

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AGUSTO NIZ-CHAVEZ,)

4 Petitioner,)

5 v.) No. 19-863

6 WILLIAM P. BARR, ATTORNEY GENERAL,)

7 Respondent.)

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9

10 Washington, D.C.

11 Monday, November 9, 2020

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

16

17 APPEARANCES:

18

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20 on behalf of the Petitioner.

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

2 (10:00 a.m.)

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

6 Mr. Zimmer.

7 ORAL ARGUMENT OF DAVID ZIMMER

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

23 And I think that the -- the point of
24 that is that there's no way to distinguish that
25 situation from the situation like my client's,

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

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

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

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

1 And -- and I think that -- that often,
2 as the -- as the House report shows, these
3 hearing notices weren't being served, weren't
4 being properly served --

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

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

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

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

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

22 But I think that what -- what Congress
23 was doing here, you know, the problem that
24 Congress was trying to solve, was the -- the
25 problems that were caused when this information

1 was served separately. And so it created this
2 firm rule.

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

7 CHIEF JUSTICE ROBERTS: So it's not --

8 MR. ZIMMER: -- distinguishing --

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

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

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

1 -- if it's coming separately.

2 But, again, I -- you know, I don't
3 think that what -- what Congress was doing here,
4 this idea, if the government can serve two
5 envelopes that arrive on the same day, then
6 surely it can just put all of the information in
7 one document and provide it together. And I
8 think that's clearly what Congress intended that
9 the government do here.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief
14 Justice.

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

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

1 MR. ZIMMER: Right. So I think this
2 would be a very different case, and I -- and I
3 think our -- our -- our textual argument would
4 -- would be -- would be a much more difficult
5 one.

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

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

21 JUSTICE THOMAS: But the -- again, I
22 go back to what the statute says. The statute
23 refers to written notice, and it -- it defines
24 written notice. It does not define the
25 parenthetical. The -- the -- the parenthetical

1 simply says "referred to as." It didn't say
2 that that is what was being defined.

3 So it would seem that you would have
4 to rely on the reference, not the definition.

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

10 And, again, I think, under cases like
11 Gustafson and Bond, when you're -- when you're
12 trying to understand the definition, you know, I
13 think that the definition, sort of the written
14 notice language that you're talking about, could
15 be read either way. I think that, in context,
16 it doesn't explicitly require a specific notice
17 document, but nor does it explicitly authorize
18 the government to use multiple notice documents.

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

1 actually did in IIRIRA.

2 So we're not arguing that absent the
3 parenthetical the statute would be unambiguous.
4 I think it -- it -- it's unclear. But I think
5 that the defined term and these other statutory
6 provisions and the history of this provision
7 really resolves that ambiguity and makes it
8 clear that what Congress was talking about here
9 was a specific notice document.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

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

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

18 JUSTICE BREYER: I have no comment.

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

1 authorize the government to use multiple -- to
2 -- to -- to provide notice over the course of
3 multiple documents. It used to define an order
4 to show cause as notice of specific information
5 that did not include the time and place of the
6 hearing and then had a separate provision that
7 authorized the government to provide time and
8 place information in the order to show cause or
9 otherwise.

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

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

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

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

8 JUSTICE BREYER: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

25 MR. ZIMMER: Yeah, I mean, I still

1 think that -- I don't think that there's a --
2 there's sort of a -- the non-citizen would have
3 an opportunity to sort of, you know, bring some
4 sort of statistical analysis as to whether it's
5 likely to be the date. But I think that -- that
6 there's still a real important purpose served in
7 having a date put on the notice to appear.

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

11 MR. ZIMMER: Oh.

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

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

16 JUSTICE ALITO: What if it's
17 99 percent likely not to be the real date?

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

1 point in time the date and time of the hearing.

2 But there's a real --

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

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

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

1 government has told this Court in its brief that
2 it can comply and that it is largely -- it is
3 now largely complying with the statute's
4 requirement and it's providing information about
5 the actual hearing date upfront, and -- and --
6 and that's not surprising. You know --

7 JUSTICE ALITO: Well, if Congress want
8 --

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

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

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

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

1 know, that that's sort of set in stone and can't
2 be altered. But having --

3 JUSTICE ALITO: All right. Thank you,
4 counsel. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.

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

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

16 MR. ZIMMER: Sure.

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

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

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

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

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

1 this hearing notice was properly served.

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

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

23 JUSTICE SOTOMAYOR: And so why is it
24 that the -- why is it that the ability of the
25 government, because it's specified by -- by

1 statute, to change the time and place by telling
2 the alien that, why doesn't that destroy your
3 argument?

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

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

24 JUSTICE SOTOMAYOR: And that person
25 already knows all the rights that the notice to

1 appear has given them?

2 MR. ZIMMER: Exactly. That person
3 already knows all the other information that --

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

6 MR. ZIMMER: Yes.

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

20 So who are we helping here really?

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

1 -- that was causing significant problems, was
2 causing all of these unnecessary fights, because
3 non-citizens would show up in court and say, I
4 never received a hearing notice.

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

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

22 I just think it would have been too
23 much to ask, understandably, that the
24 government, once they put a hearing date on, you
25 know, that there's nothing they could do to

1 change it. So -- so I think that's just sort of
2 bowing to reality, that you could have hearing
3 notices, but I certainly think it's still very
4 helpful to have all this information in one
5 place.

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

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

20 MR. ZIMMER: Right.

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

23 MR. ZIMMER: I think it would be
24 permissible. I think that -- you know, I -- I
25 don't think it's what Congress would have

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

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

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

19 JUSTICE KAGAN: Thank you, Mr. Zimmer.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch.

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

24 MR. ZIMMER: Thank you.

25 JUSTICE GORSUCH: It sure seems a

1 little bit like Pereira groundhog day to me. I
2 guess I'm curious what your argument -- what
3 your response is to the government's argument
4 that it should just win under Chevron step 2 at
5 a minimum. No harm, no foul. Good enough for
6 government work. If it's ambiguous, the tie
7 goes to the government.

8 Why -- why -- why -- why should we --
9 why should we care?

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

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

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

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

1 going on here.

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

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

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

1 entitled to deference.

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

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

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

1 And this is a proceeding that
2 basically takes place in secret. This is an
3 opinion that basically came out of the blue. No
4 one other than the parties knew that the agency
5 was even considering this question. There was
6 no opportunity for public input, let alone, you
7 know, public input as to whether the agency was
8 going to change its longstanding position on
9 this.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you.

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

19 So why doesn't that end the case?

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

1 a legal proceeding, I don't think that that
2 language is entirely clear.

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

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

18 JUSTICE KAVANAUGH: Well, let me --

19 MR. ZIMMER: -- document.

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

22 MR. ZIMMER: No, no, please.

23 JUSTICE KAVANAUGH: -- you're --
24 you're relying, obviously, on a notice to appear
25 and the parenthetical, which does not, as

1 Justice Thomas said, necessarily account for the
2 term "written notice" in the text.

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

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

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

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

21 MR. ZIMMER: Absolutely. And -- and
22 that -- but that makes perfect sense given what
23 Congress -- you know, what Congress -- the
24 changes that Congress made in IIRIRA, because
25 the whole problem that was being addressed here

1 was that there were all of these unnecessary
2 disputes, that Congress was sick of these
3 disputes about whether that sort of thing --

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

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

17 JUSTICE KAVANAUGH: Congress was
18 trying --

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

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

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

1 exactly right, Your Honor. I think it was
2 trying to avoid --

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

5 MR. ZIMMER: Yes, please.

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

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

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

24 And I think, if Congress wanted to
25 allow the government to keep doing what it was

1 doing, there's no reason it would have cut the
2 language that explicitly authorized that
3 practice from the statute.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Barrett.

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

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

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

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

24 JUSTICE BARRETT: Okay. So here's my
25 question: Justice Alito was saying, and -- and

1 you agreed, that the stop-time rule would run
2 when notice was complete, even if the government
3 used a dummy date or a date that was 99 percent
4 certain to be changed in the initial notice that
5 contained everything.

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

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

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

20 MR. ZIMMER: Well --

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

24 MR. ZIMMER: I -- it -- no, no, it
25 absolutely would. And I -- and I'm not changing

1 that. I'm just talking about in terms of why
2 Congress would have set up this -- this -- this
3 system.

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

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

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

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

12 Why do you resist --

13 MR. ZIMMER: Well --

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

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

21 I think that I resisted it only in the
22 sense that I -- I -- I don't think that there's
23 any reason to think that the government can't
24 just provide accurate information in the first
25 place, which is, you know, exactly what this

1 Court said in Pereira. And, again, if you look
2 at pages 41 to 42 of the government's brief,
3 they're basically doing that now.

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

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

15 JUSTICE BARRETT: Thank you, counsel.

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

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

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

25 And in IIRIRA, Congress cut the

1 language authorizing the separate hearing notice
2 and required the time and place information be
3 included in the notice to appear itself.

4 That change only makes sense if both
5 the order to show cause and the notice to appear
6 are specific notice documents. Accepting our
7 interpretation of the statute simply requires
8 that the government do what IIRIRA clearly
9 commands.

10 And, as I've been describing, the
11 government plainly can do this. Indeed, as I
12 was just mentioning to Justice Barrett, it told
13 the Court in -- in its brief at pages 41 to 42
14 that it has already largely done it.

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

23 Thank you very much.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Yang.

2 ORAL ARGUMENT OF ANTHONY A. YANG

3 ON BEHALF OF THE RESPONDENT

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

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

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

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

25 No sound reason exists for precluding

1 the use of a separate document to specify the
2 time and date of an initial hearing.

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

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

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

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

24 The Court should do the same here by
25 holding that the statutory text shows the

1 substance of the notice, not its form as one or
2 two documents, controls.

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

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

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

22 CHIEF JUSTICE ROBERTS: But why -- why
23 would that -- I'm sure you understand the
24 intricacies more than I do, but whoever is
25 sending out the updated notice to appear or the

1 original notice to appear, you know, just has to
2 attach what they've -- someone has already sent,
3 which is the original notice, notice to appear.

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

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

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

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

1 place to place depending on what's been going
2 on.

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

8 Now we're not saying this can't be
9 done, but it would be burdensome. Now remember
10 --

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.

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

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

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

25 CHIEF JUSTICE ROBERTS: No, I think

1 you can proceed.

2 MR. YANG: Okay. So it's
3 administratively difficult, particularly for
4 aliens arrested without a warrant. And this is
5 a very frequent event, particularly at our
6 borders.

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

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

25 It's important to let an alien know,

1 an individual who you have detained in the
2 United States, why they are being detained.
3 But, when the border patrol arrests the alien
4 and it's the one that issues the NTA because
5 it's the investigating agency and it has -- has
6 knowledge of the charges, the government's
7 detention decision is normally then made by ICE
8 because the border patrol doesn't detain the
9 individual, ICE has to, and it has to make the
10 determination based on its resources.

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

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

21 MR. YANG: There's nothing that
22 textually limits us, but there are practical
23 considerations. As we explained, remember,
24 we're talking about a volume here of, like,
25 500,000 NTAs per year. That's about 10,000 a

1 week or 2,000 a day on average.

2 There is no interest in the government
3 to balkanize the notice, the written notice it
4 has to provide, because it multiplies our effort
5 and introduces all kinds of potential for error.

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

10 JUSTICE THOMAS: Thank you, Mr. Yang.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

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

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

1 The aliens might get mixed up.

2 On the other hand, it's more
3 burdensome to the government. So I see things
4 on both sides of the practicalities of it, so
5 why don't we just go with the language?

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

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

25 The written -- the operative text

1 doesn't have an "a." It simply provides that
2 written notice is required. We don't think the
3 "a" really matters either way, but Petitioner's
4 argument hinges on it.

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

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

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

25 And it would be pretty backwards for

1 Congress to say written notice is required in
2 the section referred to as a notice to appear
3 and have that article intended to
4 unambiguously -- as Petitioner said, that
5 article unambiguously shows that you need one
6 document versus two?

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

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

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

1 removal, and the alien can show that the alien
2 didn't receive the required notice.

3 We are --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Alito.

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

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

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

1 non-detained cases, will have NTAs.

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

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

24 And when -- this is again at page 42
25 of our brief. EOIR attempted to have the

1 automated scheduling system operate for its
2 detained docket, but, as we explain in our
3 brief, the operational logistics were impossible
4 to overcome because of the fluctuation in the
5 detained population.

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

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

24 His -- he seems to -- his -- his --
25 the legislative history, which does not support

1 the proposition, he thinks that Congress was
2 concerned about disputes about the hearing
3 notice. But the legislative history doesn't
4 resolve that.

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

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

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor.

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

25 The only issue is whether the

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

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

24 So please tell me why your logic makes
25 more sense than the commonsense logic of the

1 statute says a notice to -- to appear must have
2 all of these items in it.

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

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

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

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

1 JUSTICE SOTOMAYOR: They still -- they
2 -- they still have that remedy. But, if you
3 give them that information all at once, they no
4 longer have a defense if they fail to show up at
5 the specified hearing date. That's what your
6 adversary's saying.

7 MR. YANG: No --

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

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

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

23 JUSTICE SOTOMAYOR: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Kagan.

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

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

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

1 specifying the following.

2 And that seems pretty clear to me.
3 It's a written notice specifying the following,
4 one piece of paper specifying the following.

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

9 JUSTICE KAGAN: No, and --

10 MR. YANG: The definition is --

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

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

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

1 JUSTICE KAGAN: It is not. I mean, it
2 -- the -- the quotation marks are only around
3 "notice to appear." That's the --

4 MR. YANG: Well, even --

5 JUSTICE KAGAN: -- defined term. And
6 so --

7 MR. YANG: -- even Petitioner --

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

10 MR. YANG: -- even Petitioner is not
11 making that argument, Justice Kagan. The -- the
12 --

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

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

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

25 MR. YANG: No, I understand that, but,

1 if you look -- obviously, "a" with the quotes
2 notice to appear, Congress included the article
3 there. And the idea that Congress, when it
4 would put the article again in front of that
5 defined term, it does later on in the stop-time
6 rule, it doesn't add anything to this. It's
7 simply the same --

8 JUSTICE KAGAN: But the way you read
9 it --

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

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

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

23 If -- and -- and even that, so this is
24 without the parenthetical, and suppose somebody
25 said: Okay, I'm going to send you two pieces of

1 paper. On the first piece of paper, I'm going
2 to give you my name. In the second piece of
3 paper, I'm going to give you the judgment that
4 I'm appealing from.

5 How would that work out?

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Gorsuch.

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

1 mean.

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

6 And, in addition, although we can
7 provide a hearing date on certain non-detained
8 aliens, for instance, an alien who's not going
9 to be detained because they've already been in
10 the country and they apply for a benefit and
11 it's denied, and it, as a matter of course, was
12 --

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

19 Let me ask you this: What if -- what
20 if I had a law clerk and I said in my manual --
21 in my law clerk manual I want a bench memorandum
22 analyzing the facts, the law, and your proposed
23 disposition, and instead of providing that, my
24 law clerk provided three separate memos, each
25 detailing various views of the facts, four more

1 on the law, and then, I don't know, a couple on
2 proposed dispositions.

3 Would that be a bench memorandum?

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

6 JUSTICE GORSUCH: Would an --

7 MR. YANG: -- fit that --

8 JUSTICE GORSUCH: -- ordinary speaker
9 of the English memorandum think that's a bench
10 memorandum?

11 MR. YANG: Maybe not, but you could
12 certainly say a notice could be provided by
13 telling you when -- you know, which memo to
14 write and then, in a separate instruction, when
15 to provide it. That --

16 JUSTICE GORSUCH: Let me ask you this
17 about -- the government has actually mustered
18 the courage to make a Chevron step 2 argument
19 here, which is interesting to me.

20 Why should the government get -- if
21 there's ambiguity here at the end of the day,
22 after we exhaust everything, why should the
23 government presumptively win? What about Saint
24 Cyr and the deportation canon that suggests that
25 ambiguity should be resolved in favor of a

1 presumptively free individual?

2 MR. YANG: We -- we don't think that
3 Saint Cyr actually stands for that proposition.
4 In Saint Cyr, the Court concluded that the
5 presumption against retroactivity eliminated all
6 the ambiguity and that -- you know, and, in
7 addition, you know, as -- there's a very -- one
8 sentence that mentioned some immigration
9 principle for -- to benefit the alien.

10 But we don't think in the cases that
11 the Court has addressed in the Chevron context,
12 the -- the canon or the -- the principle that
13 the Petitioner relies on just doesn't resolve
14 the case. It is a tie-breaking rule.

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

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

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

25 MR. YANG: Well, Chevron step 2, the

1 Court has repeatedly said that it just requires
2 ambiguity on the question, and then that goes to
3 the agency. The question then is whether the
4 agency reasonably resolves it, and
5 particularly --

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

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

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

23 This Court previously addressed
24 suspension of deportation, which is the
25 predecessor provision that cancellation of

1 removal replaced, and narrowed the eligibility
2 requirements in a case called INS versus
3 Phinpathya at 464 U.S. 183. And at page 185,
4 the Court said that the eligibility provisions
5 were adopted "specifically to restrict the
6 opportunity for discretionary administrative
7 action." And then the Court goes on to say
8 construing the act to broaden that discretion is
9 "fundamentally inconsistent with that intent."

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

17 JUSTICE KAVANAUGH: To follow up on
18 something Justice Thomas raised and then Justice
19 Kagan followed up on, and just to make sure I
20 understand your answer on the six or seven
21 notices point, I understood you to say, but
22 correct me if I'm wrong, that the actual
23 operation of the system and the structure of the
24 overall statute operates as a -- a deterrent on
25 the government doing any such thing because it

1 just makes no sense for the government to do
2 that.

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

5 MR. YANG: Exact --

6 JUSTICE KAVANAUGH: -- make sure I
7 understand that.

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

24 JUSTICE KAVANAUGH: Is that --

25 MR. YANG: It's fanciful to think that

1 the government would ever do that. We want to
2 do this --

3 JUSTICE KAVANAUGH: Okay, but one last
4 thing --

5 MR. YANG: -- as a --

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

11 Can you follow up on that?

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

22 And this Court determined that
23 1229b(b)(5), which is the stop-time rule, that
24 was a reference -- it says a notice to appear --
25 served a notice to appear under Section 1229(a).

1 It's no longer --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Barrett.

5 JUSTICE BARRETT: Mr. Yang, I want to
6 go back to the difficulty that you described
7 when aliens are detained by border agents. You
8 were talking about this in response to some
9 questions by Justice Thomas. And you said, in
10 that case, you have to issue the NTA
11 immediately, within 48 hours, but you don't
12 necessarily know at that point where the
13 detention facility will be.

14 So here's my question. I mean,
15 presumably, now you're handling that by, within
16 48 hours, issuing a notice to appear that has
17 all information except the time and the place of
18 the hearing.

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

24 MR. YANG: So we would then be issuing
25 two notices to appear, one with a hearing date

1 later. The reason we -- and I'm not saying
2 that's not possible, but the reason that it's
3 difficult is because the marrying up of written
4 notices with the physical A-file, the NTA form,
5 and doing that on the volume that we're talking
6 about, plus within the timeline. Remember, if
7 -- if you want to schedule these hearings
8 promptly, you can do it within 10 days of
9 service of the written notice under 1229(a).

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

13 JUSTICE BARRETT: No, no, no. I'm not
14 saying you rely on the immigration court setting
15 a date. I'm saying that once a non-citizen is
16 put in a detention facility, can't DHS at that
17 point -- you know, Justice Alito talked about
18 issuing notices to appear that maybe have
19 estimated dates. I mean, couldn't you do that
20 at that point?

21 MR. YANG: It -- you could, but you
22 still have the additional problem that, one, the
23 aliens -- well, I -- I take it -- take it back.
24 In theory, you could. You have the additional
25 problem that aliens will bond out and you will

1 have holes in the docket.

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

8 The -- they tell me that the -- the
9 real issue is efficiently scheduling these
10 hearings close together. If you have all these
11 gaps, you end up having inefficient allocation,
12 and that results in people waiting longer for
13 hearings.

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

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

22 JUSTICE BARRETT: Counsel, before my
23 time expires, let me ask you one other question.
24 You said that part of the problem in having the
25 immigration court issue the complete notice to

1 -- to appear that would have the time and date
2 is that the immigration court doesn't like
3 issuing the charges. So part of this seems to
4 derive from the separation between DHS and then
5 having the immigration courts housed within DOJ.

6 But is that just reluctance on the
7 part of the immigration court? Couldn't the
8 immigration court simply include a copy of what
9 you've already sent to the -- the non-citizen,
10 and then on a separate document notice the time
11 and place of the hearing and put them in the
12 same envelope?

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

20 CHIEF JUSTICE ROBERTS: Thank you.

21 MR. YANG: -- that --

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

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

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

7 There is no dispute that Petitioner
8 received written notice of all of the
9 information required in 1229(a). That should be
10 the end of the matter.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Yang.

13 Mr. Zimmer, you have three minutes for
14 rebuttal.

15 REBUTTAL ARGUMENT OF DAVID ZIMMER

16 ON BEHALF OF THE PETITIONER

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

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

25 I mean, it could provide, as we

1 explained in our brief, if the government's
2 right that all it has to do is provide written
3 notice in some form, it could provide all of the
4 non-case-specific information to every single
5 non-citizen who enters the country and leave
6 that out when it provides the -- the specific
7 charging information.

8 And, ultimately, all the government
9 can say is, well, trust us not to do that. And
10 that's generally not, you know, the way that
11 this Court, you know, would interpret statutes
12 to sort of -- to have absurd results that --
13 that just because you trust the -- trust the
14 government not to sort of carry out those
15 results.

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

23 And if -- if -- prior to IIRIRA, the
24 government -- the -- the statute specifically
25 authorized the government to use the system it's

1 defending here. It specifically told the
2 government it could provide the time and place
3 information in a separate hearing document.

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

9 And, again, as I emphasized before,
10 the government has known this from day one on --
11 in its post-IIRIRA rulemaking -- and this is at
12 page 53A of our statutory appendix -- in
13 interpreting IIRIRA, the government itself
14 stated, and this is a direct quote, it
15 recognized "the language of the amended act
16 indicating that the time and place of the
17 hearing must be on the notice to appear."

18 So maybe this was a hard problem. But
19 it was a hard problem that the government knew
20 from day one it was required by the statute to
21 solve. And if -- if the government ultimately
22 decided that it couldn't solve that problem, its
23 response was not to make the unilateral decision
24 to ignore what it conceded to be Congress's
25 clear instructions. Its solution was to go back

1 to Congress and ask it to change the statute
2 back to what it had said before.

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

10 Thank you very much.

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

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

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