Nos. 22-674 and 22-884

# In the Supreme Court of the United States

MORIS ESMELIS CAMPOS-CHAVES, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

MERRICK B. GARLAND, ATTORNEY GENERAL, PETITIONER

*v.*

VARINDER SINGH AND RAUL DANIEL MENDEZ-COLÍN

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND NINTH CIRCUITS*

## BRIEF FOR THE ATTORNEY GENERAL


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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 An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen filed at any time" if the noncitizen subject to the order demonstrates that he "did not receive" such notice. 8 U.S.C.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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# In the Supreme Court of the United States

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## OPINIONS BELOW

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

In *Garland* v. *Singh*, the opinion of the court of appeals (*Singh* Pet. App. 1a-12a) is reported at 24 F.4th 1315. The decisions of the Board of Immigration Appeals (*Singh* Pet. App. 13a-16a) and the immigration judge (*Singh* Pet. App. 17a-23a, 24a-25a) are unreported.

In *Garland* v. *Mendez-Colín*, the opinion of the court of appeals (*Singh* Pet. App. 53a-55a) is not published in the Federal Reporter but is available at 2022 WL 342959. The decisions of the Board of Immigration Appeals (*Singh* Pet. App. 56a-61a, 62a-63a) and the immigration judge (*Singh* Pet. App. 64a-70a, 71a-77a, 78a-79a, 80a-81a) are unreported.

**JURISDICTION**

In *Campos-Chaves*, the amended judgment of the court of appeals was entered on December 1, 2022, and petitions for rehearing were denied on the same date. The petition for a writ of certiorari was filed on January 18, 2023.

In *Singh* and *Mendez-Colín*, the judgments of the court of appeals were entered on February 4, 2022. Petitions for rehearing were denied on October 12, 2022. On December 30, 2022, Justice Kagan extended the time within which to file petitions for a writ of certiorari to and including February 9, 2023. On January 27, 2023, Justice Kagan further extended the time to and including March 10, 2023, and the petition was filed on that date, pursuant to this Court's Rule 12.4 (permitting a "single petition" where the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions").

In each case, the jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-8a.

## STATEMENT

### A. Statutory Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes a detailed framework for the removal of noncitizens who enter or remain in the country without authorization or engage in conduct that renders them inadmissible or deportable.[1] That framework 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. *Ibid.*

Paragraph (1) of Section 1229(a) governs a "notice to appear." 8 U.S.C. 1229(a)(1). 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 Section 1229a(b)(5) "of the failure * * * to appear." 8 U.S.C. 1229(a)(1).

To provide the notice required under paragraph (1), the Department of Homeland Security (DHS) uses a

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[1] 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)).

form labeled "Notice to Appear." *E.g.*, J.A. 10 (capitalization altered; emphasis omitted). That form, which this brief refers to as an NTA, has space for DHS to fill in the time and place at which the initial proceedings will be held. See, *e.g.*, *ibid.*

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); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 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] 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" of "failing * * * to attend." 8 U.S.C. 1229(a)(2)(A).

To provide the notice required under paragraph (2), the immigration court uses a form labeled "Notice of Hearing." *E.g.*, J.A. 7 (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.*

2. The "[c]onsequences of failure to appear" are addressed in 8 U.S.C. 1229a(b)(5) (emphasis omitted); see IIRIRA § 304(a)(3), 110 Stat. 3009-590. It specifies 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 government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the al-

ien is removable." 8 U.S.C. 1229a(b)(5)(A). "The written notice * * * shall be considered sufficient for purposes of th[at] subparagraph if provided at the most recent address" that the noncitizen supplied. *Ibid.* The noncitizen is required to provide the government with a "written record" of his address and of "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)].").

An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen," but "only" if the noncitizen makes certain showings. 8 U.S.C. 1229a(b)(5)(C). As most relevant here, rescission is available "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). A motion to reopen and rescind an in absentia removal order based on a lack of notice may be "filed at any time," *ibid.*; there is no statute of limitations.

**B. Procedural History**

***1. Campos-Chaves***

a. Moris Esmelis Campos-Chaves is a native and citizen of El Salvador. *Campos-Chaves* Pet. App. 15a. On January 24, 2005, he entered the United States without inspection by wading across the Rio Grande River near Laredo, Texas. J.A. 58.

On January 27, 2005, DHS served Campos-Chaves with an NTA charging that he was removable because he was a noncitizen present in the United States without being admitted or paroled. J.A. 53-59; see 8 U.S.C. 1182(a)(6)(A)(i). The NTA ordered Campos-Chaves to appear for removal proceedings at the immigration

court in San Antonio, Texas, at a time "to be set." J.A. 54.

On May 24, 2005, the immigration court mailed to Campos-Chaves an NOH specifying that his case had been scheduled for a hearing on September 20, 2005, at 9 a.m., in San Antonio. J.A. 50-52. The NOH was mailed to Campos-Chaves at the address in Houston, Texas, that he had provided to DHS, as required by 8 U.S.C. 1229(a)(1)(F). See J.A. 50, 53. On September 20, 2005, Campos-Chaves failed to appear at his scheduled hearing and the immigration judge (IJ) ordered him removed in absentia. *Campos-Chaves* Pet. App. 15a-17a.

b. Thirteen years later, in September 2018, Campos-Chaves filed a motion to reopen his removal proceedings in light of this Court's decision in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018). In *Pereira*, this Court addressed Section 1229b(d)(1)(A)'s "stop-time" rule, under which the service of "a notice to appear" stops a noncitizen from accruing physical presence or residency needed to qualify for cancellation of removal. *Id.* at 2113. The Court held that the stop-time rule is triggered only when the government serves a noncitizen with an NTA that specifies the time and place of the removal proceedings. See *id.* at 2109-2110 (quoting 8 U.S.C. 1229(a)(1)). Campos-Chaves contended that he "never received proper statutory notice" under Section 1229(a) because his NTA did not specify the time of his removal hearing. *Campos-Chaves* Administrative Record (A.R.) 76; see *Campos-Chaves* A.R. 71-160.

The IJ denied the motion, *Campos-Chaves* Pet. App. 12a-14a, and the Board of Immigration Appeals (Board) dismissed Campos-Chaves's appeal, *id.* at 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." *Campos-Chaves* Pet. App. 8a (citing *Pena-Mejia*, 27 I. & N. Dec. at 548-549). The Board found it "undisputed" in this case that Campos-Chaves, "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 Campos-Chaves "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 Campos-Chaves's in absentia removal order was not subject to rescission for lack of notice. *Id.* at 8a.

c. The Fifth Circuit denied Campos-Chaves's petition for review. *Campos-Chaves* Pet. App. 3a-4a. The court observed that, although Campos-Chaves 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]." *Campos-Chaves* 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.

*Campos-Chaves* 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.*

d. Campos-Chaves 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." *Campos-Chaves* C.A. Pet. for Panel Reh'g 5 (citing 8 U.S.C. 1229a(b)(5)(B)); see *Campos-Chaves* C.A. Pet. for Reh'g En Banc 10-11. Campos-Chaves argued that the provision at issue in *Spagnol-Bastos* had "no bearing here because [Campos-Chaves] *did* provide immigration authorities with an accurate mailing address." *Campos-Chaves* C.A. Pet. for Panel Reh'g 2; see *Campos-Chaves* C.A. Pet. for Reh'g En Banc 11.

The court of appeals denied Campos-Chaves's petitions for rehearing, *Campos-Chaves* 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*, which described the prior opinion in Campos-Chaves's 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),'" *Singh* Pet. App. 49a-50a n.5 (quoting *Campos-Chaves* Pet. App. 4a); see *Campos-Chaves* Pet. App. 2a.

***2. Singh***

a. Varinder Singh is a native and citizen of India. *Singh* Pet. App. 13a. On October 19, 2016, he entered the United States without inspection by climbing over a fence at the border with Mexico. See J.A. 10; *Singh* A.R. 133.

On December 1, 2016, DHS served Singh with an NTA. J.A. 10-16. The NTA charged that Singh was removable because he was a noncitizen present in the United States without being admitted or paroled. *Ibid.*; see 8 U.S.C. 1182(a)(6)(A)(i). The NTA ordered Singh to appear for removal proceedings at the immigration court in Calexico, California, at a time "TBD" (*i.e.*, "to be determined"). J.A. 11

On December 6, 2016, the immigration court mailed to Singh an NOH specifying that his case had been scheduled for a hearing on January 29, 2021, at 8 a.m., in Imperial, California. J.A. 7. The NOH was mailed to an address in Dyer, Indiana, that Singh had provided to DHS. See *ibid.*; see also Singh A.R. 134.

On October 31, 2018, the immigration court mailed to Singh a second NOH, dated October 29, 2018, changing the time of his hearing to November 26, 2018, at 1 p.m. J.A. 4. That NOH was mailed to the same address in Dyer, Indiana. *Ibid.*

On November 26, 2018, Singh failed to appear at his scheduled hearing and DHS did not have his file, so the IJ rescheduled the hearing for December 12, 2018, at 9 a.m. J.A. 1-3; *Singh* Pet. App. 19a. On November 26, 2018, the immigration court mailed to Singh, at the same Dyer, Indiana address, an NOH specifying the new time. J.A. 1.

On December 12, 2018, Singh again failed to appear, and the IJ ordered him removed in absentia. *Singh* Pet. App. 24a-25a.

b. In April 2019, Singh filed a motion to reopen his removal proceedings and rescind the in absentia removal order. *Singh* A.R. 80-117. Singh acknowledged that he had lived in Indiana with a family friend from December 8, 2016, to December 6, 2018; that the Dyer, Indiana address that he had provided to DHS was the mailing address that he had used during that time; that he had retained the services of an attorney while in Indiana; and that he "remember[ed]" his attorney "specifically telling [him his] hearing date at the Imperial Immigration Court was sometime in 2021." *Id.* at 99; see *id.* at 85-86. Singh did not dispute that "the two hearing notices dated October 29, 2018, and November 26, 2018, were delivered to the Dyer, Indiana address when [he] was still residing there," *id.* at 99, but he claimed that he "did not receive them because [his friend], with whom he was residing," did not give him the mail, *id.* at 87. "In other words," Singh stated, "the mail reached the correct address but did not reach [him] because of some failure in the internal workings of the household." *Ibid.* Singh nevertheless asserted that he "did not receive notice in accordance with Section 1229(a)(1)" because his NTA did not specify the time of his initial removal hearing, and that the in absentia removal order should be rescinded on that ground. *Id.* at 96.

The IJ denied Singh's motion to reopen. *Singh* Pet. App. 17a-23a. The IJ determined that "[n]otice was proper in this case because notice was sent to the last address [Singh] provided to the Court." *Id.* at 22a; see *In re G-Y-R-*, 23 I. & N. Dec. 181, 189 (B.I.A. 2001) (en banc) (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"). The IJ further explained that, "[a]lthough the NTA here did not specify the time and place of [Singh's] removal hearing, the [immigration court] subsequently mailed notices of his hearing, specifying this information, to the most recent address he provided." *Singh* Pet. App. 22a.

The Board dismissed Singh's appeal. *Singh* Pet. App. 13a-16a. The Board noted Singh's acknowledgement that Board precedent foreclosed his argument that the NOHs were "defective." *Id.* at 14a n.1 (citing *In re Pena-Mejia*, *supra*, and *In re Miranda-Cordiero*, 27 I. & N. Dec. 551 (B.I.A. 2019)).

c. The Ninth Circuit granted Singh's petition for review and remanded for further proceedings. *Singh* Pet. App. 1a-12a. The court noted that under *Pereira* and *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474 (2021), there can be no valid notice under paragraph (1) of Section 1229(a) unless all of the information specified in paragraph (1) is provided in a single document. *Singh* Pet. App. 11a-12a; see *id.* at 6a-9a. The court further read the text of paragraph (2) of Section 1229(a)—which provides for notice "in the case of any change or postponement in the time and place of such proceedings," 8 U.S.C. 1229(a)(2)(A)—to mean that "there can be no valid notice under paragraph (2) without valid notice under paragraph (1)." *Singh* Pet. App. 10a. Specifically, the court took the view that "a 'change' in the time" of a proceeding "is not possible" unless "the Notice to Appear provided in paragraph (1) * * * included a date and time." *Ibid.* The court therefore 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" on the ground that the noncitizen did not receive notice in accordance with paragraph (1) or (2). *Id.* at 5a.

d. The Ninth Circuit denied rehearing en banc. *Singh* Pet. App. 26a-52a. Judge Collins, joined by 11 other judges, filed an opinion dissenting from the denial of rehearing en banc. *Id.* at 28a-51a. In the dissenters' view, the panel "seriously misconstrue[d] the text of the [INA] in resolving an exceptionally important question concerning the type of notice that must be provided to an alien under that Act before an immigration court may proceed with an in absentia removal." *Id.* at 28a. The dissent explained that, contrary to the panel's interpretation, the text of Section 1229a(b)(5)(A) makes clear that when, as here, the noncitizen "failed to attend a hearing that was the subject of a properly served NOH that correctly stated the date, time, and place of that hearing, it is irrelevant whether the earlier NTA did or did not provide such information." *Id.* at 39a; see *id.* at 39a-47a. The dissent observed that the panel's analysis "threatens to invalidate potentially tens of thousands" of in absentia removal orders previously entered in the Ninth Circuit. *Id.* at 47a; see *id.* at 47a-51a. Judge O'Scannlain issued a statement respecting the denial of rehearing en banc, agreeing with the views expressed in Judge Collins's dissent. *Id.* at 52a.

***3. Mendez-Colín***

a. Raul Daniel Mendez-Colín is a native and citizen of Mexico. J.A. 44. On August 25, 2001, he tried to enter the United States through a vehicle lane at the port of entry at San Luis, Arizona, by falsely claiming that he was a U.S. citizen. *Ibid.*; see *Mendez-Colín* A.R. 122,

128, 131. He also tried to smuggle in two other noncitizens who were in the car with him. *Mendez-Colín* A.R. 128, 132, 136.

On August 26, 2001, the former Immigration and Naturalization Service (INS) served Mendez-Colín with an NTA. J.A. 44-50. The NTA charged that Mendez-Colín was removable because he was a noncitizen who knowingly aided or abetted another noncitizen to enter or try to enter the United States in violation of law. J.A. 44-45; see 8 U.S.C. 1182(a)(6)(E)(i). The NTA ordered Mendez-Colín to appear for removal proceedings at the immigration court in Phoenix, Arizona, at a time "[t]o be set." J.A. 45-46.

On October 5, 2001, the immigration court mailed to Mendez-Colín an NOH specifying that his case had been scheduled for a hearing in Phoenix on November 6, 2001, at 9 a.m. J.A. 41; see J.A. 41-43. That NOH was mailed to the address in Buckeye, Arizona, that Mendez-Colín had provided to INS. J.A. 41.

On November 6, 2001, Mendez-Colín appeared at the scheduled hearing. *Singh* Pet. App. 66a. The immigration court served him, in person, with an NOH specifying the time for his next hearing, on January 15, 2002, at 1 p.m. J.A. 36; see J.A. 36-40. Mendez-Colín's attorney appeared at the hearing on January 15, 2002, as well as at additional hearings that were noticed for May 28, 2002, and July 23, 2002. See *Singh* Pet. App. 66a; J.A. 17-35; *Mendez-Colín* C.A. Br. 4. At the July 23 hearing, the IJ sustained the charge of removability and the attorney expressed Mendez-Colín's desire to apply for cancellation of removal. *Singh* Pet. App. 66a.

On July 23, 2002, the immigration court mailed to Mendez-Colín's attorney an NOH (the seventh sent to Mendez-Colín or his counsel) specifying the time of his

next hearing, on September 15, 2003, at 9 a.m. J.A. 17-19; see *Singh* Pet. App. 66a, 73a. One week before that hearing—the fifth hearing held in Mendez-Colín's removal proceedings—Mendez-Colín's attorney submitted 30 pages of documents in support of the application for cancellation of removal. *Mendez-Colín* A.R. 79-113. But three days before the hearing, Mendez-Colín's attorney moved to withdraw as counsel, citing Mendez-Colín's failure "to maintain contact" regarding "the merits of his case." *Id.* at 77. The attorney stated, however, that there was "no issue" regarding Mendez-Colín's "notice of hearing." *Ibid.*

On September 15, 2003, Mendez-Colín failed to appear at the scheduled hearing, but his attorney appeared. *Singh* Pet. App. 66a, 73a, 78a. His attorney explained that he had "mailed the hearing notice in both English and Spanish to [Mendez-Colín] and that [Mendez-Colín] had signed the bottom of his attorney's hearing notice." *Id.* at 76a. The attorney also presented an account of Mendez-Colín's failure "to maintain contact with the attorney's office." *Ibid.*; see *id.* at 73a; *Mendez-Colín* A.R. 139. The IJ granted the attorney's motion to withdraw and found that Mendez-Colín had been "duly notified of the date, time, and place of his hearing but, without good cause, [had] failed to appear as required." *Singh* Pet. App. 66a-67a; see *id.* at 75a-76a, 80a-81a. The IJ determined that Mendez-Colín "had abandoned any and all claims for relief from removal and ordered him removed to Mexico in absentia." *Id.* at 67a; see *id.* at 78a-79a.

In December 2003, Mendez-Colín, acting through the same attorney as before, filed a motion to reopen his removal proceedings, asserting that he had "failed to appear because he wrongfully believed that the court

was scheduled for 1:00 pm, instead of [t]he correct time of 9:00 am." *Mendez-Colín* A.R. 148; see *id.* at 147-150. The IJ denied the motion, finding that Mendez-Colín's "failure to appear for his individual hearing appear[ed] to stem from a lack of interest, rather than a scheduling error." *Singh* Pet. App. 76a; see *id.* at 71a-77a.

In February 2004, Mendez-Colín filed a second motion to reopen, arguing that he should be given an opportunity to seek cancellation of removal. *Mendez-Colín* A.R. 56-61. The IJ denied the motion, explaining that Mendez-Colín was "limited by regulation to filing one motion to reopen" and that he had "already filed a motion to reopen." *Singh* Pet. App. 69a; see *id.* at 64a-70a. Mendez-Colín appealed to the Board, but was removed from the United States while his appeal was pending. *Id.* at 62a; *Mendez-Colín* A.R. 36. The Board deemed the appeal withdrawn and the IJ's decision final. *Singh* Pet. App. 62a-63a.

b. In January 2020 (*i.e.*, more than 15 years later), Mendez-Colín filed a motion to reinstate his appeal or, in the alternative, to remand his case to the IJ for consideration of a motion to rescind his in absentia removal order on the ground that his August 2001 NTA did not specify the time of his initial removal hearing. *Mendez-Colín* A.R. 11-21. The Board denied the motion. *Singh* Pet. App. 56a-61a. The Board rejected Mendez-Colín's contention that he had received defective notice, finding "no indication that [he] was not properly served with a[n] NOH specifying the time and place of the initial removal hearing." *Id.* at 60a.

c. In an unpublished decision issued the same day as *Singh*, the same Ninth Circuit panel granted Mendez-Colín's petition for review and remanded for further proceedings. *Singh* Pet. App. 53a-55a. The panel reit-

erated *Singh*'s holding that "[n]oncitizens must receive a Notice to Appear, in a single document, with the time and date of their hearing before the government can order them removed *in absentia*." *Id.* at 54a. The panel then held that because Mendez-Colín's NTA did not specify the time of his removal proceedings, he "did not receive statutorily compliant notice before his removal hearing," and "the *in absentia* removal order issued at that hearing is invalid." *Id.* at 54a-55a.

d. The Ninth Circuit denied rehearing en banc. *Singh* Pet. App. 82a-83a. Judge Collins, joined by 11 other judges, filed the same dissent as in *Singh*. *Id.* at 84a-107a. In their view, the outcome in *Mendez-Colín* illustrated the "absurd[ity]" of *Singh*'s holding because "[i]t makes no sense to read the statute as saying that, if an alien attends the first several hearings but then skips the next hearing—one for which an otherwise valid NOH was served—the alien can obtain rescission by showing that, years earlier, the NTA that initially opened the case failed to include a date and time for a hearing." *Id.* at 97a. Judge O'Scannlain again agreed with the views expressed in Judge Collins's dissent. *Id.* at 108a.

## SUMMARY OF ARGUMENT

The three noncitizens in these cases contend that 8 U.S.C. 1229a(b)(5) entitles them to obtain rescission of their in absentia removal orders solely because the NTA that each of them received when their removal proceedings began stated that the times of their initial removal hearings would be set or determined later. Under the noncitizens' reading, which the Ninth Circuit adopted but the Fifth Circuit rejected, the omission of a specific hearing time in the initial NTA is a perpetual ground for rescinding the in absentia removal order. It

does not matter if the noncitizen subsequently received an NOH supplying a specific time for that initial hearing, or if an even-later NOH changed a previously set hearing time. It does not even matter if the noncitizen attended some removal hearings before failing to attend the hearing that resulted in the in absentia order.

The Ninth Circuit's position is wrong. The plain text of Section 1229a(b)(5), along with statutory context, history, and common sense, forecloses such a sweeping expansion of the INA's grounds for rescission. When a noncitizen has received notice of a removal hearing under either paragraph (1) or paragraph (2) of 8 U.S.C. 1229(a), that noncitizen cannot undo an in absentia removal order by claiming that he lacked notice of the hearing that he failed to attend.

A. The plain text of Section 1229a(b)(5) does not permit a noncitizen who receives notice of a specific hearing time in an NOH to obtain rescission of an in absentia order based on a lack of notice.

1. Section 1229a(b)(5) states that a noncitizen may be removed in absentia "after written notice required under paragraph (1) or (2) of section 1229(a) * * * has been provided," and an immigration judge may rescind such an order for lack of notice only if the noncitizen "demonstrates" that he "did not receive notice in accordance with paragraph (1) or (2)." 8 U.S.C. 1229a(b)(5)(A) and (C)(ii). By using the disjunctive term "or," Congress made clear that a noncitizen's eligibility for removal in absentia—and his ability to obtain rescission of a removal order—depends on whether the noncitizen received whichever form of notice scheduled the hearing the noncitizen did not attend: an NTA under paragraph (1), or an NOH under paragraph (2).

2. The Ninth Circuit held that there can be no valid NOH under paragraph (2) if the NTA provided under paragraph (1) lacked all the required information. But Section 1229(a) creates two distinct forms of notice, and nothing in that provision, or elsewhere in the INA, suggests that the validity of an NOH turns on the completeness of the NTA that preceded it. The Ninth Circuit further erred in asserting that an NOH cannot "change" the time and place of a hearing if the NTA listed the time and place for the initial hearing as "to be determined." That conclusion misunderstands the requirements for a statutorily compliant NOH, and it also rests on an unduly narrow construction of the word "change."

Whether a "change" is considered to be an alteration or a substitution, one has occurred when an indeterminate time is superseded by a specific one. That understanding is consistent with other instances where a statute or rule creates an obligation to report a "change" and that requirement is triggered by having new information about a specific thing that fills a gap where there was previously nothing to report. For example, a party in litigation must report a new corporate parent even when it previously had none; a sex offender must report a new job even when he previously had none; and, under Section 1229(a) itself, a noncitizen in removal proceedings must report a new address or telephone number even when he previously had none.

3. The alternative rationales advanced by the noncitizens here are equally unavailing. The contention that specific notice of a hearing is irrelevant under Section 1229a(b)(5)—unless the noncitizen received a complete notice under paragraph (1)—again ignores the disjunctive nature of the statute. Any suggestion that

the noncitizens here did not "receive" notice via the NOHs provided to them also fails. The applicable NOHs were concededly mailed to the noncitizens at the addresses they provided. Contrary to Singh's and Mendez-Colín's assertion, the statute does not require the government to prove that the noncitizens had actual notice of their new hearing times. For his part, Campos-Chaves errs in relying on Section 1229(b)(1). That provision requires only that a hearing be scheduled at least ten days after service of the NTA so that the noncitizen can adequately prepare. It has no bearing on the validity of an NOH that, like those here, schedules a hearing for a time weeks or months after the notice is provided.

4. This Court's opinions in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474 (2021), do not require the Ninth Circuit's construction of Section 1229a(b)(5). Neither decision construed that provision, and neither decision addressed the specific question presented in this case. In fact, the dissent in *Niz-Chavez* expressly noted that the Court's holding about the differently phrased stop-time rule would not prevent the government from relying on an NOH to "justify removal in absentia." 141 S. Ct. at 1491 (Kavanaugh, J., dissenting).

B. The plain-text reading of Section 1229a(b)(5) harmonizes subparagraphs (b)(5)(A) and (b)(5)(C) by making the same consideration govern eligibility not only for in absentia removal but also for rescission of a removal order for lack of notice: whether the noncitizen received notice under either paragraph (1) *or* paragraph (2), whichever form of notice preceded the hearing at which removal was ordered in absentia. The plain-text interpretation also makes Section 1229a(b)(5) comport with the broader context of the INA. Multiple

overlapping provisions limit the ability of noncitizens to contest their in absentia removal orders through motions to reopen. And the INA forecloses rescission where the noncitizen's failure to attend a scheduled hearing is the noncitizen's fault or a consequence of circumstances within the noncitizen's control. Common sense supports applying the same rule here. There is no basis in the statute or common sense to permit a noncitizen who was informed of the time and place of his removal hearing, and then failed to attend that hearing, to obtain rescission of an in absentia removal order on the supposed ground that the noncitizen lacked notice of the time and place of the hearing.

C. Statutory history and purpose further support the conclusion that rescission for lack of notice is not available to a noncitizen who receives an NOH containing exact hearing-time-and-place information. Section 1229a(b)(5)'s in absentia removal provisions are the culmination of Congress's efforts to make it easier to remove noncitizens who fail to participate in the removal process. Although Congress created provisions specifying the notice that noncitizens are to receive, those provisions were designed to *limit* the ability of noncitizens to avoid removal by claiming a lack of notice. Restricting motions to reopen for lack of notice to those noncitizens who—unlike the noncitizens here—never received notice of the hearings that they missed furthers that aim. The contrary interpretation would permit potentially hundreds of thousands of noncitizens to seek rescission of removal orders that may be decades old, even if the omission of an exact hearing time in the initial NTA had no bearing on the noncitizen's failure to attend a hearing that was properly noticed with an NOH.

D. The noncitizens' policy arguments are irrelevant and mistaken. As interpreted by the government, Section 1229a(b)(5) protects noncitizens' due process rights by allowing those who did not receive notice of the hearings they did not attend to obtain rescission of in absentia removal orders. And speculation that the government will seek to remove noncitizens who have never been informed of the charges against them is baseless.

E. In any event, any ambiguity about whether the noncitizens here are eligible for rescission of their in absentia removal orders should be resolved by deferring to the Board's reasonable conclusion that Section 1229a(b)(5) does not permit rescission in the circumstances of these cases. Congress has charged the Attorney General with interpreting the INA, and made his "determination[s] * * * with respect to all questions of law * * * controlling." 8 U.S.C. 1103(a)(1). The Board, acting on the Attorney General's behalf, has considered the interpretation of Section 1229a(b)(5) multiple times, including in decisions that post-date *Pereira* and *Niz-Chavez*. And the Board has consistently held that a noncitizen who receives notice of a removal hearing under paragraph (2) cannot get an in absentia removal order rescinded for lack of notice. That interpretation is, at the very least, a reasonable one entitled to deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

## ARGUMENT

### RESCISSION OF AN IN ABSENTIA REMOVAL ORDER FOR LACK OF NOTICE UNDER 8 U.S.C. 1229a(b)(5) IS UNAVAILABLE WHEN A NONCITIZEN RECEIVED A NOTICE OF HEARING THAT CONTAINED THE RELEVANT HEARING'S TIME AND PLACE

Under 8 U.S.C. 1229a(b)(5)(C)(ii), a removal order entered in absentia can be rescinded if the noncitizen subject to the order demonstrates that he "did not receive notice in accordance with paragraph (1) or (2)" of 8 U.S.C. 1229(a). The noncitizens in this case contend that the failure to include in an NTA all of the information specified in paragraph (1) precludes the government from providing adequate notice to a noncitizen in an NOH under paragraph (2). Under that interpretation, any in absentia removal order entered against a noncitizen whose NTA listed his initial hearing time as "to be set" or "to be determined" is subject, indefinitely, to rescission. All the standard tools of statutory construction—"not to mention common sense," *Abramski* v. *United States*, 573 U.S. 169, 179 (2014)—counsel against that interpretation. That interpretation is also contrary to the Board's longstanding and reasonable interpretation of the statutory text.

#### A. An In Absentia Removal Order Is Not Subject To Rescission For Lack Of Notice If The Noncitizen Failed To Appear After Receiving Notice Of The Relevant Hearing Under 8 U.S.C. 1229(a)(2)

##### *1. The text of Section 1229a(b)(5) bars rescission for lack of notice when a noncitizen receives notice under paragraph (1) or paragraph (2) of Section 1229(a)*

Section 1229a governs "[r]emoval proceedings" against noncitizens. 8 U.S.C. 1229a (emphasis omitted). Under Section 1229a(b)(5)(A), a noncitizen may be or-

dered removed in absentia when he "does not attend a [removal] proceeding" "after written notice required under paragraph (1) or (2) of section 1229(a) * * * has been provided" to him or his counsel of record. 8 U.S.C. 1229a(b)(5)(A). Section 1229a(b)(5)(C), in turn, provides that a removal order 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)." 8 U.S.C. 1229a(b)(5)(C)(ii).

Those provisions set out a three-step process for removal in absentia. First, the government must provide notice to the noncitizen under paragraph (1) "or" paragraph (2) of Section 1229(a). 8 U.S.C. 1229a(b)(5)(A). The paragraph (1) notice is the Notice to Appear, or NTA, that contains information regarding the nature of the charges against the noncitizen, the time and place of an initial hearing, and other details of the removal proceedings. See 8 U.S.C. 1229(a)(1). The paragraph (2) notice is the Notice of Hearing, or NOH, that informs the noncitizen of a "new time or place of the proceedings." 8 U.S.C. 1229(a)(2)(A)(i).

Second, if the noncitizen "does not attend a proceeding," the government must prove "by clear, unequivocal, and convincing evidence that the written notice was" provided. 8 U.S.C. 1229a(b)(5)(A). Use of the definite article "the" before "notice" indicates that the government must establish that the noncitizen received a particular notice, one whose identity "has been previously specified by context." *Nielsen* v. *Preap*, 139 S. Ct. 954, 965 (2019) (citation omitted). Here, context dictates that "the written notice" the government must prove it provided is whichever form of notice, NTA or

NOH, informed the noncitizen of the hearing the noncitizen did not attend.

Third, the noncitizen may seek rescission of an in absentia removal order by demonstrating, as relevant here, that he "did not receive notice in accordance with paragraph (1) or (2)." 8 U.S.C. 1229a(b)(5)(C)(ii). Read together with Section 1229a(b)(5)(A), the critical inquiry under Section 1229a(b)(5)(C)(ii) is clear: Did the noncitizen "receive notice in accordance with paragraph (1) or (2) of section 1229(a)"—whichever form of notice applies—before the "proceeding" that he "d[id] not attend"? 8 U.S.C. 1229a(b)(5)(A). If so, then the in absentia removal order is not subject to rescission for lack of notice. But if no notice was received, then the removal order "may be rescinded" on that ground. 8 U.S.C. 1229a(b)(5)(C).

In these three cases, the "proceeding" that the noncitizen "d[id] not attend," 8 U.S.C. 1229a(b)(5)(A), was a removal hearing noticed under paragraph (2) of Section 1229(a).[2] Campos-Chaves did not attend his hearing on September 20, 2005, at 9 a.m. *Campos-Chaves* App. 15a-17a. Campos-Chaves received notice

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[2] Although an individual noncitizen is placed in removal "proceedings," phrased in the plural, see, *e.g.*, 8 U.S.C. 1229a(a)(1), the INA in some places, including Section 1229a(b)(5)(A), refers to a "proceeding," in the singular, when describing a particular hearing, see, *e.g.*, 8 U.S.C. 1229a(b)(2) (providing in subparagraph (A) the methods by which "[t]he proceeding" may occur, but specifying in subparagraph (B) that "[a]n evidentiary hearing on the merits" has additional restrictions), (c)(1)(A) (providing that "[a]t the conclusion of the proceeding" where the immigration judge makes a removability determination, the immigration judge must consider evidence "produced at the hearing"); 8 U.S.C. 1182(a)(6)(B) (rendering inadmissible "[a]ny alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding").

of that hearing nearly four months in advance, via an NOH that was mailed to the address in Houston, Texas, that he had provided. See 8 U.S.C. 1229a(b)(5)(A) (deeming "written notice" "sufficient" "if provided at the most recent address provided"); see also J.A. 50. That NOH satisfied paragraph (2) because it specified a "new time" for the proceeding (which had previously been scheduled for a time "to be set") of September 20, 2005, at 9 a.m. 8 U.S.C. 1229(a)(2)(A)(i).

The proceeding that Singh did not attend was his hearing on December 12, 2018, at 9 a.m. *Singh* Pet. App. 24a-25a. More than two weeks before that hearing, the immigration court mailed to Singh, at the Dyer, Indiana address that he had provided, an NOH specifying the time of that hearing—the third NOH issued during his removal proceedings. J.A. 1-9; *Singh* A.R. 87. That NOH satisfied paragraph (2) because it specified a "new time" for the proceeding (which had previously been scheduled for November 26, 2018, at 1 p.m.) of December 12, 2018, at 9 a.m. 8 U.S.C. 1229(a)(2)(A)(i); see J.A. 1, 4.

The proceeding that Mendez-Colín did not attend was his hearing on September 15, 2003, at 9 a.m. *Singh* Pet. App. 66a, 78a. More than a year before that hearing, the immigration court mailed to Mendez-Colín's counsel of record an NOH specifying the time of that hearing. *Id.* at 66a, 73a, 75a; J.A. 17. By that point, the immigration court had already held four hearings, each attended by Mendez-Colín or his attorney. See p. 13-14, *supra*. In specifying the time of Mendez-Colín's fifth hearing—scheduled to consider the application for cancellation of removal that his attorney said, at the fourth hearing, Mendez-Colín wanted to submit—the

NOH necessarily specified a "new time" for the proceeding. 8 U.S.C. 1229(a)(2)(A)(i).

A straightforward application of the statutory text should resolve the matter in all three of these cases. Because each respondent received a notice, in accordance with paragraph (2), of the hearing that he did not attend, his in absentia removal order is not subject to rescission for lack of notice.

***2. The Ninth Circuit's contrary interpretation misconstrues the statutory text***

The Ninth Circuit did not question that Singh and Mendez-Colín each received an NOH for the hearing that he did not attend. Campos-Chaves likewise did not dispute that he received notice of the hearing he missed. *Campos-Chaves* Pet. App. 2a, 4a. Instead, the Ninth Circuit held, and the noncitizens here all assert, that an NOH cannot constitute "valid notice under paragraph (2)" if the NTA a noncitizen received at the outset of his removal proceedings did not specify a time for the initial hearing. *Singh* Pet. App. 10a; see *id.* at 54a-55a. That interpretation finds no support in the statutory text.

a. The Ninth Circuit stated that "there can be no valid notice under paragraph (2) without valid notice under paragraph (1)." *Singh* Pet. App. 10a. That assertion fails to give effect to the structure of Section 1229a(b)(5), and in particular to its use of the disjunctive word "or."

It is true that the noncitizens in these cases did not receive all of the information specified in paragraph (1) in a single document. But the basis for their removal in absentia—and thus, their ability to seek rescission of their removal orders—does not depend on whether they did. Rather, Section 1229a(b)(5) authorizes the entry of an in absentia removal order if the government estab-

lishes that it provided "written notice required under paragraph (1) *or* (2)." 8 U.S.C. 1229a(b)(5)(A) (emphasis added). The word "or" is "almost always disjunctive." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141 (2018) (citation omitted). The plain language of Section 1229a thus creates two alternative avenues under which the government may seek in absentia removal: It may show that the noncitizen failed to attend a hearing after receiving notice of that hearing under paragraph (1), or it may show that the noncitizen failed to attend a hearing after receiving notice of that hearing under paragraph (2). See Antonin Scalia & Bryan A. Garner, *Reading Law* 116 (2012) ("[W]ith the disjunctive list, at least one of the three [A, B, or C] is required, but any one (or more) of the three satisfies the requirement.").

The in absentia removal orders at issue here implicate only the form of notice issued under paragraph (2), which the government may provide to a noncitizen "in the case of any change or postponement in the time and place of [the] proceedings." 8 U.S.C. 1229(a)(2)(A). Here, the basis for in absentia removal and eligibility for rescission depended solely on whether each noncitizen received notice of the "new time or place" for the removal hearing he missed, *ibid.*, not on whether he previously received an NTA that complied (or failed to comply) with all the requirements of paragraph (1).

b. The Ninth Circuit concluded that the NOHs issued to Singh and Mendez-Colín were defective because the previous NTAs failed to specify a particular time and place to appear. *Singh* Pet. App. 10a. The court reasoned that it is "not possible" for the government to provide notice of "a 'change' in the time" of a removal hearing if the NTA listed the initial hearing time as "to

be determined." *Ibid.* Campos-Chaves endorses the same view. See *Campos-Chaves* Pet. 27-28.

For several reasons, that position cannot be squared with Section 1229(a)(2)'s text. To begin, the position mistakenly assumes that Section 1229(a)(2)(A)'s reference to "change or postponement" of the hearing time and place defines a statutorily compliant paragraph (2) notice. In fact, the requirements for a paragraph (2) NOH are set out in 8 U.S.C. 1229(a)(2)(A)(i) and (ii). Those provisions state that a paragraph (2) notice need contain only two pieces of information: "(i) the new time or place of the proceedings," and "(ii) the consequences * * * of failing * * * to attend such proceedings." 8 U.S.C. 1229(a)(2)(A)(i) and (ii). A written notice containing those two items is the "notice required under" paragraph (2) for purposes of in absentia removal. 8 U.S.C. 1229a(b)(5)(A); cf. *Pereira*, 138 S. Ct. at 2116 (explaining that paragraph (1) defines "a notice to appear" as "written notice" specifying certain information). The Ninth Circuit's contrary argument thus "conflates *when* the Government must issue a paragraph (2) notice"—in the case of a change or postponement of a hearing time—"with *what* that notice must contain"—the "new time or place" of the hearing. *Lazo-Gavidia* v. *Garland*, 73 F.4th 244, 258 (4th Cir. 2023) (Rushing, J., dissenting). As explained above, pp. 24-25, *supra*, the three NOHs that are relevant here each provided the requisite "new time" information.

Even assuming an NOH must constitute a "change" in the time or place of a noncitizen's hearing, the NOHs in these cases satisfy that requirement because they changed the time from "To Be Set" or "TBD" to a specific time. As a noun, a "change" can be "an instance of making or becoming different in some particular * * *

: ALTERATION, MODIFICATION, VARIATION," *Webster's Third New International Dictionary* 374 (1993) (def. 2.a), or "the action of replacing something with something else of the same kind or with something that serves as a substitute," *ibid.* (def. 3); see *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 231 (2014) (describing "two common meanings" of "chang[e]": "to 'substitute' and to 'alter'") (citation omitted). Either of those senses is satisfied here, whether the supplying of a specific time is considered an alteration of the indeterminate placeholder or a substitution for it. As the Ninth Circuit dissenters explained, under the "ordinary sense of the term," it "certainly reflects * * * a '*change* . . . in the time and place' that was previously listed" in an NTA when a hearing's time and date go from "To Be Set" or "TBD" to "a particular date, time, and place" specified in an NOH. *Singh* Pet. App. 42a (Collins, J., dissenting from the denial of rehearing en banc) (quoting 8 U.S.C. 1229(a)(2)(A)).

The Ninth Circuit panel believed that there must already be a particular date and time before any change is "possible." *Singh* Pet. App. 10a; see *Singh* Br. in Opp. 15 (contending that, if there was no "*initial* time or place, there was nothing to change") (citation and internal quotation marks omitted). But contrary examples abound in which the filling of a gap where there was previously nothing to report is understood to be a "change." In this Court, for example, a party's corporate-disclosure statement may initially say that the corporation has "no parent or publicly held company that owns 10% or more of the corporation's stock." Sup. Ct. R. 29.6. But the party's counsel must "promptly inform the Clerk" "whenever there is a material change in the identity of the parent corporation or publicly held com-

panies that own 10% or more of the corporation's stock." *Ibid.* Such a "change in the identity" manifestly occurs when the party goes from having no parent to having one. Likewise, a registered sex offender who goes from being unemployed to having a job is required to update his registration to reflect that "change of * * * employment," 34 U.S.C. 20913(c), by supplying "[t]he name and address of any place where the sex offender is an employee," 34 U.S.C. 20914(a)(4).

Nothing in the INA hints that Section 1229a(b)(5) reflected a departure from that ordinary usage of "change." To the contrary, Congress provided for the immigration court to issue an NOH whenever there is "*any* change" in the time or place of a noncitizen's hearing. 8 U.S.C. 1229(a)(2)(A) (emphasis added). "As this Court has repeatedly explained, the word 'any' has an expansive meaning," which means its use here encompasses a change "of whatever kind." *Patel* v. *Garland*, 142 S. Ct. 1614, 1622 (2022) (citations and some internal quotation marks omitted). A modification of the time of a removal hearing from "to be determined" to a specific time is a "kind" of change that the government may make and of which it must then give notice.[3]

Indeed, Section 1229(a) includes another instance in which "any change" can refer to the substitution of specific information for the previous lack of any such infor-

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[3] Because an NOH must specify "the new time or place of the proceedings," 8 U.S.C. 1129(a)(2)(A)(i), Singh and Mendez-Colín contend (Br. in Opp. 15) that "the word 'new' implies that there was an 'old'—that is, prior—time or place." While the adjective "new" can describe something that is "other than the former or old," *Websters Third* at 1522 (def. 2.b), it equally describes something that has "originated or occurred lately," *ibid.* (def. 1), or is "recently manifested, recognized, or experienced : NOVEL," *ibid.* (def. 2.a).

mation. A noncitizen in removal proceedings is required to "provide (or have provided) the Attorney General with a written record of an address and telephone number (*if any*) at which the noncitizen may be contacted respecting [removal] proceedings." 8 U.S.C. 1229(a)(1)(F)(i) (emphasis added). But during the proceedings, the noncitizen is also required to "provide the Attorney General immediately with a written record of *any change* of the alien's address or telephone number." 8 U.S.C. 1229(a)(1)(F)(ii) (emphasis added). Thus, a noncitizen who has no address or telephone number to report at the outset is still required to report the subsequent acquisition of a new address or number. In other words, Congress necessarily intended "any change" to include a change from something that was not yet determined to something specific.

c. In the circumstances of Singh's and Mendez-Colín's cases, the Ninth Circuit's narrow construction of the term "change" fails for additional reasons. As the dissenters explained, 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." *Singh* Pet. App. 45a (brackets in original). But the Ninth Circuit made no attempt to explain why the time specified in Singh's third NOH did not represent a "change" in the time specified in his second. Nor did the court explain why the time specified in the seventh NOH Mendez-Colín received, scheduling his fifth hearing, was not a "new time," representing a "change" in the time of his proceedings. 8 U.S.C. 1229(a)(2)(A).

For Mendez-Colín, moreover, the contention (*Singh* Br. in Opp. 16) that every NOH he received was "void"

fails for yet another reason. After receiving the NTA and the first NOH, Mendez-Colín appeared at his initial hearing. *Singh* Pet. App. 66a; J.A. 41. Mendez-Colín subsequently appeared through counsel at three additional hearings, after receiving an NOH for each one. J.A. 20-40. He thus treated each of those prior NOHs as valid; indeed, his attorney affirmatively stated that there was "no issue" with the NOH that preceded the hearing where the in absentia removal order was entered. *Mendez-Colín* A.R. 77. In those circumstances, it defies credulity to claim that the NOH for his fifth hearing (the one he missed) was somehow invalid.

***3. The alternative rationales advanced by the noncitizens here are also unavailing***

In opposing certiorari, Singh and Mendez-Colín sought to defend the Ninth Circuit's decisions on two alternative grounds not adopted by that court. Campos-Chaves similarly offered a novel statutory argument, not accepted by any court of appeals, when seeking this Court's review. None of those additional arguments has merit.

a. Singh and Mendez-Colín assert (*Singh* Br. in Opp. 18-20) that regardless of whether the relevant NOHs were valid paragraph (2) notices, the earlier lack of a complete paragraph (1) notice is alone sufficient to subject their in absentia removal orders to rescission. But that argument misunderstands the inquiry under Section 1229a(b)(5). The statute permits noncitizens to seek rescission when 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) (emphasis added). As explained above, pp. 28-29, *supra*, the statute's use of the word "or" indicates that the basis for receiving an in absentia removal order, and thus eligibility to seek rescis-

sion of such order, depends on whether the noncitizen received whichever form of notice is relevant to the proceeding the noncitizen did not attend. Thus, when the relevant proceeding was noticed under paragraph (2), the government's failure to provide a statutorily compliant paragraph (1) notice is not a basis for rescission.

b. Singh and Mendez-Colín also 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 Singh and Mendez-Colín did "receive" those notices. *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." *Singh* Pet. App. 76a. 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. 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) ("Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F)"), 1229a(b)(5)(A) (specifying that the written notice under paragraph (1) or (2) that must be provided to support in absentia removal "shall be considered sufficient * * * if provided at the most recent address provided under section 1229(a)(1)(F)").

Singh and Mendez-Colín make much of the fact that the government can obtain an in absentia removal order when it "provided" notice, while noncitizens must prove

they did not "receive" notice. See Br. in Opp. 20-21 (quoting 8 U.S.C. 1229a(b)(5)(C)). But the explanation for Congress's variation in word choice is obvious: A noncitizen could not be said to have "provided" the notice that is sent to the noncitizen by the government. To "receive" an item is the natural linguistic opposite of having been "provided" with that item.

Regardless, Congress's use of the word "receive" (rather than, for instance, "has been provided") was not an oblique shorthand for a requirement of "*actual* notice." Contra *Singh* Br. in Opp. 21. It has long been recognized that constructive notice can be consistent with due process. See, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); cf. *Krupski* v. *Costa Crociere S.p.A.*, 560 U.S. 538, 554 (2010) (defendant had "received * * * notice" of complaint for purposes of Fed. R. Civ. P. 15(c)'s relation-back rule where defendant had "constructive notice" of complaint). And when Congress wanted to deviate from that baseline in the INA and attach significance to a heightened form of notice, it did so expressly. For example, a ten-year ban on certain types of relief applies to a noncitizen who has been ordered removed in absentia if that noncitizen was "provided oral notice * * * of the time and place of the proceedings and of the consequences * * * of failing * * * to attend." 8 U.S.C. 1229a(b)(7). The fact that Congress referred explicitly to *oral* notice—a form of actual notice—in Section 1229a(b)(7) strongly indicates that the "notice" simpliciter that must be "receive[d]" under Section 1229a(b)(5)(C) can be constructive notice.[4]

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[4] In other parts of the U.S. Code, Congress has referred to "actual notice" when deviating from the understanding that "notice" may be actual or constructive. See, *e.g.*, 11 U.S.C. 542(c) (permitting

Singh's and Mendez-Colín's "actual notice" requirement also contradicts the portion of Section 1229a(b)(5)(A) that permits in absentia removal when the government provides notice to "the alien's counsel of record." 8 U.S.C. 1229a(b)(5)(A). Service on a party's attorney is a classic form of constructive notice. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court addressed a requirement that a letter from the EEOC be "received" and refused to read it as requiring actual receipt. *Id.* at 92-93. The Court concluded that "[i]f Congress intends to depart from the common and established practice of providing notification through counsel, it must do so expressly." *Id.* at 93. But, under Singh's and Mendez-Colín's position, the language expressly permitting in absentia removal after service on an attorney would put the INA on a collision course with itself, because orders obtained on that basis could always be rescinded for lack of "actual notice" to the noncitizen.

c. Campos-Chaves contends (Pet. 29) that the government's reading "conflicts with [S]ection 1229(b)(1)." That provision states that in removal proceedings "the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear" unless the noncitizen consents to an earlier date. 8 U.S.C. 1229(b)(1). Campos-Chaves argues (Pet. 29) that by re-

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transfer of bankruptcy estate property if an entity "has neither actual notice nor actual knowledge" of the bankruptcy); 18 U.S.C. 930(h) (permitting conviction for possession of firearms in federal facilities where signage noted prohibition or "person had actual notice" of prohibition); 35 U.S.C. 154(d)(1)(B) (permitting certain patent infringement remedies against individuals with "actual notice of the published patent application"). Such provisions illustrate that Congress knows how to specify when constructive notice will be insufficient.

ferring to the date of the service of the NTA, Section 1229(b)(1) indicates that, if an NTA lacks all the required information, "no subsequent, standalone hearing notice could provide service of a valid hearing date."

Campos-Chaves misunderstands the role that Section 1229(b)(1) plays in the statutory scheme. Its explicit purpose is to ensure that the noncitizen is "permitted the opportunity to secure counsel before the first hearing date." 8 U.S.C. 1229(b)(1); see *Pereira*, 138 S. Ct. at 2115 (provision guarantees noncitizen "time to prepare adequately" for hearing). It says nothing about the substance or validity of a subsequent notice issued for a later hearing. Nor does Campos-Chaves explain why the NOH provided to him, which was sent 119 days before his scheduled removal hearing, failed to provide him with a "meaningful" opportunity to obtain counsel. *Pereira*, 138 S. Ct. at 2115.

#### *4.* Pereira *and* Niz-Chavez *do not require deviating from the plain text of Section 1229a(b)(5)*

Like the Ninth Circuit, the noncitizens here claim to find support for their interpretation of Section 1229a(b)(5) in *Pereira* v. *Sessions*, *supra*, and *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474 (2021). But neither decision squarely addressed the question presented here.

*Pereira* concerned the circumstances under which a noncitizen can invoke the "stop-time" rule contained in 8 U.S.C. 1229b(d)(1). Under that rule, the accrual of continuous presence or residence necessary for noncitizens to qualify for the discretionary relief of cancellation of removal is "deemed to end" when the noncitizen has been "served a notice to appear," *i.e.*, the notice required by Section 1229(a)(1). *Ibid.* The Court framed "[t]he narrow question" before it in *Pereira* as follows:

"If the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule?" 138 S. Ct. at 2110. The Court answered that question in the negative. *Ibid.* In reaching that result, the Court focused primarily on the text of Section 1229(a)(1), governing NTAs, and Section 1229b(d)(1), governing the stop-time rule. The Court also stated that it viewed the text of paragraph (2) as "reinforc[ing]" its conclusions about those other provisions because "paragraph (2) presumes that the Government has already served a 'notice to appear under section 1229(a)' that specified a time and place." *Id.* at 2114. The Court did not hold, however, that if the "presum[ption]" it identified were incorrect, and a paragraph (2) notice followed a paragraph (1) notice that did not specify a time and place, then the paragraph (2) notice would automatically be rendered ineffective.

Moreover, although the Court in *Pereira* looked to Section 1229(a)(2)'s language when identifying the elements of "a notice to appear," see 138 S. Ct. at 2114, the question presented did not require the Court to consider the validity of a paragraph (2) "written notice" either generally or in the specific context at issue here concerning rescission of in absentia removal orders. Because the NOH in Pereira's case was not sent to the mailing address he had provided, "Pereira never received notice of the time and date of his removal hearing" under paragraph (2). *Id.* at 2112. Accordingly, the Court had no occasion to consider whether an NOH that was received by the noncitizen and replaced a TBD time with a specific time would be invalid under paragraph (2)—much less to suggest that the NOHs at issue in

Singh's and Mendez-Colín's cases, which were issued after previous NOHs had already replaced the TBD time and, in Mendez-Colín's case, after the noncitizen or his attorney had already attended multiple hearings, would be invalid. See *Singh* Pet. App. 44a-45a (Collins, J., dissenting from the denial of rehearing en banc).

The noncitizens are also wrong to assert (*Singh* Br. in Opp. 10, 16; *Campos-Chaves* Pet. 1) that *Niz-Chavez* answered the question presented. *Niz-Chavez*, like *Pereira*, was a case about the application of the stop-time rule governing eligibility for the *substantive* relief of cancellation of removal. *Niz-Chavez* held only that, in determining whether the stop-time rule was triggered, the government could not rely on two documents to satisfy the requirements of paragraph (1) of Section 1229(a). 141 S. Ct. at 1481. *Niz-Chavez* "did not address—much less resolve * * * —the 'point now at issue,'" *Van Buren* v. *United States*, 141 S. Ct. 1648, 1660 (2021) (citation omitted), which is whether an NOH that is issued as a single document (as were the NOHs in these cases) satisfies the *procedural* requirements of paragraph (2) and permits in absentia removal.

*Niz-Chavez*'s description of NOHs as "supplemental notice[s]," 141 S. Ct. at 1485, similarly does not cast doubt on the validity of an NOH that provides adequate notice of a new time or place for a hearing. That description is undoubtedly correct in that an NOH is provided after—that is, supplements—an NTA. But the supplemental nature of an NOH does not mean that a noncitizen who receives notice of the exact time and place of his initial hearing in an NOH has somehow received defective notice of that hearing as a procedural matter, and is therefore eligible to seek, for lack of notice, recession of any removal order entered in absentia

at that hearing. Indeed, as the dissenters in *Niz-Chavez* noted, and the majority opinion did not dispute, "two-document notice"—*i.e.*, notice in the form of an NTA followed by an NOH—"could justify removal in absentia" notwithstanding the majority's interpretation of the stop-time rule. *Id.* at 1491 (Kavanaugh, J., dissenting).

In any event, this Court does not resolve in passing important questions of statutory interpretation not directly at issue in a case. To the extent that *Pereira* and *Niz-Chavez* addressed Section 1229a, those prior statements provide no sound reason to adopt a construction contrary to the ordinary meaning of the statutory text. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013). That is especially so given the multiple other provisions in the relevant statutory context that support the government's position, see pp. 41-44, *infra*, but that the Court did not discuss in *Pereira* or *Niz-Chavez*.

### B. Statutory Context And Common Sense Show That An In Absentia Removal Order Cannot Be Rescinded For Lack Of Notice When The Noncitizen Received Notice Of The Relevant Hearing And Failed To Attend

Statutory provisions "do[] not exist in a vacuum" and must be read within the context of the statute "'as a whole.'" *Territory of Guam* v. *United States*, 141 S. Ct. 1608, 1612-1613 (2021) (citation omitted). Here, the best interpretation of Section 1229a(b)(5)'s text is also the interpretation that best fits the structure of Section 1229a and the broader context of the INA's adjudicatory provisions.

1. Section 1229a establishes detailed procedures to be followed during removal proceedings. Sections 1229a(b)(5)(A) and (b)(5)(C) address in absentia removal orders in particular. "One specifies what notice

is necessary to enter an in absentia removal order in the first place, while the other keeps that order in place unless an alien shows that he did not receive the required notice." *Dacostagomez-Aguilar* v. *U.S. Att'y Gen.*, 40 F.4th 1312, 1316 (11th Cir. 2022), cert. dismissed, 143 S. Ct. 1102 (2023). Under the government's reading, those provisions "work[] in tandem" by focusing the removal inquiry on the same notice: the one that corresponds with the hearing missed by the noncitizen. *Ibid.* If the noncitizen received that notice, then he cannot obtain rescission of an in absentia removal order on the basis of lack of notice.

Under the Ninth Circuit's reading, by contrast, Section 1229a creates a profound mismatch between the government's ability to obtain in absentia removal orders and noncitizens' ability to get them rescinded. A noncitizen "shall be ordered removed" when the government proves it provided notice of the missed hearing under paragraph (2). 8 U.S.C. 1229a(b)(5)(A). But to obtain rescission of that order the noncitizen would need to prove only that he did not receive notice of a specific time in the NTA served under paragraph (1). And that would be true even if the lack of information concerning the time and place of the initial hearing in the NTA was entirely irrelevant to the noncitizen's failure to attend the hearing at which he was ordered removed in absentia. The statutory text should not be interpreted to create such untenable "inconsistencies with the design and structure" of Section 1229a(b)(5). *Van Buren*, 141 S. Ct. at 1659 (brackets and citation omitted).

2. "[R]elated statutory provisions" can also illuminate the meaning of "the statute's text." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 558

(2005). Several aspects of the statutory scheme here show that Congress designed Section 1229a(b)(5) to ensure that noncitizens are given their procedural due process rights in removal proceedings, see generally *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976), not to create a far broader rescission remedy that may be deployed "at any time" a noncitizen chooses to file a motion to reopen, 8 U.S.C. 1229a(b)(5)(C)(ii).

First, other portions of Section 1229a(b)(5)(C) show that it is highly unlikely that Congress intended to permit rescission of an in absentia removal order absent extenuating circumstances beyond a noncitizen's control. Section 1229a(b)(5)(C)(i) permits a noncitizen to file a motion to reopen within 180 days after the date of the removal order "if the alien demonstrates that the failure to appear was because of exceptional circumstances." 8 U.S.C. 1229a(b)(5)(C)(i). "Exceptional circumstances" are narrowly defined as "exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1229a(e)(1). The fact that Congress made rescission unavailable even where the noncitizen has a reason for nonattendance that is only somewhat "less compelling" than an "exceptional circumstance[]" greatly undermines the view that rescission is routinely available when a noncitizen simply fails to attend a specific hearing of which he had notice.

The adjoining clause points in the same direction. In addition to providing for motions to reopen when the noncitizen did not receive notice under paragraph (1) or (2), Section 1229a(b)(5)(C) makes rescission available

when "the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien." 8 U.S.C. 1229a(b)(5)(C)(ii). Again, Congress's emphasis on whether the noncitizen was at "fault" for the failure to appear strongly reinforces the conclusion that Congress did not intend rescission to be available for those who, like the noncitizens here, do bear responsibility for their nonattendance.

Sections 1229a(b)(5)(B) further weakens any inference that noncitizens whose nonattendance is due to circumstances within their control can nevertheless obtain rescission based on lack of notice. Section 1229a(b)(5)(B) expressly exempts the government from the obligation to provide the "written notice * * * required under" Section 1229a(b)(5)(A)—*i.e.*, the "written notice required under paragraph (1) or paragraph (2) of section 1229"—"if the alien has failed to provide" a written record of an address at which the noncitizen may be contacted regarding removal proceedings. 8 U.S.C. 1229a(b)(5)(B) (citing 8 U.S.C. 1229(a)(1)(F)(i)).

The effect of that provision is to deprive noncitizens who do not comply with the address-information requirement of the ability to obtain rescission of in absentia removal orders under Section 1229a(b)(5)(C). See, *e.g.*, *Dacostagomez-Aguilar*, 40 F.4th at 1319. That bar is categorical, including in cases where the government's original NTA did not include a time certain for the noncitizen's removal proceedings. *Ibid.*; see *Platero-Rosales* v. *Garland*, 55 F.4th 974 (5th Cir. 2022).

Section 1229(a)(2)(B) similarly reiterates that the government does not need to provide an NOH where the noncitizen has failed to keep his address information current. Again, that bar applies even when the original

NTA does not include time-and-place information for the initial hearing. 8 U.S.C. 1229(a)(2)(B); see *Pereira*, 138 S. Ct. at 2111.

Given that rescission is unavailable when the noncitizen did not update his address and therefore *did not even receive notice* of a removal hearing, it is exceedingly improbable that Congress intended rescission to be available to a noncitizen who *did* receive notice at his current address of record and yet failed to attend the hearing. Under Sections 1229a(b)(5)(B) and 1229(a)(2)(B), the government's obligation to provide notice—and thus a noncitizen's eligibility for rescission on lack-of-notice grounds—turns on the noncitizen's actions, specifically whether the noncitizen has complied with the statutory obligation to provide current contact information. There is no reason to suspect that Congress mandated a different approach under the circumstances here, where the entry of the in absentia removal order is a consequence of a noncitizen's failure to comply with the basic requirement of the removal process that he attend his hearing.

Section 1229a's time limits on motions to reopen also confirm that rescission for lack of notice should be available only where a noncitizen truly lacked notice of the relevant hearing. A motion seeking rescission for lack of "notice" of the hearing may be filed "at any time." 8 U.S.C. 1229a(b)(5)(C)(ii). All other motions to reopen have a restricted time limit and are generally required to be filed within 90 or 180 days of the final order of removal. See 8 U.S.C. 1229a(b)(5)(C)(i) and (c)(7)(C). If Congress intended that rescission for lack of notice could be based on an asserted defect known to the noncitizen before the in absentia removal order, such as an NTA that failed to comply fully with Section

1229(a)(1), there would have been no need to permit the noncitizen to file the motion "at any time." A noncitizen who sought rescission based on the absence of time information in his NTA could easily file such a motion within the usual 90-day deadline. Congress's exemption of motions to rescind in absentia removal orders for lack of "notice" from the time restrictions imposed on all other types of motions to reopen again reinforces the conclusion that Congress provided for rescission as a tool to ensure procedural due process in removal proceedings, not as a permanent "get out of removal free" card.

3. "Context also includes common sense." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring). And here, the Ninth Circuit's construction of paragraph (2) is manifestly contrary to common sense. It requires the rescission of an in absentia removal order even when the lack of a specific time in the NTA had nothing to do with the noncitizen's failure to attend the hearing at which the order was entered.

Singh's and Mendez-Colín's cases illustrate the bizarre consequences of the Ninth Circuit's rule. In Singh's case, the fact that the NTA listed the time of his removal hearing as "TBD" was immaterial for two reasons. J.A. 11. First, Singh received notice of the time specified in the first NOH. See J.A. 7 (specifying a time of January 29, 2021, at 8 a.m.); *Singh* A.R. 99 (acknowledging that his attorney "specifically" told him about that "hearing date"). The fact that the initial time was specified not in the NTA, but rather in a separate document (the first NOH), made no difference to whether he received notice of that time. Second, the time initially specified was superseded anyway by the second NOH (mailed on October 29, 2018) and then by the third NOH

(mailed on November 26, 2018). J.A. 1, 4. Thus, even if the NTA itself had specified a time, that initial time would not have ultimately mattered. Singh's failure to appear at the time specified in the *third* NOH was in no way attributable to the NTA's omission of a specific time.

In Mendez-Colín's case, the fact that the NTA listed the time of his initial removal hearing as "[t]o be set" was even more demonstrably immaterial. J.A. 44, 46. First, like Singh, Mendez-Colín received notice of a specific time in the first NOH; in fact, Mendez-Colín personally attended his first hearing. See *Singh* Pet. App. 66a. Thus, the lack of a specific time in the NTA demonstrably caused him no prejudice. Second, his attorney attended three more hearings on his behalf and made the request that precipitated the need for a fifth hearing, and Mendez-Colín then had actual notice of the time for that fifth hearing—the missed hearing that justified entry of an in absentia removal order. See p. 13-14, *supra*; *Singh* Pet. App. 75a-76a. Mendez-Colín asserted, moreover, that he missed that hearing because he "wrongfully believed that the court was scheduled for 1:00 pm, instead of [t]he correct time of 9:00 am," on September 15, 2003. *Mendez-Colín* A.R. 148. Thus, according to Mendez-Colín himself, the lack of a specific time for the initial hearing in the August 2001 NTA had nothing to do with his failure to appear at the later, pivotal hearing. Yet the court of appeals permitted Mendez-Colín to rescind his removal order anyway, 18 years after his removal proceedings ended, and 17 years after the Government executed the order.

As the facts of these cases show, the Ninth Circuit's interpretation leads to the "extraordinary" result of allowing a removal order to be rescinded years or decades

later just because "the *first* link in the chain of notices" was incomplete, even though the noncitizen received later notices or attended later hearings. *Singh* Pet. App. 45a (Collins, J., dissenting from the denial of rehearing en banc). "The illogical results of applying such an interpretation . . . argue strongly against the conclusion that Congress intended these results." *Jones* v. *Hendrix*, 143 S. Ct. 1857, 1869 (2023) (citation omitted).

### C. Statutory History And Purpose Confirm That Rescission For Lack Of Notice Is Unavailable When The Noncitizen Received Notice Of The Relevant Hearing Under Paragraph (2)

This Court often looks to a statute's history and purpose in determining the statute's meaning. See *Abramski*, 573 U.S. at 179. The history and purpose of the INA's in absentia removal provisions fortify the plain-text construction. Congress adopted Section 1229a(b)(5) and its predecessors in an effort to expand, not limit, the government's ability to obtain in absentia removal of noncitizens. The statutory history is irreconcilable with any suggestion that Congress intended to allow an irrelevant defect in an earlier notice to grant immunity from in absentia removal to a noncitizen who receives notice of, and declines to attend, a specific removal hearing.

1. a. In absentia removal traces its origins back to Congress's enactment of the INA in 1952. The original Act provided that, if a noncitizen is "given a reasonable opportunity to be present at a proceeding" to determine deportability and "without reasonable cause fails or refuses to attend or remain in attendance at such proceeding," then a "special inquiry officer" (the precursor to an immigration judge) "may proceed to a determination in like manner as if the alien were present." 8 U.S.C.

1252(b) (1952). But that provision made in absentia removal discretionary. *Ibid.* And such an order could also be challenged at any time through a "motion to reopen." See *Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008) (discussing the history of motions to reopen in the immigration context).

Over the following decades, concerns arose that the then-existing system allowed noncitizens to "frustrate removal through taking advantage of certain procedural loopholes." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 122 (1996) (1996 House Report). The loopholes included many noncitizens' willingness to "fail to appear for their deportation hearing[s]." *Ibid.*; see *ibid.* (noting that "there are few consequences (other than forfeiture of bond) for aliens who fail to appear for their hearings").

Congress began addressing those concerns in the Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 5061-5065 (1990 Act). The 1990 Act *mandated* entry of an in absentia order of deportation for failure to appear if the noncitizen had been provided with "the written notice" for the "proceeding" that he "d[id] not attend." 8 U.S.C. 1252b(c)(1) (1994). The 1990 Act permitted rescission of an in absentia order only "if the alien demonstrates" "exceptional circumstances," or "that the alien did not receive notice," or "that the alien was in Federal or State custody and did not appear through no fault of the alien." 8 U.S.C. 1252b(c)(3) (1994).

In 1996, Congress enacted IIRIRA, which adopted the current version of Section 1229a and consolidated the INA's in absentia removal provisions in that section. IIRIRA strengthened the in absentia removal process in multiple respects. After concluding that "problems

regarding lack of accurate information" had "impair[ed] the ability of the government to secure in-absentia deportation orders in cases where aliens fail to appear for their hearings," 1996 House Report 159, Congress adopted a new requirement that the government maintain a central address file to record address information provided by noncitizens. See 8 U.S.C. 1229(a)(3). Congress also provided that "service by mail of the required notice of hearing is sufficient if there is proof of delivery to the most recent address provided by the alien." 1996 House Report 159; see 8 U.S.C. 1229a(b)(5)(A). Congress further restricted the availability of recission by requiring a noncitizen asserting a lack of notice to "demonstrate[] that notice was not received notwithstanding the alien's compliance with the notice of address requirements." *Ibid.*; see 8 U.S.C. 1229a(b)(5)(C). In explaining the changes made by IIRIRA, the House Judiciary Committee expressed concern that under the prior system "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings le[d] some immigration judges to decline to exercise their authority to order an alien deported in absentia." 1996 House Report 122.

b. The manner in which the INA's in absentia removal procedures evolved is significant for three reasons.

First, Congress's adoption of mandatory in absentia removal orders and strict limitations on rescission of such orders demonstrates that Congress intended for Section 1229a to increase the number of noncitizens who are removed in absentia after failing to attend their removal proceedings.

Second, while Congress was concerned about ensuring that noncitizens received notice during removal pro-

ceedings, a key goal of the 1990 Act's and IIRIRA's notice provisions was to minimize the number of noncitizens who did not attend hearings, and to ease removal of those noncitizens who failed to attend despite receiving notice.

Third, and fundamentally, Congress's adoption of multiple measures aimed at closing "procedural loopholes," 1996 House Report 122—and at expediting removal of noncitizens who fail to attend their removal hearings—is at odds with the notion that the government's omission of specific time information in an NTA permits a noncitizen to evade in absentia removal in perpetuity by simply failing to appear. The essential purpose of the 1990 Act's and IIRIRA's modifications to the in absentia removal process was "to abbreviate the process of [removal] . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics." *Stone* v. *INS*, 514 U.S. 386, 399 (1995) (quoting *Foti* v. *INS*, 375 U.S. 217, 224 (1963)). The Ninth Circuit's reading, however, creates a perverse incentive for noncitizens who received "TBD" NTAs to fail to attend their hearings even when they have actual notice of them. If such a noncitizen attends his removal hearing, he can be removed. But if he declines to attend, and is ordered removed in absentia at the hearing he skips, the Ninth Circuit permits him to obtain rescission of that order at any time. That erroneous construction encourages the kind of gamesmanship that Section 1229a(b)(5) was designed to combat.

Moreover, even if noncitizens do not intentionally exploit the Ninth Circuit's rule, its consequences for the immigration system would still be dire. Since IIRIRA's enactment, hundreds of thousands of noncitizens have

been ordered removed in absentia. See, *e.g.*, Exec. Office for Immigration Review (EOIR), U.S. Dep't of Justice, *Adjudication Statistics: In Absentia Removal Orders* (Apr. 21, 2023) (showing figures going back to Fiscal Year 2008). For many years, nearly all NTAs served on noncitizens lacked the time of the initial removal hearing. See *Pereira*, 138 S. Ct. at 2111. After *Pereira*, EOIR has implemented an online scheduling system that allows DHS components that serve NTAs to independently set initial-hearing times in cases involving noncitizens who are not detained. See EOIR, *EOIR Courts & Appeals System, Summary of ECAS Enhancements DHS Users* 2 (July 2019), https://go.usa.gov/xGkuy. Despite those improvements, however, operational and technical challenges have continued to prevent the issuance of NTAs with specific hearing times in certain circumstances. See Gov't Br. at 41-42, *Niz-Chavez*, *supra* (No. 19-863).

The upshot is that potentially hundreds of thousands of noncitizens who have already been ordered removed in absentia would be able to undo those orders under the view adopted by the Ninth Circuit, regardless of how many NOHs they received or how many hearings they attended, and even when the lack of a specific time in their NTAs demonstrably had nothing to do with their subsequent failures to attend their proceedings. That result would frustrate, not further, Section 1229a's purposes.

2. Campos-Chaves observes (Pet. 29-30) that, before IIRIRA, the INA distinguished between two kinds of notice: notice of the "time and place at which the proceedings will be held" and, "in the case of any change or postponement in the time and place of such proceedings," notice of "the new time or place of the proceed-

ings." Campos-Chaves then asserts (Pet. 30) that this history reflects a "longstanding distinction between notice scheduling a hearing and notice changing the time of a previously scheduled hearing." That argument rests on the same unduly narrow understanding of the word "change" discussed above. See pp. 28-29, *supra*. When a noncitizen receives an initial notice that the "time and place" of his hearing is "to be determined," a later notice providing a definite time and place reflects a "change" in the time of the hearing.

Regardless, the history that Campos-Chaves cites favors the government. Although IIRIRA amended the INA's "notice" provisions to require that the charging document include information about the "time and place at which the proceedings will be held," 8 U.S.C. 1229(a)(1)(G)(i), it retained the government's ability to supply additional information about hearing logistics to noncitizens in the form of an NOH. 8 U.S.C. 1229(a)(2). The decision not to require the government to provide definitive information in the initial notice concerning the hearing at which removal would ultimately be ordered reinforces the conclusion that Congress's overriding concern in enacting IIRIRA's notice provisions was to "simplify procedures for initiating removal proceedings" and to make it easier for the government "to secure in absentia" orders. 1996 House Report 159. Under the Ninth Circuit's position, by contrast, the flexibility created by the ability to supplement an NTA with an NOH is largely illusory. Even a minor defect in an NTA would render all subsequent NOHs invalid, regardless of whether they complied with the requirements of Section 1229(a)(2).

### D. Policy Considerations Do Not Undermine the Plain-Text Reading Of Section 1229a(b)(5)

Singh and Mendez-Colín contend (*e.g.*, Br. in Opp. 21) that "policy considerations" weigh in their favor. But it is beyond dispute that "even the most formidable policy arguments cannot overcome a clear statutory directive" of the kind found in Section 1229a(b)(5). *BP p.l.c.* v. *Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1542 (2021) (internal quotation marks and citation omitted). And the noncitizens' policy arguments are unpersuasive even on their own terms.

Singh and Mendez-Colín emphasize (Br. in Opp. 21) that noncitizens are entitled to certain "due process protections" during removal proceedings. That is true but beside the point. Section 1229a(b)(5) fully protects due process rights by requiring the government to provide, and the noncitizen to receive, notice of the relevant hearing before an in absentia removal order can be issued. And here, it is conceded that the government provided each noncitizen with a notice stating the time and place of the relevant hearing—in addition to all of the other information required by paragraphs (1) and (2). Due process does not require anything more.

Singh and Mendez-Colín also invoke (Br. in Opp. 22) the potential for "language barriers" or "mental incompetence" to prevent noncitizens from understanding when removal proceedings will take place. But there is no evidence that such concerns—or anything like them—prevented Singh or Mendez-Colín from attending the hearings they missed in their respective removal proceedings.[5]

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[5] Such concerns are addressed by statute, regulations, and Department of Justice policies. See, *e.g.*, EOIR, *The Executive Office*

All three noncitizens suggest (*Campos-Chaves* Pet. 29; *Singh* Br. in Opp. 17) that under the government's interpretation, a noncitizen could be ordered removed in absentia even if he was never provided with any of the information required under Section 1229(a)(1). That speculative concern is unfounded. Much of the information required to be included in the NTA does not vary from case to case and is included, in standardized language, on the NTA form used by DHS. Compare, *e.g.*, J.A. 10-16 with 8 U.S.C. 1229(a)(1)(A)-(B), (E)-(F), and (G)(ii). Other case-specific information is included by necessity. For example, under the relevant regulations, an NTA must list the charges against the noncitizen (but not a specific time and date for the hearing when that is not "practicable"). See 8 C.F.R. 1003.15(b)(4), 1003.18(b). Sending an NTA that did not include any charges against the noncitizen would thus be futile. Because an NOH specifying only the time and place of an upcoming hearing under paragraph (2) would not remedy that underlying defect, the government would have to issue a new NTA to commence removal proceedings.

Moreover, the noncitizens ignore the government's burden when seeking to remove a noncitizen in absentia. If DHS simply provided a noncitizen with a blank document titled "Notice to Appear," and nothing else,

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*for Immigration Review's Plan for Ensuring Limited English Proficient Persons Have Meaningful Access to EOIR Services*, https://www.justice.gov/sites/default/files/eoir/legacy/2012/05/31/EOIRLanguageAccessPlan.pdf; EOIR, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013), https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented.

the government would not be able to prove by "clear, unequivocal, and convincing evidence" that the noncitizen had been provided "written notice" under either paragraph (1) or paragraph (2). The noncitizen therefore would not be eligible for in absentia removal on that basis. But if, as here, the government has provided the noncitizen with notices that contain all the information required by Section 1229(a), lack of notice is not a defense to in absentia removal.[6]

Concerns about the effects of incomplete NTAs are especially unavailing as applied to these three cases. Although the NTAs did not specify exact times for initial removal hearings, there is no contention that those NTAs lacked any of the other information required to be included under Section 1229(a)(1). Nor is there any dispute that the information most relevant to each noncitizen's ability to attend the hearing he missed—the time and place of that particular hearing—was provided by the government in a later NOH.

In any event, policy concerns provide no sound basis to disregard the plain text of Section 1229a(b)(5). The best reading by far of that provision is that noncitizens may be removed in absentia where they receive notice

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[6] Campos-Chaves incorrectly claims (Pet. 28-29) that the government took a different position in *Niz-Chavez*. The government noted in *Niz-Chavez* that the NTA requirement "ensured that in absentia removal would be ordered only if an alien had been served with notice of the full panoply of information that Congress deemed requisite" in Section 1229(a)(1). Gov't Br. at 39, *Niz-Chavez*, *supra* (No. 19-863). That statement was, and is, correct. But it does not address the question here, which concerns the validity of an in absentia removal order issued after the noncitizen has been served with an NTA that included all information required by Section 1229(a)(1) except a specific hearing time, and also served with one or more NOHs that provide a specific hearing time.

of the relevant hearing under paragraph (1) *or* paragraph (2). If a noncitizen receives notice under paragraph (2), and nevertheless fails to attend the hearing scheduled by that notice, the removal order cannot be rescinded based on a lack of notice.

### E. Alternatively, The Board's Reasonable Interpretation Is Entitled to Deference

For the reasons given above, the government's interpretation of Section 1229a(b)(5)'s in absentia removal procedures reflects by far the best construction of the text. At a minimum, however, the Board's decision to adopt that interpretation is reasonable and entitled to deference. See *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); *Aguirre-Aguirre*, 526 U.S. at 424; *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).[7]

1. "Congress has charged the Attorney General with administering the INA." *Negusie*, 555 U.S. at 516-517; see 8 U.S.C. 1103(a)(1). Congress thus has made clear that any ambiguity in the INA should be resolved, "first

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[7] This Court has granted certiorari in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451, to consider whether to "overrule *Chevron*" or limit its application in certain cases involving statutory "silence." Pet. at i-ii, *Loper Bright*, *supra*. The Court's resolution of that question should not affect the outcome here: This case does not involve the sort of statutory silence that the petitioners in *Loper Bright* contend is present in that case, and the BIA's interpretation is in any event the best reading of Section 1229a(b)(5). Moreover, the INA expressly provides that the "determination and ruling by the Attorney General with respect to all questions of law" arising from "the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of" noncitizens "shall be controlling." 8 U.S.C. 1103(a)(1); *Negusie*, 555 U.S. at 517. That express vesting of interpretive authority would not be affected by the Court's consideration of implicit delegations in *Loper Bright*.

and foremost," by the Attorney General, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996). The Attorney General, in turn, has vested his interpretive authority in the Board, including with respect to removal proceedings, see *Negusie*, 555 U.S. at 517.

Since this Court's decision in *Pereira*, the Board has consistently interpreted Section 1229a(b)(5) to require in absentia removal where a noncitizen receives notice of the time and place of the relevant hearing through an NOH, even if an earlier NTA lacked that scheduling information.

*In re Pena-Mejia*, 27 I. & N. Dec. 546 (B.I.A. 2019), was the Board's first precedential decision on the issue. The noncitizen there was personally served an NTA that listed the time of her initial removal hearing as "to be set." *Id.* at 546. She was later provided with an NOH informing her that a hearing had been scheduled for October 31, 2002, at 9:00 am, and she was ordered removed in absentia after failing to appear at the scheduled hearing. *Ibid.* The Board rejected the noncitizen's challenge to her removal order, reasoning that an immigration judge may enter an in absentia order of removal "if a written notice containing the time and place of the hearing was provided *either* in a notice to appear under section [1229](a)(1) *or* in a subsequent notice of [hearing specifying] the time and place of the hearing pursuant to section [1229](a)(2)." *Id.* at 548. The Board emphasized Section 1229a(b)(5)'s use of "the disjunctive term 'or' rather than the conjunctive 'and,'" which, in the Board's view, distinguished "the provisions of the Act at issue in *Pereira*." *Ibid.* The Board cited the *Pereira* Court's own description of the question it decided about the stop-time rule as "'narrow,'" and the Board concluded that *Pereira* "did not hold that [an NTA lacking

specific hearing time information] is invalid for all purposes." *Id.* at 547 (quoting *Pereira*, 138 S. Ct. at 2113).

The same day it decided *Pena-Mejia*, the Board issued its decision in *In re Miranda-Cordiero*, 27 I. & N. Dec. 551 (B.I.A. 2019). The noncitizen in *Miranda-Cordiero* received an NTA with a "to be set" hearing time, but refused to provide an address at which immigration officials could contact her. *Id.* at 551. Consequently, the noncitizen did not attend a later scheduled hearing and was ordered removed in absentia. *Ibid.* As in *Pena-Mejia*, the Board determined that "rescission of the [noncitizen's] in absentia order of removal is not mandated by *Pereira*." *Id.* at 552. In reaching that conclusion, the Board reiterated *Pena-Mejia*'s analysis of the disjunctive nature of Section 1229a(b)(5). *Id.* at 553.

Most recently, in *In re Laparra-Deleon*, 28 I. & N. Dec. 425, 428 (B.I.A. 2022), vacated in part, 52 F.4th 514 (1st Cir. 2022), the Board considered the continued validity of *Pena-Mejia* and *Miranda-Cordiero* in light of this Court's decision in *Niz-Chavez*. As in the Board's earlier decisions, the noncitizen in *Laparra-Deleon* received an NTA with a hearing time "to be set," followed by an NOH that specified a hearing time. *Id.* at 426. The noncitizen moved to reopen, relying on *Pereira* and *Niz-Chavez*. *Ibid.* The Board denied the motion and reaffirmed its precedents. The Board explained that "[u]nlike the provisions at issue in *Niz-Chavez*," Section 1229a(b)(5) makes clear that the required notice "may come in the form of either a statutorily compliant notice to appear or a compliant notice of hearing." *Id.* at 431, 433. Accordingly, any defects in "notice" documents issued prior to the relevant "notice" for the missed proceeding are irrelevant for purposes of rescission under 8 U.S.C. 1229a(b)(5)(C)(ii). See *In re Laparra-Deleon*,

28 I. & N. Dec. at 433-434. The Board deemed that interpretation most consistent with "the overall statutory scheme as well as the relevant regulatory history." *Id.* at 434.

2. The Board's consistent interpretation is at the very least a reasonable one that is entitled to deference. This Court has repeatedly held that principles of *Chevron* deference apply when the Board interprets the INA. See, *e.g.*, *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591-598 (2012); *Aguirre-Aguirre*, 526 U.S. at 424-432. See also *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56-75 (2014) (plurality opinion); *id.* at 76-79 (Roberts, C.J., concurring in the judgment). Indeed, "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Negusie*, 555 U.S. at 517 (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)). Here, too, the Board's consistent interpretation of Section 1229a(b)(5), under which a noncitizen who receives specific notice of a removal hearing and then fails to attend that hearing cannot seek rescission based on lack of notice, should be upheld, or, at minimum, deferred to as a reasonable interpretation of the INA.

## CONCLUSION

The judgment of the court of appeals in *Campos-Chaves* v. *Garland*, No. 22-674, should be affirmed. The judgments of the court of appeals in *Garland* v. *Singh* and *Garland* v. *Mendez-Colín*, No. 22-884, should be reversed.

Respectfully submitted.

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# APPENDIX

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## APPENDIX

1. 8 U.S.C. 1229(a)-(c) provide:

**Initiation of removal proceedings**

**(a) Notice to appear**

**(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.

**(B) Exception**

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

**(3) Central address files**

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

**(b) Securing of counsel**

**(1) In general**

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

**(2) Current lists of counsel**

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

**(3) Rule of construction**

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

**(c) Service by mail**

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

2. 8 U.S.C. 1229a(b)(5) and (7), (c)(7), and (e) provide in relevant part:

**Removal proceedings**

**(b) Conduct of proceeding**

**(5) Consequences of failure to appear**

**(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)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

**(B) No notice if failure to provide address information**

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

**(C) Rescission of order**

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(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 or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

**(D) Effect on judicial review**

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the

proceeding, and (iii) whether or not the alien is removable.

**(E) Additional application to certain aliens in contiguous territory**

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

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**(7) Limitation on discretionary relief for failure to appear**

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

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**(c) Decision and burden of proof**

**(7) Motions to reopen**

**(A) In general**

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

**(B) Contents**

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

**(C) Deadline**

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

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**(e) Definitions**

In this section and section 1229b of this title:

**(1) Exceptional circumstances**

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

**(2) Removable**

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.