No. 19-1590

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

YOUSSEF BOUTRIQ and RACHIDA GOUMMIH,

Petitioners,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

ON REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

In support of the Petitioners and reversal of the Board of Immigration Appeals

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(2), undersigned counsel for amicus curiae states that all parties have consented to the filing of this brief.

Pursuant to FRAP 29(a)(4)(E), undersigned counsel for amicus curiae states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for amicus curiae certifies pursuant to FRAP 29(a)(4)(A) that the American Immigration Lawyers Association is a non-profit organization that does not have any parent corporation or issues stock, so there is no publicly held corporation owning 10% or more of its stock.

Dated: September 25, 2019

/s/ Russell Reid Abrutyn
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INTEREST OF AMICUS CURIAE

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. As part of its mission, AILA provides trainings, information, and practice advisories to practitioners providing direct services to noncitizens, and, increasingly, to counsel representing noncitizens accused of criminal offenses in federal and state courts.

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. In

addition, it 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.

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 creates a specific form of notice, called "a 'notice to appear,'" and uses "quintessential definitional language" to define that document as one that includes all of 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 repeatedly held that the question of 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 government to avoid the unambiguous stop-time consequences of its refusal to accept Congress's decision to reject the two-step notice process.

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). The Court has recently and repeatedly made clear that 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).

Here, using standard interpretive tools, the statute's text plainly requires the DHS to serve a *single* notice that includes the information required by section 1229(a) to trigger the stop-time rule. Indeed, the BIA's contrary conclusion flies in the face of Congressional amendments specifically intended to *reject* the two-step notice process the BIA endorsed—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 v. Barr*, 925 F.3d 396, 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., __ F.3d __, 2019 WL 3940873, at *4 (11th Cir. 2019) ("a notice of hearing sent later … does not render the original NTA non-deficient").[1]

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 Supreme Court held in *Pereira* 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) in accordance with section 1229(a)'s requirements.

[1] 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*, __ F.3d __, 2019 WL 3940873, at *4-*7. 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. This Brief addresses the stop-time issue raised by *Mendoza-Hernandez* and not the jurisdictional question.

Section 1229(a), in turn, uses "quintessential definitional language" to define what "a 'notice to appear'" is. *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). Notice that omits the required information is not "in accordance with" section 1229(a) and therefore does not trigger the stop-time rule.

The question is therefore whether § 1229(a) permits the BIA's creation of a two-step notice process where the DHS can serve "*a* notice to appear" by providing the statutorily required information "in one or more documents—in a single or multiple mailings." *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)—*i.e.*, one notice specifying the removal charges, 8 U.S.C. § 1229(a)(1)(D), one notice identifying the

"legal authority under which the proceedings are conducted," *id.* § 1229(a)(1)(B), one notice identifying the "time and place at which the proceedings will be held," *id.* § 1229(a)(1)(G)(i), etc.

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. As the Supreme Court put it, "[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," *Pereira*, 138 S. Ct. at 2116, to create a single notice document, the NTA, that must *itself* contain the required information.

Remarkably, despite *Pereira*'s focus on the statute's text, and despite the BIA dissent's explanation of how the text forecloses "a 'combination' approach to trigger the stop time rule," *Mendoza-Hernandez*, 27 I&N Dec. at 539 (Guendelsberger, Board Member, dissenting), the BIA majority barely discussed the statute's text. Instead, the BIA majority 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 if *Pereira* stands for anything, it is that the agency cannot ignore Congress's textual instructions in favor of its own conception of the statute's "fundamental purpose" by substituting its

own belief as to how the statute *should* work for how Congress instructed that the statute *does* work.

Moreover, this piecemeal approach does not actually serve the purposes of the NTA, even as conceived by the BIA. Because the information required by section 1229(a) relates to the initiation of a single removal proceeding, it only makes sense to the notice's recipient when it is received together. If, on one day, the government serves notice on a noncitizen that she is being charged as removable and then, years later, the government serves notice that she must appear in immigration court on a specific date and time without reference to the prior charges, the noncitizen likely will not understand how these notices relate, and may be unable to appear to defend against the charges.

Service of such unconnected notices is not a hypothetical—it is the way the "two-step process" actually works. The difficulties in connecting multiple notices are heightened by the fact that the government does not serve these notices at the same time and there can be years between when the service of the NTA lacking the time-and-place information

and a subsequent hearing notice providing this information. *see Camarillo*, 25 I&N Dec. at 644-45 & n.1 (two years); *Pereira*, 138 S. Ct. at 2113 (one year). There is no reason that when a noncitizen receives a notice instructing her to appear in immigration court at a specific place and time she would know that this is to respond to charges served on her years ago.

Relatedly, dividing the required notice into multiple documents increases the likelihood that some pieces of the notice will not actually be properly served. This is, again, a real concern: *Pereira* notes that though the government properly served the initial notice (lacking the time-and-place information), it mailed the subsequent hearing notice to the wrong address. As discussed below, *infra*, a desire to avoid such 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. To be sure, *Pereira* did not consider the precise facts at issue here because, in *Pereira*, the government did not serve a hearing notice until after Pereira had accrued the required ten years of continuous presence. *Id.* at 2112. But *Pereira* does make 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*—read on its own and in light of its history and other interpretive tools, *see* pp. 30-42, *infra*—requires that *all* the required information be provided in the specific document section 1229(a) *defines* as "*a* 'notice to appear.'"

The pre-*Pereira* precedent on which the BIA majority also relied, *Mendoza-Hernandez*, 27 I&N Dec. at 527-28, is similarly unhelpful, as none of those cases engaged in the type of textual analysis that *Pereira* makes clear is necessary. Indeed, two of the courts that, before *Pereira*, upheld the two-step notice process for triggering the stop-time rule have since *reversed* those precedents and concluded that the two-step notice

process is *not* in accordance with 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, in light of *Pereira*, that "the two-step procedure that the Board followed" was not "compatible with the statute"); *Lopez*, 925 F.3d at 400 (concluding that its prior decision upholding the two-step process "ha[s] been effectively overruled" by *Pereira*).

In short, in holding that the two-step notice process triggers the stop-time rule, the BIA was guilty of the same interpretive error that the Supreme Court reversed in *Pereira*: substituting what it thinks the statute *should* say for what the statute *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

Not only does section 1229(a)'s text explicitly preclude the government's two-step notice process, section 1229(a)'s history shows that Congress enacted that provision to prevent the DHS from using

that two-step process. As both the BIA dissent and the Seventh Circuit have recognized, the 1996 Congress that created both the notice to appear and the stop-time rule consciously decided to remove language authorizing a two-step process, instead 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). The BIA majority's decision deprives Congress's 1996 amendments of any meaning, and it does so without *any* explanation—despite being fully aware of this history, the BIA majority simply ignored it.

Before Congress enacted IIRIRA in 1996, there were multiple different notices related to initiating 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, however, the statute did *not* require that the "order to show cause" include the

time and place of the hearing. 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). Consistent with that statute, the regulations provided that the Immigration Court would provide notice of the hearing's time and location separate from the order to show cause. *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. Among other things, 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 deportation

proceedings. H.R. Rep. No. 104-469, at 122, 158-59 (1996).

Among Congress's responses to these concerns was to require that the "time and place" of the initial removal proceedings be included in the NTA itself and 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. *Id.* § 1229(a)(1). Much of that information 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 to the notice process. Shortly after IIRIRA's enactment, the Department of Justice 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 that the government would need "automated scheduling" to issue notices to appear with the required time-and-place information. 62 Fed. Reg. 449 (emphasis added). The government itself recognized that IIRIRA's amendments rejected the prior two-step notice procedure by replacing it with a single form of notice that *must* include all the statutorily required information.

Ultimately, though, the government simply decided not to carry

out what it recognized as Congress's statutory command. The regulation it eventually adopted, currently codified at 8 C.F.R. § 1003.18(b), only requires that the time-and-place information be included in the notice to appear "where practicable." *See also* 62 Fed. Reg. 10,332 (Mar. 6, 1997). The government initially intended this to be a limited exception to the recognized statutory rule and pledged 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 based on the recognition that 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, and simply continue with the two-step process the 1996 Congress had explicitly rejected. Indeed, by the time of *Pereira*, "almost 100 percent" of the putative notices to

appear the government issued did *not* include the time-and-place information, and hence did not comply with 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 of the information specified in section 1229(a) be served in a single document. After all, were that not the case, Congress's decision to amend the statute to mandate 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 fails to provide notice "in accordance with" section 1229(a), and does not trigger the stop-time rule. *Pereira*, 138 S. Ct. at 2117.

Remarkably, although the BIA dissent recognized the importance of this statutory history, 27 I&N Dec. at 539 (Guendelsberger, Board Member, dissenting), the BIA majority completely ignored it. Instead, it 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 itself, which mandates the inclusion of the time-and-place information in the NTA, not in a separate document. Second, the regulation was intended to address extremely narrow circumstances like power outages and computer crashes, not to authorize a two-step notice process in all circumstances. 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 has 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). The statute includes rigorous eligibility requirements, and even satisfying those requirements only gives the Attorney General discretion to grant relief, which itself is limited by the annual cap on the number of immigrants who can receive cancellation. 8 U.S.C. § 1229b(e). The strict eligibility requirements and the discretionary nature of relief, combined with the life-changing impact cancellation 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 not only have a "spouse, parent, or child" who is a U.S. citizen or lawful permanent resident, but also show that her deportation would cause "exceptional and extremely unusual hardship" to that family member, she has "good moral character," she has no disqualifying criminal history, she is not a security risk, and she has not committed removable immigration fraud. 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). Even meeting these stringent requirements only qualifies an applicant for *discretionary* relief—the Attorney General can still decline to grant cancellation as a matter of discretion.

The standard for cancellation eligibility is demanding even for a permanent resident. She must show both five years of lawful permanent

residence and seven years of continuous residence. 8 U.S.C. § 1229b(a)(1). Those periods are cut off not only upon service of a "notice to appear under § 1229(a)," but also on the date she commits certain offenses. 8 U.S.C. § 1229b(d)(1). She is also ineligible if she poses a security risk or has committed an aggravated felony. 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).

Given these restrictions, the only people for whom the statutory question in this case will matter will be the most deserving immigrants—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, limited criminal history, and a strong equitable case for remaining in the

country. Given the numerous ways in which cancellation is limited to the most deserving applicants, combined with the devastating impact removal would have not only on applicants but also on 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 eligibility for relief. *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.

The principle of construing statutes in favor of noncitizens 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 form of relief from inadmissibility for certain lawful permanent residents. 533 U.S. at 320.

The purposes behind this principle are particularly applicable to determining eligibility for cancellation of removal, which not only

"prevents[s] the breaking up of families," *Errico*, 385 U.S. at 225, but is available only to those who meet numerous stringent requirements and merit a favorable exercise of discretion. *See* pp. 36-38, *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).

This Court applies this "accepted principle[] of statutory construction," *Costello*, 376 U.S. at 128, without first reaching 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, which had held 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 plain meaning of the text, as it shows that Congress amended the statute in 1996 to specifically reject the two-step notice process the BIA has endorsed. 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

This Court should reject the BIA's decision in *Mendoza-Hernandez* for the entirely separate reason that it departs from the agency's prior 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. The *Mendoza-Hernandez* majority 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*, 136 S. Ct. at 2126 (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 the Supreme Court's decision in *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 precisely the argument the BIA majority 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 the BIA held in that case that a document labeled a "notice to appear" could trigger the stop-time rule without providing the time and place of proceedings (an interpretation of the statute *Pereira* rejected), the BIA plainly held that the relevant inquiry focused *only* on 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 triggers the stop-time rule if it was served but never filed with the Immigration Court. 26 I&N Dec. at 637. In concluding that such a notice does 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 in order 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).

The BIA majority in *Mendoza-Hernandez* barely tried to justify its reversal. In a footnote, it simply characterized 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. To be sure, the hearing notice tells a noncitizen to appear at a certain time and place (though it does not state *why* she must appear). But the question is not whether the government provided that time-and-place information in the abstract, but whether information served after the initial notice, such as a hearing notice, can be considered in determining whether the government triggered the stop-time rule by serving "a notice to appear under section 1229(a)." 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 not surprising, as its opinions in *Camarillo* and *Mendoza-Hernandez* are nothing more than an attempt to twist the statute in any way necessary to allow the DHS to avoid the stop-time consequences of its refusal to adhere to Congress's decision to jettison the two-step notice process. Both the *Camarillo* panel and the *Mendoza-Hernandez* majority 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 majority in *Mendoza-Hernandez* 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").

The *Mendoza-Hernandez* majority not only unjustifiably departs from *Camarillo*, its position is equally at odds with the statute's text, and with Congress's clear decision in IIRIRA to require that *all* of the

information in section 1229(a) come in a single document. There is simply 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 the government does not trigger the stop-time rule.

III. 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, not in Immigration Judges, but solely with certain DHS officials. *Compare* 8 C.F.R. § 1239.1(a) *with* 8 C.F.R. § 239.1(a).

In cases like this, where the NTA is lacks 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. Under *Mendoza-Hernandez*, judges are required to correct a mistake made by one party, the DHS, to the significant detriment of another party, the noncitizen. It is as if the Immigration

Judge filled out and filed an application on behalf of a noncitizen where the noncitizen 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 they are not filed timely).

The Immigration Judges have no authority to issue NTAs or commence removal proceedings. That authority and discretion is vested in the DHS. If Immigration Judges take on the DHS's responsibility in commencing and prosecuting removal proceedings, it creates a bias concern. 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.

Respectfully submitted September 25, 2019.

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CERTIFICATE OF COMPLIANCE

I, Russell Reid Abrutyn, hereby state that, pursuant to FRAP 32(a)(7)(B)(i), the Brief of Amicus Curiae contains no more than 6,367 words, as counted by the word processing system used to prepare the Brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2019, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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