No. 15-289

IN THE

Supreme Court of the United States

ANTHONY THOMPSON,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case presents a direct and acknowledged circuit conflict on the question of whether an alien can be removed *in absentia* for failing to appear at a removal hearing, when the Notice of Hearing was sent to an incorrect address that was erroneously recorded by the government, and when the alien was never advised of his regulatory obligation under 8 C.F.R. § 1003.15(d)(1) to take affirmative steps to correct the government's error. *See* Pet. App. 13a ("[W]e would arguably be obligated to grant Thompson's petition if *Velasquez* were a binding precedent in this circuit. But … we respectfully disagree with our sister circuit's conclusion.").

The government's various efforts to reconcile the holding in this case with the Ninth Circuit's holding in *Velazquez-Escovar v. Holder*, 768 F.3d 1000 (9th Cir. 2014), all fail. This Court's review is needed to resolve the conflict.

ARGUMENT

The government offers three main arguments for denying certiorari. Each is unpersuasive.

1. The government's lead argument is that, under 8 U.S.C. § 1229(a)(1)(F)(i), the alien must provide the Attorney General with a "written record of an address," and if the alien fails to do so, he may be removed *in absentia*. Here, the government claims, Petitioner failed to satisfy this requirement, because he merely communicated his address orally to the immigration officer. Gov't Br. 11-12. "[S]uch an oral communication standing alone," the government contends, "does not satisfy petitioner's obligation to

provide the government with a 'written record' of [his] address…." *Id.* at 12.

Of course, this was not the basis for the decision by the Board of Immigration Appeals ("BIA"), *see* Pet. App. 22a-28a, nor was this argument addressed in the Sixth Circuit's decision. Likewise, in *Velazquez*, this argument was waived. 768 F.3d at 1005 n.1. Nevertheless, the government argues, this argument remains open to it in future cases, and the fact that it has not yet been foreclosed by any court is a reason to deny review in this case. Gov't Br. 16-17.

The government is wrong. There is good reason why the BIA did not rely on this argument in either this case or *Velazquez*: it ignores the practical reality of how the government obtains address information from aliens in its custody. Immigration officers and immigration judges routinely create a "written record of an address," 8 U.S.C. § 1229(a)(1)(F)(i), by asking an alien to provide that address orally, recording the answer on the government's form for the alien, and then asking the alien to sign the form. Yet, under the government's argument, every time an immigration officer or immigration judge did so, the alien would then have failed to comply with the statutory command to provide a "written record of an address," *id.*, and could be removed *in absentia*.

The upshot of this position is that even if the immigration officer *had* recorded Petitioner's correct address, but the government then neglected to send out any Notice of Hearing at all, Petitioner *still* would have been subject to removal *in absentia*. *See id.* § 1229a(b)(5)(B). Moreover, an alien asked by an

immigration officer or immigration judge to provide his address, and who then cooperates by answering orally rather than by insisting on writing his address himself, would have no reason even to suspect that he was in fact flouting a statutory obligation to provide a "written record" and thereby could be removed *in absentia*.

Unsurprisingly, the government can cite no authority for this draconian view. The fact that this unappetizing and unpersuasive argument technically remains available to the government in future cases—even though the BIA has never endorsed it and the government's appellate counsel have not seen fit to argue it in either this case or *Velasquez*—is not a reason for this Court to deny review.

2. The government's second argument for denying review is that the Petitioner had an obligation under 8 C.F.R. § 1003.15(d)(1) to inform the government within five days "if the address on the … Notice to Appear is incorrect." *See* Gov't Br. 13. The government argues that, because Petitioner did not take affirmative steps to correct the address erroneously recorded by the immigration officer on the Notice to Appear, he violated his regulatory obligation and can be removed *in absentia*. *Id.* at 13-14.

Yet the significance of Section 1003.15(d)(1) is the precise subject of the circuit conflict on which this Court's review is needed. The question presented by this case is whether an alien is obligated under Section 1003.15(d)(1) despite never having received notice of that obligation. The Ninth Circuit held in *Velasquez* that, simply put, "no notice, no obligation." *Velasquez*,

768 F.3d at 1006. The Sixth Circuit held here that "Thompson was required to comply with 8 C.F.R. § 1003.15(d)(1) regardless of his knowledge thereof." Pet. App. 16a. Thus, there is a clear and direct conflict between the Sixth and Ninth Circuits on whether the government must provide notice of Section 1003.15(d)(1)'s requirements before an alien is subject to any obligations under that provision.

In both this case and *Velasquez*, the only notice provided to the aliens was the standard form advisal that is included on the Notice to Appear ("NTA"). Pet. App. 47a; *Velasquez*, 768 F.3d at 1005 n.2. That advisal is reproduced at Pet. 4-5 and Pet. App. 47a. As the Court can see, and as the Ninth Circuit explained, it "never mentions § 1003.15(d)(1) or otherwise puts aliens on notice than an NTA with an incorrect address is their problem. Rather, the NTA warns aliens that they will be removed in absentia if they fail to appear and that the 'government shall not be required to provide [them] with written notice' if they fail to provide a current address or fail to notify the government when they move. This tracks the statute but not the regulation." *Velazquez*, 768 F.3d at 1005 (bracket in original) (footnote omitted).

The government does not dispute that the Notice to Appear failed to provide Petitioner with notice of his obligation under Section 1003.15(d)(1). Nor does the government even acknowledge the Ninth Circuit's holding that such notice is a condition precedent of any obligation on the part of an alien. Instead, the government quibbles with the Ninth Circuit's reading of *In re G—Y—R—*, 23 I. & N. Dec. 181 (BIA 2001) (en banc), the BIA decision on which the Ninth Circuit

relied in holding that notice of Section 1003.15(d)(1)'s obligations was required. According to the government, that decision "did not address circumstances like those presented here, where the alien has been personally served with the NTA." Gov't Br. 14.

The government's argument is both irrelevant and wrong. It is irrelevant because the Ninth Circuit has already interpreted *G—Y—R—* to require notice that was indisputably lacking in this case. *Velasquez*, 768 F.3d at 1005-06. The fact that the government disagrees with the Ninth Circuit, and instead agrees with the Sixth Circuit, simply underscores the need for this Court's review.

The government's argument is wrong because it begs the question: If the NTA fails to include notice of the alien's obligations, is the alien still obligated? The fact that Petitioner was "personally served with the NTA," Gov't Br. 14, does not change the fact that the NTA failed to notify Petitioner of his obligations under Section 1003.15(d)(1). And the BIA held in *G—Y—R—* that "an in absentia order may *only* be entered where the alien has received … a Notice to Appear … *informing the alien* of the statutory address obligations," 23 I. & N. Dec. at 181 (emphasis added), as well as the regulatory address obligations, *id.* at 191. As the BIA made clear, notice of the statutory address obligations is required by the statute itself, *id.* at 189 ("the statute does not authorize the entry of an in absentia order unless the advisals in the Notice to Appear are properly conveyed"), and "the regulations … derive from and … track the language of the statute." *Id.* at 191. Thus, that same notice

requirement applies to the regulatory obligations as well.[1]

The government also argues that "[n]othing in *G—Y—R—* suggests that the warnings printed on NTAs are insufficient to convey the alien's address-reporting obligations under Section 1229(a)(1)(F)." Gov't Br. 14-15. Again, that fully misses the point. The problem here is that the NTA failed to place Petitioner on notice of his obligations under *Section 1003.15(d)(1)*. And the government does not dispute that the NTA's advisals were inadequate with respect to those obligations.

The government nevertheless contends that even if the NTA's advisals were inadequate to provide notice of the alien's obligations under Section 1003.15(d)(1), the government could still rely "on the logic of the regulation in a future case," and that the Ninth Circuit's decision in *Velasquez* does not foreclose such reliance. Gov't Br. 17-18. Not so. Nothing in the Ninth Circuit's decision suggests that the government can rely on the "logic" of Section 1003.15(d)(1) to hold an alien to its requirements, even where the alien is never

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[1] In a footnote, the government references a Notice of Custody Determination that is not part of the administrative record in this case, which Petitioner signed the same day as the Notice to Appear and contained the same erroneous address as the Notice to Appear. It is unclear what significance the government thinks this document has. The most likely explanation is that the Notice of Custody Determination and Notice to Appear were both prepared at the same time and thus reflect the same error by the immigration officer. In any event, the government concedes that this extra-record material "would not directly affect the legal analysis or alter the proper resolution of this case." Gov't Br. 14 n.2.

informed about the regulation at all. To the contrary, the Ninth Circuit could not have been clearer: "no notice, no obligation." 768 F.3d at 1006.

3. The government's third and final argument is that, in a future case, it could rely on the Ninth Circuit's decision in *Hamazaspyan v. Holder*, 590 F.3d 744 (9th Cir. 2009), to avoid the holding in *Velasquez*. But *Hamazaspyan* has nothing to do with the question presented to this Court. That case held that "serving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court." *Id.* at 749. The government points to dicta in a footnote suggesting that if the alien in that case had orally conveyed "his correct address, and the government agents incorrectly transcribe[] what he said," the alien would not be "entitled to relief" if he "failed to correct the mistake when it was brought to his … attention." Gov't Br. 18 (quoting *Hamazaspyan*, 590 F.3d at 746 n.3) (alterations in original). But the government overlooks that the alien in *Hamazaspyan* received *both* the Notice to Appear *and* a Notice of Hearing, 590 F.3d at 745—and the latter *does* contain an advisal of an alien's obligations under Section 1003.15(d)(1), *see* Pet. 14 n.3; Pet. App. 44a-45a. Thus, in *Hamazaspyan*, "Hamazaspyan and therefore his counsel of record were aware of Hamazaspyan's obligation to provide the government with his correct address." 590 F.3d at 746 n.3 (quotation marks omitted). Accordingly, *Hamazaspyan* does not contradict *Velasquez*, and *Velasquez* is the case addressing the circumstances here.

CONCLUSION

Because the Sixth Circuit's decision in this case conflicts with the Ninth Circuit's decision in *Velasquez*, this Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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