No. 17-459

In the Supreme Court of the United States

WESCLEY FONSECA PEREIRA, PETITIONER

v.

JEFFERSON B. SESSIONS III

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

To be eligible for cancellation of removal under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has not been admitted for permanent residence must establish, among other things, that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [his cancellation] application." 8 U.S.C. 1229b(b)(1)(A). Under the "stop-time rule," an applicant's period of continuous residence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)" of the INA, notifying him that removal proceedings are being initiated against him. 8 U.S.C. 1229b(d)(1). The question presented is as follows:

Whether a notice to appear issued under 8 U.S.C. 1229(a) must include a date and time certain for the alien's initial removal hearing to stop an alien's period of continuous physical presence for purposes of 8 U.S.C. 1229b(b)(1)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 866 F.3d 1. The opinions of the Board of Immigration Appeals (Pet. App. 17a-19a) and the immigration judge (Pet. App. 20a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The petition for a writ of certiorari was filed on September 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is admitted to the United States for a temporary period as a nonimmigrant but who remains longer than permitted is removable. See 8 U.S.C. 1227(a)(1)(B) and (C)(i). To effectuate such a removal, the Department of Homeland Security

(DHS) commences removal proceedings against the alien before an immigration judge (IJ), who decides the inadmissibility or deportability of the alien. See 8 U.S.C. 1229a. To apprise the alien of the government's initiation of removal proceedings against him, the INA provides that "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. 1229(a)(1).

Such a notice to appear must specify, among other things: (A) the "nature of the proceedings against the alien"; (B) the "legal authority under which the proceedings are conducted"; (C) the "acts or conduct alleged to be in violation of law"; (D) the "charges against the alien"; (E) that the "alien may be represented by counsel"; (F) that "the alien must immediately provide * * * the Attorney General with a written record of an address * * * at which the alien may be contacted" and "a written record of any change of the alien's address"; and (G) the "time and place at which the proceedings will be held." 8 U.S.C. 1229(a)(1). The notice must include a list of counsel, maintained by the Attorney General, who are available to represent aliens pro bono in removal proceedings. 8 U.S.C. 1229(a)(1)(E) and (b)(2). And "in the case of any change or postponement in the time and place," written notice must also be given indicating "the new time or place of the proceedings," unless "the alien has failed to provide the[ir] address" as instructed in paragraph (1)(F). 8 U.S.C. 1229(a)(2); see also 8 U.S.C. 1229(a)(3) (requiring the Attorney General to "create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F)").

Any alien who, after written notice has been provided, does not appear at the removal proceedings "shall be ordered removed in absentia if [DHS] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). An in-absentia order may be rescinded only if the alien files a motion to reopen within 180 days demonstrating "exceptional circumstances" preventing him from appearing, 8 U.S.C. 1229a(b)(5)(C)(i), or, at any time, "if the alien demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)" or that he was in federal or state custody and failed to appear "through no fault of [his own]," 8 U.S.C. 1229a(b)(5)(C)(ii).

b. The Attorney General may, in certain circumstances, cancel the removal of an alien determined to be removable. See 8 U.S.C. 1229b. This discretion to grant cancellation from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for the relief he seeks and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A); 8 U.S.C. 1229b(b); 8 C.F.R. 1240.8(d); see, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008).

To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must: (1) have been physically present in the United States for a continuous period of at least ten years; (2) have been a person of good moral character during that period; (3) have not been convicted of certain designated crimes; and (4) establish that removal would result in

exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is either a citizen of the United States or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(A)-(D). Under what is often referred to as the "stop-time rule," an applicant's period of continuous physical presence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1).

Whether an applicant warrants a favorable exercise of discretion depends on a balancing of "the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented [o]n his * * * behalf to determine whether the granting of . . . relief appears in the best interest of this country." *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (citation omitted).

2. a. Petitioner is a native and citizen of Brazil. Pet. App. 3a. In June 2000, he was admitted to the United States for a period of six months as a temporary nonimmigrant visitor. *Ibid.* He failed to honor the terms and conditions of his admission, remaining for years after its December 2000 expiration. *Ibid.* In May 2006, approximately six years after his arrival and about five-and-a-half years after his authorized period of admission had expired, petitioner was arrested for drunk driving. Administrative Record (A.R.) 39-42, 195. While in detention, DHS personally served him with a notice to appear (Form I-862). See Pet. App. 3a, 18a; A.R. 217-218 ("Notice to Appear").

The notice to appear informed petitioner that "removal proceedings under section 240 of the Immigration and Nationality Act[, 8 U.S.C. 1229a]," were being initiated against him. A.R. 217. It alleged that petitioner was removable for having remained in the United

States longer than authorized. *Ibid.* It indicated that he was "ordered to appear" for removal proceedings in the Boston immigration court "on a date to be set at a time to be set to show why [he] should not be removed from the United States." *Ibid.* (capitalization altered). It informed petitioner that, if he so chose, he could be represented by counsel in those proceedings, and it included a list of qualified attorneys who might be available to represent him pro bono. *Id.* at 218.

The notice listed petitioner's street address in Oak Bluffs, Massachusetts. A.R. 217. In accordance with Section 1229(a), it instructed petitioner: "You are required to provide the INS, in writing, with your full mailing address and telephone number," and "You must notify the Immigration Court immediately * * * whenever you change your address or telephone number during the course of this proceeding." *Id.* at 218.

Petitioner's hearing was later set for October 31, 2007, at 9:30 a.m. Six weeks prior to the hearing, the immigration court mailed a notice of hearing to the street address that was listed in the notice to appear. Pet. App. 3a; A.R. 216 ("Notice of Hearing"). Petitioner failed to appear at that hearing, however, and was ordered removed in absentia. Pet. App. 3a; A.R. 209.

b. Five-and-a-half years later, in March 2013, petitioner was again arrested, this time for driving on a suspended license, and detained by DHS. Pet. App. 3a; A.R. 43-45. Upon being informed of the in-absentia order, petitioner moved to reopen the removal proceedings based on his sworn statement that he had never received the notice of hearing indicating the date and time of the hearing because it had been mailed to his "physical residential address," not his "mailing address." Pet.

App. 3a; A.R. 194-195. The IJ granted petitioner's motion and reopened the proceedings. Pet. App. 3a; A.R. 194.

During the reopened proceedings, petitioner conceded he was removable as charged but sought relief in the form of cancellation of removal. Pet. App. 3a-4a; A.R. 147. He argued that he was eligible for cancellation because, among other things, he had been physically present in the United States since June 2000. Pet. App. 4a. He contended that the May 2006 notice to appear did not interrupt his accrual of the statutorily required ten years of continuous presence, because it did not include a date and time certain for his initial hearing. According to petitioner, the stop-time rule under 8 U.S.C. 1229b(d) did not "stop" his continuous physical presence until he received notice of the specific date and time of a hearing on his reopened removal proceedings in 2013. Pet. App. 4a.

c. The IJ denied petitioner's application for cancellation of removal and ordered that petitioner be removed, Pet. App. 20a-24a. The IJ reasoned that the omission of a date and time certain from the notice to appear did not "somehow * * * negate the service of the Notice to Appear insofar as it would cut off [petitioner's] continuous physical presence." *Id.* at 23a. Thus, the IJ determined, petitioner was "statutorily ineligible to submit [a cancellation of removal] application." *Ibid.*

d. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 17a-19a. Relying on its precedential decision in *In re Camarillo*, 25 I. & N. Dec. 644 (2011), the BIA reasoned that "an alien's period of continuous physical presence for cancellation of removal is deemed to end upon service of the Notice to Appear even if the Notice to Appear does not include the date and time of

the hearing." Pet. App. 18a. Because petitioner was personally served with a notice to appear in May 2006, less than ten years after he was admitted into the United States, the Board determined that he "lack[ed] the requisite period of continuous physical presence for cancellation." *Ibid.* The Board declined to reconsider its decision in *Camarillo*, *ibid.*, and dismissed petitioner's appeal, *id.* at 19a.

3. The court of appeals denied petitioner's petition for review of the BIA's decision. Pet. App. 1a-16a. The court first rejected petitioner's argument that Section 1229b(d)(1)'s reference to "a notice to appear under § 1229(a)" unambiguously requires that a notice to appear containing all of the information listed in Section 1229(a)(1), including the specific date and time of the removal hearing, be served on the alien before it can trigger the stop-time rule. Pet. 7a-9a. The court observed that Section 1229b(d)(1) "does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous presence." *Id.* at 9a. And it reasoned that the statute's reference to "'under' § 1229(a)" does not "clearly indicate" that the rule incorporates all of the requirements of paragraph (1) of Section 1229(a). *Ibid.*

The court of appeals disagreed with the Third Circuit's reasoning that "§ 1229(a)(1)'s commandment that a notice to appear specifying the ten pieces of information listed '*shall* be given in person to the alien'" provided the missing clarity. Pet. App. 7a-8a (quoting *Orozco-Velasquez* v. *Attorney Gen. U.S.*, 817 F.3d 78, 83 (2016)). "It is undisputed," the court observed, "that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." *Id.* at 8a. "But whether a notice to appear that

omits some of this information nonetheless triggers the stop-time rule [in Section 1229b(d)(1)] is a different question." *Ibid.*

Having found the provision ambiguous, the court of appeals concluded that the BIA's interpretation was "a permissible construction of the stop-time rule." Pet. App. 10a; see *id.* at 9a-15a; see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). It agreed with the BIA's reasoning from *Camarillo* that, because Section 1229(a) is the "'primary reference in the [INA] to the notice to appear,'" Pet. App. 10a (quoting *Camarillo*, 25 I. & N. Dec. at 647) (brackets in original), it is logical to read the phrase "under section 1229(a)" in the stop-time rule as merely "specif[ying] the document the DHS must serve on the alien to trigger the 'stop-time' rule," *ibid.* (quoting *Camarillo*, 25 I. & N. Dec. at 647). And it found reasonable the BIA's reliance on the administrative context in which notices to appear are issued—namely, that while DHS serves the notice to appear, it is the immigration court that sets the date and time of an initial hearing, and that information is often unavailable to DHS when it serves the notice. *Id.* at 12a.

The court of appeals also agreed that the legislative history of the stop-time rule supported the BIA's reading. The rule was enacted, the court reasoned, to close a "legal loophole" that permitted an alien's continuous physical presence, for purposes of cancellation of removal, to be calculated without regard to "'whether or when the Immigration and Naturalization Service had initiated deportation proceedings against the person.'" Pet. App. 12a-13a (quoting *Camarillo*, 25 I. & N. Dec. at 650). Moreover, the court observed, the requirement that DHS send the notice to appear itself, informing aliens of, among other things, the requirement to "notify

the government of any changes in their contact information," was intended to "prevent notice problems from dragging out the deportation process." *Id.* at 13a-14a. In light of that history, the court of appeals concluded, it would "make little sense" for Congress to have "condition[ed] the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings." *Id.* at 14a.

Because the court of appeals deferred to the BIA's interpretation of the stop-time rule, it agreed with the BIA's conclusion that petitioner's period of continuous physical presence ended when he was served with a notice to appear in 2006, and that therefore he was ineligible for cancellation of removal. *Id.* at 15a-16a.

ARGUMENT

Petitioner contends (Pet. 15-35) that the court of appeals wrongly denied his petition for review of the BIA's determination that he was ineligible for cancellation of removal by virtue of his failure to meet the eligibility requirement of ten years of continuous physical presence. He urges this Court to grant the petition for a writ of certiorari to resolve a conflict about whether a notice to appear must include a date and time certain for an alien's initial removal hearing in order to be "deemed to end" the alien's continuous physical presence under 8 U.S.C. 1229b(d)(1). The court of appeals' decision denying his petition for review was correct, and this case is not an appropriate vehicle for resolving the conflict on which petitioner relies because even if the Court were to adopt petitioner's interpretation of the statute, he would still not likely be eligible for cancellation of removal. Further review is therefore unwarranted.

1. To be eligible for cancellation of removal, an alien who is not a lawful permanent resident must establish, among other things, that he has been "physically present in the United States for a continuous period of at least ten years." 8 U.S.C. 1229b(b)(1)(A). Under the stop-time rule, an applicant's period of continuous residence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)" of the INA. 8 U.S.C. 1229b(d)(1). Petitioner entered the United States in June 2000 and was personally served with a notice to appear issued pursuant to Section 1229(a) on May 31, 2006. See Pet. App. 3a; A.R. 217-218 ("Notice to Appear"). Under the plain terms of the INA, his "continuous physical presence" in the United States was therefore "deemed to end" on that date, well short of the ten years of continuous physical presence required for cancellation of removal. 8 U.S.C. 1229b(d)(1). The BIA thus correctly denied petitioner's application for cancellation of removal.

Petitioner contends (Pet. 20-26) that the statute "unambiguously" requires a different result, because the notice to appear that he received did not specify the date and time of his initial removal hearing. He argues (Pet. 20) that the text, structure, and legislative history of the stop-time rule all make clear that "the stop-time rule does not end the period of continuous residence until the immigrant has been served with *all* the information" listed in paragraph (1) of Section 1229(a), and because the date and time of the hearing are among the information listed in that paragraph, the stop-time rule does not apply until an alien receives that information. Petitioner is mistaken.

a. The text of the stop-time rule provides that "[f]or purposes of [Section 1229b], any period of continuous

residence or continuous physical presence in the United States shall be deemed to end * * * when the alien is served a notice to appear under section 1229(a) of this title." 8 U.S.C. 1229b(d)(1). Petitioner argues that the phrase "served a notice to appear under section 1229(a)" unambiguously means "served with written notice of the specific information listed in § 1229(a)(1)." Pet. 21-22. In essence, petitioner would read "under section 1229(a)" to mean "in compliance with section 1229(a)(1)" or "in accordance with section 1229(a)(1)," such that any notice to appear that does not include all the information required by that subsection does not qualify as a "notice to appear under section 1229(a)."

As this Court has repeatedly recognized, however, "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani* v. *United States*, 502 U.S. 129, 135 (1991); see *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 531 (2013) ("[T]he word evades a uniform, consistent meaning."); *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010) ("The word 'under' is chameleon."); *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40 (2008) ("[T]he variability of the term 'under' is well documented."). That recognition alone defeats petitioner's argument that the text "unambiguously" commands his reading.

In fact, petitioner's reading of the phrase is not even the most natural one. "[A] thing that is "'under'" a statute is most naturally read as being "'subject to'" or "'governed by'" the statute." *Florida Dep't of Revenue*, 554 U.S. at 39 (quoting *Ardestani*, 502 U.S. at 135); see also *id.* at 52-53 (noting that the "most natural reading" is "pursuant to"). There is no question that the notice to appear petitioner received in May 2006 was "subject to," "governed by," and "pursuant to" Section 1229(a).

Section 1229(a) "is the primary reference in the Act to the notice to appear." *In re Camarillo*, 25 I. & N. Dec. 644, 647 (B.I.A. 2011); see 8 U.S.C. 1229(a) (entitled "Notice to appear"). No other provision in the INA requires or authorizes DHS to serve such a notice to appear. It was no coincidence that, by all accounts, the notice satisfied all ten of the requirements of Section 1229(a)(1) other than specifying the time and date of the hearing. Compare 8 U.S.C. 1229(a)(1)(A)-(G), with A.R. 217-218.

At times, petitioner seems to suggest (Pet. 22) that a document that does not contain *all* of the information listed in Section 1229(a)(1) cannot rightly be called a "notice to appear." But, of course, it can. An incomplete "notice to appear" can still be a "notice to appear," just as an unsigned notice of appeal can still be a notice of appeal. Cf. *Becker* v. *Montgomery*, 532 U.S. 757, 768 (2001) (holding that an unsigned notice of appeal satisfied Federal Rule of Appellate Procedure 3(a)(1)'s requirement to timely "fil[e] a notice of appeal with the district clerk," as long as it was subsequently signed, even after the time to appeal has expired). Petitioner recognizes as much elsewhere when he refers (Pet. 33) to the type of notice that petitioner received as "an incomplete notice to appear," and when he asserts (Pet. 26) that the stop-time rule ends a period of continuous physical presence only upon the service of a "complete notice to appear."

Petitioner also relies (Pet. 23) on this Court's decision in *Ardestani* to argue that "notice to appear under section 1229(a)" cannot be read to include a notice that does not satisfy the requirements of Section 1229(a)(1). But that reliance is misplaced. In that case, the Court held that the Equal Access to Justice Act (EAJA),

5 U.S.C. 504; 28 U.S.C. 2412, did not authorize the award of attorney's fees in deportation proceedings. *Ardestani*, 502 U.S. at 131. EAJA provides for such awards in agency "adjudication[s] under section 554" of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* 5 U.S.C. 504(b)(1)(C)(i). The Court interpreted "under" in accordance with its most natural meaning: "subject or pursuant to" or "by reason of the authority of." *Ardestani*, 502 U.S. at 135 (brackets and citation omitted). Thus, although deportation proceedings were required by regulation to conform closely to the procedures dictated in Section 554 of the APA, the Court held that they were not "adjudications under section 554" because they were not "governed by the APA." *Id.* at 133.

Petitioner overreads (Pet. 23) the Court's decision when he claims that EAJA applies "only to a hearing meeting the specific requirements listed in" Section 554. No one would think, for example, that the authority to award attorney's fees under EAJA suddenly disappears if, during a proceeding held pursuant to 5 U.S.C. 554, an agency fails to give "all interested parties [an] opportunity" to be heard, 5 U.S.C. 554(c), or if it fails to give the parties proper notice of the "time, place, and nature of the hearing" or the "legal authority * * * under which the hearing is to be held," 5 U.S.C. 554(b). Regardless of whether the agency satisfies these requirements, any adjudication to which Section 554 applies is "subject to"—and therefore "under"—that provision. So too here.

b. Contrary to petitioner's contention (Pet. 26-27), the statutory structure confirms the BIA's interpretation of the stop-time rule. As the title of Section 1229 indicates, a primary purpose of the notice to appear is the "[i]nitiation of removal proceedings." 8 U.S.C. 1229;

see *Camarillo*, 25 I. & N. Dec. at 650. It reflects the government's formal determination to charge the alien with removability. A notice to appear can and does serve that purpose without providing a specific date and time for the alien's initial hearing, by providing the alien a host of information about those proceedings, including, among other things, the fact of their initiation, the legal authority for the proceedings, the charges about the alien, and his right to be represented by counsel. 8 U.S.C. 1229(a)(1); see *Camarillo*, 25 I. & N. Dec. at 650. Nothing in the stop-time rule indicates that the absence of a specific date and time makes the initiating document anything other than a "notice to appear under section 1229."

By contrast, another provision of the INA indicates that full compliance with Section 1229(a)(1) is required for other purposes. If, after the government provides the written notice required by paragraph (1) of Section 1229(a), an alien does not appear at the removal proceedings, he may be ordered removed "in absentia." 8 U.S.C. 1229a(b)(5)(A). Such an in-absentia order may be rescinded only in narrow circumstances. One of those circumstances, and the one on which petitioner relied here, is if the alien shows that he "did not receive notice *in accordance with paragraph (1) or (2) of section 1229(a)*." 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added). Two aspects of this provision make clear that the stop-time rule does not apply only to notices issued in full compliance with Section 1229(a)(1).

i. First, unlike the stop-time rule, Section 1229a(b)(5)(C)(ii) refers specifically to paragraphs (1) and (2) of Section 1229(a), indicating that where Congress intended to hinge the application of a rule on the provisions of specific paragraphs of Section 1229(a), it knew

how and did so explicitly. By contrast, as the BIA noted, the stop-time rule's general reference to "section 1229(a)" tends to show that Congress was not concerned about the requirements imposed by any particular subsection.

Petitioner argues (Pet. 27) that the general reference to Section 1229(a) in the stop-time rule supports his reading because a notice to appear is defined only in paragraph (1) of Section 1229(a) and "no one has argued that notice of a change in the time or place of a hearing under § 1229(a)(2) has any impact on the stop-time rule." Presumably, petitioner also does not intend to argue that the Attorney General must have complied with paragraph (3) of Section 1229(a), requiring the creation of a system to record updated mailing addresses, for a notice to appear to trigger the stop-time rule.[1] But it is not clear how any of that helps petitioner. All it proves is that, even under petitioner's reading, "notice to appear under section 1229(a)" requires full compliance only with paragraph (1) of Section 1229(a). It does not explain why, if that were so, Congress would not have specifically referred to paragraph (1)—a failure that is all the more inexplicable in light of Congress's specific reference to paragraphs (1) and (2) in Section 1229a(b)(5)(C)(ii).

ii. Second, and perhaps more importantly, Section 1229a(b)(5)(C)(ii) clearly provides that, before ordering an alien removed in absentia, the government must have provided notice "*in accordance with* paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added). Under that formulation, an alien

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[1] But see Pet. App. 11a n.6 (noting that, in the court of appeals, petitioner "neither addresse[d] whether the stop-time rule incorporates § 1229(a)(2) and (a)(3), nor argues that the rule somehow incorporates only the requirements of § 1229(a)(1)").

may not be ordered removed in absentia unless he has been served with all of the information listed the applicable paragraph of Section 1229(a). Congress's use of different—and much clearer—language in Section 1229a(b)(5)(C)(ii) to establish such a rule in the context of in-absentia orders provides strong evidence that "notice to appear under section 1229(a)" does not carry the same meaning in the context of the stop-time rule. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original; citation omitted).

c. Finally, the legislative history of the stop-time rule also strongly supports the BIA's interpretation. As the First Circuit recognized, the stop-time rule was enacted to close a "legal loophole," Pet. App. 13a (citation omitted), by which "some [f]ederal courts [would] permit aliens to continue to accrue time toward the [continuous physical presence] threshold even after they ha[d] been placed in deportation proceedings," H.R. Rep. No. 469, 104th Cong. 2d Sess. Pt. 1, at 122 (1996) (House Report). See Pet. App. 12a-13a. As petitioner recognizes (Pet. 28), that loophole was "often abused by aliens seeking to delay proceedings until [the requisite time] ha[d] accrued." House Report 122. Petitioner focuses on efforts to obstruct deportation proceedings by filing meritless continuances and similar procedural mechanisms. But the abuses to which the legislative history refers also expressly "include[d] aliens," like petitioner, "who failed to appear for their deportation proceedings and were ordered deported in absentia, and then seek

to re-open proceedings once the requisite time has passed." *Ibid.*

Congress closed that loophole by deeming an alien's continuous presence to end upon service of the document that initiates deportation proceedings. 8 U.S.C. 1229b(d)(1). See House Report 160 ("The time period for continuous physical presence terminates on the date a person is served a notice to appear for a removal proceeding."); 143 Cong. Rec. 25,543 (1997) ("IIRIRA changed th[e] rule to bar additional time for accruing after receipt of a 'notice to appear,' the new document the Act created to begin 'removal' proceedings."). There is no reason that Congress would have wanted an alien to be able to take advantage of the very loophole it sought to close, merely because the notice to appear that initiated his deportation proceedings did not include a precise date and time for his initial hearing.

d. For all these reasons, the best reading of the stop-time rule is that an alien's continuous physical presence is "deemed to end" upon service of a notice to appear served pursuant to Section 1229(a), even if that notice does not include a specific date and time for the alien's initial removal hearing. At a minimum, however, the statute is at least ambiguous as to the answer to that question, and the court of appeals correctly deferred to the BIA's reasonable interpretation. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

When "a statute leaves a 'gap' or is 'ambiguous,'" this Court "typically interpret[s] it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2142 (2016) (brackets omitted). Congress has delegated authority to interpret the INA to the Attorney General, and through him

to the BIA, see 8 U.S.C. 1103(a)(1) and (g), and thus this Court defers to the BIA's reasonable construction of ambiguities in the Act. See *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (opinion of Kagan, J.); *id.* at 2215-2216 (Roberts, C.J., concurring in the judgment); *INS* v. *Aguirre–Aguirre,* 526 U.S. 415, 424-425 (1999).

In *Camarillo*, the BIA thoroughly examined the question presented here and issued a precedential decision adopting the interpretation followed in the proceedings below. The BIA considered the text, statutory structure, and legislative history, as well as the administrative context in which notices to appear are issued—where it is often not practical for DHS to include a date and time certain when issuing notices to appear. And the BIA concluded that "the DHS's service of a notice to appear triggers the 'stop-time' rule, regardless of whether the date and time of the hearing have been included in the document." *Camarillo*, 25 I. & N. Dec. at 651. For the reasons described above, the BIA's construction of the statute was reasonable and thus entitled to deference.

2. Petitioner contends (Pet. 17-19) that the Court should issue a writ of certiorari to resolve a circuit split on whether a notice to appear that does not specify a date and time for the alien's initial hearing ends the alien's continuous physical presence for purposes of his eligibility for cancellation of removal. Of the seven courts of appeals to have addressed that question in precedential opinions, six have found the BIA's construction of the statute to be reasonable and entitled to deference. See Pet. App. 1a-16a; *Moscoso-Castellanos* v. *Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015); *Guaman-Yuqui* v. *Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (per curiam); *Gonzalez-Garcia* v. *Holder*, 770 F.3d 431, 434-435 (6th

Cir. 2014); *Wang* v. *Holder*, 759 F.3d 670, 675 (7th Cir. 2014); *Urbina* v. *Holder*, 745 F.3d 736, 740 (4th Cir. 2014); see also *O'Garro* v. *United States Att'y Gen.*, 605 Fed. Appx. 951, 953 (11th Cir. 2015) (per curiam). The Third Circuit alone has concluded that the Board's construction of the stop-time rule is impermissible. See *Orozco-Velasquez* v. *Attorney Gen. U.S.*, 817 F.3d 78, 81-82 (2016). Even if that disagreement may, at some point, warrant this Court's review, however, this case is not an appropriate vehicle for resolving the disagreement.

Even if petitioner met the continuous presence requirement, further review is not warranted because he would likely be ineligible for cancellation of removal on the basis of another statutory requirement. In addition to establishing ten years of continuous presence, cancellation applicants must also "establish[] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(D). To meet that standard, the alien must prove that the hardship to his U.S. citizen (or lawful permanent resident) relatives, if the alien were removed, would be "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (quoting H.R. Conf. Rep. No. 828, 104th Cong. 2d Sess. 213 (1996) (Conf. Report)). It can be met in only "'truly exceptional' situations." *Ibid.* (quoting Conf. Report 213-214).

Petitioner notes (Pet. 4) that he is "the father of, and primary breadwinner for, two young, U.S.-citizen children." See Pet. 12-13. He contends that his removal

"would undoubtedly cause his [two U.S. citizen] daughters 'exceptional and unusual hardship.'" Pet. 34 (citation omitted). Without questioning whether petitioner's deportation would cause some hardship to his daughters, those facts do not remotely make his case "truly exceptional" or prove that his removal would cause hardship to his daughters "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *Monreal-Aguinaga*, 23 I. & N. Dec. at 62; see, *e.g.*, *id.* at 62, 64 (concluding that the removal of a father of two U.S.-citizen children would not cause "exceptional and extremely unusual hardship" because "[t]here [wa]s nothing to show that he would be unable to work and support his United States citizen children in [his home country]"); *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 324 (B.I.A. 2002) (concluding that the removal of a single mother of two children would not cause "exceptional and extremely unusual hardship"). Thus, even if the Court were to adopt petitioner's interpretation of the stop-time rule, his removal proceedings would be unlikely to reach a different conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2017