No. 22-674

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government agrees with Mr. Campos-Chaves that the Court should grant review in this case. For good reason. As the government's brief acknowledges (at 8), the Fifth Circuit's decision "implicates a circuit conflict on an important question of federal law," and this case is a suitable vehicle to resolve the split. There is thus no reason for delay: the Court should grant certiorari and decide whether the two-step notice that the government provided to Mr. Campos-Chaves—and countless other noncitizens—satisfies the in absentia removal statute's notice requirements.

Unlike the government, the respondents in *Garland v. Singh*, No. 22-884, assert that the decision below implicates no split and that this case is a poor vehicle. In their view, the Fifth Circuit's decision was limited to the question whether the immigration judge had jurisdiction over these proceedings. Br. in Opp. at 23, 27-28, *Garland v. Singh* (No. 22-884) (*Singh* Opp.). That is wrong. The Fifth Circuit noted, in passing, that Mr. Campos-Chaves challenged the immigration judge's jurisdiction before the Board. But the Fifth Circuit's holding has nothing to do with the immigration judge's authority to hear this case. Instead, the Fifth Circuit refused to remand and denied Mr. Campos-Chaves's petition for review because it held that a noncitizen cannot take advantage of the Fifth Circuit's interpretation of 8 U.S.C. §1229a(b)(5) in *Rodriguez v. Garland*, 15 F.4th 351 (2021), if the noncitizen does not dispute receiving a hearing notice. That holding is plainly directed to the question presented. And, as the government acknowledges, the Fifth Circuit answered that question in a way that conflicts with decisions from the First and Ninth Circuits.

The government parts ways with petitioner only on the merits. The government concedes (at 7) that Mr. Campos-Chaves never received a valid "paragraph (1)" notice because his "notice to appear" lacked the time and place of his removal proceedings. But the government maintains (at 7-8) that a subsequent "notice of hearing" containing *only* that information was a valid "paragraph (2)" notice—and so Mr. Campos-Chaves may not seek rescission of his removal order. That argument defies the plain text of the statute. A paragraph (2) notice must "change or postpone[]" the time or place of proceedings. 8 U.S.C. §1229(a)(2). Mr. Campos-Chaves's hearing notice did neither: you cannot "change or postpone" the time of a hearing that had never previously been scheduled. The government also ignores the ample contextual and historical evidence confirming that straightforward interpretation. Accordingly, the Court should grant certiorari and reverse the judgment below.

ARGUMENT

I. The Court should grant the petition.

A. This case implicates an entrenched conflict on an important question.

1. The lower courts are intractably divided over whether the government's two-step notice process—which this Court has twice rejected in other contexts—qualifies as notice "required under" and "in accordance with paragraph (1) or (2) of section 1229(a)" for purposes of 8 U.S.C. §1229a(b)(5), the in absentia removal statute. Pet. 20-24.

The government agrees that there is an entrenched conflict on that question—indeed, it agrees with petitioner on the precise taxonomy of the split.

As both parties have explained, the First and Ninth Circuits hold that the government's two-step notice process does not provide notice "in accordance with" or "required under" paragraph (2) of section 1229(a); the Sixth Circuit takes the opposite view, as does the Eleventh Circuit (at least in cases in which the government has served multiple hearing notices); and the Fifth Circuit has adopted a mixed approach, depending on whether a noncitizen claims that she never received the hearing notice.[1] Pet. 20-24; Pet. at 14-20, *Garland v. Singh* (No. 22-884) (*Singh* Pet.). This case implicates that conflict, as Mr. Campos-Chaves would have prevailed in the First or Ninth Circuit (and possibly the Eleventh) but not in the Fifth or Sixth. Pet. 25-26. And the conflict will not resolve itself: courts of appeals on all sides of the split have considered, and rejected, their sister circuits' decisions. *See* Pet. 22-23. This Court's review is needed.

2. The *Singh* respondents maintain that any split is illusory. That is wrong.

The *Singh* respondents principally argue that the Fifth Circuit's decision in this case does not implicate any split because it "did not address . . . whether a noncitizen can move to reopen his in absentia removal order under [section] 1229a(b)(5)(C)(ii)." *Singh* Opp. 23. But that is precisely the question the Fifth Circuit addressed. The question below was, as the Fifth Circuit put it, whether to "remand [Mr. Campos-Chaves's

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[1] A recent Fifth Circuit decision reaffirms that court's mixed approach: in *Luna v. Garland*, No. 21-60195, 2023 WL 3563015 (May 19, 2023), the Fifth Circuit allowed a noncitizen to seek rescission where, as in *Rodriguez*—but unlike in this case—he disputed receiving the post-NTA notice of hearing. *See id.* at *1 ("Luna asserted he received neither the NTA nor the NOH.").

case] to the Board for reconsideration of his NTA challenge in light of [the Fifth Circuit's intervening decision in] *Rodriguez*." Pet. App. 2a. That intervening decision was all about the proper application of section 1229a(b)(5)(C)(ii): *Rodriguez* interpreted section 1229a(b)(5) to authorize rescission of an in absentia order when the government did not comply with section 1229(a)'s notice requirements. *See* 15 F.4th at 354-356. The Fifth Circuit declined to remand Mr. Campos-Chaves's case because it created an exception to *Rodriguez*'s interpretation of section 1229a(b)(5)(A) and (C) in cases, like this one, in which the noncitizen did not dispute receiving the standalone hearing notice. The Fifth Circuit's decision thus squarely answered the question presented in this case—and did so in a way that conflicts with decisions from the First and Ninth Circuits, and possibly also the Eleventh.

Eschewing the Fifth Circuit's actual reasoning, the *Singh* respondents assert that the decision below "addressed a different question: whether 'the IJ lacked authority to conduct the removal proceedings' in the face of a deficient NTA.'" *Singh* Opp. 23 (quoting Pet. App. 2a). But they misconstrue the line they quote. The panel below observed, by way of background, that Mr. Campos-Chaves's "principal[]" argument *before the Board* related to the IJ's authority. Pet. App. 2a. But that was not his *only* argument: he developed, and the Board addressed, the argument that under "section 240(b)(5)(C)(ii) of the [Immigration and Nationality] Act" (*i.e.*, 8 U.S.C. §1229a(b)(5)(C)(ii)), "his proceedings should be reopened because he did not receive the notice required under section 239(a)(1)" (*i.e.*, 8 U.S.C. §1229(a)(1)). Pet. App. 6a. It was *that* argument that the Fifth Circuit ruled on, and that provides

the basis for the question presented in this Court—as even the government acknowledges.

The *Singh* respondents' efforts to distinguish the Sixth Circuit's decision in *Santos-Santos v. Garland*, 917 F.3d 486 (2019), are similarly unpersuasive. They contend that *Santos-Santos* did "not squarely consider[]" the question presented here because it predated this Court's ruling in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). *Singh* Opp. 25. But nothing in *Niz-Chavez* undermines the basis for the Sixth Circuit's decision. The Sixth Circuit held that Mr. Santos-Santos could not seek rescission of his removal order because his hearing notice "me[t] the requirements of *paragraph (2)*," 917 F.3d at 492 (emphasis added),[2] while *Niz-Chavez* considered only the requirements of *paragraph (1)*. *See* 141 S. Ct. at 1480.

B. This case is a suitable vehicle to address the conflict.

1. As petitioner explained, this case is a suitable vehicle to resolve the split: the question presented is

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[2] The *Singh* respondents suggest that this conclusion "was dicta" because the court also determined that Mr. Santos-Santos had forfeited his arguments. *Singh* Opp. 25. But the Court's conclusion was an alternative holding, not dicta. *See Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 716 (2006) (Thomas, J., dissenting) ("This alternative holding is no less binding than if it were the exclusive basis for the Court's decision."). The *Singh* respondents also observe that a later unpublished Sixth Circuit opinion stated that the Sixth Circuit has "yet to take a binding position" on the split (for reasons *other* than Mr. Santos-Santos's supposed forfeiture). *Singh* Opp. 25; *see Lakhvir Singh v. Garland*, No. 21-3812, 2022 WL 4283249, at *8 (Sept. 16, 2022). But even if that unpublished decision had any force, it acknowledges that the question presented "has split the circuit courts and Board." *Id.*

dispositive, and granting this case allows the Court the greatest flexibility to consider each of the competing approaches to the question presented. Pet. 24-26. The government agrees. *See* Gov't Resp. Br. 8. Accordingly, the Court should grant certiorari.

Unlike the government, the *Singh* respondents argue that this case is not a "suitable vehicle." *Singh* Opp. 27. But their primary argument is that the Fifth Circuit did not address section 1229a(b)(5)(C)(ii), which is wrong for the reasons discussed above. The *Singh* respondents' suggestion (at 27-28) that Mr. Campos-Chaves "waived" reliance on section 1229a(b)(5)(C)(ii) is also wrong: Mr. Campos-Chaves's remand motion focused entirely on *Rodriguez*, which was all about section 1229a(b)(5)(C)(ii). *See* Petr.'s C.A. Mot. to Remand, at 1-4 (March 18, 2022). And, as discussed above, the Fifth Circuit's decision focused entirely on that issue. Unsurprisingly, then, the government agrees with Mr. Campos-Chaves that the question presented in this case is squarely raised by the decision below. *See* Resp. Br. 8.

2. The government further argues (at 8) that the Court should also grant the government's petition from the Ninth Circuit's decisions in *Singh* and *Mendez-Colin* so that the Court may interpret the statute "in full view" of the "different scenarios" in which the question presented and closely related questions arise. Mr. Campos-Chaves has no objection to that approach.

If the Court grants only one petition, however, it should grant Mr. Campos-Chaves's petition, not the government's. That is true for a number of reasons.

First, this petition presents a question that logically precedes the question raised in the government's petition. The statute requires that a paragraph (2) notice "change or postpone[]" the time or place of proceedings. 8 U.S.C. §1229(a)(2). This petition presents the question whether a *single* hearing notice that follows a putative notice to appear that lacked time-and-place information "change[s] or postpone[s]" the time or place of proceedings. The government's petition presents the question whether the last of *multiple* hearing notices that follow a putative notice to appear that lacked time-and-place information "change[s] or postpone[s]" the time or place of proceedings. It makes little sense to answer the latter question before answering the former. Indeed, granting only the government's petition creates a real chance that this Court could rule without actually resolving the circuit conflict raised by the petition in this case.

Second, only this case squarely presents the Fifth Circuit's halfway approach. *See* Pet. 25. In other words, only this case allows the Court to resolve not only whether the government's two-step notice process satisfies the requirements of the in absentia removal statute, but also whether the Fifth Circuit properly imposed an extra-statutory requirement that a noncitizen allege non-receipt of a hearing notice in order to rescind an in absentia order. *See id.*

Third, Mr. Campos-Chaves filed his petition first. As the *Singh* respondents note, the government typically urges this Court to grant the first-filed of multiple related petitions. *Singh* Opp. 29. That approach is particularly appropriate here because it ensures fairness to Mr. Capos-Chaves individually: given that

his petition was filed first, he should not have to endure further delays if the Court grants *Singh* but decides the case without squarely addressing whether the first hearing notice that follows a deficient notice to appear constitutes notice in accordance with section 1229(a)(2).

The government suggests (at 8-9) that granting the petition in *Singh* would allow the Court to "cover more ground" because its petition in that case raises both the scenario in which the government serves multiple hearing notices (*Singh*) and the scenario in which the government serves multiple hearing notices and the noncitizen attends a hearing (*Mendez-Colin*). But the *Mendez-Colin* scenario does not independently warrant certiorari. While there is a circuit conflict concerning the scenario presented in *Singh*, there is no published opinion from any court of appeals considering how the statute applies when a noncitizen fails to appear at one hearing after appearing at prior hearings. The only case the government points to is the Ninth Circuit's unpublished opinion in *Mendez-Colin* itself. That is, presumably, because the scenario presented in *Mendez-Colin* arises only infrequently. Thus, any marginal benefit to considering the unique factual circumstances of *Mendez-Colin* does not outweigh the factors that support granting certiorari in this case instead.

For these reasons, the Court should grant certiorari both this case and *Singh* or, in the alternative, it should grant certiorari in this case and hold *Singh*.

II. The Fifth Circuit's decision was wrong.

On review, the Court should reverse the Fifth Circuit's judgment. 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)." The government concedes (at 7) that Mr. Campos-Chaves never received a valid paragraph (1) notice because his "notice to appear" lacked the time and place of his removal proceedings. So the only question is whether his subsequent "notice of hearing" provided a valid paragraph (2) notice. It did not—as the statute's text, structure, and history all make clear. *See* Pet. 26-32.

The government's position does not square with that text, structure, and history. As a textual matter, paragraph (2) only applies to a "change or postponement in the time and place of [removal] proceedings." 8 U.S.C. §1229(a)(2); *see* Pet. 27. The government argues (at 7-8) that "[t]he NOH that petitioner received qualified as valid notice under paragraph (2) because it changed a 'to be set' time to a specific time." But that is not how the English language ordinarily works: one does not usually speak of "changing" or "postponing" an appointment that was never scheduled in the first place. *See* Pet. 27. As for the ample structural and historical evidence that confirms this straightforward interpretation, *see* Pet. 28-30, the government simply ignores it. *See* Gov't Resp. Br. 7-8; *Singh* Pet. 14-20. Nor does the government defend the Fifth Circuit's uniquely atextual approach to section 1229a(b)(5), under which the ability to rescind an in absentia removal order depends on whether the noncitizen *received* the (statutorily noncompliant) notice. *See* Pet. 30-32; *see also* Gov't Resp. Br. 7-8.

For all these reasons, Mr. Campos-Chaves is eligible to seek rescission of his in absentia removal order under a straightforward interpretation of the statute.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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