No. 19-863

IN THE
Supreme Court of the United States

AGUSTO NIZ-CHAVEZ,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

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

REPLY BRIEF FOR PETITIONER

SUFEN HILF
HILF & HILF, PLC
1775 W. Big Beaver Rd.
Troy, MI 48084

DAVID J. ZIMMER
Counsel of Record
BRITTANY NIEVES
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
dzimmer@goodwinlaw.com
(617) 570-1000

Counsel for Petitioner

May 11, 2020

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

I. The Court should grant certiorari to resolve the acknowledged circuit conflict on a frequently recurring issue of vital importance to immigrant families. 3

A. Without this Court's intervention, the circuit conflict will not resolve and will continue to cause significant inequities. 3

B. The government's vehicle argument is baseless because the agency and the court of appeals decided only the eligibility question that has split the circuits. 7

II. The government's merits arguments provide no reason to deny certiorari. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Banuelos-Galviz v. Barr,
953 F.3d 1176 (10th Cir. 2020) 1, 3, 4

Barton v. Barr,
__ S. Ct. __ (2020) 6

Garcia-Romo v. Barr,
940 F.3d 192 (6th Cir. 2019) 1, 3, 4, 5

Guadalupe v. U.S. Att'y Gen.,
951 F.3d 161 (3d Cir. 2020) 3

Holder v. Martinez Gutierrez,
566 U.S. 583 (2012) 9

Judulang v. Holder,
565 U.S. 42 (2011) 4

Matter of L-O-G-,
21 I. & N. Dec. 413 (BIA 1996) 8

Lopez v. Barr,
925 F.3d 396 (9th Cir. 2019) 3
948 F.3d 989 (9th Cir. 2020) 3

Pereira v. Sessions,
138 S. Ct. 2105 (2018) 4, 5, 8, 9, 11, 12

Perez-Sanchez v. U.S. Att'y Gen.,
935 F.3d 1148 (11th Cir. 2019) 3

Yanez-Pena v. Barr,
952 F.3d 239 (5th Cir. 2020) 3

STATUTES

Immigration and Nationality Act:

8 U.S.C. § 1229(a) 3, 5, 11, 12

8 U.S.C. § 1229b(d)(1)(B) 6

8 U.S.C. § 1252b(a)(1) (1994) 11

OTHER AUTHORITIES

62 Fed. Reg. 449 (Jan. 3, 1997) 11

REPLY BRIEF FOR PETITIONER

The government agrees that the question presented in this case is the subject of a circuit conflict and is "exceptionally important" because it "has profound ramifications for thousands of immigration cases." Opp. 14-16; Gov't Pet. for Reh'g at 1, 15, *Banuelos-Galviz v. Barr*, 953 F.3d 1176 (10th Cir. 2020) (No. 19-9517). The government urges this Court to delay review of this concededly certworthy question to see if the conflict resolves on its own, but it is now clear that it will not: After the government filed its opposition, the Tenth Circuit denied the government's rehearing petition in *Banuelos-Galviz*, and the Sixth Circuit had already denied rehearing on the other side of the split in *Garcia-Romo v. Barr*, 940 F.3d 192 (6th Cir. 2019). There is thus no reason for this Court to delay review and every reason to accelerate it: Until this Court resolves the conflict, the accident of geography will bar many deserving immigrants, but not others, from even *applying* for one of the most important forms of relief available under immigration law.

The government also claims that it will win on the merits and that even if it does not, Mr. Niz-Chavez may ultimately lose on other grounds. Neither prediction is well-founded, and neither is a valid basis for leaving the circuit split unresolved.

The government's speculation concerning what will happen if Mr. Niz-Chavez is held eligible for cancellation falls particularly flat. Mr. Niz-Chavez had no opportunity to develop his cancellation case before the Immigration Judge ("IJ") because he was ineligible under then-controlling law. The government

nevertheless claims, based on the incomplete evidentiary record in Mr. Niz-Chavez's remand motion, that Mr. Niz-Chavez could not show the required hardship to his U.S.-citizen children *if* given a remand. Neither the government, nor the Board of Immigration Appeals ("Board"), nor the court of appeals disputed below that Mr. Niz-Chavez would be entitled to a remand if held eligible to seek cancellation. Accordingly, rather than speculate concerning whether Mr. Niz-Chavez *could* establish the required hardship at an evidentiary hearing that the agency has refused to give him, this Court should answer the question presented concerning whether Mr. Niz-Chavez is eligible to apply for cancellation at all. That is the course that this Court routinely takes—and that the government itself has recommended in supporting certiorari review of analogous eligibility questions.

The government devotes most of its opposition to arguing that the Board correctly resolved the merits. Even if that were right, it would not be a reason to deny certiorari and leave the circuit conflict in place on this exceptionally important and recurring issue. Further, as multiple appellate courts have concluded, the Board's interpretation conflicts with the statute's text, structure and history.

The Court should resolve the conflict.

I. The Court should grant certiorari to resolve the acknowledged circuit conflict on a frequently recurring issue of vital importance to immigrant families.

A. Without this Court's intervention, the circuit conflict will not resolve and will continue to cause significant inequities.

1. As the government concedes (at 14-15), there is a clear circuit conflict concerning the question presented. Two courts of appeals—the Third and Tenth Circuits—have held that the government must serve a specific notice document that includes all of the information identified in 8 U.S.C. § 1229(a) to serve "a notice to appear under section 1229(a)" and trigger the stop-time rule. *Guadalupe v. U.S. Att'y Gen.*, 951 F.3d 161, 165 (3d Cir. 2020); *Banuelos-Galviz*, 953 F.3d at 1178. A Ninth Circuit panel reached the same conclusion, *Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019), though the court is reconsidering that decision en banc, 948 F.3d 989 (9th Cir. 2020). Two courts of appeals—the Fifth and Sixth Circuits—have disagreed, holding that the government can provide the required information across as many notice documents as it chooses. *Yanez-Pena v. Barr*, 952 F.3d 239, 241 (5th Cir. 2020); *Garcia-Romo*, 940 F.3d at 196-197.[1]

---

[1] Contrary to the government's opposition (at 16-17), the Seventh and Eleventh Circuits also held, in resolving jurisdictional challenges not at issue here, that the government must provide the notice required by section 1229(a) in a single document. *See* Pet. 15-16. The Eleventh Circuit wrote, citing the Seventh Circuit, that a later "notice of hearing … does not render the original NTA non-deficient." *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019). And a deficient notice to ap-

In its opposition (at 16), the government asks this Court to delay resolution of this acknowledged circuit conflict because the circuits may "resolve the conflict on their own." But, as the government acknowledged in its May 1, 2020 letter, circuits on both sides have now shown that they will not change their minds. The Tenth Circuit denied the government's petition for rehearing en banc in *Banuelos-Galviz* shortly after the government filed its brief in opposition in this Court, so the split cannot resolve in the government's favor. And the Sixth Circuit denied rehearing en banc in *Garcia-Romo*, so the split cannot resolve in petitioner's favor either. There is thus no longer any chance that the circuit conflict will resolve without this Court's intervention.

The government offers no additional reason that further percolation would be beneficial, and there is none. Though the Ninth Circuit granted rehearing en banc (but then postponed argument due to the pandemic) and the government's rehearing petition remains pending in the Third Circuit, this Court's review will still be warranted whatever happens in those courts. Even if the tally eventually became 4-1 in the government's favor, the circuits would still be split. And this Court regularly validates the position of one circuit in a split, especially in the immigration context. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 n.4 (2018); *Judulang v. Holder*, 565 U.S. 42, 52 n.6 (2011).

---

pear does not trigger the stop-time rule. *See* Pet. 23; *Pereira*, 138 S. Ct. at 2117. But even if those circuits were disregarded as the government suggests, there is still an acknowledged conflict on the precise stop-time question presented in this case.

Nor is there any benefit in waiting for the views of additional courts of appeals. Given the depth of the disagreement on this issue—with fifteen Board members splitting 9-6 in favor of the government and fifteen court of appeals judges splitting 8-7 against the government—all sides of the question presented have been thoroughly and carefully aired. All that remains is for this Court to resolve the now-entrenched conflict.

2. In addition to providing no benefit, delay would inflict substantial unfairness on Mr. Niz-Chavez and many other immigrants. As the government has repeatedly and correctly told the courts of appeals, the question presented in this case is "exceptionally important" and arises with unusual frequency. *E.g.*, Gov't Pet. for Reh'g at 15, *Banuelos-Galviz*, *supra* (No. 19-9517).

The government conceded in *Pereira* that it almost never provides all of the information required by section 1229(a) in a single document. 138 S. Ct. at 2111. The government has thus recognized that the question presented "has profound ramifications for thousands of immigration cases" and "affects the vast majority of aliens placed into removal proceedings over the past 15 years, whose notices to appear generally omitted 'time and place' information." Gov't Pet. for Reh'g at 1, 15, *Banuelos-Galviz*, *supra* (No. 19-9517). Unsurprisingly, then, the question has generated five published appellate decisions in the last year alone, in addition to many more unpublished decisions. Indeed, since the Sixth Circuit decided *Garcia-Romo* seven months ago, that decision has been dispositive of ten other petitions for review in that court. And the Ninth Circuit has

stayed at least thirty-five cases pending its currently-unscheduled en banc proceedings in *Lopez*.

In each of the numerous cases raising the question, it is exceptionally important. After all, the effect of the decision below, and those like it, is to deny cancellation of removal even to immigrants who would otherwise qualify for that relief based on "exceptional and extremely unusual hardship" to an immediate relative. And because there is a separate stop-time rule for the commission of many crimes, 8 U.S.C. § 1229b(d)(1)(B),[2] the immigrants affected by this stop-time rule are likely to be those who, like Mr. Niz-Chavez, have no criminal history of any significance. Pet. 19. For those immigrants, cancellation eligibility means a chance at lawful permanent residence in the United States, while ineligibility means deportation and separation from U.S.-citizen and lawful-permanent-resident family members.

Any delay in this Court's review would mean that Mr. Niz-Chavez and likely hundreds of similarly-situated immigrants could be removed and separated from their families based on nothing more than where they live. If this Court denies certiorari, the Sixth Circuit's mandate will issue and nothing would stop the government from removing Mr. Niz-Chavez to Guatemala and separating him from his young, U.S.-citizen children. *See* Pet. 36-37. But if Mr. Niz-Chavez lived in Denver rather than Detroit, he would be eligible to apply for cancellation and re-

---

[2] As the petition explained (at 25-26), *Barton v. Barr*, __ S. Ct. __ (2020), turned on the interpretation of that unrelated bar to cancellation of removal. As the government does not dispute, nothing in *Barton* has any bearing on the question presented here.

main with his family. And Mr. Niz-Chavez is far from alone: Given how frequently this issue arises, numerous petitions raising the question presented in both the Fifth and Sixth Circuits will undoubtedly be denied in the coming weeks and months, and many more immigrants will be issued final orders of removal in those Circuits without the resources to bring a petition for review at all. Meanwhile, in the Third and Tenth Circuits, immigration judges bound by those circuits' precedent will be granting cancellation of removal to identically-situated applicants.

Given that the circuit conflict will not disappear without this Court's intervention and is causing deep unfairness on an ongoing basis, the Court should grant certiorari now.

B. The government's vehicle argument is baseless because the agency and the court of appeals decided only the eligibility question that has split the circuits.

The government's only other argument about the certworthiness of this case (as opposed to the merits) is that this case is a "poor vehicle" because, even if Mr. Niz-Chavez were eligible for cancellation, he cannot show the required hardship to his U.S.-citizen children. Opp. 17-19. The government did not raise this issue below, and neither the agency nor the court of appeals considered it. The mere possibility that, after losing in this Court, the government might win before the agency on an alternative ground it did not raise below is not a persuasive reason to deny review of a pressing, certworthy legal issue that is properly presented. Having deprived Mr. Niz-Chavez of any opportunity to bat, the govern-

ment cannot now complain that the record does not show whether he would have gotten on base.

1. The agency did not allow Mr. Niz-Chavez to fully establish the hardship his removal would cause to his U.S.-citizen children. As the petition explained (at 35), Mr. Niz-Chavez tried to, but could not, apply for cancellation before the IJ because he was ineligible under then-governing pre-*Pereira* law. Pet. App. 42a. After *Pereira*, Mr. Niz-Chavez sought a remand from the Board to apply for cancellation. Pet. App. 4a. To make the prima facie case required for a remand, Mr. Niz-Chavez was *not* required to "show[] that the facts, if true, definitively establish" his entitlement to relief; he needed to show only a "reasonable likelihood" that he could obtain relief if given the opportunity. *Matter of L-O-G-*, 21 I. & N. Dec. 413, 419 (BIA 1996). The remand would then be his opportunity to make his case for relief.

Neither the Board nor the court of appeals disputed that Mr. Niz-Chavez's remand motion made the required prima facie showing of "exceptional and extremely unusual hardship" to his U.S.-citizen children. The only basis for either decision was that the stop-time rule prevented Mr. Niz-Chavez from accruing the required continuous presence. Pet. App. 11a-15a, 21a-23a. Indeed, the government did not even challenge Mr. Niz-Chavez's prima facie hardship showing before either the agency or the court of appeals. *See* A.R. 12-14; Gov't C.A. Br. 25-28 (No. 18-4264).

Even in its opposition, the government does not dispute that Mr. Niz-Chavez made the prima facie hardship showing necessary to obtain a remand. Instead, the government's argument appears to be

that, based on the incomplete evidentiary record, Mr. Niz-Chavez would not obtain cancellation if he were allowed to apply. *See* Opp. 17-19. Rather than speculate as to whether Mr. Niz-Chavez could, if given the opportunity, establish the required hardship to his U.S.-citizen children, this Court should grant certiorari to resolve the circuit conflict concerning whether Mr. Niz-Chavez is eligible to apply for cancellation at all.

2. This Court frequently grants certiorari in cases concerning eligibility for relief even where it is not clear the immigrant would ultimately merit relief. This Court granted certiorari in *Pereira* despite the government's claim that the case was "not an appropriate vehicle" because even if held eligible, Mr. Pereira could not establish the required hardship to his U.S.-citizen children. Br. in Opp. at 19, *Pereira*, *supra* (No. 17-459). And in *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012), the *government* sought certiorari on a question concerning cancellation eligibility even though the respondent might well have been denied cancellation on the merits. *Id.* at 590. Far from viewing that possibility as a vehicle problem, the government identified multiple other cases in which this Court had granted certiorari "petitions by aliens from decisions restricting eligibility for discretionary relief" before entitlement to relief had been adjudicated. Gov't Cert. Reply Br. at 11, *Martinez Gutierrez*, *supra* (Nos. 10-1542 and 10-1543) (citing *Judulang v. Holder*, 565 U.S. 42 (2011), and *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 571 (2010)). In all of these cases, a stark split on eligibility for relief could not be brushed aside on the theory that nobody would qualify for relief anyway. So too here.

3. The record suggests that Mr. Niz-Chavez could make a particularly strong case that his removal would cause the required hardship to his U.S.-citizen children. As the petition explained (at 36-37), Mr. Niz-Chavez is the breadwinner for his family; his now-one-year-old daughter was born two months prematurely, spent months in the neonatal intensive care unit, and still requires significant respiratory support and regular medical attention that she could not get were she forced to accompany her father to Guatemala; and his five-year-old daughter suffers from speech and language delays for which she is receiving assistance through the Matrix Head Start program in Detroit. Mr. Niz-Chavez could submit much more hardship evidence in a cancellation hearing.

The government's speculation that Mr. Niz-Chavez could not show sufficient hardship to his U.S.-citizen children thus creates no vehicle problem. The Court should resolve the circuit conflict concerning whether Mr. Niz-Chavez can even *try* to make that showing.

II. The government's merits arguments provide no reason to deny certiorari.

The government's primary argument is that the Board was right. Opp. 9-14. Whatever the merits of that argument, it provides no reason for this Court to leave in place an entrenched circuit conflict. And, as multiple courts have recognized, the government's arguments are wrong in any event.

1. Section 1229(a)'s text requires a specific notice document: It uses the singular term "a 'notice to appear'" and requires that such a notice include interrelated information about the noncitizen's appear-

ance at a removal hearing that would create "confusion" if split into pieces. *Pereira*, 138 S. Ct. at 2119. The government concedes that the phrase "a written notice" requires a single notice document, Opp. 10-11, and so too does "a 'notice to appear.'"

2. The government cannot reconcile its position with section 1229(a)'s history. The government disputes neither that the pre-1996 definition of "an 'order to show cause'" required a single notice document, *see* Pet. 28; 8 U.S.C. § 1252b(a)(1) (1994), nor that section 1229(a) uses functionally identical definitional language, *see* Pet. 29. There is no reason that the same definitional language would require that "an 'order to show cause'" be a single document but allow "a 'notice to appear'" to be multiple documents.

The Congressional intent behind the 1996 amendments was sufficiently clear that *the government itself* acknowledged that it must serve a single notice document. 62 Fed. Reg. 449 (Jan. 3, 1997); Pet. 9-10. The government does not dispute this, but claims (at 14 n.2), without any citation, that it changed its position a decade later. The Board, however, characterized "a 'notice to appear'" as a single document long after that. *See* Pet. 10, 34.

3. Petitioner's interpretation is consistent with the stop-time rule's purpose by giving the government the *power* to stop time whenever it wants by serving the single notice document required by section 1229(a). *See Pereira*, 138 S. Ct. at 2119; *contra* Opp. 11-12. There was nothing Mr. Niz-Chavez did or could have done to stop the government from doing just that. Mr. Niz-Chavez accrued the required presence not because of anything *he* did, but because

the government never fulfilled the statute's requirements.[3]

The government claims (at 13) that petitioner's interpretation would "serve little purpose," but ignores the numerous reasons that requiring a single notice document makes sense. *See* Pet. 30-32. Indeed, this Court rejected the government's position in *Pereira* in part because it would "confuse and confound noncitizens" to receive "notices that lack [time-and-place information]." 138 S. Ct. at 2119. Yet the government now claims it can serve precisely such notices.

4. Because the statute is unambiguous, the government's reliance on agency deference (at 13-14) is unavailing. Moreover, the agency's decision is not reasonable; among other things, the government does not defend the Board's post-*Pereira* change in position. *See* Pet. 33-35.

[3] The government is wrong (at 14 n.2) that the petitioner in *Pereira* acknowledged that multiple notices could trigger the stop-time rule. The cited statements do not address whether section 1229(a) requires a single document.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SUFEN HILF
HILF & HILF, PLC
1775 W. Big Beaver Rd.
Troy, MI 48084

DAVID J. ZIMMER
Counsel of Record
BRITTANY NIEVES
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
dzimmer@goodwinlaw.com
(617) 570-1000

Counsel for Petitioner