No.

In the Supreme Court of the United States

ERIKA JISELA YANEZ-PENA, PETITIONER
v.
WILLIAM P. BARR, ATTORNEY GENERAL, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether "a notice to appear" as defined by 8 U.S.C. § 1229(a) and this Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), can consist of information compiled from multiple documents, rather than one document that contains all of the statutorily required information.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

There are no related proceedings to this petition.

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The decision of the court of appeals (Pet. App. 1a–14a) is reported at 952 F.3d 239. The decisions of the Board of Immigration Appeals (Pet. App. 15a–23a; 24a–25a; 26a–28a) and the immigration judge (Pet. App. 29a–34a) are unreported.

JURISDICTION

The decision of the court of appeals was entered on February 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229(a)(1) states in relevant part:

> In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:
>
> (A) The nature of the proceedings against the alien.
>
> (B) The legal authority under which the proceedings are conducted.
>
> (C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)

(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, ex-

> cept under exceptional circumstances, to appear at such proceedings.

8 U.S.C. § 1229a(b)(5)(A) states in relevant part:

> Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

8 U.S.C. § 1229b(b)(1) states in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> >
> > (B) has been a person of good moral character during such period;

> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(d)(1) states in relevant part:

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

8 U.S.C. § 1229c(b)(1) states in relevant part:

> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a

proceeding under section 240, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

> (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a);
>
> (B) the alien is, and has been a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;
>
> (C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4); and
>
> (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

INTRODUCTION

This case squarely presents an acknowledged circuit split on an important issue of federal law: whether "a notice to appear" as defined by 8 U.S.C. § 1229(a) and this Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), can consist of multiple documents, none of which individually contains all of the statutorily required information. The answer to that question will affect thousands, if not hundreds of thousands, of immigration cases. The question is ripe for this Court's review: five courts of appeals

have addressed the question and disagreed sharply on the correct reading of § 1229(a). The conflict is active and current, with the most recent court of appeals decision having been issued on March 25, 2020. And this case is an ideal vehicle: it would permit this Court to resolve both of the principal statutory tie-ins to the definition of a notice to appear under § 1229(a), and it cleanly presents the question unobstructed by any threshold issues. The question is dispositive of petitioner's statutory rights, and this petition seeks review of a published, precedential opinion.

Noncitizens subject to removal under 8 U.S.C. § 1229a must be served written notice—"referred to as a 'notice to appear'"—which specifies, among other things, the "time and place at which the proceedings will be held." *See* 8 U.S.C. § 1229(a)(1)(A)–(G). Service of "a notice to appear" affects a noncitizen's rights in two principal substantive ways. First, a noncitizen may apply for cancellation of removal if she has accumulated a specified period of continuous physical presence in the United States. *See id.* § 1229b(b)(1). Under the so-called "stop-time rule," that period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." *See id.* § 1229b(d)(1). Second, a noncitizen may "be ordered removed in absentia" only after receipt of the "written notice required under . . . section 1229(a)." *See id.* § 1229a(b)(5)(A).

Under the plain text of § 1229(a), a noncitizen must be served a single document—"a notice to appear"—that includes all of the specified information in § 1229(a)(1)(A)–(G) in order to trigger the stop-time rule or to be removed *in absentia*. The Department of Homeland Security ("DHS"), however, al-

most never provides all of the specified information in a single document. Instead, DHS typically serves noncitizens with a notice to appear that omits the time and place of the removal hearing. The Executive Office for Immigration Review ("EOIR") then sends another document nowhere recognized in the applicable statutes—a "notice of hearing"—that provides the time and place of the hearing, but does not include the other information specified in § 1229(a)(1)(A)–(G).

DHS and EIOR maintained that practice even after this Court held in *Pereira* that a putative notice to appear that fails to specify the time or place of the removal hearing "is not 'a notice to appear under section 1229(a),'" and therefore does not trigger the stop-time rule. *See* 138 S. Ct. at 2110 (quoting 8 U.S.C. § 1229b(d)(1)(A)).

Refusing to follow *Pereira*, DHS and EOIR now assert that § 1229(a) is satisfied when a noncitizen receives some of the information specified in § 1229(a)(1)(A)–(G) in a notice to appear, and the remainder of the information in a notice of hearing.[1] That argument sharply divided the Board of Immigration Appeals ("BIA"), which upheld this so-called "two-step" practice in *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520 (BIA 2019) (en banc), and the is-

[1] After *Pereira*, "EOIR began providing dates and times directly to DHS to use on NTAs for some . . . cases." *See* Mem. from James R. McHenry to EOIR (Dec. 21, 2018), available at https://www.justice.gov/eoir/file/1122771/download. This practice suggests DHS and EOIR initially understood *Pereira* to require that noncitizens receive all of the information listed in § 1229(a) in a single document, but subsequently abandoned that understanding. *See Pereira*, 138 S. Ct. at 2111 (observing admission that "almost 100 percent" of "notices to appear omit the time and date of the proceeding over the last three years").

sue has since yielded a deep split among the courts of appeals. The Third Circuit and Tenth Circuit held that the stop-time rule is not triggered by the combination of multiple incomplete documents. So did a divided panel of the Ninth Circuit, in an opinion that was vacated when the court granted rehearing en banc. The Fifth Circuit and Sixth Circuit have reached the opposite conclusion, holding that § 1229(a) is satisfied when DHS and EOIR provide the required information in multiple incomplete documents.

This case offers the best vehicle for this Court to resolve the circuit split. There are a number of pending certiorari petitions that purport to present the question whether multiple incomplete documents may satisfy § 1229(a).[2] All but one of those petitions, however, arise in the context of challenges to the immigration court's jurisdiction—an issue that is largely determined by the interpretation of regulations and would require this Court to resolve several threshold questions as to which there is no circuit conflict. The one remaining petition seeks review of an unpublished order issued without oral argument that addresses only one of the two principal statutory applications of § 1229(a).[3]

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[2] *See, e.g.*, *Pedroza-Rocha v. United States*, No. 19-6588 (filed Nov. 6, 2019); *Pierre-Paul v. Barr*, No. 19-779 (filed Dec. 16, 2019); *Callejas Rivera v. United States*, No. 19-7052 (filed Dec. 19, 2019); *Araujo Buleje v. Barr*, No. 19-908 (filed Jan. 17, 2020); *Mora-Galindo v. United States*, No. 19-7410 (filed Jan. 21, 2020); *Gonzalez-De Leon v. Barr*, No. 19-940 (filed Jan. 22, 2020); *Nkomo v. Barr*, No. 19-957 (filed Jan. 28, 2020); *Ferreira v. Barr*, No. 19-1044 (filed Feb. 18, 2020); *Ramos v. Barr*, No. 19-1048 (filed Feb. 20, 2020).

[3] *See Niz-Chavez v. Barr*, No. 19-863 (filed Jan. 9, 2020) (involving the stop-time rule but not removal *in absentia*).

In this case, the definition of "a notice to appear" under § 1229(a) is dispositive. There are no threshold questions that would preclude the Court from reaching the question. The resolution of that question in this case will permit the Court to consider both of the two principal statutory contexts in which § 1229(a)'s definition of a notice to appear arises: (1) calculating when the stop-time rule is triggered, *see* 8 U.S.C. § 1229b(d)(1)(A), and (2) determining when a noncitizen may be removed *in absentia*, *see id.* § 1229a(b)(5)(A). Certiorari is warranted.

STATEMENT

1. Prior to 1996, what are now known as removal proceedings were initiated with an order to show cause. *See* 8 U.S.C. § 1252b(a)(1) (1994). By statute, an order to show cause was defined as "written notice" which included specified information but which did not need to include "the time and place at which the proceedings will be held." *Id.*; *id.* § 1252b(a)(2)(A). That information could be provided in the "order to show cause *or otherwise*." *Id.* § 1252b(a)(2) (emphasis added). Accordingly, proceedings were initiated via a two-step process: first, the noncitizen was served an "order to show cause"; second, the noncitizen was separately sent the time and place at which the proceedings will be held.

Under that regime, a noncitizen was eligible for discretionary relief if she had accumulated a specified period of residence in the United States, which continued to accrue during the pendency of the proceeding. Concerned that noncitizens had an incentive to delay proceedings in order to satisfy the residence requirement, Congress in 1996 enacted the Illegal Immigration Reform and Immigrant Responsibility

Act ("IIRIRA"). *See* Pub. L. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, IIRIRA changed eligibility for discretionary relief in two significant ways.

First, Congress introduced the stop-time rule, under which "any period of continuous residence or physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a)." *See* 8 U.S.C. § 1229b(d)(1). In other words, the stop-time rule prevented noncitizens from delaying proceedings in order to satisfy the residence requirement.

Second, Congress rejected the two-step removal process that had relied on an order to show cause and a separate notification of the time and place of the proceeding. Instead, Congress required that the "time and place at which the [removal] proceedings will be held" be included in the "notice to appear." *See* 8 U.S.C. §§ 1229(a), 1229b(d)(1)(A).

After Congress repudiated the two-step process, the Immigration and Naturalization Service and EOIR jointly issued a proposed rule to "implement[] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear." *See* 62 Fed. Reg. 444-01 (1997). Even the BIA recognized that "[t]he statute affords 'stop-time' effect to *a single instrument*—the notice to appear that is the subject of proceedings in which cancellation of removal is sought." *See Matter of Ordaz-Gonzalez*, 26 I. & N. Dec. 637, 640 n.3 (BIA 2015) (emphasis added).

Over time, however, DHS reverted to the two-step process Congress had specifically rejected in IIRIRA. It eventually adopted regulations stating that the "notice to appear" need only include "the time, place and date of the initial removal hearing[] *where practicable*." *See* 8 C.F.R. § 1003.18(b) (em-

phasis added). And in recent years, DHS has "almost always serve[d] noncitizens with notices that fail to specify the time, place, or date of initial hearings." *See Pereira*, 138 S. Ct. at 2111.

2. Petitioner Erika Jisela Yanez-Pena is a native and citizen of Honduras. Pet. App. 3a. She entered the United States without inspection on or about August 29, 2007, to live with her brother in Texas. *See* Pet. App. 3a.

On August 31, 2007, Yanez-Pena was served with a putative notice to appear that failed to specify the date and time of her removal hearing. Pet. App. 3a. On September 10, 2007, the immigration court mailed a notice of hearing that contained the date and time of her removal hearing to the address she had provided. Pet. App. 3a. On November 19, 2007, the immigration court mailed a second notice of hearing that rescheduled her removal hearing for January 28, 2008. Pet. App. 3a. Because Yanez-Pena did not receive the November 19, 2007, notice, she failed to appear at her rescheduled hearing. The Immigration Judge ("IJ") ordered her removed *in absentia*. Pet. App. 3a.

On February 23, 2017, Yanez-Pena moved the IJ to reopen her removal proceedings on the grounds that she did not receive the November 19, 2007, notice of hearing rescheduling her removal hearing. Pet. App. 29a. The IJ denied her motion as untimely, finding that she failed to rebut the presumption of delivery. Pet. App. 31a. She appealed to the BIA, which dismissed her appeal and subsequently denied her motion to reconsider. Pet. App. 24a–28a. The Fifth Circuit denied her petition for review. Pet. App. 23a.

Shortly thereafter, this Court addressed the question whether service of a purported notice to ap-

pear that "fails to specify either the time or place of the removal proceedings [triggers] the stop-time rule." *See Pereira*, 138 S. Ct. at 2110. The Court reasoned that § 1229(a) speaks "in definitional terms," *see id.* at 2116, concluding that a document that does not include the time and place of the proceeding is not "a proper notice to appear" and does not trigger the stop-time rule, *see id.* at 2119. And, according to the majority, "common sense compels the conclusion that a notice that does not specify when and where to appear is not 'a notice to appear.'" *See id.* at 2115.

Because Pereira was not served a notice of hearing until after he had satisfied the period of continuous residence required to be eligible for cancellation of removal, *see id.* at 2112, this Court did not explicitly decide whether DHS must satisfy the requirements of § 1229(a) in a single document to trigger the stop-time rule. And although this Court highlighted removal *in absentia* as a "quite severe" consequence of a noncitizen's failure to appear at a removal proceeding, *see id.* at 2111, this Court had no occasion to consider that issue further.

Yanez-Pena subsequently filed a second motion to reopen, asking the BIA to reopen her removal proceedings in light of this Court's decision. Her second motion argued that (1) she is eligible for cancellation of removal because the deficient notice to appear she received did not trigger the stop-time rule, and (2) the order removing her *in absentia* was invalid because she failed to receive the written notice required in § 1229(a). The BIA denied the second motion to reopen, reasoning that the stop-time rule was triggered when DHS issued its November 2007 notice of hearing, and the *in absentia* order of removal was valid for the same reason. Pet. App. 15a–19a.

3. The Fifth Circuit upheld the BIA's decision. Pet. App. 14a. The court held that the statute unambiguously allowed DHS to employ a two-step process to trigger the stop-time rule, finding that the phrase "written notice" in § 1229(a) could encompass multiple documents that collectively contained the statutorily required information. Pet. App. 6a–11a. The court further reasoned that, to the extent there was any ambiguity, the BIA's decision in *Mendoza-Hernandez* was entitled to *Chevron* deference. Pet. App. 12a. The court also concluded for the same reasons that the combination of a notice to appear and notice of hearing also satisfied § 1229(a) for purposes of permitting Yanez-Pena's removal *in absentia*. Pet. App. 13a–14a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the circuit split regarding whether multiple documents, none of which contains all of the information required by § 1229(a), constitute "a notice to appear" as defined by that provision and this Court's decision in *Pereira*.

This case meets all of the Court's criteria for granting certiorari. First, the question presented concerns an intractable, acknowledged circuit split on a recurring question that only this Court can resolve. Second, the Fifth Circuit's interpretation of § 1229(a) squarely conflicts with this Court's interpretation of that provision in *Pereira*. Third, the question presented is vitally important and has profound consequences for thousands of cancellation applicants and their families. Fourth, this case is an ideal vehicle.

A. The Question Presented Concerns an Intractable, Acknowledged Circuit Split on a Recurring Question Only This Court Can Resolve.

The decision below conflicts with the decisions of other courts of appeals on the same question. This Court should grant review to resolve the conflict.

1. There is a clear, current, and acknowledged conflict among the courts of appeals.

Five circuits have considered whether a notice to appear as defined by § 1229(a) can consist of information compiled from multiple documents, even when the government has never provided any single document containing all of the statutorily required information. Those decisions have led to an active 2-2 circuit split. The remaining court to consider the issue held that multiple incomplete documents cannot satisfy § 1229(a), but the panel's opinion was vacated when the court of appeals granted rehearing en banc.

a. Two circuits have correctly concluded that a notice to appear under § 1229(a) must be a single document that contains all the information specified in that provision. The Third Circuit recognized *Pereira*'s holding "that an NTA shall contain all of the information set out in section 1229(a)(1)" abrogated circuit precedent which had permitted § 1229(a) to be satisfied "with a combination of notices." *See Guadalupe v. Attorney Gen.*, 951 F.3d 161, 162, 165–66 (3d Cir. 2020) ("We now hold that *Pereira* does abrogate *Orozco-Velasquez*[*v. Attorney Gen.*, 817 F.3d 78 (3d Cir. 2018)]."). Accordingly, the panel held that a de-

fective notice to appear cannot be cured by the filing of a subsequent notice "with the missing information." *See id.* at 164. And, as the panel observed, requiring DHS to satisfy § 1229(a) with a single document affords a common-sense interpretation to the statute: "The ability of the noncitizen to receive and to keep track of the date and place of the hearing, along with the legal basis and cited acts to be addressed at the hearing, is infinitely easier if all that information is contained in a single document – as described in the statute." *See id.* at 164–65.

The Tenth Circuit agreed. *See Banuelos v. Barr*, -- F.3d --, 2020 WL 1443523 (10th Cir. 2020). It found that under "the unambiguous language of the pertinent statutes, the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing." *Id.* at *7. According to the Tenth Circuit, use of "the single article 'a' in "a notice to appear" meant that the statute was satisfied "only when the noncitizen is served with a single notice to appear, not a combination of two documents." *Id.* at *3. And the court found that this interpretation of the statute's text was reinforced by IIRIRA's legislative history, which showed "congressional intent to replace two documents with one." *Id.* at *4 (citing H.R. Rep 104-469(l) (1996)).

A divided panel of the Ninth Circuit reached the same conclusion in a decision later vacated when the court granted rehearing en banc. *See Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019), *vacated and reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020). In interpreting "a notice to appear," the panel concluded that "[t]he use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule." *See id.* at 402.

b. Two circuits have reached the opposite conclusion and upheld the two-step approach. The Sixth Circuit concluded that § 1229(a)'s reference to "a notice to appear" does not require service of a single, compliant document, because "the use of the indefinite article 'a' before a word that describes written communication does not necessarily mean that delivery of the message must be in one transmission." *Garcia-Romo v. Barr*, 940 F.3d 192, 201 (6th Cir. 2019). According to the Sixth Circuit, just as an author who pledges to send an editor "a book" satisfies that obligation by sending individual chapters separately over time, DHS can satisfy its obligation to serve the information required by "a notice to appear" in separate documents. *See id.* And it concluded that because *Pereira* "had no occasion to determine whether the government would be able to supplement the initial written communication . . . through a subsequent document, . . . the *Pereira* holding does not control" here. *See id.* at 202.

The Fifth Circuit's decision below reached the same conclusion. Pet. App. 14a. Like the Sixth Circuit, the Fifth Circuit held that "the stop-time rule is triggered when an alien receives notice of all the information required under § 1229(a)(1)(A)–(G), *whether that takes place in one or more communications*." Pet. App. 2a (emphasis added). Moreover, the Fifth Circuit concluded that even if § 1229(a)'s reference to "a notice to appear" were ambiguous, it "owe[d] *Chevron* deference to the BIA's interpretation of immigration law," *see* Pet. App. 12a, under which the requirements of § 1229(a) can be satisfied through multiple documents, *see Mendoza-Hernandez*, 27 I. & N. Dec. at 529.

2. The circuit conflict will not resolve without a decision from this Court.

This split among the circuits is entrenched and is highly unlikely to resolve without action by this Court. The Third, Fifth, Sixth, and Tenth Circuits have explicitly recognized the circuit split without finding occasion to address it, and the Sixth Circuit declined to reconsider this question en banc without even a single judge requesting a vote on the petition. As a result, there is no realistic prospect that the circuit conflict will resolve without the Court's intervention. Further review is therefore warranted.

This issue need not percolate further. Five circuits have addressed whether DHS must satisfy § 1229(a) in a single document, and the arguments on both sides of the circuit split have been fully aired. Although the Fifth Circuit and Sixth Circuit have sided with the Government, both the Third Circuit's and the Tenth Circuit's opinions (and the Ninth Circuit's now-vacated opinion) correctly interpret § 1229(a) and *Pereira*.

Finally, this Court's review is especially warranted because this circuit split may render a substantial number of noncitizens ineligible for cancellation of removal based solely on the location of the removal hearing. The circuit split also creates the prospect of manipulation by DHS. A noncitizen's petition for review must be filed in the court of appeals with jurisdiction over where the IJ is located. *See* 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 1003.14. Because DHS can transfer detainees, *see, e.g.*, *Reyna v. Hott*, 921 F.3d 204, 209 (4th Cir. 2019), it can effectively conduct proceedings in the immigration court of its choice and steer petitions for review into the court of appeals it prefers. The existing circuit split creates

the risk that noncitizens will be transferred away from immigration courts within the Third Circuit and Tenth Circuit because those courts of appeals require the information specified in § 1229(a) to be included within a single document.

B. The Decision Below Conflicts With This Court's Decision in *Pereira*.

The Fifth Circuit's holding that DHS can rely on multiple incomplete documents to satisfy § 1229(a), *see* Pet. App. 14a, and its conclusion that it owes "*Chevron* deference to the BIA's interpretation of immigration law," *see* Pet. App. 12a, both conflict with this Court's decision in *Pereira*.

Pereira's holding emphasized what the statute's "unambiguous" text already made clear: a putative notice to appear that fails to specify the time or place of the removal hearing is not "a notice to appear under section 1229(a)." *See* 138 S. Ct. at 2113–14. That holding resolves this case: Petitioner was never served with a single document that contained all of the required, "definitional" information listed in § 1229(a). *See id.* at 2116. She is thus eligible for cancellation of removal because the stop-time rule was never triggered. In addition, the order removing her *in absentia* is invalid because she was not provided the "written notice required under . . . section 1229(a)." *See* 8 U.S.C. § 1229a(b)(5)(A). Service of a different document (a "notice of hearing")that the statutes nowhere recognize or define does not change the outcome. The text of § 1229(a) and *Pereira* control here.

The Fifth Circuit also erred by deferring to the agency's interpretation of the statute. In *Pereira*, this Court found it "need not resort to *Chevron* deference"

to resolve the question presented because § 1229(a) was "clear and unambiguous." 138 S. Ct. at 2113. Section 1229(a) remains clear and unambiguous, yet the Fifth Circuit utterly failed to grapple with *Pereira*'s analysis and instead summarily concluded it "owe[d] *Chevron* deference to the BIA's interpretation of immigration law." Pet. App. 12a.

The Fifth Circuit's unreasoned deference to the BIA's interpretation of § 1229(a) is particularly inappropriate in light of Justice Kennedy's explicit criticism in *Pereira* of the "reflexive deference" some courts of appeals applied "to the BIA's interpretation" of § 1229(a) and § 1229b(d)(1), a practice he described as "troubling" and "suggest[ed] an abdication of the Judiciary's proper role in interpreting federal statutes." *See* 138 S. Ct. at 2120 (Kennedy, J., concurring); *see also Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference."); *BNSF Railway Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., dissenting) (observing "the mounting criticism of *Chevron* deference"). "Under *Chevron*, the statute's plain meaning controls, whatever the Board might have to say." *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 57 (2014).

Accordingly, even if *Chevron* deference to the BIA's interpretation of immigration law were warranted in some appropriate case, it cannot be justified here. *Mendoza-Hernandez* reflects the BIA's decision simply to ignore this Court's decision in *Pereira*. [4] *Mendoza-Hernandez* acknowledged that

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[4] *Mendoza-Hernandez* is not the only recent example of the BIA's defiance. *See Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035–

Pereira, "in a literal sense," can be interpreted to require DHS to provide all of the information listed in § 1229(a) in a single document to trigger the stop-time rule. *See* 27 I. & N. Dec. at 529. But rather than apply this Court's interpretation of § 1229(a), the BIA instead announced that *Pereira* was best read "as directing us to respond to the substantive concerns of fundamental fairness inherent in procedural due process." *See id.* at 530. This approach, which relied in part on the Third Circuit's pre-*Pereira* decision in *Orozco-Velasquez*—a decision the Third Circuit has itself since held was abrogated by *Pereira*—cannot be reconciled with the text of § 1229(a) or with *Pereira*. *See id.* at 529 (citing *Orozco-Velasquez*, 817 F.3d at 83, *abrogation recognized by Guadalupe*, 951 F.3d at 162 ("We now hold that *Pereira* does abrogate *Orozco-Velasquez*.")). As the dissenting board members observed, "*Pereira* . . . governs this case and compels us to find that the service of a notice of hearing by an Immigration Court does not meet the definition of a 'notice to appear' . . . and therefore does not trigger the 'stop-time rule' when a 'notice to appear' from [DHS] fails to specify the time of the initial proceedings." *Id.* at 536 (dissenting opinion).

C. The Decision Below Concerns an Important and Recurring Question of Federal Law.

Whether DHS is required to satisfy the requirements of § 1229(a) in a single document is an important and recurring question of federal law. Be-

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36 (7th Cir. 2020) ("In sum, the Board flatly refused to implement our decision. . . . Members of the Board must count themselves lucky that [petitioner] has not asked us to hold them in contempt, with all the consequences that possibly entails.").

cause in recent years DHS "almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings," *see Pereira*, 138 S. Ct. at 2111, the resolution of this question will impact thousands, if not hundreds of thousands, of immigration cases, *see* Statistics Yearbook: Fiscal Year 2018, *Executive Office for Immigration Review*.

Thus, until this Court resolves this circuit conflict, a substantial number of noncitizens may be rendered ineligible for cancellation of removal based solely on the location of their removal hearing. Had the petition for review in this case been filed in the Third Circuit or Tenth Circuit, it would have been granted.

The noncitizens who will bear the consequences of this circuit split are precisely those who could obtain cancellation on the merits, if only they had been found eligible. These are men and women who are productive, long-term residents of the United States without serious criminal records. *See* 8 U.S.C. § 1229b(b)(1) (listing eligibility criteria). Indeed, rendering ineligible for cancellation a non-permanent resident who would otherwise qualify would cause "exceptional and extremely unusual hardship to the [noncitizen's] spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." *See id.* § 1229b(b)(1)(D).

Allowing this circuit split to persist will ensure that different notice requirements apply to *in absentia* removals in different jurisdictions. This lack of uniformity threatens to inject uncertainty into removal proceedings nationwide.[5]

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[5] Whether the requirements of § 1229(a) can be satisfied by multiple documents has other implications too. An applicant for

When outcomes in such important matters turn on geography instead of the predictable application of clear legal rules, the risk of forum shopping increases and the rule of law is undermined. Because DHS can transfer detainees, *see, e.g.*, *Reyna*, 921 F.3d at 209, it can effectively conduct proceedings in the immigration court of its choice and steer noncitizens' petitions for review into the court of appeals of its choosing. The existing circuit split creates the risk that noncitizens will be transferred away from immigration courts within the Third Circuit and Tenth Circuit because those courts of appeals require § 1229(a) to be satisfied by a single, compliant document.

D. This Case Presents an Ideal Vehicle to Resolve the Federal Question.

Throughout the proceedings below, petitioner has preserved her arguments that (1) she is eligible for cancellation of removal because the stop-time rule has not been triggered, *see* 8 U.S.C. § 1229b(d)(1)(A), and (2) the order removing her *in absentia* was invalid because she did not receive the "written notice required under . . . section 1229(a)," *see id.* § 1229a(b)(5)(A). She presented these arguments to the BIA in her motion to reopen after this Court decided *Pereira*. *See* Pet. App. 16a. She again presented these arguments in her petition for review.

The question of whether the Government must satisfy the requirements of § 1229(a) in a single doc-

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post-conclusion voluntary departure must establish, among other things, physical presence in the United States for at least one year prior to the date "notice to appear was served under section 1229(a)." *See* 8 U.S.C. § 1229c(b)(1)(A).

ument is dispositive of both of petitioner's arguments because it is undisputed that neither the notice to appear nor the notices of hearing contained all of the information listed in § 1229(a). *See* Pet. App. 17a.

Further, petitioner has a strong case that the Attorney General should cancel her removal. She has accrued ten years of continuous presence in the United States. She has demonstrated "good moral character," *see* 8 U.S.C. § 1229b(b)(1) and has no disqualifying criminal convictions. Her husband and two children are U.S. citizens, and both children were born in the United States. Because her husband works full-time, petitioner is the primary caregiver for her two young children. If she were deported, her husband and children would have no choice but to accompany her to Honduras, where they would struggle to find housing and employment, and would face extreme danger from the serious, ongoing violence in that country.[6]

She also has an equally strong case to have the order removing her *in absentia* rescinded because she did not receive notice "in accordance with paragraph (1) or (2) of section 1229(a)." *See* 8 U.S.C. § 1229a(b)(5)(C). Accordingly, this Court's interpretation of § 1229(a) will resolve her eligibility for relief on both arguments she presented below.

There is no better vehicle than the Fifth Circuit's published opinion to address the question presented. While other petitions argue that IJs lack jurisdiction to hear removal proceedings where DHS has failed to

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[6] Information about petitioner's family is not included in the opinion below but is described in a notarized affidavit that was part of her motion to reopen filed with the BIA, which was filed with the Fifth Circuit. *See Yanez-Pena v. Barr*, Docket No. 19-60464 (5th Cir), Entry Docketed July 17, 2019 ("Immigration Record Filed").

satisfy § 1229(a) with a single document, there is no circuit split on that issue, and granting review to consider that issue may not answer the important question presented here. Further, this case provides a vehicle to address the two-step notice process without having to decide whether DHS's regulations are mere claim-processing rules or are jurisdictional. The one other petition to raise the stop-time rule question arises from an unpublished order of the Sixth Circuit, decided without oral argument, that involves the stop-time rule but not removal *in absentia*. *See Niz-Chavez v. Barr*, No. 19-863 (filed Jan. 9, 2020).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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