22-674

No.

IN THE
Supreme Court of the United States

MORIS ESMELIS CAMPOS-CHAVES,

Petitioner,

v.

MERRICK B. GARLAND, 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

The Immigration and Nationality Act provides that a noncitizen who does not appear at a removal hearing shall be ordered removed in absentia, but only if she was provided "written notice required under paragraph (1) or (2) of section 1229(a)." 8 U.S.C. §1229a(b)(5)(A). The Act authorizes rescission of an in absentia order if the noncitizen "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." *Id.* §1229a(b)(5)(C)(ii).

Paragraph (1) of section 1229(a) requires a single notice document that contains all the information specified in the statute, including the "time and place" of proceedings. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480-1485 (2021). Paragraph (2) requires notice of the "new time and place" "in the case of any change or postponement in the time and place of such proceedings."

The question presented is:

If the government serves an initial notice document that does not include the "time and place" of proceedings, followed by an additional document containing that information, has the government provided notice "required under" and "in accordance with paragraph (1) or (2) of section 1229(a)" such that an immigration court must enter a removal order in absentia and deny a noncitizen's request to rescind that order?

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

Campos-Chaves v. Garland, No. 20-60262 (5th Cir.) (original opinion and judgment issued August 3, 2022; new opinion issued December 1, 2022, denying panel rehearing and rehearing en banc)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

Other Authorities:

Moris Esmelis Campos-Chaves respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

This case involves yet another circuit split arising from the government's persistent refusal to follow the statutory requirements for initiating removal proceedings against noncitizens. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021); *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). To initiate removal proceedings, the government must serve "a 'notice to appear'"—a single document that provides crucial information about the proceedings, including the "time and place at which the proceedings will be held." 8 U.S.C. §1229(a)(1); *Niz-Chavez*, 141 S. Ct. at 1480-1482. For years, the government has refused to follow those straightforward instructions. Rather than include the time and place of the initial hearing in the "notice to appear," as the statute requires, the government supplies that information in a standalone "notice of hearing" that it serves later—at times, years later.

This Court's decisions in *Pereira* and *Niz-Chavez* make clear that the government's refusal to comply with the statute's notice requirements has important consequences for its ability to remove noncitizens. Those cases both addressed the "stop-time rule," under which the government's service of "a notice to appear under section 1229(a)" stops a noncitizen from accruing additional periods of residency needed to qualify for cancellation of removal. 8 U.S.C. §1229b(d)(1). In *Pereira*, the Court held that a putative notice to appear that does not provide all of the information required by paragraph (1) of section

1229(a) is not "a notice to appear under section 1229(a)," and hence does not trigger the stop-time rule. 138 S. Ct. at 2113-2116. And in *Niz-Chavez*, the Court held that section 1229(a)(1) requires "a single document containing all the [required] information"—that is, the government does not serve "a notice to appear under section 1229(a)" if it splits the necessary information across multiple documents. 141 S. Ct. at 1478.

This case concerns a related issue: the effect of the government's extra-statutory notice practice on its ability to issue removal orders in absentia. An immigration court may enter a removal order in absentia if a noncitizen does not appear at a removal proceeding. *See* 8 U.S.C. §1229a(b)(5)(A). But the court can enter such an order only if the government complied with the statute's notice requirements—specifically, if the government provided "written notice required under paragraph (1) or (2) of section 1229(a)." *Id.* The noncitizen can also move to rescind an in absentia removal order "at any time" if she can demonstrate that she "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." *Id.* §1229a(b)(5)(C)(ii).

The question presented here is whether the government's extra-statutory, two-step notice practice provides notice "required under" and "in accordance with paragraph (1) or (2) of section 1229(a)" for purposes of these in absentia removal provisions. There is no real dispute that the two-step notice practice does not provide notice under paragraph (1) of section 1229(a)—that was this Court's precise holding in *Niz-Chavez*. The question is therefore whether the two-step notice practice provides valid notice under para-

graph (2) of section 1229(a), which allows the government to "change" the "time and place of such proceedings" by serving notice of "the new time or place."

There is an intractable three-way split on this question. The First and Ninth Circuits have held that because a hearing notice cannot "change" the time or place of a hearing that has not previously been scheduled, it does not constitute notice "in accordance with" or "required under" paragraph (2). *Laparra-Deleon v. Garland*, 52 F.4th 514, 519-523 (1st Cir. 2022); *Singh v. Garland*, 24 F.4th 1315, 1318-1320 (9th Cir. 2022). The Sixth and Eleventh Circuits, by contrast, have held that a standalone hearing notice can qualify as the notice "required under" paragraph (2). *Santos-Santos v. Barr*, 917 F.3d 486, 492 (6th Cir. 2019); *Dacostagomez-Aguilar v. Attorney General*, 40 F.4th 1312, 1316-1319 (11th Cir. 2022). The Fifth Circuit, for its part, agrees with the First and Ninth Circuits as to what notice the statute requires. *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021). But the Fifth Circuit held in this case that, even if the two-step notice process does not provide statutorily compliant notice, an immigration court cannot rescind an in absentia order if the noncitizen received the non-compliant hearing notice, Pet. App. 2a—a rule that exists in neither the First nor the Ninth Circuit.

This Court should grant certiorari to resolve the conflict. Not only is the conflict entrenched—this deep-seated disagreement cannot be resolved without this Court's intervention—but the question on which the courts are divided is also incredibly important and frequently recurring, as the government itself has recognized. A question that arises with such frequency, and that has such dramatic implications, should not

turn on the happenstance of the immigration court in which the government brought removal proceedings. Moreover, this case is an ideal vehicle to address the conflict, as the answer to the question presented is dispositive of Mr. Campos-Chaves's ability to reopen his removal proceedings and apply for cancellation of removal to remain in this country with his family.

Certiorari is especially warranted because the Fifth Circuit's decision was wrong. The hearing notice that the government sent Mr. Campos-Chaves was the first notice it ever provided that set the time and place of his hearing. That notice therefore did not "change" the time and place of his hearing under any ordinary usage of that word, and so it was not a valid notice under paragraph (2). And the Fifth Circuit's rule that a noncitizen must allege that she did not receive the hearing notice in order to rescind an in absentia order has no basis in the statute—the court just made it up.

This Court should grant the petition.

OPINIONS BELOW

The revised decision of the court of appeals and its order denying rehearing (Pet. App. 1a-2a) are reported at 54 F.4th 314. The initial decision of the court of appeals (Pet. App. 3a-4a) is reported at 43 F.4th 447. The decisions of the Board of Immigration Appeals (Pet. App. 5a-11a) and the immigration judge (Pet. App. 12a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2022. The court of appeals denied a timely petition for panel rehearing and rehearing en banc and issued a revised opinion on December 1,

2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

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

(A) In general

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)). * * *

* * *

(C) Rescission of order

Such an order may be rescinded only—

* * *

(ii) 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) of this title * * * .

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

(1) In general

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, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice 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—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

The full text of Sections 1229 and 1229a, together with other relevant statutes, are reproduced in the Appendix, *infra*, at 18a-35a.

STATEMENT

A. Statutory Background.

1. Paragraphs (1) and (2) of 8 U.S.C. §1229(a) specify the precise form of notice that the government

must provide to initiate removal proceedings. Paragraph (1) requires that the government serve "a 'notice to appear,'" which the statute defines as written notice of specified information about the removal proceedings. That includes crucial information like the "acts or conduct alleged to be in violation of law," the "charges against the alien and the statutory provisions alleged to have been violated," the "time and place at which the proceedings will be held," and the potential for an in absentia order if the noncitizen "fail[s] ... to attend." 8 U.S.C. §1229(a)(1); *see also Niz-Chavez*, 140 S. Ct. at 1480-1482. Paragraph (2) provides that, "in the case of any change or postponement in the time and place of such proceedings," the government must serve notice of "the new time or place of such proceedings." 8 U.S.C. §1229(a)(2).

2. Congress enacted these notice requirements as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (IIRIRA). But for decades, the government intentionally flouted them.

Before IIRIRA, the statute permitted a two-step notice process in which the initial notice document—then called an "order to show cause"—did not need to contain the time and place of the proceedings; that information could be provided "in the order to show cause *or otherwise*." 8 U.S.C. §1252b(a)(1), (a)(2)(A) (1994) (emphasis added). In creating the "notice to appear" in IIRIRA, however, Congress jettisoned this two-step notice process. Concerned that existing procedures led to unnecessary disputes about whether noncitizens received certain information, *see* H.R. Rep. No. 104-469, pt. I, at 122, 159 (1996), IIRIRA re-

quired that the "time and place at which the proceedings will be held" be included in the "notice to appear" itself. 8 U.S.C. §1229(a)(1)(G)(i).

As this Court explained in *Niz-Chavez*, the government recognized in rulemaking shortly after IIRIRA's passage that Congress had rejected the two-step notice process and required that the time and place of the initial hearing be in the "notice to appear." *See* 141 S. Ct. at 1484 (citing 62 Fed. Reg. 449 (1997)). But the government refused to do what it conceded that section 1229(a)(1) requires and continued to use the two-step notice practice that IIRIRA rejected. Indeed, by 2017 the government had begun omitting the time or place of the initial hearing from "almost 100 percent" of its putative notices to appear. *Pereira*, 138 S. Ct. at 2111.

3. In recent years, the government has repeatedly sought to avoid the consequences of its failure to comply with the statute's notice requirements. This Court has consistently rebuffed those maneuvers.

In *Pereira*, the Court considered the implications of the government's two-step notice practices on the stop-time rule. Under that rule, a noncitizen stops accruing the residency or presence necessary for cancellation of removal "when the alien is served a notice to appear under section 1229(a) of this title." 8 U.S.C. §1229b(d)(1). The government claimed that it could trigger the stop-time rule by serving a document labeled "notice to appear" even if that document failed to provide the time and place of the initial hearing—and hence did not comply with section 1229(a). This Court rejected that argument. The word "under" means "in accordance with" or "according to," the Court explained, and a putative "notice to appear" that lacks

the time and place of the initial hearing is not notice "in accordance with" section 1229(a)(1). 138 S. Ct. at 2117. The Court held that its interpretation of section 1229(a)(1) was "bolstered" by section 1229(a)(2), which "presumes that the Government already served a 'notice to appear' that specified a time and place as required by §1229(a)(1)(G)(i)." *Id.* at 2108.

The government could have responded to *Pereira* by correcting its notice practices and "issuing notices to appear with all the information §1229(a)(1) requires—and then amending the time or place information [under §1229(a)(2)] if circumstances required it." *Niz-Chavez*, 141 S. Ct. at 1479. Instead, the government insisted—in conflict with its own post-IIRIRA rulemaking—that it could comply with section 1229(a)(1) by serving *multiple* documents that, in combination, included all of the information specified in section 1229(a)(1). In *Niz-Chavez*, this Court rejected the government's "notice-by-installment theory" and held that section 1229(a) requires "a single notice—rather than 2 or 20 documents." *Id.* at 1486.

4. This case "represents the latest chapter in the Government's ongoing efforts to dig itself out of a hole it placed itself in." *Estrada-Cardona v. Garland*, 44 F.4th 1275, 1282 (10th Cir. 2022). Like the stop-time rule, the statute's in absentia removal provisions require compliance with section 1229(a)'s notice requirements. 8 U.S.C. §1229a(b)(5)(A), (b)(5)(C)(ii). The question presented is whether the government's two-step notice practice provides the required notice. The Board of Immigration Appeals has held that it does, but the courts of appeals disagree as to whether that holding is consistent with the statute.

a. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," *Reno v. Flores*, 507 U.S. 292, 306 (1993), including "a meaningful opportunity to be heard," *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 115 (3d Cir. 2006). The in absentia provisions at issue in this case create a limited exception to the right to be heard.

Under section 1229a(b)(5), when the government can prove that it provided a noncitizen with statutorily compliant notice, and yet the noncitizen still fails to appear at her removal proceedings, the immigration judge must order the noncitizen removed without a hearing. Specifically, the statute provides that:

> 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 [government] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable.

8 U.S.C. §1229a(b)(5)(A).

The statute includes a corresponding provision that allows a noncitizen to seek rescission of an in absentia removal order and reopening of her proceedings if the government did not provide the required notice. Specifically, the statue provides that a removal order entered in absentia "may be rescinded ... upon a motion to reopen filed at any time if the alien demon-

strates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title." 8 U.S.C. §1229a(b)(5)(C)(ii).

b. Both before and after *Niz-Chavez*, the Board has held that the government's extra-statutory, two-step notice process fulfills the statutory prerequisites for a non-rescindable in absentia order. *Matter of Pena-Mejia*, 27 I. & N. Dec. 546 (BIA 2019); *Matter of Laparra*, 28 I. & N. Dec. 425 (BIA 2022).

In the most recent case, *Laparra*, the government had served the noncitizen with a putative notice to appear that lacked the time and place of his initial hearing. 28 I. & N. Dec. at 426. Then, nearly two years later, the immigration court sent him a hearing notice with that information. *Id.* When Mr. Laparra did not appear, the immigration judge ordered him removed in absentia. *Id.* Mr. Laparra later sought to rescind the in absentia order and reopen his proceedings. *Id.*

The Board held that the immigration judge properly denied the motion to reopen. The Board noted that the in absentia provision requires notice in accordance with "paragraph (1) *or* (2)," and concluded, with no reasoning, that the hearing notice Mr. Laparra received qualified as a "statutorily compliant notice of hearing under section [1229](a)(2)" even though the notice did not "change" the time or place of any previously scheduled hearing. *Id.* at 432-434.

c. The courts of appeals have disagreed on whether the Board's interpretation is correct. Even before the Board's decisions, the Sixth Circuit reached the same conclusion as the Board for effectively the same reason: It held that notice under paragraph (2) was sufficient and concluded, with no reasoning, that

the hearing notice "meets the requirements of paragraph (2)." *Santos-Santos*, 917 F.3d at 492.

The Fifth Circuit reached the opposite conclusion in *Rodriguez*, which it decided after the Board's decision in *Pena-Mejia* but just before the Board's decision in *Laparra*. 15 F.4th at 355. There, the court held that this Court's "interpretation of the §1229(a) notice requirements ... applies in the in absentia context" and bars the government from obtaining an in absentia order when it does not comply with section 1229(a)(1). *Id.* The court denied the government's petition for rehearing en banc in a nine-to-eight vote. 31 F.4th 935 (5th Cir. 2022). Judge Duncan concurred in the denial of rehearing en banc and explicitly rejected the Board's decision in *Laparra*. As he explained, the hearing notice cannot be not a valid notice under paragraph (2) because paragraph (2) applies only to a "'*change* in time or place of [removal] proceedings' and guarantees a written notice of 'the *new* time or place of the proceedings.'" *Id.* at 937 (quoting 8 U.S.C. §1229(a)(2)) (alterations in original). Mr. Rodriguez "never got an *initial* 'time or place,' so there was nothing to 'change' and any subsequently set 'time or place' wouldn't be 'new.'" *Id.*

The Ninth Circuit then "join[ed] the Fifth Circuit" in rejecting the Board and Sixth Circuit's position. *Singh*, 24 F.4th at 1319. Relying heavily on this Court's decision in *Pereira*, the Ninth Circuit held that "the Notice to Appear provided in paragraph (1) must have included a date and time because otherwise, a 'change' in the time or place is not possible." *Id.* at 1320 (citing *Pereira*, 138 S. Ct. at 2114). The court denied rehearing en banc over a dissenting opinion joined by twelve judges. 51 F.4th 371 (9th Cir. 2022).

The Eleventh Circuit then "disagree[d] with the Ninth Circuit." *Dacostagomez-Aguilar*, 40 F.4th at 1318 n.3. It acknowledged that, "[f]or the original hearing, the government must provide a paragraph (1) notice to appear." *Id.* at 1317. But it held that the statute's use of the word "or" in the phrase "paragraph (1) or (2)" meant that "the Act allows in absentia removal if an alien fails to attend a hearing after being provided the written notice required for the hearing." *Id.* at 1318. Because the hearing that the noncitizen had missed had been "rescheduled twice," the court held, paragraph (2), not paragraph (1), supplied the relevant rules—and the noncitizen had received a valid paragraph (2) notice. *Id.* at 1318-1319; *see also id.* at 1314-1315. Like the Fifth and Ninth Circuits, the Eleventh Circuit denied rehearing en banc. *See* Order, *Dacostagomez-Aguilar v. Attorney General*, No. 20-13576 (11th Cir. Oct. 17, 2022) (Dkt. No. 48).

Next, the First Circuit joined the Fifth and Ninth Circuits by granting the petition for review from the Board's decision in *Laparra* and vacating the Board's decision. 52 F.4th at 523. The court largely endorsed the Fifth and Ninth Circuit's decisions in *Rodriguez* and *Singh*, found "unpersuasive the Sixth Circuit's ruling in *Santos-Santos*," and concluded that the Eleventh Circuit's emphasis on the word "or" was misguided. *Id.* at 521. As discussed, *supra*, p. 12, Mr. Laparra had received only one hearing notice, and the First Circuit held that, under *Pereira*, such a notice did not "change" the time or place of proceedings and hence was not a valid notice under paragraph (2). *Id.* at 520-521.

B. Factual Background and Procedural History.

1. Petitioner Moris Esmelis Campos-Chaves is a native and citizen of El Salvador. He arrived in the United States without inspection in January 2005 and lives with his wife and two U.S.-citizen children, a twelve-year-old daughter and seventeen-year-old son. Certified Administrative Record (A.R.) 115-116, 118. Since his arrival, he has worked consistently as a gardener and filed an income tax return every year. A.R. 117, 123. He has no criminal history. A.R. 119.

On January 27, 2005, the government served Mr. Campos-Chaves with a document labeled "notice to appear." But that document did not provide the time and place at which the proceedings would be held, as the statute requires. Instead, it stated that the hearing would occur "on a date to be set at a time to be set." A.R. 174. Five months later, the government sent Mr. Campos-Chaves a standalone hearing notice that, for the first time, identified the date and time of his hearing. A.R. 171. Mr. Campos-Chaves did not appear at that hearing, and he was ordered removed in absentia. Pet. App. 17a.

2. In September 2018, Mr. Campos-Chaves moved the immigration court to rescind his removal order and reopen his removal proceedings. He argued that, under this Court's decision in *Pereira*, he "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)," and hence was entitled to rescission of his in absentia removal order under 8 U.S.C. §1229a(b)(5)(C)(ii). A.R. 75-76. He also argued that he was prima facie eligible for cancellation of removal because his two adolescent U.S.-citizen children

would face extreme hardship if they were forced to accompany him to El Salvador—a dangerous country in which his children had never lived. A.R. 79-84.

The immigration judge denied the motion. Pet. App. 13a-14a. In the judge's view, *Pereira* was limited to the stop-time context and had no impact on the notice requirements for cancellation of removal. *Id.*

3. The Board agreed with the immigration judge and dismissed the appeal. Adhering to its pre-*Niz-Chavez* decision in *Pena-Mejia*, the Board held that the government complies with the statute's notice requirements when it provides a putative notice to appear that lacks time-and-place information followed by a subsequent hearing notice containing that information. Pet. App. 5a-10a.[1]

4. Mr. Campos-Chaves petitioned for review. While that petition was pending, two relevant cases were decided. First, this Court decided *Niz-Chavez*, holding that the government's two-step notice process does not provide adequate notice under paragraph (1) of section 1229(a). Second, the Fifth Circuit decided *Rodriguez*, holding that a subsequent hearing notice does not cure an inadequate initial notice for purposes of in absentia removal.

Those two decisions made it so clear that Mr. Campos-Chaves should prevail that the *government* filed

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[1] The Board also concluded that Mr. Campos-Chaves failed to establish prima facie eligibility for cancellation of removal, but only on the ground that the notice of hearing had triggered the stop-time rule. Pet. App. 9a-10a. This Court subsequently rejected that conclusion—and the precedent on which it relied—in *Niz-Chavez*.

an unopposed motion to grant the petition and remand to the agency. As the government put it, because *Rodriguez* had held "that a deficient notice to appear did not constitute notice for the purpose of an *in absentia* removal order," this case "should be remanded to the Board for further proceedings." Resp.'s C.A. Mot. to Remand, at 2-3 (May 18, 2022).

Rather than grant the government's motion—or at least set the case for argument—the Fifth Circuit issued a published, three-paragraph per curiam opinion denying the government's remand motion and denying the petition for review. Pet. App. 1a-2a. The court held that *Rodriguez* was "distinguishable" because, in that case, "the alien received an undated NTA [*i.e.*, notice to appear] but did not receive a subsequent notice of hearing ('NOH') because he moved. Here, by contrast, petitioner received the NTA and does not dispute that he also received the subsequent NOH." *Id.* The panel did not explain why, under *Rodriguez*'s reasoning, it mattered whether the noncitizen received the hearing notice. Nor did the panel identify anything in the statute's text that made that fact relevant. Instead, the panel's reasoning turned entirely on the fact that, under Fifth Circuit precedent, noncitizens "are not entitled to *Rodriguez* remands where they failed to provide their address to the Department of Homeland Security." Pet. App. 4a (citing *Spagnol-Bastos v. Garland*, 19 F.4th 802 (5th Cir. 2021)). "If an alien forfeits his right to a *Rodriguez* remand by not giving the Government a good address," the panel reasoned, "then *a fortiori* the alien forfeits his right to a *Rodriguez* remand when he in fact receives the NOH (or does not dispute receiving it)." Pet. App. 4a.

5. Mr. Campos-Chaves sought panel rehearing and rehearing en banc. As relevant here, he argued that there is no principled way to distinguish his case from *Rodriguez*. The panel's proffered distinction turned entirely on the panel's analogy to precedent holding that a noncitizen forfeits his right to notice when he fails to update his address. But that precedent relied on a specific statutory provision under which, as interpreted by the Fifth Circuit, a noncitizen forfeits his right to compliant notice if he "has failed to provide the address" at which he can be reached. *See* 8 U.S.C. §1229a(b)(5)(B); *Spagnol-Bastos*, 19 F.4th at 806-807. Neither the Fifth Circuit nor the government disputed that Mr. Campos-Chaves provided the relevant address. Thus, Mr. Campos-Chaves is entitled to rescind his in absentia order if he did not receive compliant notice. And under *Rodriguez*, he did not receive such notice.

On rehearing, the Fifth Circuit recognized that its analogy did not work and issued a substituted opinion omitting any reference to the cases in which a noncitizen has failed to update his address. Pet. App. 1a-2a. But even though its analogy to those cases was the only piece of reasoning in the court's initial decision, the court stuck to its guns and again denied the petition for review—now, without any reasoning at all. As modified, the Fifth Circuit's substantive discussion—in its entirety—consists of the following three sentences:

> In *Rodriguez*, the alien received an undated NTA but did not receive a subsequent notice of hearing ('NOH') because he moved. Here, by contrast, petitioner received the NTA and does

> not dispute that he also received the subsequent NOH. *See* Red Br. 9 n.3. The fact that petitioner received the NOH (or does not dispute receiving the NOH) makes *Rodriguez* distinguishable. *See Singh v. Garland*, 51 F.4th 371, 381 & n.5 (9th Cir. 2022) (Collins, J., dissenting from the denial of rehearing en banc).

Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the circuit conflict concerning whether the government's extra-statutory, two-step notice process is sufficient to support entry of a non-rescindable in absentia removal order. The circuits are deeply and intractably divided on this incredibly important and frequently recurring question—a fact the government has recognized in repeatedly seeking rehearing en banc. This case is an ideal vehicle in which to resolve the conflict: Mr. Campos-Chaves would have prevailed in either the First or Ninth Circuit—and possibly even in the Eleventh Circuit. Mr. Campos-Chaves's opportunity to stay in this country with his family should not turn on the happenstance of the circuit in which the government instituted removal proceedings.

Certiorari is particularly warranted because the Board's decision in *Laparra* and the Fifth Circuit's decision in this case conflict with the statute's text and history. As this Court already recognized in *Pereira*, a hearing notice cannot "change" the time of proceedings or provide notice of a "new" time—as required by paragraph (2)—if the hearing had not previously been scheduled. 138 S. Ct. at 2114. Indeed, if an initial hearing notice qualifies as notice under paragraph (2),

then the government could obtain an in absentia order based *only* on a hearing notice, even if the government provided the noncitizen with *none* of the other information specified in paragraph (1). The government told this Court in *Niz-Chavez* that Congress sought to *avoid* that precise result in enacting IIRIRA.

The Fifth Circuit's decision in this case is, if anything, even more divorced from the statute's text than the Board's. The statute makes clear that an immigration judge cannot enter an in absentia order if the government did not provide the notice "required under paragraph (1) or (2)," and that the immigration judge can rescind an in absentia order if the noncitizen can show that she did not receive notice "in accordance with paragraph (1) or (2)." The Fifth Circuit held in *Rodriguez* that the type of notice Mr. Campos-Chaves received did *not* comply with paragraph (1) or (2). And yet the Fifth Circuit held in this case—with absolutely no reasoning—that a noncitizen cannot rescind an in absentia order even if she did not receive notice "in accordance with" these provisions if she does not *also* allege that she never received the government's noncompliant notice. That additional requirement for rescinding an in absentia order appears nowhere in the statute.

I. The courts of appeals are divided on an important and frequently recurring issue concerning notice in removal proceedings.

The acknowledged circuit conflict implicated in this case cannot be resolved without this Court's intervention. Given how frequently this issue arises, the confusion it is currently causing across the country, and how important it is when it does arise, this

Court should grant certiorari now to resolve the conflict.

A. There is a clear, three-way split over whether the government's two-step process provides the notice necessary to support entry of an in absentia removal order and to prevent an immigration court from rescinding such an order. The First and Ninth Circuits have held that the two-step process does not provide the required notice. Those circuits have recognized that when the government provides its first notice of the time and place of proceedings in a standalone hearing notice, that document is not notice of a "change" in the time and place of proceedings, and hence is not a valid notice under paragraph (2). *See supra*, pp. 13-14. The Sixth Circuit, by contrast, has held that any hearing notice constitutes a valid notice under paragraph (2). *See supra*, pp. 12-13. The Eleventh Circuit similarly "disagree[s]" with the Ninth Circuit, holding that, at least where the government has served multiple hearing notices before the first hearing takes place, those standalone hearing notices are independently sufficient to support a non-rescindable in absentia order. *See supra*, p. 14. And the Fifth Circuit has charted its own course, agreeing with the First and Ninth Circuits as to the meaning of the in absentia and notice provisions, but creating an extra-statutory rule that a noncitizen cannot rescind an in absentia order unless she alleges that she did not receive the standalone hearing notice. *See supra*, pp. 13, 17-19. The five circuits that have addressed this issue

handle the vast majority—approximately 74%—of petitions for review from the Board.[2]

This circuit conflict inevitably leads to deeply unfair results. If Mr. Campos-Chaves lived in California or Massachusetts, he could have reopened his removal proceedings and applied to stay in the United States to continue to care for his U.S.-citizen children. Indeed, given that venue in immigration cases depends on where the government initiates removal proceedings, 8 U.S.C. §1252(b)(2); 8 C.F.R. §1003.14(a), Mr. Campos-Chaves may have been able to reopen his proceedings if he had been detained by DHS while on a road trip in Arizona, rather than at home in Texas. Only this Court can alleviate the inevitable inequities caused by the disparate interpretations of the in absentia provisions across the circuits.

B. This conflict will not resolve without this Court's intervention. Courts of appeals on all sides of the split have considered, and rejected, the other courts' decisions. *E.g.*, *Dacostagomez-Aguilar*, 40 F.4th at 1318 n.3 ("we disagree with the Ninth Circuit"); *Laparra*, 52 F.4th at 521 (finding Sixth Circuit's decision "unpersuasive"). Moreover, the Ninth and Eleventh Circuits have denied rehearing en banc on opposite sides of the conflict. *See supra*, pp. 13-14. And the Fifth Circuit has denied rehearing en banc twice—both in *Rodriguez* and in this case. *Rodriguez*, 31 F.4th at 935; Pet. App. 1a.

The likelihood that the circuit conflict would resolve itself is particularly low given the depth of the

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[2] *See* U.S. Courts, Judicial Business, Table B-3 (2019), *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2019.pdf

disagreement on the question presented. The Fifth Circuit denied rehearing en banc in *Rodriguez* in a nine-to-eight vote—and then, as a practical matter, gutted *Rodriguez* based on the extra-statutory requirement the panel imposed in this case. And twelve judges dissented from denial of rehearing en banc in the Ninth Circuit's decision in *Singh*. Given this disagreement, it is practically inevitable that this Court will, at some point, have to resolve the question presented.

C. Prompt review of the question presented is vital given the frequency with which it arises and its importance when it does arise. In any case in which the government follows its extra-statutory, two-step notice practice and the noncitizen did not appear and was ordered removed in absentia, the question presented will determine whether the noncitizen can seek rescission of that in absentia order. And, in recent years, the government has consistently flouted the statute and used its two-step notice practice. *See Pereira*, 138 S. Ct. at 2111. Thus, even the government has recognized that the question in this case "could potentially have a significant impact on the immigration system." Pet. for Reh'g, at 15, *Mendez-Colin v. Garland*, No. 20-71846 (9th Cir. May 20, 2022) (Dkt. No. 40); *see also Rodriguez*, 31 F.4th at 938 (Elrod, J., dissenting from denial of rehearing en banc) (question presented is "extraordinarily important"); *Singh*, 51 F.4th at 382 (Collins, J., dissenting from denial of rehearing en banc) (question presented has "broad implications").

Moreover, when the question presented does determine whether a noncitizen can reopen proceedings, it will often affect whether particularly deserving

noncitizens can remain in the country. A noncitizen does not obtain any right to remain in the country simply by reopening her removal proceedings; reopening only allows her to argue that she is not removable or to apply for cancellation of removal or some other form of relief. Indeed, to obtain reopening, a noncitizen must make a prima facie showing of eligibility for relief from removal, a standard that requires demonstrating a "reasonable likelihood" of ultimately obtaining relief. *See, e.g.*, *Matter of L-O-G-*, 21 I. & N. Dec. 413, 419 (BIA 1996). Thus, the noncitizens for whom the question presented matters are those—like Mr. Campos-Chaves—who were ordered removed without a hearing and who can show a reasonable likelihood that they would *not* be removed if given a hearing. Those noncitizens should not be treated differently based on nothing more than geographic happenstance.

II. This case presents an ideal vehicle for resolving the question presented.

This case offers the Court a straightforward opportunity to decide whether the government's extra-statutory, two-step process provides the notice required to support a non-rescindable in absentia order. The notice the government provided Mr. Campos-Chaves is a classic example of the two-step notice process: The government first served a putative notice to appear that lacked the date and time of the removal proceedings, and only later served a hearing notice that provided that information for the first (and only) time. Pet. App. 2a. Mr. Campos-Chaves was then ordered removed in absentia. Pet. App. 17a. In seeking to rescind that in absentia order, Mr. Campos-Chaves has consistently argued that the notice the government

provided does not constitute the notice "required under" or "in accordance with paragraph (1) or (2)." This case thus squarely raises the question presented.

In light of the multi-way split, granting certiorari in this case—which arises out of the Fifth Circuit—would give the Court the greatest flexibility to consider each approach to the question presented. To resolve this case, the Court would have the opportunity to address both whether the two-step process provides the notice required by "paragraph (1) or (2)" and, if it does not, whether the Fifth Circuit properly imposed an extra-statutory requirement that a noncitizen allege that she did not receive the hearing notice in order to rescind an in absentia order.

Finally, this case is a suitable vehicle because the question presented is dispositive. If this Court adopts the view of the First or Ninth Circuits, Mr. Campos-Chaves would prevail. As discussed, both of those courts have recognized that the documents Mr. Campos-Chaves received here—a deficient "notice to appear," followed by a standalone "notice of hearing"—do not satisfy the statutory requirements. In those circumstances, these courts have held, a standalone hearing notice is not notice "in accordance with" or "required under" paragraph (2) because it does not "change" a *previously scheduled* hearing. *See supra*, pp. 13-14. Indeed, Mr. Campos-Chaves may prevail even if this Court adopts the Eleventh Circuit's reading. While that court concluded that a hearing notice falls under paragraph (2) where the operative hearing is one that was "rescheduled" from a previous date, the court explained that "[f]or the *original* hearing, the government must provide a paragraph (1) notice to appear." 40 F.4th at 1317 (emphasis added). Here,

the hearing at which Mr. Campos-Chaves was ordered removed was his originally scheduled hearing—yet he never received a paragraph (1) notice. Notably, *no* circuit other than the Fifth Circuit in this case has suggested that it matters whether the noncitizen actually received the hearing notice if the notice did not comply with the statute's requirements.

Accordingly, this case is an excellent vehicle for the Court to address the interpretive issue that has divided the circuits.

III. The Fifth Circuit's decision is wrong.

This Court's review is necessary not only because there is a conflict among the lower courts as to the question presented, but also because, under a correct interpretation of the statute, Mr. Campos-Chaves was entitled to rescind his in absentia order, reopen his removal proceedings, and seek to remain in this country with his U.S.-citizen children.

A. The statute's text, structure, and history all demonstrate that the government's two-step process does not provide the notice necessary to support a non-rescindable in absentia order.

1. Under section 1229a(b)(5)(C)(ii), a noncitizen may seek rescission of an in absentia removal order if she "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." Under *Niz-Chavez*, the government's extra-statutory, two-step notice process plainly does not provide "notice in accordance with paragraph (1)." This Court held in *Niz-Chavez* that paragraph (1) requires a single document containing all the specified information, and the two-step notice process provides no such document.

Nor does the two-step notice process provide a valid "paragraph (2)" notice. Paragraph (2) only applies to a "*change or postponement* in the time and place of [removal] proceedings," and requires notice of the "*new* time or place of the proceeding." 8 U.S.C. §1229(a)(2) (emphases added). As both the First and Ninth Circuits recognized, and as Judge Duncan explained in concurring in the denial of rehearing en banc in *Rodriguez*, you cannot "change or postpone[]" the time of a hearing that has not previously been scheduled. *Singh* 24 F.4th at 1319-1320; *Laparra*, 52 F.4th at 520-521; *Rodriguez*, 31 F.4th at 937 (Duncan, J., concurring in the denial of rehearing en banc); *see also* 3 Oxford English Dictionary 15 (2d ed. 1989) (defining "change" as "the substitution of one thing for another" or "the succession of one thing in place of another"); *cf. also Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 977 (11th Cir. 2016) (en banc) (Rosenbaum, J., concurring in part and dissenting in part) (explaining that "to change something, it must exist in the first place").

This Court recognized as much in *Pereira*. This Court wrote, in describing paragraph (2):

> By allowing for a "change or postponement" of the proceedings to a "new time or place," paragraph (2) presumes that the Government has already served a "notice to appear under section 1229(a)" that specified a time and place as required by §1229(a)(1)(G)(i). Otherwise, there would be no time or place to "change or postpone."

Pereira, 138 S. Ct. at 2114 (brackets omitted); *see also Niz-Chavez*, 141 S. Ct. at 1479, 1485. As the First Circuit explained, this understanding of paragraph (2)

was a key part of this Court's reasoning in *Pereira. Laparra*, 52 F.4th at 520. And it is dispositive as to the question presented here.

2. The statute's structure confirms, in multiple ways, that this straightforward interpretation of the statute's text is correct.

First, the Board's contrary reading of the statute would mean that the government could obtain an in absentia order without providing *any* notice under paragraph (1) *at all*. After all, if a standalone hearing notice were a valid notice under paragraph (2) regardless whether the government had previously served a valid notice under paragraph (1), then the government could simply forego paragraph (1) notices altogether with no impact on its ability to obtain in absentia orders if the noncitizen did not appear.

Notably, the government argued to this Court in *Niz-Chavez* that Congress, in IIRIRA, sought to *avoid* this exact outcome. Under the pre-IIRIRA statute, the government could obtain an in absentia order based only on a hearing notice because the statute explicitly authorized the government to provide time-and-place information outside the initial charging document. *See* 8 U.S.C. §1252b(a)(2), (c)(1) (1994). But, as the government explained in *Niz-Chavez*, IIRIRA's requirement that time-and-place information be included in the "notice to appear" "ensured that in absentia removal would be ordered only if an alien had been served with notice of the full panoply of information that Congress deemed requisite" in section 1229(a)(1). Gov't Br. at 39, *Niz-Chavez*, *supra* (No. 19-863). Yet the government now takes the opposite position—rather than require that the govern-

ment provide "the full panoply of information" required by section 1229(a)(1) to obtain an in absentia order, the government's current interpretation of the statute would authorize an in absentia order even if the government provided *practically none* of that information.

Second, the Board's reading of the statute conflicts with section 1229(b)(1), which requires that, "[i]n order that an alien be permitted the opportunity to secure counsel before the first hearing date ... , the hearing shall not be scheduled earlier than 10 days after *the service of the notice to appear*." 8 U.S.C. §1229(b)(1) (emphasis added). Under *Niz-Chavez*, the two-step notice process does not provide "service of the notice to appear," and thus no subsequent, standalone hearing notice could provide service of a valid hearing date.

3. The statute's history also confirms that the two-step notice process does not provide support for a non-rescindable in absentia order. Most importantly, the pre-IIRIRA statute specifically distinguished between two notice documents: (1) "written notice ... of the time and place at which the proceedings will be held," which could be provided "in the order to show cause or otherwise," 8 U.S.C. §1252b(a)(2)(A) (1994); and (2) "in the case of any change or postponement in the time and place of such proceedings, written notice ... of the new time or place of the proceedings," *id.* §1252b(a)(2)(B). Congress thus understood that notice of a "change or postponement" of proceedings did not encompass notice of the *initial* time or place of proceedings—otherwise, section 1252b(a)(2)(A) would have been superfluous.

In IIRIRA, Congress simply moved the first type of notice (*i.e.*, the notice of the initial "time and place at which the proceedings will be held") into the notice to appear, while retaining the separate provision regarding notice "in the case of any change or postponement in the time and place of such proceedings." *Compare* 8 U.S.C. §1252b(a)(2)(A) (1994), *with id.* §1229(a)(1)(G) (2012); *compare id.* §1252b(a)(2)(B) (1994), *with id.* §1229(a)(2)(A) (2012). The statute thus retains the distinction between a notice that *schedules* the hearing and a notice that *changes* a hearing, but requires that the first type of notice be included in the notice to appear itself rather than permitting it to be served in a standalone hearing notice. The Board's interpretation of the statute fails to account for the statute's longstanding distinction between notice *scheduling* a hearing and notice *changing* the time of a previously scheduled hearing.

B. Unlike the Sixth Circuit and Eleventh Circuits, the Fifth Circuit in *Rodriguez* seemed aligned with the First and Ninth Circuits in endorsing petitioner's interpretation of the statute's in absentia and notice provisions. *See Rodriguez*, 15 F.4th at 355; *see also Rodriguez*, 31 F.4th at 937 (Duncan, J., concurring in the denial of rehearing en banc). But then, in this case, the Fifth Circuit held that, even if the two-step notice process does not provide notice "in accordance with paragraph (1) or (2)," a noncitizen who received notice pursuant to that two-step notice process still cannot rescind an in absentia order unless she alleges that she did not receive the hearing notice. Pet. App. 2a.

That holding is based on nothing in the statute, and is clearly wrong. The statute authorizes a noncitizen to rescind an in absentia order "at any time" if she did not "receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. §1229a(a)(5)(C)(ii). So if the government uses its two-step notice process, and if that process does not provide notice "in accordance with paragraph (1) or (2)," then a noncitizen can rescind her in absentia order. There is no requirement that the noncitizen show that she did not receive the notice the government provided if that notice did not comply with the statute.

Notably, the panel abandoned its only attempt to ground its decision in the statute. The panel's initial decision rested entirely on an analogy to cases holding that a noncitizen cannot rescind her in absentia order if she did not update her address. Pet. App. 4a. Those decisions, however, rested on specific statutory provisions that, as interpreted by the courts of appeals, strip a noncitizen of *any* right to *any* notice if she fails to update her address. *E.g.*, *Spagnol-Bastos*, 19 F.4th at 806-807 (citing 8 U.S.C. §1229(a)(1)(F)); *id.* at 808 n.2 (citing 8 U.S.C. §1229a(b)(5)(B)). Here, neither the Fifth Circuit nor the government disputed that Mr. Campos-Chaves provided the relevant address. When Mr. Campos-Chaves pointed this out in his rehearing petition, the panel issued an amended opinion that removed its reference to the address cases but substituted nothing in its place—leaving its decision devoid of any reasoning at all. Indeed, the panel's only authority for its holding was a footnote in a Ninth Circuit dissent from denial of rehearing that simply points back to the panel's initial, now-vacated decision *in this case*. Pet. App. 2a (citing *Singh*, 51 F.4th at

381 & n.5 (2022) (Collins, J., dissenting from denial of rehearing en banc)).

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In sum, had Mr. Campos-Chaves been brought into immigration court in Arizona, rather than Texas, he could have rescinded his in absentia order and sought to remain in the United States with his family. This Court should not allow such geographic happenstance to determine the fate of Mr. Campos-Chaves and countless other noncitizens across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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