No. 22-884

IN THE

Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,

v.

VARINDER SINGH,
Respondent.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,

v.

RAUL DANIEL MENDEZ-COLÍN,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Per 8 U.S.C. § 1229a(b)(5)(C)(ii), a noncitizen who can show that he "did not receive notice in accordance with paragraph (1) or (2)" of 8 U.S.C. § 1229(a) may move to reopen an *in absentia* removal order. Although a "paragraph (1)" notice requires information about the time of a hearing, the purported "paragraph (1)" notices sent to respondents in this case did not contain such information.

The question presented is whether a noncitizen may move to reopen an *in absentia* removal order because he "did not receive notice in accordance with paragraph (1)," even if the Government later sent the noncitizen information about the time of his hearing.

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INTRODUCTION

Federal immigration law requires that, in every removal proceeding, the Government "shall" provide "a 'notice to appear'" that contains the "time . . . at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). This Court has already twice confirmed that Section 1229(a)(1) means what its plain language says. In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), this Court held that a document omitting the time of the hearing does not qualify as a "Notice to Appear," even if the Government subsequently sends the time of the hearing in some other document. Thanks to this Court's prior reprimands, the Government now provides noncitizens with Notices to Appear that include the time of the hearing.

But before the Government corrected course, respondents received deficient Notices to Appear, and the Government secured *in absentia* removal orders against them. The statute provides an unambiguous remedy for such noncitizens: They are eligible under Section 1229a(b)(5)(C)(ii) to request that an immigration judge rescind the *in absentia* order and allow them to argue their cases. The Government nevertheless asks this Court once again to set aside the plain language of the statute and make noncitizens bear the costs of the Government's failure to comply.

This Court should deny certiorari. It has twice rejected the Government's request to ignore or rewrite the relevant provisions here and need not do so a third time. Lower courts are faithfully applying *Pereira* and *Niz-Chavez* to *in absentia* removal cases. And in any

event, the question presented only applies to removal proceedings commenced before 2018.

STATEMENT OF THE CASE

A. Statutory background.

1. The Immigration and Nationality Act, 8 U.S.C. § 1101, *et. seq.*, requires that the Government "shall" provide "a 'notice to appear'" (NTA) to initiate "removal proceedings." *Id.* § 1229(a)(1). The NTA is sometimes shorthanded as a "paragraph (1)" notice because it is described in paragraph (1) of Section 1229(a). *Id.*

The statute also mandates the contents of an NTA. This document must advise the noncitizen of the time and place at which the removal hearing will be held and the consequences of failing to appear. 8 U.S.C. § 1229(a)(1)(G). It must also include other information, such as: the nature of the proceedings against the noncitizen; the legal authority under which the proceedings are conducted; the acts or conduct alleged to be in violation of the law; the charges against the noncitizen and the statutory provisions alleged to have been violated; the right to counsel; the requirement to immediately provide the Attorney General with the noncitizen's address and phone number; and the requirement to advise the Attorney General as to changes in address or phone number. *Id.* § 1229(a)(1)(A)-(F).

If there is a "change or postponement in the time and place of such proceedings," Section 1229(a)(2) requires another "written notice." The statute refers to this document as a "Notice of [C]hange" or "paragraph (2)" notice. 8 U.S.C. § 1229(a)(2). The Notice of Change (NOC) advises the noncitizen of the "new time and

place of the proceedings." *Id.* An NOC must include the consequences of failing to appear but does not need to provide the other information that an NTA must provide. *Id.*

2. Notwithstanding the statute's clear mandate that the NTA include "[t]he time and place at which the proceedings will be held," 8 U.S.C. § 1229(a)(1)(G)(i), for many years the Government issued NTAs that listed "TBD" or some equivalent phrase in lieu of the actual time and date of a hearing. The Government would instead provide time and date information on a separate form labeled a "notice of hearing" (NOH). Pet. 4.

In two recent cases, this Court held that a document that failed to include the time and place for a removal hearing did not qualify as an NTA. In those cases, the Court was considering whether a noncitizen was eligible for a form of discretionary relief that required the noncitizen to have been in the United States for ten years, measured from the time the noncitizen entered the United States until the time the noncitizen was "served a notice to appear under Section 1229(a)." 8 U.S.C. § 1229b(d)(1).

In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Supreme Court held that a noncitizen served a document that does not specify a time for a hearing is not "served a notice to appear under Section 1229(a)." *Id.* at 2114-15. The Court looked to the NOC provision and explained that "[by] allowing for a 'change or postponement' of the proceeding to a 'new time or place[,]'" that provision "presumed" that the NTA had already specified an original time and date. *Id.* at 2114. "Otherwise, there would be no time or place to 'change or postpone.'" *Id.*

In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2020), this Court made clear that supplementing an incomplete NTA (one without the time and date of the hearing) with a second document containing the time and date is still not serving "a notice to appear." *Id.* at 1480. This Court held that the pair of documents did not add up to an NTA, emphasizing that the statute referred to "'*a*' notice containing all the information Congress has specified," rather than permitting notice "by installment." *Id.* at 1480-81 (emphasis added).

Following *Pereira* in 2018, the Government began providing NTAs that specified the time and date of the hearing.

3. This case concerns the requirements for *in absentia* removals in light of the Government's pre-*Pereira* failure to provide proper NTAs. There are two distinct statutory provisions at issue.

Section 1229a(b)(5)(A) allows the Government to initially obtain an *in absentia* removal order when "written notice required under paragraph (1) or (2) of Section 1229(a)"—that is, an NTA or an NOC—"has been provided" and the noncitizen "fails to attend the hearing." *Id.*

Separately, Section 1229a(b)(5)(C)(ii) permits a noncitizen to seek rescission of an *in absentia* removal order in certain circumstances.

This case concerns only the first step of a three-part process. At the first step, the noncitizen must show that he is eligible to move to reopen the *in absentia* order. Noncitizens are eligible under Section 1229a(b)(5)(C)(ii) to move to reopen "at any time" if they can demonstrate that they "did not receive notice

in accordance with paragraph (1) or (2)" of Section 1229(a). 8 U.S.C. § 1229a(b)(5)(C)(ii).[1]

At the second step, once a noncitizen shows eligibility, an immigration judge "may" rescind the *in absentia* removal order, but rescission is not automatic. 8 U.S.C § 1229a(b)(5)(C). Finally, even if the immigration judge grants rescission of the *in absentia* removal order, the noncitizen must then still prove that he should not be removed from the United States. *Id.* § 1229a(c)(4)(A).

B. The *Singh* case.

1. Respondent Varinder Singh is an Indian citizen, practicing Sikh, and supporter of a Sikh political party. *Singh* A.R. 98. He sought asylum in the United States after members of an opposing political party attacked him several times and threatened to kill him. *Id.* 147, 151. He was interviewed by an asylum officer at the United States border, who determined that his asylum claim was credible. *Id.* 141.

Because he had entered the United States without inspection, Mr. Singh was served an NTA before he left the asylum interview. *Singh* A.R. 102-03. The NTA was incomplete: It ordered Mr. Singh to appear at a date and time "TBD." *Id.* Mr. Singh also provided the Government with the most reliable mailing address he had at the time, the home of a friend in Dyer, Indiana. *Id.* 98. Mr. Singh then moved to Hammond, Indiana, a

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[1] Section 1229a(b)(5)(C)(ii) also allows some noncitizens in federal or state custody to move to reopen their *in absentia* removal orders. That portion of Section 1229a(b)(5)(C)(ii) is not at issue in this case.

town near Dyer. *Id.* He lived in a home owned by the same friend whose address he had supplied. *Id.*

The Government then mailed a document to the Dyer, Indiana, address listing the date of Mr. Singh's removal hearing as January 29, 2021. *Singh* A.R. 130. In March 2017, Mr. Singh consulted with an immigration attorney, who told him he did not need to "worry too much" about his hearing yet, because it was still four years away. *Id.* 99.

But on October 29, 2018, the Government mailed a second document to the same Dyer, Indiana, address. *Singh* A.R. 17. This document accelerated Mr. Singh's hearing date by more than two years, setting it for just one month later (on November 26, 2018). *Id.* Mr. Singh did not receive the second document because his friend living at the Dyer address did not pass along the mail. *Id.* 99.

Mr. Singh did not appear at the November 2018 hearing. *Singh* A.R. 54. The Government was not prepared to proceed at that hearing, so the immigration judge sent a third document to the Dyer, Indiana, address, setting a hearing for December 12, 2018. *Id.* Mr. Singh did not receive the third document, either, and did not attend the December 2018 hearing. *Id.* 18, 100. Mr. Singh was ordered removed *in absentia*. *Id.* 122-23. The notification of *in absentia* removal was sent to the same Dyer, Indiana, address. *Id.*

2. Two months later, Mr. Singh's friend finally informed him of the documents sent to the Dyer, Indiana, address. *Singh* A.R. 99. With the help of a new attorney, Mr. Singh filed a motion to reopen. *Id.* 100. That motion argued that Mr. Singh was eligible

to move to reopen his *in absentia* removal order under Section 1229a(b)(5)(C)(ii). *Id.* 18-19. In the alternative, the motion relied on a different statutory provision, which allows a noncitizen to move to reopen an *in absentia* removal order for "exceptional circumstances." *Id.* 19. The immigration judge rejected both arguments and denied the motion to reopen. *Id.* 53-56. The Board of Immigration Appeals affirmed. *Id.* 3-4. The BIA decision predated this Court's instruction in *Niz-Chavez*.

3. Mr. Singh petitioned for review to the Ninth Circuit. The Ninth Circuit held that Mr. Singh was eligible to move to reopen his *in absentia* removal order under Section 1229a(b)(5)(C)(ii).

In particular, the Ninth Circuit "join[ed] the Fifth Circuit" and found that Mr. Singh satisfied the requirements of Section 1229a(b)(5)(C)(ii) because he neither received "notice in accordance with paragraph (1)" (as he had never received a document that qualified as an NTA) nor "notice in accordance with paragraph (2)" (as the document supplying date and time information did not qualify as an NOC). Pet. App. 8a-9a, 47a. In so holding, the Ninth Circuit rejected the Government's argument that an incomplete NTA could be "cured" by a subsequent document notifying the noncitizen of the date and time of his hearing. *Id.* 6a. Such an interpretation, it held, "contravenes the unambiguous statutory text and the Supreme Court's decision in *Niz-Chavez*." *Id.*

As to the statutory text, the Ninth Circuit explained that Section 1229(a) makes clear there can be no NOC without a complete NTA. Pet. App. 10a. "Th[e] text presupposes—and common sense confirms—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.* It also explained that the "statutory structure" of Section 1229(a) "resolves any doubt" because the NTA requires many pieces of information that the NOC does not, making clear that NOCs "are additions to, and not alternatives to, the Notice to Appear." *Id.* 11a.

As to precedent, the Ninth Circuit explained *Niz-Chavez* had already "rejected the government's two-step approach to providing notice because that approach was inconsistent" with the statute's requirements for an NTA. Pet. App. 7a.

4. The Ninth Circuit denied rehearing en banc. Pet. 8.

C. The *Mendez-Colín* case.

1. Respondent Raul Daniel Mendez-Colín became a lawful permanent resident of the United States over thirty years ago. *Mendez-Colín* A.R. 57. He married a U.S. citizen and has three U.S. citizen children. *Id.* 20.

In 2001, Mr. Mendez-Colín was stopped at the San Luis, Arizona, port of entry and served with an NTA after seeking to bring a noncitizen friend and her sick child into the United States. *Mendez-Colín* A.R. 12-13. The NTA listed the date and time for his removal hearing as "To be set." *Id.* 167-68. The Government subsequently scheduled multiple hearings for 2001 and 2002, which Mr. Mendez-Colín and his attorney attended. *Id.* 50.

On July 23, 2002, the Government sent Mr. Mendez-Colín's attorney a document scheduling an additional hearing for September 15, 2003, at 9:00 a.m. *Mendez-Colín* A.R. 157. But Mr. Mendez-Colín's

attorney was unable to maintain contact with him. *See id.* 156. Mr. Mendez-Colín did not attend the hearing and was subsequently ordered removed *in absentia*. *Id.*

2. Between 2003 and 2004, Mr. Mendez-Colín filed two motions to reopen his *in absentia* removal order, both based on provisions other than Section 1229a(b)(5)(C)(ii). Mr. Mendez-Colín filed a first motion to reopen on December 10, 2003. *Mendez-Colín* A.R. 13. The immigration judge denied the motion. *Id.* Mr. Mendez-Colín filed a second motion to reopen on February 10, 2004, which was again denied by the immigration judge. *Id.* Mr. Mendez-Colín appealed the second denial to the BIA. Pet. App. 48a-50a. The BIA rejected the appeal because Mr. Mendez-Colín had already been removed from the United States. *Id.* 13a-14a, 30a.

In January 2020, Mr. Mendez-Colín filed a document entitled "Motion to Review/Reinstate Appeal By Certification Per 8 C.F.R. § 1003.1(c)/Alternative Motion To Remand To Immigration Judge For Consideration Of Motion To Rescind Order Entered In Absentia/Removal Automatically Stayed By Operation Of 8 C.F.R. § 1003.23(b)(4)(ii)." An "appeal by certification" asks the BIA to take jurisdiction separate from the typical appeals process, typically at the Government's request. *Mendez-Colín* A.R. 15; 8 C.F.R. § 1003.1(c). This motion made two arguments. First, Mr. Mendez-Colín argued that he was eligible to move to reopen his *in absentia* removal order under Section 1229a(b)(5)(C)(ii). *Mendez-Colín* A.R. 16. Second, Mr. Mendez-Colín explained that the BIA's 2004 dismissal based on his removal from the United States was

erroneous in light of subsequent Ninth Circuit precedent. *Id.* 15-16 (citations omitted). The BIA rejected both arguments. Pet. App. 37a.

3. Mr. Mendez-Colín petitioned for review to the Ninth Circuit. The Ninth Circuit held that Mr. Mendez-Colín's arguments "match[ed] the substance of those raised in" *Singh*, which it decided on the same day. Pet. App. 54a. "For the reasons explained in" *Singh*, the Ninth Circuit held that Mr. Mendez-Colín was eligible to move under Section 1229a(b)(5)(C)(ii) to reopen his *in absentia* removal order. *Id.*

4. The Ninth Circuit denied rehearing en banc. Pet. 12.

REASONS FOR DENYING THE WRIT

The Court has seen this movie before. It has already provided clear guidance on the Government's failure to provide notices that comply with the federal immigration statute. In fact, it has done so twice over—in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Lower courts are faithfully applying this Court's precedent to cases stemming from those deficient notices. This Court need not intervene for a third time to reiterate that "notice-by-installment" simply will not "do the trick." *Niz-Chavez*, 141 S. Ct. at 1479.

The Government nonetheless argues for certiorari, suggesting that *Singh* will upend the immigration system. *See* Pet. 23-24. Such concerns are overblown. This Court should deny the petition.

I. The Government vastly overstates the importance of the question presented.

The Government speculates that *Singh*, by "hinder[ing]" its ability to obtain new *in absentia* removal orders, will create a "perverse incentive" for noncitizens to dodge immigration hearings. Pet. 24-25. And it claims that *Singh* "threatens to invalidate potentially tens of thousands" of existing *in absentia* removal orders. *Id.* 9 (quoting Pet. App. 47a).

Not so. There are three groups of noncitizens potentially impacted by the question presented. The Government overstates the impact *Singh* will have on each of the three.

1. *Singh* has no impact at all on noncitizens who receive a notice to appear in the future, nor on noncitizens who received an NTA since *Pereira*. The Government currently issues statutorily compliant NTAs and has been doing so since at least 2018, following *Pereira*. *Acceptance of Notices to Appear and Use of the Interactive Scheduling System*, Department of Justice (Dec. 21, 2018), https://perma.cc/D6HH-2DA8. As a result, the Government's concerns about "perverse incentive[s]" or "invalidat[ing]" removal orders do not apply at all to removal proceedings that began after *Pereira* or to any removal proceedings initiated in the future. *See* Pet. 9, 25.

2. The Government can easily ensure that *Singh* has no impact on noncitizens whose cases are currently pending but who were served a deficient NTA before *Pereira* (that is, cases that began more than five years ago but that are still ongoing). The Government need only reissue the NTA with the time of the hearing and all the other required information.

The Government can thus easily avoid any "perverse incentive[s]" or "invalidat[ion]" of existing removal orders. *See* Pet. 9, 25. And doing so does not impose an additional burden on the Government, as it already must send the noncitizen a document specifying the date and time of the hearing.

Indeed, *Singh* does not ask anything more from the Government than *Niz-Chavez* already demanded. If the Government does not provide new, complete NTAs to noncitizens who were served defective NTAs, those noncitizens will continue to accrue time that will make them eligible for relief from removal. *Niz-Chavez* thus already functionally requires the Government to provide new, complete NTAs to this group of noncitizens.

3. The Government overstates *Singh*'s impact on the remaining group of noncitizens: those who received a deficient NTA and have already been ordered removed *in absentia*. *See* Pet. 23-24. As an initial matter, *Singh* cannot create a "perverse incentive" to miss a hearing that has already happened. Pet. 25.

And the Government's suggestion that its removal orders will be "invalidate[d]" en masse, Pet. 9, skips multiple steps. The Government confuses the eligibility of these individuals simply to *move* for rescission under Section 1229a(b)(5)(C)(ii) with the prospect that their removal orders will actually be invalidated. The truth, however, is that it is not easy to obtain relief after an *in absentia* removal order.

The statute creates a three-step process for rescission and relief. The Ninth Circuit's decision only addressed the first step, proving eligibility under Section 1229a(b)(5)(C)(ii). *See* Pet App. 12a. After

proving eligibility, the noncitizen must satisfy a second requirement: The noncitizen must convince an IJ to actually reopen the case. The statute says such *in absentia* orders "may" be rescinded, not that rescission is automatic. 8 U.S.C. § 1229a(b)(5)(C). IJs can and do deny such motions where noncitizens have abused the system.

And there is yet a third hurdle: The noncitizen must still prove that he is eligible to remain in the country. 8 U.S.C. § 1229a(b)(5)(C)(ii). In other words, *Singh* does not offer any noncitizen a claim to stay in the country. It merely allows noncitizens with strong claims to press them, affording such noncitizens the most basic of procedural protections. Indeed, it is not clear that noncitizens without viable claims to remain in the United States would even attempt to reopen an *in absentia* removal order.

Only the small number of noncitizens with meritorious claims to remain in the United States will thus succeed in "invalidating" their removal order. What's more, the impact of any such invalidation must be considered in the context of a system designed to adjudicate hundreds of thousands of claims each year (and designed to find that handful of meritorious claims). *See Executive Office for Immigration Review Adjudication Statistics*, Department of Justice (Jan. 16, 2023), https://perma.cc/KZV9-QJ88. And, of course, any such invalidation is a result of the fact that the Government itself violated the terms of the statute for so many years. This Court should again reject the Government's efforts to absolve itself of the consequences of violating the statute.

II. The decisions below are correct.

Recall that there are two separate provisions at issue here. First, Section 1229a(b)(5)(A) allows the Government to initially obtain an *in absentia* removal order by showing that the "written notice required under paragraph (1)" (the Notice to Appear provision) "or paragraph (2)" (the Notice of Change provision) "has been provided" to the noncitizen. *Id.* Second, Section 1229a(b)(5)(C)(ii) allows noncitizens to move to reopen the *in absentia* order if they "did not receive notice in accordance with paragraph (1) or (2)." *Id.*

There is no dispute that the Government failed to provide respondents with complete NTAs, thereby denying them the written notice required under paragraph (1). *See* Pet. 5, 9. The question here is whether subsequently providing the noncitizen a document with the time and date of his hearing renders him ineligible to move to reopen under Section 1229a(b)(5)(C)(ii).

The answer is no. First, the Government cannot provide "notice in accordance with paragraph (2)" if it has not already provided "notice in accordance with paragraph (1)," because a paragraph (2) notice is an addition to, not a substitute for, a paragraph (1) notice. Second, even if there could be a proper NOC without a proper NTA, Section 1229a(b)(5)(C)(ii) still allows respondents to move to reopen their *in absentia* removal orders. Finally, public policy considerations militate against the Government's reading.

A. A Notice of Change requires an earlier, statutorily compliant Notice to Appear.

The Government claims that respondents' *in absentia* removal orders were proper because it

"provided notice in accordance with . . . paragraph (2)," as required under Section 1229a(b)(5)(A). *See* Pet. 20. But the Ninth Circuit correctly held that notice can be provided "in accordance with paragraph (2)" only if the Government has previously provided a statutorily compliant NTA. Pet. App. 10a. That holding follows directly from both the statutory text and this Court's decisions in *Pereira* and *Niz-Chavez*.

1. The statute mandates that an NTA "*shall* be given" in any removal proceeding. 8 U.S.C. § 1229(a)(1) (emphasis added). Providing an NOC does not relieve the Government of that statutory mandate. As this Court made clear in *Niz-Chavez*, NOCs are thus "supplemental notice[s]" that cannot replace NTAs. 141 S. Ct. at 1485.

Moreover, only an NTA can *set* the date and time of a removal hearing in the first instance. An NOC cannot do so. In *Pereira*, this Court held that, "[b]y 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." 138 S. Ct. at 2114. Where "[t]he [noncitizen] never got an *initial* 'time or place,'" there was "nothing to 'change.'" *Rodriguez v. Garland*, 31 F.4th 935, 937 (5th Cir. 2022) (Duncan, J., concurring in the denial of rehearing en banc) (emphasis in original).

Lest there be any doubt, Section 1229(a)(2)(A)(i) requires that the NOC detail "the *new* time or place of the proceedings[.]" *Id.* (emphasis added). Paired with the "change" and "postponement" language of Section 1229(a)(2)(A), the word "new" implies that there was an "old"—that is, prior—time or place that

is being modified. *See* Pet. App. 10a; *Rodriguez*, 31 F.4th at 937 (Duncan, J., concurring in the denial of rehearing en banc). An NOC, therefore, functions only to modify a previously set time or place, not to set the date and time for a hearing in the first instance.

2. The Government argues that its failure to provide a complete NTA should be excused because respondents were eventually sent a document containing information about the time and place of the hearing. *See* Pet. 19. The Government already tried this argument in *Niz-Chavez*, to no avail. *See Niz-Chavez*, 141 S. Ct. at 1479. Section 1229(a)(1) requires "*a* 'notice to appear.'" *Id.* (emphasis added). As the Court noted in *Niz-Chavez*, "[t]o an ordinary reader—both in 1996 and today—'a' notice would seem to suggest just that: 'a' single document containing the required information, not a mishmash of pieces with some assembly required." *Id.* at 1480.

Alternatively, the Government argues that "even if the first [NOC] that follows a defective NTA does not count as a 'change' to the time and place, the same cannot be said of a subsequent [NOC], which obviously 'change[s] or postpone[s]' the time in the prior [NOC]." Pet. 17. (citation and internal quotation marks omitted). This is another attempt to resurrect the "notice-by-installment" theory firmly rejected in *Niz-Chavez*. 141 S. Ct. at 1479-80. If the time and date cannot be spread across two documents, as *Niz-Chavez* held, it would be perverse to allow the Government to spread it across three or more. As the *Niz-Chavez* Court recognized, the statutory text itself refutes this reading. *Id.* Because the first NOC was void as it did not "change or postpone[] the time or place" of the removal proceeding, the second NOC has nothing to

"change or postpone[]" either. *See* 8 U.S.C. § 1229(a)(2)(A). Per the statutory text, until a complete NTA is sent, the time and place has not been set for the removal proceeding. Indeed, the last notices sent to each of the respondents set the time for a brand-new hearing—one that had not been previously scheduled and for which there was nothing to "change."

The Government's final fallback is that *Pereira* and *Niz-Chavez* "did not squarely address the issues here." Pet. 18. But it provides no explanation for why those cases' discussion of the statutory language would not apply with equal force to this case. *See id.*

3. What is worse, the Government's reading of the INA would empower the Government to obtain *in absentia* removal orders without ever satisfying the requirements of Section 1229(a)(1). An NOC need only include "the new time or place of the proceedings" and the consequences of a failure to appear. 8 U.S.C. §§ 1229(a)(2)(A)(i)-(ii). An NTA, by contrast, must also include six other categories of information including the charges against the noncitizen and the right to counsel. *Id.* §§ 1229(a)(1)(A)-(G). The statute does not distinguish between the time requirement of the NTA and any of its other requirements. If the Government is correct that an NOC can exist without a complete NTA, the Government could remove a noncitizen *in absentia* without ever notifying the noncitizen of the charges against him or of his right to counsel. Congress has expressly directed otherwise.

B. Noncitizens who did not receive a valid Notice to Appear can move to reopen an *in absentia* order under Section 1229a(b)(5)(C)(ii).

Even if a Notice of Change without a proper Notice to Appear can be the basis for an *in absentia* removal order under Section 1229a(b)(5)(A), respondents are still eligible to move to reopen under Section 1229a(b)(5)(C)(ii). That's for two reasons.

1. Section 1229a(b)(5)(C)(ii) makes a noncitizen eligible for reopening if he "did not receive notice in accordance with paragraph (1) *or* (2)." 8 U.S.C. § 1229a(b)(5)(C)(ii) (emphasis added). This wording makes clear that a noncitizen is eligible under 1229a(b)(5)(C)(ii) if the noncitizen *either* did not receive a valid NTA *or* did not receive a valid NOC.

Consider some everyday analogues of Section 1229a(b)(5)(C)(ii). If the return policy of a favorite online shopping site states, "You do not need to pay for your purchase if your delivery does not arrive at the correct time or location," we would understand that we don't need to pay if the delivery arrived at *either* the wrong time *or* the wrong location. Similarly, if a teacher says, "Raise your hand if you did not receive your exam booklet or answer sheet," we would raise our hands if we *either* did not receive our exam booklet *or* did not receive our answer sheet. When the statute says a noncitizen can move to reopen if he "did not receive notice in accordance with paragraph (1) or (2)," then, it means that he can move to reopen if he *either* did not receive "notice in accordance with paragraph (1)" *or* did not receive "notice in accordance with paragraph . . . (2)." Respondents here indisputably did

not receive "notice in accordance with paragraph (1)" and so can move to reopen.

A contrary theory of the statute would lead to absurd results. Consider a noncitizen who receives notice in accordance with paragraph (1), with time and place included. But suppose that the hearing is then moved to a new time and place, that the noncitizen indisputably never receives notice in accordance with paragraph (2) informing him of the change, and that he therefore misses the hearing and is ordered removed *in absentia*. If respondents' reading of the statutory provision is incorrect, the noncitizen would not be eligible under Section 1229a(b)(5)(C)(ii) because he received notice in accordance with paragraph (1), even though he never received notice in accordance with paragraph (2). The noncitizen has no recourse, even though no one disputes that he had no knowledge of the hearing he missed.

To avoid that illogical outcome, the Government insists that the notice that matters for Section 1229a(b)(5)(C)(ii) is notice of the "proceeding" the noncitizen did not attend. Pet. 15. But the Government makes that argument based on the phrase "proceeding" in Section 1229a(b)(5)(A). No such word appears in Section 1229a(b)(5)(C)(ii). And this reading would still allow for a result that is anathema to the statute. Imagine a noncitizen who receives a document purporting to change the date and time of his hearing, but who never received an NTA (or, alternatively, received an NTA that omitted critical information about the charges against him). Under the Government's theory, that noncitizen would not be eligible to move to reopen his *in absentia* removal order. *See supra* Part II.A.3. He, too, has no recourse,

even though he never received the information that the statute requires from an NTA.

Because respondents never received "notice in accordance with paragraph (1)," each is eligible to move for reopening under Section 1229a(b)(5)(C)(ii). And that result holds even if the Government subsequently sent them "notice in accordance with paragraph (2)."

2. Even if the Government provides a noncitizen with both an NTA and an NOC, a noncitizen who did not actually *receive* either document is eligible to move to reopen under Section 1229a(b)(5)(C)(ii). So, for instance, Mr. Singh can still move to reopen because he can prove that he did not actually *receive* the date and time information before he missed his hearing. *See* Pet. App. 3a.

The Government ignores that Sections 1229a(b)(5)(A) and 1229a(b)(5)(C)(ii) differ in a crucial respect. The Government can initially obtain an *in absentia* removal order under Section 1229a(b)(5)(A) simply by showing that "written notice . . . has been *provided*"—for instance, by showing that it put the relevant document in the mail. *Id.* (emphasis added). But the noncitizen can move to reopen the order under Section 1229a(b)(5)(C)(ii) if he "did not *receive* notice." *Id.* (emphasis added).

What's more, under Section 1229a(b)(5)(A), "written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided" by the noncitizen. *Id.* That presumption is expressly limited to "this subparagraph"—that is, Section 1229a(b)(5)(A). *Id.* There's no such

presumption clause in Section 1229a(b)(5)(C)(ii). Its omission further demonstrates that when it comes to the possibility of reopening an *in absentia* removal order, Congress intended a focus on *actual* receipt of the document in question, not just on whether the Government put the document in the mail. After all, "[w]here Congress includes particular language in one section of a statute but omits it in another," courts should assume Congress intended the two to be construed differently. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted)).

Noncitizens who "did not receive" the relevant NOC are thus eligible to move for reopening under Section 1229a(b)(5)(C)(ii).

C. Policy considerations further support the Ninth Circuit's analysis.

Not only do the plain text of the statute and this Court's recent precedent compel the result in this case, but policy considerations also counsel against the Government's reading.

First, it is "well established" that noncitizens in removal proceedings are entitled to Fifth Amendment due process protections. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). For this reason, Congress designated Section 1229a(b)(5)(C)(ii) as a counterweight to the unusual procedure of *in absentia* removal, allowing noncitizens to move for reopening "at any time" if an *in absentia* removal order is entered without statutorily required notice. *Id.*

Second, *Niz-Chavez* already considered the policy implications of allowing additional forms to substitute for a single complete NTA. As in this case, the

Government argued in *Niz-Chavez* that "it would be free to send a person who is not from this country—someone who may be unfamiliar with English and the habits of American bureaucracies—a series of letters . . . which the individual [noncitizen] would have to save and compile in order to prepare for a removal hearing." *Niz-Chavez*, 141 S. Ct. at 1485. Indeed, *in absentia* removal orders have been entered against noncitizens who face language barriers and "against individuals who arrived in court minutes after the entry of the removal order, were present in the courthouse (but not the courtroom), and even against individuals with mental incompetence who failed to follow the judge's directives."[2]

The plain text of the statute makes clear the Ninth Circuit is correct. But were there any doubt, policy considerations militate in favor of that holding as well.

III. There is no circuit split that warrants this Court's intervention.

There are three related cases currently before this Court: *Singh*, *Mendez-Colín*, and *Campos-Chaves v. Garland*, 54 F.4th 314 (5th Cir. 2022) (No. 22-674). There is no conflict among these three cases; nor do

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[2] Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. Cal. L. Rev. 181, 220 (2017), https://perma.cc/T6BJ-3W5F; *see* Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court*, 168 U. Pa. L. Rev. 817, 823-24, 861-64 (2020), https://perma.cc/PGL8-2MTS; Asylum Seeker Advocacy Project & Catholic Legal Immigration Network, Inc., *Denied a Day in Court: The Government's Use of* In Absentia *Removal Orders Against Families Seeking Asylum*, 6 (2019), https://perma.cc/ET8Z-LEZR.

any of the three pose a conflict with any published decision in any other circuit.

1. a. There is no disagreement between the Fifth Circuit's *Campos-Chaves* opinion and the Ninth Circuit's opinions in *Singh* or *Mendez-Colín*.

As a threshold matter, *Campos-Chaves* is a per curiam opinion with only three sentences of analysis. *Campos-Chaves* did not address the question presented here: whether a noncitizen can move to reopen his *in absentia* removal order under 1229a(b)(5)(C)(ii). Instead, *Campos-Chaves* addressed a different question: whether "the IJ lacked authority to conduct the removal proceedings" in the face of a deficient NTA. 54 F.4th at 315. The circuit courts are entirely in agreement on this IJ authority issue. *See, e.g.*, *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1192-93, 1193 n.7 (9th Cir. 2022). In particular, Mr. Campos-Chaves would have lost his claim in the Ninth Circuit for the same reason he lost his claim in the Fifth.

Moreover, *Campos-Chaves* addressed a materially different legal issue than *Singh*. Mr. Campos-Chaves "[did] not dispute that he also received the subsequent [NOC]" for the hearing that he missed. *Campos-Chaves*, 54 F.4th at 315. But Mr. Singh did *not* receive the Notice of Change for the hearing he missed. Pet. App. 3a. And were there any doubt, the controlling Fifth Circuit case and the only one to actually analyze 1229a(b)(5)(C)(ii), *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), held that a noncitizen who received an incomplete NTA can move to reopen his *in absentia* removal order under Section 1229a(b)(5)(C)(ii). 15 F.4th at 354-56. The Ninth Circuit in *Singh* explicitly

"join[ed] the Fifth Circuit" because it agreed with *Rodriguez*. *See* Pet. App. 8a.

b. Nor is there any split between *Campos-Chaves* and *Mendez-Colín*. To start, *Mendez-Colín* is an unpublished opinion and does not bind the Ninth Circuit.

Additionally, in the Ninth Circuit's view, the arguments in *Mendez-Colín* "match the substance of those raised in" *Singh*. Pet. App. 54a. For essentially the same reasons that *Singh* does not conflict with *Campos-Chaves*, neither does *Mendez-Colín*. First, *Campos-Chaves* did not address the issue in *Mendez-Colín*, namely eligibility for a Section 1229a(b)(5)(C)(ii) motion. *Campos-Chaves*, 54 F.4th at 315. And second, in *Mendez-Colín*, the Government did not argue, and the Ninth Circuit did not consider, whether the fact that a noncitizen "received the [NOC] (or does not dispute receiving the [NOC])" was legally relevant.

Alternatively, the Government suggests review is warranted in *Mendez-Colín* because *Mendez-Colín* involves "attendance at one or more hearings," unlike *Singh* or *Campos-Chaves*, where respondents never attended a hearing. Pet. 26. The Government does not explain why "attendance at one or more hearings" would make a legal difference, does not point to any decision or statutory provision suggesting it does so, and does not claim there is any circuit split regarding "attendance at one or more hearings."

2. Nor are there any decisions from other circuits that conflict with *Singh*, *Mendez-Colín*, or *Campos-Chaves*.

a. The First Circuit's rule does not conflict with any of the three cases currently before this Court. The

First Circuit held that an *in absentia* order may be reopened if the noncitizen was sent an incomplete Notice to Appear—even if the government later sent date and time information for the hearing missed. *See Laparra-Deleon v. Garland*, 52 F.4th 514, 520 (1st Cir. 2022) In so holding, the First Circuit announced that its "conclusion accords with two of our sister circuits"—the Fifth Circuit (in *Rodriguez*) and the Ninth Circuit (in *Singh* and *Mendez-Colín*). *Id.*

b. Second, the Government is wrong to contend that *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019), creates a split. *See* Pet. 21. *Santos-Santos*, decided in 2019, predates *Niz-Chavez*, and the Sixth Circuit has not squarely considered the issue since *Niz-Chavez*. Given the Court's clear instruction in *Niz-Chavez* that an NTA without date and time is statutorily incomplete even if supplemented by a document specifying date and time, the Sixth Circuit will likely reach the same conclusion as the First, Fifth and Ninth Circuits when it considers the question with the benefit of *Niz-Chavez*.

Moreover, any discussion in *Santos-Santos* of the question presented here was dicta, as the Sixth Circuit held that the noncitizen in *Santos-Santos* forfeited any argument about lack of statutorily compliant notice. 917 F.3d at 491. As the Sixth Circuit has explained, "*Santos-Santos* ultimately did not need to resolve the question" and the Circuit has "yet to take a binding position." *Lakhvir Singh v. Garland*, 2022 WL 4283249, at *8 (6th Cir. 2022).

c. Third, the Government is wrong to suggest that *Dacostagomez-Aguilar v. U.S. Att'y Gen.*, 40 F.4th 1312 (11th Cir. 2022), creates a split. *See* Pet. 20. As the Government concedes, the Eleventh Circuit's

decision in that case "ultimately turned on" a separate statutory provision not implicated by the question presented here—the provision governing the notice due to noncitizens who fail to apprise the government of their current mailing address. *Id.* 27. And the Government concedes "[t]here is no circuit conflict" on that provision. *Id.*

That *Dacostagomez-Aguilar* creates no split is confirmed by a recent unpublished opinion in the Eleventh Circuit, *Mendoza-Ortiz v. U.S. Att'y Gen.*, 2023 WL 2519598 (11th Cir. 2023). That case did not implicate the separate statutory provision decisive in *Dacostagomez-Aguilar*. And in that case, the Eleventh Circuit aligned with *Laparra-Deleon*, *Rodriguez*, and *Singh* in ruling that the noncitizen was eligible for rescission "[b]ecause he never received a single document that contained all the information required to be in an NTA." *Mendoza-Ortiz*, 2023 WL 2519598, at *5.

IV. The cases pending before this Court are unsuitable vehicles for the question presented.

1. None of the three cases in which the Government urges certiorari are clean vehicles for resolving the question the Government poses.

a. It is not clear that a decision from this Court reversing the Ninth Circuit would affect the ultimate outcome in either *Singh* or *Mendez-Colín*. Independent of the Ninth Circuit's decisions, respondents in both cases have alternative bases to rescind their *in absentia* removal orders. Mr. Singh has also moved to reopen under a different statutory provision, Section 1229a(b)(5)(C)(i), because his failure to appear was due to "exceptional circumstances." Pet. App. 2a. The

Ninth Circuit did not address this argument. Mr. Mendez-Colín also argued that the BIA was wrong when it dismissed an appeal on the basis of outdated case law on the so-called "departure bar." *Id.* 57a-58a (citing *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010)). The Ninth Circuit did not rule on that argument, either.

In addition, *Mendez-Colín* did not come to the Ninth Circuit on a petition for review of a straightforward denial of a Section 1229a(b)(5)(C)(ii) motion. The procedural posture is far more complex: *Mendez-Colín* reviews the denial of a "Motion to Review/Reinstate Appeal By Certification Per 8 C.F.R. § 1003.1(c)/Alternative Motion to Remand to Immigration Judge for Consideration of Motion to Rescind Order Entered in Absentia/Removal Automatically Stayed by Operation of 8 C.F.R. § 1003.23(b)(4)(ii)." *Mendez-Colín* A.R. 11. Among other things, Mr. Mendez-Colín asked for the BIA to take "jurisdiction by certification," which is usually invoked by the Government, not a noncitizen, and is a creature of BIA regulations, not of the INA statute itself. *See id.* 14.

b. Nor is *Campos-Chaves* a suitable vehicle. The exceedingly brief appellate opinion in that case did not even evaluate whether the noncitizen could move to reopen his *in absentia* removal order under Section 1229a(b)(5)(C)(ii). *Campos-Chaves*, 54 F.4th at 315. Neither the panel briefing nor the opinion even cites the Section 1229a(b)(5)(C)(ii) or Section 1229a(b)(5)(A) *in absentia* removal provisions. *Campos-Chaves*, 54 F.4th at 315; Petr. C.A. Br. at vii, *Campos-Chaves*, *supra* (No. 20-60262). Indeed, not only did the noncitizen in *Campos-Chaves* concede receiving the

documents in question, but the Government maintained below that he in fact "waived" *any* argument under Section 1229a(b)(5)(C)(ii). Resp. C.A. Br. at 9 n.3, *Campos-Chaves, supra* (No. 20-60262). So the question presented was neither pressed, nor passed upon, below.

2. Additionally, the Government proposes a question presented that is not squarely addressed by *any* of the three cases currently before this Court. The Government has asked this Court to resolve "whether the failure to receive, in a single document, all of the information specified in paragraph (1) of 8 U.S.C. 1229(a) precludes an additional document from providing adequate notice under paragraph (2), and renders any in absentia removal order subject, indefinitely, to rescission." Pet. I.

But none of the pending cases seem to tee up that question. *Singh* and *Mendez-Colín* feature additional *documents*, plural, not "an" additional document. And the Government explicitly argues that a case involving provision of multiple NOCs might require a separate legal analysis and different outcome than a case involving only one NOC. Pet. 17-18. The Government suggests that *Mendez-Colín* requires separate consideration because that case featured "attendance [at] at least one hearing," but "attendance [at] at least one hearing" forms no part of the question presented. *Id.* 22-23 n.2. Nor does whether a noncitizen "received the [NOC] (or [did] not dispute receiving the [NOC])"—the dispositive fact in *Campos-Chaves*—form any part of the question presented.

If the Government seeks this Court's answer to its chosen question presented, this Court should await a vehicle that actually *raises* that question. *Laparra-*

Deleon was such a case: It featured "an additional document," singular (a single NOC), no attendance at "at least one hearing," and no concession of receipt. The Government protests that a case like *Laparra-Deleon* does not "squarely address the application of paragraph (2) to the factual scenarios here, involving multiple subsequent [NOCs] (*Singh*) and attendance [at] at least one hearing (*Mendez-Colín*)." Pet. 22-23 n.2. But of course, the Government's question presented does not ask about "the application of paragraph (2)" to cases involving "multiple subsequent" NOCs or attendance at "at least one hearing."

Indeed, this Court could grant certiorari on all three cases and *still* not resolve the question presented. Rather than retrofit an answer to the question presented by considering three cases that do not tee that question up, this Court should await a clean vehicle.

3. If this Court nonetheless decides to grant certiorari at this juncture, it should not grant all three cases. It should instead grant *Campos-Chaves*, the first-filed of the three cases (filed January 18, 2023) and hold *Singh* and *Mendez-Colín* pending the disposition of *Campos-Chaves*. That's the practice for which the Government typically argues when this Court is faced with related petitions. *See, e.g.*, Pet. at 7, *United States v. Home Concrete & Supply, LLC*, 564 U.S. 1066 (2011) (No. 11-139).

The Government asks this Court to depart from its normal practice and grant certiorari in all three cases to answer the question presented "in full view of the considerations raised by three scenarios." Pet. 26. But three sows' ears still do not a silk purse make.

Each of the three pending cases is a flawed vehicle, and adding them together will not fix those flaws.

* * *

The Government's request for this Court to grant certiorari in even one case, let alone three, does not pass muster, given that the issue is of declining importance, that there is no split among the circuits, and that all three of the pending cases are unsuitable vehicles. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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