No. 19-673

In the Supreme Court of the United States

MELIDA TERESA LUNA-GARCIA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Board of Immigration Appeals' determination that the Guatemalan address petitioner provided to immigration officials did not satisfy her obligation under 8 U.S.C. 1229(a)(1)(F) to provide an address at which she could be contacted respecting her removal proceedings, where petitioner had left Guatemala and intended to remain and reside in the United States during the pendency of her removal proceedings.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

Luna-Garcia de Garcia v. *Barr*, No. 15-60526 (Apr. 22, 2019)

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

Luna-Garcia v. *Holder*, No. 14-9569 (Feb. 10, 2015)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 932 F.3d 285. The decisions of the Board of Immigration Appeals (Pet. App. 25a-27a) and the immigration judge (Pet. App. 28a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2019. A petition for rehearing was denied on July 23, 2019 (Pet. App. 35a-36a). On September 16, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 20, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that an alien placed in

removal proceedings under 8 U.S.C. 1229a be served with "written notice" of certain information. 8 U.S.C. 1229(a)(1). Section 1229 refers to that "written notice" as a "'notice to appear.'" *Ibid.* Under paragraph (1) of Section 1229(a), such written notice must specify, among other things, the "nature of the proceedings against the alien," 8 U.S.C. 1229(a)(1)(A); the "charges against the alien and the statutory provisions alleged to have been violated," 8 U.S.C. 1229(a)(1)(D); and the "time and place at which the proceedings will be held," and the "consequences under section 1229a(b)(5) of [Title 8] of the failure * * * to appear at such proceedings," 8 U.S.C. 1229(a)(1)(G). Under subparagraph (F) of that same paragraph, such written notice must also specify the "requirement that the alien must immediately provide * * * a written record of an address * * * at which the alien may be contacted respecting proceedings under section 1229a of [Title 8]," and "of any change of the alien's address," to "the Attorney General," and the "consequences under section 1229a(b)(5) of [Title 8] of failure" to do so. 8 U.S.C. 1229(a)(1)(F). Paragraph (2) of Section 1229(a) provides that, "in the case of any change or postponement in the time and place of [the removal] proceedings," "written notice shall be given" specifying "the new time or place of the proceedings," and the consequences under Section 1229a(b)(5) of failing to attend such proceedings. 8 U.S.C. 1229(a)(2).

Under Section 1229a(b)(5), an alien who fails to appear at his removal proceedings "shall be ordered removed in absentia" if "clear, unequivocal, and convincing evidence" shows that the "written notice required under paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided" and that "the alien is removable."

8 U.S.C. 1229a(b)(5)(A). Section 1229a(b)(5)(A) provides that the "written notice * * * shall be considered sufficient * * * if provided at the most recent address provided [by the alien] under section 1229(a)(1)(F)." *Ibid.* Section 1229a(b)(5)(B) provides, however, that "if the alien has failed to provide the address required under section 1229(a)(1)(F)," "[n]o written notice shall be required" before the alien is ordered removed in absentia. 8 U.S.C. 1229a(b)(5)(B). A removal order entered in absentia "may be rescinded * * * upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Petitioner is a native and citizen of Guatemala. Administrative Record (A.R.) 104. In April 2004, petitioner illegally entered the United States "by wading across the Rio Grande River." A.R. 102. Petitioner was apprehended near Jourdanton, Texas, and transported to a Border Patrol station for further questioning. A.R. 103. At the station, petitioner claimed that she had "left Guatemala" earlier that month and "was headed to New York, New York, to seek employment." *Ibid.* She provided an address in Guatemala, but did not provide an address in the United States. A.R. 102.

The Department of Homeland Security (DHS) served petitioner in person with a notice to appear for removal proceedings "on a date to be set at a time to be set." A.R. 104; see A.R. 103. The notice to appear charged that petitioner was subject to removal because she was an alien present in the United States without being admitted or paroled. A.R. 104; see 8 U.S.C. 1182(a)(6)(A)(i).

The notice to appear contained a space to be filled in with the address at which petitioner was "currently re-

siding." A.R. 104. The notice to appear informed petitioner: "You are required to provide the [government], in writing, with your full mailing address * * * . You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address." A.R. 105. The notice to appear further stated that "[n]otices of hearing will be mailed to this address," and that "the Government shall not be required to provide you with written notice of your hearing" if "you do not * * * provide an address at which you may be reached during proceedings." *Ibid.* The notice to appear additionally explained that "[i]f you fail to attend the hearing * * * , a removal order may be made by the immigration judge in your absence." *Ibid.*

Petitioner signed the notice to appear, A.R. 105, which stated, in the space for her "current[]" address, that she had "failed to provide a US address," A.R. 104 (capitalization altered). The notice to appear advised petitioner that she was "required to carry [a copy of the notice to appear] with [her] at all times" as "evidence of [her] alien registration." A.R. 105.

DHS subsequently filed the notice to appear with the immigration court. A.R. 104. The INA's implementing regulations provide that, "[i]f the alien's address is not provided on the * * * Notice to Appear, or if the address on the * * * Notice to Appear is incorrect, the alien must provide to the Immigration Court * * * a written notice of an address * * * at which the alien can be contacted." 8 C.F.R. 1003.15(d)(1). The regulations further provide that, "[w]ithin five days of any change of address, the alien must provide written notice of the change of address * * * to the Immigration Court." 8 C.F.R. 1003.15(d)(2). The immigration court did not

receive any written notice of a United States address for petitioner. See Pet. App. 29a-30a.

In June 2004, an immigration judge (IJ) ordered petitioner removed in absentia after she failed to appear for a hearing. Pet. App. 32a-34a. The IJ explained that notice of the hearing was "not given to [petitioner] because [she] failed to provide the court with [her] address as required under Section [1229(a)(1)(F)] after having been advised of that requirement in the Notice to Appear." *Id.* at 33a. The IJ further explained that, given petitioner's failure to provide her address as required under that provision, the IJ "determined to proceed with a hearing in absentia pursuant to Section [1229a]." *Ibid.* After considering evidence offered by DHS, the IJ found petitioner removable as charged and ordered her removed to Guatemala. *Id.* at 33a-34a. Petitioner later departed the United States. A.R. 92.

3. In 2014, petitioner illegally reentered the United States, and DHS reinstated the 2004 order of removal. A.R. 92; see 8 U.S.C. 1231(a)(5). Because petitioner expressed a fear of returning to Guatemala, she was referred to an asylum officer for a reasonable-fear interview to determine her potential eligibility for withholding of removal and related protection. *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1184 (10th Cir. 2015); see 8 C.F.R. 208.31(a) and (b). Before the asylum officer issued a reasonable-fear determination, petitioner filed a petition for review of the reinstated removal order in the Tenth Circuit. *Luna-Garcia*, 777 F.3d at 1184. The Tenth Circuit dismissed the petition, holding that it lacked jurisdiction because "the reinstated removal order is not final until the reasonable fear proceedings are complete." *Id.* at 1186.

The asylum officer determined that petitioner did not have a reasonable fear of returning to Guatemala. *Luna-Garcia*, 777 F.3d at 1184. Petitioner requested review by an IJ. 8 C.F.R. 208.31(g). The IJ reversed the asylum officer's determination, but denied petitioner's application for withholding of removal and related protection. *Luna-Garcia de Garcia* v. *Barr*, 921 F.3d 559, 561-562 (5th Cir. 2019); see 8 C.F.R. 208.31(g)(2). The Board of Immigration Appeals (Board) affirmed the IJ's denial of withholding of removal and related protection, and denied petitioner's motion to reopen based on allegedly new evidence. *Luna-Garcia de Garcia*, 921 F.3d at 562. The Fifth Circuit denied petitioner's petitions for review of those two Board decisions. *Id.* at 561-566; see Pet. App. 3a n.1.

4. In 2016, while those petitions for review before the Fifth Circuit were pending, petitioner filed a motion to reopen her 2004 removal proceedings and rescind the 2004 order of removal. A.R. 67-79; see Pet. App. 26a. Petitioner argued that the IJ erred in ordering her removed in absentia on the ground that she had not provided an address as required under Section 1229(a)(1)(F). A.R. 72. Petitioner contended that she had complied with the statute by providing an address in Guatemala, and that she was therefore entitled to notice of her removal hearing at that address. A.R. 76-77.

An IJ denied the motion to reopen. Pet. App. 28a-31a. The IJ rejected petitioner's contention that her "provision of an address in Guatemala [wa]s sufficient." *Id.* at 29a. The IJ explained that "the law requires that the [alien] provide an address 'at which the alien may be contacted.'" *Ibid.* (quoting 8 U.S.C. 1229(a)(1)(F)(i)). The IJ further explained that petitioner "in this case was not in fact in Guatemala and had no plans to go

there but was traveling to New York to seek employment." *Ibid.* The IJ therefore found that the Guatemalan address petitioner provided did not qualify as "an address where she could be contacted for notice purposes." *Id.* at 30a. The IJ also pointed out that the notice to appear that was personally served on petitioner stated that she "failed to provide a US address." *Id.* at 29a. And the IJ found that, even after petitioner was "served with a Notice to Appear reflecting that no address was provided," she "fail[ed] to provide a current address to the Immigration Court through an unknown number of relocations." *Ibid.*

The Board dismissed petitioner's appeal. Pet. App. 25a-27a. Like the IJ, the Board rejected petitioner's contention that "the address in Guatemala suffices for an address where she 'may be contacted.'" *Id.* at 26a. The Board noted that petitioner cited "no authority to support her argument that a foreign address is sufficient." *Ibid.* Given petitioner's "failure to provide her U.S. address," the Board determined that "no notice for a hearing was required." *Ibid.* The Board thus found no basis to rescind the in absentia removal order. *Ibid.*

5. The Fifth Circuit denied petitioner's petition for review. Pet. App. 1a-12a.

The court of appeals observed that Section 1229(a)(1)(F)(i) "requires 'an address . . . at which the alien may be contacted respecting proceedings under [8 U.S.C. § 1229a]'—that is, removal proceedings." Pet. App. 6a (emphasis omitted; brackets in original). The court did not rule out the possibility that, in some circumstances, an alien may satisfy that requirement by providing a foreign address. See *id.* at 7a-9a. But the court determined that, in the case of "an alien who is living in the United States and subject to removal from

the United States," Section 1229(a)(1)(F)(i) requires the alien to provide "a United States address." *Id.* at 6a. The court noted that the "IJ found that [petitioner] 'had no plans to go [back to Guatemala] but was traveling to New York to seek employment.'" *Id.* at 10a (second set of brackets in original). The court determined that, "given [petitioner's] admission that she was going to New York, she could not be contacted in Guatemala." *Id.* at 11a. The court thus concluded that the Board "properly rejected the argument that a Guatemalan address was sufficient under these circumstances," and that the Board "did not abuse its discretion in dismissing [petitioner's] appeal." *Id.* at 9a.

The court of appeals further concluded that, even if a foreign address would have been sufficient under these circumstances, petitioner still could not prevail, because "she failed to follow up with an address despite being served with a [notice to appear] listing no address." Pet. App. 11a. The court explained that, under 8 C.F.R. 1003.15(d)(1), "[i]f the alien's address is not provided on the [notice to appear], . . . the alien must provide to the Immigration Court * * * a written notice of an address * * * at which the alien can be contacted." Pet. App. 11a (quoting 8 C.F.R. 1003.15(d)(1)) (first set of brackets in original). The court determined that, because petitioner "never followed up with an address" even though no address was provided on the notice to appear, "there is no realistic possibility that the [Board] would reach another outcome than to dismiss her appeal." *Ibid.* The court therefore denied the petition for review on that "alternative ground[]." *Id.* at 12a.

6. The Fifth Circuit denied rehearing en banc. Pet. App. 35a-36a.

ARGUMENT

Petitioner contends (Pet. 16-23) that the court of appeals erred in upholding the Board's determination that the Guatemalan address she provided to immigration officials did not satisfy her obligation under 8 U.S.C. 1229(a)(1)(F) to provide an address at which she could be contacted respecting her removal proceedings. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for this Court's review, because the outcome would be the same regardless of this Court's resolution of the question presented. The petition for a writ of certiorari should be denied.

1. Petitioner contends that she satisfied her obligation to "provide the address required under section 1229(a)(1)(F)," 8 U.S.C. 1229a(b)(5)(B), by providing an address in her home country of Guatemala. Pet. 16-23. The court of appeals correctly upheld the Board's determination that providing a foreign address was insufficient under the circumstances of this case. Pet. App. 4a-11a.

a. Section 1229a(b)(5)(A) provides that any alien who does not attend the alien's removal hearing "shall be ordered removed in absentia" if DHS "establishes by clear, unequivocal, and convincing evidence" that the "written notice required under paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided" and that "the alien is removable." 8 U.S.C. 1229a(b)(5)(A). Section 1229a(b)(5)(B), however, provides that "[n]o written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of [Title 8]." 8 U.S.C. 1229a(b)(5)(B). Section 1229(a)(1)(F), in turn, requires that the alien

"immediately provide * * * the Attorney General with a written record of an address * * * at which the alien may be contacted respecting proceedings under section 1229a of [Title 8]"—that is, removal proceedings. 8 U.S.C. 1229(a)(1)(F)(i).

The court of appeals correctly upheld the Board's determination that petitioner did not provide the address required under Section 1229(a)(1)(F) in this case. Pet. App. 4a-11a. The only address that petitioner provided was an address in her home country of Guatemala. *Id.* at 26a. Petitioner, however, had "left Guatemala" for the United States. A.R. 103. When she was apprehended in Texas, she claimed that she was "headed to New York, New York, to seek employment." *Ibid.* As the court of appeals concluded, "[t]o the extent § 1229(a)(1)(F)(i) concerns notifying an alien who is living in the United States and subject to removal from the United States, the alien must provide a United States address to satisfy the requirements of § 1229(a)(1)(F)(i)." Pet. App. 6a. Given that petitioner had left Guatemala and begun living in the United States, the Guatemalan address she provided was not "an address * * * at which [she] may be contacted respecting [removal] proceedings," 8 U.S.C. 1229(a)(1)(F)(i); only an address in the United States could suffice "under these circumstances," Pet. App. 9a. And because petitioner "failed to provide a US address," A.R. 104 (capitalization altered), "no notice for a hearing was required" before the IJ ordered her removed in absentia, Pet. App. 26a.

b. Petitioner's counterarguments lack merit. Petitioner contends (Pet. 17) that Section 1229(a)(1)(F)'s text "plainly contemplates that *any* address—domestic or foreign—suffices to fulfill the statutory requirement." But Section 1229(a)(1)(F)'s text does not refer

to "*any* address." *Ibid.* Rather, it requires "an address * * * at which the alien may be contacted respecting [removal] proceedings." 8 U.S.C. 1229(a)(1)(F)(i). In some cases, such as where the alien is in a contiguous foreign country during removal proceedings, a foreign address may satisfy that requirement. See Pet. App. 7a-9a. But in this case, a foreign address did not, because petitioner intended to "remain and reside in the United States during the pendency of [her removal] proceedings." *Id.* at 8a; see A.R. 103.

Petitioner argues (Pet. 6) that Section 1229(a)(1)(F) should not "var[y] in meaning" depending on the facts of the particular case. But the meaning of the statute itself does not vary; in every case, the statute requires "an address * * * at which the alien may be contacted respecting [removal] proceedings." 8 U.S.C. 1229(a)(1)(F)(i). The statute's application may differ, but that is simply because different aliens have different addresses at which they "may be contacted respecting [removal] proceedings." *Ibid.*

Petitioner errs in contending (Pet. 20) that "established agency practice" suggests a different approach. Petitioner observes that the INA's implementing regulations "require a[] [notice to appear] to contain '[t]he alien's address,' without qualification with respect to whether the address is domestic or foreign." *Ibid.* (quoting 8 C.F.R. 1003.15(c)(2)) (third set of brackets in original). She also observes (*ibid.*) that Form EOIR-33, to be used in notifying the immigration court of a change in address, allows aliens "to provide a foreign address." And she cites (Pet. 9, 21) cases in which the government sent notices of hearing to addresses in Mexico. See *In re Rivas-Vivas*, No. AXX XX2 482, 2008 WL 486913, at *1 (B.I.A. Jan. 30, 2008) (per curiam);

In re Sanchez-Avila, 21 I. & N. Dec. 444, 445 (B.I.A. 1996) (en banc). But as the court of appeals recognized, the fact that a foreign address was insufficient in this case does not mean that a foreign address would be insufficient in every case. See Pet. App. 7a-9a. The regulations, change-of-address form, and cases petitioner cites simply reflect the fact that, in some circumstances, a foreign address may be the address "at which the alien may be contacted respecting [removal] proceedings." 8 U.S.C. 1229(a)(1)(F)(i).

Petitioner's reliance (Pet. 22, 24-26) on 8 U.S.C. 1225(b)(2)(C) is likewise misplaced. Section 1225(b)(2)(C) provides that, "[i]n the case of an alien" who is "an applicant for admission" to the United States, who "is not clearly and beyond a doubt entitled to be admitted," and "who is arriving on land * * * from a foreign territory contiguous to the United States," DHS "may return the alien to that territory pending a proceeding under section 1229a of [Title 8]." 8 U.S.C. 1225(b)(2)(A) and (C); see 8 U.S.C. 1229a(b)(5)(E) (providing that Section 1229a(b)(5) shall apply to "any alien who remains in a contiguous foreign country pursuant to section 1225(b)(2)(C)"). DHS has exercised its authority under Section 1225(b)(2)(C) to implement the Migrant Protection Protocols, under which certain "aliens entering the United States from Mexico illegally or without documentation must remain in Mexico for the duration of their immigration proceedings." Pet. App. 9a n.3.[*]

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[*] In *Innovation Law Lab* v. *Wolf*, 951 F.3d 1073 (2020), the Ninth Circuit affirmed a preliminary injunction barring DHS from implementing the Migrant Protection Protocols. This Court granted a stay of the preliminary injunction pending the timely filing and disposition of a petition for a writ of certiorari and further proceedings in this Court. See Order, No. 19A960 (Mar. 11, 2020).

As the court of appeals explained, however, its decision in this case does not bear on whether an alien who remains in a contiguous foreign country pursuant to Section 1225(b)(2)(C) may satisfy her obligation under Section 1229(a)(1)(F) by providing a foreign address at which she may be contacted. See Pet. App. 7a-9a; *id.* at 9a n.3 (explaining that the court's "holding does not prevent an alien remaining in Mexico under the Protocols—who is therefore not in the United States—from using a foreign address"). That question was not presented in this case because petitioner "remain[ed] *in the United States* during her proceedings." *Id.* at 8a. The court of appeals determined only that "under the[] circumstances" of this case, involving an alien "physically in the United States and subject to removal from the United States," providing a foreign address was insufficient. *Id.* at 9a.

2. The court of appeals' decision does not warrant this Court's review. Petitioner acknowledges (Pet. 15) "the absence of a circuit conflict" on the question presented. The only "conflict" she asserts—at a high level of generality—is one with this Court's Fifth Amendment jurisprudence. Pet. 23 (emphasis omitted; capitalization altered). The decision below, however, does not raise any Fifth Amendment concerns. As the court of appeals explained, petitioner had ample notice that an address in the United States was required under the circumstances of her case. Pet. App. 12a. The notice to appear informed her that she had "failed to provide a US address," A.R. 104 (capitalization altered), and that if she did not "provide an address at which [she] may be reached during proceedings, then the Government shall not be required to provide [her] with written notice of

[her] hearing," A.R. 105. "Th[o]se warnings were sufficient to apprise [petitioner] that she needed to provide a full United States address to receive notices of hearing." Pet. App. 12a.

3. In any event, this case would be a poor vehicle for this Court's review, because the outcome would be the same regardless of this Court's resolution of the question presented. The court of appeals held that, even if a foreign address would have been sufficient under these circumstances, petitioner still could not prevail, because "she failed to follow up with an address despite being served with a [notice to appear] listing no address." Pet. App. 11a. The INA's implementing regulations provide that, "[i]f the alien's address is not provided on the * * * Notice to Appear, or if the address on the * * * Notice to Appear is incorrect, the alien must provide to the Immigration Court * * * a written notice of an address * * * at which the alien can be contacted." 8 C.F.R. 1003.15(d)(1). Here, no address was provided on the notice to appear. A.R. 104. In the space to be filled in with petitioner's address, the notice to appear stated that petitioner had "failed to provide a US address." *Ibid.* (capitalization altered). Petitioner was personally served with that notice in 2004, and was advised to carry a copy of it with her "at all times." A.R. 105. Yet, in the decade that followed, petitioner did not follow up with an address. Pet. App. 30a; see *id.* at 29a (emphasizing petitioner's "own lack of any action when served with a Notice to Appear reflecting that no address was provided and [petitioner's] further lack of any action in failing to provide a current address to the Immigration Court through an unknown number of relocations"). Because she did not do so, she failed to meet her obligation to "provide the address required under

section 1229(a)(1)(F)," and "[n]o written notice" was "required" before the IJ ordered her removed in absentia. 8 U.S.C. 1229a(b)(5)(B).

The question presented in the petition for a writ of certiorari does not challenge that "alternative ground[]" for the court of appeals' judgment. Pet. App. 12a; see Pet. i (challenging only the court of appeals' determination that providing an "address in Guatemala did not suffice"). Thus, regardless of this Court's resolution of the question presented, the outcome in this case would be the same: petitioner's petition for review would be denied. Pet. App. 11a-12a; see *id.* at 9a n.4 (explaining that "alternative holdings are binding precedent") (citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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