

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MORIS ESMELIS CAMPOS-CHAVES,)

4 Petitioner,)

5 v.) No. 22-674

6 MERRICK B. GARLAND,)

7 ATTORNEY GENERAL,)

8 Respondent.)

9 - - - - -

10 MERRICK B. GARLAND,)

11 ATTORNEY GENERAL,)

12 Petitioner,)

13 V.) No. 22-884

14 VARINDER SINGH,)

15 Respondent.)

16 - - - - -

17 Washington, D.C.

18 Monday, January 8, 2024

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20 The above-entitled matter came on for
21 oral argument before the Supreme Court of the
22 United States at 10:04 a.m.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-674, Campos-Chaves versus Garland, and the consolidated case.

Mr. McCloud.

ORAL ARGUMENT OF CHARLES L. McCLOUD
ON BEHALF OF THE UNITED STATES

MR. McCLOUD: Thank you, Mr. Chief Justice, and may it please the Court:

Each of the non-citizens in these cases failed to attend a removal hearing after receiving written notice of the time and place of that hearing. Under the rule adopted by the Ninth Circuit, however, the non-citizens can rescind their in absentia removal orders based on a supposed lack of notice.

That holding defies text, context, and common sense, and it threatens to unsettle hundreds of thousands of in absentia orders that had been entered over the course of nearly three decades. In reaching that extraordinary result, the Ninth Circuit misread the statutory scheme and this Court's decisions in Pereira and

1 Niz-Chavez.

2 As to the statute, the Ninth Circuit
3 is wrong that the omission of time and place
4 information in a notice to appear renders all
5 subsequent notices invalid. Congress created
6 two distinct forms of notice, and it made both
7 of them potential grounds for in absentia
8 removal.

9 The removal orders in these cases were
10 based on notices of hearing that specified a new
11 time and place for the removal proceedings and
12 that warned the non-citizens of the consequences
13 of failing to attend those proceedings. That's
14 all Section 1229 requires for a notice of
15 hearing to be valid.

16 As to Pereira and Niz-Chavez, we
17 acknowledge that the Court is not writing on a
18 blank slate when it comes to notices to appear,
19 but Pereira and Niz-Chavez do not decide these
20 cases. The question presented today was not
21 briefed in those cases, it was not argued in
22 those cases, and was not necessary to resolve in
23 those cases. The Court's narrow decisions do
24 not create the sweeping defense to removal that
25 the non-citizens here seek.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Well, Mr. McCloud,
3 Pereira seems to work against you, so I think
4 you -- it would be good for you to spend a -- a
5 bit of time on that.

6 MR. McCLOUD: Certainly, Your Honor.
7 So I think that the important thing about
8 Pereira is that it was a narrow decision that
9 decided a particular question presented, and
10 that question presented was about the
11 interaction between the stop-time rule in
12 1229b(d)(1) and the notice to appear
13 requirements.

14 And if I could point to where in the
15 Court's opinion that holding appears, it's at
16 the beginning of Part II B of the opinion. This
17 is on page 2114 of the Supreme Court Reporter
18 version if you have that available.

19 And at the beginning of the first
20 paragraph of that section of the opinion, the
21 Court says, "The statutory text alone is enough
22 to resolve this case." It then proceeds to
23 analyze the text of the two provisions that I
24 just referenced.

25 Now it's true that after this point in

1 the opinion, there is additional analysis, but I
2 think much of that additional analysis is dicta.
3 The Court said that that analysis supported or
4 bolstered or reinforced the conclusion it had
5 already reached. And I think that's
6 particularly true of the statements that the
7 non-citizens and the Ninth Circuit have relied
8 on in Pereira.

9 To go directly to the statement about
10 the -- the meaning of "change," the meaning of
11 "change" was not briefed in Pereira. It was not
12 argued in Pereira. And so the Court in Pereira
13 did not have before it, the wealth of argument
14 and evidence that we have brought to bear on
15 that question in this case.

16 JUSTICE KAGAN: I -- I take the point,
17 Mr. McCloud, but, you know, it is a very
18 directed statement. By allowing for a change or
19 a postponement to a new time or place, paragraph
20 (2) presumes that the government has already
21 served an NTA that specified a time and place as
22 required by (a)(1).

23 And I don't think we were looking to
24 reach out and decide a lot of questions that
25 weren't before us. I think -- and this was a --

1 you know, eight justices joined this opinion.
2 It just seemed the sort of obvious understanding
3 of the statutory scheme. So, you know, even if
4 it's dicta, it reflected what eight people
5 thought was pretty obvious when you looked at
6 the statute.

7 MR. McCLOUD: So, Justice Kagan, if I
8 can take that in -- in two pieces.

9 So there are two sentences there. The
10 first one you referred to talks about a
11 presumption in the statute that the notice of
12 hearing will follow the notice to appear. And I
13 agree, I -- I don't think that there is any
14 dispute that there is such a presumption in the
15 statute. But identifying that presumption does
16 not answer the question in this case, which is
17 what happens when the presumption is not met and
18 the notice to appear did not contain the time
19 and place information.

20 Then the second statement, which I
21 acknowledge is a difficult statement for me, is
22 the statement about the meaning of "change."
23 And I -- I -- I do think that's dicta. I also
24 think it's incorrect dicta, and it's not
25 surprising the Court got that incorrect because

1 it just did not have the evidence like the
2 dictionary definitions, like the contextual
3 evidence about the meaning of "change" that we
4 have brought to the Court's attention in our
5 briefing in this case.

6 JUSTICE SOTOMAYOR: Mr. McCloud, that
7 -- that seems to beg the question. The finding
8 in that case, and since I wrote it --

9 (Laughter.)

10 JUSTICE SOTOMAYOR: -- was that the
11 statutory presumption commanded by Congress, who
12 knew full well that the government was giving
13 notices with TBAs, time and place to be
14 announced, regularly, was contrary to that
15 history. They wanted these notices to be full
16 and complete. That's what we held.

17 And having held that, I think there's
18 a presumption that you have to look at the
19 statute in that context, that there will always
20 either -- they will always start with a proper
21 notice to appear, and if you're going to change
22 the time and place, you're going to give a new
23 time and place.

24 I -- I -- I don't understand that a
25 new time and place is something different than

1 what you've already specified.

2 MR. McCLOUD: And, Justice Sotomayor,
3 in this case, we think that we did satisfy that
4 burden because we did provide a new time and
5 place. We told the non-citizens where their
6 removal hearings would be held, and so they had
7 the information they needed to attend.

8 And so I -- I don't think that
9 "change" is actually the operative word in the
10 statutory scheme, but I don't want to fight you
11 too hard on that because I do think that even if
12 you think that a notice of hearing must change a
13 previously set time or place for the hearing,
14 that requirement is satisfied here because the
15 ordinary meaning of the word "change" is very
16 broad, and it encompasses the process of going
17 from --

18 JUSTICE SOTOMAYOR: So change is no
19 change? Meaning you haven't set a time and
20 place and we're going to change that and set
21 what? Another no time and place?

22 MR. McCLOUD: Your Honor, what we have
23 done --

24 JUSTICE SOTOMAYOR: You're saying no,
25 it's going to be a time and place now.

1 MR. McCLOUD: Your Honor, what we have
2 done in the TB NTAs is to tell the non-citizen
3 you're going to have a hearing. We don't know
4 when that hearing will be, but we have changed
5 from that placeholder time to a specific time.

6 And we think that under the ordinary
7 meaning of "change," particularly as it's used
8 in this statutory scheme, going from an
9 indeterminate time and place to a determined one
10 is a kind of change.

11 JUSTICE SOTOMAYOR: Mr. McCloud --

12 JUSTICE JACKSON: But didn't you lose
13 that --

14 JUSTICE SOTOMAYOR: I'm sorry.

15 JUSTICE JACKSON: Didn't you lose that
16 argument in Niz-Chavez? I mean, I -- I -- I
17 understand and take your point, but I thought
18 the Court said you really couldn't interpret the
19 statute in that way or the word "change" in that
20 way.

21 MR. McCLOUD: Respectfully, Justice
22 Jackson, I -- I don't agree. I think the only
23 issue that the Court decided in Niz-Chavez was
24 whether we could compile two documents together
25 to create "a" notice to appear, and the Court

1 said that that definite article "a" indicated
2 that the notice to appear needed to be a single
3 document.

4 And so we are not disputing for
5 purposes of these cases that the notices to
6 appear alone could not be the basis for in
7 absentia removal, but what's critical about this
8 case and what distinguishes this case from
9 Pereira and Niz-Chavez is that Congress here
10 created two forms of notice and it made both of
11 them relevant for purpose of in absentia removal
12 in a way that they are not relevant for purposes
13 of this topic --

14 JUSTICE JACKSON: Can you say more
15 about that --

16 JUSTICE BARRETT: Mr. --

17 JUSTICE JACKSON: -- two forms of
18 notice? What do you mean?

19 MR. McCLOUD: I mean that they created
20 both the paragraph (1) notice, the notice to
21 appear, and the paragraph (2) notice, the notice
22 of hearing or, as the other side refers to it,
23 the notice of change.

24 JUSTICE JACKSON: So you think those
25 --

1 JUSTICE BARRETT: Mr. --

2 JUSTICE JACKSON: -- operate
3 completely independently of one another?

4 MR. McCLOUD: They're independent in
5 the sense that they can both be independent
6 valid bases for in absentia removal. I take the
7 point that the notice to appear is what
8 initiates the proceeding, and so, some sense,
9 you need to have a proceeding in order for there
10 to be a notice of hearing to -- to alter that
11 proceeding.

12 But I don't think it is the case that
13 the TBD status of the notice to appear in any
14 way invalidates the later notice of hearing, and
15 that's because the statute is very clear about
16 the requirements for a valid notice of hearing.
17 It needs to set the new time and place, and we
18 did that in this case.

19 JUSTICE BARRETT: Mr. McCloud, what
20 would happen if the non-citizen showed up to the
21 right time and place in response to the notice
22 of hearing, but the NTA had been incomplete?

23 Would that be grounds for the
24 non-citizen objecting that the entire proceeding
25 was invalid? Because, after all, the statute

1 does say "shall," this following information
2 shall be provided. So, if the date and time was
3 omitted from the initial one, would that be
4 grounds for an invalidation of a proceeding?

5 MR. McCLOUD: No, Justice Barrett.
6 All of the courts of appeals that have
7 considered that issue and the Board when it has
8 considered that issue has said that the
9 requirements, both the statutory requirements
10 and the regulatory requirements, regarding the
11 notice to appear and the information it has to
12 contain are claims processing rules, they are
13 not jurisdictional rules, so they do not divest
14 the immigration court of jurisdiction if there
15 is information missing from the notice to
16 appear.

17 JUSTICE BARRETT: So is your position
18 -- let me try to state how I -- I don't think
19 you say it quite this way in your brief, but
20 this is what I take from your brief, and I want
21 to see if I'm understanding it correctly.

22 A notice of hearing presupposes that
23 there has been a notice to appear because,
24 otherwise, well, both because of the word
25 "change" and, otherwise, there would be no way

1 for the alien to receive it because you have to
2 know what address to send it at or have
3 personally served it, correct?

4 MR. McCLOUD: That's correct.

5 JUSTICE BARRETT: Okay. So is it your
6 position that once the notice of hearing arrives
7 telling the non-citizen where and when to show
8 up, even if there's some information lacking --
9 and let's say it's information that's even maybe
10 more significant than the date and time that the
11 government has been omitting and it's maybe an
12 incomplete statement of the grounds for removal.

13 That the alien, by versus -- by virtue
14 of the in absentia provision, has an obligation
15 to show up because he's on notice, it's not like
16 he's not aware that he is in contact with, you
17 know, Immigration and that there are removal
18 proceedings underway. But he has an obligation
19 created by the notice of a hear -- of hearing to
20 show up and at that point to register any
21 objections he may have to the incomplete NTA.

22 MR. McCLOUD: That is our position,
23 Justice Barrett. I want to make sure that I'm
24 clear, though, that we think there are a number
25 of safeguards that would prevent the result that

1 you're talking about or the blank document
2 hypothetical that the other side has raised, and
3 if I could go into those protections.

4 JUSTICE BARRETT: Sure.

5 MR. McCLOUD: The first is the
6 regulatory requirement that the notice to appear
7 contain the charging information. So, if we had
8 a blank document or a document that was missing
9 the charges against the non-citizen --

10 JUSTICE BARRETT: But don't you need,
11 and I'm sorry to interrupt -- but don't you --
12 I'm sorry, don't you need need the protection
13 from the statute itself? Because the regulatory
14 requirement can be subject to change. So I
15 think your better argument comes from the clear
16 and convincing evidence requirement in the
17 statute itself.

18 MR. McCLOUD: That was my second
19 response, Your Honor, which is we bear the
20 burden by clear and convincing evidence to prove
21 that the non-citizen both received notice and
22 that they are removable as charged. And so, if
23 you have a document that lacks charges, we could
24 not prove that the non-citizen actually is
25 removable.

1 And then the third --

2 JUSTICE KAGAN: Suppose -- I'm sorry.

3 MR. McCLOUD: Well, the third
4 protection I was going to refer to is the fact
5 that in absentia removal is not automatic.
6 There is an immigration judge who is sitting on
7 the other side of the bench and who has to
8 review the documents and decide whether in
9 absentia removal is appropriate.

10 And so I think it is highly unlikely
11 that an -- an -- an immigration judge in the
12 circumstances with the blank document or the
13 document without charges would enter in
14 absentia.

15 JUSTICE KAGAN: Suppose the (a)(1)
16 notice didn't have the right to counsel in it.

17 MR. McCLOUD: So the -- the answer I
18 think is the same as before. We view the right
19 to counsel information obviously as an important
20 piece of information, but the lack of that
21 information does not affect the validity of the
22 proceedings.

23 So, if the -- the non-citizen --

24 JUSTICE KAGAN: Right. So it does
25 suggest -- I mean, you're -- you're not informed

1 of your right to counsel. Nonetheless, you have
2 to show up. And I don't see that any of your
3 safeguards actually protect the alien, the
4 non-citizen, in that situation.

5 I mean, what's going to prevent the
6 non-citizen from being ordered removed, not
7 being able to reopen, notwithstanding that he's
8 never been told that he has a right to a lawyer?

9 MR. McCLOUD: What prevents that
10 result, Your Honor, is the regulations that I
11 was referring to. If the notice to appear does
12 not contain the information about the right to
13 counsel, that is an incomplete notice to appear
14 that would be rejected by the immigration court.

15 JUSTICE GORSUCH: Well --

16 MR. McCLOUD: I also want to emphasize
17 that --

18 JUSTICE GORSUCH: -- counsel, let --
19 let me -- let me -- let me pause there. Your
20 regulations are interesting because they -- they
21 suggest that a lot of things are required in a
22 notice to appear, except stuff that the
23 government finds inconvenient, like the hearing
24 date, and try to resuscitate the pre-statutory
25 regime that existed before where the government

1 could issue as many notices as it wanted.

2 So the regulations themselves may or
3 may not comply with the statute and they -- as
4 Justice Barrett pointed out, they may or may not
5 change.

6 The only statutory hook I think you've
7 identified to -- to save the problem is the
8 clear and convincing evidence requirement, but
9 that's just a clear and convincing evidence
10 requirement that the notice was given.

11 And, here, the notice would be the
12 Section 2 notice, the notice of change. So none
13 of that means that the NTA, the Section 1
14 notice, has to be complete or, in fact, anything
15 other than a blank document, right?

16 MR. McCLOUD: So, Justice Gorsuch, I
17 think, if we were in the world where we had
18 repealed our -- all our regulations and we have
19 somehow, you know --

20 JUSTICE GORSUCH: I'm not --

21 MR. McCLOUD: -- convinced the
22 immigration judge to --

23 JUSTICE GORSUCH: Forget about your
24 regulations. The law. Your -- your -- your --
25 your interpretation of the law has to hang

1 together and make sense of the law. Otherwise,
2 it is a "trust us" argument. Trust us. We will
3 -- we will have all our own internal operating
4 procedures.

5 I'm asking you about statutory
6 interpretation. And we normally ask -- we think
7 statutes are coherent, sensible, not ridiculous.
8 You -- you invoked common sense in your opening
9 argument.

10 And, here, one consequence of your
11 argument, I think, is that the NTA can be a
12 blank document and that you can remove someone
13 in absentia based on a notice of change that
14 says show up on a date certain.

15 Nobody -- the immigrant may or may not
16 know that this is really the government. It's
17 just a date to show up in some place. It
18 doesn't have notice of charges or lawyers
19 against him.

20 And the government wins, right?

21 MR. McCLOUD: So, Just -- Justice
22 Gorsuch, I have several responses to that
23 question. The first is this is not a case where
24 we are simply asking you to trust us. This is a
25 statute that has been on the books for nearly 30

1 years --

2 JUSTICE GORSUCH: So let's talk --

3 MR. McCLOUD: -- and has been used --

4 JUSTICE GORSUCH: -- about the
5 statute. Let's --

6 MR. McCLOUD: --- hundreds of
7 thousands of times.

8 JUSTICE GORSUCH: Am -- am I correct
9 that the clear and convincing evidence rule that
10 you're relying on as a matter of statutory
11 interpretation would allow the government to
12 remove somebody for a blank document, NTA, if
13 they failed to appear on a notice of change, the
14 government can prove by clear and convincing
15 evidence it issued a compliant notice of change?

16 MR. McCLOUD: Our position is that if
17 a non-citizen receives a paragraph (2) notice, a
18 notice of hearing saying show up at immigration
19 proceedings at this date and this time, then,
20 yes, the non-citizen needs to comply with that.

21 JUSTICE GORSUCH: Okay.

22 MR. McCLOUD: And if the non-citizen
23 doesn't attend, they could be removed.

24 JUSTICE GORSUCH: And so, if that
25 happens --

1 MR. McCLOUD: That's very far away
2 from the facts of these cases.

3 JUSTICE GORSUCH: -- if -- if that
4 happens -- if that happens, if that's the
5 consequence of your statutory interpretation, we
6 have to ask whether that fits with common sense,
7 you say. Okay.

8 One common-sense consequence might be
9 this: That if the government can issue blank
10 notices to appear, which it has found rather
11 inconvenient in the past to -- to -- to comply
12 with that provision, need only file notice of
13 changes and then remove people who fail to show
14 up, why wouldn't it proceed in exactly that
15 fashion going forward as a consequence of a
16 decision in the government's favor in this case
17 when, as I understand it, and my figures may not
18 be exact, about a third of cases in immigration
19 proceedings are in absentia removals, so
20 failures to appear.

21 So why not issue a blank NTA because
22 they're hard -- they're -- they're a pain, we've
23 found them difficult, then issue an -- a
24 compliant notice of change, show up on a date
25 certain, and then remove about a third of the

1 aliens in this country without any notice of the
2 charges against them or their right to counsel
3 or anything else, and then deal with the
4 remainders and -- and file compliant notices to
5 appear in those cases?

6 MR. McCLOUD: So, Justice Gorsuch, we
7 do not do that and have never done that --

8 JUSTICE GORSUCH: I'm not asking
9 you --

10 MR. McCLOUD: -- for several reasons.

11 JUSTICE GORSUCH: Let's put aside the
12 "trust us" arguments. What would prevent the
13 government from following where the incentives
14 of that decision might lead as a matter of law?

15 MR. McCLOUD: And -- and, Justice
16 Gorsuch, what I'm disputing is that we would
17 have any incentive ever to do that because, if
18 we did that, if we used the blank document,
19 there would not be a removal proceeding under
20 our own regulations in which to order the
21 non-citizen removed. So we have no incentive to
22 do that --

23 JUSTICE SOTOMAYOR: Mr. McCloud, I --
24 I have a problem, which is I think I don't have
25 to go as far as Justice Gorsuch. You could

1 continue what you're doing. We have two prior
2 decisions telling the government a notice to
3 appear is inadequate that doesn't have the time
4 and place. Despite that, and despite the fact
5 that there's ample proof that it can be done, it
6 hasn't been done. It continues to issue these
7 TBA notices to appear.

8 If we rule in your favor, we're giving
9 you an incentive to continue that practice,
10 because you can do it continuously. You don't
11 have to pay any attention to the statute. You
12 can continue doing TBAs and continue your
13 practice. As Justice Gorsuch said, those people
14 who show up, you give them a compliant one when
15 they show up. Those people who don't, you
16 remove them in absentia, and they can't ever
17 come back and complain about your process.
18 That's really the incentive here.

19 MR. McCLOUD: So, Justice Sotomayor, I
20 have two responses to that.

21 First, I want to talk a little bit
22 about our current practices. We have made very
23 significant progress in the years since Pereira
24 and Niz-Chavez in reducing the number of TBD
25 NTAs that are still issued. There are

1 technological and operational reasons why we're
2 not down to zero yet, and I'm happy to talk
3 about those if Your Honor is interested. But I
4 do want to assure the Court that we take very
5 seriously the obligation to comply with this
6 Court's decisions and to comply with the
7 statute.

8 The -- the bigger problem is, assuming
9 we could issue NTAs that had time and date
10 information going forward, it does not do
11 anything about the hundreds of thousands of
12 cases that have already been closed where
13 removal orders were already issued --

14 JUSTICE SOTOMAYOR: So let's go to the
15 practical problems. You started by saying
16 there's an entitlement to reopen. There isn't.
17 It is the right to make a motion to reopen, but
18 it's still discretionary for the BIA to decide
19 whether to reopen. Is that correct?

20 MR. McCLOUD: So that is the way that
21 we read the statute. That's not the way that
22 some courts, in particular the Ninth Circuit,
23 have read the statute. They have suggested that
24 if a non-citizen files a motion and they can
25 prove that they -- they got the defective NTA --

1 JUSTICE SOTOMAYOR: Well, that's a
2 separate legal issue. The way the statute is
3 risen -- written, it is not mandatory to reopen.
4 It -- there -- they can take into account what
5 happened in one of these three cases where a --
6 a litigant showed up. And I don't know, did you
7 forfeit that argument in -- was that the last
8 case that's before us, the Mendez-Colín case?

9 MR. McCLOUD: In the Mendez-Colín
10 argument?

11 JUSTICE SOTOMAYOR: Yes. He showed up
12 a number of times and then left, correct?

13 MR. McCLOUD: That is correct, and we
14 did not make a specific waiver or forfeiture
15 argument if that's what Your Honor is referring
16 to.

17 JUSTICE SOTOMAYOR: That --

18 MR. McCLOUD: We've highlighted the
19 facts of his case for two reasons. The first is
20 because it shows --

21 JUSTICE SOTOMAYOR: But you could have
22 made that argument?

23 MR. McCLOUD: I suppose we could have,
24 Your Honor. But it wouldn't, I think, address
25 some of the problems with the other side's

1 position, in particular --

2 JUSTICE SOTOMAYOR: Why?

3 MR. McCLOUD: -- the other side's --

4 JUSTICE SOTOMAYOR: If -- if you had
5 raised that argument, do you have any doubt the
6 BIA would have said you forfeited because you
7 had notice of these proceedings and your rights
8 and the time and place?

9 MR. McCLOUD: So there are two
10 problems with relying on waiver or forfeiture in
11 this context. The first is it still allows
12 these motions to be filed. And if even some
13 significant fraction of the hundreds of
14 thousands of old in absentia orders are injected
15 back into the immigration system, that could
16 have a very significant impact on a system that
17 is already dealing with a backlog of 3 million
18 cases.

19 The second problem is that waiver or
20 forfeiture actually heightens the perverse
21 incentives that the non-citizens rule creates.
22 Mendez-Colín would have been better off just
23 never showing up. And so their rule creates a
24 circumstance where non-citizens are encouraged
25 to flout the rules of the removal process by

1 failing to appear.

2 JUSTICE SOTOMAYOR: But, if you comply
3 with the statute, they won't be in that
4 position. This is about past people who have
5 already chosen to abscond after they know about
6 hearings. They can't unring the bell.

7 MR. McCLOUD: And -- and that's our
8 significant concern, Your Honor. There are a
9 huge number of these past people who have gotten
10 in absentia orders after failing to appear, and
11 we don't have any way to remedy that going
12 forward. And if the Ninth Circuit's rule stands
13 --

14 JUSTICE KAGAN: I mean, I appreciate
15 the force of the point, Mr. McCloud, but there
16 are so many people because the government was
17 out of compliance with this statute for so long.
18 And so, at a certain point, it's just -- you
19 can't sort of ask us to read the statute against
20 what the statute says because we've created a
21 world in which kind of we've long since
22 forgotten what the statute says.

23 MR. McCLOUD: So, respectfully,
24 Justice Kagan, that's not what we're asking.
25 We're asking you to apply the statute as it's

1 written, and that is a statute that permits in
2 absentia removal when a non-citizen received
3 notice either -- under either paragraph (1) or
4 paragraph (2). And all the non-citizens here
5 got the paragraph (2) notice. They haven't
6 contested that they received notice of when and
7 where to show up.

8 JUSTICE KAGAN: I think that's what
9 most fundamentally I find a little bit
10 discomfiting about your argument, this idea that
11 there are two forms of notice, take your pick.
12 If one is good, who cares about the other.

13 I mean, it seems to me that if you
14 read the statute fairly, it's quite clearly --
15 and -- and this is what we said in our two prior
16 cases -- you know, (a)(1) is the notice. That's
17 the notice. And what (a)(2) -- it tells you
18 what you have to put in it, all the things that
19 you have to do. Here are the charges. Here is
20 your right to counsel. And here is when you're
21 supposed to show up.

22 And what (a)(2) is about is Congress
23 understood that there were going to be times
24 when you were told to show up on March 15th and
25 then it turned out that March 15th was

1 impracticable or impossible for any of a number
2 of reasons, and it was a mechanism to say, okay,
3 we don't mean March 15th; instead, show up on
4 August 15th.

5 But that's what the function of (a)(2)
6 is. It's not some completely distinct form of
7 notice that you can say, hey, look, we did that
8 one.

9 MR. McCLOUD: I -- I just disagree,
10 Your Honor. I think that the (a)(2) notice
11 serves a distinct purpose, and that purpose is
12 to provide the non-citizen with the information
13 they need to know in order to decide whether
14 they want to attend the removal hearing or not.

15 JUSTICE JACKSON: Doesn't it also --

16 MR. McCLOUD: And all of the
17 non-citizens --

18 JUSTICE JACKSON: -- doesn't it also
19 serve the purpose of giving the government the
20 right to remove them in absentia? I mean, the
21 thing that's a little concerning to me about the
22 way the government has constructed its argument
23 here is the suggestion that we ignore
24 1229(a)(5)(A), which requires the government to
25 give the person notice as a prerequisite for the

1 government's ability to take advantage of the
2 procedure of removing them without a hearing.

3 So I guess I'm a little concerned that
4 what you're suggesting is that we should presume
5 that the -- that the removal is proper, the
6 removal order is proper, even if the notice was
7 defective, and now it's on the non-citizen to
8 say something or it shifts to his burden to
9 prove, you know, that he should not be removed
10 under those circumstances.

11 MR. McCLOUD: A -- a couple of
12 responses, Your Honor.

13 First, we are not asking you to read
14 out of the statute the -- the paragraph (2)
15 notice or to ignore the paragraph (1) notice.
16 We're saying both of those notices are relevant
17 for purposes of in absentia removal. And we
18 bear the burden as the government of proving
19 that the non-citizen got notice. But that
20 notice can be in the form of the paragraph (1)
21 notice or the paragraph (2) notice.

22 JUSTICE JACKSON: But how do you
23 square that with the -- the prior cases? I
24 don't understand your distinction. It -- maybe
25 I would understand it if we hadn't already

1 looked at this same circumstance to determine
2 whether a notice is defective and what is the
3 consequence of that.

4 So, in Pereira, we said, if it doesn't
5 have the time or place, the notice to appear,
6 then it's defective. And as I read Niz-Chavez,
7 we say the government can't cure that deficiency
8 for the purpose of the stop-gap -- stop-time
9 rule by providing a paragraph (2) notice.

10 So the government, I think, has to say
11 there's something different about this scenario,
12 the removal scenario in -- in absentia, than the
13 top -- the stop-time rule scenario.

14 MR. McCLOUD: And there are two
15 significant differences, Your Honor.

16 JUSTICE JACKSON: Okay.

17 MR. McCLOUD: One is textual and one
18 is based on -- on legislative history and
19 drafting.

20 So the textual difference is that for
21 purposes of the stop-time rule, the only notice
22 that is relevant is the notice to appear. That
23 is the only notice that is referred to in that
24 provision.

25 JUSTICE JACKSON: Why -- why do you

1 say that? I'm sorry.

2 MR. McCLOUD: Because, when you look
3 at the text of the stop-time rule --

4 JUSTICE JACKSON: Yeah.

5 MR. McCLOUD: -- it says it is
6 triggered based on the service of a notice to
7 appear. There is no reference to the notice of
8 hearing.

9 JUSTICE JACKSON: But it says a notice
10 to appear under Section 1229(a) of this title,
11 and the notice of hearing is under Section 20 --
12 1229(a) of this title as well, right?

13 MR. McCLOUD: Well, Your Honor, that's
14 the argument we made in Pereira that the Court
15 rejected. The Court said that for purposes of
16 that provision, only the notice to appear is
17 relevant. So, even though it refers generally
18 to 1229, the notice to appear is the only notice
19 that's being referred there -- to there.

20 And that is very different textually
21 from the in absentia removal provision, which
22 refers to notice under either paragraph (1) or
23 paragraph (2). And so --

24 JUSTICE JACKSON: What's the
25 legislative history reason?

1 MR. McCLOUD: The legislative history
2 reason is that Congress clearly, when it was
3 adopting these provisions, the in absentia
4 removal provisions, wanted to cut down on
5 procedural gamesmanship and the abuse of
6 loopholes by non-citizens that could be used to
7 avoid removal. So it makes sense that Congress
8 would want to be expansive in in absentia
9 removal in a way it wouldn't necessarily have
10 wanted to do for purposes of stop time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: What do you think
16 would happen if the government proceeded along
17 the lines that Justice Gorsuch has outlined?

18 MR. McCLOUD: I think we would create
19 a mess for ourselves because we would not have
20 any proceedings in which to remove non-citizens.

21 JUSTICE ALITO: Would that be subject
22 to challenge under any provision of federal law?

23 MR. McCLOUD: Yes. It would be
24 subject to challenge under our own regulations.
25 I assume that non-citizens would challenge it

1 under this statute as well. And I think the
2 fact that this has never happened in more than
3 500,000 in absentia removals is proof that we
4 have no incentive whatsoever to do that.

5 JUSTICE ALITO: Would aliens have an
6 incentive to challenge that as a due process
7 violation?

8 MR. McCLOUD: They could. We haven't
9 taken a position on the due process issue, but I
10 think that's a viable argument that they could
11 at least raise.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: No.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: I mean, the reason I
18 asked earlier about suppose not a blank piece of
19 paper, but suppose you just stopped telling
20 people about their right to counsel, how that
21 would be cured, what would prevent it? Because
22 that kind of thing seems both more likely to me
23 and more difficult to remedy through anything --
24 any of the supposed safeguards that you've
25 talked about.

1 MR. McCLOUD: So, Justice Kagan, if I
2 can maybe address the question about whether
3 that's more likely, I think it's important to
4 recognize that the notice to appear is a form
5 document. It's not as though the notice to do
6 --

7 JUSTICE KAGAN: Well, it is now, but
8 it doesn't have to be. And, you know, maybe
9 somebody will say, why are we -- why are we
10 telling people that they have this right?

11 MR. McCLOUD: So, Justice Kagan, if --
12 you know, non-citizens don't have the right to
13 have counsel during these proceedings, they have
14 the right to be informed that they could obtain
15 counsel.

16 JUSTICE KAGAN: Yeah.

17 MR. McCLOUD: If a non-citizen is --

18 JUSTICE KAGAN: Right. But, you know,
19 that's a useful thing for a non-citizen to know.

20 MR. McCLOUD: And I'm not disputing
21 that. And that's why we put that in the -- the
22 notice to appear.

23 JUSTICE KAGAN: And so tomorrow you
24 decide not to.

25 MR. McCLOUD: If we were to decide not

1 to put that information into the notice to
2 appear, I would still say that that notice to
3 appear can validly be used to start the removal
4 proceeding, but the non-citizen, if they come to
5 the hearing, as they should, can say, I was
6 never informed of the right to counsel and,
7 therefore, I shouldn't have been -- you know, I
8 should get that opportunity.

9 JUSTICE KAGAN: Not that we have to
10 start all over again? That's and -- I mean,
11 what law would -- would the non-citizen at that
12 point invoke under -- under your theory of the
13 statute?

14 MR. McCLOUD: So the regulations and
15 the statute have been interpreted as a claim
16 processing rule. If we don't comply with all of
17 the requirements of the claim processing rule,
18 there are questions about exactly what the
19 remedy is. Some courts have said the remedy is
20 a new proceeding. Some courts have said that
21 the remedy is that the government gives an
22 opportunity to cure.

23 So, in your scenario, I think the
24 remedy would be that we give the non-citizen
25 time to obtain counsel and we inform them of

1 their right.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 JUSTICE GORSUCH: I'm not sure if I
6 understand in the first place your -- your
7 response to Justice Thomas and -- and -- and
8 Justice Sotomayor about Pereira and particularly
9 the most troublesome language for you about
10 "change" meaning something other than what the
11 government is currently suggesting.

12 As I understand it, we -- we would
13 have to say, first, that's dicta and, second,
14 it's incorrect, is that right?

15 MR. McCLOUD: Yes. And that's exactly
16 the analysis the Court undertook in the
17 Kirtsaeng case, where it confronted a very
18 similar statement.

19 JUSTICE GORSUCH: Got it, okay. I --
20 I understand my hypotheticals about a blank
21 sheet are hypotheticals, but it's not
22 hypothetical that the government has long issued
23 NTAs that are non-compliant and that it concedes
24 it did so in the cases presently before us,
25 right?

1 MR. McCLOUD: That's correct.

2 JUSTICE GORSUCH: And then I wanted to
3 ask you about the provision in the in absentia
4 removal statute that says that you can remove
5 somebody if they've -- an alien if -- if he has
6 failed to supply his address.

7 Doesn't that fairly suggest that the
8 alien has first received a compliant notice to
9 appear telling him, as the statute requires,
10 that he must supply his address?

11 MR. McCLOUD: Yes, Your Honor, and
12 that's what the Board held in the In re G-Y-R-
13 decision that's cited in our reply brief. It
14 said, if you never received a notice that
15 informed you of that requirement, you can't be
16 ordered in absentia --

17 JUSTICE GORSUCH: I -- I understand
18 that's your response, that, oh, don't worry.
19 Okay?

20 But I think the logic of your argument
21 is, if he fails to appear for a notice of change
22 hearing, he -- your -- and -- and the notice of
23 change statement notice was itself compliant,
24 forget about the NTA, you're good to go in
25 absentia removal. That's -- that's the --

1 that's the -- how you're asking us to read the
2 statute presently.

3 Now you're adding a qualifier and
4 saying: Well, not with respect to addresses if
5 the NTA didn't ask him for his address. But
6 where in the statute does that come from?

7 When I look at the in absentia removal
8 provision as you read it, if I'm to take your
9 logic seriously, that's irrelevant. Now it's
10 nice that you have a Board decision and -- and
11 -- or a regulation, but I'm again asking you as
12 a matter of statutory interpretation how that
13 argument hangs together.

14 MR. McCLOUD: And the answer as a
15 matter of statutory interpretation is that if
16 you look at 1229(b)(B), it refers to --

17 JUSTICE GORSUCH: 1229?

18 MR. McCLOUD: (b)(B).

19 JUSTICE GORSUCH: (b).

20 MR. McCLOUD: Little b, big B.

21 JUSTICE GORSUCH: Little b, big B,
22 okay.

23 MR. McCLOUD: It says that no written
24 notice shall be required under subparagraph (a)
25 if the alien has failed to provide the address

1 required --

2 JUSTICE GORSUCH: Yes.

3 MR. McCLOUD: -- under Section
4 1229(a)(1)(F).

5 JUSTICE GORSUCH: Yes, which just
6 repeats what's -- what -- what 1229(a) says and
7 what a(B)(5)(b) and what 1229(a)(2)(B) say.
8 It's -- it -- it -- there it is again. But it
9 doesn't say anything about limitations on in --
10 in absentia removal. It just simply says the
11 notice to appear should -- should contain this
12 information --

13 MR. McCLOUD: Well -- well, what --

14 JUSTICE GORSUCH: -- and you should
15 provide it and --

16 MR. McCLOUD: -- what the Board has
17 said is that --

18 JUSTICE GORSUCH: Forget about what
19 the Board has said. As a matter of statutory
20 interpretation, you pointed me to one provision.
21 It doesn't work. What else have you got?

22 MR. McCLOUD: If I could finish my
23 answer about why that provision does work, it's
24 the words "required under Section
25 1229(a)(1)(F)."

1 JUSTICE GORSUCH: Yes, which refers us
2 all the way back up, I got that.

3 MR. McCLOUD: Which refers us back up
4 to (a) --

5 JUSTICE GORSUCH: Yeah.

6 MR. McCLOUD: -- (a)(1).

7 JUSTICE GORSUCH: Yeah.

8 MR. McCLOUD: And so, if you never
9 received information in (a)(1) that said you
10 have this obligation, you don't have an
11 obligation to update the information.

12 JUSTICE GORSUCH: Fair enough. But
13 where does it follow that in absentia removal
14 for a failure to appear for a notice of change
15 hearing depends upon any of that? I don't see
16 that in the statute.

17 MR. McCLOUD: I -- I think that
18 follows from the text of (b)(5)(A) and
19 (b)(5)(B), Your Honor.

20 JUSTICE GORSUCH: That -- that's what
21 you've got?

22 MR. McCLOUD: That's what I've got.

23 JUSTICE GORSUCH: All right. Thank
24 you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: I think you were
3 interrupted when you were saying correcting the
4 NTAs going forward doesn't do anything about the
5 hundreds of thousands who previously received
6 NTAs without the time and date, so can you just
7 finish your answer on that? Like, what will
8 happen to those hundreds of thousands of cases?

9 MR. McCLOUD: Certainly, Justice
10 Kavanaugh. So, as the Ninth Circuit has
11 interpreted this provision, all of those
12 hundreds of thousands of individuals have a
13 right to seek rescission. And as I was
14 discussing with some members of the Court
15 earlier, at least in the Ninth Circuit and some
16 other courts, that right is essentially
17 automatic.

18 And so we are very concerned that
19 those hundreds of thousands of cases could be
20 injected back into the immigration system. And
21 we have already seen some evidence of that in
22 the wake of the Ninth Circuit's panel decision
23 in Singh. So, in 2021, the year prior to the
24 Singh panel decision, there were 380 motions to
25 rescind in absentia orders filed nationwide. In

1 2022, the year of the Singh decision, that had
2 risen to over 6,000. And in 2023, that had
3 risen to over 11,000.

4 So I think, if this Court sides with
5 the Ninth Circuit, that already substantial
6 increase we have seen is going to turn into an
7 avalanche.

8 JUSTICE KAVANAUGH: And then how do we
9 think about the context of the stop-time rule
10 versus the context of in absentia removal in
11 thinking about the particular statutory
12 provisions here, or is that the different
13 context not relevant?

14 MR. McCLOUD: No, I think it is
15 relevant in this respect, Your Honor. So one of
16 the concerns that the petitioner in Pereira
17 brought and that I think the Court latched onto
18 in Pereira was that the stop-time rule gives the
19 government a procedural advantage, and there was
20 a sense that it was unfair to allow the
21 government that procedural advantage if it had
22 never committed to moving forward with removal
23 proceedings in the first place.

24 JUSTICE KAVANAUGH: What's the
25 procedural advantage? Just spell that out.

1 MR. McCLOUD: The procedural advantage
2 is that the non-citizen does not accrue years
3 toward cancellation of removal. And so it makes
4 it easier for the government to remove someone
5 if we can trigger the stop-time rule. So there
6 was a sense of -- of unfairness, I think, or at
7 least an allegation of unfairness there.

8 That's very different from this
9 context. In the in absentia removal context,
10 the unfairness, I think, would come from giving
11 non-citizens who knew they were in removal
12 proceedings and who knew they had an obligation
13 to go to their hearings and who knew when and
14 where the hearings were the chance to claim a
15 lack of notice when they clearly had notice.

16 And that disadvantages other
17 non-citizens who did follow the rules, who
18 complied and went to their removal proceedings,
19 because those non-citizens could be removed at
20 the end of their proceedings, but someone like
21 Mendez-Colín, who just decides, I don't want to
22 show up, has this in absentia order, but it
23 could always be rescinded under the Ninth
24 Circuit's rule.

25 JUSTICE KAVANAUGH: So you're better

1 off not showing up?

2 MR. McCLOUD: You are. You're
3 absolutely better off not showing up.

4 JUSTICE KAVANAUGH: Yeah. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Mr. McCloud, could
8 you tell me what the distinction is between the
9 notice to appear and the charging document that
10 the government begins to file the removal
11 proceedings?

12 MR. McCLOUD: For purposes of removal
13 proceedings, there is no distinction. Charging
14 document in the regulations is defined to
15 include other documents that can start other
16 kinds of immigration proceedings.

17 JUSTICE BARRETT: And it's defined
18 exclusively in the regulations --

19 MR. McCLOUD: It's defined in the
20 regulations.

21 JUSTICE BARRETT: -- and in the
22 statute?

23 MR. McCLOUD: That's correct.

24 JUSTICE BARRETT: Okay. So -- and
25 that "clear and convincing" portion of the in

1 absentia removal proceeding part of the statute,
2 it says you have to show by clearing and --
3 clear and convincing evidence that the written
4 notice was provided and by clear and convincing
5 evidence that the non-citizen is removable.

6 MR. McCLOUD: Correct.

7 JUSTICE BARRETT: Okay. So a big
8 concern and I think the -- the worst part for
9 you is this blank document hypothetical or
10 hypothetical that omits crucial information like
11 the right to counsel or the grounds for removal.

12 What would the IJ do -- and -- and I'm
13 going to toe -- the Justice Gorsuch line here --
14 don't refer me to the regulations. As a matter
15 of the statutory language, for purposes of
16 determining whether the non-citizen by clear and
17 convincing evidence is removable, is it possible
18 if only the notice of hearing has been provided
19 for the IJ to make that determination?

20 I mean, I guess, according to the
21 statute, the government could simply say and
22 launch into a whole new explanation that wasn't
23 included in any NTA about why the alien or the
24 non-citizen is removable.

25 MR. McCLOUD: So I -- I think the

1 answer is it is not possible because
2 removability requires an assessment of the
3 charges against the non-citizen. So, if all the
4 IJ had was the notice of hearing that says this
5 is the time for the proceeding and the
6 consequences for not attending --

7 JUSTICE BARRETT: But the charging
8 document, you told me, isn't defined in the
9 statute, so it could say something different
10 than the NTA.

11 MR. McCLOUD: So, if we are in a world
12 where the government has supplemented the
13 charges against the non-citizen I guess orally
14 or they've appended them to the notice of
15 hearing, I suppose the immigration judge could
16 look at that document and decide that it
17 complies --

18 JUSTICE BARRETT: We're imagining the
19 world of the worst-case hypothetical where it's
20 a blank document for the NTA and then the notice
21 of hearing that tells the non-citizen where and
22 when to show up and the nightmare hypothetical
23 that then the non-citizen can be ordered
24 removable when he was never informed what the
25 charges against him were, the grounds of

1 removability.

2 MR. McCLOUD: And I guess where I'm
3 struggling in the hypothetical is with the idea
4 that the -- the immigration judge would even be
5 able to say that the non-citizen is removable if
6 there are no charges.

7 JUSTICE BARRETT: Well, that's my
8 question too, so that's why I asked you what the
9 distinction between the NTA and whatever
10 document is necessary to initiate the removal
11 proceeding is, because it seems to me that if
12 they are distinct documents and they are
13 different, the nightmare scenario can unfold
14 with the safeguard of the regulations.

15 MR. McCLOUD: Maybe I was unclear in
16 my -- my answer --

17 JUSTICE BARRETT: Okay.

18 MR. McCLOUD: -- to your first
19 question. For purposes of removal, the charging
20 document is the notice to appear. That's why
21 the notice to appear has to contain the charges
22 in order for it to be a notice to appear that
23 starts a removal proceeding.

24 So, in the blank document
25 hypothetical, where there's no charges

1 whatsoever, there was no charging document, and
2 so there was no proceeding, and there's no way
3 for the immigration judge to assess removability
4 because they can't see the charges against the
5 --

6 JUSTICE BARRETT: Okay. So, when you
7 told Justice Gorsuch -- he -- he said all you
8 need to show by clear and convincing evidence is
9 that the notice was served, and you agreed with
10 him, are you amending that answer?

11 MR. McCLOUD: I -- I may have
12 misunderstood his question. I thought the
13 question that I was asked by Justice Gorsuch was
14 assume away all of those protections in the
15 regulation and assume away the fact that the
16 notice has to contain the charges, what result
17 then? And I -- I think the answer then is the
18 notice of hearing alone would be sufficient, but
19 that's just a million miles away from the
20 reality of this statutory scheme --

21 JUSTICE BARRETT: Okay. So your
22 answer is that the non-citizen cannot be found
23 removable unless the government shows by clear
24 and convincing evidence that the notice was
25 provided and that he is removable, and you're

1 saying that there's no way to show that he's not
2 removable if the NTA has not been served? So at
3 least that much information would have to be
4 there?

5 MR. McCLOUD: If -- if there's no
6 document that contains charges against the
7 non-citizen, there's no way to show that they're
8 removable.

9 JUSTICE BARRETT: Okay. So it doesn't
10 eliminate Justice Kagan's hypothetical of right
11 to counsel not being included, but it would
12 eliminate the hypothetical of the entirely blank
13 document?

14 MR. McCLOUD: I think that's fair.

15 JUSTICE BARRETT: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: Can we go back to
19 the distinction, if any, between the stop-time
20 rule and in absentia removal? I understood you
21 to respond to Justice Kavanaugh by saying that
22 the government's position is that the stop-time
23 rule gives the government a procedural
24 advantage, the ability to thwart the accrual of
25 time, and so that's why the government has to

1 dot all the I's and -- and cross all the T's
2 with respect to that.

3 But I guess I see this as exactly --
4 "this" meaning in absentia removal -- as exactly
5 the same thing, because, ordinarily, a
6 non-citizen would be entitled to a hearing where
7 he or she could make an argument and advocate
8 for themselves about removal, and the statute
9 allows the government to get around that in a
10 sense by allowing the -- the government to get a
11 removal order in the absence of adversarial
12 presentation by the person who doesn't show up.

13 And so I guess what I'm trying --
14 still struggling with is why we would have a
15 world in which a statute that requires the
16 government to give notice in order to be able to
17 get a removal in absentia order would allow for
18 that notice to be deficient in any way.

19 Justice Barrett talked about the
20 different ways in which it might be deficient,
21 but why -- why could the government give
22 deficient notice in order to get the benefit of
23 in absentia removal when we've already held that
24 the government can't give deficient notice to
25 get the benefit of the stop-time rule?

1 MR. McCLOUD: I have a couple of
2 responses to that, Justice Jackson.

3 The first is we agree that
4 non-citizens get the opportunity to present
5 their case in the way that Your Honor suggested,
6 and they get that opportunity by showing up at
7 the hearing. So the facts of these cases are we
8 told the non-citizens when and where to show up
9 to present their case and they failed to do
10 that.

11 JUSTICE JACKSON: Yeah, but the
12 statute --

13 MR. McCLOUD: That still leaves --

14 JUSTICE JACKSON: -- the statute
15 doesn't say, if the non-citizen doesn't show up,
16 the government gets the removal order. The
17 statute says, if the non-citizen doesn't show up
18 and the government proves that through clear and
19 convincing evidence they got notice and the
20 person is removable, then the government gets
21 the order.

22 So I don't think the government can
23 rely on the fact that the person didn't show up
24 as the basis for the validity of their removal
25 order. And my question remains, if the

1 government doesn't actually prove that they gave
2 the notice that the statute requires, why should
3 the government be entitled to getting the
4 removal order in this case when the government
5 would not have been able to get the stop-time
6 order under our prior precedents?

7 MR. McCLOUD: And -- and I think my
8 answer is similar to the one that I gave you
9 before, which is, for purposes of in absentia
10 removal, there are two notices that are relevant
11 and can be a basis for in absentia removal, and
12 --

13 JUSTICE JACKSON: No, you're just
14 saying that the notice isn't deficient. I -- if
15 -- let's assume that the notice is deficient.
16 My question is, if the notice is deficient,
17 you're suggesting that there's something about
18 removal that would make it okay for the
19 government to still get the order in that
20 situation, when we've said, if a notice is
21 deficient in the stop-time rule scenario, that
22 the government can't stop the time.

23 And I see that parallel and I'm
24 worried about whether or not you're really
25 asking us to implicitly overrule Pereira or

1 Niz-Chavez in the analysis if we hold for you in
2 this case in the way that you are setting
3 forward.

4 MR. McCLOUD: No, Your Honor. We're
5 asking you to take Pereira seriously when it
6 said that it was a narrow decision about the
7 intersection between the stop-time rule and the
8 notice to appear requirements.

9 We are not saying that if a
10 non-citizen gets absolutely no notice
11 whatsoever, they can be ordered removed in
12 absentia. In these cases, it is true that the
13 notice to appear lacked certain information, but
14 that missing information was supplied by the
15 notices of hearing that the non-citizens
16 received.

17 JUSTICE JACKSON: But you don't -- you
18 don't dispute that that missing information in
19 this case is the same mission -- missing
20 information that was in Pereira and Niz-Chavez,
21 right? We're not talking about two different
22 kinds of missing information that might allow
23 you to make this distinction?

24 MR. McCLOUD: I don't dispute that the
25 information is the same. I dispute that the

1 relevance is the same because, in Pereira and in
2 Niz-Chavez, for purposes of the stop-time rule,
3 there was a concern, if it -- we never told the
4 non-citizen when and where to show up for the
5 proceedings, they weren't going to be able to
6 figure out what to do.

7 Here, the information was provided to
8 the non-citizens, so they had --

9 JUSTICE JACKSON: All right. Let me
10 ask you just two more really quick things. One
11 is, is in absentia removal the only way the
12 government can remove a non-citizen? I -- I
13 didn't understand your response to Justice Alito
14 about that. You can -- you can remove a
15 non-citizen without in absentia removal, right?

16 MR. McCLOUD: Correct. If a
17 non-citizen goes to their removal proceeding,
18 they can be found removable. So I didn't mean
19 to suggest that in absentia is the --

20 JUSTICE JACKSON: Or if you find them
21 and you arrest them and you bring them for
22 removal, they can be removed, right?

23 MR. McCLOUD: That's the way that an
24 ordinary removal proceeding works, and that's
25 the way that these removal proceedings were

1 initiated as well. What's different about these
2 cases is the non-citizens just didn't finish out
3 the process.

4 JUSTICE JACKSON: All right. And,
5 finally, with respect to the catastrophic nature
6 of a ruling in the favor of the other side, you
7 said that the Ninth Circuit finds that there's
8 automatic reopening and whatnot.

9 So couldn't we agree with the Ninth
10 Circuit's holding related to the deficiency of
11 the notice here but maybe disagree that there's
12 automatic reopening for all the people who have
13 previously had this problem?

14 MR. McCLOUD: So I -- I guess what I
15 would say is the question of what is the remedy
16 and whether it's automatic or not is not before
17 you. I don't think it's fairly included as part
18 of the question presented, but --

19 JUSTICE JACKSON: But if we were to --
20 true, true. But what I'm just saying is it's --
21 it's not necessarily the case that we would have
22 this catastrophic result because we could have a
23 separate remedy question that we could disagree
24 with the Ninth Circuit.

25 MR. McCLOUD: That -- that is true,

1 you could have a later remedy case, but I would
2 still caution that even if it's not automatic, a
3 significant number of these motions are likely
4 to be granted because the non-citizens are
5 saying we did not get notice. And so, if they
6 are granted and if they are injected back into
7 the immigration system, that is going to have
8 significant impacts on that system.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. McCLOUD: Thank you.

13 CHIEF JUSTICE ROBERTS: Ms. Anand.

14 ORAL ARGUMENT OF EASHA ANAND

15 ON BEHALF OF THE PETITIONER IN CASE 22-674

16 AND ON BEHALF OF THE RESPONDENT IN CASE 22-884

17 MS. ANAND: Thank you. Thank you, Mr.
18 Chief Justice, and may it please the Court:

19 This is the third time the government
20 has come before this Court and asked to be
21 relieved of the consequences of flouting the
22 plain text of the INA.

23 For a third time, the government says
24 the notice it gave is good enough. Just as it
25 did in *Pereira* and *Niz-Chavez*, this Court should

1 reject the government's argument here.

2 Indeed, the government's position in
3 these cases is more extreme than its position in
4 Niz-Chavez. In Niz-Chavez, the government said,
5 so long as the government -- so long as the
6 non-citizen gets all of the information listed
7 in paragraph (1), it doesn't matter what format
8 it comes in.

9 In these cases, the government seems
10 to be arguing that if you have a paragraph (2)
11 notice, it does not matter if the non-citizen
12 never gets any of the information in paragraph
13 (1). And just to slightly amend the kind of
14 nightmare hypothetical we're talking about, it's
15 where the government sends the non-citizen a
16 blank piece of paper but nonetheless gives the
17 immigration judge information about, for
18 instance, the charges against the non-citizen.

19 In that circumstance, the government
20 can prove by clear and convincing evidence
21 removability, the non-citizen has no clue what
22 the charges against him are.

23 And where, as in Niz-Chavez, the
24 argument was that a deficient NTA was
25 nonetheless sufficient to stop the clock for

1 discretionary relief, here, the government is
2 arguing that same deficient NTA is somehow
3 sufficient for the far more draconian sanction
4 of removing a non-citizen without ever hearing
5 their side of the story.

6 Because the statute doesn't
7 contemplate that result, because it requires a
8 complete valid paragraph (1) notice in every
9 case, and contemplates a paragraph (2) notice
10 only as a supplement to that valid paragraph (1)
11 notice, this Court should reject the
12 government's arguments again.

13 I welcome this Court's questions.

14 JUSTICE THOMAS: What's your best
15 textual argument for your last point?

16 MS. ANAND: So, Your Honor, we think
17 that there's two buckets of textual evidence.
18 The first is about the sort of centrality of the
19 NTA. So it's the fact that it shall be issued
20 in every removal proceeding, the fact that it
21 contains a bunch of information that's not in
22 paragraph (2), and the fact that the statute
23 says that a hearing can't be held less than 10
24 days from the NTA. So there's a presumption of
25 the NTA.

1 The second bucket is the language of
2 1229 paragraph (2), which says that a -- a
3 notice of change must be given only in the case
4 of a change in the time and place of the
5 proceeding. And we believe that the -- the
6 combination of those two, the centrality of the
7 NTA, the change language that this Court has
8 already interpreted in *Pereira*, adds up to our
9 position.

10 JUSTICE THOMAS: I think it says "any
11 change," and that "any change" language seems to
12 be broad enough for the change here.

13 MS. ANAND: So, Your Honor, again,
14 that "any change" language is -- is the same
15 language that was interpreted in *Pereira*, and I
16 don't think it's broad enough to encompass what
17 happened here.

18 If I could take the example from the
19 government's reply brief of the voter
20 registration form and the change of party
21 affiliation form, if you mess up your voter
22 registration form, if it's invalid in the same
23 way here the NTAs were invalid, it doesn't
24 matter how many change of party affiliation
25 forms you file. Until you fix that voter

1 registration form, filing a change form won't do
2 any good.

3 The same thing is true here. Because
4 the NTA initially was invalid because it had the
5 TBD language, it doesn't matter how many times
6 you say, I'm trying to change that. Until
7 you've got the valid NTA, there's no change to
8 be had.

9 JUSTICE KAGAN: Could I just have a
10 clarification of your position, Ms. Anand?

11 Suppose that you have a -- a
12 non-citizen has a paragraph (1) notice and
13 there's nothing wrong with the date and time.
14 So the government fills out the date and time
15 correctly, but it does something else wrong. It
16 doesn't tell the non-citizen about the charges,
17 or it doesn't tell the non-citizen about the
18 right to counsel or so forth. And then there's
19 a paragraph (2) notice because there needs to be
20 a change in the date or time.

21 Now, at that point, what happens? Is
22 -- is -- is -- could the non-citizen reopen?

23 MS. ANAND: So no, Your Honor, and
24 that's sort of for the reason I just
25 articulated. So we think that in this case, the

1 change language is wrong for two reasons. One
2 is we think TBD to date and time is not actually
3 a change, but the other reason is what I just --

4 JUSTICE KAGAN: Right. So I've just
5 taken that out.

6 MS. ANAND: Right.

7 JUSTICE KAGAN: Right?

8 MS. ANAND: So the second --

9 JUSTICE KAGAN: And I'm saying so --
10 so now you can't rely anymore on the textual
11 hook of what the word "change" means.

12 MS. ANAND: Right. So --

13 JUSTICE KAGAN: Do you still have an
14 argument?

15 MS. ANAND: Yes, Your Honor, because
16 it's not just a change. It's a change to the
17 time and place of the proceeding. And if
18 there's never been a time and place of the
19 proceeding set, because the NTA is invalid,
20 right, it's not doing its function of initiating
21 a proceeding, then there can't be a change to
22 the time and place.

23 JUSTICE KAGAN: No, no. Maybe I'm not
24 making myself clear. I was assuming that in
25 your -- in -- there's -- there's no problem in

1 the first notice with the time and date. So,
2 you know, you don't get the textual hook of
3 saying, oh, that's not a change because it
4 hasn't gone from to be determined to March 15th.
5 It's gone from February 15th to March 15th.

6 But there's some other problem.
7 There's some other problem about the charges or
8 about the right to counsel. It seems to me that
9 you've now lost your textual hook for the
10 non-citizen to be able to say that they have a
11 right to reopen.

12 Am I wrong about that?

13 MS. ANAND: I think you're wrong, and
14 that's, again, because of -- I'll go back to the
15 voter registration hypothetical.

16 So, if the initial document is
17 invalid, right, you never actually registered to
18 vote, you can't just file -- fill out a change
19 of party affiliation form even if you had a
20 party listed in the registration form.

21 And that the same thing is true here.
22 The NTA is invalid if it's missing some of the
23 information in paragraph (1). And so it's not
24 actually doing any work.

25 Now --

1 JUSTICE GORSUCH: So you would say --

2 MS. ANAND: -- you know, I think it's
3 overdetermined in this case because --

4 JUSTICE ALITO: Well, do you think as
5 a --

6 JUSTICE GORSUCH: I -- I -- I -- I
7 just want to make -- before we leave this, I
8 just want to make sure I understand it too. I'm
9 sorry to interrupt.

10 But you would just say there's simply
11 no NTA, and so it isn't something that's
12 remedied by Section 2, which has to do with time
13 and place information. You just need to file a
14 compliant NTA and then off you go. Is that --

15 MS. ANAND: That's exactly right.
16 Now, again, in this case, it's overdetermined
17 because we also have the --

18 JUSTICE GORSUCH: The change, yeah.

19 MS. ANAND: -- TBD date change
20 language and because sort of the square holding
21 of Pereira is that it --

22 JUSTICE GORSUCH: I just wanted to
23 make sure I understood. Thank you.

24 MS. ANAND: Thank you.

25 JUSTICE GORSUCH: Sorry to interrupt.

1 JUSTICE ALITO: Do you dispute the
2 proposition that just as a matter of ordinary
3 language, there can be a change from an
4 indeterminate time or place to a determinate
5 time or place?

6 MS. ANAND: So, yes, Your Honor, we
7 think that ordinary speakers of English don't
8 use "change" to refer to indeterminate time to
9 determinate time. So we give the example of a
10 bride who announces she's going to get married.
11 We don't know the date yet. When she sends out
12 her cards telling you the date, we call that a
13 Save the Date, not a Change the Date, for
14 instance.

15 JUSTICE ALITO: Well, I mean, if the
16 -- the bride says, I'm going to get married, and
17 a friend says, oh, when is that going to happen,
18 and the bride says, well, we don't know yet,
19 then the other person says, well, let me know if
20 there's any change, do you think that's an
21 unusual use of language?

22 MS. ANAND: So I do, Your Honor, and I
23 think that's particularly so in this case
24 because of the kind of validity point I've been
25 making. So that is to say when in the -- when

1 the initial document is invalid --

2 JUSTICE ALITO: No, no, I'm not
3 talking about the -- the intricacies of this
4 statute. I'm just talking about ordinary
5 language. I could give you many examples of
6 exactly the same thing. It doesn't seem to me
7 -- you -- you have an interpretation of change,
8 but do you really want to say that this is
9 outside of the realm of -- reasonable realm of
10 possibility that people can talk about a change
11 in that way?

12 MS. ANAND: So I don't know if it's
13 outside of the reasonable realm, but when
14 combined with the language from Pereira, sort of
15 not quite holding but clearly sort of central to
16 the discussion is this interpretation of the
17 exact same language, and when combined with the
18 other structural clues that an NTA is central to
19 the whole administration of this statute, I
20 think our interpretation of "change" is the
21 better one.

22 JUSTICE JACKSON: How do you respond
23 to the government's suggestion that the NTA is
24 really not central? I mean, the government says
25 we -- we are looking at the statute and it says,

1 you know, we can get an in absentia removal
2 order if we have issued (1) or (2).

3 And so I guess the government's point
4 is that suggests that (1) is really not pivotal
5 in the way that you are putting forward.

6 MS. ANAND: So I think that's wrong,
7 Your Honor, for two reasons.

8 The first is that the "or" in the in
9 absentia context doesn't define the relationship
10 between (a)(1) and (a)(2). That's done in the
11 statute defining those two provisions.

12 And so, again, to go back to the voter
13 registration hypothetical, you could have a
14 sentence saying, you know, send the voter the
15 primary ballot for the party listed in their
16 voter registration form or their change of party
17 affiliation form. That wouldn't mean that
18 somehow the voter registration form is
19 irrelevant just because you have the word "or"
20 in that sentence.

21 And so I think what you have to do is
22 look at paragraphs (1) and (2) and the
23 relationship between them, and it's clear both
24 from the mandatory language of paragraph (1),
25 from the fact that, as this Court explained in

1 Niz-Chavez, it's the one place that tells you
2 all the information you need to defend yourself
3 at a removal proceeding, and the fact that
4 (a)(2) is structured as a change or a
5 supplement, that those two documents are not
6 interchangeable.

7 JUSTICE BARRETT: Ms. Anand, let -- I
8 -- I want to make sure I understand your answer
9 to Justice Kagan about change. So you're saying
10 that, you know, just because you file a change
11 of party affiliation form doesn't make your
12 initial voter registration valid. I -- I -- I
13 get that.

14 But, in the statute, it says, "change
15 of time or place of proceedings." So it's not,
16 you know, referring generally. I'm just
17 wondering where you get the statutory hook,
18 because that presumes that there is an NTA.
19 But, if it's defective in some way, if, as
20 Justice Kagan said, we take the defect in time
21 and place out of it, why couldn't it be that
22 there is an NTA that's defective in some way,
23 but the statute imposes an obligation on the
24 non-citizen who knows the time and place he's
25 supposed to show up to make an appearance at

1 that proceeding and raise whatever objection
2 there is to the defect?

3 MS. ANAND: So --

4 JUSTICE BARRETT: And -- and maybe --
5 maybe the objection -- and I'm thinking of
6 analogy to a Rule 55 civil, you know, default
7 judgment proceeding.

8 It may well be that whatever objection
9 that the non-citizen raises at that point is
10 fatal to the government's case. You know, maybe
11 it's missing some vital piece of information.
12 Maybe it can be remedied if it's omitted the
13 right to counsel by giving him time to obtain
14 counsel. If there's some problem in the
15 description of the charges, the grounds for
16 removal, then maybe the entire thing has to be
17 dismissed and the government has to start again.

18 But why wouldn't it be consistent with
19 the statutory scheme for the non-citizen to have
20 to show up to the removal proceeding and
21 register whatever objection the non-citizen has?
22 I'm not saying that that's right, but it seems
23 to me -- I -- I just want to understand why
24 that's ruled out on your understanding of the
25 statutory language.

1 MS. ANAND: Sure, Your Honor. So the
2 statute doesn't ask about notice generally or
3 notice of the time of the hearing. It asks
4 about notice in accordance with the specific
5 statutory provisions.

6 And that's a contrast to the pre- --

7 JUSTICE BARRETT: Or, though, right?

8 MS. ANAND: So that's correct. But
9 our position is that there's been neither a
10 paragraph (1) notice nor a paragraph (2) notice.

11 JUSTICE BARRETT: But I guess I don't
12 understand why -- where in the statute you can
13 say there has not been a paragraph (1) notice if
14 there's been a defective paragraph (1) notice?
15 There's been a paragraph (1) notice. And, here,
16 I'm not talking about the blank piece of paper.
17 I'm just saying it's missing some piece of
18 information other than date and time.

19 Why isn't that just a defective NTA?

20 MS. ANAND: So I think that's sort of
21 the square holding of Pereira. So, again,
22 Pereira reserved the question of missing other
23 pieces of information, but the statute puts them
24 all on par. And Pereira says it's not just that
25 this is a deficient document. It says no notice

1 to appear has been served, right? That's the
2 language that Pereira was interpreting.

3 JUSTICE BARRETT: But stop -- well,
4 I'm sorry. Go ahead.

5 MS. ANAND: So -- so Pereira is
6 interpreting has a notice to appear been served
7 under paragraph (1). It says no notice to
8 appear has been served if it's missing one of
9 these pieces of information.

10 JUSTICE SOTOMAYOR: Counsel, can I --
11 I -- I'm not cutting you off?

12 JUSTICE BARRETT: No, I'm done.

13 JUSTICE SOTOMAYOR: I -- then I'll
14 jump into that. I have -- I want to follow up
15 on Justice Barrett's question because she seems
16 to be seeing a difference between a
17 jurisdictional flaw and a claim processing flaw,
18 which is what Mr. McCloud has been calling this.

19 And I do think that we -- you have to
20 address that question. It seems to me that the
21 clear holding of our precedent -- prior
22 precedents is that it's jurisdictional, that if
23 you don't have a proper notice of appeal -- of
24 -- of appearance, that that's a jurisdictional
25 defect. They can't order you -- they can't

1 invoke the stop-gap rule, but they also can't
2 order you removed until they provide you with
3 the proper document, correct?

4 MS. ANAND: So I think that's right.
5 I want to be a little bit careful because I
6 think "jurisdictional" is a little bit of a
7 slippery word.

8 JUSTICE SOTOMAYOR: It is.

9 MS. ANAND: So --

10 JUSTICE SOTOMAYOR: That's the
11 problem.

12 MS. ANAND: Right. So --

13 JUSTICE SOTOMAYOR: So -- but so is
14 using claim processing in this kind of context.

15 MS. ANAND: So our position is that if
16 you show up at the hearing, as Justice Barrett
17 articulated, you can say this was defective.
18 And until the government cures that defect, they
19 can't go forward. Congress also provided an
20 express remedy for where there's a defective
21 notice and you're removed in absentia.

22 There is no remedy in the statute for
23 where there's a defective notice and a removal
24 order was entered after a hearing. So we're not
25 saying that someone who attended their hearing,

1 had the chance to object to the notice to
2 appear, and was nonetheless removed gets to
3 reopen because Congress hasn't provided that
4 remedy.

5 JUSTICE SOTOMAYOR: All right. So --

6 MS. ANAND: Congress has, however, in
7 --

8 JUSTICE SOTOMAYOR: -- could -- before
9 -- I'm sorry. Before we end -- you end today, I
10 -- I want to take head-on the draconian
11 consequences that a ruling in your favor that
12 the government is painting, and I want you to
13 answer that. So -- but I cut off a colleague
14 who had --

15 CHIEF JUSTICE ROBERTS: No, we may as
16 well go with that now.

17 (Laughter.)

18 MS. ANAND: So -- so two responses,
19 Your Honor, right? So the first is the
20 government came to you in Pereira and Niz-Chavez
21 and also articulated a parade of horrors. And
22 this Court said those sorts of raw
23 consequentialist calculations have no place,
24 particularly where, as Justice Kagan noted,
25 those consequences are a function of the

1 government ignoring the text of the statute over
2 many cases and many years.

3 The second is, you know, I -- I -- I
4 don't want to dispute that there will be an
5 increase in the volume of these motions, but I
6 do want to be clear about who exactly has an
7 incentive to file them. Remember, if you win on
8 reopening your in absentia removal order, all
9 you get is another hearing, right, even if
10 you're successful in clearing all the hurdles.
11 And at that hearing, you have to prove that
12 you're able to remain in the U.S.

13 And so, you know, for many, many
14 non-citizens who have no pathway to staying in
15 the United States, it's very unlikely that
16 they're going to come forward and file one of
17 these motions to reopen because the best they
18 get is another hearing.

19 CHIEF JUSTICE ROBERTS: Now, counsel,
20 did I understand you to say that if an -- I
21 mean, we've heard a lot of talk about
22 deficiencies in -- apart from the -- the notice
23 and that being one of the problems, but we --
24 you -- you -- you should get original notice
25 rather than simply later notice, even if you

1 comply with the later notice.

2 It -- it -- is it a harmless error
3 situation if there have been no changes in the
4 rest of the NTA?

5 MS. ANAND: So, Your Honor, I think
6 that the statute doesn't contemplate that,
7 right? The statute asks not just for notice or
8 notice of the information listed in paragraph
9 (1) but notice in accordance with these
10 provisions.

11 And prior to 1990, remember the scheme
12 was this sort of case-by-case adjudication. So
13 the statute said "notice reasonable under the
14 circumstances." And what Congress did was it
15 said, rather than that kind of case-by-case
16 adjudication, did the non-citizen get enough
17 notice, we're going to put the cards in the
18 government's hand.

19 CHIEF JUSTICE ROBERTS: Well, but
20 let's just say that there has been no change in
21 the notice. I suppose, if you want to challenge
22 the notice as a categorical matter across the
23 board of all these proceedings, you could.

24 But I thought you said that if there
25 has been no change, in other words, other than a

1 change in the time and the place, but the rest
2 of the NTA is -- is the same, that that
3 individual would have no -- no claim at that
4 point.

5 MS. ANAND: So, just so I understand
6 the hypothetical, the -- the -- the notice to
7 appear is compliant?

8 CHIEF JUSTICE ROBERTS: Except for,
9 you know, the reason that -- the reason there is
10 a later, a new notice, that's the only situation
11 in which it is -- the only aspect in which it's
12 non-compliant.

13 MS. ANAND: So --

14 CHIEF JUSTICE ROBERTS: And the person
15 -- and the person shows up at the time.

16 MS. ANAND: The person shows up at the
17 time, so they have a non-compliant -- they have
18 a TBD NTA that the -- right?

19 CHIEF JUSTICE ROBERTS: Yeah.

20 MS. ANAND: So I think, at that point,
21 they can say -- you know, they won't get much
22 for it, but they can certainly say you can't
23 proceed until you give me a compliant NTA. The
24 government has to print out a new one.

25 CHIEF JUSTICE ROBERTS: No, I mean

1 they just said here's the -- the -- the NTA was
2 compliant in every respect except that we had a
3 TBA rather than the actual time and place. You
4 got notice of the time and place. You showed
5 up. What?

6 MS. ANAND: You show up and you say my
7 NTA was not compliant. The government has to
8 give you a new one. It has to wait 10 days
9 before they can remove you. Now it's the same
10 thing --

11 CHIEF JUSTICE ROBERTS: It was not
12 compliant in that it didn't have a time and
13 place. But then it was. There was a time and
14 place. And you say he has to show up and say, I
15 didn't get a time and place in the original one;
16 even though I got a time and place in the second
17 one and showed up, I can complain that I didn't
18 get one in the original one?

19 MS. ANAND: So I think that's the
20 square holding of Niz-Chavez. Niz-Chavez says
21 two different documents that add up to all the
22 notice requirements under paragraph (1) is still
23 not a paragraph (1) notice. That's the holding
24 of Niz-Chavez.

25 And in this case, the government's

1 position is even more extreme because they're
2 telling you it doesn't even matter if the
3 non-citizen never got all of the notice in
4 paragraph (1).

5 CHIEF JUSTICE ROBERTS: Yeah, I know
6 that's what they're telling us, but I'm
7 addressing a case which I -- I would suppose
8 would be a very common one where there's no
9 objection other than that I didn't get the time
10 and notice in the first place. There's been a
11 lot of talk, well, they don't tell you there's
12 a right to counsel, they don't tell you this or
13 that. What if they told you all that in the
14 original one that you got, but it didn't have a
15 time and place; then they come back and say,
16 well, here's the time and place, you show up,
17 and they say, well, what's -- what's your
18 objection, and you say that the objection is
19 that I didn't get the time and place originally,
20 even though I got it later and here I am?

21 MS. ANAND: So I think that's right.
22 I think that's the -- the sort of square holding
23 of Niz-Chavez. It says that those two documents
24 don't add up to a paragraph (1) notice. I'll
25 hasten to add, though, remember this isn't just

1 about eligibility to move to reopen. There are
2 other points in the process where the question
3 of whether or not the --

4 JUSTICE KAVANAUGH: But your -- your
5 answer to the Chief Justice makes it clear, I
6 think, but correct me if I'm wrong, that you
7 would be better off not showing up.

8 MS. ANAND: I don't think so, Your
9 Honor, because remember, if you don't show up,
10 all the government has to do at that point is
11 say, oh, that's right, I didn't have a proper
12 NTA. Here -- here's, I'm printing it out, I'm
13 mailing it to the non-citizen with the time and
14 place. Ten days later I can remove you in
15 absentia.

16 So either way, all you're buying
17 yourself is the government reprinting this piece
18 of paper and waiting 10 days to remove you.

19 JUSTICE JACKSON: And --

20 JUSTICE KAVANAUGH: But -- but the
21 removal --

22 JUSTICE ALITO: I under --

23 JUSTICE KAVANAUGH: -- in absentia
24 will be -- can't happen under your theory.

25 MS. ANAND: Well, the removal in

1 absentia can happen if the government prints out
2 the NTA, again, fills in the time and date and
3 then waits 10 days.

4 JUSTICE KAVANAUGH: They start the
5 proceedings over again --

6 JUSTICE JACKSON: But the removal in
7 absentia can't happen if the person shows up,
8 right? I mean, the -- the reason why we're in
9 absentia world is because they don't show up.
10 So I guess I'm confused about the Chief
11 Justice's hypothetical and how it relates to
12 this statute or this circumstance that we're
13 talking about.

14 I thought the -- I thought the -- the
15 -- the sort of premise of where we were was
16 we're in a situation in which the person isn't
17 there and the government gets removal in
18 absentia as a result.

19 MS. ANAND: And that's exactly right.
20 I was just trying to clarify that I don't know
21 how much of this -- sort of bizarre incentives
22 point. First of all, of course, the government
23 can just issue a compliant NTA upfront. If they
24 haven't and the non-citizen doesn't show up,
25 they can send ICE out to arrest the person.

1 If they choose not to do that, they
2 can print out the compliant NTA then and there,
3 put it in the mail, and then they can get their
4 in absentia.

5 JUSTICE KAVANAUGH: Well, that I think
6 the --

7 CHIEF JUSTICE ROBERTS: Well, I
8 thought the proposition that I was simply trying
9 to suggest that your argument leads to an absurd
10 result if what it says is that everything's the
11 same, except you didn't get the notice
12 originally and the fact that you got a later
13 notice, you're saying your argument would still
14 be the same.

15 MS. ANAND: That's exactly right, Your
16 Honor. I think that's a function of the
17 government flouting the statute, though, right?
18 The statute was not actually designed for a
19 situation in which the government systematically
20 puts TBD instead of the -- the sort of date and
21 time of the charges. It was designed for the
22 kind of one-off mistake, you put the wrong
23 person's name on this or sent this to the wrong
24 address.

25 And so, you know, what Congress

1 thought it was doing was coming up with a scheme
2 that put all the cards in the government's
3 hands. It said we're not going to ask on a
4 case-by-case basis did the non-citizen have
5 enough notice and allow them to say I was
6 confused, I got this document and not this
7 document. We're just going to give the
8 government all the power. All you need to do,
9 government, is put these seven pieces of
10 information on one piece of paper.

11 JUSTICE KAVANAUGH: But Congress was
12 concerned --

13 JUSTICE JACKSON: Maybe --

14 JUSTICE ALITO: Well, as to what
15 Congress thought it was doing, you filed a brief
16 on behalf of Mr. Singh. Are you able to address
17 the situation of Mr. Mendez-Colín?

18 MS. ANAND: So, yes, Your Honor.

19 JUSTICE ALITO: All right. So, in Mr.
20 Mendez-Colín's case, his removal proceeding
21 began in 2001, and after that, he showed up at
22 numerous hearings, the dates were changed.

23 And you say Congress would have wanted
24 him at this late date to be able to reopen his
25 removal proceedings because he didn't get a

1 compliant NTA back in 2001?

2 MS. ANAND: Yes, Your Honor. Congress
3 expressly said at any time, in contrast to
4 numerous other provisions of allowing --

5 JUSTICE SOTOMAYOR: Counsel, that -- I
6 think there's a difference between the right to
7 make a motion to reopen than to have it
8 reopened.

9 Are you arguing that if there was a
10 deficient notice in this situation under (a)(1),
11 that the Board has to reopen, or does it have
12 the discretion to consider a forfeiture or a
13 waiver argument?

14 MS. ANAND: So certainly, Your Honor.
15 There's several provisions outside the scope of
16 the question presented in this case that can
17 deal with any sort of gamesmanship.

18 So, as Your Honor noted, there's
19 equitable doctrines. The government can raise
20 waiver, forfeiture, estoppel. There are
21 doctrines -- there's statutory provisions about
22 the subsequent hearing. So, for instance, under
23 1229a(b)(7), if the -- if the non-citizen had
24 oral notice of the time and place of the
25 hearing, they aren't eligible to apply for

1 various forms of discretionary relief.

2 JUSTICE ALITO: Well, counsel, could
3 you answer the question that I -- I don't think
4 you had -- really had a chance to answer the
5 question that I asked, which is whether -- you
6 talked about what Congress thought it was doing,
7 and my question was, do you think Congress
8 really thought it was doing what you are
9 claiming should be the result in Mendez-Colín's
10 case?

11 MS. ANAND: I think that Congress
12 didn't anticipate the government would ignore
13 the text of the statute. The reason that
14 Congress put in the "at any time" hook is
15 because they imagined these would be one-off
16 circumstances where something gets lost in the
17 mail or the government makes a typo and so
18 switches two non-citizens' paperwork.

19 They were not imagining sort of
20 systematically ignoring the statute for many
21 years. And so, yes, at this point, the statute
22 probably leads to results Congress didn't
23 intend, but that's a function of the government
24 flouting the plain text of the statute and
25 shouldn't be -- shouldn't have any bearing on

1 your reading of the remedial provision.

2 JUSTICE ALITO: Well, as to the plain
3 text of the statute, we've now had, like, an
4 hour and 17 minutes of argument, and virtually
5 nothing has been said about the plain text of
6 1229a(b)(5)(A). Pereira and Niz-Chavez were
7 literal interpretations of the statute.

8 Now there's an answer to what I'm
9 going to say, but I'll get to that.

10 MS. ANAND: Okay.

11 JUSTICE ALITO: But, if you read the
12 provision I just mentioned literally, you lose,
13 right? Any alien who after written notice
14 required under paragraph (1) or (2) has been
15 provided to the alien, okay, notice under (2)
16 was provided, right?

17 MS. ANAND: So we -- we disagree with
18 that. So we don't think notice under (2) was
19 provided because (2) is a supplement to a valid
20 (1). And so, without a valid (1), you can't
21 have a paragraph (2) notice. So our position is
22 that neither notice in accordance with paragraph
23 (1) --

24 JUSTICE ALITO: I'm just talking about
25 the literal language of the statute. I'm not

1 talking about what was held in Pereira or
2 Niz-Chavez, which concerned very -- a -- a
3 different question. You keep saying they held
4 this, they held that. What they held had to do
5 with the stop-time rule. Just the literal
6 language of this, that's against you, right?

7 MS. ANAND: So I disagree because we
8 think there's been no paragraph (2) notice. So
9 you can't have notice required under paragraph
10 (1) or (2) if you've neither gotten paragraph
11 (1) notice -- that's the government's position
12 in this case -- nor paragraph (2) notice, which
13 is our contention about how you read paragraph
14 (a)(2).

15 JUSTICE KAVANAUGH: Your position then
16 is a paragraph (2) notice isn't really a
17 paragraph (2) notice if there was not a
18 paragraph (1) notice that was compliant?

19 MS. ANAND: That's correct.

20 JUSTICE KAVANAUGH: And where does
21 that come from in the text of the statute?

22 MS. ANAND: Two pieces. First is the
23 word "change," which, as we've explained, we
24 don't think encompasses the difference between
25 TBD and March 15th. The second is it's a change

1 of the time and place of such proceeding. So,
2 again, this is my voter registration
3 hypothetical. If you never filled out your
4 voter registration form, your change of party
5 affiliation form doesn't -- is -- is not valid
6 either.

7 JUSTICE KAGAN: Your argument, I
8 think, treats the following two people
9 differently. And that might be just, well, yes,
10 it does, and we're living in this world where
11 this is a strange statute because the government
12 has been out of compliance for so long and it
13 leads to some kind of strange results.

14 But I'll -- I'll tell you that I think
15 that this is a kind of strange result and I want
16 to ask you to -- to comment on it, which is one
17 person gets (a)(1) notice that is perfect and it
18 says January 15th and then later gets (a)(2)
19 notice saying, mhhmm, let's make it June 15th
20 instead.

21 Now the second person gets (a)(1)
22 notice that is perfect except that it says to be
23 determined, and then there's a later (a)(2)
24 notice that says, okay, here's the new notice,
25 June 15th.

1 Now I understand your view as to why
2 the statutory text makes those two people
3 different, but, you know, to go back to the
4 Chief Justice's point about sort of, huh, like,
5 why are those two people in any different
6 situations with respect to anything we care
7 about? Why does one have the ability to reopen
8 and the other does not?

9 MS. ANAND: So, Your Honor, Congress
10 was trying to address this problem in gross.
11 So, in an individual case, there may not be much
12 of a difference, but in general, Congress found
13 that these TBD provisions in the notice to
14 appear, remember, that's the one document that
15 actually gets handed to the non-citizen, right?

16 And so what Congress found is, if you
17 put a date and time in the notice to appear,
18 there's at least one time where the non-citizen
19 knows I have to be at immigration court, I can
20 figure everything else out.

21 If you only put a "TBD" in the notice
22 to appear, what Congress found is the subsequent
23 notices have a hard time getting to the
24 non-citizen. And so the non-citizen never has a
25 date and time certain they have to show up.

1 JUSTICE KAGAN: I'm not sure that
2 the -- that the statute does suggest that. I
3 mean, the statute allows for, again, assuming
4 you have perfect (a)(1) notice, you can have an
5 (a)(2) notice and then you can have another
6 (a)(2) notice and another (a)(2) notice, and all
7 of these things are extremely difficult for any
8 non-citizen to figure out, and the statute
9 appears not to care about that.

10 So why should the statute care about
11 the difference between a "to be determined" and
12 a certain date?

13 MS. ANAND: So I think Congress
14 assumed that the government would do its best to
15 hold the hearing on the date in the NTA and only
16 use the notice of change if it actually had to
17 change the date.

18 But you're right, in some cases,
19 potentially, you know, a non-citizen who gets a
20 TBD notice and a non-citizen who gets a notice
21 with a date and time are similarly situated.

22 But this Court's holding in *Pereira*
23 and *Niz-Chavez* is, even if Congress's judgment
24 was off on this, even if in many cases it
25 doesn't make a difference, Congress has

1 determined that what makes a valid NTA is the
2 inclusion of these seven pieces of information,
3 one of which the government didn't include here.
4 But --

5 JUSTICE KAVANAUGH: I think the
6 government's broad argument is it's very odd
7 when someone gets notice of the time and date of
8 the hearing and skips it intentionally, flouting
9 the system, thumbing your nose at the system,
10 and then comes back when they're caught and
11 says, oh, that removal in absentia was no good.
12 Why? Oh, because I didn't have notice of the
13 time and date of the hearing, when we know -- so
14 I think that's the government's kind of
15 overarching concern about reading the statute
16 your way.

17 MS. ANAND: Sure, Your Honor. So I
18 think that the problem is you can't just look at
19 this provision in isolation, right? So what
20 Congress thought it was doing was it was giving
21 the government all the cards. If you don't want
22 -- if you don't want someone to skip the
23 hearing, just put these seven pieces of
24 information on the notice to appear, and then
25 they can't skip the hearing.

1 There're other places in the scheme
2 that allow for consideration of exactly the kind
3 of fault analysis you're talking about. So, for
4 instance, you know, if you get to reopen your
5 hearing, you may be ineligible for various forms
6 of discretionary removal under 1229a(b)(7) if
7 you're that person who gets, you know, notice --
8 oral notice of the date and time of the hearing
9 and just doesn't show up. As some of the
10 Justices have alluded to, there may be some
11 residual discretion embedded in the "may" in
12 (b)(5) that gives the IJ some discretion.

13 All we're talking about is the
14 eligibility criteria to even be able to file a
15 motion to reopen. And at that stage, Congress
16 didn't ask about notice generally, notice of the
17 time of the hearing. It asked about notice in
18 accordance with these two provisions that
19 prescribe a particular format for the
20 information.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 You said that Congress thought the
24 government would do its best. I mean, as a
25 practical matter, is it possible for the

1 government to be able to put in the orders a
2 time that they'll stick to? I mean, is --
3 there's a reason they say, you know, TBA or TBD,
4 right? And yet, you seem to think that we ought
5 to analyze it as if the facts on the ground are
6 not what they are, which may be right. I mean,
7 if Congress doesn't like it, maybe they can
8 change it.

9 But it -- it seems to me, at -- at
10 least in terms of practicalities, to say, well,
11 they ought to put the time on when they issue
12 the order, and if they don't, all these
13 consequences are going to follow. The
14 government makes the argument that, well, there
15 are a lot -- they're just not able to do that.
16 And if there's a reading of the statute that
17 makes more sense or at least sense to deal with
18 the situation on the ground, is that something
19 we should consider?

20 MS. ANAND: So I think the -- the
21 short answer is no, but I also want to push back
22 on the premise of the question. So no, again,
23 Pereira and Niz-Chavez, the government gave you
24 the same arguments, and this Court said --

25 CHIEF JUSTICE ROBERTS: Yeah, but, you

1 know, Pereira and Niz-Chavez, of course, dealt
2 with an entirely different question. So --

3 MS. ANAND: Sure. So --

4 CHIEF JUSTICE ROBERTS: -- push --
5 push back on the premise --

6 MS. ANAND: On the premise of your
7 question, following Pereira, as my friend on the
8 other side has told you, the government has been
9 able to, in the mine run of cases, put dates and
10 times in these notices. And the immigration
11 judges' brief tells us that there was until 2014
12 a scheduling system that as far as these former
13 immigration judges understand, had the ability
14 to schedule these date and time of the hearings.

15 So that evidence that prior to 2014,
16 there was a scheduling system, post-Pereira the
17 government's been able to do it, strongly
18 suggests that actually the government has had
19 the ability to do this and has chosen not to,
20 despite knowing, as this Court put it in
21 Niz-Chavez, since 1996 that this was a
22 requirement.

23 CHIEF JUSTICE ROBERTS: Do you have
24 any idea how often the -- when the government
25 puts in an original time that that time sticks

1 or hasn't been extended later on or --

2 MS. ANAND: So I -- I don't have those
3 numbers, Your Honor. But I'll note that prior
4 to 1996, Congress gave the government the
5 option, right? It said you could put the -- the
6 date and time in the order to show cause, which
7 was the predecessor to the NTA, or somewhere
8 else if you couldn't do it.

9 And in 1996, Congress made the
10 decision that it was no longer going to kind of
11 excuse the government from putting the date and
12 time in the initial document, and it did that
13 with a full understanding, right, the government
14 testified at that hearing, of the logistical
15 problems of doing so.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: If the -- the date
20 that the government puts in an NTA is sort of an
21 aspirational date, but in a good percentage of
22 those cases, they end up having to change the
23 date, is that -- is that system better for
24 non-citizens than a system that would tolerate
25 the TBD in the initial NTA?

1 MS. ANAND: So Congress made the
2 determination it was better. And I think that's
3 because of what I said to Justice Kagan; namely,
4 the NTA is the document that's generally handed
5 to the non-citizen. It's the one you know they
6 got. And at the very least, if they have some
7 date and time, they can come to immigration
8 court and find out that their hearing was moved;
9 whereas, if they have no information about when
10 and where to show up, except for a document
11 that's mailed that may or may not reach them,
12 then they may never clarify when their
13 hearing --

14 JUSTICE ALITO: Well, that doesn't
15 really answer the question, because they may be
16 handed a document, an NTA with an aspirational
17 date, but if they are later sent a document with
18 a change, mailed to the address that they
19 provide, you know, they're in the same
20 situation.

21 MS. ANAND: So, Your Honor, I -- I
22 think that's precisely the argument that was
23 made in dissent in Niz-Chavez.

24 JUSTICE ALITO: Yeah, I know. I'm not
25 asking you about -- I know -- I'm not asking you

1 about Pereira and Niz-Chavez. I'm not asking
2 that they be overruled, even though --

3 (Laughter.)

4 MS. ANAND: Right.

5 JUSTICE ALITO: I'm asking you about
6 what might make some bit of sense. But, if you
7 just want to say Pereira and Niz-Chavez, we can
8 leave it at that.

9 MS. ANAND: Well, maybe I'll just cite
10 the majority in Niz-Chavez, which said that we
11 think another result is more likely still, which
12 is that the government will develop its computer
13 systems and technology to put forward dates that
14 are likely to stick.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: I -- all dates are
18 aspirational.

19 (Laughter.)

20 JUSTICE SOTOMAYOR: But, in the mine
21 run of cases, the first appearance, like the
22 first appearance when you're arraigned, you
23 don't accomplish much substantively. There's
24 not decisions on whether you're going to be
25 convicted or not at an arraignment generally,

1 unless you're going to plead guilty. But, even
2 then, time is usually given for people to confer
3 with counsel and do other things.

4 I'm assuming that this time -- TBA, as
5 you explained, is just the start of the process,
6 correct? You show up on that day and -- and you
7 either say I'm going to get an attorney or you
8 say I need more time to prepare or something
9 else happens, correct?

10 MS. ANAND: I think that's exactly
11 right, Your Honor, and so the reason you need
12 that date is, for instance, to be able to get an
13 attorney, right? It's clear then that --

14 JUSTICE SOTOMAYOR: So the point being
15 that a system that continues with TBA does every
16 -- all the damage you're saying. It doesn't
17 tell people where they should go to find out if
18 something has been changed or to direct --
19 figure out where to hire a lawyer, given that I
20 know that many of these TBAs are in
21 jurisdictions different than where the alien was
22 served, correct?

23 MS. ANAND: I think that's exactly
24 right. Yes.

25 JUSTICE SOTOMAYOR: All right. So

1 there's a lot of things to do with a date that
2 you can't do with a -- don't happen with a TBA.

3 MS. ANAND: That's exactly right.

4 And, again, Your Honor, Congress was replacing a
5 prior system that did this kind of case-by-case
6 did the non-citizen get enough analysis -- did
7 -- did the non-citizen get enough notice
8 analysis. And what it said is, rather than
9 having that scheme where we're going to ask on a
10 case-by-case basis, we're going to come up with
11 a blanket rule that's much easier to administer.

12 Yes, in some cases, it's going to be
13 underinclusive. Some non-citizens are going to
14 be genuinely confused notwithstanding this form.
15 In some cases, it's going to be overinclusive.
16 Some non-citizens had all the information they
17 needed, but -- but the government didn't comply
18 with the text of the statute. But Congress
19 determined that a rule was better than the sort
20 of fuzzy pre-1990 standard.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?
23 Justice Gorsuch?

24 JUSTICE GORSUCH: This morning, we
25 heard some arguments from the government about

1 policy. I had thought as I read the briefs in
2 this case, unlike Niz-Chavez and Pereira, that
3 the government hadn't rested on policy arguments
4 as a basis for ruling in its favor here.

5 Am I mistaken?

6 MS. ANAND: I think that because the
7 plain text of the statute counsels in our favor,
8 the government's strongest argument is about the
9 consequences to the immigration system, which we
10 don't deny.

11 JUSTICE GORSUCH: Did -- did they make
12 that in their brief?

13 MS. ANAND: I -- I believe they
14 mentioned the hundreds of thousands --

15 JUSTICE GORSUCH: Hundreds of
16 thousands. Okay.

17 MS. ANAND: -- of immigration cases in
18 their -- in their brief --

19 JUSTICE GORSUCH: Okay. All right.
20 Fair enough. Thank you.

21 MS. ANAND: Yeah.

22 JUSTICE GORSUCH: And -- and we're
23 asked to weigh -- and this discussion seems to
24 me summing up at least in part kind -- two --
25 two difficult circumstances. One, on the other

1 hand, a suggestion that it's harmless or might
2 be absurd to require the government to fill in a
3 TBD. Congress -- Congress may have thought
4 dates were important, but, nah, they're not that
5 important.

6 And on the other hand, the potential
7 that an alien might -- might be removed from the
8 country in absentia without any notice of the
9 charges against him, his right to an attorney,
10 the facts of his case, based on a compliant
11 notice of change which just says show up on a
12 date certain and you don't know where it's
13 coming from necessarily or who, and then clear
14 and convincing evidence in whatever form that
15 the government may supply in a non-adversarial
16 proceeding, a inquisitorial proceeding before
17 its own employee and immigration judge.

18 How do we weigh those two
19 consequential arguments?

20 MS. ANAND: Sure, Your Honor. So I
21 think the short answer is Congress has done that
22 weighing for you, right, that the date and time
23 is situated no differently from the other
24 information listed in paragraph (1).

25 But even if we were to do the

1 weighing, as Your Honor noted, the first -- the
2 first sort of downside is entirely within the
3 government's control. The government can just
4 put a date and time on the notice to appear, as
5 it acknowledged nearly 30 years ago the statute
6 required it to do.

7 On the other hand, the non-citizen has
8 no control over whether they get adequate
9 notice. And so, in the hypothetical you're
10 talking about where they're never told of the
11 charges against them, they're removed in
12 absentia without an opportunity to present their
13 case before the immigration judge, that's a
14 pretty draconian sanction.

15 And there's a reason why Congress
16 wanted to be -- to -- in absentia removal orders
17 in particular to be able to be reopened at any
18 time if there's inadequate notice. It's because
19 Congress thought that downside of someone being
20 removed with inadequate notice was so -- was so
21 draconian and so severe that it gave this remedy
22 to non-citizens.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: You say inadequate
2 notice, but they had notice.

3 MS. ANAND: That's right, Your Honor.
4 Again, Congress replaced the kind of reasonable
5 notice or notice of the hearing regime with
6 notice in accordance with paragraphs (1) or (2),
7 right? So Congress thought that rather than
8 doing a kind of case-by-case determination,
9 we're just going to ask that the government
10 comply with these two paragraphs of the statute.

11 And, again, it thought that it was
12 making things easier on the government. Rather
13 than doing this kind of case-by-case analysis,
14 we'll just let the government follow these
15 precise instructions, put these seven pieces of
16 information on a piece of paper, and we won't
17 ask further. So --

18 JUSTICE KAVANAUGH: Well, Congress was
19 concerned, correct me if I'm wrong, about people
20 not showing up for their removal hearings,
21 right?

22 MS. ANAND: That's exactly right. And
23 so it thought that the kind of reasonable
24 notice, the sort of predecessor regime, gave too
25 much leeway to immigration judges to say, well,

1 this person was confused, this person got this
2 document and not that document.

3 And so what it wanted to do was make
4 these in absentia removal orders easier to
5 obtain by giving the government all the power.
6 Government, comply with the statute and we'll
7 give you your removal order, and the non-citizen
8 can't be heard to complain that the notice to
9 appear was confusing.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: Why wouldn't a
14 non-citizen show up if a non-citizen gets a
15 notice that says here's the time and place of
16 your removal proceeding and, if you don't show
17 up, the consequence is removal?

18 MS. ANAND: So, Your Honor, I think
19 the non-citizen does have every incentive to
20 show up, among other things, if they don't, ICE
21 can come out and arrest them and bring them to
22 the hearing and the government can get an in
23 absentia removal order fairly straightforwardly.
24 Even if they messed up the NTA the first time,
25 all it takes is at that hearing, you know, they

1 say, oh, the NTA is defective, let me print it
2 out again, fill in the date and time.

3 JUSTICE BARRETT: Well, no, I
4 understand there's incentives. I'm just talking
5 about, like, when we're looking at the statutory
6 language, I mean, Justice Alito pointed out
7 the -- the text of this provision, and I guess
8 I'm just -- you know, we're talking about the
9 system that Congress set up, and I guess Justice
10 Kavanaugh just pointed out that the notice
11 that's most pertinent one might say here because
12 we can imagine, you know, things that don't
13 really matter. The Chief Justice gave you the
14 hypothetical of, well, well listen, maybe it
15 said TBD, but now they know the notice and they
16 know everything else.

17 So let's just put aside whatever
18 defect might have existed in the NTA. If the
19 non-citizen knows the critical information,
20 here's the date and here's the time, and if you
21 don't show up, you will be removed, even if the
22 non-citizen has some questions maybe that the
23 NTA didn't answer, why would it be draconian for
24 Congress to say that that person could then be
25 removed in absentia if they didn't show up?

1 MS. ANAND: So, Your Honor, Congress
2 could have had that scheme, right, and, again,
3 pre-1996 had a scheme for --

4 JUSTICE BARRETT: Okay. No. I -- I
5 understand that. But why -- I'm -- I'm --
6 I'm -- your -- your -- I understand your
7 argument -- let's say that I disagree with your
8 argument about the NTA and let's say that I
9 think that maybe the removal proceeding is the
10 place where the non-citizen could register
11 objections to the NTA that may well render the
12 proceeding invalid.

13 Why wouldn't it make sense? I mean,
14 because you've made arguments about the
15 coherence of the scene -- scene -- scheme and
16 said it would be draconian. Why would it be, if
17 the alien has that information, not show up?
18 Why -- why -- what would be the incentive other
19 than, as Justice Kavanaugh said, just saying
20 like, well, you know, I'm just not going to show
21 up?

22 MS. ANAND: In Niz-Chavez, this Court
23 said that the NTA is akin to the indictment in a
24 criminal case.

25 JUSTICE BARRETT: Okay.

1 MS. ANAND: Right? And in a criminal
2 case, we don't say just show up or else we're
3 going to incarcerate you.

4 JUSTICE BARRETT: What -- what would
5 the incentive be? So you're -- you're saying
6 there's no incentive, it's kind of a
7 technicality.

8 MS. ANAND: I don't think it's a
9 technicality any more than the indictment in a
10 criminal case is a technicality.

11 JUSTICE BARRETT: Okay. So your whole
12 argument really does turn on our interpreting
13 (a)(1) the way that you're arguing that it has
14 to have all of the information or it's totally
15 invalid, that -- your whole argument really
16 hinges on that?

17 MS. ANAND: I think that's right. And
18 I think the practical reason for that is the
19 non-citizen shows up to be prepared to defend
20 against what, from whom, on what statutory
21 basis.

22 That can't possibly be the scheme
23 Congress intended to have the non-citizen show
24 up at a date and time on pain of in absentia
25 removal without even knowing what they're going

1 to have to argue over or why the government
2 thinks that they're removable.

3 JUSTICE BARRETT: Well, the
4 non-citizen could show up and say, I have no
5 idea what the government is intending to proceed
6 against me, so please, you know, I -- I need to
7 know. And at that point, the immigration judge,
8 they may say the government has given completely
9 inadequate notice and so can't proceed.

10 MS. ANAND: Or the immigration judge
11 -- the statute's constraint against that
12 happening is not just the immigration judge's
13 discretion. It's you've got to do something
14 like in a criminal case to let the non-citizen
15 know what they're going to be facing when they
16 show up.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Yeah, can I just go
20 back to Justice Kagan's question about the
21 difference between a non-citizen who gets a
22 complete NTA, one who doesn't, both get the
23 change order that says come June 15th.

24 You know, I was sitting here trying to
25 figure out whether or not those people really

1 are different. And I guess, if both show up on
2 June 15th, they're not different for the purpose
3 of this scheme because there's no removal in
4 absentia. If they come, the -- they're actually
5 having the hearing, right?

6 So we're not talking about a situation
7 because I've -- the removal in absentia
8 provision, one of the requirements is that the
9 person doesn't show up. So we're not in the
10 world of removal. Am -- am I right about that?

11 MS. ANAND: I think that's right,
12 although we -- I think we would say that under
13 paragraph (1), which says a notice to appear
14 shall be given in every removal proceeding --

15 JUSTICE JACKSON: Yeah.

16 MS. ANAND: -- the -- the TBD person
17 who shows up can still register an objection and
18 say --

19 JUSTICE JACKSON: Yes, yes, yes.

20 MS. ANAND: Yeah.

21 JUSTICE JACKSON: But I'm just talking
22 about with respect --

23 MS. ANAND: Right. Yes.

24 JUSTICE JACKSON: -- to the order of
25 removal --

1 MS. ANAND: Right. It will not be an
2 in absentia --

3 JUSTICE JACKSON: It's not going to be
4 under in absentia authority --

5 MS. ANAND: That's right.

6 JUSTICE JACKSON: -- because the
7 person is there and both of those people are
8 there, so we don't have that difference.

9 MS. ANAND: Yeah.

10 JUSTICE JACKSON: And then, if they --
11 if neither show up, then the removal order gets
12 issued and the difference is in whether or not
13 one can move to reopen, the one who got all of
14 the information can't, and the one who didn't
15 can. Is that right?

16 MS. ANAND: I think that's right with
17 the -- one caveat, which is that we don't think
18 that an IJ should enter the removal order in the
19 first place under (b)(5)(A).

20 JUSTICE JACKSON: Yes, understood.

21 MS. ANAND: Yes.

22 JUSTICE JACKSON: But let's say they
23 do.

24 MS. ANAND: Right. Yes.

25 JUSTICE JACKSON: The government, you

1 know, convinces them to --

2 MS. ANAND: Yep.

3 JUSTICE JACKSON: -- even though
4 the -- the -- the one who got the defective
5 notice is there, the government -- in both
6 cases, the IJ issues the removal order and the
7 difference then becomes that one can reopen, you
8 would say --

9 MS. ANAND: Exactly. Yes.

10 JUSTICE JACKSON: -- because they got
11 all the information and the other one couldn't.

12 All right. So my question, I guess,
13 is, is there anything odd or strange about
14 Congress trying to enforce or police its
15 requirements of the government with respect to
16 notice in that way?

17 So the difference is one can move to
18 reopen, one can't, and so why couldn't Congress
19 say, you know what, we're going to allow the
20 person who didn't get all the information to
21 reopen because we want to make sure that the
22 government puts all the information in their
23 notices per the statute?

24 MS. ANAND: I think that's exactly
25 right. As Your Honor put the point earlier, the

1 government gets a huge procedural advantage,
2 right? It gets to remove someone without them
3 ever getting a hearing. And in order to get
4 that procedural advantage, the government needs
5 to put the information in the statute that the
6 statute requires.

7 JUSTICE JACKSON: Right. So it's not
8 really odd that we -- they would be treated
9 differently for that purpose if we're thinking
10 that's what the Congress cared about, right?

11 MS. ANAND: I think that's exactly
12 right. The government --

13 JUSTICE JACKSON: All right. And so
14 then the second question that I have is about
15 the government's concern about people not
16 showing up, and Justice Kavanaugh makes this
17 point and I -- I take that point and I think
18 that's right, but I wonder whether or not
19 Congress actually is solving for that problem in
20 a different way than the government is
21 suggesting here, right?

22 I -- the way I read this statutory
23 scheme, Congress is allowing people who don't
24 show up and who have an order issued against
25 them in absentia to actually move to rescind

1 that order under certain circumstances.

2 So it's not as though they say -- that
3 -- that we don't have a provision that allows
4 the person who doesn't show up to do something.
5 And the government here is saying: Well, what
6 about all the gamesmanship of the person not
7 showing up?

8 I think Congress says, if you're going
9 to remove -- excuse me -- if you're going to
10 rescind, the burden is on you to show you never
11 got the notice or that the notice was defective,
12 you say, in this situation. The burden shifts
13 to the person to get the order rescinded, and
14 that's the way the Congress is solving for
15 people gaming the system.

16 MS. ANAND: I think that's exactly
17 right. So it's not only the burden shifts to
18 you. It's, remember, the government can fix all
19 of this, right? The cards are in the
20 government's hands. The government can, you
21 know, issue a new NTA that day, and then you've
22 got no remedy going forward.

23 So it's a very risky -- you know, if
24 you imagine the hypothetical non-citizen who
25 says, oh, I caught the government with a TBD in

1 the notice to appear and I'm not going to show
2 up, all the government has to do to fix that is,
3 at the hearing where the non-citizen doesn't
4 show up, they print out the NTA again, they fill
5 out the date and time, send it to the
6 non-citizen, and then they can get that in
7 absentia removal order.

8 So it's a -- it's a game that wouldn't
9 get the non-citizen much benefit. And, as Your
10 Honor noted, the question of (b)(5)(C)(ii) is
11 about policing the government, right? The
12 provisions in (b)(5)(C)(ii) are did the
13 government turn square corners, did the
14 government issue notice? We see that in the
15 other part of (b)(5)(C)(ii), which is about
16 non-citizens in government custody.

17 JUSTICE JACKSON: And there's a way to
18 prevent the gamesmanship that we're worried
19 about or that the government is worried about
20 here because --

21 MS. ANAND: I think that's exactly
22 right.

23 JUSTICE JACKSON: -- because, if you
24 actually did receive the notice, you're not
25 going to be able to rescind.

1 MS. ANAND: That's exactly right.

2 JUSTICE JACKSON: All right.

3 MS. ANAND: The -- the cards are all
4 in the government's hands.

5 JUSTICE JACKSON: Thank you.

6 MS. ANAND: They can prevent any
7 gamesmanship.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Rebuttal, Mr. McCloud?

11 REBUTTAL ARGUMENT OF CHARLES L. McCLOUD

12 ON BEHALF OF THE UNITED STATES

13 MR. McCLOUD: Thank you, Mr. Chief
14 Justice. I'd like to make one point about
15 Pereira and then one point about the
16 consequences of the other side's rule.

17 As to Pereira, it is true that there
18 are cases in this Court where the Court
19 construes one statutory provision and that
20 decision has the effect of resolving other
21 statutory questions. Pereira is not that case.
22 And it would be very strange to pre -- to treat
23 Pereira as such a case when Pereira went out of
24 its way to say that its holding was narrow and
25 was confined to particular statutory provisions

1 that are not at issue in this case. So we don't
2 think that Pereira resolves these cases, nor
3 does Niz-Chavez.

4 Finally, as to the consequences, the
5 consequences here are not just the number of
6 motions to rescind that might be filed. The
7 larger problem is that the other side's
8 interpretation of these provisions deprives them
9 of any sort of rational force. There's no
10 reason that Congress would have enacted the
11 version of the provision that Ms. Anand just
12 described, and I don't think you need to look
13 any further than the facts of these cases to see
14 that.

15 In these cases, the non-citizens got
16 every single piece of information that they were
17 required to get not just under paragraph (2) but
18 also under paragraph (1). They knew the
19 charges, they knew the nature of the
20 proceedings, and they knew that they had the
21 right to counsel. And many of them had counsel.

22 Mendez-Colín's case I think is a
23 perfect example. In Mendez-Colín's case, by his
24 own admission, the omission of time and place
25 information in the paragraph (1) notice was

1 irrelevant, and it was rendered irrelevant over
2 and over again by the provision of additional
3 notice.

4 So to say that a provision whose
5 evident purpose is about creating a defense
6 based on lack of notice applies to individuals
7 who had notice of all of the information
8 required under the statute, I think, is
9 inconsistent with any rational understanding of
10 what Congress was trying to achieve.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

15 (Whereupon, at 11:45 a.m., the case
16 was submitted.)

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