No. 22-884

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
PETITIONER

v.

VARINDER SINGH

MERRICK B. GARLAND, ATTORNEY GENERAL,
PETITIONER

v.

RAUL DANIEL MENDEZ-COLÍN

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

REPLY BRIEF FOR THE PETITIONER

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Respondent Singh and respondent Mendez-Colín each received notice of a removal hearing that he failed to attend. Yet the Ninth Circuit held that removal orders entered in absentia at respondents' missed hearings may be rescinded for lack of notice. That result is contrary to the text of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and to common sense. And the decisions below conflict with the decisions of other courts of appeals on an issue implicating the viability of potentially tens of thousands of in absentia removal or-

ders, including many, like Mendez-Colín's, that were entered decades ago.

Respondents attempt to minimize the need for this Court's review. But the 12 judges dissenting from the denial of rehearing en banc and the petitioner in *Campos-Chaves* v. *Garland*, petition for cert. pending, No. 22-674 (filed Jan. 18, 2023), among others, have recognized the circuit conflict and the exceptional importance of the question presented. Moreover, these two cases, together with *Campos-Chaves*, present this Court with the opportunity to address the interpretation of the INA's in absentia removal provisions in full view of three variant scenarios in which the issue frequently arises. The Court should grant both this petition and the petition in *Campos-Chaves*.

A. The Decisions Below Are Wrong

Because respondents received notice, in accordance with paragraph (2) of 8 U.S.C. 1229(a), of the hearings that they failed to attend, their in absentia removal orders are not subject to rescission. Pet. 14-20. The Ninth Circuit's contrary conclusion is wrong, and respondents' efforts to defend it lack merit.

1. Respondents primarily contend (Br. in Opp. 14-17) that the notices for the hearings that they missed were not valid paragraph (2) notices. That contention rests on two premises: (1) because they each received a Notice to Appear (NTA) listing the time of an initial removal hearing as to be set or to be determined (TBD), the Notice of Hearing (NOH) that they each subsequently received "was void as it did not 'change or postpone[] the time or place' of the removal proceeding"; and (2) every successive NOH also had "nothing to 'change or postpone[]'" and was therefore void. *Id.* at 16-17 (citation omitted; brackets in original).

Neither premise is correct. As the dissent from the denial of rehearing en banc explained, "[i]f 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." Pet. App. 42a (citation omitted). And even if "the first NOH that follows a defective NTA does not count as a 'change' in the time and place, the same cannot be said of a subsequent NOH, which obviously 'change[s] or postpone[s]' the time in the prior NOH." *Id.* at 45a (brackets in original). That is what the relevant NOHs did here: They "change[d] or postpone[d]" the time in a prior NOH, notifying respondents of "the new time" at which their proceedings would be held. 8 U.S.C. 1229(a)(2)(A); see Pet. 15-16.

In Mendez-Colín's case, the contention (Br. in Opp. 16) that every NOH was "void" fails for an additional reason. After receiving the NTA and the first NOH, Mendez-Colín appeared at his initial hearing. Pet. App. 66a; *Mendez-Colín* A.R. 166. He subsequently appeared through counsel at three additional hearings, after receiving an NOH for each one. Pet. 10; *Mendez-Colín* A.R. 158-160, 164-165. Mendez-Colín thus treated each of those prior NOHs as valid and forfeited any contention to the contrary. Accordingly, he cannot challenge the NOH for his fifth hearing (the one he missed) on the ground that there was no valid, previously specified time "to 'change or postpone[].'" Br. in Opp. 16-17 (citation omitted; brackets in original).

Respondents are also wrong to assert (Br. in Opp. 10, 16) that *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474 (2021), resolved this issue. *Niz-Chavez* held only that the gov-

ernment could not rely on two documents to satisfy the requirements of paragraph (1) of Section 1229(a). *Id.* at 1481. *Niz-Chavez* did not squarely address when an NOH satisfies the requirements of paragraph (2).

2. Respondents also defend the decisions below on two alternative grounds, neither of which the Ninth Circuit addressed. First, they contend (Br. in Opp. 18-20) that even if the relevant NOHs were valid paragraph (2) notices, the earlier lack of a valid paragraph (1) notice is alone sufficient to subject their in absentia removal orders to rescission. That is incorrect. Under Section 1229a(b)(5)(A), 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) * * * has been provided." 8 U.S.C. 1229a(b)(5)(A) (emphasis added). Section 1229a(b)(5)(C)(ii), in turn, provides that an in absentia removal order may be rescinded if the noncitizen "did not receive" such notice—*i.e.*, "notice in accordance with paragraph (1) or (2)," whichever one is applicable. 8 U.S.C. 1229a(b)(5)(C)(ii). Determining which paragraph is applicable depends on whether there was a "change or postponement in the time." 8 U.S.C. 1229(a)(2)(A). When paragraph (2) applies, the government's failure to provide a valid paragraph (1) notice is not a basis for rescission.

Second, respondents observe (Br. in Opp. 20-21) that even if the relevant NOHs were valid paragraph (2) notices, their removal orders may be rescinded if they "did not receive" those NOHs, 8 U.S.C. 1229a(b)(5)(C)(ii). But respondents did "receive" them. *Ibid.* In Mendez-Colín's case, it is undisputed that his attorney "mailed the hearing notice in both English and Spanish to [Mendez-Colín]," who then "signed the bottom." Pet. App. 76a; see Pet. 10-11, 19-20. And in Singh's case, it

is undisputed that the NOH "reached the correct address"—the address where Singh told immigration officials he could be reached. *Singh* A.R. 87; see Pet. 6-7. Even if, at that point, "some failure in the internal workings of the household" prevented Singh from "personally see[ing]" the NOH, he is still "properly charged with receiving notice." *In re G-Y-R-*, 23 I. & N. Dec. 181, 189 (B.I.A. 2001) (en banc); see 8 U.S.C. 1229(c), 1229a(b)(5)(A).

B. Respondents' Attempts To Minimize The Need For This Court's Review Are Unavailing

1. The courts of appeals are divided on the question presented, as recognized by other circuits, the dissenters below, and the petitioner in *Campos-Chaves*. See *Laparra-Deleon* v. *Garland*, 52 F.4th 514, 521 (1st Cir. 2022); *Dacostagomez-Aguilar* v. *U.S. Att'y Gen.*, 40 F.4th 1312, 1318 n.3 (11th Cir. 2022), cert. dismissed, 143 S. Ct. 1102 (2023); Pet. App. 47a-49a & n.5 (Collins, J., dissenting from the denial of rehearing en banc); Pet. at 12-14, 20-23, *Campos-Chaves*, *supra* (No. 22-674). Respondents' efforts to minimize the conflict fail.

a. The government's petition explains (at 22) that the decisions below conflict with the Fifth Circuit's decision in *Campos-Chaves* v. *Garland*, 54 F.4th 314 (2022) (per curiam), petition for cert. pending, No. 22-674 (filed Jan. 18, 2023). The Fifth Circuit in *Campos-Chaves* held that the failure to receive, in a single document, all of the information specified in paragraph (1) does not justify rescission if the noncitizen "received [a] subsequent NOH," *id.* at 315; but the Ninth Circuit held that such a failure categorically justifies rescission, Pet. App. 5a, 54a. Campos-Chaves would have prevailed in the Ninth Circuit, where the lack of a specific time in his

NTA would have been dispositive. Pet. at 19, *Campos-Chaves*, *supra* (No. 22-674).

Respondents assert (Br. in Opp. 23) that *Campos-Chaves* "addressed a different question" from "the question presented here." But Campos-Chaves argued before the Fifth Circuit that his NTA's lack of a specific time rendered his in absentia removal order subject to rescission. See Campos-Chaves C.A. Reply Br. at 8; Campos-Chaves C.A. Pet. for Reh'g En Banc at 15. The government also addressed the rescission issue. See Gov't C.A. Unopposed Mot. to Remand in *Campos-Chaves* at 2-3. And the Fifth Circuit's opinion cited the dissent from the denial of rehearing en banc in *Singh* and distinguished *Rodriguez* v. *Garland*, 15 F.4th 351 (5th Cir. 2021), reh'g en banc denied, 31 F.4th 935 (5th Cir. 2022), which had vacated a denial of rescission where the noncitizen had "not receive[d] a subsequent [NOH]." *Campos-Chaves*, 54 F.4th at 315. *Campos-Chaves* thus "squarely" addressed the question presented here. Pet. at 25, *Campos-Chaves*, *supra* (No. 22-674).

Respondents also attempt (Br. in Opp. 23-24) to distinguish *Campos-Chaves* on its facts. But both Singh and Mendez-Colín, like Campos-Chaves, received a subsequent NOH. See pp. 4-5, *supra*. And contrary to respondents' assertion (Br. in Opp. 24), the government argued in both *Singh* and *Mendez-Colín* that receiving the subsequent NOH was legally relevant. See Gov't C.A. *Singh* Br. 15-16 (emphasizing that "the immigration court mailed a hearing notice to the most recent address [Singh] provided"); Gov't C.A. *Mendez-Colín* Br. 22 (emphasizing that Mendez-Colín "received notice of the time and place of his scheduled hearing subsequent to the issuance of the NTA"); Gov't C.A. *Mendez-Colín*

Pet. for Reh'g En Banc 7-12; Gov't C.A. *Singh* Pet. for Reh'g En Banc 6-10. That the decision in *Mendez-Colín* is unpublished (Br. in Opp. 24) does not disguise that its outcome would have differed in the Fifth Circuit. See Pet. App. 49a n.5 (Collins, J., dissenting from the denial of rehearing en banc).

b. The decisions below also conflict with the Sixth Circuit's decision in *Santos-Santos* v. *Barr*, 917 F.3d 486 (2019), which held that the failure to "receive notice in accordance with paragraph (1)" does not preclude a subsequent NOH from providing "notice in accordance with paragraph (2)." *Id.* at 492. Respondents observe (Br. in Opp. 25) that *Santos-Santos* was decided before *Niz-Chavez*. But *Niz-Chavez* did not squarely address the requirements of paragraph (2) and therefore does not override the analysis in *Santos-Santos*. See pp. 3-4, *supra*.

Respondents err in asserting (Br. in Opp. 25) that "any discussion in *Santos-Santos* of the question presented here was dicta." The court in *Santos-Santos* held that (1) Santos-Santos's in absentia removal order was not subject to rescission if he received a subsequent NOH, and (2) he had failed to rebut the presumption that a subsequent NOH had been delivered to him. 917 F.3d at 491-493. As to the second of those holdings, the Sixth Circuit found both that Santos-Santos had "forfeited any challenge to the Board's determination that he failed to overcome the presumption," *id.* at 491, and that he had "fail[ed] to overcome th[e] presumption" on the merits, *id.* at 492. Those alternative findings do not relate to the first holding, let alone render it dicta.

Respondents' reliance (Br. in Opp. 25) on *Singh* v. *Garland*, No. 21-3812, 2022 WL 4283249 (6th Cir. Sept. 16, 2022), is misplaced. In that unpublished decision,

the Sixth Circuit noted that it had "yet to take a binding position" on a particular issue. *Id.* at *8. But the issue it identified—whether a noncitizen must "prove[] lack of notice under *both* paragraphs (1) *and* (2)," *ibid.* (emphases added)—is not the issue here.

c. The decisions below further conflict with the Eleventh Circuit's decision in *Dacostagomez-Aguilar*, which explicitly "disagree[d]" with the Ninth Circuit's view that "there can be no valid notice under paragraph (2) without valid notice under paragraph (1)." 40 F.4th at 1318 n.3 (citation omitted). Respondents suggest (Br. in Opp. 26) that the discussion in *Dacostagomez-Aguilar* was dicta. But subsequent Eleventh Circuit decisions have treated it as circuit law. See, *e.g.*, *Miller* v. *U.S. Att'y Gen.*, No. 22-10779, 2023 WL 2944423, at *4 (Apr. 14, 2023) (per curiam); *Dragomirescu* v. *U.S. Att'y Gen.*, 44 F.4th 1351, 1355 n.3 (2022). Indeed, *Miller* relied on *Dacostagomez-Aguilar* to find rescission unwarranted on facts similar to those in *Mendez-Colín*. 2023 WL 2944423, at *1, *4.

Respondents observe (Br. in Opp. 26) that in *Mendoza-Ortiz* v. *U.S. Attorney General*, No. 21-12438, 2023 WL 2519598 (Mar. 15, 2023) (per curiam), the Eleventh Circuit concluded that a noncitizen was entitled to rescission "[b]ecause he never received a single document that contained all the information required to be in an NTA." *Id.* at *5. But that case involved a "deficient" NTA followed by a *single* NOH, and the court reasoned that the NOH's substitution of a specific time for a to-be-set time was not a "change" under paragraph (2). *Id.* at *3 n.3. As the court's subsequent decision in *Miller* confirms, the outcome would have been different if the case had involved *multiple* subsequent NOHs—as respondents' cases do. See *id.* at *3-*4.

2. The question presented is a frequently recurring issue of exceptional importance. See Pet. App. 28a (Collins, J., dissenting from the denial of rehearing en banc); *Rodriguez* v. *Garland*, 31 F.4th 935, 938 (5th Cir. 2022) (Elrod, J., dissenting from the denial of en banc rehearing); Pet. at 19, *Campos-Chaves*, *supra* (No. 22-674). Respondents do not demonstrate otherwise.

Respondents do not dispute, for example, that the question presented implicates potentially tens of thousands of existing in absentia removal orders in the Ninth Circuit alone. Pet. 23-24. Instead, respondents observe (Br. in Opp. 12-13) that the Ninth Circuit's rule would not necessarily result in relief from removal for every noncitizen subject to such an order. But that is beside the point. Regardless of how many noncitizens are ultimately able to obtain relief from removal, the adjudication of potentially tens of thousands of additional claims—arising from removal orders stretching back decades—would impose a significant burden on an immigration-court system that already has a backlog of 1.8 million cases. Pet. 24.

Respondents also do not dispute that the Ninth Circuit's rule gives noncitizens in currently pending removal proceedings that began with TBD NTAs the perverse incentive to fail to attend scheduled hearings even when they have notice of them. Pet. 24-25. Instead, respondents assert (Br. in Opp. 11) that the government could avoid such incentives by "reissu[ing] the NTA with the time of the hearing and all the other required information." But "reissu[ing]" an untold number of NTAs would itself require a substantial commitment of time and resources. And respondents do not address how "reissu[ing]" an NTA would affect the conduct of ongoing proceedings—including whether it would re-

quire disregarding everything that has already happened during those proceedings and restarting them altogether.

Finally, respondents are mistaken in asserting (Br. in Opp. 11) that the Ninth Circuit's rule will have "no impact at all on noncitizens who receive a notice to appear in the future, nor on noncitizens who received an NTA since" *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018). As the government explained in its brief in *Niz-Chavez*, while the government has made considerable progress in issuing NTAs with specific times, operational challenges have continued to prevent the issuance of such NTAs in certain cases. See Gov't Br. at 41-42, *Niz-Chavez*, *supra* (No. 19-863).

C. Respondents' Vehicle Concerns Are Misplaced

Respondents' various vehicle concerns provide no reason to deny review. First, respondents contend (Br. in Opp. 26-27) that even if this Court reverses the Ninth Circuit on the question presented, they could still prevail on alternative grounds on remand. As respondents acknowledge (*ibid.*), however, the Ninth Circuit did not address those alternative grounds; rather, it addressed only the question presented. These cases therefore squarely raise that question.

Second, respondents note (Br. in Opp. 27) that Mendez-Colín's motion before the Board sought reinstatement of his prior appeal by certification, in addition to rescission of his in absentia removal order. But throughout his case, Mendez-Colín has treated his certification request as separate from his "motion to rescind." Mendez-Colín C.A. Br. 17. Accordingly, his certification request has had no effect on consideration of the question presented. Pet. App. 54a-55a, 60a.

Third, respondents suggest (Br. in Opp. 28) that these cases fail to "tee up" the question presented in the government's petition. That question, however, simply asks whether the Ninth Circuit's categorical rule, announced in *Singh* and applied in both cases, is correct. Pet. App. 5a, 54a. Respondents observe (Br. in Opp. 28-29) that the question presented does not mention the specific circumstances of their individual cases. But that is because the Ninth Circuit's categorical rule rendered those circumstances irrelevant. Respondents also criticize (*id.* at 28) the question presented for referring to "'an' additional document," rather than "additional *documents*, plural." But that criticism misunderstands the government's position, which is that *an* additional document (the NOH for the missed hearing) provided the requisite paragraph (2) notice in each case.

D. This Court Should Grant Both This Petition And The Petition In *Campos-Chaves*

As the government's petition explains (at 25-26), *Singh*, *Mendez-Colín*, and *Campos-Chaves* each present a somewhat different scenario implicating the question presented, and this Court should grant certiorari both here and in *Campos-Chaves* to consider that question in full view of those three frequently recurring scenarios. Contrary to respondents' contention (Br. in Opp. 27-28), *Campos-Chaves* is likewise a suitable vehicle for review because the question presented was pressed and passed upon in that case. See p. 6, *supra*.

Should the Court grant only one petition, however, it should grant this one. Respondents contend (Br. in Opp. 29) that the Court "should instead grant *Campos-Chaves*, the first-filed of the three cases." But as the government's petition explains (at 26), granting this petition would allow the Court to cover more ground—

especially since respondents address the single-NOH scenario presented by *Campos-Chaves* as part of their statutory analysis, Br. in Opp. 15-16. In any event, the fact that the petition in *Campos-Chaves* was filed first does not mean that it should be the only petition granted. Earlier this Term, the Court granted a first-filed petition along with one filed by the government to ensure that it could consider distinct and recurring applications of an issue of statutory interpretation. See *Pugin* v. *Garland*, 143 S. Ct. 645 (2023) (No. 22-23); *Garland* v. *Cordero-Garcia*, 143 S. Ct. 644 (2023) (No. 22-331).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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