No.

In the Supreme Court of the United States

GILBERTO GARCIA-ROMO,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Attorney General may cancel the removal of certain noncitizens who can establish, among other things, that they have continuously resided in the country for a certain period of time. 8 U.S.C. §§ 1229b(a), 1229b(b). Under the "stop-time" rule, the government can cut off a noncitizen's period of continuous residence by serving "a notice to appear under section 1229(a)." *Id.* § 1229b(d)(1). In turn, "a 'notice to appear'" is defined as "written notice … specifying" certain categories of information related to the removal proceeding. *Id.* § 1229(a)(1).

The government routinely issues notices to appear that fail to include all the pieces of information required by § 1229(a). When this occurs, the government often provides the missing information later, in a second document.

The Fifth Circuit and the Sixth Circuit hold that this two-step notification process triggers the stop-time rule. In contrast, the Third Circuit and the Tenth Circuit hold that this process does not trigger the stop-time rule.

The question presented is whether the government may trigger the stop-time rule when it issues a document that fails to include all of the information listed under § 1229(a), followed by a second document that supplies the missing information but nevertheless fails to meet § 1229(a)'s definition.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Petitioner Gilberto Garcia-Romo and Respondent William P. Barr, in his official capacity as Attorney General of the United States. (William P. Barr has been substituted for former Acting Attorney General Matthew Whitaker, who was substituted for former Attorney General Jefferson B. Sessions III.) There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *Garcia-Romo v. Attorney General of the United States*, No. 18-3857 (6th Cir.), on petition for review from the Board of Immigration Appeals (opinion issued October 4, 2019; petition for rehearing denied January 22, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Gilberto Garcia-Romo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The order and opinion of the court of appeals (Pet. App. 1a–22a) is reported at 940 F.3d 192. The petition for rehearing was denied. Pet. App. 42a. The opinion of the Board of Immigration Appeals (Pet. App. 23a–26a) and the immigration judge's order (Pet. App. 27a–42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2019. Mr. Garcia-Romo's petition for rehearing was denied on January 22, 2020. On March 19, 2020, the Court extended the deadline to file this petition until June 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application ….

8 U.S.C. § 1229b(d)(1) provides in relevant part:

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end … when the alien is served a notice to appear under section 1229(a) of this title ….

8 U.S.C. § 1229(a)(1) provides in relevant part:

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)

(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

INTRODUCTION

This case concerns an acknowledged circuit split on an issue that the government has already admitted is exceptionally important.

At its core, this case turns on the way the government informs noncitizens that they may be removed from this country. An earlier statutory regime allowed the government to provide notice in two steps. *See* 8 U.S.C. § 1252b (1995). Under that law, the government first issued an "Order to Show Cause," which notified the recipient that he or she had violated the law and was subject to deportation. *Id.* § 1252b(1). Later, the government sent a second document that informed the recipient when and where to appear. *Id.* § 1252b(2).

Under this regime, noncitizens were ordered to appear in future proceedings—but they were left guessing as to when and where they should appear. And due to "substantial" bureaucratic delays, this two-step procedure often left noncitizens in an administrative "No Man's Land." *See* Amicus Brief of Former BIA Chairman Paul Wickham Schmidt, *Pereira v. Sessions*, No. 17-459, 2018 WL 1156645 at *3. This "backwards and byzantine" system, *see id.*, frequently placed noncitizens in limbo for years. *E.g.*, *Ba v. Holder*, 561 F.3d 604, 605 (6th Cir. 2009) (government didn't tell the recipient when or where to appear for "[m]ore than two years").

The two-step notification regime also gave the government twice as many opportunities to make bureaucratic mistakes. Frequently, the government sent the second document to the wrong address. *E.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2107 (2018). And even when the *government* committed this error, the *noncitizen* often suffered the consequences. If noncitizens failed to appear—despite their lack of notice—the government tried to remove them *in absentia*. *See id.*

By all measures, this system should have ceased to exist. In 1996, Congress decided to streamline this two-step notification system by enacting the Immigration Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996). The amended law directed the government to commence removal proceedings with "a 'notice to appear.'" 8 U.S.C. § 1229(a)(1). An accompanying report of the Judiciary Committee of the House of Representatives noted that this legislation was designed to cure "lapses

(perceived or genuine) in the procedures for notifying aliens of deportation proceedings." H.R. Rep. No. 104-469, pt. I, at 122. To fix these lapses, Congress decided to "simplify procedures for initiating removal proceedings against an alien" in a key manner: under the new law, "[t]here will be a single form of notice." *Id.* at 159.

The agency responsible for initiating these removal proceedings didn't follow suit. Due to an oversight, bureaucratic inertia, or something else, the agency issued regulations that conformed to the old regime. This oversight caused the agency—at least in recent years—to ignore § 1229(a)'s requirements in "almost 100 percent" of immigration cases. 138 S. Ct. at 2111.[1]

The government's consistent failure to follow § 1229(a)'s text has now generated a circuit split. Below, the Sixth Circuit recognized that the government failed to follow the statutory text, but the court allowed the government to "cure" the defect with a legal mechanism that appears nowhere in the U.S. Code. Pet. App. 20a (citation omitted). Employing different logic, the Fifth Circuit concluded that the two-step procedure "comports with the relevant statutory language." *Yanez-Pena v. Barr*, 952 F.3d 239, 245 (5th Cir. 2020).

In contrast, the Third Circuit has rejected this logic as "unconvincing." *Guadalupe v. Attorney Gen.*

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[1] Elsewhere, the government has admitted that it has committed this error in "the vast majority" of immigration cases "over the past 15 years." Government's Petition for Rehearing, *Guadalupe v. Attorney Gen. U.S.*, No. 19-2239, Docket No. 70 (3d Cir. April 9, 2020), at 15.

U.S., 951 F.3d 161, 166 (3d Cir. 2020). The Tenth Circuit deepened the divide when it concluded that the Fifth Circuit and the Sixth Circuit's analysis "disregards the entirety" of the statutory text. *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1183 (10th Cir. 2020).

This entrenched split jeopardizes the constitution's promise of a "uniform" rule of naturalization, U.S. Const. art. I, § 8, cl. 4, just as it makes it impossible for the country's immigration laws to function as "a comprehensive and unified system," *see Arizona v. United States*, 567 U.S. 387, 401 (2012). Immigration cases like Mr. Garcia-Romo's now turn on accidents of geography: if Mr. Garcia-Romo's immigration proceedings had taken place in Denver, he would be eligible to seek relief. But since those proceedings took place in Memphis, Mr. Garcia-Romo now faces a life in exile.

This case is an ideal vehicle to resolve the circuit split. As several courts have recognized, the question presented is a purely legal one. And here, this legal issue was dispositive: it is the sole reason that the agency denied Mr. Garcia-Romo the relief he requested.

As the government has admitted elsewhere, this issue holds "profound ramifications for thousands of immigration cases." Government's Petition for Rehearing, *Lopez v. Barr*, No. 15-72406, Docket No. 72 (9th Cir. Aug. 7, 2019), at 9. To put it bluntly, the erroneous interpretation of § 1229(a) will allow the government to separate thousands of families—even when family members with deep ties to this country would suffer "extreme and unusual hardship." *See* 8 U.S.C. § 1229b(b); *accord Barton v. Barr*, 140 S. Ct.

1442, 1454 (2020) ("Removal of a lawful permanent resident from the United States is a wrenching process, especially in light of the consequences for family members.").

To resolve the circuit split on this exceptionally important issue, the Court should grant the petition.

STATEMENT OF THE CASE

A. Statutory and regulatory framework.

Cancellation of removal and the "stop-time" rule. The Attorney General may cancel the removal of certain nonpermanent residents who can prove that they possess good moral character, that they lack certain criminal convictions, and that removal would cause exceptional hardship to immediate family members who are U.S. citizens or legal permanent residents. *See generally* 8 U.S.C. § 1229b(b)(1). To be eligible for this relief, the noncitizen must have been physically and continuously present in this country for at least ten years. *Id.* § 1229b(b)(1)(A).

Under the "stop-time" rule, the government can end a noncitizen's period of continuous residence by serving "a notice to appear under [8 U.S.C. § 1229(a)]." *Id.* § 1229b(d)(1).

Congress streamlines an older two-step notification system. Before 1996, Congress allowed the government to initiate removal proceedings in two steps. *See* 8 U.S.C. § 1252b (1995). Under that system, the government was required to first issue an "Order to Show Cause," *see id.* § 1252b(1), followed by a second document titled "Notice of Time and Place of Proceedings," *id.* § 1252b(2).

Congress repealed this law when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). 110 Stat. 3009–546. In the newer Act, Congress specified the "sole and exclusive procedure" for commencing removal proceedings. 8 U.S.C. § 1229a(a)(3). Under the new law, the government "shall" serve noncitizens with "a 'notice to appear'" that specifies ten categories of information, including the proceedings' time and place. *Id.* § 1229(a)(1)(A)–(G).

The agency subsequently issues regulations that conform to the older statutory regime. After Congress enacted IIRIRA, the relevant agency promulgated regulations to "implement[] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear." *See* Immigration and Naturalization Service and EOIR, Proposed Rules, Inspection and Expedited Removal of Aliens ("Proposed Rules"), 62 Fed. Reg. 444, 4891997 WL 1514 (Jan. 3, 1997).

For some reason, these regulations effectively conformed to the older, two-step system. One regulation diverges from the statute and allows the omission of the hearing's time and place in the notice to appear. 8 C.F.R. § 1003.15(b). Another regulation states that the government must provide this time-and-place information, but only "where practicable." *Id.* § 1003.18(b).

The agency originally justified this regulatory "practicability" exception by describing narrow circumstances, such as "power outages" or "computer crashes/downtime." Proposed Rules, 62 Fed. Reg. at 449. But the agency allowed the exception to swallow the rule, and the agency eventually invoked this ex-

ception in "almost 100 percent" of cases "over the last three years." *Pereira*, 138 S. Ct. at 2111. Thus, the agency effectively reverted to its earlier system of providing notice in "two or more documents." *Pereira v. Sessions*, 866 F.3d 1, 4 (1st Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2105 (2018).

This Court rejects the government's interpretation of the "stop-time" rule. In *Pereira*, the Court rejected an interpretation of § 1229(a) "that would 'confuse and confound' noncitizens … by authorizing the Government to serve notices that lack any information about the time and place of the removal proceedings." 138 S. Ct. at 2119. In the Court's view, any document that fails to meet the statute's "quintessential definitional language" is not a "notice to appear." *Id.* at 2116. And if a document is not a "notice to appear under section 1229(a)," the Court reasoned, that document "does not trigger the stop-time rule." *Id.* at 2114. The Court saw no need to "resort to *Chevron* deference" because "Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Id.* at 2113.

In a divided en banc decision, the Board of Immigration Appeals refuses to apply *Pereira* in a "literal sense." In *Matters of Mendoza-Hernandez & Capula-Cortes*, 27 I. & N. Dec. 520 (BIA 2019) (en banc), nine BIA members construed § 1229(a) in a way that permitted the government to provide notice in piecemeal fashion. Those members concluded that if *Pereira* were read in a "literal sense," it would compel a "different result." *Id.* at 529. But these members did not "elect that path"; instead, they decided the issue based on its broader notions of "fundamental fairness." *Id.* at 530.

Six BIA members dissented, warning: "Congress provided clear and unambiguous language identifying the event that triggers the 'stop-time' rule—that is, service by the DHS of a 'notice to appear' under [§ 1229(a)(1)] that specifies the time and place of the hearing." *Id.* at 538–39. The dissenters concluded that "[a] subsequent 'notice of hearing' generated by the Immigration Court is not a section 239(a)(1) 'notice to appear' and, therefore, does not trigger the 'stop-time' rule." *Id.*

B. Factual background and proceedings below.

Gilberto Garcia-Romo is a Mexican citizen[2] who entered the United States without authorization sometime in 2002. Pet. App. 29a. He is the father of four children, including two school-age children who are U.S. citizens. Pet. App. 30a. He works at a nursery, where he is a foreman; he is the sole breadwinner for his family. Pet. App. 30a. He fears that if he returned to his town of origin, his family would be placed in peril by "two cartels fighting over territory." Pet. App. 32a.

Two of Mr. Garcia-Romo's children have severe speech impediments, such that they "cannot speak in sentences." Pet. App. 31a. One of these children, currently a teenager, suffers from a head injury such that he speaks at a "two-year-old" level. Pet. App. 32a. These two children do not speak Spanish, and when they meet with Spanish-speakers, they rely on their younger sibling to translate for them. Pet. App. 31a. During his removal proceedings, Mr. Garcia-

[2] The Sixth Circuit erroneously referred to Mr. Garcia-Romo as a citizen of Guatemala. Pet. App. 4a.

Romo testified that "[i]f his family were to stay in the United States, they would not have the means to support themselves or a place to live." Pet. App. 32a.

In February 2012, the government served Mr. Garcia-Romo with a document titled "Notice to Appear" that ordered him to appear "on a date to be set at a time to be set." Pet. App. 4a. Mr. Garcia-Romo did not learn of the proceeding's date, time, and place until April 2012, when the government sent a second document titled "Notice of Hearing." Pet. App. 4a.

Mr. Garcia-Romo sought cancellation of removal, but the Immigration Judge concluded that the Notice of Hearing cut off his continuous residency, making him ineligible for relief. Pet. App. 4a. The BIA affirmed. Pet. App. 5a.

Mr. Garcia-Romo sought review in the Sixth Circuit, arguing that § 1229(a) "mandates service of a singular, compliant document" which contains "all of the information required by Section 1229(a)(1)(A) through (G)." Pet. App. 12a.

The panel disagreed. The panel construed the statutory phrase "*a* notice" to mean "*multiple* communications." Pet. App. 13a (emphasis added). The panel thus concluded that these two documents collectively triggered the stop-time rule, rendering Mr. Garcia-Romo ineligible for relief. Pet. App. 14a. The panel alternatively suggested that "[u]nder *Chevron*, we would defer to the BIA's statutory interpretation." Pet. App. at 21a–22a.

Mr. Garcia-Romo filed a petition for rehearing en banc, which was denied. Pet. App. 42a. In a later decision, several members of that same court confessed that the panel's decision below engaged in "scant tex-

tual analysis." *Dable v. Barr*, 794 F. App'x 490, 495 (6th Cir. 2019).

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals are divided on the question presented.

A. The Third Circuit and the Tenth Circuit reject the two-step notification system.

In *Guadalupe*, the Third Circuit concluded that *Pereira* established a "bright-line rule": if a putative notice to appear "fails to designate the specific time or place of the noncitizen's removal proceedings," then it is "not a 'notice to appear' under section 1229(a), and so does not trigger the stop-time rule." 951 F.3d at 164 (citing *Pereira*, 138 S. Ct. at 2113–14) (cleaned up). The court went on to conclude that any document that fails to meet § 1229(a)(1)'s definitional floor is "defective." *Id.* If the government wishes to fix this defect, the court reasoned, "the government cannot, in maybe four days or maybe four months, file a second – and possibly third – Notice with the missing information." *Id.*

The Third Circuit explained why adhering to § 1229(a)'s text also makes practical sense: it is "infinitely easier" for noncitizens to "keep track of" their case-related information when "all that information is contained in a single document." *Id.* at 164.

There, the government had argued that "§ 1229(a)(1) requires merely written notice rather than one written document," but the court rejected that argument as "inconsistent with the statutory language." *Id.* The government had also asked the court

to rely on the Dictionary Act, 1 U.S.C. § 1, but the court rejected this extrinsic aid due to the statutory text's "clarity." *Id.*

Like the Third Circuit, the Tenth Circuit has concluded that "the stop-time rule is triggered by one complete notice to appear rather than a combination of documents." *Banuelos-Galviz*, 953 F.3d at 1178. That court reasoned that "[t]he stop-time rule refers to 'a notice to appear,' using the singular article 'a.' This article ordinarily refers to one item, not two." *Id.* at 1181.

The Tenth Circuit rejected the notion that § 1229(a)'s reference to "a 'notice to appear'" was intended to refer to multiple documents. *Id.* Though "a singular article may refer to multiple items," this possibility is foreclosed by § 1229(a)'s text, as well as the "statutory context" behind that statue's enactment. *Id.* By comparing § 1229's single-document language to the language of its multi-document predecessor, the court recognized that Congress enacted § 1229(a) to "simplify removal proceedings" by repealing its predecessor and "replacing the two documents with a single notice to appear." *Id.* at 1182. This single document "had to include all of the information previously sprinkled throughout the order to show cause and the notice of hearing." *Id.* (citations omitted).

The court ultimately concluded that "Congress intended the singular article 'a' to refer to a *single document* satisfying all of the statutory requirements for a notice to appear." *Id.* at 1181–82 (emphasis added).

B. In contrast, the Sixth Circuit and the Fifth Circuit approve of the two-step notification system.

In the decision below, the Sixth Circuit recognized that "only 'a notice to appear' described in paragraph (1) of § 1229(a) will trigger the stop-time rule." Pet. App. 11a. The court went on to observe that § 1229(a) "sets forth the necessary categories of information that a noncitizen must receive in her or his 'written notice' in order for such notice to qualify as 'a notice to appear' under § 1229(a)(1)." Pet. App 11a–12a. Finally, the court admitted that the agency had not followed the statutory language: "There is no question that the document Garcia-Romo received … was not, standing alone, sufficient to qualify as 'a notice to appear' within the meaning of § 1229(a)(1) for purposes of triggering the stop-time." Pet. App. 12a.

In the Sixth Circuit's view, the only remaining question was whether the government could "meet its notice obligation" by sending Mr. Garcia-Romo a "second written communication" containing the "information that was missing in the first communication." *See* Pet. App. 12a.

The court never identified any statutory language that authorized the agency to take this step. Instead, the court interpreted the phrase "*a* 'notice to appear'" to mean "*multiple* communications." Pet. App. 13a. (emphasis added). The court cited no authority except for a 90-year-old book titled *English in the Law*

Courts: The Part That Articles, Prepositions, and Conjunctions Play in Legal Decisions. Pet. App. 14a.[3]

The Fifth Circuit also ruled for the government, albeit for different reasons. *See generally Yanez-Pena v. Barr*, 952 F.3d 239. While the Sixth Circuit had concluded that "the Dictionary Act is not relevant to the statutory interpretation issue we are deciding," Pet. App. 19a, the Fifth Circuit invoked the Dictionary Act for the proposition that "words importing the singular include and apply to several persons, parties, or things." *Id.* at 245, n.30 (citing *Pierre-Paul v. Barr*, 930 F.3d 684, 691 (5th Cir. 2019) (citing 1 U.S.C. § 1)). The Fifth Circuit never explained why any extrinsic aids were necessary in a case where "Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira*, 138 S. Ct. at 2113.

The Fifth Circuit also recognized that the Third Circuit had "rejected the two-step notification process," but then gave no reason why the Third Circuit's analysis was unsound. 952 F.3d at 245.

Finally, the Fifth Circuit stated that the "two-step process comports with relevant statutory lan-

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[3] Apparently, this book concludes that "there are thirteen methods used by law courts in making decisions involving articles, prepositions, and conjunctions." Book Review, *English in the Law Courts; the Part That Articles, Prepositions and Conjunctions Play in Legal Decisions*, 44 Harv. L. Rev. 497, 498 (1931). But the book does not explain when courts "will choose one of these methods, and when one of the other twelve." *Id.*

guage," *id.* at 245, but the court never identified the relevant statutory language.[4]

C. In a distinct but related context, the Seventh Circuit and the Eleventh Circuit have rejected the two-step notification system.

In *Ortiz-Santiago v. Barr*, the Seventh Circuit observed that "Congress defined a 'Notice to Appear' as a document containing a specific list of required information, including '[t]he time and place at which the proceedings will be held.'" 924 F.3d 956, 961 (7th Cir. 2019) (citing 8 U.S.C. § 1229(a)(1)(G)(i)). Accordingly, the Seventh Circuit held that § 1229(a) imposes a "requirement" that a notice include this information "*within its four corners*." *Id.* at 958 (emphasis added).

The Seventh Circuit also rejected the notion that the government "achieves substantial compliance with the statute when it uses the two-step process, first sending an incomplete Notice, and then filling in the blanks for time and place in a later Notice of Hearing." *Id.* at 962. That court concluded that this logic "tracked the dissenting opinion" in *Pereira* "rather than that of the majority." *Id.* Ultimately, the Seventh Circuit concluded that the government's attempt to provide notice in two separate documents "violated the Immigration and Nationality Act." *Id.*

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[4] Instead, the Fifth Circuit cited its earlier decision in *Pierre-Paul v. Barr*, which in turn cited this Court's decision in *United States v. Hayes*, 555 U.S. 415 (2009). And that is puzzling: in *Hayes*, the Court *rejected* the use of the Dictionary Act. *Id.* at 422, n.5. Moreover, *Hayes* pointed out that when Congress describes an item "in the singular," it suggests that Congress "intended to describe only one" of those items. *Id.*

at 961; *id.* at 962 ("Congress itself appears to have rejected the two-step approach when it passed [§ 1229].").

Similarly, the Eleventh Circuit concluded that the government's method of providing notice was "unquestionably deficient under the statute." *Perez-Sanchez v. United States Att'y Gen.*, 935 F.3d 1148, 1153 (11th Cir. 2019). That court went on to conclude that *Pereira* "foreclosed" the notion that "an NTA [notice to appear] under section 1229(a) is not deficient so long as a subsequent notice of hearing is later sent." *Id.*

To be sure, the Seventh Circuit and the Eleventh Circuit construed § 1229(a) in a different but related context. Those cases did not specifically involve challenges involving the stop-time rule—rather, those cases involved challenges to the agency's jurisdiction. Nevertheless, these courts' construction of § 1229(a) cannot be squared with the construction of § 1229(a) that prevailed below.

II. The decision below is incorrect.

A. Neither the BIA nor the Sixth Circuit had any power to write a loophole into § 1229's text.

"When Congress provides exceptions in a statute, it does not follow that courts have authority to create others." *United States v. Johnson*, 529 U.S. 53, 58 (2000).

In Mendoza-Hernandez, the BIA held that the agency was required to comply with § 1229(a)—but only when the agency found it "practicable." 27 I. & N. Dec. at 532 (citation omitted). The Sixth Circuit

agreed, even though there is no "practicability" exception in § 1229(a)'s plain text.

Of course, Congress could have inserted a "practicability" exception in § 1229(a)'s text if it wanted to. Congress certainly knew how—after all, it repeatedly did so elsewhere in the same statute. For example, though a notice to appear must ordinarily be served in person, service by mail is permitted "if personal service is not practicable." 8 U.S.C. § 1229(a)(1). And if the government wishes to change the proceeding's time or place, the noncitizen must be personally served with that information unless "personal service is not practicable." *Id.* § 1229(a)(2).

The Sixth Circuit should have recognized this language as fatal to the government's argument, as courts must "generally presum[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (citation omitted).

B. The panel resurrected a statute that Congress repealed.

Any doubts about § 1229(a)'s meaning can be laid to rest by comparing the statute to its predecessor. Before 1996, Congress required the government to initiate removal proceedings in two steps. But Congress specifically repealed the older law and replaced it with § 1229(a)'s streamlined, one-step notification system. Put simply, Congress "rejected the two-step approach when it passed IIRIRA." *Ortiz-Santiago*, 924 F.3d at 962; *accord Banuelos-Galviz*, 953 F.3d at 1182 ("To simplify removal proceedings, Congress

adopted § 1229(a), replacing the two documents with a single notice to appear.").

Though the new statute "differed markedly from its predecessor," the Sixth Circuit "acted as though the amendment … had not taken place." *See Ross v. Blake*, 136 S. Ct. 1850, 1853 (2016). Of course, the court had no power to "resurrect" the older statute from its legislative graveyard. *Id.*

C. The Sixth Circuit's decision conflicts with this Court's decision in *Pereira v. Sessions*.

Pereira definitively construed § 1229(a)'s meaning: "based on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, 'specif[ies]' the 'time and place' of the removal proceedings." 138 S. Ct. at 2114.

Several aspects of the Court's opinion suggest the government cannot replace § 1229(a)'s reference to "a 'notice to appear'" with some undefined combination of documents. For example, the sole dissenter theorized that § 1229(a)(1)'s language does not mandate a particular form of notice. 138 S. Ct. at 2126. Instead, the dissenter reasoned that the statutory language simply lists the information that "makes a notice to appear *complete*." 138 S. Ct. at 2126 (emphasis in original). The majority rejected this view for the simple reason that "[t]he statutory text proves otherwise":

> Section 1229(a)(1) 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 specifies, *at a minimum*, the time and place of the removal proceedings.

Id. at 2116 (cleaned up, emphasis added).

Put simply, *Pereira* refused to view § 1229(a)(1) as a diffuse obligation to provide notice in whatever manner the government deems expedient. Rather, the Court saw § 1229(a)(1) as employing "quintessential definitional language." *Id.* at 2116. And if a document fails to meet § 1229(a)'s definitional floor, the Court held, that document does not qualify as a "Notice to Appear" that triggers the stop-time rule. *Id.* at 2114.

Other aspects of the Court's opinion bolster the notion that § 1229(a)(1) requires the government to provide notice in one step. For example, the Solicitor General had insisted that "administrative realities" made it impossible to issue a Notice to Appear that also contained the hearing date. *Id.* at 2119. But the Court rebuffed that argument: "Given today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings *before* sending notices to appear." *Id.* (emphasis added). The Solicitor General had also claimed that delivering notice in a single document would hobble the government's ability to adjust the hearing date later. *See id.* Again, the Court disagreed: "Nothing in our decision today inhibits the Government's ability to [alter the hearing date] *after* it has served a notice to appear specifying the time and place of the removal proceedings." *Id.* at 2119 (emphasis added). Indeed, the Court held that the statute "*presumes*" that the government will serve "*a* 'notice to appear' that specifie[s] a time and

place as required by § 1229(a)(1)(G)(i)." *Id.* at 2114 (emphasis added).

Importantly, these passages assume the government will *first* compile all of the relevant information, *then* provide that information to the noncitizen. None of these portions of the Court's opinion would make sense if the government could simply deliver that information piecemeal. Accordingly, the Sixth Circuit erred when it concluded that there was "[n]othing in *Pereira*" to suggest that the government must issue notice in a single step. Pet. App. 17a.

D. The Sixth Circuit's analysis flouts the statutory text.

As several members of the Sixth Circuit subsequently recognized, the decision below engaged in "scant textual analysis." *Dable*, 794 F. App'x at 495 n.6. For example, the panel homed in on § 1229b(d)(1)'s reference to "*a* notice to appear." Pet. App. 13a (emphasis added). It then spent hundreds of words developing an exegesis on "the plain and ordinary meaning of the word 'a.'" Pet. App. 13a–14a, 19a. The panel then concluded that the statutory phrase "*a* notice" actually means "*multiple* communications." Pet. App. 13a (emphasis added).

The court's blinkered focus on a single letter of the alphabet was erroneous because "when interpreting a statute, a particular word or phrase should not be examined in isolation." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132–33 (2000). Had the panel viewed the statutory scheme as a whole, it would have reached the opposite conclusion.

From there, the court abandoned any effort to construe the statutory text. Instead, it relied on a

number of imaginative hypotheticals. For example, the panel reasoned that if an author "submits her writing piecemeal as it is drafted," then "most people would say" she had submitted a book. Pet. App. 13a.

This analogy contains four flaws. **First**, legal documents often require a high degree of formality because they affect individuals' substantive rights. That's why contracts are reduced to writing, wills are attested, and lawsuits must be served on the other party.[5] These formalities reduce the risk that individual rights are destroyed inadvertently or without notice.

Here, a notice to appear informs the recipient that they face one of the most "drastic measure[s]" in our legal system: lifelong "banishment or exile." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (citations omitted). Accordingly, fair notice is not just sound practice—it is a constitutional mandate. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597–98 (1953). That is why in *Pereira*, a former BIA chairman warned that ignoring § 1229(a)'s notice provisions could generate serious "due process ... concerns." Amicus Brief of Paul Wickham Schmidt, *Pereira v. Sessions*, 2018 WL 1156645, at *5 (U.S. Feb. 28, 2018). The same could not be said of a publisher's informal expectations regarding an author's tardy submission.

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[5] To give a straightforward legal twist on the panel's hypothetical: if we submitted this petition "piecemeal" over the course of a year or two, this Court would almost certainly reject our efforts as improper and untimely.

Second, hypothetical cases involving consumer products (as opposed to legal instruments) fail to shine much light on this issue because Congress rarely provides a definition of the relevant item. Thus, these hypotheticals founder on unanswerable questions like "Is a Chevy with three wheels still a Chevy?" *Compare Pereira*, 138 S. Ct. at 2126 (Alito, J., dissenting) (yes), *with id.* at 138 S. Ct. at 2116 (majority opinion of Sotomayor, J.) (irrelevant). "Is a book published in installments still a book?" *Compare* Pet. App. 13a (yes), *with Banuelos-Galviz*, 953 F.3d at 1181 ("Consider a purchaser ordering a book from Amazon. The purchaser would surely be surprised to receive individual chapters in the mail."). Or as the question was memorably framed in the First Circuit, "Is clam chowder without clams and potatoes still clam chowder?" *See* Oral Argument in *Da Silveira v. Barr*, No. 19-1546 (1st Cir.), at minute 3:00, *available at* https://www.courtlistener.com/audio/67189/da-silveira-v-barr (last visited May 18, 2020).

Of course, Congress has never provided a statutory definition of a Chevy, a book, or a bowl of clam chowder. In contrast, Congress *has* provided a statutory definition for a notice to appear. Thus, the Sixth Circuit didn't need to resort to hypotheticals. Instead, the court should have measured the government's actions against the statutory text. And this comparison can lead to only one conclusion: the government "violated the Immigration and Nationality Act." *Ortiz-Santiago*, 924 F.3d at 961.

Third, the Sixth Circuit's analogy permits absurd results: Section 1229(a) requires the government to furnish noncitizens with ten different pieces of in-

formation. *See* 8 U.S.C. § 1229(a)(1)(A)–(G)(ii). In the Sixth Circuit's view, the government could dribble out this information to noncitizens in ten different installments, and the noncitizen would be held responsible for the chaotic paper chase that would inevitably ensue.

Fourth, "[w]hen a statute includes an explicit definition" of a term, courts "must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). In § 1229(a), Congress used "quintessential definitional language" to prescribe the requisite form of notice. 138 S. Ct. at 2116. Accordingly, the Sixth Circuit had no license to decide this issue based on what it believed "[m]ost people would say" would be the right result. Pet. App. at 13a.

E. Since § 1229(a) is "clear and unambiguous," the Court need not resort to *Chevron* deference.

Below, the Sixth Circuit alternatively suggested that "[u]nder *Chevron*, we would defer to the BIA's statutory interpretation." Pet. App. 21a–22a. But that is exactly what the Court refused to do in *Pereira*. There, the Court construed the exact same statutory language and held that there was no need to "resort to *Chevron* deference" because "Congress has supplied a clear and unambiguous answer to the interpretive question at hand." 138 S. Ct. at 2113; *accord Guadalupe*, 951 F.3d at 165 & n.19 (concluding that *Chevron* deference is "inapplicable"); *Banuelos-Galviz*, 953 F.3d at 1180 (refusing to defer under *Chevron* because "Congress has directly spoken on the issue through unambiguous language in the pertinent statutes").

F. The decision below will encourage bureaucratic errors, confusion, and delay.

Congress had good reasons to discard the older statute and its cumbersome two-step notification procedure. The older system deprived noncitizens of critical information, often for years. *E.g.*, *Ba*, 561 F.3d at 605 (government sent second document "[m]ore than two years after" the first document issued); *Orozco-Velasquez v. Attorney Gen. U.S.*, 817 F.3d 78, 79 (3d Cir. 2016) (delay of "almost two years"); *Matter of Camarillo,* 25 I & N Dec. 644 (BIA 2011) (delay of two years and two months).

Moreover, the two-step notification spawned bureaucratic mistakes. Indeed, this inefficient procedure has led the Executive Branch to try and deport countless individuals due to nothing more than a bureaucrat's typo. *E.g.*, *Matter of Phung*, 2018 WL 4692861, at *2 (BIA Aug. 21, 2018) (unpublished) (government erroneously mailed the second document to "suite #14" instead of "suite 148"); *Matter of Cabreja-Arias*, 2013 WL 4925062, at *1 (BIA Sept. 5, 2013) (unpublished) (government erroneously mailed the second document to zip code as "78523," rather than "78237"); *Matter of Khalaf*, 2007 WL 1724845, at *1 (BIA Mar. 23, 2007) (unpublished) (government erroneously mailed the second document to "105 Main Street" instead of "1050 Main Street").

There is no practical reason why the government must deliver notice piecemeal: once the government "has gathered" all the relevant information, "a valid NTA can easily be sent later which contains all the required information in one document." *Guadalupe*, 951 F.3d at 165.

III. This case is an excellent vehicle to resolve the confusion below.

This issue presents a purely legal question of statutory interpretation that does not meaningfully vary from case to case. *Banuelos-Galviz*, 953 F.3d at 1179 ("The issue here involves a pure matter of law."); *Guadalupe*, 951 F.3d at 164 ("The question here is a legal one."). Mr. Garcia-Romo raised this issue in his merits briefs, and the Sixth Circuit squarely addressed the issue in a published decision. Moreover, the court's interpretation of the stop-time rule was outcome-determinative: it was the only reason why Mr. Garcia-Romo was deemed ineligible for cancellation of removal.

IV. This recurring issue is exceptionally important.

A. The government has conceded that this issue will affect thousands of cases.

Below, the government conceded that this issue is "exceptionally important." Government's Opposition to Petition for Rehearing En Banc, *Garcia-Romo v. Barr*, No. 18-3857, Docket No. 42 (6th Cir. Jan. 3, 2020) at 8. And as the government has admitted elsewhere, this issue has "significant ramifications for thousands of cases." Government's Petition for Rehearing, *Lopez v. Barr*, No. 15-72406, Docket No. 72 (9th Cir. Aug. 7, 2019), at 9.

This issue "affects the vast majority of aliens placed into removal proceedings over the past 15 years," as the government has observed, because their notices to appear "generally omitted 'time and place' information." Government's Petition for Re-

hearing, *Guadalupe v. Attorney Gen. U.S.*, No. 19-2239, Docket No. 70 (3d Cir. April 9, 2020), at 15. And because this issue often arises in the context of a motion to reopen, it also "has the potential to affect closed cases." *Id.*

This issue recurs with startling frequency. In the Sixth Circuit alone, the decision below has proven dispositive in no less than ten cases. *Ying Zheng v. Barr*, 799 F. App'x 914 (6th Cir. 2020) (6th Cir. Apr. 10, 2020) (describing the "many cases" involving this issue); *Aristondo-Lemus v. Barr*, No. 19-3429, 2020 WL 1244921 (6th Cir. Mar. 16, 2020); *Ramirez-Guzman v. Barr*, No. 19-3289, 2020 WL 1230808 (6th Cir. Mar. 13, 2020); *Cheat v. Barr*, 799 F. App'x 367 (6th Cir. 2020); *Castro v. Barr*, 795 F. App'x 446 (6th Cir. 2020); *Jian Chen v. Barr*, 791 F. App'x 597 (6th Cir. 2020); *Murcia-Pinto v. Barr*, 794 F. App'x 516 (6th Cir. 2020); *Luquin-Coronel v. Barr*, 796 F. App'x 284, 286 (6th Cir. 2020); *Khaytekov v. Barr*, 794 F. App'x 497 (6th Cir. 2019); *Niz-Chavez v. Barr*, 789 F. App'x 523 (6th Cir. 2019).

B. The decision below offends the constitutional separation of powers.

Ultimately, this case presents a classic separation-of-powers question: when an executive agency disagrees with a Congressional statute, can the agency replace that statute with a different set of rules that the agency deems more "practicable"?

The answer is no. The Executive's power to execute the laws "does not include a power to revise clear statutory terms that turn out not to work in practice." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) (citing *Barnhart v. Sigmon Coal*

Co., 534 U.S. 438, 462 (2002) (agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute")).

As a rival branch of government, the Executive will often differ with the Legislature's preferred way of achieving certain policy goals. The Executive may "want[] to address pressing policy concerns quickly, before the sometimes glacial congressional machinery can be stirred to action." *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting). But even if an Executive agency finds the mechanics of lawmaking to be "cumbersome and frustrating," *see id.*, it may not ignore Congressional limits on the agency's power. The Court has "shudder[ed] to contemplate the effect that such a principle would have on democratic governance." *Utility Air Regulatory Group*, 573 U.S. at 328 n.8.

Here, the agency ignored § 1229's text and instead devised a rule that it deemed more "practicable." If this Court were to stand by and permit the DHS to exercise "extraconstitutional government," it might be a short-term victory for the bureaucratic ease of administration. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (citation omitted). But in the long term, the resulting erosion of democratic self-rule would be "far worse." *Id.* (citation omitted).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 4, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-3857

GILBERTO GARCIA-ROMO,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition for Review from the Board
of Immigration Appeals
No. A 205 151 390.

August 7, 2019, Argued
October 4, 2019, Decided
October 4, 2019, Filed

Before: ROGERS, BUSH, and LARSEN,
Circuit Judges.

Appendix A

OPINION

JOHN K. BUSH, Circuit Judge. This case presents the following central question: may "a notice to appear" for a removal proceeding under 8 U.S.C. §§ 1229(a), 1229b(d)(1) be served upon a noncitizen[1] through service of more than one written communication and still constitute such "notice" if those multiple installments collectively give the noncitizen all of the information required to be provided by § 1229(a)(1)(A)-(G)? Petitioner, Gilberto Garcia-Romo, a noncitizen, says no. He argues that "a notice to appear" means that all of the information required by § 1229(a)(1)(A)-(G) must be provided in a single document served upon him in order for such "notice" to be effectuated. As discussed below, we disagree, and for that principal reason we deny Garcia-Romo's petition for review of a final order of his removal from this country as affirmed by the Board of Immigration Appeals ("BIA" or "Board").

Before addressing the "notice to appear" issue, however, we should explain how this issue arises here. Garcia-Romo filed an application with the Immigration Court to cancel his removal order, seeking a form of discretionary relief that the Attorney General may grant to noncitizens to allow them to remain in the United States if they meet certain eligibility requirements under 8 U.S.C. § 1229b(b)(1). One of those requirements is that the alien "has been physically present in the United

1. Consistent with the Supreme Court, we use the term "noncitizen" in this opinion "to refer to any person who is not a citizen or national of the United States." *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 n.1, 201 L. Ed. 2d 433 (2018) (citing 8 U.S.C. § 1101(a)(3)).

States for a continuous period of not less than 10 years immediately preceding the date of such application." *Id.* § 1229b(b)(1)(A). Under the "stop-time" rule set forth in § 1229b(d)(1), the accrual period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." A "notice to appear," as defined and referred to in § 1229(a)(1), specifies that the noncitizen be provided with written notice of several different categories of information, described in subsections (A)-(G) of that statutory provision. One of those categories is "[t]he time and place at which the [removal] proceedings will be held." *Id.* § 1229(a)(1)(G).

Garcia-Romo received a document entitled "Notice to Appear" from the Department of Homeland Security ("DHS") that contained all of the required information under § 1229(a)(1)(A)-(G) except for the time and date of the removal proceedings. The Immigration Court later sent Garcia-Romo a document entitled "Notice of Hearing in Removal Proceedings," which provided the required time-and-date information. Thus, there is no dispute that, through the two referenced written communications, Garcia-Romo received all of the categories of information required to be served by § 1229(a)(1)(A)-(G). Nonetheless, relying on *Pereira v. Sessions*, 138 S. Ct. 2105, 201 L. Ed. 2d 433 (2018), Garcia-Romo argues that the stop-time rule was never triggered in his removal proceedings because he never received a single document that contained all requisite categories.

For the reasons explained below, in light of the ordinary meaning of the relevant statutory text, the stop-

time rule is triggered when a noncitizen has received all of the required categories of information of § 1229(a)(1)(A)-(G) whether sent through a single written communication or in multiple written installments. Even if the statutory text were ambiguous, we would be required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) to defer to the BIA's interpretation of the statute, which accords with ours. We therefore **DENY** Garcia-Romo's petition for review.

I.

Garcia-Romo is a native and citizen of Guatemala who entered the United States without the government's authorization sometime in 2002. On February 29, 2012, DHS served Garcia-Romo with a document entitled "Notice to Appear." A.R. at 794-95. The document indicated that Garcia-Romo was charged as subject to removal under 8 U.S.C. § 1182(a)(6)(A)(i) and ordered him to appear "on a date to be set at a time to be set" to show why he should not be removed from the United States. A.R. at 794. Approximately two months later, on April 30, 2012, Garcia-Romo received another document entitled "Notice of Hearing in Removal Proceedings," indicating that his removal proceedings were scheduled on December 19, 2012, at 9:00 a.m. A.R. at 793.

During the December proceedings, Garcia-Romo, appearing with counsel, indicated that he would apply for cancellation of removal and also conceded his charges of removability. A little over two years later, on February 25, 2014, Garcia-Romo timely filed his "Application for

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents," arguing that he was eligible for relief under 8 U.S.C. § 1229b(b). After a hearing, the immigration judge denied Garcia-Romo's application for cancellation of removal. The immigration judge reasoned that Garcia-Romo failed prove that he had been continuously present in the United States for the ten years preceding the service of his February 29, 2012 "Notice to Appear." To support this conclusion, the immigration judge pointed to evidence in the administrative record showing that Garcia-Romo "was arrested by immigration officials on April 25, 2005 and was voluntarily removed to Mexico." A.R. at 63.

Garcia-Romo appealed the immigration judge's order, and on August 17, 2018, the BIA dismissed the appeal. The BIA concluded that Garcia-Romo's "accrual of continuous physical presence for cancellation purposes was terminated by the February 29, 2012, service of the Notice to Appear . . . in combination with the subsequent Notice of Hearing dated April 30, 2012, informing the respondent of the date, time and place of his hearing." A.R. at 3 (citing 8 U.S.C. § 1229b(d)(1); *Pereira v. Sessions*, 138 S. Ct. 2105, 201 L. Ed. 2d 433 (2018)). Thus, Garcia-Romo "needed to demonstrate that he was continuously physically present in the United States for 10 years prior to the receipt of his April 30, 2012 Notice of Hearing." The BIA held that Garcia-Romo failed to make this showing, because of the evidence showing that Garcia-Romo was apprehended and returned to Mexico in April 2005. Accordingly, the BIA dismissed the appeal.

This timely petition followed.

II.

"Where the BIA reviews the immigration judge's decision and issues a separate opinion, rather than summarily affirming the immigration judge's decision, we review the BIA's decision as the final agency determination." *Khalili v. Holder*, 557 F.3d 429, 435 (6th Cir. 2009) (citation omitted). "To the extent the BIA adopted the immigration judge's reasoning, however, [we] also review[] the immigration judge's decision." *Id.* (citation omitted). We review questions of law de novo, "but substantial deference is given to the BIA's interpretation of the [Immigration and Nationality Act] and accompanying regulations." *Id.* (citing *Morgan v. Keisler*, 507 F.3d 1053, 1057 (6th Cir. 2007)). The immigration judge's and the Board's factual findings, by contrast, are reviewed under the substantial-evidence standard. *Ben Hamida v. Gonzales*, 478 F.3d 734, 736 (6th Cir. 2007). Thus, the immigration judge's and the Board's factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

Before we turn to the crux of this case, we must address the government's assertion that we lack jurisdiction because Garcia-Romo did not exhaust his administrative remedies. As the government sees it, Garcia-Romo failed to exhaust his administration remedies because he "did not include in his appeal to the Board any argument regarding the sufficiency of the [notice to appear] or subsequent notice of hearing and whether the service of those documents effectively triggered the stop-time rule for cancellation of removal." Resp't Br. at 7.

Appendix A

Under the Immigration and Nationality Act, this court has jurisdiction to review "constitutional claims or questions of law" presented in a timely petition for review. 8 U.S.C. § 1252(a)(2)(D). However, as required by the statute, a court of appeals "may review a final order of removal only if," in addition to one other requirement not relevant here, "the alien has exhausted all administrative remedies to the alien as of right." *Id.* § 1252(d)(1); *see also Suassuna v. INS*, 342 F.3d 578, 583 (6th Cir. 2003) ("The statute governing [the courts of appeals' jurisdiction] to review an order of deportation requires the exhaustion of administrative remedies."). "The purpose of section 1252(d)(1)'s exhaustion requirement is (1) to ensure that the agency responsible for constructing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims; (2) to avoid premature interference with the agency's processes; and (3) to allow the BIA to compile a record which is adequate for judicial review." *Bi Xia Qu v. Holder*, 618 F.3d 602, 609 (6th Cir. 2010) (alteration omitted) (quoting *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004)).

As a general rule the exhaustion requirement requires that the petitioner press all reviewable issues to the BIA and each issue "must be reasonably developed in the petitioner's brief to the BIA." *Khalili*, 557 F.3d at 432-33 (citing *Sterkaj v. Gonzales*, 439 F.3d 273, 279 (6th Cir. 2006); *Hasan v. Ashcroft*, 397 F.3d 417, 420 (6th Cir. 2005)). However, when the Board sua sponte decides an issue not formally presented to it in the party's briefing or in the party's Notice of Appeal, "the BIA's action waives that issue's exhaustion requirements." *Khalili*, 557 F.3d at 435.

Appendix A

In its opinion below, the BIA concluded that "accrual of continuous physical presence for cancellation purposes was terminated by the February 29, 2012, service of the Notice to Appear (NTA) . . . in combination with the subsequent Notice of Hearing dated April 30, 2012, informing the respondent of the date, time and place of his hearing." A.R. at 3 (citing 8 U.S.C. § 1229a(d)(1); *Pereira v. Sessions*, 138 S. Ct. 2105, 201 L. Ed. 2d 433 (2018)). The Board reached this conclusion without invitation or argument from Garcia-Romo or the government. True, as the government noted at oral argument, the BIA summarily concluded without reasoned analysis that the stop-time rule was triggered after the service of the Notice of Hearing dated April 30, 2012. Oral Arg. at 14:12-32. But that does not mean that the BIA did not raise the issue sua sponte. Indeed, if the Board did not wish to address the issue of whether the ten-year continuous presence requirement was satisfied, it could have considered the issue forfeited and dismissed the appeal because of Garcia-Romo's failure to brief when the accrual period ended. *See* 8 C.F.R. § 1003.1(d)(2)(i). Instead, the BIA decided that the "Notice to Appear" (which omitted time-and-date information) and the subsequent "Notice of Hearing in Removal Proceedings" (which included the previously omitted time-and-date information) triggered the stop-time rule in this case and that substantial evidence in the record supported the immigration judge's conclusion that Garcia-Romo did not satisfy the continuous presence requirement under 8 U.S.C. § 1229b(b)(1)(A).

Thus, when the BIA concluded that the stop-time rule was triggered in this case, Garcia-Romo was entitled to

challenge this aspect of the BIA's decision in a petition for review in this court. The BIA's determination that the "Notice of Hearing in Removal Proceedings," dated April 30, 2012, triggered the stop-time rule must be based on a permissible reading of the statute. And if the BIA erred in reaching this sua sponte conclusion, the exhaustion requirement under 8 U.S.C. § 1252(d)(1) does not bar Garcia-Romo from raising this issue in a petition for review in this court. Accordingly, we have jurisdiction to reach the merits of Garcia-Romo's sole issue in this petition.

III.

As indicated above, the issue before us is whether the government is required to satisfy the requirements of 8 U.S.C. § 1229(a)(1)(A)-(G) in a single document, rather than in multiple installments, in order to serve "a notice to appear" as used in § 1229b(d)(1) and thus trigger the stop-time rule in that latter statutory provision.

We consider this legal question of statutory interpretation de novo. *See United States v. Kassouf*, 144 F.3d 952, 955 (6th Cir. 1998). We start with the text of the relevant provisions—here, 8 U.S.C. §§ 1229(a)(1), 1229b(d)(1)—"giving the words used their ordinary meaning," *Artis v. District of Columbia*, 138 S. Ct. 594, 603, 199 L. Ed. 2d 473 (2018) (citation and internal quotation marks omitted), based on usage at the time of the statute's enactment, *see, e.g., New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citations omitted); *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070, 201 L. Ed. 2d 490

(2018). The words are to "be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989) (citation omitted); *see also Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) ("Plain meaning is examined by looking at the language and design of the statute as a whole." (citation omitted)).

Under this statutory scheme, Congress has given the Attorney General the discretion to cancel the removal or adjust the status of certain nonpermanent residents. 8 U.S.C. § 1229b(b). A nonpermanent resident who applies to cancel her or his removal order must show, among other requirements,[2] that she or he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application." 8 U.S.C. § 1229b(b)(1)(A). Although § 1229b(b)(1)(A) establishes that the ten-year period is measured by the "date of such application," Congress also established a separate stop-time rule that measures the ten-year period based on different intervening events. *Id.* § 1229b(d)(1). Relevant here is the provision under § 1229b(d)(1), which states that "any period of continuous residence or continuous physical presence in the United

2. The noncitizen also must demonstrate that she or he has been a person of good moral character during the ten-year period and has not been convicted of an offense listed under the statute, and must establish that removal would result in exceptional and extremely unusual hardship to the noncitizen's spouse, parent, or child who is a citizen of the United States or a noncitizen who is a lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(B)-(D).

States shall be deemed to end . . . when the [noncitizen] is served a notice to appear under section 1229(a) of this title." § 1229b(d)(1).[3]

The text clearly indicates that the noncitizen must receive "a notice to appear under 1229(a)" to trigger the stop-time rule. Based upon the cross-reference to § 1229a and express reference to "a notice to appear" in § 1229b(d)(1), only "a notice to appear" described in paragraph (1) of § 1229a will trigger the stop-time rule. *Accord Pereira*, 138 S. Ct. at 2114 ("It is true . . . that the stop-time rule makes broad reference to the notice to appear under 'section 1229(a),' which includes paragraph (1) as well as paragraphs (2) and (3). But the broad reference to § 1229(a) is of no consequence, because . . . only paragraph (1) bears on the meaning of 'notice to appear.'" (internal citations omitted)).

Section 1229(a)(1), in turn, describes "a notice to appear" and states, "[i]n removal proceedings under section 1229a of this title, written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien . . . specifying" the required categories of information listed in subsections (A) through (G). As explained in *Pereira*, this is "quintessential definitional language." 138 S. Ct. at 2116. In other words, the statute sets forth the necessary categories of information that a noncitizen must receive in her or his "written notice" in

3. The statute indicates that the stop-time rule also may be triggered when a noncitizen commits an offense referred to in § 1182(a)(2) that in turn renders her or him removable or inadmissible. 8 U.S.C. § 1229b(d)(1)(B).

order for such notice to qualify as "a notice to appear" under § 1229(a)(1). This, of course, requires that the noncitizen be given notice of all of the categories in § 1229(a)(1)(A)-(G), including "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i).

There is no question that the document Garcia-Romo received bearing the title "Notice to Appear"—which lacked the requisite time-and-date information, but otherwise contained all the other required information under § 1229(a)(1)—was not, standing alone, sufficient to qualify as "a notice to appear" within the meaning of § 1229(a)(1) for purposes of triggering the stop-time rule. *Pereira*, 138 S. Ct. at 2114, 2116. But that does not answer the question of whether the government can meet its notice obligation under § 1229(a) by sending Garcia-Romo a second written communication, as it did through the "Notice of Hearing in Removal Proceedings," that provides him with the time-and-date information that was missing in the first communication.

Garcia-Romo argues that the statute precludes the government from "curing" its incomplete initial communication with a supplemental communication. To support his interpretation, Garcia-Romo focuses on the provision in § 1229b(d)(1) stating that service of "*a* notice to appear" triggers the stop-time rule. (emphasis added). This language, according to Garcia-Romo, "mandates service of *a* singular, compliant document" which contains "all of the information required by Section 1229(a)(1)(A) through (G)." Pet'r Br. at 12.

This interpretation of the statute lacks merit. It gives too cramped a reading to the meaning of the indefinite article "a" as understood in ordinary English. When the word "a" precedes a noun such as "notice," describing a written communication, the customary meaning does not necessarily require that the notice be given in a single document. Rather, there may be multiple communications that, when considered together, constitute "a notice."

Consider, for example, an editor who tells an author that if she sends him "a book" he will get it published. Suppose that, rather than send all chapters at once, the author submits her writing piecemeal as it is drafted. Once she has sent all of the chapters to her editor, has she sent "a book"? Most people would say yes. Maybe the editor expected that he would receive the book in one submission, but the multiple installments nonetheless constitutes "a book" as English is commonly used.

Or suppose a professor assigns each of her students to write "a paper." The professor explains that, for purposes of the assignment, the paper must contain an introduction, a body, and a conclusion. One student turns in a document with an introduction and a body but neglects to submit the conclusion. Once the student discovers that the conclusion is missing, he makes arrangements to get it to the professor. Has the student submitted "a paper" even though he made two submissions? Most would say he has. The student has submitted multiple written communications, that when combined, meet the professor's definition of "a paper" because they provide all of the information required by professor to be included

in the paper.

As these examples demonstrate, the use of the indefinite article "a" before a word that describes written communication does not necessarily mean that delivery of the message must be in one transmission. This principle reflects ordinary usage of the indefinite article "a" with respect to physical objects in general. For example, "[i]f a girl should say that she wanted a dress made from *a piece* of red satin, she would not signify that all the material required would have to be in one piece. The goods might be in several lengths, each length used for a particular part of the dress." Margaret M. Bryant, *English in the Law Courts: The Part That Articles, Prepositions, and Conjunctions Play in Legal Decisions* 40-41 (1962) (emphasis added).

Similarly, here, written communications to a noncitizen in multiple components or installments may collectively provide all the information necessary to constitute "a notice to appear" under 8 U.S.C. § 1229b(d). Thus, the government triggers the stop-time rule when it sends a noncitizen all the required categories of information under § 1229(a)(1)(A)-(G) through one or multiple written communications.

IV.

Contrary to what Garcia-Romo argues, the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105, 201 L. Ed. 2d 433 (2018) does not compel a different interpretation than the ordinary meaning applied above. The *Pereira* Court answered the following "narrow

question": "If the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule?" 138 S. Ct. at 2110. In that case, the noncitizen (Pereira) received a document entitled "Notice to Appear" that met all the requirements of § 1229(a)(1) with the exception that it failed to list the time and date when the proceedings would be held. *See id.* at 2113. That document was personally served on Pereira on May 31, 2006. *Id.* at 2112. The immigration court then mailed Pereira "a more specific notice setting the date and time for his initial removal hearing for October 31, 2007, at 9:30 a.m." *Id.* "But that second notice was sent to Pereira's street address rather than his post office box (which he had provided to DHS), so it was returned as undeliverable." *Id.* "In 2013, after Pereira had been in the country for more than 10 years," he was arrested for a "minor motor vehicle violation" and subsequently entered removal proceedings. *Id.* The BIA and the First Circuit agreed that the stop-time rule was triggered in 2006 by the notice he received in person. *See id.* at 2112.

But the Supreme Court disagreed. Because the Court concluded that the 2006 document did not trigger the stop-time rule, Pereira satisfied the ten-year continuous presence requirement in § 1229b(b)(1). *See id.* at 2112. In reaching this conclusion, the Court had no occasion to determine whether the government would be able to supplement the initial written communication lacking all the required disclosures of § 1229(a)(1) through a subsequent document providing the missing information to trigger the

stop-time rule because the government never successfully served Pereira with a supplemental communication that included the time-and-date information. Thus, the *Pereira* holding does not control the outcome of this case.

Garcia-Romo nonetheless contends that "the Supreme Court made clear that the Government may not cobble together a notice to appear through several separate documents which serve to 'complete' the original, defective notice to appear." Pet'r Br. at. 13. *Pereira* does not say this. To understand why, consider the dialogue between the dissenting and majority Supreme Court opinions in that case.

Justice Alito, writing as the sole dissenter in *Pereira*, concluded that "§ 1229(a)(1)'s language can be understood to define what makes a notice to appear *complete*," and "[u]nder that interpretation a notice that omits some of the information required by § 1229(a)(1) might still be a 'notice to appear.'" *Id.* at 2126 (Alito, J., dissenting). To support his point, Justice Alito invoke the colorful illustration involving a three-wheeled car: "In everyday life, a person who sees an old Chevy with three wheels in a junkyard would still call it a car." *Id.*

The *Pereira* majority rejected this interpretation. In rebuttal, the *Pereira* majority explained that section 1229(a)(1) "defines a 'notice to appear' as a 'written notice' that 'specif[ies],' at a minimum, the time and place of the removal proceedings." *Id.* at 2116 (alteration in original) (quoting 8 U.S.C. § 1229(a)(1)(G)(i)). Thus, it could not be that a "defective notice to appear is still a 'notice to

appear' even if it is incomplete—much like a three-wheeled Chevy is still a car." *Id.* Accordingly, the *Pereira* majority rejected only the premise that "a notice to appear" can come into fruition before the government delivers all the required information in § 1229(a)(1)(A)-(G) to the noncitizen. In other words, if a car were defined to require four wheels, the three-wheeled Chevy only becomes a car after a fourth tire has been installed. Nothing in *Pereira* majority's reasoning suggests that the government may not supplement the first incomplete communication with an additional communication so that the noncitizen receives all the required information in § 1229(a)(1)(A)-(G). In the spirit of keeping with the three-wheeled Chevy analogy, nothing prevents the government from adding a fourth tire so that the three-wheeled Chevy can finally be a car that is defined to have four wheels.

Thus, we are not persuaded by Garcia-Romo that *Pereira* compels interpreting the statute in his favor. In fact, our holding is entirely consistent with *Pereira*.

V.

Also unpersuasive is the Ninth Circuit's reasoning in *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019), which adopted the statutory interpretation advanced by Garcia-Romo. The *Lopez* court held that "the statute speaks clearly: residence is terminated 'when the alien is served *a notice* to appear. The use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule." 925 F.3d at 402 (citations omitted) (quoting 8 U.S.C. § 1229b(d)(1)). The Ninth Circuit reasoned that allowing

the government to serve noncitizens with multiple notices to appear would contradict the statute's text and was inconsistent with *Pereira*. *See id.* at 402, 403.

Regarding the text of the statute, the *Lopez* court emphasized the singular use of the phrase "a notice to appear" in § 1229b(d)(1). Although the Dictionary Act, 1 U.S.C. § 1, requires that, in determining the meaning of an Act of Congress, "words importing the singular include and apply to several persons, parties, or things," the *Lopez* court declined to apply the Dictionary Act to the phrase "a notice to appear." *See* 925 F.3d at 402. Relying on *United States v. Hayes*, 555 U.S. 415, 422 n.5, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009), the Ninth Circuit explained that the singular/plural rule in the Dictionary Act is designed to apply "only on the rare occasions when doing so is necessary to carry out the evident intent of the statute." *Lopez*, 925 F.3d at 402 (cleaned up). The Ninth Circuit determined that this "rare occasions" exception was inapplicable because "[a] single, complete Notice to Appear achieves" Congressional intent to convey time-and-place information to a noncitizen and facilitates appearance at the removal proceedings. *See id. Lopez* also rejected the interpretation we have adopted because, according to the Ninth Circuit, it would require reading the statute as stating that "the stop-time provision would be triggered 'when the alien is served *notices* to appear under section 1229(a).'" *Id.* at 402.

However, the interpretation of § 1229b(d)(1) does not even hinge on the significance of whether the phrase "a notice to appear" should be read in the singular or

the plural. Therefore, the Dictionary Act is not relevant to the statutory interpretation issue we are deciding. As explained above, the plain and ordinary meaning of the word "a" as used in context naturally contemplates that service of the required information can be achieved through written communication in multiple installments. *See supra*, at 8-12. Our interpretation of the statute is *not* that there can be "multiple notices to appear," as the Ninth Circuit characterizes the statutory interpretation we adopt. We agree with the Ninth Circuit that the statute calls for only one "notice to appear." But that proposition does not answer the question of whether the requisite informational components of "a notice to appear" may be provided through multiple written communications. The *Lopez* court did not consider this particular question; therefore, we find its analysis of the statute to be incomplete.

Further, the Ninth Circuit misreads *Pereira*. The *Lopez* court suggests that *Pereira* established a binary inquiry for determining whether a document is "a notice to appear": either the document contains all the required information under § 1229(a)(1)(A)-(G) (rendering it a true "notice to appear') or it does not (rendering it a "putative notice to appear"). *See* 925 F.3d at 402, 403 ("Nevertheless, no matter how many documents are sent, none qualifies as a 'notice to appear' unless it contains the information Section 1229(a) prescribes."). To support its reading of *Pereira*, the Ninth Circuit noted that "the Supreme Court held that Section 1229(a)(1) *defines* what a notice to appear is, and that the definition is imported every time the term 'notice to appear' is used in the statute—especially when

it is used in the stop-time rule, 8 U.S.C. § 1229b(d)(1), which refers to 'a notice to appear under section 1229(a).'" *Lopez*, 925 F.3d at 403 (quoting *Pereira*, 138 S. Ct. at 2116). Thus, under this reading, the government lacks the ability to supplement its first communication with a second one.

The analytical problem with this conclusion is that it rests on the assumption that a subsequent written communication cannot "cure the defect in the initial" communication. *See Lopez*, 925 at 407 (Callahan, J., dissenting). In fact, the *Pereira* opinion "says nothing about whether a" deficient initial communication "can be cured by a subsequent document that fully provides specific time, date, and place information." *Id.* And thus, while we agree with the *Lopez* court that a noncitizen receives "a notice to appear" only after she or he has received all the required information listed under § 1229(a)(1)(A)-(G), "it does not follow that all the criteria listed in § 1229(a) *must* be contained in a single document." *Id.*

VI.

Lastly, our holding accords with the BIA's interpretation of the statute set forth in its en banc opinion in *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520 (B.I.A. 2019) (en banc). There, the BIA held that "where a notice to appear does not specify the time and place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information 'perfects' the deficient notice to appear, satisfies the notice requirements of section [1229(a)(1)], and triggers the 'stop-time' rule of section [1229b(d)(1)(A)]." *Id.* at 535. The

BIA explained, "[W]e do not read the statute as requiring that the 'written notice' be in a single document. Rather it may be provided in one or more documents—in a single or multiple mailings . . . so long as the essential information is conveyed in writing and fairly informs the alien of the time and place of the proceedings." *Id.* at 531.

When the BIA interprets the Immigration and Nationality Act, its interpretation is eligible for *Chevron* deference. *See Negusie v. Holder*, 555 U.S. 511, 516-17, 129 S. Ct. 1159, 173 L. Ed. 2d 20 (2009). The BIA's entitlement to deference hinges on the result of a two-step test we must employ. *See City of Arlington v. FCC*, 569 U.S. 290, 296, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013). First, after "applying the ordinary tools of statutory construction," we must determine if the statute is ambiguous. *Id.* "If the statute is unambiguous, then the court applies it as-written; 'that is the end of the matter.'" *Arangure v. Whitaker*, 911 F.3d 333, 337-38 (6th Cir. 2018) (quoting *City of Arlington*, 569 U.S. at 296). But if we were to conclude that the statute was ambiguous, then we would be required to defer to the agency's interpretation of the statute provided that it is a "permissible" interpretation. *City of Arlington*, 569 U.S. at 296. In other words, the agency's interpretation must be "within the bounds of reasonable interpretation." *Id.*

We have concluded that the relevant statutory text is unambiguous and that its ordinary meaning allows for the government to provide non-citizens with the required categories of information under § 1229(a)(1)(A)-(G) using multiple documents. Accordingly, we need not defer to the BIA's interpretation of the statute. But even if we

had to defer under *Chevron*, that would not change the outcome here because, as noted, the BIA agrees with our interpretation of statute.

If we were to accept Garcia-Romo's strict construction of § 1229b(d)(1) as a reasonable interpretation of the statute, it would at most suggest that § 1229b(d)(1) is subject to at least two reasonable interpretations. "When a statute ambiguously lends itself to more than one interpretation, we may not substitute one party's construction of the statute for a reasonable interpretation issued by the agency charged with administering it." *Gonzalez-Garcia v. Holder*, 770 F.3d 431, 434 (6th Cir. 2014), *abrogated on other grounds by Pereira*, 138 S. Ct. at 2114. Accordingly, the government's interpretation would nonetheless prevail even had we credited Garcia-Romo's interpretation. Under *Chevron*, we would defer to the BIA's statutory interpretation, which is the same as our own.

VII.

For the foregoing reasons, we **DENY** the petition for review.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS IN THE U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED AUGUST 17, 2018

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A205 151 390 – Memphis, TN

Date: AUG. 17, 2018

In re: Gilberto GARCIA-ROMO

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
Rehim Babaoglu, Esquire

APPLICATION:
Cancellation of removal

The respondent, a native and citizen of Guatemala, has appealed from the Immigration Judge's decision dated August 21, 2017, denying his application for cancellation of removal under section 240A(b) of the Immigration and

Nationality Act, 8 U.S.C. § 1229b(b). The respondent separately moves to remand on the ground that he was denied due process when a document contradicting his testimony was admitted without prior notice. The motion will be denied and the appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under a clearly erroneous standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge determined that the respondent did not establish that he had accrued the 10 years of continuous physical presence necessary to qualify for cancellation of removal (IJ at 7). *See* section 240A(b)(1)(A) of Act. The respondent's accrual of continuous physical presence for cancellation purposes was terminated by the February 29, 2012, service of the Notice To Appear (NTA) which placed him in these proceedings, in combination with the subsequent Notice of Hearing dated April 30, 2012, informing the respondent ofthe date, time and place of his hearing. *See* section 240A(d)(1) of the Act. *Cf Pereira v. Sessions,* _ U.S._, 138 S. Ct 2105 (2018). Therefore, he needed to demonstrate that he was continuously physically present in the United States for 10 years prior to the receipt of his April 30, 2012 Notice of Hearing.

The respondent testified that he visited Mexico annually for a time but did not leave the United States after February 2002 (IJ at 5-6; Tr. at 16-61). However, a

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Record of Deportable Alien (Form I-213) introduced by the Department of Homeland Security (DHS) references the respondent's apprehension and return to Mexico in April 2005, contradicting that testimony (IJ at IJ at 6; Exh. 6; Tr. at 40-41, 55). The respondent argues that the Immigration Judge erred in admitting the I-213 because it was submitted on the day of the hearing, and he was given no prior notice of its existence (Respondent's Mot. to Remand; Br. at 5-6).

We will affirm the Immigration Judge's decision to deny cancellation of removal because the respondent did not provide reasonably available corroborating evidence of his continuous physical presence to resolve his inconsistent testimony. *See* section 240(c)(4)(B) of the Act, 8 U.S.C. § 1229a(c)(4)(B) (providing that an Immigration Judge may determine when it is necessary for an alien to furnish reasonably available corroborating evidence to supplement testimony); *see generally Santana-Albarran v. Ashcroft,* 393 F.3d 699 (6th Cir. 2005) (listing examples of types of documents that an alien might reasonably be expected to provide in order to establish continuous physical presence).

We find no merit in the respondent's due process arguments. The respondent acknowledges that he did not object to the admission of the 1-213 (Respondent's Br. at 6). Moreover, the formal rules of evidence do not apply in immigration proceedings; documents are admissible so long as they are probative and their use is fundamentally fair. *See Matter of Ponce-Hernandez,* 22 I&N Dec. 784, 785 (BIA 1999). The 1-213 was properly admitted because it was probative of the respondent's

credibility and the accuracy of his recollection. Admission of the 1-213 without prior notice was fundamentally fair because it was introduced as impeachment evidence, which is generally exempt from discovery. *Compare* Fed. Rules of Civil Procedure. 26(a)(1)(B) (providing an exception to the regular disclosure requirements when documents will be used "solely for impeachment"). Moreover, the respondent was afforded the opportunity to submit further evidence after the hearing in response to the DHS' motion to pretermit the respondent's application for relief in the absence of evidence to corroborate his date of entry into the United States (IJ at 6). The paycheck stubs submitted by the respondent for that purpose further contradicted his testimony, however, and other inconsistencies noted in the respondent's application for relief further undermined the reliability of his testimony (IJ at 6·7). Under the circumstances, we find no reason to disturb the Immigration Judge's decision to deny the respondent's application on this basis.

Accordingly, the motion to remand will be denied, and the appeal will be dismissed.

ORDER: The motion is denied, and the appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX C — DECISION OF THE UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT, DATED AUGUST 7, 2017

UNITED STATES DEPARTMENT OF
JUSTICE EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MEMPHIS, TENNESSEE

FILE NO.: A205-151-390

IN REMOVAL PROCEEDINGS

IN THE MATTER OF

GARCIA-ROMO, Gilberto

Respondent.

DATE: August 7, 2017

CHARGE: Section 212(a)(6)(A)(i) of the Act, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Cancellation of Removal for Certain Nonpermanent Residents under INA § 240A(b)

DECISION OF THE IMMIGRATION JUDGE

Appendix C

I. PROCEDURAL HISTORY

The Department of Homeland Security ("the Department") personally served Gilberto Garcia-Romo ("Respondent") with a Notice to Appear ("NTA") on February 29, 2012, ordering him to appear before the Oakdale, Louisiana Immigration Court on a date and time to be set. Exh. 1. On April 5, 2012, the Department mailed Respondent a Notice of Change of Address for Immigration Court, informing Respondent that it would file his NTA with the Memphis, Tennessee Immigration Court. The Department initiated the present removal proceedings against Respondent on April 17, 2012, through the filing of his NTA with the Memphis Immigration Court alleging that he is inadmissible to the United States pursuant to § 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"). *Id.*

Respondent had an initial Master Calendar hearing on December 19, 2012 where he was represented by counsel, who appeared telephonically. On that day, Respondent, through counsel, admitted the factual allegations and conceded the § 212(a)(6)(A)(i) charge of inadmissibility contained in his NTA. Thereafter, the Court sustained the charge. Respondent filed his Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents on February 25, 2014. Respondent's Individual hearing was held on June 1, 2016.

On June 6, 2016, the Department filed a Motion to Pretermit Respondent's Application for Non-LPR Cancellation of Removal. Respondent filed his Response

to the Department's Motion to Pretermit on June 20, 2016. The Court now issues this decision.

II. FACTS

On June 1, 2016, the Court heard testimony from Respondent and Ms. Gail Bouldin in support of Respondent's application for relief. Respondent initially testified that he first entered the United States in July of 1994, and every year from 1996 to 2002 he would leave in December and return to the United States in January after visiting his family in Mexico. Respondent provided that he last entered the United States in 2002. Respondent stated that he was sure his last entry was in 2002 because his wife was pregnant and that was the last Christmas he spent with them. He explained that his wife and children came to the United States in November of 2003. Respondent testified that he filed his 2001, 2002, and 2003 tax returns all together in 2003 when his wife was in the United States.

Later, Respondent provided that the longest period of time he spent outside the United States since entering in 1994 was eight months during his last visit to Mexico. Respondent then testified that although he was sure he last entered the United States in 2002, he did not remember the exact month. Although Respondent could not remember the month he entered in 2002, he explained that it was "at the beginning of being hot," in the spring. He confirmed that before this entry, he had been in Mexico for eight months.

Respondent also testified that he did not enter the United States in 2005. When asked why his I-213 indicated that he was arrested by immigration officials on April 25, 2005, and Voluntarily Returned to Mexico, Respondent replied that he had no idea why the I-213 provided that information.

Respondent is married to Emma Castorena Luevano. They have four children: Charlie Garcia (15 years old), Juan Pablo Garcia ("Pablo") (13 years old), Jennifer Garcia (10 years old), and Christopher Garcia (2 years old). Charlie and Pablo were born in Mexico, but Jennifer and Christopher were born in the United States, and are United States citizens. Respondent met his boss, Mr. Charles Sunderland, in 1994. He has lived in Mr. Sunderland's house since 2005. Before that, he lived at North Chancery Street in McMinnville, Tennessee. Respondent works in McMinnville, Tennessee at a nursery where he is a foreman. Ten employees work for Mr. Sunderland, five of whom do not have legal status in the United States. Respondent is paid with a check. Respondent testified that he paid someone $200 for a social security card. Respondent initially testified that neither he nor his family members receive government assistance, however he then stated that his two United States citizens are on TennCare and his family receives food stamps.

Respondent testified that he filed tax returns in the United States since 2002. He stated that he did not file tax returns before that because he did not have his wife with him. Respondent has three criminal convictions. He

was arrested for the first time in 1999 for driving without a driver's license, but this charge was dismissed. In 2003, Respondent pled guilty to driving under the influence; in 2006, Respondent was convicted of criminal impersonation and driving on revoked license; and in 2010, Respondent was convicted of driving on revoked license (second offense). Respondent stopped drinking three years ago because of his family and trying to be a good citizen. To maintain his sobriety, he has been attending AA meetings for 13 months.

Respondent's United States citizen daughter, Jennifer, goes to school at Irving College Elementary School in McMinnville, Tennessee, and she does very well in school. Respondent's two oldest children have speech impediments, and Jennifer translates for them in Spanish. On the bus that Charlie, Pablo, and Jennifer take to school, there are many Spanish speakers, so Jennifer translates for her brothers. Charlie and Pablo do not speak Spanish, only English, so it would be difficult for them to go to school in Mexico. Jennifer speaks English and Spanish.

Charlie and Pablo cannot speak two words at one time; they cannot speak in sentences. They take special speech and reading classes in school. They spend three hours a day in special education classes. They have been taking these classes for approximately five years. When Charlie was two years old, someone drove over him; the doctors said he had a contusion. Respondent took him to the doctor in the United States, who said he did not get the attention he needed. Charlie spoke before the accident, but when they moved from Mexico, Charlie could not speak

Spanish anymore. It takes Charlie one minute to read one sentence aloud. If he were asked to read a sentence with seven words aloud, he would have to read it in parts. When he speaks now, he sounds like a two-year-old boy. Pablo speaks better than Charlie, but he still speaks very slow. Respondent knows someone who has a speech impediment in Mexico, and he is made fun of and teased. Jennifer gets very upset and nervous when people call her brothers names; when she comes home she cries if someone called her brothers names. Respondent thinks in three or four years, Charlie and Pablo could work without Jennifer.

Respondent testified that if he is ordered removed, he would bring his family to Mexico with him since he is the only one who works. If his family were to stay in the United States, they would not have the means to support themselves or a place to live. Moving back to Mexico would affect Jennifer's comfort and stability. In the town where Respondent is from, people are not free to walk in the street whenever they want because there are two cartels fighting over territory so there is a ten o'clock curfew. Respondent would be worried about Jennifer's safety in Mexico. Additionally, Jennifer would have to walk approximately one hour to go to school. Jennifer does not have a medical condition that requires her to see a doctor regularly; she is in good health. Christopher is also in good health. Respondent testified that Jennifer's role with her brothers would be different if they moved to Mexico because she would not be able to go outside with her brothers because they would be called names. Without Jennifer's help, Charlie and Pablo would not be able to work in Mexico because they would need someone to interpret for them.

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Ms. Gail Bouldin also testified at Respondent's Individual hearing. Ms. Bouldin first met Respondent in the mid-1990s (approximately 1993 or 1994) through Mr. Sunderland (Ms. Bouldin's partner and Respondent's boss), and he eventually moved into an apartment building that Ms. Bouldin owned at the time. Ms. Bouldin sees Respondent three or four times a week. She recalls Respondent taking trips to Mexico in the very beginning, but she does not remember what year. She thought the trips lasted approximately one month. She sees Respondent more in the summer than in the winter, so she does not know if he took a longer trip. Ms. Bouldin has not known Respondent to miss a season of work. The planting season begins in March or April and the harvesting season begins in October. Ms. Bouldin explained that Charlie and Pablo's interactions depend on Jennifer. Jennifer has a very significant role in her brothers' lives. Ms. Bouldin provided that Jennifer carries a heavy load with the concerns of Charlie and Pablo, and it would be like starting all over again if the family moved to Mexico.

Additionally, the following is a list of documents that have been formally admitted as exhibits in the Record of Proceeding and considered by the Court in making the present decision: Exhibit 1 is the Notice to Appear; Exhibit 2 is Respondent's Application for Cancellation of Removal; Exhibit 3 is Respondent's Evidence and Brief in Support of Application for Cancellation of Removal and Adjustment of Status; Exhibit 4 is Respondent's Refreshed Evidence and Brief in Support of Application for Cancellation of Removal; Exhibit 5 is a signed Letter from the District Attorney of the 31st Judicial District in Tennessee, dated August 20, 2014; Exhibit 6 is Respondent's Form I-213,

Record of Deportable/Inadmissible Alien; and Exhibit 7 is evidence of a border encounter with Respondent on April 25, 2001.

III. DISCUSSION

An alien whose application for relief is subject to the REAL ID Act of 2005 has the burden to prove eligibility for cancellation of removal. *Matter of Almanza*, 24 I&N Dec. 771, 774-75 (BIA 2009). When applying for any form of relief from removal, Respondent

> shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

8 C.F.R. § 1240.8(d)(2017); INA § 240(c)(4).

Respondent has applied for cancellation of removal under INA § 240A(b)(1) which provides that:

> [t]he Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3), subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

INA § 240A(b)(1) (2017).

To meet the time requirement for cancellation of removal, Respondent must prove entry into and continuous presence in the United States at least ten years prior the service of the NTA. *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011) (holding that "any period of continuous residence or continuous physical presence of an alien applying for cancellation of removal under section 240A is deemed to end upon the service of a notice to appear...."). Respondent was served with an NTA on February 29, 2012. Exh. 1. Therefore, Respondent must demonstrate he

has been continuously present in the United States since February 29, 2002. *See* INA § 240A(b)(1)(A).

At Respondent's December 19, 2012 Master Calendar hearing, Respondent informed the Court that he first entered the United States in 1994. At Respondent's June 1, 2016 Individual hearing, Respondent testified that he first entered the United States in July of 1994, and every year from 1996 to 2002 he would leave in December and return to the United States in January after visiting his family in Mexico. Respondent explained that he was sure he last entered the United States in 2002 because his wife was pregnant and that was the last Christmas he spent with them. He stated that his family joined him in the United States in November of 2003. Respondent testified that he was not sure what month he entered the United States in 2002, but he had just spent eight months in Mexico, and it was "at the beginning of being hot," in the spring. Additionally, Ms. Gail Bouldin testified that she first met Respondent in the mid-1990s, and she recalled him taking trips to Mexico in the very beginning, but she did not remember which years. Thus, based on the testimony in Respondent's case, the Court cannot find that Respondent met his burden to demonstrate he has been continuously present in the United States since February 29, 2002.

The Court will now turn to the documentary evidence in Respondent's case. The only documentary evidence Respondent provided before his Individual hearing demonstrating that he was present in the United States since February of 2002 is his federal tax return for 2002. However, Respondent testified that he filed his 2001,

2002, and 2003 tax returns all together in 2003 when his wife was present in the United States. Additionally, Respondent testified that his wife and children did not move to the United States until November of 2003, but he filed a Joint Tax Return with his wife in 2002. Other than this fraudulent tax return, Respondent did not provide any documentary evidence verifying his presence in the United States since February of 2002 before his June 1, 2016 Individual hearing. The possible documentation that may be used to prove presence in the United States includes:

> (1) past employment records... (2) utility bills; (3) school records; (4) hospital or medical records; (5) attestations by churches, unions, or other organizations; and (6) additional documents including passport entries, birth certificates of children born in the United States, letters or correspondence, contracts, government issued identification cards, or any other relevant document.

Santana-Albarran v. Ashcroft, 393 F.3d 669, 705-06 (6th Cir. 2005); *see also* 8 C.F.R. § 245a.2(d)(3).

On June 6, 2016, the Department filed a Motion to Pretermit Respondent's Application for Non-LPR Cancellation of Removal, asserting that Respondent's testimony that he entered the United States when it was beginning to get hot in 2002 was the only evidence presented as to his date of entry. Therefore, the Department asked this Court to pretermit Respondent's

application because "[t]here was no corroboration of his entry date." On June 20, 2016, Respondent responded to the Department's Motion to Pretermit by providing paycheck stubs for the pay periods of: December 28, 2001 – January 3, 2002; February 1, 2002 – February 7, 2002; February 22, 2002 – February 28, 2002, among others. Respondent's Response to Motion to Pretermit at Tab A, Pages 17-20. These paycheck stubs are in direct contradiction with Respondent's testimony that he left in December of 2001 and spent eight months in Mexico before returning to the United States when it was beginning to get hot in 2002. With these paycheck stubs, Respondent's counsel only stated that "[a]fter the hearing, Mr. Garcia's employer pulled payroll records for Mr. Garcia and has provided them to my office," without explaining why this evidence was not presented at or before Respondent's Individual hearing. These paycheck stubs were not accompanied by an affidavit purporting to the accuracy of these records, nor did Respondent's employer testify at his Individual hearing. Additionally, Respondent did not provide any official documentation, such as a W2, illustrating his earnings for 2002.

While the Court acknowledges that Respondent provided some evidence of his presence in the United States in February of 2002, albeit after the hearing with no explanation as to why such evidence was only submitted after the Department's Motion to Pretermit, the Court must consider the source of such evidence. Respondent testified that he and his employer, Mr. Charles Sunderland, had a personal relationship, in that they have been friends for a long time. Respondent stated that he met Mr. Sunderland in 1994, and that he and his

family have lived in Mr. Sunderland's house since 2005. Respondent also testified that Mr. Sunderland employees ten individuals, five of whom do not have legal status in the United States. As mentioned above, Respondent did not offer Mr. Sunderland's testimony in his case to inform the Court, under oath, that Respondent was present in the United States since February of 2002. Beyond these paycheck stubs provided by Respondent's employer, who he has known for twenty-three years and who he has lived with for twelve years, Respondent did not provide any other evidence demonstrating his presence in the United States since February of 2002, including utility bills, hospital or medical records, attestations by churches, unions, or other organizations, or any other relevant document.

The Court notes there were significant discrepancies between Respondent's testimony and the documentary evidence in his case. Respondent confirmed his testimony on cross-examination that he did not leave the United States after 2002. However, Respondent's Form I-213 provides that Respondent was arrested by immigration officials on April 25, 2005 and was voluntarily removed to Mexico. Exh. 6. Additionally, although Respondent also confirmed that he returned to the United States in January every year between 1996 and 2002, the Department submitted evidence of a border encounter involving Respondent on April 25, 2001. Exh. 7.

Further, Respondent initially testified that neither he nor his family members receive government assistance. However, when asked directly about health insurance and food stamps, Respondent stated that his two United States

citizen children are on TennCare and his family receives food stamps. Respondent's Cancellation application provides that he does not receive public or private relief or assistance. Exh. 2. Respondent also testified that if he was ordered removed, he would bring his family to Mexico with him since he is the only one who works. However, Respondent's Cancellation application states that if his application were denied, his spouse and children would not accompany him to his country of birth, nationality, and last residence. *Id*.

When considering all of the evidence presented in Respondent's case, including the evidence Respondent submitted with his response to the Department's Motion to Pretermit, the Court will find that Respondent failed to meet his burden to prove his continuous physical presence in the United States beginning in February of 2002. Therefore, Respondent has failed to carry his burden to show that he "has been physically present in the United States for a continuous period of not less than [ten] years preceding the date of the date of the application" and thus, Respondent is not statutorily eligible for Cancellation of Removal under INA § 240A(b)(1).

Since Respondent is statutorily ineligible for Cancellation of Removal due to his failure to prove he has been continuously present in the United States for the ten years preceding service of his NTA, the Court will grant the Department's Motion to Pretermit. *See* 8 C.F.R. 1240.21(c)(1) ("Immigration judges and the Board may deny without reserving decision or may pretermit those . . . cancellation of removal applications in which the applicant has failed to establish statutory eligibility for

relief. The basis of such denial or pretermission may not be based on an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically noted in section 101(f) of the Act, a failure to establish exceptional or extremely unusual hardship to a qualifying relative in cancellation cases . . .").

IV. ORDERS

For the foregoing reasons, the following **ORDERS** are **HEREBY ENTERED**:

It is **HEREBY ORDERED** that the Department of Homeland Security's Motion to Pretermit be **GRANTED**.

IT IS FURTHER ORDERED that Respondent's application for Cancellation of Removal be **DENIED**.

IT IS FURTHER ORDERED THAT Respondent be and hereby is ordered removed from the United States to Mexico.

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before 30 calendar days from the date of service of this decision.

DATED this the 21st day of August 2017.

/s/_____
Honorable Charles E. Paz
Immigration Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED JANUARY 22, 2020

No. 18-3857

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GILBERTO GARCIA-ROMO,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

ORDER

BEFORE: ROGERS, BUSH, and LARSEN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

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*. Judge Readler recused himself from participation in this ruling.

Appendix D

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk