19-60758

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FIDENCIO MUNOZ-GRANADOS aka FIDENCIO MUNOZ,

Petitioner,

v.

WILLIAM P. BARR, U.S. ATTORNEY GENERAL,

Respondent.

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
In support of the Petitioner

Russell Reid Abrutyn
Abrutyn Law PLLC
3765 12 Mile Road
Berkley, MI 48072
(248) 965-9440

Attorney for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that–in addition to the persons and entities listed in the petitioner's Certificate of Interested Persons–the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Petitioner
Fidencio Munoz-Granados, aka Fidencio Munoz

Attorneys for Petitioner
Dr. Alicia Triche
Jerome Mayer-Cantú

Respondent
William P. Barr, United States Attorney General

Attorneys for Respondent
Cristin Whitaker

Amicus Curiae
American Immigration Lawyers Association

Attorney for Amicus Curiae
Russell Reid Abrutyn

Respectfully submitted,

/s/ Russell Reid Abrutyn

Russell Reid Abrutyn
Abrutyn Law PLLC
3765 12 Mile Road
Berkley, MI 48072
(248) 965-9440

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and United States Supreme Court.

---

[1] This brief is submitted under Federal Rules of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel certifies that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *amicus* and their counsel contributed money for this brief.

SUMMARY OF THE ARGUMENT

The Board of Immigration Appeals' (BIA) conclusion that the two-step notice process triggers the stop-time rule conflicts with the statute's unambiguous text, read using standard interpretive tools.

First, the statute's text provides that to trigger the stop-time rule, the government must service "a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The statute uses "quintessential definitional language" to define a "notice to appear" as one that includes all the information listed in the statute. *Pereira v. Sessions*, 138 S. Ct. 2105, 2116 (2018).

Second, section 1229(a)'s history shows that Congress deliberately chose language requiring a single notice.

Third, to the extent the statute's text and history leave any ambiguity, standard interpretive tools require strictly construing the statute against the government.

Fourth, pre-*Pereira*, the BIA consistently held that whether the government served a notice to appear under section 1229(a) that triggers the stop-time rule turns on the contents of a "single

instrument," and does not involve consideration of subsequent notices like hearing notices. *Matter of Camarillo*, 25 I&N Dec. 644, 648 (BIA 2011); *Matter of Ordaz*, 26 I&N Dec. 637, 640 n.3 (BIA 2015). The BIA's unreasonable and unexplained departure from its prior decisions reveals its decision for what it is—an extra-statutory attempt to allow the DHS to avoid the unambiguous stop-time consequences of its refusal to accept Congress's rejection of the two-step notice process.

This Court's decision in *Pierre-Paul* does not resolve the question raised in this case because it addressed the jurisdictional consequences of a defective notice to appear, not the stop time statute. *Pierre-Paul v. Barr*, 930 F.3d 684, 688-89 (5th Cir. 2019); 8 U.S.C. § 1229b(d)(1). The BIA and Court assumed that Pierre-Paul was eligible for cancellation of removal and his application was denied on the merits. 930 F.3d at 688; *see also Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 n.1 (5th Cir. 2018) (noting that *Pereira* held that a defective notice to appear does not trigger the stop time rule and that it did not address whether it deprived an immigration court of jurisdiction). *Pereira* abrogated the Court's pre-*Pereira* case law, *Gomez-Palacios v. Holder*, 560 F.3d 354

(5th Cir. 2009), so it can no longer be relied on in addressing the question raised in this case. *See Lopez v. Barr*, 925 F.3d 396, 403-04 (9th Cir. 2019).

ARGUMENT

I. The Statute Unambiguously Precludes the BIA's Conclusion that the Government's Two-Step Notice Process Triggers the Stop-Time Rule

The BIA's conclusion that the government's two-step notice process is "in accordance with" section 1229(a)'s requirements is not a permissible interpretation of the statute, read using "traditional tools of statutory construction." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). Courts may not "reflexive[ly]" defer to agencies' interpretations of statutes, but must "carefully consider the text, structure, history, and purpose" before deeming a statute ambiguous. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring)). "This means courts must do their best to determine the statute's meaning before giving up, finding ambiguity, and deferring to the agency. When courts find ambiguity where none exists, they are abdicating their judicial duty." *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018).

Using standard interpretive tools, the statute's text plainly requires DHS to serve a *single* notice containing section 1229(a)'s required information to trigger the stop-time rule. The BIA's contrary conclusion flies in the face of Congressional amendments specifically intended to *reject* the BIA's two-step notice process—a rejection the government itself has acknowledged. *See* 62 Fed. Reg. 449. This Court should therefore join the Seventh, Ninth, and Eleventh Circuits in concluding that the two-step process does not comply with section 1229(a). *Lopez*, 925 F.3d at 405 (9th Cir. 2019) ("The law does not permit multiple documents to collectively satisfy the requirements of a Notice to Appear."); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019) (the "two-step procedure that the Board followed" is not "compatible with the statute"); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019) ("a notice of hearing sent later … does not render the original NTA non-deficient").[2]

[2] The Sixth Circuit reached the opposite conclusion in *Garcia-Romo v. Barr*, 940 F.3d 192 (6th Cir. 2019), but it did so without considering the legislative history and the BIA's pre-*Pereira* decisions in *Ordaz* and *Camarillo*.

We note that after rejecting the BIA's conclusion that the two-step notice process complies with section 1229(a), the Seventh and Eleventh Circuits held that the government's violation of section 1229(a) does not deprive the immigration court of jurisdiction. *Ortiz-Santiago*, 924 F.3d at 962-64; *Perez-Sanchez*, 935 F.3d at 1154-1157; *see also Karingithi v. Whitaker*, 913 F.3d 1158, 1162 (9th Cir. 2019). This Court reached the same conclusion on the jurisdictional question. *Pierre-Paul*, 930 F.3d 684. But unlike the jurisdictional regulations at issue in those cases, the stop-time rule explicitly requires "a notice to appear under"—*i.e.*, "in accordance with"—"section 1229(a)." 8 U.S.C. § 1229b(d)(1); *Pereira*, 138 S. Ct. at 2117. Indeed, *Pierre-Paul* specifically distinguished the stop-time issue as it had arisen in *Pereira* from the jurisdictional question, based on this language in 8 U.S.C. § 1229b(d)(1). *See Pierre-Paul*, 930 F.3d at 689-90. This Brief addresses the stop-time issue raised by *Mendoza-Hernandez*, not the jurisdictional question. *Pierre-Paul*'s jurisdictional holding is consistent with *Ortiz-Santiago*, *Perez-Sanchez*, and *Lopez* (itself consistent with *Karingithi*), and does not prevent the Court from following the Seventh, Ninth, and Eleventh Circuits on the

stop-time issue.

A. The statute's text unambiguously requires the government to serve a single document that satisfies section 1229(a)'s "notice to appear" definition to trigger the stop-time rule

The statute's instructions are straightforward. To trigger the stop-time rule, the government must serve a specific document: "a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). The *Pereira* Court held that the word "under" in this context "can only mean 'in accordance with' or 'according to.'" 138 S. Ct. at 2117. Thus, to trigger the stop-time rule, the government must serve a notice to appear (NTA) that complies with section 1229(a).

Section 1229(a), in turn, uses "quintessential definitional language" to define "a 'notice to appear.'" *Pereira*, 138 S. Ct. at 2116. It defines "a 'notice to appear'" as "written notice … specifying" the seven pieces of information listed in the statute, including, for instance, the removal charges, the alleged violations of law, and the "time and place at which" to appear to defend against those charges. 8 U.S.C. § 1229(a)(1).

The question is therefore whether the BIA's creation of a two-step

notice process complies with 8 U.S.C. § 1229(a). *Matter of Mendoza-Hernandez*, 27 I&N Dec. 520, 531 (2019). If so, then the DHS could serve "a notice to appear" by serving a *series* of notices at completely different times, each of which identifies one of the many pieces of information required by section 1229(a).

The statute's text unambiguously precludes this piecemeal approach. The statute identifies a single, specific document that triggers the stop-time rule and then *defines* that document as "written notice … specifying" the required information. Because "the use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule," *Lopez*, 925 F.3d at 402, the "statute contains no ambiguity or gap that would permit a 'combination' approach to trigger the stop time rule," *Mendoza-Hernandez*, 27 I&N Dec. at 539 (Guendelsberger, Board Member, dissenting).

Had Congress intended to allow the DHS to provide the required notice in multiple documents, it easily could have drafted section 1229(a) to instruct the government *generally* to provide written notice of the specified information, without creating a specific form of notice that

it *defined* to include the required information. That is not, however, what Congress did: "[s]ection [1229(a)] does not say a 'notice to appear' is 'complete' when it specifies the time and place of the removal proceedings. Rather, it defines a 'notice to appear' as a 'written notice' that 'specif[ies],' at a minimum, the time and place of the removal proceedings." *Pereira*, 138 S. Ct. at 2116. In other words, Congress used "quintessential definitional language" to create a single notice document, the NTA, that must *itself* contain the required information. *Id.*

Remarkably, the BIA barely discussed the statute's text and instead relied on what it conceived to be the NTA's "fundamental purpose": to "create[] a reasonable expectation of the alien's appearance at the removal proceeding." *Mendoza-Hernandez*, 27 I&N Dec. at 531. But *Pereira* stands for the rule that the agency cannot ignore Congress's textual instructions by substituting its own belief as to how the statute *should* work for how Congress instructed that the statute *does* work.

This piecemeal approach does not even serve the BIA's conception of the NTA's purpose. Because the information required by section

1229(a) relates to the initiation of a single removal proceeding, it only makes sense when the noncitizen receives this information together. Receiving this information in a piecemeal fashion over a period of months or years means that the noncitizen likely will not understand how these notices relate and may be unable to appear to defend against the charges. *See Camarillo*, 25 I&N Dec. at 644-45 & n.1 (two years); *Pereira*, 138 S. Ct. at 2113 (one year).

Relatedly, dividing the required notice into multiple documents increases the likelihood that some pieces of the notice will not be properly served. *Pereira* notes that though the government properly served an initial notice lacking the time-and-place information, it mailed the subsequent hearing notice to the wrong address. The desire to avoid this confusion was why Congress amended the statute to reject the two-step notice process by requiring all the information listed in section 1229(a) to be included in a *single* notice to appear.

The BIA also erred in relying on *Pereira*'s purported "narrow[ness]." *Mendoza-Hernandez*, 27 I&N Dec. at 530. *Pereira* emphasized that its holding was "narrow" only in that it left open the

question whether a putative "notice to appear" that lacked information *other than* time-and-place information triggered the stop-time rule. 138 S. Ct. at 2113. *Pereira* did not consider the precise facts at issue here because Pereira had accrued the required ten years of continuous presence before the immigration court issued the first hearing notice. *Id.* at 2112. But *Pereira* makes clear that the government can only trigger the stop-time rule by serving notice "in accordance with" section 1229(a)'s requirements, and *section 1229(a) itself* requires the inclusion of *all* the required information in the specific document section 1229(a) *defines* as "*a* 'notice to appear.'"

The pre-*Pereira* precedent on which *Mendoza-Hernandez* also relied, 27 I&N Dec. at 527-28, is similarly unhelpful because none of those cases engaged in the type of textual analysis that *Pereira* makes clear is necessary. Indeed, two courts that had previously upheld the two-step notice process have since *reversed* those precedents because the two-step notice process is contrary to section 1229(a). *See Ortiz-Santiago*, 924 F.3d at 958, 961-62 (reversing its prior decision "expressly approv[ing] th[e] two-step procedure" and concluding,

following *Pereira*, that the BIA"s "the two-step procedure" was not "compatible with the statute"); *Lopez*, 925 F.3d at 400 (same).

In short, the BIA's holding that the two-step notice process triggers the stop-time rule repeats the same interpretive error that the Supreme Court reversed in *Pereira*: substituting what it thinks the statute *should* say for what it *actually* says. The stop-time rule requires notice "in accordance with" section 1229(a). And section 1229(a) requires that all of the specified information be provided in a single, statutorily-defined piece of notice: "*a* 'notice to appear.'"

B. The statute's history shows that Congress enacted section 1229(a) for the express purpose of rejecting the two-step notice process the BIA endorsed

Furthermore, the legislative history shows that Congress enacted section 1229(a) to prevent the DHS from using a two-step process. The BIA dissent and the Seventh Circuit recognized that the 1996 Congress that created the notice to appear and the stop-time rule consciously removed language authorizing a two-step process by requiring that all the notice be included in a single document. *Ortiz-Santiago*, 924 F.3d at 962; *Mendoza-Hernandez*, 27 I&N Dec. at 539 (Guendelsberger, Board

Member, dissenting). Without any explanation, the BIA majority's decision deprives Congress's 1996 amendments of any meaning.

Before Congress enacted IIRIRA in 1996, there were multiple different notices to initiate different types of immigration hearings. *See Judulang v. Holder*, 565 U.S. 42, 45-46 (2011). What were then called deportation proceedings were initiated by an "order to show cause." The statute imposed many of the same substantive requirements on an order to show cause that it now imposes on a "notice to appear." *See* 8 U.S.C. § 1252b(a)(1) (1994). Notably, the statute did *not* require an "order to show cause" to contain the hearing time and location. Instead, it provided that written notice of "the time and place at which the proceedings will be held" shall be given "in the order to show cause *or otherwise*." 8 U.S.C. § 1252b(a)(2)(A) (1994) (emphasis added). The regulations similarly provided that the court would provide the hearing time and location in a separate notice. *See* 8 C.F.R. §§ 3.18, 242.1(b) (1996). The statute and implementing regulations provided for an entirely separate notice to initiate what were then called "exclusion" proceedings concerning noncitizens seeking to enter the country. *See* 8

U.S.C. §§ 1225, 1226 (1994); 8 C.F.R. § 235.6(a) (1996).

IIRIRA's legislative history shows that Congress sought to simplify the different notices that initiated different types of proceedings by creating a *single* notice, the NTA, that included *all* the statutorily-required information. Congress was frustrated with the "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings," and the resulting disputes about receipt of notice and inability to carry out in absentia proceedings. H.R. Rep. No. 104-469, at 122, 158-59 (1996).

Congress addressed these concerns by requiring the inclusion of the "time and place" of the first hearing in the NTA, not in a separate document. 8 U.S.C. § 1229(a)(1)(G)(i). Specifically, Congress combined deportation and exclusion proceedings into a single form of proceeding called "removal," *see Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 349-350 (2005), and created "a 'notice to appear'" as the single form of notice to initiate the proceeding. 8 U.S.C. § 1229(a). Congress defined "a 'notice to appear'" as notice containing specific information, much of which was taken from the prior definition of an "order to show

cause." *See* 8 U.S.C. § 1229(a)(1)(A)-(F); 8 U.S.C. § 1252b(a)(1) (1994). But Congress made one key change: it specifically added the "time and place at which the proceedings will be held" as information that "shall" be included for notice to qualify as a "notice to appear." 8 U.S.C. § 1229(a)(1)(G)(i). Congress abandoned the previous flexibility that allowed the government to use multiple notices "to simplify the process for initiating removal proceedings," moving "from the two-step process for initiating deportation proceedings to a one-step 'notice to appear'" that includes *all* the section 1229(a) information. *Mendoza-Hernandez*, 27 I&N Dec. at 539 (Guendelsberger, Board Member, dissenting).

The government initially recognized the importance of these amendments. It issued a proposed rule implementing the new "notice to appear" provision. In a section entitled "The Notice to Appear (Form I-862)," the preamble explained that the rule "implements the language of the amended Act indicating that *the time and places of the hearing must be on the Notice to Appear*," and recognized the need for "automated scheduling." 62 Fed. Reg. 449 (emphasis added). The government acknowledged that IIRIRA replaced the two-step notice

procedure with a single notice containing all the statutorily required information.

Eventually, the government simply decided not to carry out what it recognized as Congress's statutory command. It adopted the regulation currently codified at 8 C.F.R. § 1003.18(b), which only requires that notice to appear contain the time-and-place information "where practicable." *See also* 62 Fed. Reg. 10,332 (Mar. 6, 1997). It initially intended this to be a limited exception to the statute, pledging to implement the "requirement" that the NTA include time-and-place information "as fully as possible by April 1, 1997," but added the "where practicable" language because the "automated scheduling" necessary to comply with the statute "will not be possible in every situation (e.g. power outages, computer crashes/downtime.)." 62 Fed. Reg. 449. Over time, however, the government decided it would be easier to simply ignore IIRIRA's changes altogether; rather than exclude the time-and-place information only in exceptional circumstances like "power outages" or "computer crashes," the government decided to *always* exclude it. By the time of *Pereira*, "almost 100 percent" of the

government's putative notices to appear omitted the time-and-place information and violated what the government had previously recognized to be a statutory "requirement" after IIRIRA. *See Pereira*, 138 S. Ct. at 2111.

Given this history, there can be no serious dispute that Congress intended that all the information required by section 1229(a) be included in a single document. Otherwise, Congress's statutory amendments mandating the inclusion of the time-and-place information in the NTA would have no meaning. When the government uses the very two-step process that section 1229(a) precludes, it violates section 1229(a) and does not trigger the stop-time rule. *Pereira*, 138 S. Ct. at 2117.

Remarkably, although the dissent recognized the importance of this statutory history, 27 I&N Dec. at 539 (Guendelsberger, Board Member, dissenting), the BIA majority completely ignored it. It instead relied heavily on the regulation stating that the government need only include the time-and-place information in the notice to appear "where practicable." *Mendoza-Hernandez*, 27 I&N Dec. at 532 (quoting 8 C.F.R.

§ 1003.18(b)). As the history discussed above shows, that reliance is doubly-wrong. First, the regulation conflicts with the statute's mandate to include the time-and-place information in the NTA, not in a separate document. Second, it was intended to address extremely narrow circumstances like power outages and computer crashes, not to always authorize a two-step notice process. Indeed, in promulgating this regulation, the government recognized that the statute *required* the inclusion of the time-and-place information in the NTA itself. 62 Fed. Reg. 449.

C. Other established principles of statutory interpretation support a strict reading of the stop-time rule

In addition to the statute's clear text and history, two important and related interpretive principles support construing the stop-time trigger as only a *single* notice that includes all the statutorily required information. First, the Supreme Court held that courts should narrowly construe threshold eligibility requirements for discretionary relief like cancellation of removal because the government can deny the requested relief even to eligible applicants based on the applicant's specific circumstances. Second, the Supreme Court has repeatedly held that

"lingering ambiguities" in provisions relating to removal should be construed against the government. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001).

That the stop-time rule involves only a threshold question of eligibility for discretionary relief, not entitlement to relief, strongly supports strictly interpreting the statutory text and history. *See Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (narrowly interpreting provision limiting eligibility for cancellation of removal in part because of discretionary nature of relief). Applicants must satisfy rigorous threshold eligibility requirements before the Attorney General can consider discretionary entitlement to relief. 8 U.S.C. § 1229b. The strict eligibility requirements and the discretionary nature of relief, combined with the life-changing impact it has both on immigrants and their U.S.-citizen or permanent-resident families, supports reading the statute to mean what it says—*i.e.*, that the government must serve "*a* notice to appear" that meets section 1229(a)'s substantive requirements to trigger the stop-time rule and potentially cut off the last chance for relief for the most deserving immigrants.

Cancellation eligibility for non-permanent residents is particularly limited. To qualify for cancellation, a non-permanent resident must show "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, parent, or child; good moral character for the ten proceeding years; no disqualifying criminal or immigration history; and that she is not a security risk. 8 U.S.C. §§ 1229b(b)(1)(B)-(D). Finally, she must show ten years of continuous presence prior to service of a "notice to appear under section 1229(a)." *Id.* § 1229b(b)(1)(A), (d)(1). For applicants meeting these stringent requirements, the Attorney General must then decide whether to grant the application as a matter of discretion. Although Congress limited the number of such applications that can be approved at 4,000 per year, the immigration courts have approved significantly less than that: between 3,719 and 3,847 per year from 2014 to 2018.[3]

Lawful permanent residents are also subject to demanding threshold eligibility requirements. They must establish five years of

[3] *See* EOIR Statistics Yearbook Fiscal Year 2018 at p. 32, https://www.justice.gov/eoir/file/1198896/download (last visited December 31, 2019).

lawful permanent residence and seven years of continuous residence, the latter of which is subject to the stop-time rule. 8 U.S.C. § 1229b(a)(1). Aggravated felons and security risks are barred from relief. 8 U.S.C. §§ 1229b(a)(3), 1229b(c)(4). And like a non-permanent-resident applicant, these criteria only establish *eligibility* for discretionary relief. *See Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001). The number of lawful permanent residents receiving this relief has steadily declined from 3,220 in 2014 to just 2,152 in 2018.[4]

Given these restrictions, only deserving applicants will receive relief. It is for this narrow class for whom the statutory question in this case will matter—those who would qualify for cancellation of removal, both as a matter of law and discretion, but for the BIA's interpretation of the stop-time rule. Those candidates are non-permanent residents with extended residence in the United States, good moral character, little or no criminal history, and close U.S. family members who would suffer "exceptional and extremely unusual hardship" if the applicant were removed; or permanent residents with extended U.S. residence,

[4] *See supra* n. 3.

limited criminal history, and a strong equitable case for remaining in the country.

The forms of relief implicated by the stop-time rule are reserved for and granted to deserving applicants. This is in line with the relief's humanitarian purpose – to cancel the removal of long term permanent and non-permanent residents. Given the numerous ways in which cancellation is limited to the most deserving applicants, combined with the devastating impact removal on applicants and their families, there is good reason that Congress would have imposed strict requirements for the government to trigger the stop-time rule and cut off relief eligibility. *See Moncrieffe*, 569 U.S. at 204.

Relatedly, the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" weighs strongly against the BIA's interpretation. *St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). That "accepted principle[] of statutory construction" stems from the nature of deportation. *Costello v. INS*, 376 U.S. 120, 128 (1964). The Supreme Court has repeatedly recognized that "deportation is a drastic measure

and at times the equivalent of banishment or exile." *Id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)); *see also INS v. Errico*, 385 U.S. 214, 225 (1966); *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010) (recognizing "the seriousness of deportation" and the "concomitant impact of deportation on families living lawfully in this country"). Thus, even where the government's proposed interpretation "might find support in logic," courts should "not assume that Congress meant to trench on [noncitizens'] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan*, 333 U.S. at 10.

This principle is particularly applicable in interpreting a provision, like cancellation of removal, that is not "punitive" but "was designed to accomplish a humanitarian result." *Errico*, 385 U.S. at 225. Thus, in *Errico*, the Supreme Court applied the principle to resolve ambiguities in a provision with the "humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens." *Id.* And the Court similarly applied the principle in

St. Cyr, which concerned a predecessor to cancellation of removal for certain lawful permanent residents. 533 U.S. at 320.

This principle is also particularly applicable to cancellation of removal, which not only "prevents[s] the breaking up of families," *Errico*, 385 U.S. at 225, but is limited to those who meet numerous stringent requirements and merit a favorable exercise of discretion. *See* pp. 17-19, *supra*; *Errico*, 385 U.S. at 225; *St. Cyr*, 533 U.S. at 320; *cf. Moncrieffe*, 569 U.S. at 204; *Dean v. United States*, 556 U.S. 568, 585-85 (2009) (Breyer, J., dissenting) (explaining that lenity is particularly important when interpreting provisions, like mandatory minimum sentences, that remove adjudicatory discretion).

Courts apply this "accepted principle[] of statutory construction" at *Chevron* step one, *Costello*, 376 U.S. at 128, before considering the "reasonableness" of the BIA's interpretation under *Chevron*'s second step. Courts must apply "normal tools of statutory interpretation" before deeming a statute "ambiguous" for *Chevron* purposes. *E.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569, 1572 (2017) (applying "normal tools of statutory interpretation" to conclude that a

statute, "read in context, unambiguously forecloses the Board's interpretation" without reaching *Chevron*'s second step); *Kisor*, 139 S. Ct. at 2415. The principle that ambiguous deportation provisions should be read to have the "narrowest of several possible meanings," *Fong Haw Tan*, 333 U.S. at 10, is precisely such an interpretive tool.

The Supreme Court recognized this precise point in *St. Cyr*. That case concerned whether IIRIRA's repeal of section 212(c) relief applied retroactively. 533 U.S. at 314-15. The Court held that IIRIRA was "ambiguous" as to whether its repeal applied retroactively. *Id.* at 315. The government argued that because the statute was ambiguous, the Court should defer to the BIA's holding that IIRIRA *is* retroactive. The Court disagreed, concluding that deference only applies "to agency interpretations of statutes that, *applying the normal 'tools of statutory constructions,'* are ambiguous." *Id.* at 320 n.45 (emphasis added) (quoting *Chevron*, 467 U.S. at 843). The Court identified two relevant tools of statutory construction: "[t]he presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in

deportation statutes in favor of the alien." *Id.* at 320 (internal quotation marks omitted). Applying these principles, the Court concluded that "there is, for *Chevron* purposes, no ambiguity in such a statute for [the] agency to resolve." *Id.* at 320 n.45.

As in *St. Cyr*, the statute's text, confirmed by its history and traditional interpretive canons, unambiguously resolves this case. The stop-time rule is triggered only by service of "a notice to appear under section 1229(a)," and in this case the government simply never served "a notice" in accordance with section 1229(a)'s definitional requirements. The statute's history confirms the text's plain meaning, as it shows that Congress amended the statute in 1996 to specifically reject the BIA's two-step notice process. And to the extent any lingering doubts remain, they should, consistent with longstanding interpretive principles, be construed in the immigrant's favor. As in *St. Cyr*, "there is, for *Chevron* purposes, no ambiguity [left] for [the] agency to resolve." *St. Cyr*, 533 U.S. at 320 n.45.

II. The BIA's Decision Unreasonably Departs From its Prior Precedent Without Adequate Explanation

Moreover, the Court should reject *Mendoza-Hernandez* because it departs from prior BIA decisions holding that the notice to appear must be a single document and that subsequent notices, like hearing notices or substitute or additional charges, are not part of the NTA. *E.g.*, *Camarillo*, 25 I&N Dec. at 648; *Ordaz*, 26 I&N Dec. at 640 n.3. *Mendoza-Hernandez* disregarded these decisions with the largely unreasoned statement, in a footnote, that their analysis was "flawed." 27 I&N Dec. at 525 n.8. Such "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice," such that the interpretation "is itself unlawful and receives no *Chevron* deference." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 1562, 2126 (2016) (internal alterations and quotation marks omitted). The unjustified change in position reveals the BIA majority's position as a transparent attempt to assist the DHS in avoiding the statutory consequences that flow from its refusal to adhere to Congress's rejection of the two-step notice process.

Before *Pereira*, the BIA repeatedly rejected the argument that

multiple documents could be considered together in analyzing whether the government had served a "notice to appear." For instance, in *Camarillo*, the noncitizen made the same argument that the BIA adopted in *Mendoza-Hernandez*: while a notice lacking the time-and-place information did not trigger the stop-time rule, the subsequent hearing notice did. 25 I&N Dec. at 648. The BIA *rejected* this argument, concluding that "[n]o authority … supports the contention that a notice of hearing issued by the Immigration Court is a constituent part of a notice to appear, the charging document issued only by DHS." *Id.* Thus, while *Camarillo* held that a document labeled a "notice to appear" triggered the stop-time rule even if it lacked the time and place of the first hearing (which *Pereira* rejected), the BIA plainly limited the relevant inquiry to the putative "notice to appear" itself, not the collective notice provided across multiple documents.

The BIA emphasized the same point in *Ordaz*. The question there was whether an NTA triggered the stop-time rule if it was served but never filed with the Immigration Court. 26 I&N Dec. at 637. In concluding that it did not trigger the stop-time rule, the BIA

emphasized that a notice does trigger it even if, during the removal proceedings, the government amends the charges against the noncitizen. *Id.* at 640 n.3. Again, the BIA emphasized that the inquiry focuses only on a "*single instrument*," not on notices the government serves later: "The statute affords 'stop-time' effect to a single instrument—the notice to appear that is the subject of proceedings in which cancellation of removal is sought." *Id.* (emphasis added).

These decisions, combined with the Supreme Court's decision in *Pereira*, plainly require the government to serve a *single* notice providing all the statutorily required information to trigger the stop-time rule. The BIA held in *Camarillo* and *Ordaz* that the relevant "notice to appear" is a "single instrument," and that "[n]o authority" supports the contention that subsequent notices are part of the relevant "notice to appear." And the Supreme Court held in *Pereira* that such a "notice to appear" only triggers the stop-time rule if it includes *all* the information listed in section 1229(a).

In a footnote, *Mendoza-Hernandez* barely tried to justify its reversal by characterizing its prior decisions as "flawed," stating merely

that while a "notice of hearing is *not* part of the notice to appear," it is a "separate notice, served in conjunction with the notice to appear, that satisfies the requirements of section [1229(a)(1)(G)]." 27 I&N Dec. at 525 n.8 (emphasis added). Far from supporting its reversal, this statement undermines it. The question is not whether the government provided the time-and-place information in the abstract, but whether information served after the initial notice, such as a hearing notice, triggers the stop-time rule. 8 U.S.C. § 1229b(d)(1). As to *that* question, the BIA actually agreed with its *prior* position that the "notice of hearing is *not* part of the notice to appear." 27 I&N Dec. at 525 n.8 (emphasis added).

The BIA's inability to justify its change is unsurprising, as *Camarillo* and *Mendoza-Hernandez* reveal themselves as nothing more than results-oriented attempts to twist the statute however necessary to allow the DHS to avoid the consequences of its longstanding refusal to follow Congress's mandate to jettison the two-step notice process. Both *Camarillo* and *Mendoza-Hernandez* largely ignored the statute's text and completely ignored its history. They instead focused on

allowing the government to follow its regulation requiring time-and-place information in a "notice to appear" only "when practicable," 8 C.F.R. § 1003.18(b), without suffering any stop-time consequences. *Camarillo*, 25 I&N Dec. at 648; *Mendoza-Hernandez*, 27 I&N Dec. at 532. The BIA thus first recognized in *Camarillo* that the "notice to appear" is a single document, but held that the document triggers the stop-time rule *regardless* what information it contains. 25 I&N Dec. at 647 (statute "does not impose substantive requirements" to trigger stop-time rule). When *Pereira* rejected that position, the BIA sought to find a different way to reach effectively the same result, reversing its prior position and holding that the government can serve the required information across however many documents it wants. 27 I&N Dec. at 531 (notice can come "in one or more documents—in a single or multiple mailings").

Mendoza-Hernandez not only unjustifiably departs from *Camarillo*, its position is equally at odds with the statute's text and IIRIRA's requirement to include *all* the information in section 1229(a) in a single document. There is no permissible way for the agency to

avoid the fact that when the government refuses to follow the one-step notice process mandated by IIRIRA in section 1229(a), the unambiguous statutory consequence is that DHS does not trigger the stop-time rule.

III. The BIA's Decision Frustrates, Rather than Serves, Congress's Intent to Prevent Noncitizens from "Gaming" the System

One reason why Congress enacted the stop time rule in 8 U.S.C. § 1229b(d)(1) was to prevent noncitizens from delaying their removal proceedings long enough to qualify for the predecessors for cancellation of removal, suspension of deportation, and § 212(c) relief. *Camarillo*, 25 I&N Dec. at 649. Previously, a noncitizen continued to accrue time towards qualifying for these forms of relief during the proceedings. *Pereira*, 138 S. Ct. at 2119.

Mendoza-Hernandez claimed to rely on the stop-time rule's anti-gaming purpose. Separate from the fact that this purported policy goal does not allow the BIA or the Court to ignore the plain statutory language, *Arangure*, 911 F.3d at 344-45, it also critically misunderstands this measure. Congress wanted to stop noncitizens from delaying their proceedings until they qualified for relief. In

situations like Petitioner's, however, the noncitizen has no control over and is not responsible for the DHS's failure to follow the law. In fact, the DHS is the party frustrating Congressional intent because the DHS's omission of the date-and-time information in the NTA delays the scheduling of the first hearing.

Applying the plain language of the statute fulfills congressional intent because requiring DHS to include the date and time of the first hearing in the NTA results in the quicker initiation of removal proceedings. When the DHS does not prepare and serve an NTA that complies with the statute, there is no reason to think that Congress intended for the stop time to be triggered because here, the error was committed by the DHS, not the noncitizen, and the power to fix it lies with DHS.

The DHS has known since *Pereira* that it has been violating the plain statutory language, yet it has chosen not to fix the problem by serving proper NTAs. Instead, it has asked the BIA to bail it out by disregarding the statute's plain language and ignoring the agency precedents. The Supreme Court noted that software is available that

allows DHS to include hearing dates on NTAs, so even as a practical matter there is no reason why DHS cannot comply with the statute.

The DHS's cavalier attitude towards its statutory and regulatory responsibilities and *Pereira*'s dictates, is apparent in its practice of providing fake hearing dates in many notices to appear.[5] As a result, hundreds, if not thousands, of noncitizens have shown up to court for hearings that do not exist, burdening them, the courts, and building staff.

Moreover, there has been no gaming by noncitizens along the way because, pre-*Pereira*, they did not have a reason to raise this argument or seek to delay the proceedings, since the agency concluded they were ineligible for relief based on its erroneous reading of the stop-time statute.

[5] *See* https://www.cbsnews.com/news/immigration-court-ice-agents-hundreds-of-immigrants-fake-court-dates-2019-01-30-live-updates/ (last visited December 31, 2019).

IV. The BIA's *Mendoza-Hernandez* Decision Requires Immigration Judges to Take on the Duties of the DHS

The NTA is the charging document that commences removal proceedings. 8 C.F.R. § 1239.1(a). It is the functional equivalent of an indictment or complaint in a criminal proceeding. Therefore, authority to issue and file the NTA is vested with certain DHS officials, not Immigration Judges. *Compare* 8 C.F.R. § 1239.1(a) *with* 8 C.F.R. § 239.1(a).

In cases like this, where the NTA omits critical statutorily required items (the date and time of the first hearing), the BIA's decision requires Immigration Judges to abdicate their role as neutral decision-makers. *Mendoza-Hernandez* requires judges to correct a mistake made by one party, the DHS, to the significant detriment of another party, the noncitizen. It would be like requiring Immigration Judges to fill out and file applications for noncitizens who missed a deadline. This has not been something that the BIA has been willing to do. *See, e.g., Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010) (deeming the noncitizen's opportunity to file documents waived when filed late).

The Immigration Judges do not have the authority to issue NTAs or commence removal proceedings because this prosecutorial function is vested solely in the DHS. It creates a real concern of bias if Immigration Judges take on the DHS's prosecutorial responsibilities. It is especially troubling in light of EOIR's intention to remove decision-making authority from Board members, who are supposed to be neutral adjudicators, and place it in the hands of political appointees. *See* 84 Fed. Reg. 44537, 44538 (Interim Rule, Aug. 26, 2019).

CONCLUSION

The Court should follow the Seventh, Ninth, and Eleventh Circuits in rejecting the BIA's decision in *Matter of Mendoza-Hernandez*. The BIA's conclusion that the two-step notice process triggers the stop-time rule conflicts with the statute's unambiguous text, and unreasonably departs from the agency's consistent recognition that "a 'notice to appear'" is a single document, of which a subsequent hearing notice is not a constituent part.

Dated: December 31, 2019

Respectfully submitted,

/s/ Russell Reid Abrutyn
Russell Reid Abrutyn
Abrutyn Law, PLLC
3765 12 Mile Road
Berkley, MI 48072
(248) 965-9440

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Russell Reid Abrutyn
Russell Reid Abrutyn

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font size 14.

/s/ Russell Reid Abrutyn
Russell Reid Abrutyn

Attorney for Amicus Curiae