NO. 19-673

# In the Supreme Court of the United States

MELIDA TERESA LUNA-GARCIA,

*Petitioner,*

v.

WILLIAM BARR, U.S. ATTORNEY GENERAL,

*Respondent.*

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

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY BRIEF OF PETITIONER

This petition presents an important question concerning the rights of individuals to receive notice of the time and place of their removal hearings. Specifically, the question presented is whether an individual who provides a foreign address to the Attorney General for notice purposes has satisfied the Immigration & Nationality Act's (INA) requirement that she provide the Attorney General with "an address . . . at which [she] may be contacted respecting [removal] proceedings," 8 U.S.C. § 1229(a)(1)(F)(i), and is therefore entitled to written notice of the time and date of her hearing.

The Attorney General's position underscores the need for review. According to the Attorney General, the INA's statutory address requirement means different things in different circumstances, depending on whether the individual served with a Notice to Appear (NTA) expresses an intent to stay in the United States, or whether the Attorney General returns her to Mexico pursuant to the so-called "Migrant Protection Protocols" (MPP). In the Attorney General's view, the statute requires an individual who "intend[s] to remain and reside in the United States during the pendency of her removal proceedings" to provide a U.S. address in order to receive notice of her hearing. (Opp.11). But if she is returned to Mexico pursuant to the MPP, the Attorney General explains, the statute requires something different entirely. (Opp.13). The Attorney General never explains what the statute requires in those circumstances—*amici* suggest that it could be

anything, but is often not the address the individual provides as her best address for notice purposes.

That position cannot be reconciled with the statute's text, and upends the very purpose that it exists to serve, which is to create a simple and straightforward mechanism to provide noncitizens with notice. The Attorney General's position effectively ensures that individuals without a reliable U.S. address at the time they are issued an NTA will not receive notice, even if they provide the Government with a reliable foreign address to which notice could be mailed. As a result, those noncitizens may immediately be ordered deported without an opportunity to defend themselves.

Certiorari is necessary now in light of the Attorney General's and the court of appeals' plainly implausible readings of the statute's straightforward notice requirement. Both readings—one of which requires an "intent to remain," (Opp.I, 11), the other physical presence (App.9a)—are entirely unworkable in practice and impose on both the Attorney General and the noncitizen a far greater burden than the statute requires. Neither reading provides any basis for meaningfully distinguishing individuals who are subject to the MPP, and therefore both readings jeopardize the due process rights of tens of thousands of asylum seekers who have been returned to Mexico to wait for their hearings. Immediate review is required to prevent the chaos that inevitably will result.

## ARGUMENT

### I. THE ATTORNEY GENERAL'S POSITION COMPLICATES A SIMPLE STATUTORY REQUIREMENT AND IS ENTIRELY UNWORKABLE IN PRACTICE

The Attorney General's position and the court of appeals' holding grossly overcomplicate a simple statutory scheme, and will result in chaos in practice. As Petitioner reads the Attorney General's brief, his position appears to be that § 1229(a)(1)(F)(i), which requires an individual who has been served with an NTA to provide the Attorney General with "an address . . . at which [she] may be contacted respecting [her removal] proceedings," requires the individual to provide a U.S. address if that individual, at the time she is served with the NTA, expresses an "inten[t] to remain and reside in the United States during the pendency of her removal proceedings." (Opp.I, 11). But if the individual is issued an NTA and then subjected to MPP, the Attorney General reads § 1229(a)(1)(F)(i) to require something entirely different. (Opp.13). The Attorney General does not specify exactly what that is, (*see* Opp.13), and nor does the court of appeals (*see* App.9a). *Amici*, and the individual stories they tell, suggest that for an individual who is subject to the MPP, the statutorily required "address" may be anything the Attorney General wants it to be at the time the NTA is issued. (*See Brief of Amici Curiae* at 13-19). The Attorney General's reading cannot be reconciled with the statutory text. That reading grossly overcomplicates a statutory scheme that Congress intended to be simple and workable, and imposes on

both the Attorney General and the noncitizen a far greater burden than the statute requires. It also operates to undermine the very purposes the scheme exists to serve.

a. The statutory mechanism that Congress created to ensure the delivery of notice for removal proceedings is simple and easy to administer. That mechanism requires the noncitizen to select the address at which she best "may be contacted respecting [her removal] proceedings." 8 U.S.C. § 1229(a)(1)(F)(i). So long as she provides "an address," she is entitled to written notice of the time and date of her removal proceedings, sent to the address that she provides. If she fails to provide "an address," she forfeits her right to written notice. 8 U.S.C. § 1229(a)(2)(B). Because she may be removed *in absentia* if she fails to appear at her hearing, 8 U.S.C. § 1229(b)(5)(A), she has every incentive to provide the Attorney General with a reliable address—that is, an address at which she can actually receive the written notice that the Attorney General sends her. The upshot of the statutory scheme is clear—it relieves the Attorney General of the burden to identify the individual's best address for notice, while assuring individual accountability to appear and participate in the removal proceedings.

Relying on the court of appeals' decision, the Attorney General now contends that § 1229(a)(1)(F)(i) requires an individual who "intend[s] to remain and reside in the United States during the pendency of her removal proceedings" to provide a U.S. address, as opposed to a foreign one. (Opp.11). The Attorney General does not explain how and on what record an individual's "intent" is determined; nor does he explain how and on what record an individual might contest

that determination if no further notice is required. If accepted, the Attorney General's position would impose on both government officials and noncitizens far greater burden than the statute unambiguously commands. In all events, the position cannot be squared with the statute's straightforward text, which neither expressly nor impliedly reflects an "intent to remain" requirement.[1] And Congress certainly did not intend such results—indeed, it sought to avoid them. *See* H.R. Rep. No. 104-469, at 159 (statutory design intended to avoid "protracted disputes concerning whether an alien has been provided proper notice").

b. Neither the Attorney General's nor the court of appeals' readings of the address requirement reflects a meaningful distinction between individuals who are served with an NTA in the United States and those who are subjected to MPP. Indeed, like Petitioner, every single one of the people subjected to MPP—standing before a border patrol officer, thousands of miles from home, having risked her life to travel through Mexico to seek safety in the United States—"intends to remain and reside in the United States" during the pendency of her removal proceedings, which occur in the United States. The only difference between the two is that, for those who are returned to Mexico under the MPP, the Attorney General has stripped them of an opportunity to fulfill their intent.

Absent any meaningful distinction, the Attorney General's position simply cannot withstand even the slightest judicial scrutiny. His position, it seems, is

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[1] Nor does it suggest that a U.S. address is required if the individual is "physically in the United States"—a requirement that the court of appeals imposed. (App.9a).

that when the Attorney General exercises his discretion to return an individual to Mexico under the MPP, the U.S. address requirement that otherwise would apply under § 1229(a)(1)(F)(i) somehow no longer exists. According to the Attorney General, when that occurs, the very same statute permits not only a U.S. address, but practically any address—domestic, foreign, or an address of the border patrol officer's choosing. (*See* Pet.24-25). Put differently, the Attorney General's position is that, with respect to those whom he chooses to return to Mexico under the MPP, the statutory address requirement may be disregarded entirely. That position is untenable, because a statute cannot have more than one meaning.

c. The Attorney General's position, if accepted, also undermines the very purpose that the statute is intended to serve. The purpose of the statutory scheme, of course, is to provide the noncitizen with notice of her removal proceeding. 8 U.S.C. § 1229(a)(1)(A). The Attorney General does not and cannot dispute that. Nonetheless, he would construe the statute in a way that precludes notice to an individual who provides a reliable foreign address.

Consider, for instance, any other noncitizen in Petitioner's position, whether or not she has been subjected to the MPP. At the time she is issued an NTA, she may be standing in front of a government officer in the United States, thousands of miles from home, almost certainly having an "inten[t] to remain and reside in the United States" during the pendency of her removal proceedings in the United States. Like Petitioner, who "left Guatemala" and "headed to New York, New York, to seek employment," others likewise will have "left" their country of origin, often

fleeing persecution, and will be "headed" to a place in the United States to seek refuge and, often, financial and economic security. Many of those individuals, like Petitioner, will have no reliable U.S. address to provide to the Attorney General. For many of those individuals, like Petitioner, an address in their country of origin may be the best address for notice purposes—often for several months, sometimes for many years.

Yet the Attorney General would interpret the statute to require an unreliable address over a reliable one, or he would not issue notice at all. That position not only departs from the statutory text, which does not support it, but also makes no sense. If the statute can be interpreted to deny notice to an individual who registers a reliable foreign address instead of an unreliable U.S. address, then it cannot meaningfully serve its purpose. The statute simply cannot be construed to discourage an individual from providing their only reliable address, even if that address is a foreign one.

If the Attorney General's position stands, many noncitizens placed in removal proceedings would be unable to satisfy the statutory address requirement, and therefore would not receive notice of their hearings. As a result, many would fail to appear and be removed *in absentia* and ordered deported. Such results upend the purpose of the notice requirement and create grave due process concerns that warrant immediate review from this Court.

## II. THIS CASE IS AN APPROPRIATE VEHICLE THROUGH WHICH TO ANSWER THE QUESTION PRESENTED

This case provides an appropriate vehicle through which to answer the question presented. The Attorney General's contention that the result would be the same

regardless whether this Court grants the writ misses the point entirely by assuming the conclusion of the issue at hand. As Petitioner explains above, certiorari is necessary now to avoid widespread confusion, unfairness, and harm that inevitably will otherwise result.

The Attorney General contends that this case is not an appropriate vehicle for review because the result would be the same regardless of this Court's resolution of the question presented. (Opp.13). He supports that position with two assertions, the first of which is unpersuasive, and the second of which assumes the answer to the very question this case presents. Neither is reason to deny review.

The Attorney General first contends that the result would remain unchanged because Petitioner did not comply with 8 C.F.R. § 1003.15(d)(1) when she failed to provide her address after none appeared on her NTA. But no fair reading of Petitioner's NTA could adequately have informed her of that requirement; the text to which the Attorney General refers—the phrase "FAILED TO PROVIDE A US ADDRESS," and a "Failure to appear" warning that did not reflect the regulation[2]—in no way could have informed Petitioner that, by providing the officer with a reliable address in Guatemala, she was forfeiting her right to written notice of the time and date of her removal hearing. For the agency or the court to conclude otherwise would not comport with due process.[3]

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[2] Petitioner's NTA did not reflect the requirement of 8 C.F.R. § 1003.15(d)(1), on which the Attorney General's position relies.

[3] The regulation also formed no part of the immigration court or Board of Immigration Appeals decisions in this case.

The Attorney General's second argument, that Petitioner failed to provide a "current" address, assumes the conclusion of the very question presented in this case, and thus likewise does not impede review. To be sure, the Attorney General does not dispute—nor could he—that Petitioner's address in Guatemala was a reliable foreign address. He contends, instead, that Petitioner failed to provide a "current" address and thus her petition would be denied in any event. (Opp.14). But whether a "current" address is sufficient is the very question presented for review—if it was not, then Petitioner's otherwise-reliable foreign address satisfied the statutory requirement.[4] And if that is true, then Petitioner's motion to reopen must be granted, and her *in absentia* removal order must be rescinded. All of that turns on this Court's resolution of the question presented for review.

Immediate review by this Court is necessary and appropriate in this case. The Attorney General's interpretation of the INA's address requirement is unworkable and would create chaos if it is allowed to stand. In defending the court of appeals' analysis, the Attorney General grossly overcomplicates a simple statutory scheme, imposing on both the Government and the noncitizen far greater burdens that the statute requires. The need for immediate review by

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[4] By "current" address, the Attorney General appears to mean that Petitioner failed to provide the Attorney General with the address of her physical residence. But neither the statute nor the regulation requires a physical residence. As Petitioner explains above, the statute requires a reliable address at which she could be contacted. Here, Petitioner provided the Attorney General with a reliable address at which she could have been contacted, but the Attorney General opted not to contact her about her hearing.

this Court to restore the orderly administration of the INA's notice provisions is clear, and is made even more pressing as the Government has forced upwards of 60,000 people to return to Mexico under the MPP, where they may or may not receive notice at all.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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