No. 20-356

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

JOSE ANGEL BANUELOS-GALVIZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government must provide the written notice required to trigger the stop-time rule, 8 U.S.C. 1229b(d)(1)(A), in a single document.

RELATED PROCEEDING

United States Court of Appeals (10th Cir.):

Banuelos-Galviz v. *Barr*, No. 19-9517 (Mar. 25, 2020), petition for reh'g denied (Apr. 20, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 953 F.3d 1176. The decisions of the Board of Immigration Appeals (App., *infra*, 15a-19a) and the immigration judge (App., *infra*, 20a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2020. A petition for rehearing was denied on April 20, 2020 (App., *infra*, 33a). On March 19, 2020,

this Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here, the order denying a timely petition for rehearing. Under that order, the deadline for filing a petition for a writ of certiorari is September 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this petition. App., *infra*, 34a-37a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, grants the Attorney General the discretion to cancel the removal of an alien who is inadmissible or deportable. 8 U.S.C. 1229b(a)-(b). To obtain cancellation of removal, the alien bears the burden of demonstrating both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A).

To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must show (A) that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [his] application" for cancellation for removal; (B) that he "has been a person of good moral character during such period"; (C) that he "has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of [Title 8], subject to paragraph (5) [of Section 1229b(b)]"; and (D) 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." 8 U.S.C. 1229b(b)(1)(A)-(D).

The continuous-physical-presence requirement is subject to the "stop-time rule." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2110 (2018). As relevant here, the stop-time rule provides that "any period of * * * 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 [Title 8]." 8 U.S.C. 1229b(d)(1)(A).

Paragraph (1) of Section 1229(a), in turn, provides that "written notice (in this section referred to as a 'notice to appear') shall be given * * * to the alien * * * specifying," among other things, the "nature of the proceedings against the alien," the "charges against the alien," the "time and place at which the proceedings will be held," and the "consequences under section 1229a(b)(5)" of failing to appear. 8 U.S.C. 1229(a)(1)(A), (D), and (G)(i)-(ii). Paragraph (2) of Section 1229(a) provides that, "in the case of any change or postponement in the time and place of [the removal] proceedings," "a written notice shall be given" specifying the "new time or place of the proceedings," and the "consequences under section 1229a(b)(5)" of failing to attend. 8 U.S.C. 1229(a)(2)(A).

Under Section 1229a(b)(5), "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided * * * , does not attend a proceeding under this section, shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An alien may not be removed in absentia, however, unless the Department of Homeland Security (DHS) "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." *Ibid.* An order of removal entered in absentia may be rescinded "if the alien demon-

strates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Respondent is a native and citizen of Mexico. App., *infra*, 21a. In 2006 or 2007, he entered the United States illegally, without inspection by an immigration officer. *Ibid.*; see Administrative Record (A.R.) 337.

In January 2010, DHS served respondent with a document labeled "Notice to Appear." A.R. 337 (emphasis omitted). That notice informed respondent of the "removal proceedings" being initiated against him, and charged that he was subject to removal because he was an alien present in the United States without being admitted or paroled. *Ibid.* (emphasis omitted); see 8 U.S.C. 1182(a)(6)(A)(i). The notice did not specify the date and time of respondent's initial removal hearing. See A.R. 337 (ordering respondent to appear for removal proceedings "on a date to be set at a time to be set") (emphasis omitted).

DHS later filed the notice to appear with the immigration court. A.R. 337. The INA's implementing regulations provide that "[t]he Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. 1003.18(a). The regulations further provide that if "the time, place and date of the initial removal hearing" "is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. 1003.18(b).

About three weeks after service of the notice to appear, A.R. 335, 338, the immigration court provided respondent with a document labeled "Notice of Hearing,"

which informed him that it had scheduled his removal hearing for June 2, 2010, at 8:30 a.m. A.R. 335 (capitalization altered). After respondent's case was consolidated with his wife's, an immigration judge (IJ) held a hearing on August 18, 2010. See A.R. 72. Respondent appeared at that hearing and subsequent hearings before the IJ. A.R. 72, 77, 117, 136, 178.

In August 2017, the IJ found respondent removable as charged, App., *infra*, 21a; denied his applications for asylum, withholding of removal, and related protection, *id.* at 31a; and granted his request for voluntary departure, *ibid.* Respondent filed an appeal with the Board of Immigration Appeals (Board). A.R. 37-39.

3. While respondent's appeal was pending before the Board, this Court issued its decision in *Pereira* v. *Sessions*, *supra*. In *Pereira*, the Court was presented with the "narrow question," 138 S. Ct. at 2110, whether a document labeled a "notice to appear" that does not specify the time or place of an alien's removal proceedings is a "notice to appear under section 1229(a)" that triggers the stop-time rule governing the calculation of the alien's continuous physical presence in the United States for purposes of cancellation of removal, 8 U.S.C. 1229b(d)(1). The Court answered no, holding that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." *Pereira*, 138 S. Ct. at 2110.

Following this Court's decision in *Pereira*, respondent filed a "motion to remand in lieu of appeal brief," arguing that his case should be remanded to the IJ so that he could apply for cancellation of removal. A.R. 18-22 (capitalization and emphasis omitted). Respondent

contended that, in light of *Pereira*, the "Notice to Appear" with which he had been served did not trigger the stop-time rule, because it did not contain the date and time of his removal proceedings. A.R. 18-19. He therefore argued that he could establish the requisite ten years of continuous physical presence in the United States for purposes of eligibility for cancellation of removal. A.R. 19.

The Board dismissed respondent's appeal and denied his motion to remand. App., *infra*, 15a-19a. The Board explained that, although respondent was served with "a notice to appear that did not specify the date and time of his removal hearing," *id.* at 18a, the "initial hearing notice * * * effectively cured the defects in his notice to appear by supplying the missing time and place information at issue in *Pereira*, thereby triggering the 'stop-time rule,'" *id.* at 19a. The Board therefore concluded that respondent could not establish "the requisite 10-year period of continuous physical presence to be eligible for relief in the form of cancellation of removal." *Ibid.*

4. The court of appeals granted respondent's petition for review and remanded to the Board for further proceedings. App., *infra*, 1a-14a. The court determined that "the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing." *Id.* at 14a. Rather, the court held that "the stop-time rule is triggered by one complete notice to appear rather than a combination of documents." *Id.* at 2a. The court concluded that, because respondent's "putative notice to appear was missing the date and time," the Board erred in applying the stop-time rule. *Id.* at 14a.

5. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 33a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the government must provide the written notice required to trigger the stop-time rule, 8 U.S.C. 1229b(d)(1)(A), in a single document. App., *infra*, 2a. This Court is currently considering whether that interpretation of the INA is correct in *Niz-Chavez* v. *Barr*, cert. granted, No. 19-863 (oral argument scheduled for Nov. 9, 2020). The Court should accordingly hold this petition for a writ of certiorari pending its decision in *Niz-Chavez* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Niz-Chavez* v. *Barr*, cert. granted, No. 19-863 (oral argument scheduled for Nov. 9, 2020), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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SEPTEMBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9517

JOSE ANGEL BANUELOS-GALVIZ, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL, RESPONDENT

Filed: Mar. 25, 2020

PETITION FOR REVIEW OF A DECISION OF THE BOARD OF IMMIGRATION APPEALS

Before: **HOLMES**, **MATHESON**, and **BACHARACH**, Circuit Judges.

This petition involves qualification for a remedy known as "cancellation of removal," which allows noncitizens to avoid removal under certain circumstances. To qualify for cancellation of removal, noncitizens must continuously stay or reside in the United States for a minimum number of years. The requirement varies based on whether the noncitizens are lawful permanent residents. If the noncitizens are lawful permanent residents, they must have continuously resided in the United States for at least seven years. 8 U.S.C. § 1229b(a)(2). All other noncitizens must have continuously been present for at least ten years. 8 U.S.C. § 1229b(d)(1)(A); *see* Part 1, below. The period of continuous presence terminates upon service of "a notice to appear under

§ 1229(a)" according to a provision known as the "stop-time rule." 8 U.S.C. § 1229b(d)(1).

This case involves the relationship between the stop-time rule and the statutory requirements for notices to appear. Under these requirements, a notice to appear must include the time of the removal hearing. 8 U.S.C. § 1229(a)(1)(G)(i); *see* Part 1, below. When the time is missing, the notice to appear does not trigger the stop-time rule. *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018).

But what if an incomplete notice to appear is followed by a notice of hearing that supplies the previously omitted information? We conclude that the stop-time rule is still not triggered. In our view, the stop-time rule is triggered by one complete notice to appear rather than a combination of documents.

1. Mr. Banuelos was served with a deficient notice to appear and a subsequent notice of hearing that supplied the date and time of his removal hearing.

Mr. Banuelos entered the United States in 2006. Roughly three years later, Mr. Banuelos was served with a document labeled "Notice to Appear." By statute, a notice to appear must include the time of the removal hearing. 8 U.S.C. § 1229(a)(1)(G)(i); *see* p. 2, above. But Mr. Banuelos's document did not tell him the date or time of the hearing, so the immigration court later sent him a notice of hearing with this information.

Mr. Banuelos then sought asylum, withholding of removal, and protection under the Convention Against Torture. The immigration judge rejected each request, and Mr. Banuelos appealed to the Board of Immigration Appeals.

While the administrative appeal was pending, the Supreme Court decided *Pereira v. Sessions*, which held that the stop-time rule is not triggered by a notice to appear that omits the time of the removal hearing. 138 S. Ct. 2105, 2113-14 (2018). Because Mr. Banuelos's notice to appear lacked both the date and time, he moved for a remand so that the immigration judge could consider his request for cancellation of removal.

To qualify for cancellation of removal, Mr. Banuelos needed to show continuous presence in the United States for at least ten years. 8 U.S.C. § 1229b(d)(1)(A); *see* p. 2, above. His ability to satisfy this requirement turned on whether the combination of the deficient notice to appear and notice of hearing had triggered the stop-time rule. If the stop-time rule had been triggered, Mr. Banuelos would have had only about three years of continuous presence. But if the stop-time rule had not been triggered, Mr. Banuelos's continuous presence would have exceeded the ten-year minimum.

The Board held that the stop-time rule had been triggered because the combination of the two documents—the incomplete notice to appear and the notice of hearing with the previously omitted information—was the equivalent of a complete notice to appear. Given this application of the stop-time rule, the Board found that Mr. Banuelos's period of continuous presence had been too short to qualify for cancellation of removal. So the Board denied his motion to remand.

2. We apply the abuse-of-discretion standard to the Board's denial of the motion to remand.

Mr. Banuelos seeks judicial review of the denial of his motion to remand. We review the denial of this motion for an abuse of discretion. *Neri-Garcia v. Holder*, 696 F.3d 1003, 1009 (10th Cir. 2012). The Board abuses its discretion when it makes an error of law. *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017).

The issue here involves a pure matter of law. *Guadalupe v. Attorney Gen.*, ___ F.3d ___, No. 19-2239, 2020 WL 913242, at *2 (3d Cir. Feb. 26, 2020). Mr. Banuelos's motion to remand hinged on his qualification for cancellation of removal, which in turn hinged on whether the stop-time rule had been triggered by the combination of a deficient notice to appear and the notice of hearing.[1] We thus consider whether the Board made an error of law by applying the stop-time rule based on a combination of the deficient notice to appear and the notice of hearing.

3. We must decide whether to defer to the Board's interpretation of § 1229.

To answer this legal question, we consider whether to give deference to the Board's decision. The Board decided to apply the stop-time rule based on its interpretation of 8 U.S.C. § 1229. In the past, the Board had

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[1] The immigration judge ordered Mr. Banuelos to file applications for relief by March 30, 2011. The government contends that as of March 30, 2011, Mr. Banuelos had continuously remained in the United States for only 4-1/2 years. But the Board denied Mr. Banuelos's motion based on the stop-time rule rather than the deadline to apply for cancellation of removal. So we need not address the effect of this deadline.

interpreted § 1229 to cover the combination of an incomplete notice to appear and a subsequent notice of hearing that contained the previously missing information. *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520, 529 (BIA 2019) (en banc). We must sometimes defer to the Board's statutory interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Afamasaga v. Sessions*, 884 F.3d 1286, 1289 (10th Cir. 2018). To determine if we should defer to the Board, we first ask whether Congress has directly spoken on the issue. *Chevron*, 467 U.S. at 842-43. If Congress has not directly spoken on the issue, we consider whether the Board's statutory interpretation was permissible. *Id.* at 843-44.

4. Congress has directly spoken on whether the combination of a notice to appear and notice of hearing can trigger the stop-time rule.

In our view, Congress has directly spoken on the issue through unambiguous language in the pertinent statutes. Under this statutory language, the stop-time rule is not triggered by the combination of a defective notice to appear and a notice of hearing.

To determine whether Congress has directly spoken on the issue, we use "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9 (1984). Using these tools, we must determine whether "Congress had an intention on the precise question at issue." *Id.*

To ascertain this intention, we start with the statutory language. *WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 784 F.3d 677, 684 (10th Cir. 2015). Because this case involves the relationship between the

stop-time rule (8 U.S.C. § 1229b(d)(1)(A)) and the statutory requirements for notices to appear (8 U.S.C. § 1229(a)), we examine the statutory language for both the stop-time rule and a notice to appear.

The stop-time rule provides that "continuous physical presence in the United States shall be deemed to end . . . *when* the alien is served a notice to appear *under* § 1229(a) of this title." 8 U.S.C. § 1229b(d)(1)(A) (emphasis added). This sentence contains two clauses linked to the phrase "a notice to appear." The first clause states that the period of continuous presence ends "when" the noncitizen is served with "a notice to appear." *Id.* The word "when" signals an event (service of a notice to appear) that terminates the period of continuous presence. The second clause refers to a notice to appear "under" § 1229(a). The word "under" means "in accordance with" or "according to" § 1229(a). *Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018). Based on these two clauses, the Supreme Court held that the stop-time rule is triggered only by the service of a notice to appear that satisfies § 1229(a). *Id.* at 2113-14.

Given this holding, we consider what § 1229(a) requires. Section 1229(a) says that "written notice (in this section referred to as a 'notice to appear') shall be given . . . specifying" information that includes "[t]he time . . . at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). The Supreme Court has held that this statutory language defines a notice to appear as a document that includes the time of the removal hearing. *Pereira*, 138 S. Ct. at 2116-17. So a document omitting the time of the hearing is not considered a notice to appear. *Id.*

Mr. Banuelos was served with a document that did not specify either the date or time of the hearing. But the government argues that the combination of the incomplete notice to appear and a later notice of hearing could satisfy § 1229(a) and trigger the stop-time rule. We disagree. The stop-time rule refers to "a notice to appear," using the singular article "a." This article ordinarily refers to one item, not two. *See United States v. Hayes*, 555 U.S. 415, 421 (2009) (noting that a statute had "use[d] the word 'element' in the singular, suggesting "that Congress [had] intended to describe only one required element"). We would thus naturally read the statutory language for the stop-time rule ("a notice to appear") to involve a single document rather than a combination of two documents. Given this natural reading, the stop-time rule appears to unambiguously state that continuous presence ends only when the noncitizen is served with a single notice to appear, not a combination of two documents.

Despite this natural reading of the statutory language, the government argues that the stop-time rule's use of the phrase "a notice to appear" could refer to multiple documents. The Sixth Circuit agrees that a notice to appear could consist of multiple documents despite the statutory use of the singular article "a." *Garcia-Romo v. Barr*, 940 F.3d 192, 201 (6th Cir. 2019). In support, the Sixth Circuit analogizes to an author who has submitted "a book" piecemeal as it is drafted. *Id.* The Sixth Circuit treats the analogy as evidence that singular articles like "a" can refer to multiple parts of a single item. *Id.*; *see also Yanez-Pena v. Barr*, ___ F.3d ___, No. 19-60464, 2020 WL 960829, at *5 (5th Cir. Feb. 28, 2020) (agreeing "with the Sixth Circuit's reasoning

in *Garcia-Romo* that multiple documents may collectively provide the notice required under § 1229(a)").

Federal law confirms that a singular article may refer to multiple items. Dictionary Act, 1 U.S.C. § 1. But in most contexts, the singular article "a" refers to only one item. Consider a purchaser ordering a book from Amazon. The purchaser would surely be surprised to receive individual chapters in the mail. Or a publisher who asked would-be authors to submit "a manuscript" would presumably frown at seriatim submissions of individual chapters. The article "a" can thus refer to multiple items, but only when the context involves multiple items. *Id.*

To determine the statutory context, we focus on Congress's intent. *See United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009) (explaining that the Dictionary Act should only be used when it is "necessary to carry out the evident intent of the statute") (quoting *First Nat. Bank in St. Louis v. Missouri*, 263 U.S. 640, 675 (1924)). Congress sometimes intends for a singular term to refer to multiple items. For example, Congress might provide for multiple clothing allowances by authorizing "a clothing allowance." *Sursely v. Peake*, 551 F.3d 1351, 1355-56 (Fed. Cir. 2009) (interpreting the statutory term "a clothing allowance" to refer to multiple clothing allowances).[2] But in other circumstances, Congress

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[2] The Sixth Circuit based its examples on a book: Margaret Bryant's *English in the Law Courts: The Part that Articles, Prepositions, and Conjunctions Play in Legal Decisions* (1962). *Garcia-Romo v. Barr*, 940 F.3d 192, 202 (6th Cir. 2019). This book points out that some opinions interpret laws using the singular article "a" to refer to either a single item or multiple items. Margaret M. Bry-

uses the singular article "a" to refer to only one item. Given the context of the enactment of § 1229(a), Congress intended the singular article "a" to refer to a single document satisfying all of the statutory requirements for a notice to appear.

Before the enactment of § 1229(a), removal proceedings could be initiated through an order to show cause that was silent on when the hearing would occur, followed by a notice of hearing that supplied the date and time. 8 U.S.C. § 1252b (1995). To simplify removal proceedings, Congress adopted § 1229(a), replacing the two documents with a single notice to appear, which had to include all of the information previously sprinkled throughout the order to show cause and the notice of hearing. 8 U.S.C. § 1229(a)(1); *see* Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. 104-469(I) (1996), 1996 WL 168955 at *159 (aiming to "simplify procedures for initiating removal proceedings" by creating a "single form of notice"). Given this congressional intent to replace two documents with one, we should be wary of reading the singular "a" in § 1229 to refer to multiple documents. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

Though Congress created § 1229 in order to combine two documents into one, the government argues that two documents may still constitute a notice to appear

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ant, *English in the Law Courts: The Part that Articles, Prepositions, and Conjunctions Play in Legal Decisions* 36-41 (1962). But in the opinions treating the article "a" as a reference to multiple items, the legislature had otherwise shown an intent to refer to multiple items. *Id.*

under the statute, relying on (1) Congress's purpose in adopting the stop-time rule and (2) the text of § 1229(a). We reject both arguments.

As the government points out, Congress was concerned that noncitizens could delay their removal proceedings in order to extend the periods of continuous presence. *See In re Cisneros-Gonzalez*, 23 I & N Dec. 668, 670 (BIA 2004); Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. 104-469(I) (1996), 1996 WL 168955 at *122. The government contends that Mr. Banuelos's interpretation would allow noncitizens to manipulate the removal process in order to extend their periods of continuous presence.

But manipulation would be possible even under the government's interpretation. Suppose that the government issues a notice to appear without the date and time. The notice must be served on the noncitizen, so he or she would know that the government is intending to initiate removal proceedings. With this knowledge, the noncitizen could try to move the proceedings to another immigration court. This effort could stall the issuance of a notice of hearing because a new immigration court would need to set the hearing. And if the new immigration court has a backlog, the delay could be considerable. So the purpose of the stop-time rule could be thwarted even under the government's interpretation.[3]

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[3] The government also argues that interpreting "a notice to appear" to refer to a single document creates "a windfall for noncitizens and unnecessarily interferes with Congress's intent." *Lopez v. Barr*, 925 F.3d 396, 410 (Callahan, J., dissenting), *reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020) (Thomas, C.J.). But it is not our job to interpret the statutes based on our views about what could

The government also points to the text of § 1229(a), which requires the government to provide noncitizens with "written notice." 8 U.S.C. § 1229(a)(1). But the phrase "written notice" is immediately followed by a parenthetical phrase: "(in this section referred to as a 'notice to appear')." 8 U.S.C. § 1229(a)(1). This parenthetical phrase clarifies that written notice is to be provided in the notice to appear.

Despite the parenthetical phrase, the government contrasts the reference to "written notice" with the language of § 1229(a)(2). As the government points out, § 1229(a)(2) contains a singular article, requiring "*a* written notice" of a change in the time of the proceedings. 8 U.S.C. § 1229(a)(2)(A) (emphasis added). In contrast, the language in § 1229(a)(1) has no article, either singular or plural, before the phrase "written notice."

The government's parsing of § 1229(a)(1) disregards the entirety of the provision. *Pereira* considered the entirety of the provision—"written notice (in this section referred to as a 'notice to appear')"—and defined the term as a document that includes the time of the removal hearing. 138 S. Ct. 2105, 2116 (2018); *see* p. 7, above. So the omission of an article before "written notice" does not affect our analysis.

The government downplays the significance of the phrase "referred to as a 'notice to appear,'" pointing out that this phrase appears only in a parenthetical. But

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constitute a "windfall." Congress intended to base the stop-time rule on the new statutory creature, a single notice to appear satisfying all of the requirements of § 1229(a)(1). If Congress's creation resulted in a windfall, the correction must come from Congress—not us.

we should "give effect to every word of a statute wherever possible," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), including words in a parenthetical, *United States v. Thomas*, 939 F.3d 1121, 1126-27 (10th Cir. 2019).

According to the government, the parenthetical phrase constitutes shorthand for all of the information that must be communicated under § 1229(a)(1), whether in one document or multiple documents. But the Supreme Court rejected this interpretation in *Pereira v. Sessions*, holding that the phrase "notice to appear" defines a single document that contains all of the required information. 138 S. Ct. 2105, 2116 (2018); *see also Lopez v. Barr*, 925 F.3d 396, 403 (9th Cir. 2019) ("[T]he Supreme Court [in *Pereira*] 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."), *reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020) (Thomas, C.J.).[4]

The government argues that we should not rely on *Pereira v. Sessions* because its facts differ from ours. The noncitizen in *Pereira* never received a notice of hearing, so the Supreme Court did not need to decide whether a notice of hearing could trigger the stop-time rule. 138 S. Ct. 2105, 2112 (2018).

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[4] The Ninth Circuit has decided to convene en banc to rehear *Lopez v. Barr*. As a result, the panel opinion in *Lopez* cannot be cited as precedent in the Ninth Circuit. *Lopez v. Barr*, 948 F.3d 989 (9th Cir. 2020) (Thomas, C.J.); Ninth Cir. R. 35-3.

Though *Pereira* is distinguishable on its facts,[5] the Court's reasoning supports our interpretation of the term "a notice to appear."[6] When interpreting the same

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[5] Given these factual differences, the government relies on pre-*Pereira* opinions from other circuit courts. Three circuits (the Fifth, Eighth, and Ninth Circuits) have held that § 1229(a)(1) is satisfied by the combination of an incomplete notice to appear and a notice of hearing. *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009); *Haider v. Gonzales*, 438 F.3d 902, 907-08 (8th Cir. 2006); *Popa v. Holder*, 571 F.3d 890, 896 (9th Cir. 2009), *overruled by Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019), *reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020) (Thomas, C.J.). And three other circuits (the Second, Third, and Seventh Circuits) have held that the combination of documents triggered the stop-time rule. *Guamanrrigra* v. *Holder*, 670 F.3d 404, 409-10 (2nd Cir. 2012); *Orozco-Velasquez v. Att'y Gen.*, 817 F.3d 78, 83-84 (3rd Cir. 2016); *abrogated*, *Guadalupe v. Attorney Gen.*, ___ F.3d ___, No. 19-2239, 2020 WL 913242, at *1, 4 (3d Cir. Feb. 26, 2020); *Dababneh v. Gonzales*, 471 F.3d 806, 808-10 (7th Cir. 2006).

But these holdings arguably conflict with *Pereira*, which concluded that omission of the time prevents a document from functioning as a notice to appear under § 1229(a) and triggering the stop-time rule. *Pereira v. Sessions*, 138 S. Ct. 2105, 2116 (2018). Given this conclusion, the Third and Ninth Circuits have held that their pre-*Pereira* opinions have been abrogated. *Guadalupe v. Attorney Gen.*, ___ F.3d ___, No. 19-2239, 2020 WL 913242, at *1, 4 (3d Cir. Feb. 26, 2020) (holding that the Third Circuit's previous precedent, *Orozco-Velasquez*, had been abrogated by *Pereira*); *Lopez v. Barr*, 925 F.3d 396, 400 (9th Cir. 2019) (stating that the Ninth Circuit's previous precedent, *Popa*, had been overruled by *Pereira*), *reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020) (Thomas, C.J.).

We need not address the viability of the various pre-*Pereira* opinions in other circuits.

[6] In *Pereira*, the government raised practical concerns with providing the date and time in the notice to appear, including the difficulty of assigning each noncitizen a date and time without consulting the immigration court. 138 S. Ct. 2105, 2118-19 (2018).

term, the *Pereira* Court held that the stop-time rule is not triggered by a notice to appear that omits the time because the document is "not a 'notice to appear under § 1229(a).'" *Pereira v. Sessions*, 138 S. Ct. 2105, 2110, 2116 (2018). The Court based this holding on its interpretation of the statutory phrase "(written notice (referred to as a 'notice to appear'))." *See* pp. 13-14, above. This interpretation applies equally here because Mr. Banuelos's putative notice to appear was missing the date and time.[7]

5. Conclusion

Given the unambiguous language of the pertinent statutes, the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing. We thus grant the petition for review and remand to the Board for further proceedings.

But the Supreme Court concluded that "[t]hese practical considerations are meritless and do not justify departing from the statute's clear text." *Id.* at 2118; *see also Guadalupe v. Attorney Gen.*, ___ F.3d ___, No. 19-2239, 2020 WL 913242, at *5 (3d Cir. Feb. 26, 2020) (stating that a requirement for "one complete" notice to appear does not prevent the Department of Homeland Security from waiting to send the notice to appear until after the Department has compiled all of the information required in § 1229(a)).

[7] Since *Pereira* was decided, two other circuit courts have held that an incomplete notice to appear could not be perfected by a later document stating the date and time. *Guadalupe v. Attorney Gen.*, ___ F.3d ___, No. 19-2239, at *2, 5 (3d Cir. Feb. 26, 2020) (holding that for purposes of the stop-time rule, a deficient notice to appear cannot be "cure[d]" or "supplemented" by a subsequent notice of hearing); *Lopez v. Barr*, 925 F.3d 396, 404 (9th Cir. 2019) (stating that substantive defects in a notice to appear cannot be cured by a notice of hearing that does not in itself satisfy all of the requirements of § 1229(a)(1)), *reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020) (Thomas, C.J.).

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia, 22041

File: A074-094-406—Denver, CO

IN RE: JOSE ANGEL BANUELOS-GALVIZ

[Filed: Mar. 21, 2019]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
David N. Simmons, Esquire

ON BEHALF OF DHS:
Tyler R. Wood
Assistant Chief Counsel

APPLICATION: Asylum, withholding of removal, Convention Against Torture, remand

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's decision dated August 24, 2017, denying his application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act (Act), 8 U.S.C. §§ 1158, 1231(b)(3), and his request for protection under

the Convention Against Torture.[1] On appeal, the respondent filed a motion to remand based on a change in case law regarding statutory eligibility for cancellation of removal for certain non-permanent residents. The appeal will be dismissed and the motion to remand will be denied.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

We affirm the Immigration Judge's determination that the respondent has not met his burden of proving that he is eligible for asylum. The Immigration Judge found that the respondent was a credible witness (IJ at 7). The respondent indicated that he last entered the United States in 2006 (IJ at 2; Tr. at 70). The respondent testified that one of his brothers disappeared in Mexico in 2013, there was an attempted kidnapping of one of his sisters in 2015, and his father was robbed and beaten in his own home twice in 2016 (IJ at 3-4; Tr. at 73-81; 83, 86-87, 89-90). The respondent alleges no harm to himself in Mexico. The Immigration Judge correctly determined that the respondent's testimony did not reveal that he suffered any past persecution in Mexico and he was not entitled to a presumption of a

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[1] The Immigration Judge also granted the respondent voluntary departure. Neither party appealed that determination. However, the record does not contain evidence that the respondent paid the voluntary departure bond. Accordingly, the respondent is no longer entitled to voluntary departure.

well-founded fear of future persecution if he returns to Mexico (IJ at 7).

The Immigration Judge further found that the respondent did not demonstrate a nexus between the harm that he faces on return to Mexico and a protected ground. The respondent indicated that he has a well-founded fear of future harm in Mexico based on his family membership. The Immigration Judge recognized that family can be a cognizable particular social group (IJ at 8-9). However, the requisite nexus is not established merely because family members experienced harm. Rather, the respondent must show that the persecutor is seeking to harm the family members because of an animus against the family per se. The family membership cannot play a minor role, nor be incidental or tangential to another reason for harm. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2007).

The respondent testified that he did not know who was responsible for the crimes against his brother, his father, and his sister, or their motives (IJ at 3-4; Tr. at 75, 76-77, 78-79). The Immigration Judge determined that the harm the respondent fears upon return to Mexico is based on the general conditions of crime and violence in that country, which is not a protected ground for purposes of asylum or withholding of removal under the Act. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 235 (BIA 2014). Accordingly, the respondent did not meet his burden to demonstrate that any feared future harm has a nexus to a protected ground, and he did not meet his burden to demonstrate that he is eligible for asylum or withholding of removal.

We also affirm the Immigration Judge's determination that the respondent has not met his burden of proving that he is eligible for protection under the Convention Against Torture. The respondent has not alleged that he suffered past torture in Mexico by anyone. He has not established that it is more likely than not that he would be tortured by or with the acquiescence (to include willful blindness) of an official of the Mexican government if removed to Mexico (IJ at 9-10). See 8 C.F.R. §§ 1208.16(c)(4), 1208.18(a)(1).

Further, we will deny the respondent's motion to remand. In his motion, the respondent argues that due to a recent United States Supreme Court decision issued during the pendency of his appeal, he is no longer statutorily ineligible for cancellation of removal for certain non-permanent residents. *See Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The respondent argues that this change in case law renders his notice to appear defective and the "stop-time" rule does not apply to end the accumulation of his continuous physical presence. He claims that he now has been physically present in the United States for 11 years. He argues that he does not have a disqualifying criminal conviction. Additionally, he has four United States citizen children and a lawful permanent respondent spouse whom he contends will experience exceptional and extremely unusual hardship if he is removed to Mexico.

A review of the record demonstrates that the respondent was served in person on January 6, 2010, with a notice to appear that did not specify the date and time of his removal hearing. However, the record shows that he was provided with notice dated January 26, 2010, of the date, time, and location of his removal hearing.

He subsequently received multiple hearing notices and attended several hearings in his removal proceedings. The initial hearing notice, dated January 26, 2010, effectively cured the defects in his notice to appear by supplying the missing time and place information at issue in Pereira, thereby triggering the "stop-time rule" of section 240A(d)(1)(A) of the Act. Therefore, we deem the respondent's period of continuous physical presence to have ended on January 26, 2010, the date of the initial notice of his removal hearing. Accordingly, the respondent's burden is to demonstrate 10 years of continuous physical presence calculated backwards from the hearing notice dated January 26, 2010. The respondent's motion to remand does not provide sufficient evidence that he has the requisite 10-year period of continuous physical presence to be eligible for relief in the form of cancellation of removal for certain non-permanent residents.

Accordingly, the following orders will be entered.

ORDER: The appeal of the denials of asylum, withholding of removal under the Act, and protection under the Convention Against Torture is dismissed.

FURTHER ORDER: The motion to remand for further proceedings regarding cancellation of removal is denied.

/s/ ED KELLY
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DENVER, COLORADO

File: A074-094-406

IN THE MATTER OF JOSE ANGEL BANUELOS-GALVIZ,
RESPONDENT

Filed: Aug. 24, 2017

IN REMOVAL PROCEEDINGS

CHARGES:	Immigration and Nationality Act Section 212(a)(6)(A)(i), present in the United States without being admitted or paroled.
APPLICATIONS:	Asylum pursuant to Section 208 of the Immigration and Nationality Act; withholding of removal and restriction on removal to Mexico pursuant INA Section 241(b)(3); withholding of removal pursuant to the United Nations Convention Against Torture; and voluntary departure pursuant to INA Section 240B(b).

ON BEHALF OF RESPONDENT:
DAVID SIMMONS
1175 OSAGE STREET SUITE 202
DENVER,COLORADO 80204

ON BEHALF OF DHS:
JOSHUA MARRONE,
ASSISTANT CHIEF COUNSEL
DENVER, COLORADO

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 42-year-old native and citizen of Mexico. Notice to Appear was issued to the respondent on January 6, 2010 (Exhibit 1). The respondent appeared in these proceedings. He conceded that he was subject to removal as charged. The entry date as set forth in the Notice to Appear was November 15, 2007. Respondent denied that entry date, indicating that he actually entered the United States on or about November 10 of 2006 at El Paso, Texas. In any event, based on the admissions that the respondent made to the other allegations in the Notice to Appear and based on his concession of removability, the Court will sustain the removal charge.

The respondent requested asylum, withholding of removal, relief under the United Nations Convention Against Torture and, in the alternative, voluntary departure. The respondent submitted a Form I-589 to the immigration Court (Exhibit 2). That application is considered not only an application for asylum, but also an application for withholding of removal under the Immigration and Nationality Act and under the United Nations Convention Against Torture. Respondent submitted some evidence along with his application, which

included country conditions evidence, provided some arrest history. Respondent provided a master exhibit which contained a supplemental affidavit from the respondent as well as Country Conditions Reports and corrections to the I-589 (Exhibit 3).

The respondent testified in these proceedings, he was the sole witness. Respondent testified that his first entry to the United States was in about 1994 when he was 17 years old. Since that date he has made two returns to Mexico. He returned to Mexico when he was 19 years old for a period of two months, and then in about 2005 he returned to Mexico to apply for an immigrant visa. He testified that he was in Mexico for approximately one year at that time. The respondent testified that he is married. He testified that he has four children, all four children are U.S. citizens. Respondent testified that he went to Mexico in about 2005 or 2006 to apply for an immigrant visa. The visa was refused because his wife, who was apparently the petitioner, was not a U.S. citizen. She did have a U.S. birth certificate. They stayed for about one year in Mexico at that time.

The respondent indicated that they did not remain in Mexico because "life is not so good in Mexico." Respondent was asked, whether he had any fear of Mexico at that time, he said "I didn't have any threats, only fear of the financial situation." He indicated he was concerned mainly about the financial situation, although he did testify also that there is now a lot of crime in Mexico.

The respondent explained that this has an impact on him because his brother has disappeared. Respondent testified that his brother, Javier, disappeared about four years ago. Respondent testified he does not know who

took Javier, there were no threats preceding his disappearance. Respondent testified that he does not know if Javier had been involved in any drug activity. Respondent testified that his mother reported Javier's disappearance to the federal police. Respondent did not know what the police have done in the case. Respondent testified that their information was that "they don't know" what happened with Javier. Respondent testified that no one ever dissuaded his mother from inquiring about the whereabouts of Javier.

The respondent testified also that about one year ago his father was robbed and beaten at home. The respondent testified that "they" knocked down his door, stole his money and clothes, and a television at his home. At that time the respondent's father was divorced and living separately from respondent's mother. Respondent's father now lives with respondent's grandmother. Respondent's father did not report this incident to the police. Respondent testified that the incident was not reported because the perpetrators threatened to kill the respondent if he reported this. Also the offense was not reported because the government does not do anything about crime due to corruption in the government. Respondent testified that the government is under the influence of organized crime. Respondent reiterated that he does not know why Javier disappeared.

He testified that "they" also tried to kidnap his sister. They were unsuccessful, however, as she was able to fight them off. Respondent testified that his mother made a report of this incident. He testified that there was an investigation. Days later the police advised respondent's mother to abandon her complaint, however. The respondent testified that he is from a small town, a

"colonia" in Fresnillo nameds Zacatecas. The respondent testified that his brother and sister lived nearby, and his father lived about eight minutes away. Fresnillo is the largest town, about 30 minutes away. The respondent testified that he has now two sisters living in Colorado, one living in Oklahoma, and he has one brother living in Colorado.

When asked again about who may have abducted his brother, the respondent testified "I don't know exactly." He then offered that he may have been abducted by the "mafia."

On cross-examination, the respondent testified that there is a lot of crime in his area in Mexico. He also testified that the people do not have work there. He testified that "they" may kidnap his family. He identified the perpetrators as being "organized crime." Respondent also testified on redirect that it is quite common that entire families are targeted.

When questioned by the Immigration Court, the respondent indicated that the group he identified as the mafia are drug traffickers, robbers, and evil people. He testified he learned about them through the news and through comments that his mother has made. They have been referred to as "Los Zetas" or the "Chapas." It appears that these titles are a generalization and a general term for cartels. Respondent testified that they target working people, and it appears they target just about everybody. Respondent testified that these people want to have power over everything.

The respondent testified that in the incidences that the respondent described for the Court there was never

an extortion demand for money. He did indicate, however, that persons in his area are kidnapped and held for ransom. However, with his family there was no extortion, it was simply that the criminals just "robbed us."

The respondent testified about his father's robbery, indicating that he imagined that it was the mafia. Respondent testified that the perpetrators had their faces covered, they did not say why they were robbing the respondent. The respondent testified that the perpetrators thought that his father had more money than he had, and so that's why the beat him up. The respondent indicated that he does send "some" money to his family.

On redirect, the respondent testified that people had gone to his mother's restaurant to eat and then did not pay. The respondent testified that these people said they were able to eat for free in return for "protection."

In analyzing the respondent's claims, the Court notes that the respondent bears the burden of proof for all relief applications that he places before the Court. See INA Section 240(c)(4)(A). In connection with the relief applications, the respondent will testify and the Immigration Judge will make a credibility determination. See INA Section 240(c)(4)(B). That credibility determination is based on a totality of the circumstances. See INA Section 240(c)(4)(C).

The Court notes that the Immigration and Nationality Act provisions relating to asylum create a time limit for making the application. See INA Section 208(a)(2)(B). That time limit is one year following the respondent's last arrival in the United States. In this case, the respondent is alleged to have arrived last in

2007, and he testified that his last entry was in 2006. The respondent's asylum application was clearly submitted outside that time limitation, the application was submitted April 29, 2013. The evidence provided by the respondent shows that his brother disappeared in August of 2012. This may amount to changed circumstances which materially affect the respondent's eligibility for asylum. As such, the application may be considered on its merits due to an exception to the one-year filing rule set forth in INA Section 208(a)(2)(D).

The Court would note that there was about eight months delay from the change in circumstances until when the respondent submitted the application for asylum. Regulations indicate that to take advantage of this exception the respondent must file the application within a reasonable time after the change in circumstance. The Court will find that the respondent did file the application within a reasonable time given the fact that the application could only be filed before the Immigration Court during a scheduled hearing. The Court therefore will consider the respondent's application for asylum on the merits.

To qualify for asylum, the respondent bears the burden of proof to show that he meets the definition of refugee as set forth in INA Section 101(a)(42). See INA Section 208(b)(1)(A). The statute goes onto elaborate the respondent has the burden to show that race, religion, nationality, membership in a particular social group, or political opinion form "one central reason" for the harm that he suffered, or the harm that he fears. See INA Section 208(b)(1)(B)(i).

For withholding of removal under INA Section 241(b)(3), the respondent bears the burden "to establish

that his or her life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." See 8 C.F.R. 1208.16(b). This burden requires the respondent to show that it is more likely than not that he would suffer persecution upon return to his home country.

For relief under the United Nations Convention Against Torture, the respondent must show that it is more likely than not that he would suffer torture. 8 C.F.R. Section 1208.16(c)(2). Respondent must show that that torture would be inflicted by the authorities in his home country, at their instigation, with their consent, or with their acquiescence. See 8 C.F.R. 1208.18(a)(1).

In assessing the respondent's credibility, the Court finds the respondent is a credible witness. He testified at length subject to cross-examination. He was testifying under oath. The Court has observed his demeanor and believes he was testifying sincerely. The Court finds that the respondent then is a credible witness with reference to information which is within his own personal knowledge. Of course the Court also observes that much of respondent's claim is based on hearsay and based on reports that the respondent received from his family and others.

The Court finds that the respondent's testimony does not reveal that he suffered past persecution in Mexico. Therefore, he is not entitled to a presumption of a well-founded-fear of persecution or a presumption of a likelihood of persecution in the future. See 8 C.F.R. 1208.13(b)(1) and 8 C.F.R. 1208.16(b)(1)(i).

In assessing whether or not the respondent faces a well-founded-fear of persecution in the future or a likelihood of persecution, the Court must determine whether there is a nexus between the harm that the respondent faces on return to Mexico and one of the protected grounds. After a review of all the evidence in this record, it appears to this Court that the harm that respondent fears upon return to Mexico is based on general conditions of crime and social afflictions in Mexico. The Tenth Circuit has indicated quite clearly that an applicant for asylum or withholding of removal must show that political opinion or other protected ground is related to the likelihood of harm. See Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012).

The Board of Immigration Appeals has emphasized that an applicant for asylum or withholding of removal must establish that one of the protected grounds is the basis for the fear or likelihood of harm. "Asylum and refugee laws do not protect people from general conditions of strife, such as crime and other social afflictions. Ordinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum." See Matter of M-E-V-G-, 26 I&N Dec. 227, 235 (BIA 2014) (citations omitted). The Board has gone on to indicate that "mere generalized lawlessness and violence . . . which . . . inflicts misery upon millions of innocent people daily around the world generally is not sufficient to permit the Attorney General to grant asylum . . . " M-EV-G- supra at 1235; quoting from Singh v INS, 134 F.3d 962, 967 (3d Cir. 1998). The Court would note that in the M-E-V-G- case, the Board was dealing with gang violence, but this Court believes that the analysis of claims based on gang violence is similar to claims based on violence of cartels and other

agents of organized crime. And "although certain segments of a population may be susceptible to one type of criminal activity or another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are a basis for asylum." M-E-V-G, supra at 251 (citations omitted).

The respondent, through counsel, also indicated that the respondent faces harm based on his family group membership. Family of course can be a particular social group. It does appear that the respondent's family has suffered from criminal activity in Mexico. The Board of immigration Appeals has dealt with the issue of claims based on family. See Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2017). The Board in the L-E-A- case made it clear that claims based on this type of family group need to show through evidence that one central reason for the respondent's harm was his or her family status. The Board has indicated that "nexus is not established simply because a particular social group of family members exists and the family members experience harm." L-E-A- supra at 45. The Board goes on to indicate that "the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground." L-E-A- supra at 45. The Board indicated it was possible to base a claim on family and gave an example that "nexus would be established based on family membership where a persecutor is seeking to harm the family members because of an animus against the family itself." L-E-A- supra at 44.

I do not find that the respondent has established a claim which would be cognizable under the Board's guidelines in the L-E-A- case. The respondent, through his credible testimony, indicated that he did not know why these particular~~ly~~ things were happening to his family. The closest that the evidence comes to assigning a cause for these problems is the general lawlessness in Mexico, and in the respondent's area. Accordingly, the Court believes that the respondent has not shown a nexus to one of the protected grounds sufficient to justify a grant of asylum under Section 208 of the Immigration and Nationality Act, or withholding of removal under INA Section 241(b)(3).

With reference to the Convention Against Torture, the respondent must show at least acquiescence by the government in Mexico. Respondent's testimony indicates that some of the behavior of organized crime had been reported to the police. It may be that the police were not effective in investigating the occurrences, nevertheless I do not believe that the respondent has shown that the police would torture the respondent, or would consent to his torture or acquiesce in his torture. The Court would note that Article 3 of the Convention Against Torture prohibits the return of an alien to a country where "it is more likely than not that he would be subject to torture by a public official, or at the instigation or with the acquiesce of such an official." Cruz-Funez v. Gonzales, 406 F.3d 1187, 1192 (10th Cir.2005). "Acquiesce of a public official requires that the public official, prior to the activity constituting the torture, have awareness of such activity and thereafter breach his or her legal responsibility to prevent such activity." 8 C.F.R. 1208.18(a)(7). The Tenth Circuit has indicated that the standard does not require actual or willful

acceptance by the government. Rather, "willful blindness suffices to prove acquiescence." Id. The Court believes that the respondent's evidence does not establish at a minimum such willful blindness, and therefore relief under the United Nations Convention Against Torture may not be granted.

The respondent has requested voluntary departure in the alternative. The respondent has lived in the United States for a long period of time, he has very substantial connections to this country, he appears to be in general a worthy person, and I find that he does merit a favorable exercise of discretion for this minimal form of relief. Accordingly, voluntary departure will be granted for the maximum period of time, conditioned upon posting the minimum bond.

The following order shall issue:

ORDER

The respondent's applications for asylum under Section 208 of the immigration and Nationality Act, withholding of removal and restriction on removal pursuant to Section 241(b)(3) of the immigration and Nationality Act, and for relief under the United Nations Convention Against Torture are all denied.

The respondent is granted voluntary departure until October 23, 2017, or such date as may be assigned by competent authority, conditioned upon the respondent's posting a voluntary departure bond in the amount of $500 on or before August 31, 2017.

And upon the failure of the respondent to post the bond by that date, or to depart the United States by the date given or such other date as may be assigned by competent authority, the respondent shall be removed

from the United States to Mexico pursuant to INA Section 212(a)(6)(A)(i).

Please see the next page for electronic signature

DONN L.LIVINGSTON
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9517
(Petition for Review)

JOSE ANGEL BANUELOS-GALVIZ, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

Filed: Apr. 20, 2020

ORDER

Before: **HOLMES**, **MATHESON**, and **BACHARACH**, Circuit Judges.

Respondent's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX E

1. 8 U.S.C. 1229(a)(1) and (2) provides:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

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.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice 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—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

2. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

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;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, 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.

* * * * *

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

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