No.

IN THE
Supreme Court of the United States

SAMUEL DACOSTAGOMEZ-AGUILAR,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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February 14, 2023 *Counsel for Petitioner*

QUESTIONS PRESENTED

At the initiation of removal proceedings, the Immigration and Nationality Act requires service of a charging document called a "notice to appear" that includes factual allegations and removability charges and informs the noncitizen of the "time and place" of the initial hearing in the case. *See* 8 U.S.C. § 1229(a)(1); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480-1485 (2021). A putative notice to appear that lacks time and place information does not qualify as a notice to appear under the statute. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113-2114 (2018). After the case has begun, the noncitizen is informed of "any change or postponement in the time and place" of the removal proceeding by means of a short notice of hearing. 8 U.S.C. § 1229(a)(2).

The questions presented are:

1. Whether a noncitizen may be subject to potential in absentia removal if the noncitizen has never been served a valid notice to appear.

2. Whether a second or subsequent notice of hearing can effectuate a "change or postponement" of the hearing under 8 U.S.C. § 1229(a)(2), and thus expose the noncitizen to in absentia removal, where no notice to appear ever set an initial hearing date in the case.

PARTIES TO THE PROCEEDING

Petitioner Samuel Dacostagomez-Aguilar was the petitioner below.

Respondent Merrick B. Garland, Attorney General of the United States, was the respondent below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Dacostagomez-Aguilar* v. *Garland*, No. 20-13576 (11th Cir. Jul. 19, 2022) (denying petition for review), rehearing denied (Oct. 17, 2022).

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Samuel Dacostagomez-Aguilar (Mr. Dacostagomez) respectfully asks the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in his case.

INTRODUCTION

In the decision below, the Eleventh Circuit held that a noncitizen who never received a lawful notice to appear initiating the removal proceeding may nonetheless be ordered removed in absentia in any case where an Immigration Judge (IJ) sent more than one scheduling notice in the case. This decision is in acknowledged disagreement with the Ninth Circuit, and is part of a larger split among the circuits.

The circuit disagreement arises from the government's refusal to follow the law when it initiates removal proceedings. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021); *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The statute provides that to initiate removal proceedings, the government must serve a "notice to appear"—a single document that includes factual allegations and charges of removability, and that informs the noncitizen of 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. The pertinent federal agencies refused to follow that mandate, despite multiple interventions from this Court. Instead of including the time and place of the hearing in the "notice to appear," as required by law, the government has supplied that information in one or more "notices of hearing" that it serves later, generally by mail.

In two recent cases, this Court has explained that a notice of hearing cannot cure a defect in a putative

notice to appear. In *Pereira* and *Niz-Chavez*, this Court addressed the statutory rules for a "notice to appear" and left no doubt that a putative notice to appear that fails to schedule that initial hearing does not satisfy the statutory definition of a notice to appear. It is true that *Pereira* and *Niz-Chavez* addressed this question in the context of the "stop-time rule," which governs whether a noncitizen may continue accruing physical presence so as to qualify for cancellation of removal under 8 U.S.C. §1229b(d)(1). But the legal question in those cases was whether the government was complying with the statutory rule governing notices to appear. That question was not specific to the cancellation context. There is no logical distinction by which a document could fail to qualify as a notice to appear for purposes of cancellation of removal, but would qualify where other parts of the immigration statute refer to the same statutory definition.

In *Pereira*, this Court held that a putative notice to appear that does not include all information required by paragraph (1) of section 1229(a) does not qualify as "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 rejected the government's attempt to argue that a notice to appear could be served *seriatim*, holding instead that section 1229(a)(1) requires "a single document containing all the [required] information" and that there exists no "notice to appear under section 1229(a)" if the government tries to split up the necessary information across multiple documents. 141 S. Ct. at 1486.

This case concerns the application of the statutory rules to removal orders entered in absentia. An immigration court is mandated to enter a removal order

in absentia where a noncitizen does not appear at a removal proceeding where the government provided "written notice required under paragraph (1) or (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(A). The noncitizen can move to rescind an in absentia removal order "at any time" where the noncitizen "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(C)(ii).

The Eleventh Circuit, reasoning from the statute's use of the disjunctive, concluded that a putative "notice of hearing" could constitute notice under § 1229(a)(2), even if the noncitizen never received a notice to appear. This conclusion, in acknowledged disagreement with the Ninth Circuit's decision in *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022), Pet. App. 10a-11a n.3, is demonstrably wrong. First, the Eleventh Circuit's single-minded emphasis on the disjunctive nature of the notice requirement reads out of the statute the requirement that removal proceedings be initiated by service of a charging document known as a notice to appear. Second, it makes no account for this Court's observation that a hearing cannot be "changed" until it has first been set. That is, there can be no "change" in the hearing date until the notice to appear has set an initial hearing date for the case.

There is an irremediable circuit split on these matters. 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 cannot constitute notice "in accordance with" or "required under" paragraph (2). *Laparra-Deleon v. Garland*, 52 F.4th 514, 519-521 (1st Cir. 2022); *Singh*, 24 F.4th at 1318-1320. If a single hearing notice cannot change the time or place of the hearing, it follows

that a second or third would similarly have no effect. The Ninth Circuit has applied this reasoning to the case of a noncitizen where, as in *Dacostagomez*, the agency sent more than one hearing notice to the noncitizen. As the Ninth Circuit recognized, where the initial notice to appear is invalid because it does not set a hearing, there is nothing to "change" if the government sends a hearing notice purporting to reschedule the hearing; and a subsequent hearing notice similarly cannot "change" a hearing that never existed. *See Singh*, 24 F.4th at 1319-1320. The Sixth Circuit, by contrast, has 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). In proceedings below in this matter, the Eleventh Circuit adopted a similar rule, at least where the agency sent more than one notice of hearing. Pet. App. 5a-14a.[1]

This Court should grant certiorari to resolve the split. At this point, the circuit split is deeply entrenched, and will not be resolved absent this Court's involvement. It would be appropriate to resolve the issue now, for three reasons. First, the issue arises with great frequency, given the sheer number of re-

[1] The Fifth Circuit appears to line up on both sides of the split. The Court has found that the notice to appear statute requires rescission as to notices to appear that do not conform to the statutory requirements, seemingly in agreement with the First and Ninth Circuits. *See Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021). However, that Court has also adopted judicially-created exceptions to its otherwise clear rule, which place it closer to the side of the Sixth and Eleventh Circuits. *Campos-Chaves v. Garland*, 54 F.4th 314, 315 (5th Cir. 2022); *Spagnol-Bastos v. Garland*, 19 F.4th 802, 806 (5th Cir. 2021).

moval proceedings and the commonality of the government's erroneous handling of notices to appear. Second, the issue is of great importance not only for noncitizens affected by it (and those who love them), but also for the government's task of enforcing the immigration laws. Third, the unique nature of immigration law makes geographic divergences particularly apt to lead to injustice. Petitioner resides in the Seventh Circuit, which has not addressed these questions, yet his case is governed by the Eleventh Circuit because his removal order was entered by a judge sitting in Atlanta. His case would have arisen in the Ninth Circuit, if not for an Arizona immigration judge's *sua sponte* change of venue order. Petitioner's right to have a hearing before his removal is effectuated turns on bad geographic luck.

This case is an appropriate vehicle to address the conflict. Alternatively, the Court should grant certiorari in *Campos-Chaves v. Garland*, No. 22-674, and then dispose of this case based on how it resolves the *Campos-Chaves* case.

This Court should grant the petition.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is published at 40 F. 4th 1312. The order denying rehearing en banc (Pet. App. 37a) is unpublished. The order of the Board of Immigration Appeals (Pet. App. 15a) and the orders of the immigration judges (Pet. App. 21a-36a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2022. The court of appeals denied a timely petition for panel rehearing and rehearing en banc on

October 17, 2022. Justice Thomas extended the time for filing this Petition to and including February 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

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.

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)). * * *
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> * * *
>
> **(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 * * * .

The relevant text of Sections 1229 and 1229a is reproduced in the Appendix, *infra*, at 38a-45a.

STATEMENT

A. Statutory Background.

1. The immigration statute spells out precisely what must be contained in a "notice to appear," the

charging document used to begin removal proceedings. 8 U.S.C. §1229(a)(1). The information specified includes "acts or conduct alleged to be in violation of law," the "charges against the alien and the statutory provisions alleged to have been violated," and the "time and place at which the proceedings will be held." 8 U.S.C. §1229(a)(1); *see also Niz-Chavez*, 141 S. Ct. at 1480-1482. Paragraph (2) governs "in the case of any change or postponement in the time and place of such proceedings"; when that happens, the government must serve notice of "the new time or place of such proceedings." 8 U.S.C. §1229(a)(2).

2. For more than two decades after Congress enacted these requirements, the government simply disregarded them.

In rulemaking occurring shortly after these provisions were written into the statute, the government admitted 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 Niz-Chavez*, 141 S. Ct. at 1484 (citing 62 Fed. Reg. 449 (1997)). But the government refused to do what the law required, and it kept handling cases as it had before the current statute was passed into law. By 2017, the government admitted that it was 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.

Instead of altering its practices to conform to the statute, the government instead sought to avoid the consequences of its failure to comply with the statute's notice requirements. This Court has twice rejected such attempts.

In *Pereira*, the government claimed that it could serve and file 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). But 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.

In *Niz-Chavez*, the government argued that it could satisfy section 1229(a)(1) by serving *multiple* documents that added up to all of the information specified in section 1229(a)(1). The 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." 141 S. Ct. at 1486.

3. The in absentia provisions of the statute are triggered by notice to the noncitizen that complies with 1229(a)(1) or (2). 8 U.S.C. §1229a(b)(5)(A), (b)(5)(C)(ii). The issue here is whether those provisions can be triggered if the government cannot point to a notice to appear that complies with the statute. The Board of Immigration Appeals has answered in the affirmative, but most courts of appeals disagree.

a. When the government provides a noncitizen with the notice of a hearing, as outlined in the statute, and the noncitizen fails to appear at her removal proceedings, the immigration judge must order the noncitizen removed without a hearing. 8 U.S.C. §1229a(b)(5)(A).

Where an in absentia order has been entered, another provision of the statute permits a noncitizen to seek rescission of that order. The statute allows such a motion "at any time" whenever the noncitizen can

show "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. Although the statute plainly requires "notice in accordance with paragraph (1) or (2) of section 1229(a)" for an in absentia order, the Board has allowed such orders, despite the government's flouting of the notice statute. The Board has offered various rationalizations for this practice. *See Matter of Pena-Mejia*, 27 I. & N. Dec. 546 (BIA 2019); *Matter of Laparra*, 28 I. & N. Dec. 425 (BIA 2022).

In *Matter of Pena-Mejia*, the Board dismissed Pena-Mejia's argument that he did not receive (a)(1) notice, reasoning that the holding in *Pereira* was limited to the stop-time rule and finding that (a)(2) notice cured any defect in the notice to appear. 27 I. & N. Dec. at 549 (relying on its holding in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018)).

In *Matter of Laparra*, decided after *Niz-Chavez*, the putative notice to appear failed to provide a time and place for the initial hearing and thus could not constitute "notice in accordance with paragraph (1)" of § 1229(a). 28 I. & N. Dec. at 426. Almost two years after the putative notice to appear was served, the government sent Laparra a hearing notice. *Id.* Mr. Laparra was ordered removed in absentia when he failed to appear for the hearing. *Id.* The Board refused to rescind the order. Emphasizing that the in absentia provision requires notice under either § 1229(a)(1) or § 1229(a)(2), the Board found that the hearing notice was a "statutorily compliant notice of hearing under section [1229](a)(2)" despite the fact that it did not "change" the time or place of any previously scheduled hearing. *Id.* at 432-434.

c. The Sixth Circuit reached the same conclusion as the Board, prior to the Board decisions in *Pena-Mejia* and *Laparra* decision, finding that notice under paragraph (2) was sufficient and concluding that the hearing notice "meets the requirements of paragraph (2)." *Santos-Santos*, 917 F.3d at 492.

The Fifth Circuit, by contrast, held that this Court's "interpretation of the §1229(a) notice requirements ... applies in the in absentia context," effectively precluding the government from obtaining an in absentia order unless it chooses to comply with section 1229(a)(1). *Rodriguez*, 15 F.4th at 355. The court denied rehearing en banc in a nine-to-eight vote. 31 F.4th 935 (5th Cir. 2022). Judge Duncan's concurrence explained that a hearing notice unattached to a valid notice to appear cannot be an independently valid notice under paragraph (2) because paragraph (2) applies only to a "*change* in time or place of [removal] proceedings." *Id.* at 937 (quoting 8 U.S.C. §1229(a)(2)). Because Mr. Rodriguez "never got an *initial* 'time or place,' ... there was nothing to 'change' and any subsequently set 'time or place' wouldn't be 'new.'" *Id.*

The Ninth Circuit similarly rejected the analysis of the Board and the Sixth Circuit. *Singh*, 24 F.4th at 1319. In reasoning similar to Judge Duncan's, 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 First Circuit also rejected the position of the Board and the Sixth Circuit. *Laparra-Deleon*, 52 F.4th at 523. Reversing the Board's published decision in *Laparra*, the First Circuit found "unpersuasive the Sixth Circuit's ruling in *Santos-Santos*." *Id.* at 521. It rejected an emphasis on the disjunctive in § 1229a(b)(5)(A), finding "no basis for us to disregard *Pereira*'s construction of § 1229(a)(2)." *Id.* The First Circuit found that under *Pereira*, a hearing notice did not "change" the time or place of proceedings where there was no time and place designated in the notice to appear; thus, a hearing notice could not constitute valid notice under paragraph (2). *Id.* at 520-521.

In the case at bar, the Eleventh Circuit "disagree[d] with the Ninth Circuit." Pet. App. 10a n.3. As outlined below, the Eleventh Circuit held the statute's use of the word disjunctive in the phrase "paragraph (1) or (2)" allowed in absentia removal even if the government never served a valid notice to appear. Pet. App. 10a-12a. The Eleventh Circuit's holding went further than even the Board's decisions in *Matter of Pena-Mejia* and *Matter of Laparra* by concluding that the only notice required for an in absentia order was the notice of the hearing that the noncitizen missed. *See* Pet. App. 5a. Under the reasoning of the Eleventh Circuit, it appears that not even a putative notice to appear is required. The Eleventh Circuit denied rehearing. Pet. App. 37a.

B. Factual Background and Procedural History.

1. Petitioner Samuel Dacostagomez-Aguilar fled Honduras with his mother, his sister, and two younger cousins, after they were targeted by the powerful 18th Street Gang. Pet. App. 2a, 30a. He was 17

years old. In October 2003, they crossed the border with smugglers, who abandoned them when Petitioner injured his foot; the group walked along a road hoping to encounter the Border Patrol. Pet. App. 2a; Certified Administrative Record (A.R.) 123, 131-32. After being detained and examined in a Border Patrol station, the family was released. Pet. App. 2a. Petitioner's mother told the agents that they would be living with her sister, who was the mother of the two cousins; the Border Patrol recorded that address. *Id.* The Border Patrol issued a putative Notice to Appear (NTA) to initiate removal proceedings against Petitioner but did not include the date and time of the initial hearing. *Id.*

The Immigration Court in Phoenix subsequently sent Petitioner and his family a notice of hearing in November 2003, scheduling a hearing in Phoenix in November 2004. *Id.* After his aunt filed a motion to change venue in his cousins' cases, the Court transferred Petitioner's case to Atlanta at the request of neither party. Pet. App. 35a-36a. A hearing was scheduled in Atlanta for January 10, 2005, and notice was sent by mail. Pet. App. 3a.

The Atlanta Immigration Judge rescheduled the first hearing scheduled in Atlanta after discovering that the notice of hearing failed to include the apartment number. Pet. App. 23a n.2. A third hearing was scheduled and a new notice was sent. Id.

It so happened that Petitioner and his family had been forced to leave his aunt's home, and none of the notices sent after the initial notice to appear ever reached the Petitioner or his mother. Pet. App. 25a. This was known to the agency, as the notices of hearing were returned to the Court as undeliverable. Pet.

App 26a. On February 10, 2005, entirely unaware that matters in an Atlanta immigration courtroom pertained to them, Petitioner, along with his mother and sister, failed to attend the hearing in their case. Pet. App. 3a. Petitioner was ordered removed in absentia. *Id.*

2. In 2019, in light of intervening Supreme Court case law making clear that the notice to appear served on Petitioner was contrary to statute, Petitioner sought rescission of his in absentia order. Pet. App. 15a-16a. His motion noted positive factors in his case that would be considered in any renewed removal proceedings. For instance, he is married to a native-born U.S. citizen, A.R. 247-248, and they have two U.S. citizen children, ages 13 and 11. *Id.* at 250, 256. He and his family are an established part of the community in northern Indiana. Petitioner also explained that he faces continued danger in Honduras, as multiple family members have been killed. A.R. 127-128, 134.

Petitioner's motion to rescind was denied by Immigration Judge Kelly Johnson on September 9, 2019. AR 58-63; App. 5-10. Judge Johnson found that under BIA precedent, "a NTA [notice to appear] that does not specify the time and place of an alien's initial removal hearing vests the Court with jurisdiction over the removal proceedings and meets the requirements of [§ 1229(a)] so long as a notice of hearing specifying this information is later sent to the alien." App. 26a (citing *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018)).

3. Petitioner filed a timely appeal to the Board of Immigration Appeals. The Board affirmed the denial of rescission on August 25, 2020. Pet. App. at 15. The Board rejected Petitioner's argument as "foreclosed by

its decision in *Matter of Pena-Mejia*, 27 I. & N. Dec. 546 (BIA 2019)." Pet. App. 4a. The Board also rejected his argument "that he was 17 years old at the time, and that border patrol also did not provide oral notice of the consequences of failure to appear to him or his mother," on the ground that "the notice of hearing that was mailed to the respondent contained the consequences of failure to appear and the requirement that the respondent maintain a current address with the Immigration Court." Pet. App. 17a-18a.

4. Petitioner then filed a timely Petition for Review with the Court of Appeals for the Eleventh Circuit. After briefing and argument, the Court denied the Petition for Review. The Panel agreed with Petitioner's contention "that, under *Niz-Chavez v. Garland*, his first notice was incomplete." Pet. App. 11a. However, the Panel found that because his case had been twice rescheduled, notice was governed by § 1229(a)(2) instead of § 1229(a)(1), and that the adequacy of notice under § 1229(a)(2) did not depend on the putative notice to appear having been lawful. Pet. App. 11a. The Court acknowledged that its decision was contrary to the Ninth Circuit, which had addressed this precise context. Pet. App. 10a-11a n. 3; *see Singh*, 24 F.4th at 1320.

5. Mr. Dacostagomez sought panel rehearing and rehearing en banc. His petition was denied without comment. App. 34a.

REASONS FOR GRANTING THE WRIT

In light of the deep circuit disagreement on these questions, the Court should grant certiorari to resolve the matter. This case is an appropriate vehicle for the

Court to step in: Mr. Dacostagomez would have prevailed in the Ninth Circuit and likely the First Circuit. The Eleventh Circuit in the case at bar expressed disagreement with the Ninth Circuit's decision in *Singh*; and the First Circuit in *Laparra-Deleon* expressed disagreement with the outcome and reasoning of the Eleventh Circuit in the case at bar.

In addition to concretizing the circuit split, the lower court's decision is flatly irreconcilable with this Court's prior holdings in this precise context. This Court clearly stated in *Pereira* that a hearing notice cannot constitute notice under paragraph (2) of a "change" in the date and time of proceedings or give a "new" time if a hearing was not first scheduled on a notice to appear. 138 S. Ct. at 2114. Further, if an initial hearing notice could suffice for an in absentia order under paragraph (2), without regard to the existence *vel non* of a notice to appear, that would functionally eliminate the requirement that the agency serve a notice to appear in the first place. The government would need only issue a simple hearing notice, devoid of any information explaining the legal authority for the proceedings, acts or conduct alleged to be in violation of the law, and charges of removability against the noncitizen, in order to seek an in absentia order. Setting aside the logical and legal problems with that analysis, it is irreconcilable with *Pereira* and merits review on that basis as well.

It is indisputable that "[t]he consequences of a noncitizen's failure to appear at a removal proceeding can be quite severe." *Pereira*, 138 S. Ct. at 2111. In essence, the lower court authorized an unprecedented expansion of in absentia authority in order to avoid the consequence of the government's failure to

properly initiate removal proceedings against noncitizens like Mr. Dacostagomez. The Court should apply the statute as it is written, and rule for Petitioner.

I. The courts of appeals are deeply split regarding what notice is required to trigger in absentia removal proceedings.

In the case at bar, the Eleventh Circuit acknowledged that it was creating a direct circuit conflict with the Ninth Circuit. Pet. App. 10a-11a n.3. The First Circuit subsequently disagreed with the Eleventh Circuit's reasoning in *Dacostagomez*. *Laparra-Deleon*, 52 F.4th at 521. Five circuits have now weighed in on these questions, and at least three circuits have reaffirmed their decisions despite rehearing petitions, often over published dissents. The split is ripe and cannot be resolved short of this Court's intervention. Given how frequently this issue arises and the importance of this issue for immigration law, the Court should grant certiorari at this point to resolve the conflict.

A. There is a clear split over whether the government's "notice-by-installment" theory, *cf. Niz-Chavez*, 141 S. Ct. at 1479, supports entry of an in absentia removal order. The First and Ninth Circuits have held that a valid notice to appear—one that includes a date and time for an initial hearing—is required to support an in absentia removal order. These circuits hold 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 therefore cannot constitute valid notice under paragraph (2). *See supra*, pp. 12-13.

The Sixth Circuit treats any hearing notice as valid notice for purposes of paragraph (2). *See supra*, pp. 12. The Eleventh Circuit "disagree[d]" with the Ninth Circuit and has squarely found that where the government has served multiple hearing notices, those standalone hearing notices constitute a "change" in the hearing date and are independently sufficient as § 1229(a)(2) notice to support entry of in absentia order. *See supra*, p. 13.

The Fifth Circuit appears to straddle the split, or to triangulate it. That court has found that in absentia orders require that the hearing date must be included in the notice to appear, and cannot be supplemented by a later notice of hearing, seemingly in agreement with the First and Ninth Circuits. *See Rodriguez*, 15 F.4th at 355. However, that Court has also adopted judicially-created exceptions to application of that rule, which functionally seem to bring it closer to the side of the Sixth and Eleventh Circuits. *Campos-Chaves v. Garland*, 54 F.4th 314, 315 (5th Cir. 2022); *Spagnol-Bastos v. Garland*, 19 F.4th 802, 806 (5th Cir. 2021).

The five circuits that have addressed this issue handle the vast majority of petitions for review from the Board.[2]

This circuit conflict inevitably leads to unfair results. If Mr. Dacostagomez's case had remained venued in Arizona, under the current circuit split, he could have obtained rescission of his removal proceedings and applied to for relief to stay in the United

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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

States to continue to reside with his U.S. citizen wife and his children. Indeed, Mr. Dacostagomez resides in neither the Eleventh nor the Ninth Circuit; he has lived in Indiana for many years. Allowing the circuit split to persist would cause this type of inequity to continue.

B. This Court's intervention is required to resolve the conflict. Courts of appeals on both sides of the split have considered, and expressed disagreement with, the other courts' decisions. *E.g.*, Pet. App. 10a n.3; *Laparra-Deleon*, 52 F.4th at 521. Rehearing has been denied in the Fifth, Ninth and Eleventh Circuits. *See supra*, pp. 12-13.

The slim likelihood that the split could be resolved short of this Court's intervention is illustrated by the number of lower court judges who have opined on this issue in contrary ways. The Fifth Circuit denied rehearing en banc in *Rodriguez* in a nine-to-eight vote. *See supra*, p.12. Twelve judges dissented from denial of rehearing en banc in the Ninth Circuit's decision in *Singh*. *Id.* Given the depth of the disagreement, there is little likelihood that further percolation would yield additional clarity, much less lead to resolution of the issue.

C. Given the frequency with which these questions arise before the agency and the lower courts, and the importance for the system and for noncitizens and families impacted by the rule, the Court should decide this question without further delay.

For many years, the government has flouted the rules for issuance of notices to appear, preferring administrative ease over compliance with the statute. *See Pereira*, 138 S. Ct. at 2111. The agency's history

of failing to give proper notice has made this narrow issue into a matter of some significance for the immigration system itself. *See Rodriguez*, 31 F.4th at 938 (Elrod, J., dissenting from denial of rehearing en banc) (describing issue as "extraordinarily important" because of the number of in absentia orders affected); *Singh*, 51 F.4th at 382 (Collins, J., dissenting from denial of rehearing en banc) (noting "broad implications" of the issue).

Moreover, the frequency of the government's failure to give proper notice in removal proceedings has affected numerous noncitizens, many of whom are unaware of outstanding removal orders against them. Thus, not only is the issue of the utmost importance for affected noncitizens and their families, but it has come to affect a large number of people. Given the undoubted effects of any decision, the Court should take the opportunity to resolve these questions now.

II. This case presents a suitable vehicle for resolving the questions presented.

Petitioner's case would permit the Court to directly resolve whether the government's refusal to follow the notice statute affects the availability of in absentia proceedings in such cases.

The experience of Mr. Dacostagomez is a vivid example of the government's notice process and why Congress chose a different approach. The government first served a putative notice to appear that lacked the date and time of the removal proceedings (by personal service) and only later served a series of hearing notices (by mail) that provided the time and place of the hearings. Pet. App. 17a. The mailed notices were re-

turned to the Atlanta immigration court as undeliverable; yet Mr. Dacostagomez was ordered removed in absentia. Pet. App. 26a.

In Petitioner's view, the simplest resolution is also the most straightforward and the most sensible. A notice of hearing cannot qualify on its own as sufficient notice under § 1229(a)(2), absent a notice to appear, because to so hold would be to obviate the statutory requirement that the government issue a notice to appear. 8 U.S.C. § 1229(a)(1). Petitioner's case would squarely raise that question. This case would also permit the Court to address, if necessary, the narrower disagreement between the Ninth and Eleventh Circuits regarding whether a second or third notice of hearing can qualify as a "change" of hearing so as to trigger § 1229(a)(2), where the first notice did not.

That said, if the Court does not adopt this straightforward resolution of the question, it may find it helpful to grant and consolidate matters that diverge factually, so as to maximize the chance that the Court will be able to resolve these matters without the need for future briefing and argument. For that reason, the Court may wish to grant certiorari in this matter together with *Campos-Chaves v. Garland*, No. 22-674, to ensure that it is able to resolve both related circuit splits. Alternately, the Court may wish to hold this case and to grant certiorari in another case raising these legal issues.

III. The Eleventh Circuit's decision is wrong.

Under a correct interpretation of the statute, Mr. Dacostagomez was entitled to rescission of the in absentia removal order. Rescission would afford him a fresh hearing on the question of removal, and it would

allow him to argue why he should be allowed to remain in Indiana with his U.S.-citizen wife and children, and why he fears returning to Honduras.

A. The statute's text and structure both support Petitioner's contention that the government's "installment" notice system does not provide notice that triggers the in absentia removal order process.

1. A noncitizen is allowed to 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)." 8 U.S.C. § 1229a(b)(5)(C)(ii), Under *Niz-Chavez*, there is little dispute that the government's installation notice process fails to provide "notice in accordance with paragraph (1)." *Niz-Chavez* held that paragraph (1) requires a single document containing all the specified information, 141 S. Ct. at 1480-1485, and plainly, there was no such document in this case.

Nor could the notice of hearing provide a valid "paragraph (2)" notice for someone like Petitioner. 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 Judge Duncan explained in concurring in the denial of rehearing en banc in *Rodriguez*, one cannot "change or postpone[]" the time of a hearing that has not previously been scheduled. *Rodriguez*, 31 F.4th at 937 (Duncan, J., concurring in the denial of rehearing en banc); *Singh* 24 F.4th at 1319-1320; *Laparra-Deleon*, 52 F.4th at 520-521.

Indeed, *Pereira* already said this. In *Pereira*, this Court interpreted paragraph (2) as follows:

> 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. The Eleventh Circuit's reasoning made no account for this understanding of how § 1229(a)(2) functions, and its decision cannot be reconciled with that portion of *Pereira*.

The Eleventh Circuit distinguished between an initial notice of hearing and a subsequent notice of hearing. Pet. App. 9a. But for a second hearing notice to "change" the date or place, there would have to be one set previously, either by the notice to appear itself, or by some other hearing notice. And under *Pereira*, a notice of hearing cannot be used to reset a hearing date unless a date was already set, i.e., in the notice to appear. Stated another way, notices of hearing can give effective notice of a removal hearing only if the notice to appear was also valid.

2. The statute's structure confirms this straightforward interpretation of the statute's text.

Most fundamentally, the contrary reading of the statute would read out of the statute the requirement that the government initiate removal proceedings with a notice to appear. If either notice under § 1229(a)(1) (a notice to appear) or under § 1229(a)(2) were sufficient for a removal order, it would follow that the government could obtain an in absentia order

without providing *any* notice to appear under paragraph (1). That would run counter to the norm that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....'" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, Sullivan Statutes and Statutory Construction § 46.06 (6th ed. 2000)). In other words, the Eleventh Circuit overread the disjunctive language of § 1229a(b) in ways that overlooked the statutory context, and in particular the statutory mandate that the information contained in a notice to appear (including the legal authority for proceedings, factual allegations, and charges of removability) "shall be given" to noncitizens in removal proceedings. 8 U.S.C. § 1229(a)(1). Congress made such notice mandatory. The Eleventh Circuit's reading of the disjunctive language of § 1229a(b)(5) would render it optional.

Moreover, the Eleventh Circuit's reading of the statute would undermine 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 the Eleventh Circuit's reading, nothing in the statute would prevent the agency from scheduling a hearing date so close in time to the mailed notice of hearing that the noncitizen would not receive the hearing notice until days before the hearing; or even afterwards. This is not a hypothetical problem; cases in that posture have already come before this Court. *See, e.g.*, Pet. for Writ of Cert. 3, *Garcia v. Garland*, No. 21-5928 (U.S. Feb. 2, 2022) (notice of hearing mailed

three days before hearing, received five days afterwards). The purpose of § 1229(b)(1) is to afford the noncitizen an opportunity to secure counsel for the hearing; a notice-by-installment that gives no advance notice of the hearing is inconsistent with that purpose. That is another reason to reject the lower court's view.

B. The Eleventh Circuit reasoned heavily from the use of the disjunctive in the relevant statutes. Pet. App. 6a-10a. It is certainly true that the disjunctive is used in both 8 U.S.C. § 1229a(b)(5)(A) and 8 U.S.C. § 1229a(b)(5)(C)(ii). Its use does not support the outcome reached below, for at least three reasons.

First, as noted *supra* at 24, the Eleventh Circuit apparently overlooked the discussion of this interplay in *Pereira*, where this Court observed that "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.'" 138 S. Ct. at 2114 (brackets omitted). None of the three notices of hearing could have been a "change" from the initial hearing date, because the putative notice to appear set no date for an initial hearing, in contravention of the statute.

Second, the Eleventh Circuit did not apprehend that its reasoning that "paragraph (1) and paragraph (2) notices are alternatives," Pet. App. 10a n.3—allowing paragraph (2) notice to suffice where there was no valid notice to appear—would effectively read out of the statute Congress's carefully drafted notice to appear requirements. The lower court's unnatural reading of the statute would have significant consequences. It would permit removal even if no notice to

appear were ever drafted and served. It would overturn Congress' command not to schedule an initial hearing within 10 days of the initial notice to appear, to allow the noncitizen a chance to retain counsel.

Third, the Eleventh Circuit failed to perceive the work that paragraph (2) is designed to do. Congress sensibly wrote in the disjunctive because hearing dates may be changed, and often are, after initiation of the removal process. After a *valid* notice to appear begins removal proceedings, the removal process commonly takes months or even years. If § 1229a(b)(5)(A) were not written in the disjunctive so as to cover subsequent hearing notices as well as the date in the notice to appear, a noncitizen who absconded after the first hearing could not be removed in absentia. *See Laparra-Deleon*, 52 F. 4th at 521. The use of the disjunctive in § 1229a(b)(5) does not eliminate the requirement that the government provide a lawful charging document to initiate removal proceedings.

* * * * *

Had venue never been changed in Mr. Dacostagomez's case, his case would have remained in Arizona, and he could now seek rescission under the rule announced by the Ninth Circuit. He could seek a hearing on whether he would be permitted to remain with his family, as well as a hearing on his eligibility for asylum. Instead, he faces removal from the country without ever having his day in court. Petitioner's case perfectly illustrates the effect of the current patchwork interpretation of legal rules, a patchwork that only this Court can remedy. The Court should grant certiorari in this case, or should hold this case while it resolves these issues in another case that comes before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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