file them. Remember, if you win on

       21   reopening your in absentia removal order, all

       22   you get is another hearing, right, even if

       23   you're successful in clearing all the hurdles.

       24   And at that hearing, you have to prove that

       25   you're able to remain in the U.S.

1   And so, you know, for many, many

2   non-citizens who have no pathway to staying in

3   the United States, it's very unlikely that

4   they're going to come forward and file one of

5   these motions to reopen because the best they

6   get is another hearing.

7   CHIEF JUSTICE ROBERTS: Now, counsel,

8   did I understand you to say that if an -- I

9   mean, we've heard a lot of talk about

10   deficiencies in -- apart from the -- the notice

11   and that being one of the problems, you -- you

12   -- you should get original notice rather than

13   simply later notice, even if you comply with the

14   later notice.

15   Is it a harmless error situation if

16   there have been no changes in the rest of the

17   NTA?

18   MS. ANAND: So, Your Honor, I think

19   that the statute doesn't contemplate that,

20   right? The statute asks not just for notice or

21   notice of the information listed in paragraph

22   (1) but notice in accordance with these

23   provisions.

24   And prior to 1990, remember the scheme

25   was this sort of case-by-case adjudication. So

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 1          the statute said "notice reasonable under the
 2     circumstances."  And what Congress did was it
 3     said, rather than that kind of case-by-case
 4     adjudication, did the non-citizen get enough
 5     notice, we're going to put the cards in the
 6     government's hand.
 7              CHIEF JUSTICE ROBERTS:  Well, but
 8     let's just say that there has been no change in
 9     the notice.  I suppose, if you want to challenge
10     the notice as a categorical matter across the
11     board of all these proceedings, you could.
12              But I thought you said that if there
13     has been no change, in other words, other than a
14     change in the time and the place, but the rest
15     of the NTA is -- is the same, that that
16     individual would have no -- no claim at that
17     point.
18              MS. ANAND:  So, just so I understand
19     the hypothetical, the -- the -- the notice to
20     appear is compliant?
21              CHIEF JUSTICE ROBERTS:  Except for,
22     you know, the reason that -- the reason there is
23     a later, a new notice, that's the only situation
24     in which it is -- the only aspect in which it's
25     non-compliant.
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1                MS. ANAND:  So --
2                CHIEF JUSTICE ROBERTS:  And the person
3     -- and the person shows up at the time.
4                MS. ANAND:  The person shows up at the
5     time, so they have a non-compliant -- they have
6     a TBD NTA that the -- right?
7                CHIEF JUSTICE ROBERTS:  Yeah.
8                MS. ANAND:  So I think, at that point,
9     they can say -- you know, they won't get much
10    for it, but they can certainly say you can't
11    proceed until you give me a compliant NTA.  The
12    government has to print out a new one.
13               CHIEF JUSTICE ROBERTS:  No, they just
14    said here's the -- the -- the NTA was compliant
15    in every respect except that we had a TBA rather
16    than the actual time and place.  You got notice
17    of the time and place.  You showed up.  What?
18               MS. ANAND:  You show up and you say my
19    NTA was not compliant.  The government has to
20    give you a new one.  It has to wait 10 days
21    before they can remove you.  Now it's the same
22    thing --
23               CHIEF JUSTICE ROBERTS:  It was not
24    compliant in that it didn't have a time and
25    place.  But then it was.  There was a time and
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1   place. And you say he has to show up and say, I

2   didn't get a time and place in the original one;

3   even though I got a time and place in the second

4   one and showed up, I can complain that I didn't

5   get one in the original one?

6   MS. ANAND: So I think that's the

7   square holding of Niz-Chavez. Niz-Chavez says

8   two different documents that add up to all the

9   notice requirements under paragraph (1) is still

10   not a paragraph (1) notice. That's the holding

11   of Niz-Chavez.

12   And in this case, the government's

13   position is even more extreme because they're

14   telling you it doesn't even matter if the

15   non-citizen never got all of the notice in

16   paragraph (1).

17   CHIEF JUSTICE ROBERTS: Yeah, I know

18   that's what they're telling us, but I'm

19   addressing a case which I would suppose would be

20   a very common one where there's no objection

21   other than that I didn't get the time and notice

22   in the first place. There's been a lot of talk,

23   well, they don't tell you of a right to counsel,

24   they don't tell you this or that. What if they

25   told you all that in the original one that you

1   got, but it didn't have a time and place; then

2   they come back and say, well, here's the time

3   and place, you show up, and they say, well,

4   what's -- what's your objection, and you say

5   that the objection is that I didn't get the time

6   and place originally, even though I got it later

7   and here I am?

8   MS. ANAND: So I think that's right.

9   I think that's the -- the sort of square holding

10   of Niz-Chavez. It says that those two documents

11   don't add up to a paragraph (1) notice. I'll

12   hasten to add, though, remember this isn't just

13   about eligibility to move to reopen. There are

14   other points in the process where the question

15   of whether or not the --

16   JUSTICE KAVANAUGH: But your -- your

17   answer to the Chief Justice makes it clear, I

18   think, but correct me if I'm wrong, that you

19   would be better off not showing up.

20   MS. ANAND: I don't think so, Your

21   Honor, because remember, if you don't show up,

22   all the government has to do at that point is

23   say, oh, that's right, I didn't have a proper

24   NTA. Here -- here, I'm printing it out, I'm

25   mailing it to the non-citizen with the time and

1   place. Ten days later I can remove you in

2   absentia.

3   So either way, all you're buying

4   yourself is the government reprinting this piece

5   of paper and waiting 10 days to remove you.

6   JUSTICE JACKSON: And --

7   JUSTICE KAVANAUGH: But the removal --

8   JUSTICE ALITO: I understood --

9   JUSTICE KAVANAUGH: -- in absentia

10   will be -- can't happen under your theory.

11   MS. ANAND: Well, the removal in

12   absentia can happen if the government prints out

13   the NTA, again, fills in the time and date and

14   then waits 10 days.

15   JUSTICE KAVANAUGH: They start the

16   proceedings over again --

17   JUSTICE JACKSON: But the removal in

18   absentia can't happen if the person shows up,

19   right? I mean, the reason why we're in absentia

20   world is because they don't show up. So I guess

21   I'm confused about the Chief Justice's

22   hypothetical and how it relates to this statute

23   or this circumstance that we're talking about.

24   I thought the -- I thought the -- the

25   -- the sort of premise of where we were was

1   we're in a situation in which the person isn't

2   there and the government gets removal in

3   absentia as a result.

4   MS. ANAND: That's exactly right. I

5   was just trying to clarify that I don't know how

6   much then is the sort of bizarre incentives

7   point. First of all, of course, the government

8   can just issue a compliant NTA upfront. If they

9   haven't and the non-citizen doesn't show up,

10   they can send ICE out to arrest the person.

11   If they choose not to do that, they

12   can print out the compliant NTA then and there,

13   put it in the mail, and then they can get their

14   in absentia.

15   JUSTICE KAVANAUGH: Well, that --

16   CHIEF JUSTICE ROBERTS: Well, I

17   thought the proposition was simply trying to

18   suggest that your argument leads to an absurd

19   result if what it says is that everything's the

20   same, except you didn't get the notice

21   originally and the fact that you got a later

22   notice, you're saying your argument would still

23   be the same.

24   MS. ANAND: That's exactly right, Your

25   Honor. I think that's a function of the

 1   government flouting the statute, though, right?

 2   The statute was not actually designed for a

 3   situation in which the government systematically

 4   puts TBD instead of the -- the sort of date and

 5   time of the charges. It was designed for the

 6   kind of one-off mistake, you put the wrong

 7   person's name on this or sent this to the wrong

 8   address.

 9   And so, you know, what Congress

10   thought it was doing was coming up with a scheme

11   that put all the cards in the government's

12   hands. It said we're not going to ask on a

13   case-by-case basis did the non-citizen have

14   enough notice and allow them to say I was

15   confused, I got this document and not this

16   document. We're just going to give the

17   government all the power. All you need to do,

18   government, is put these seven pieces of

19   information on one piece of paper.

20   JUSTICE KAVANAUGH: But Congress was

21   concerned --

22   JUSTICE JACKSON: Maybe --

23   JUSTICE ALITO: Well, as to what

24   Congress thought it was doing, you filed a brief

25   on behalf of Mr. Singh. Are you able to address

1   the situation of Mr. Mendez-Colin?

2   MS. ANAND: So, yes, Your Honor.

3   JUSTICE ALITO: All right. So, in Mr.

4   Mendez-Colin's case, his removal proceeding

5   began in 2001, and after that, he showed up at

6   numerous hearings, the dates were changed.

7   And you say Congress would have wanted

8   him at this late date to be able to reopen his

9   removal proceedings because he didn't get a

10   compliant NTA back in 2001?

11   MS. ANAND: Yes, Your Honor. Congress

12   expressly said at any time, in contrast to

13   numerous other provisions allowing --

14   JUSTICE SOTOMAYOR: Counsel, that -- I

15   think there's a difference between the right to

16   make a motion to reopen than to have it

17   reopened.

18   Are you arguing that if there was a

19   deficient notice in this situation under (a)(1),

20   that the Board has to reopen, or does it have

21   the discretion to consider a forfeiture or a

22   waiver argument?

23   MS. ANAND: So certainly, Your Honor.

24   There's several provisions outside the scope of

25   the question presented in this case that can

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 1   deal with any sort of gamesmanship.

 2   So, as Your Honor noted, there's

 3   equitable doctrines. The government can raise

 4   waiver, forfeiture, estoppel. There are

 5   doctrines -- there's statutory provisions about

 6   the subsequent hearing. So, for instance, under

 7   1229a(b)(7), if the -- if the non-citizen had

 8   oral notice of the time and place of the

 9   hearing, they aren't eligible to apply for

10   various forms of discretionary relief.

11   JUSTICE ALITO: Well, counsel, could

12   you answer the question that I -- I don't think

13   you had -- really had a chance to answer the

14   question that I asked, which is whether -- you

15   talked about what Congress thought it was doing,

16   and my question was, do you think Congress

17   really thought it was doing what you are

18   claiming should be the result in Mendez-Colin's

19   case?

20   MS. ANAND: I think that Congress

21   didn't anticipate the government would ignore

22   the text of the statute. The reason that

23   Congress put in the "at any time" hook is

24   because they imagined these would be one-off

25   circumstances where something gets lost in the

 1   mail or the government makes a typo and so

 2   switches two non-citizens' paperwork.

 3   They were not imagining sort of

 4   systematically ignoring the statute for many

 5   years. And so, yes, at this point, the statute

 6   probably leads to results Congress didn't

 7   intend, but that's a function of the government

 8   flouting the plain text of the statute and

 9   shouldn't be -- shouldn't have any bearing on

10   your reading of the remedial provision.

11   JUSTICE ALITO: Well, as to the plain

12   text of the statute, we've now had, like, an

13   hour and 17 minutes of argument, and virtually

14   nothing has been said about the plain text of

15   1229a(b)(5)(A). Pereira and Niz-Chavez were

16   literal interpretations of the statute.

17   Now there's an answer to what I'm

18   going to say, but I'll get to that.

19   MS. ANAND: Okay.

20   JUSTICE ALITO: But, if you read the

21   provision I just mentioned literally, you lose,

22   right? Any alien who after written notice

23   required under paragraph (1) or (2) has been

24   provided to the alien, okay, notice under (2)

25   was provided, right?

1   MS. ANAND: So we -- we disagree with

2   that. So we don't think notice under (2) was

3   provided because (2) is a supplement to a valid

4   (1). And so, without a valid (1), you can't

5   have a paragraph (2) there. So our position is

6   that neither notice in accordance with paragraph

7   (1) --

8   JUSTICE ALITO: I'm just talking about

9   the literal language of the statute. I'm not

10   talking about what was held in Pereira or

11   Niz-Chavez, which concerned very -- a different

12   question. You keep saying they held this, they

13   held that. What they held had to do with the

14   stop-time rule. Just the literal language of

15   this, that's against you, right?

16   MS. ANAND: So I disagree because we

17   think there's been no paragraph (2) notice. So

18   you can't have notice required under paragraph

19   (1) or (2) if you've neither gotten paragraph

20   (1) notice -- that's the government's position

21   in this case -- nor paragraph (2) notice, which

22   is our contention about how you read paragraph

23   (a)(2).

24   JUSTICE KAVANAUGH: Your position then

25   is that paragraph (2) notice isn't really a

1   paragraph (2) notice if there was not a

2   paragraph (1) notice that was compliant?

3   MS. ANAND: That's correct.

4   JUSTICE KAVANAUGH: And where does

5   that come from in the text of the statute?

6   MS. ANAND: Two pieces. First is the

7   word "change," which, as we've explained, we

8   don't think encompasses the difference between

9   TBD and March 15th. The second is it's a change

10   of the time and place of such proceeding. So,

11   again, this is my voter registration

12   hypothetical. If you never filled out your

13   voter registration form, your change of party

14   affiliation form doesn't -- is not valid either.

15   JUSTICE KAGAN: Your argument, I

16   think, treats the following two people

17   differently. And that might be just, well, yes,

18   it does, and we're living in this world where

19   this is a strange statute because the government

20   has been out of compliance for so long and it

21   leads to some kind of strange results.

22   But I'll -- I'll tell you that I think

23   that this is a kind of strange result and I want

24   to ask you to -- to comment on it, which is one

25   person gets (a)(1) notice that is perfect and it

 1   says January 15th and then later gets (a)(2)

 2   notice saying, uh-uh, let's make it June 15th

 3   instead.

 4   Now the second person gets (a)(1)

 5   notice that is perfect except that it says to be

 6   determined, and then there's a later (a)(2)

 7   notice that says, okay, here's the new notice,

 8   June 15th.

 9   Now I understand your view as to why

10   the statutory text makes those two people

11   different, but, you know, to go back to the

12   Chief Justice's point about sort of, huh, like,

13   why are those two people in any different

14   situations with respect to anything we care

15   about? Why does one have the ability to reopen

16   and the other does not?

17   MS. ANAND: So, Your Honor, Congress

18   was trying to address this problem in gross.

19   So, in an individual case, there may not be much

20   of a difference, but in general, Congress found

21   that these TBD provisions in the notice to

22   appear, remember, that's the one document that

23   actually gets handed to the non-citizen, right?

24   And so what Congress found is, if you

25   put a date and time in the notice to appear,

     1   there's at least one time where the non-citizen

     2   knows I have to be at immigration court, I can

     3   figure everything else out.

     4   If you only put a "TBD" in the notice

     5   to appear, what Congress found is the subsequent

     6   notices have a hard time getting to the

     7   non-citizen. And so the non-citizen never has a

     8   date and time certain they have to show up.

     9   JUSTICE KAGAN: I'm not sure that

    10   the -- that the statute does suggest that. I

    11   mean, the statute allows for, again, assuming

    12   you have perfect (a)(1) notice, you can have an

    13   (a)(2) notice and then you can have another

    14   (a)(2) notice and another (a)(2) notice, and all

    15   of these things are extremely difficult for any

    16   non-citizen to figure out, and the statute

    17   appears not to care about that.

    18   So why should the statute care about

    19   the difference between a "to be determined" and

    20   a certain date?

    21   MS. ANAND: So I think Congress

    22   assumed that the government would do its best to

    23   hold the hearing on the date in the NTA and only

    24   use the notice of change if it actually had to

    25   change the date.

1   But you're right, in some cases,

2   potentially, you know, a non-citizen who gets a

3   TBD notice and a non-citizen who gets a notice

4   with a date and time are similarly situated.

5   But this Court's holding in Pereira

6   and Niz-Chavez is, even if Congress's judgment

7   was off on this, even if in many cases it

8   doesn't make a difference, Congress has

9   determined that what makes a valid NTA is the

10   inclusion of these seven pieces of information,

11   one of which the government didn't include here.

12   But --

13   JUSTICE KAVANAUGH: I think the

14   government's broad argument is it's very odd

15   when someone gets notice of the time and date of

16   the hearing and skips it intentionally, flouting

17   the system, thumbing your nose at the system,

18   and then comes back when they're caught and

19   says, oh, that removal in absentia was no good.

20   Why? Oh, because I didn't have notice of the

21   time and date of the hearing, when we know -- so

22   I think that's the government's kind of

23   overarching concern about reading the statute

24   your way.

25   MS. ANAND: Sure, Your Honor. So I

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1       think that the problem is you can't just look at

2       this provision in isolation, right?  So what

3       Congress thought it was doing was it was giving

4       the government all the cards.  If you don't want

5       -- if you don't want someone to skip the

6       hearing, just put these seven pieces of

7       information on the notice to appear, and then

8       they can't skip the hearing.

9              There are other places in the scheme

10      that allow for consideration of exactly the kind

11      of fault analysis you're talking about.  So, for

12      instance, you know, if you get to reopen your

13      hearing, you may be ineligible for various forms

14      of discretionary removal under 1229a(b)(7) if

15      you're that person who gets, you know, notice --

16      oral notice of the date and time of the hearing

17      and just doesn't show up.  As some of the

18      Justices have alluded to, there may be some

19      residual discretion embedded in the "may" in

20      (b)(5) that gives the IJ some discretion.

21             All we're talking about is the

22      eligibility criteria to even be able to file a

23      motion to reopen.  And at that stage, Congress

24      didn't ask about notice generally, notice of the

25      time of the hearing.  It asked about notice in
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1   accordance with these two provisions that

2   prescribe a particular format for the

3   information.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   counsel.

6   You said that Congress thought the

7   government would do its best. I mean, as a

8   practical matter, is it possible for the

9   government to be able to put in the orders a

10   time that they'll stick to? I mean, is --

11   there's a reason they say, you know, TBA or TBD,

12   right? And yet, you seem to think that we ought

13   to analyze it as if the facts on the ground are

14   not what they are, which may be right. I mean,

15   if Congress doesn't like it, maybe they can

16   change it.

17   But it -- it seems to me, at least in

18   terms of practicalities, to say, well, they

19   ought to put the time on when they issue the

20   order, and if they don't, all these consequences

21   are going to follow. The government makes the

22   argument that, well, there are a lot -- they're

23   just not able to do that. And if there's a

24   reading of the statute that makes more sense or

25   at least sense to deal with the situation on the

1   ground, is that something we should consider?

2   MS. ANAND: So I think the -- the

3   short answer is no, but I also want to push back

4   on the premise of the question. So no, again,

5   Pereira and Niz-Chavez, the government gave you

6   the same arguments, and this Court said --

7   CHIEF JUSTICE ROBERTS: Yeah, but, you

8   know, Pereira and Niz-Chavez, of course, dealt

9   with an entirely different question. So --

10   MS. ANAND: Sure. So --

11   CHIEF JUSTICE ROBERTS: -- push --

12   push back on the --

13   MS. ANAND: On the premise of your

14   question, following Pereira, as my friend on the

15   other side has told you, the government has been

16   able to, in the mine run of cases, put dates and

17   times in these notices. And the immigration

18   judges' brief tells us that there was until 2014

19   a scheduling system that as far as these former

20   immigration judges understand, had the ability

21   to schedule these date and time of the hearings.

22   So that evidence that prior to 2014,

23   there was a scheduling system, post-Pereira the

24   government's been able to do it, strongly

25   suggests that actually the government has had

 1   the ability to do this and has chosen not to,

 2   despite knowing, as this Court put it in

 3   Niz-Chavez, since 1996 that this was a

 4   requirement.

 5   CHIEF JUSTICE ROBERTS: Do you have

 6   any idea how often the -- when the government

 7   puts in an original time that that time sticks

 8   or hasn't been extended later on or --

 9   MS. ANAND: So I -- I don't have those

10   numbers, Your Honor. But I'll note that prior

11   to 1996, Congress gave the government the

12   option, right? It said you could put the -- the

13   date and time in the order to show cause, which

14   was the predecessor to the NTA, or somewhere

15   else if you couldn't do it.

16   And in 1996, Congress made the

17   decision that it was no longer going to kind of

18   excuse the government from putting the date and

19   time in the initial document, and it did that

20   with a full understanding, right, the government

21   testified at that hearing, of the logistical

22   problems of doing so.

23   CHIEF JUSTICE ROBERTS: Thank you.

24   Justice Thomas?

25   Justice Alito?

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1              JUSTICE ALITO:  If the -- the date
2      that the government puts in an NTA is sort of an
3      aspirational date, but in a good percentage of
4      those cases, they end up having to change the
5      date, is that -- is that system better for
6      non-citizens than a system that would tolerate
7      the TBD in the initial NTA?
8              MS. ANAND:  So Congress made the
9      determination it was better.  And I think that's
10     because of what I said to Justice Kagan; namely,
11     the NTA is the document that's generally handed
12     to the non-citizen.  It's the one you know they
13     got.  And at the very least, if they have some
14     date and time, they can come to immigration
15     court and find out that their hearing was moved;
16     whereas, if they have no information about when
17     and where to show up, except for a document
18     that's mailed that may or may not reach them,
19     then they may never clarify when that is.
20             JUSTICE ALITO:  Well, that doesn't
21     really answer the question, because they may be
22     handed a document, an NTA with an aspirational
23     date, but if they are later sent a document with
24     a change, mailed to the address that they
25     provide, you know, they're in the same
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         1   situation.

         2   MS. ANAND: So, Your Honor, I think

         3   that's precisely the argument that was made in

         4   dissent in Niz-Chavez.

         5   JUSTICE ALITO: Yeah, I know. I'm not

         6   asking you about -- I know -- I'm not asking you

         7   about Pereira and Niz-Chavez. I'm not asking

         8   that they be overruled, even though --

         9   (Laughter.)

        10   MS. ANAND: Right.

        11   JUSTICE ALITO: I'm asking you about

        12   what might make some bit of sense. But, if you

        13   just want to say Pereira and Niz-Chavez, we can

        14   leave it at that.

        15   MS. ANAND: Well, maybe I'll just cite

        16   the majority in Niz-Chavez, which said that we

        17   think another result is more likely still, which

        18   is that the government will develop its computer

        19   systems and technology to put forward dates that

        20   are likely to stick.

        21   CHIEF JUSTICE ROBERTS: Justice

        22   Sotomayor?

        23   JUSTICE SOTOMAYOR: I -- all dates are

        24   aspirational.

        25   (Laughter.)

1   JUSTICE SOTOMAYOR: But, in the mine

2   run of cases, the first appearance, like the

3   first appearance when you're arraigned, you

4   don't accomplish much substantively. There's

5   not decisions on whether you're going to be

6   convicted or not at an arraignment generally,

7   unless you're going to plead guilty. But, even

8   then, time is usually given for people to confer

9   with counsel and do other things.

10   I'm assuming that this time -- TBA, as

11   you explained, is just the start of the process,

12   correct? You show up on that day and -- and you

13   either say I'm going to get an attorney or you

14   say I need more time to prepare or something

15   else happens, correct?

16   MS. ANAND: I think that's exactly

17   right, Your Honor, and so the reason you need

18   that date is, for instance, to be able to get an

19   attorney, right? It's clear then that --

20   JUSTICE SOTOMAYOR: So the point being

21   that a system that continues with TBA does all

22   the damage you're saying. It doesn't tell

23   people where they should go to find out if

24   something has been changed or to direct --

25   figure out where to hire a lawyer, given that I

 1   know that many of these TBAs are in

 2   jurisdictions different than where the alien was

 3   served, correct?

 4   MS. ANAND: I think that's exactly

 5   right. Yes.

 6   JUSTICE SOTOMAYOR: All right. So

 7   there's a lot of things to do with a date that

 8   you can't do with a -- don't happen with a TBA.

 9   MS. ANAND: That's exactly right.

10   And, again, Your Honor, Congress was replacing a

11   prior system that did this kind of case-by-case

12   did the non-citizen get enough analysis -- did

13   the non-citizen get enough notice analysis. And

14   what it said is, rather than having that scheme

15   where we're going to ask on a case-by-case

16   basis, we're going to come up with a blanket

17   rule that's much easier to administer.

18   Yes, in some cases, it's going to be

19   underinclusive. Some non-citizens are going to

20   be genuinely confused notwithstanding this form.

21   In some cases, it's going to be overinclusive.

22   Some non-citizens had all the information they

23   needed, but the government didn't comply with

24   the text of the statute. But Congress

25   determined that a rule was better than the sort

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1    of fuzzy pre-1990 standard.
2              JUSTICE SOTOMAYOR:  Thank you.
3              CHIEF JUSTICE ROBERTS:  Justice Kagan?
4              Justice Gorsuch?
5              JUSTICE GORSUCH:  This morning, we
6    heard some arguments from the government about
7    policy.  I had thought as I read the briefs in
8    this case, unlike Niz-Chavez and Pereira, that
9    the government hadn't rested on policy arguments
10   as a basis for ruling in its favor here.
11             Am I mistaken?
12             MS. ANAND:  I think that because the
13   plain text of the statute counsels in our favor,
14   the government's strongest argument is about the
15   consequences to the immigration system, which we
16   don't deny.
17             JUSTICE GORSUCH:  Did they make that
18   in their brief?
19             MS. ANAND:  I believe they mentioned
20   the hundreds of thousands --
21             JUSTICE GORSUCH:  Hundreds of
22   thousands.  Okay.
23             MS. ANAND:  -- of immigration cases in
24   their -- in their brief --
25             JUSTICE GORSUCH:  Okay.  All right.
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 1   Fair enough. Thank you.

 2   MS. ANAND: Yeah.

 3   JUSTICE GORSUCH: And -- and we're

 4   asked to weigh -- and this discussion seems to

 5   me summing up at least in part kind of two --

 6   two difficult circumstances. One, on the other

 7   hand, a suggestion that it's harmless or might

 8   be absurd to require the government to fill in a

 9   TBD. Congress -- Congress may have thought

10   dates were important, but, nah, they're not that

11   important.

12   And on the other hand, the potential

13   that an alien might -- might be removed from the

14   country in absentia without any notice of the

15   charges against him, his right to an attorney,

16   the facts of his case, based on a compliant

17   notice of change which just says show up on a

18   date certain and you don't know where it's

19   coming from necessarily or who, and then clear

20   and convincing evidence in whatever form that

21   the government may supply in a non-adversarial

22   proceeding, a inquisitorial proceeding before

23   its own employee and immigration judge.

24   How do we weigh those two

25   consequential arguments?

 1   MS. ANAND: Sure, Your Honor. So I

 2   think the short answer is Congress has done that

 3   weighing for you, right, that the date and time

 4   is situated no differently from the other

 5   information listed in paragraph (1).

 6   But even if we were to do the

 7   weighing, as Your Honor noted, the first -- the

 8   first sort of downside is entirely within the

 9   government's control. The government can just

10   put a date and time on the notice to appear, as

11   it acknowledged nearly 30 years ago the statute

12   required it to do.

13   On the other hand, the non-citizen has

14   no control over whether they get adequate

15   notice. And so, in the hypothetical you're

16   talking about where they're never told of the

17   charges against them, they're removed in

18   absentia without an opportunity to present their

19   case before the immigration judge, that's a

20   pretty draconian sanction.

21   And there's a reason why Congress

22   wanted to be -- in absentia removal orders in

23   particular to be able to be reopened at any time

24   if there's inadequate notice. It's because

25   Congress thought that downside of someone being

 1   removed with inadequate notice was so -- was so

 2   draconian and so severe that it gave this remedy

 3   to non-citizens.

 4   JUSTICE GORSUCH: Thank you.

 5   CHIEF JUSTICE ROBERTS: Justice

 6   Kavanaugh?

 7   JUSTICE KAVANAUGH: You say inadequate

 8   notice, but they had notice.

 9   MS. ANAND: That's right, Your Honor.

10   Again, Congress replaced the kind of reasonable

11   notice or notice of the hearing regime with

12   notice in accordance with paragraphs (1) or (2),

13   right? So Congress thought that rather than

14   doing a kind of case-by-case determination,

15   we're just going to ask that the government

16   comply with these two paragraphs of the statute.

17   And, again, it thought that it was

18   making things easier on the government. Rather

19   than doing this kind of case-by-case analysis,

20   we'll just let the government follow these

21   precise instructions, put these seven pieces of

22   information on a piece of paper, and we won't

23   ask further. So --

24   JUSTICE KAVANAUGH: Well, Congress was

25   concerned, correct me if I'm wrong, about people

1   not showing up for their removal hearings,

2   right?

3   MS. ANAND: That's exactly right. And

4   so it thought that the kind of reasonable

5   notice, the sort of predecessor regime, gave too

6   much leeway to immigration judges to say, well,

7   this person was confused, this person got this

8   document and not that document.

9   And so what it wanted to do was make

10   these in absentia removal orders easier to

11   obtain by giving the government all the power.

12   Government, comply with the statute and we'll

13   give you your removal order, and the non-citizen

14   can't be heard to complain that the notice to

15   appear was confusing.

16   JUSTICE KAVANAUGH: Thank you.

17   CHIEF JUSTICE ROBERTS: Justice

18   Barrett?

19   JUSTICE BARRETT: Why wouldn't a

20   non-citizen show up if a non-citizen gets a

21   notice that says here's the time and place of

22   your removal proceeding and, if you don't show

23   up, the consequence is removal?

24   MS. ANAND: So, Your Honor, I think

25   the non-citizen does have every incentive to

1   show up, among other things, if they don't, ICE

2   can come out and arrest them and bring them to

3   the hearing and the government can get an in

4   absentia removal order fairly straightforwardly.

5   Even if they messed up the NTA the first time,

6   all it takes is at that hearing, you know, they

7   say, oh, the NTA is defective, let me print it

8   out again, fill in the date and time.

9   JUSTICE BARRETT: Well, no, I

10   understand there's incentives. I'm just talking

11   about, like, when we're looking at the statutory

12   language, I mean, Justice Alito pointed out

13   the -- the text of this provision, and I guess

14   I'm just -- you know, we're talking about the

15   system that Congress set up, and I guess Justice

16   Kavanaugh just pointed out that the notice

17   that's most pertinent one might say here because

18   we can imagine, you know, things that don't

19   really matter. The Chief Justice gave you the

20   hypothetical of, well, listen, maybe it said

21   TBD, but now they know the notice and they know

22   everything else.

23   So let's just put aside whatever

24   defect might have existed in the NTA. If the

25   non-citizen knows the critical information,

1   here's the date and here's the time, and if you

2   don't show up, you will be removed, even if the

3   non-citizen has some questions maybe that the

4   NTA didn't answer, why would it be draconian for

5   Congress to say that that person could then be

6   removed in absentia if they didn't show up?

7   MS. ANAND: So, Your Honor, Congress

8   could have had that scheme, right, and, again,

9   pre-1996 had a scheme for --

10   JUSTICE BARRETT: Okay. I -- I

11   understand that. But why -- I'm -- I'm --

12   I'm -- your -- your -- I understand your

13   argument -- let's say that I disagree with your

14   argument about the NTA and let's say that I

15   think that maybe the removal proceeding is the

16   place where the non-citizen could register

17   objections to the NTA that may well render the

18   proceeding invalid.

19   Why wouldn't it make sense? I mean,

20   because you've made arguments about the

21   coherence of the scheme and said it would be

22   draconian. Why would it be, if the alien has

23   that information, not show up? Why -- what

24   would be the incentive other than, as Justice

25   Kavanaugh said, just saying like, well, you

1   know, I'm just not going to show up?

2   MS. ANAND: In Niz-Chavez, this Court

3   said that the NTA is akin to the indictment in a

4   criminal case.

5   JUSTICE BARRETT: Okay.

6   MS. ANAND: Right? And in a criminal

7   case, we don't say just show up or else we're

8   going to incarcerate you.

9   JUSTICE BARRETT: What -- what would

10   the incentive be? So you're -- you're saying

11   there's no incentive, it's kind of a

12   technicality.

13   MS. ANAND: I don't think it's a

14   technicality any more than the indictment in a

15   criminal case is a technicality.

16   JUSTICE BARRETT: Okay. So your whole

17   argument really does turn on our interpreting

18   (a)(1) the way that you're arguing that it has

19   to have all of the information or it's totally

20   invalid, that -- your whole argument really

21   hinges on that?

22   MS. ANAND: I think that's right. And

23   I think the practical reason for that is the

24   non-citizen shows up to be prepared to defend

25   against what, from whom, on what statutory

 1   basis.

 2   That can't possibly be the scheme

 3   Congress intended to have the non-citizen show

 4   up at a date and time on pain of in absentia

 5   removal without even knowing what they're going

 6   to have to argue over or why the government

 7   thinks that they're removable.

 8   JUSTICE BARRETT: Well, the

 9   non-citizen could show up and say, I have no

10   idea what the government is intending to proceed

11   against me, so please, you know, I -- I need to

12   know. And at that point, the immigration judge

13   may say the government has given completely

14   inadequate notice and so can't proceed.

15   MS. ANAND: Or the immigration judge

16   -- the statute's constraint against that

17   happening is not just the immigration judge's

18   discretion. It's you've got to do something

19   like in a criminal case to let the non-citizen

20   know what they're going to be facing when they

21   show up.

22   CHIEF JUSTICE ROBERTS: Justice

23   Jackson?

24   JUSTICE JACKSON: Yeah, can I just go

25   back to Justice Kagan's question about the

1   difference between a non-citizen who gets a

2   complete NTA, one who doesn't, both get the

3   change order that says come June 15th.

4   You know, I was sitting here trying to

5   figure out whether or not those people really

6   are different. And I guess, if both show up on

7   June 15th, they're no different for the purpose

8   of this scheme because there's no removal in

9   absentia. If they come, they're actually having

10   the hearing, right?

11   So we're not talking about a situation

12   because the removal in absentia provision, one

13   of the requirements is that the person doesn't

14   show up. So we're not in the world of removal.

15   Am -- am I right about that?

16   MS. ANAND: I think that's right,

17   although we -- I think we would say that under

18   paragraph (1), which says a notice to appear

19   shall be given in every removal proceeding --

20   JUSTICE JACKSON: Yeah.

21   MS. ANAND: -- the -- the TBD person

22   who shows up can still register an objection and

23   say --

24   JUSTICE JACKSON: Yes, yes, yes.

25   MS. ANAND: Yeah.

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 1              JUSTICE JACKSON:  But I'm just talking
 2    about with respect --
 3              MS. ANAND:  Right.  Yes.
 4              JUSTICE JACKSON:  -- to the order of
 5    removal --
 6              MS. ANAND:  Right.  It will not be an
 7    in --
 8              JUSTICE JACKSON:  It's not going to be
 9    under in absentia authority --
10              MS. ANAND:  That's right.
11              JUSTICE JACKSON:  -- because the
12    person is there and both of those people are
13    there, so we don't have that difference.
14              MS. ANAND:  Yeah.
15              JUSTICE JACKSON:  And then, if they --
16    if neither show up, then the removal order gets
17    issued and the difference is in whether or not
18    one can move to reopen, the one who got all of
19    the information can't, and the one who didn't
20    can.  Is that right?
21              MS. ANAND:  I think that's right with
22    one caveat, which is that we don't think that an
23    IJ should enter the removal order in the first
24    place under (b)(5)(A).
25              JUSTICE JACKSON:  Yes, understood.
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1              MS. ANAND:  Yes.
2              JUSTICE JACKSON:  But let's say they
3    do.
4              MS. ANAND:  Right.  Yes.
5              JUSTICE JACKSON:  The government, you
6    know, convinces them to --
7              MS. ANAND:  Yes.
8              JUSTICE JACKSON:  -- even though
9    the -- the -- the one who got the defective
10   notice is there, the -- in both cases, the IJ
11   issues the removal order and the difference then
12   becomes that one can reopen, you would say --
13             MS. ANAND:  Exactly.  Yes.
14             JUSTICE JACKSON:  -- because they got
15   all the information and the other one couldn't.
16             All right.  So my question, I guess,
17   is, is there anything odd or strange about
18   Congress trying to enforce or police its
19   requirements of the government with respect to
20   notice in that way?
21             So the difference is one can move to
22   reopen, one can't, and so why couldn't Congress
23   say, you know what, we're going to allow the
24   person who didn't get all the information to
25   reopen because we want to make sure that the
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 1    government puts all the information in their

 2    notices per the statute?

 3              MS. ANAND:  I think that's exactly

 4    right.  As Your Honor put the point earlier, the

 5    government gets a huge procedural advantage,

 6    right?  It gets to remove someone without them

 7    ever getting a hearing.  And in order to get

 8    that procedural advantage, the government needs

 9    to put the information in the statute that the

10    statute requires.

11              JUSTICE JACKSON:  Right.  So it's not

12    really odd that they would be treated

13    differently for that purpose if we're thinking

14    that's what Congress cared about, right?

15              MS. ANAND:  I think that's exactly

16    right.  The government --

17              JUSTICE JACKSON:  All right.  And so

18    then the second question that I have is about

19    the government's concern about people not

20    showing up, and Justice Kavanaugh makes this

21    point and I -- I take that point and I think

22    that's right, but I wonder whether or not

23    Congress actually is solving for that problem in

24    a different way than the government is

25    suggesting here, right?
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 1   I -- the way I read this statutory

 2   scheme, Congress is allowing people who don't

 3   show up and who have an order issued against

 4   them in absentia to actually move to rescind

 5   that order under certain circumstances.

 6   So it's not as though they say -- that

 7   we don't have a provision that allows the person

 8   who doesn't show up to do something. And the

 9   government here is saying: Well, what about all

10   the gamesmanship of the person not showing up?

11   I think Congress says, if you're going

12   to remove -- excuse me -- if you're going to

13   rescind, the burden is on you to show you never

14   got the notice or that the notice was defective,

15   you say, in this situation. The burden shifts

16   to the person to get the order rescinded, and

17   that's the way the Congress is solving for

18   people gaming the system.

19   MS. ANAND: I think that's exactly

20   right. So it's not only the burden shifts to

21   you. It's, remember, the government can fix all

22   of this, right? The cards are in the

23   government's hands. The government can, you

24   know, issue a new NTA that day, and then you've

25   got no remedy going forward.

1   So it's a very risky -- you know, if

2   you imagine the hypothetical non-citizen who

3   says, oh, I caught the government with a TBD in

4   the notice to appear and I'm not going to show

5   up, all the government has to do to fix that is,

6   at the hearing where the non-citizen doesn't

7   show up, they print out the NTA again, they fill

8   out the date and time, send it to the

9   non-citizen, and then they can get that in

10   absentia removal order.

11   So it's a -- it's a game that wouldn't

12   get the non-citizen much benefit. And, as Your

13   Honor noted, the question of (b)(5)(C)(ii) is

14   about policing the government, right? The

15   provisions in (b)(5)(C)(ii) are did the

16   government turn square corners, did the

17   government issue notice? We see that in the

18   other part of (b)(5)(C)(ii), which is about

19   non-citizens in government custody.

20   JUSTICE JACKSON: And there's a way to

21   prevent the gamesmanship that we're worried

22   about or that the government is worried about

23   here because --

24   MS. ANAND: I think that's exactly

25   right.

1   JUSTICE JACKSON: -- because, if you

2   actually did receive the notice, you're not

3   going to be able to rescind.

4   MS. ANAND: That's exactly right.

5   JUSTICE JACKSON: All right.

6   MS. ANAND: The -- the cards are all

7   in the government's hands.

8   JUSTICE JACKSON: Thank you.

9   MS. ANAND: They can prevent any

10 gamesmanship.

11   CHIEF JUSTICE ROBERTS: Thank you,

12 counsel.

13   Rebuttal, Mr. McCloud?

14   REBUTTAL ARGUMENT OF CHARLES L. McCLOUD

15   ON BEHALF OF THE UNITED STATES

16   MR. McCLOUD: Thank you, Mr. Chief

17 Justice. I'd like to make one point about

18 Pereira and then one point about the

19 consequences of the other side's rule.

20   As to Pereira, it is true that there

21 are cases in this Court where the Court

22 construes one statutory provision and that

23 decision has the effect of resolving other

24 statutory questions. Pereira is not that case.

25 And it would be very strange to pre -- to treat

 1   Pereira as such a case when Pereira went out of

 2   its way to say that its holding was narrow and

 3   was confined to particular statutory provisions

 4   that are not at issue in this case. So we don't

 5   think that Pereira resolves these cases, nor

 6   does Niz-Chavez.

 7   Finally, as to the consequences, the

 8   consequences here are not just the number of

 9   motions to rescind that might be filed. The

10   larger problem is that the other side's

11   interpretation of these provisions deprives them

12   of any sort of rational force. There's no

13   reason that Congress would have enacted the

14   version of the provision that Ms. Anand just

15   described, and I don't think you need to look

16   any further than the facts of these cases to see

17   that.

18   In these cases, the non-citizens got

19   every single piece of information that they were

20   required to get not just under paragraph (2) but

21   also under paragraph (1). They knew the

22   charges, they knew the nature of the

23   proceedings, and they knew that they had the

24   right to counsel. And many of them had counsel.

25   Mendez-Colin's case I think is a

1   perfect example. In Mendez-Colin's case, by his

2   own admission, the omission of time and place

3   information in the paragraph (1) notice was

4   irrelevant, and it was rendered irrelevant over

5   and over again by the provision of additional

6   notice.

7   So to say that a provision whose

8   evident purpose is about creating a defense

9   based on lack of notice applies to individuals

10   who had notice of all of the information

11   required under the statute, I think, is

12   inconsistent with any rational understanding of

13   what Congress was trying to achieve.

14   Thank you.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   The case is submitted.

18   (Whereupon, at 11:45 a.m., the case

19   was submitted.)

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