No. 22-674

In the Supreme Court of the United States

MORIS ESMELIS CAMPOS-CHAVES, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under 8 U.S.C. 1229a(b)(5), a noncitizen may be ordered removed in absentia when he "does not attend a [removal] proceeding" "after written notice required under paragraph (1) or (2) of [8 U.S.C. 1229(a)] has been provided" to him or his counsel of record. 8 U.S.C. 1229a(b)(5)(A). An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen filed at any time" if the noncitizen subject to the order demonstrates that he "did not receive" such notice. 8 U.S.C. 1229a(b)(5)(C)(ii).

The question presented is 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.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-2a) is reported at 54 F.4th 314. A prior opinion of the court of appeals (Pet. App. 3a-4a) is reported at 43 F.4th 447. The decisions of the Board of Immigration Appeals (Pet. App. 5a-11a) and the immigration judge (Pet. App. 12a-14a, 15a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2022, and petitions for rehearing were denied on the same date (Pet. App. 1a). The petition for a writ of certiorari was filed on January 18, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that a noncitizen placed

in removal proceedings be given "written notice" of certain information. 8 U.S.C. 1229(a)(1) and (2).* Two paragraphs in 8 U.S.C. 1229(a) specify the notice required.

Paragraph (1) of Section 1229(a) is entitled "Notice to appear." 8 U.S.C. 1229(a)(1) (emphasis omitted); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-587. It provides that "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," among other things, the nature of the proceedings against the noncitizen, the legal authority for the proceedings, the charges against the noncitizen, the fact that the noncitizen may choose to be represented by counsel, the "time and place at which the proceedings will be held," and the "consequences" under 8 U.S.C. 1229a(b)(5) "of the failure * * * to appear." 8 U.S.C. 1229(a)(1). To provide the notice required under paragraph (1), the government uses a form labeled "Notice to Appear." *E.g.*, Administrative Record (A.R.) 174 (emphasis omitted); see A.R. 174-176. That form, which this brief refers to as an NTA, has space for the government to fill in the time and place at which the proceedings will be held. See, *e.g.*, A.R. 174.

Paragraph (2) of Section 1229(a) is entitled "Notice of change in time or place of proceedings." 8 U.S.C. 1229(a)(2) (emphasis omitted); IIRIRA § 304(a)(3), 110 Stat. 3009-588. It provides that, "in the case of any change or postponement in the time and place of [the]

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* This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

proceedings," "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" "the new time or place of the proceedings" and "the consequences" under Section 1229a(b)(5) of "failing * * * to attend." 8 U.S.C. 1229(a)(2)(A). To provide the notice required under paragraph (2), the government uses a form labeled "Notice of Hearing." *E.g.*, A.R. 171 (capitalization altered). That form, which this brief refers to as an NOH, has space for the immigration court to fill in the new time and place of the proceedings. See, *e.g.*, *ibid.*

Section 1229a(b)(5) specifies the consequences of failing to appear at a scheduled proceeding. It provides that "[a]ny alien who, after written notice required under paragraph (1) or (2)" of Section 1229(a) "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 Department of Homeland Security (DHS) "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). "The written notice * * * shall be considered sufficient for purposes of [Section 1229a(b)(5)(A)] if provided at the most recent address provided under [8 U.S.C.] 1229(a)(1)(F)," *ibid.*, which requires the noncitizen to provide the government with a "written record" of his address and "any change of [his] address." 8 U.S.C. 1229(a)(1)(F)(i) and (ii); see 8 U.S.C. 1229(c) ("Service by mail under [Section 1229] shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with [Section 1229(a)(1)(F)]."); *In re G-Y-R-*, 23 I. & N. Dec. 181, 189 (B.I.A. 2001) (explaining that if a notice

"reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper service will have been effected").

An order of removal that was entered in absentia "may be rescinded" "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)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Petitioner is a native and citizen of El Salvador. Pet. App. 15a. On January 24, 2005, he entered the United States without inspection by wading across the Rio Grande near Laredo, Texas. A.R. 173, 176.

On January 27, 2005, DHS served petitioner with an NTA. A.R. 175; see A.R. 174-176. The NTA charged that petitioner was subject to removal because he was a noncitizen present in the United States without being admitted or paroled. A.R. 176; see 8 U.S.C. 1182(a)(6)(A)(i). The NTA ordered petitioner to appear for removal proceedings at a time "to be set." A.R. 174.

On May 24, 2005, the immigration court mailed to petitioner an NOH specifying that his case had been scheduled for a hearing on September 20, 2005, at 9 a.m., in San Antonio, Texas. A.R. 171. The NOH was mailed to petitioner at an address in Houston, Texas, that he had provided to DHS. See A.R. 171, 172, 174. On September 20, 2005, petitioner failed to appear at his scheduled hearing and the immigration judge (IJ) ordered him removed in absentia. Pet. App. 15a-17a.

3. Thirteen years later, in September 2018, petitioner filed a motion to reopen his removal proceedings, asserting that, in light of his reading of this Court's decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), he

"never received proper statutory notice" under Section 1229(a) because his NTA did not specify the time of his removal hearing. A.R. 76; see A.R. 71-160. The IJ denied the motion, explaining that a noncitizen "should not be able to make himself unreachable, and then later ask to have his case reopened because he did not receive notice." Pet. App. 14a (quoting *Gomez-Palacios* v. *Holder*, 560 F.3d 354, 361 (5th Cir. 2009)); see *id.* at 12a-14a.

The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 5a-11a. The Board explained that in *In re Pena-Mejia*, 27 I. & N. Dec. 546 (B.I.A. 2019), it had held that rescission of an in absentia removal order is not required "where an alien did not appear at a scheduled hearing after being served with an NTA that did not specify the time and place of the initial removal hearing, so long as a subsequent NOH specifying that information was properly sent to the alien." Pet. App. 8a (citing *Pena-Mejia*, 27 I. & N. Dec. at 548-549). The Board found it "undisputed" in this case that petitioner, "after having been served with an NTA, was subsequently served with an NOH providing the time and place information for his removal hearing." *Id.* at 7a. The Board observed that petitioner "has never challenged the proper service of said NOH." *Ibid.*; see *id.* at 10a ("Proper service of the NOH has not been contested."). The Board therefore determined that petitioner's in absentia removal order was not subject to rescission for lack of notice. *Id.* at 8a.

4. The court of appeals denied petitioner's petition for review in a published decision. Pet. App. 3a-4a. The court observed that although petitioner initially received an NTA that did not specify the time of his removal hearing, he "does not dispute that he also received the subsequent NOH." *Id.* at 4a. In the court's

view, "[t]he fact that petitioner received the NOH (or does not dispute receiving the NOH)" rendered the case "distinguishable" from *Rodriguez* v. *Garland*, 15 F.4th 351 (5th Cir. 2021), reh'g en banc denied, 31 F.4th 935 (5th Cir. 2022), in which the court had granted relief to a noncitizen who had "received an undated NTA" but had "not receive[d] a subsequent [NOH]." Pet. App. 4a. The court noted that in *Spagnol-Bastos* v. *Garland*, 19 F.4th 802 (5th Cir. 2021) (per curiam), it had deemed *Rodriguez* inapplicable where a noncitizen "failed to provide [his] address" to DHS. Pet. App. 4a (citing *Spagnol-Bastos*, 19 F.4th at 807-808). The court reasoned that if *Rodriguez* is inapplicable where a noncitizen fails to "giv[e] the Government a good address, then *a fortiori*" *Rodriguez* is inapplicable where the noncitizen "in fact receives the NOH (or does not dispute receiving it)." *Ibid.*

5. Petitioner petitioned for rehearing by the panel and, separately, for rehearing by the en banc court, contending that the panel's reliance on *Spagnol-Bastos* was misplaced because that decision had "turned on an express statutory provision under which a noncitizen forfeits his right to notice if he 'has failed to provide the address' at which he can be reached." Pet. C.A. Pet. for Panel Reh'g 5 (quoting 8 U.S.C. 1229a(b)(5)(B)); see Pet. C.A. Pet. for Reh'g En Banc 10-11. Petitioner argued that the provision at issue in *Spagnol-Bastos* had "no bearing here because [petitioner] *did* provide immigration authorities with an accurate mailing address." Pet. C.A. Pet. for Panel Reh'g 2; see Pet. C.A. Pet. for Reh'g En Banc 11.

The court of appeals denied petitioner's petitions for rehearing, Pet. App. 1a, but amended its opinion by replacing the discussion of *Spagnol-Bastos* with a citation

to Judge Collins's dissent from the denial of rehearing en banc in *Singh* v. *Garland*, 51 F.4th 371 (9th Cir. 2022), which described the prior opinion in this case as "holding that, despite an earlier NTA that lacked date and time information, a subsequent valid NOH will support removal in absentia if the alien fails to attend the hearing noticed in the NOH and the alien 'in fact receives the NOH (or does not dispute receiving it),'" *id.* at 381 n.5 (quoting Pet. App. 4a); see Pet. App. 2a.

DISCUSSION

Petitioner did not receive, in a single document, all of the information specified in paragraph (1) of 8 U.S.C. 1229(a). Instead, petitioner received an NTA that stated that the time of his removal hearing was "to be set." A.R. 174. But he then received (or does not dispute receiving) an NOH that specified the time of his hearing. Pet. App. 2a; see Pet. 24 (acknowledging that the government "served a hearing notice that provided that information"). The question presented is whether the failure to receive, in a single document, all of the information specified in paragraph (1) precludes the NOH from providing adequate notice under paragraph (2), and renders petitioner's in absentia removal order subject to rescission. See 8 U.S.C. 1229a(b)(5)(C)(ii).

In *Garland* v. *Singh*, No. 22-884 (filed Mar. 10, 2023), the government has filed a petition for a writ of certiorari seeking review of two decisions of the Ninth Circuit raising the same question: *Singh* v. *Garland*, 24 F.4th 1315, reh'g en banc denied, 51 F.4th 371 (2022), and *Mendez-Colin* v. *Garland*, No. 20-71846, 2022 WL 342959 (Feb. 4, 2022), reh'g en banc denied, 50 F.4th 942 (2022). For the reasons stated in that petition, the Fifth Circuit's decision in this case is correct: The NOH that petitioner received qualified as valid notice under para-

graph (2) because it changed a "to be set" time to a specific time. See Pet. at 14-20, *Garland* v. *Singh*, *supra* (No. 22-884) (*Singh* Pet.). The Fifth Circuit's decision in this case implicates a circuit conflict on an important question of federal law. See *id.* at 22-25. Petitioner would have been entitled to rescission of his in absentia removal order in the Ninth Circuit, which has held that unless a noncitizen receives all of the information specified in paragraph (1) in "a single document," "any *in absentia* removal order directed at the noncitizen is subject to rescission." *Singh*, 24 F.4th at 1317; see *Singh* v. *Garland*, 51 F.4th 371, 381 n.5 (9th Cir. 2022) (Collins, J., dissenting from the denial of rehearing en banc).

For the reasons stated in the government's petition in *Singh*, this Court should grant both the petition in *Singh* and the petition in this case. See *Singh* Pet. at 25-26. Granting both petitions would allow this Court to consider the proper interpretation of the INA's in absentia removal provisions in full view of the somewhat different scenarios presented by the two Ninth Circuit cases and this case: (1) an NTA with a TBD (*i.e.*, to be determined) time, followed by multiple NOHs (*Singh*); (2) an NTA with a TBD time, followed by multiple NOHs and attendance at one or more hearings (*Mendez-Colin*); and (3) an NTA with a TBD time, followed by a single NOH (this case). Each of those scenarios recurs frequently. And by granting the petition in *Singh* and the petition in this case, the Court would be able to consider all three of them at once.

If, however, the Court were inclined to grant only one petition, the Court should grant the petition in *Singh*. Because that petition presents two of the three scenarios noted above (*Singh* and *Mendez-Colin*), granting that petition would allow the Court to cover more

ground than granting the petition in this case, which presents only one scenario. And the Ninth Circuit panel and dissent from the denial of rehearing en banc in *Singh* addressed the single-NOH scenario as part of their statutory analysis. See *Singh*, 24 F.4th at 1320 (stating that "a 'change'" for purposes of paragraph (2) "is not possible" unless "the Notice to Appear provided in paragraph (1) * * * included a date and time"); *Singh*, 51 F.4th at 378 (Collins, J., dissenting from the denial of rehearing en banc) ("If the time and place of a hearing were listed in an NTA as 'To Be Set' or 'TBD,' a subsequent NOH that newly provides a particular date, time, and place certainly reflects, in the ordinary sense of the term, a '*change* . . . in the time and place' that was previously listed.") (citation omitted); Pet. 3, 13, 21, 25, 27 (acknowledging that the Ninth Circuit in *Singh* addressed the single-NOH scenario). Thus, the Court should grant at least the petition in *Singh* to ensure that it is able to address as many material factual variations as possible.

CONCLUSION

This Court should grant both the petition for a writ of certiorari in this case and the petition for a writ of certiorari in *Garland* v. *Singh*, No. 22-884 (filed Mar. 10, 2023). In the alternative, the Court should grant the petition in *Singh*, hold this petition pending the Court's disposition of that case, and then dispose of this petition as appropriate.

Respectfully submitted.

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