No.

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
PETITIONER

v.

VARINDER SINGH

MERRICK B. GARLAND, ATTORNEY GENERAL,
PETITIONER

v.

RAUL DANIEL MENDEZ-COLIN

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

PETITION FOR A WRIT OF CERTIORARI

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 An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen filed at any time" if the noncitizen subject to the order demonstrates that he "did not receive" such notice. 8 U.S.C.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

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Singh v. *Garland*, No. 20-70050 (Oct. 12, 2022)

Mendez-Colin v. *Garland*, No. 20-71846 (Oct. 12, 2022)

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The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these two cases. Pursuant to this Court's Rule 12.4, the government is filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

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

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

JURISDICTION

In *Singh*, the judgment of the court of appeals was entered on February 4, 2022. A petition for rehearing was denied on October 12, 2022 (App., *infra*, 26a-52a). On December 30, 2022, Justice Kagan extended the time within which to file a petition 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.

In *Mendez-Colin*, the judgment of the court of appeals was entered on February 4, 2022. A petition for rehearing was denied on October 12, 2022 (App., *infra*, 82a-108a). On December 30, 2022, Justice Kagan extended the time within which to file a petition 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.

In each case, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this petition. App., *infra*, 109a-113a.

STATEMENT

A. Statutory Background

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that a noncitizen placed in removal proceedings be given "written notice" of certain information. 8 U.S.C. 1229(a)(1) and (2).[1] Two paragraphs in 8 U.S.C. 1229(a) specify the notice required. *Ibid.*

Paragraph (1) of Section 1229(a) is entitled "Notice to appear." 8 U.S.C. 1229(a)(1) (emphasis omitted); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-587. It provides that "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying," among other things, the nature of the proceedings against the noncitizen, the legal authority for the proceedings, the charges against the noncitizen, the fact that the noncitizen may choose to be represented by counsel, the "time and place at which the proceedings will be held," and the "consequences" under 8 U.S.C. 1229a(b)(5) "of the failure * * * to appear." 8 U.S.C. 1229(a)(1). To provide the notice required under paragraph (1), the government uses a form labeled "Notice to Appear." *E.g.*, *Singh* Administrative Record (*Singh* A.R.) 135 (capitalization altered; emphasis omitted).

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[1] This petition 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)).

That form, which this petition refers to as an NTA, has space for the government to fill in the time and place at which the proceedings will be held. See, *e.g.*, *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); IIRIRA § 304(a)(3), 110 Stat. 3009-588. It provides that, "in the case of any change or postponement in the time and place of [the] proceedings," "a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying" "the new time or place of the proceedings" and "the consequences" under Section 1229a(b)(5) of "failing * * * to attend." 8 U.S.C. 1229(a)(2)(A). To provide the notice required under paragraph (2), the government uses a form labeled "Notice of Hearing." *E.g.*, *Singh* A.R. 130 (capitalization altered). That form, which this petition refers to as an NOH, has space for the immigration court to fill in the new time and place of the proceedings. See, *e.g.*, *ibid.*

Section 1229a(b)(5) specifies the consequences of failing to appear at a scheduled proceeding. It provides that "[a]ny alien who, after written notice required under paragraph (1) or (2)" of Section 1229(a) "has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia" if the Department of Homeland Security (DHS) "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). "The written notice * * * shall be considered sufficient for purposes of [Section 1229a(b)(5)(A)] if provided at the most recent address provided under [8 U.S.C.] 1229(a)(1)(F)," *ibid.*, which

requires the noncitizen to provide the government with a "written record" of his address and "any change of [his] address." 8 U.S.C. 1229(a)(1)(F)(i) and (ii); see 8 U.S.C. 1229(c) ("Service by mail under [Section 1229] shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with [Section 1229(a)(1)(F)]."); *In re G-Y-R-*, 23 I. & N. Dec. 181, 189 (B.I.A. 2001) (explaining that if a notice "reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper service will have been effected").

An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

B. *Singh*

1. Respondent Varinder Singh is a native and citizen of India. App., *infra*, 13a. In October 2016, he entered the United States without inspection by climbing over a fence at the border with Mexico. *Singh* A.R. 133, 135.

On December 1, 2016, DHS served Singh with an NTA. *Singh* A.R. 135-136. The NTA charged that Singh was subject to removal because he was a noncitizen present in the United States without being admitted or paroled. *Id.* at 135; see 8 U.S.C. 1182(a)(6)(A)(i). The NTA ordered Singh to appear for removal proceedings at a time "TBD" (*i.e.*, to be determined). *Singh* A.R. 135.

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. *Singh* A.R. 130. The NOH was

mailed to an address in Dyer, Indiana, that Singh had provided to DHS. *Id.* at 130, 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. *Singh* A.R. 129. 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 immigration judge (IJ) rescheduled the hearing for December 12, 2018, at 9 a.m. *Singh* A.R. 128; App., *infra*, 19a. On November 26, 2018, the immigration court mailed to Singh, at the same Dyer, Indiana address, an NOH specifying the new time. *Singh* A.R. 127.

On December 12, 2018, Singh failed to appear at his scheduled hearing and the IJ ordered him removed in absentia. App., *infra*, 24a-25a.

2. In April 2019, Singh filed a motion to reopen his removal proceedings and rescind the in absentia removal order. *Singh* A.R. 80-96. 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 further acknowledged 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 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. App., *infra*, 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. The IJ 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." *Ibid.*

The Board of Immigration Appeals (Board) dismissed Singh's appeal. App., *infra*, 13a-16a. The Board noted Singh's acknowledgement that Board precedent foreclosed his argument that the notice he had received was "defective." *Id.* at 14a n.1 (citing *In re Pena-Mejia*, 27 I. & N. Dec. 546 (B.I.A. 2019), and *In re Miranda-Cordiero*, 27 I. & N. Dec. 551 (B.I.A. 2019)).

3. In a published decision, a panel of the court of appeals granted Singh's petition for review and remanded for further proceedings. App., *infra*, 1a-12a. The panel read this Court's decisions in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474 (2021), to mean that 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. App., *infra*, 11a-12a; see *id.* at 6a-9a. The panel further read the text of paragraph (2) of Sec-

tion 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)—to mean that "there can be no valid notice under paragraph (2) without valid notice under paragraph (1)." App., *infra*, 10a. Specifically, the panel 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 panel 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.

The panel concluded that because Singh's NTA did not specify the time of his initial removal hearing, Singh had not received "all the information" specified in paragraph (1) in "a single document." App., *infra*, 12a. The panel thus held that "Singh's *in absentia* removal order is subject to re[s]cission" under Section 1229a(b)(5)(C)(ii). *Ibid.*

4. The Ninth Circuit denied rehearing en banc. App., *infra*, 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 dissent's view, the panel had "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 conflicts with the decisions of other Circuits and "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; see *id.* at 52a n.1 (noting that judges in senior status are unable to formally "join a dissent from failure to rehear en banc").

C. *Mendez-Colin*

1. Respondent Raul Daniel Mendez-Colin is a native and citizen of Mexico. *Mendez-Colin* Administrative Record (*Mendez-Colin* A.R.) 167. In August 2001, he tried to enter the United States through the vehicle lane of the port of entry at San Luis, Arizona, by falsely claiming that he was a U.S. citizen. *Id.* at 122, 128, 131, 167. He also tried to smuggle in two other noncitizens who were in the car with him. *Id.* at 128, 132, 136, 167.

On August 26, 2001, the former Immigration and Naturalization Service served Mendez-Colin with an NTA. *Mendez-Colin* A.R. 167-168. The NTA charged that Mendez-Colin was subject to removal 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. *Id.* at 167; see 8 U.S.C. 1182(a)(6)(E)(i). The NTA ordered Mendez-Colin to appear for removal proceedings at a time "[t]o be set." *Mendez-Colin* A.R. 167.

On October 5, 2001, the immigration court mailed to Mendez-Colin an NOH specifying that his case had been scheduled for a hearing on November 6, 2001, at 9 a.m., in Phoenix, Arizona. *Mendez-Colin* A.R. 166. That NOH was mailed to the address in Buckeye, Arizona, that the NTA had identified as Mendez-Colin's residence. *Id.* at 166-167.

On November 6, 2001, Mendez-Colin appeared at the scheduled hearing. App., *infra*, 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. *Mendez-Colin* A.R. 164-165. Mendez-Colin's attorney appeared at the hearing on January 15, 2002, as well as at additional hearings on May 28, 2002, and July 23, 2002. See App., *infra*, 66a; *Mendez-Colin* A.R. 157-163; Mendez-Colin C.A. Br. 4. At the July 23 hearing, the IJ sustained the charge of removability and the attorney expressed Mendez-Colin's desire to apply for cancellation of removal. App., *infra*, 66a.

On July 23, 2002, the immigration court mailed to Mendez-Colin's attorney an NOH specifying the time of his next (and fifth) hearing, on September 15, 2003, at 9 a.m. *Mendez-Colin* A.R. 157; see App., *infra*, 66a, 73a. One week before that hearing, Mendez-Colin's attorney submitted 30 pages of documents in support of the application for cancellation of removal. *Mendez-Colin* A.R. 79-113. But three days before the hearing, Mendez-Colin's attorney moved to withdraw as counsel, citing Mendez-Colin's failure "to maintain contact" regarding "the merits of his case." *Id.* at 77. Mendez-Colin's attorney stated, however, that there was "no issue" regarding Mendez-Colin's "notice of hearing." *Ibid.*

On September 15, 2003, Mendez-Colin failed to appear at the scheduled hearing, but his attorney appeared.

App., *infra*, 66a, 73a, 78a. His attorney explained that he had "mailed the hearing notice in both English and Spanish to [Mendez-Colin] and that [Mendez-Colin] had signed the bottom of his attorney's hearing notice." *Id.* at 76a. His attorney also presented an account of Mendez-Colin's failure "to maintain contact with the attorney's office." *Ibid.*; see *id.* at 73a; *Mendez-Colin* A.R. 139. The IJ granted the attorney's motion to withdraw and found that Mendez-Colin had been "duly notified of the date, time, and place of his hearing but, without good cause, [had] failed to appear as required." App., *infra*, 66a-67a; see *id.* at 75a-76a, 80a-81a. The IJ determined that Mendez-Colin "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.

2. In December 2003, Mendez-Colin, 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-Colin* A.R. 148; see *id.* at 147-150. The IJ denied the motion, finding that Mendez-Colin's "failure to appear for his individual hearing appear[ed] to stem from a lack of interest, rather than a scheduling error." App., *infra*, 76a; see *id.* at 71a-77a.

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

Id. at 62a. The Board deemed the appeal withdrawn and the IJ's decision final. *Id.* at 62a-63a.

More than 15 years later, in January 2020, Mendez-Colin 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 NTA did not specify the time of his initial removal hearing. *Mendez-Colin* A.R. 11-21. The Board denied the motion. App., *infra*, 56a-61a. The Board rejected Mendez-Colin'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.

3. In an unpublished decision issued the same day as *Singh*, the same panel of the court of appeals granted Mendez-Colin's petition for review and remanded for further proceedings. App., *infra*, 53a-55a. The panel reiterated *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-Colin'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.

4. The Ninth Circuit denied rehearing en banc. App., *infra*, 82a-83a. Judge Collins, joined by 11 other judges, filed the same dissent as in *Singh*. *Id.* at 84a-107a. In the dissent's view, the outcome in *Mendez-Colin* 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. As in *Singh*, 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 108a.

REASONS FOR GRANTING THE PETITION

Under 8 U.S.C. 1229a(b)(5)(C)(ii), a removal order entered in absentia is subject to rescission 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 court of appeals held that the failure to receive, in a single document, all of the information specified in paragraph (1) precludes an additional document from providing adequate notice under paragraph (2), and renders any in absentia removal order subject, indefinitely, to rescission. App., *infra*, 5a, 10a. Under that holding, if the initial Notice to Appear said that the time of the noncitizen's initial removal hearing was to be set or determined later—a common governmental practice for many years—it does not matter that a later Notice of Hearing supplied a specific time for that hearing, or that an even-later NOH changed a previously set time (or gave notice of the date on which a hearing that had begun would continue). It does not even matter that the noncitizen attended some removal hearings before failing to attend the hearing that resulted in an in absentia order. In the Ninth Circuit, the omission of a specific time in the initial NTA means there was inadequate notice, which is a perpetual ground for rescinding the removal order.

As the dissent from the denial of rehearing en banc recognized, the Ninth Circuit's interpretation of the INA is erroneous. App., *infra*, 28a (Collins, J.). It is also contrary to the decisions of other courts of appeals on an "exceptionally important question concerning the type of notice that must be provided * * * before an immigration court may proceed with an in absentia removal." *Ibid.* This Court's review is therefore warranted, and the government requests that the Court grant both this petition and the petition for a writ of certiorari in *Campos-Chaves* v. *Garland*, No. 22-674 (filed Jan. 18, 2023). Granting both petitions would allow the Court to address the application of the INA's in absentia removal provisions in full view of the slightly different, yet frequently recurring, circumstances presented by the two cases here and *Campos-Chaves*.

A. The Court Of Appeals' Decisions In These Cases Are Wrong

The court of appeals in these cases announced the categorical rule that unless a noncitizen receives all of the information specified in paragraph (1) of Section 1229(a) in "a single document," "any *in absentia* removal order directed at the noncitizen is subject to rescission." App., *infra*, 5a. That interpretation of the INA's in absentia removal provisions is erroneous.

1. Under Section 1229a(b)(5)(A), a noncitizen may be ordered removed in absentia when he "does not attend a [removal] proceeding" "after written notice required under paragraph (1) *or* (2) of section 1229(a) * * * has been provided" to him or his counsel of record. 8 U.S.C. 1229a(b)(5)(A) (emphasis added). 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 establish a straightforward inquiry for determining whether an in absentia removal order may be rescinded. As the statutory text makes clear, the relevant proceeding is the "proceeding" that the noncitizen "d[id] not attend." 8 U.S.C. 1229a(b)(5)(A). And the relevant question is whether the noncitizen "receive[d] notice" of that proceeding "in accordance with paragraph (1) or (2)." 8 U.S.C. 1229a(b)(5)(C)(ii). If so, then the in absentia removal order is not subject to rescission for lack of notice. But if not, then the in absentia removal order "may be rescinded" on that ground. *Ibid.*

Under the terms of paragraph (2), the government may notify a noncitizen of "any change or postponement in the time and place of [the] proceedings" by giving "written notice" of "the new time or place of the proceedings" and the consequences of failing to attend. 8 U.S.C. 1229(a)(2)(A). That notice may 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)." *Ibid.*

Here, both respondent Singh and respondent Mendez-Colin received notice, in accordance with paragraph (2), of the hearings that they later failed to attend. The proceeding that Singh did not attend was his hearing on December 12, 2018, at 9 a.m. App., *infra*, 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. *Singh* A.R. 87, 127; see 8 U.S.C. 1229a(b)(5)(A) (deeming "written notice" "sufficient" "if provided at the most recent address provided"). That NOH satisfied

paragraph (2) because it "change[d] or postpone[d]" the "time" of the proceeding (which had previously been scheduled for November 26, 2018, at 1 p.m.) and specified a "new time" (of December 12, 2018, at 9 a.m.). 8 U.S.C. 1229(a)(2)(A); see *Singh* A.R. 127, 129. Because Singh received 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.

The proceeding that Mendez-Colin did not attend was his hearing on September 15, 2003, at 9 a.m. App., *infra*, 66a, 78a. More than a year before that hearing, the immigration court mailed to Mendez-Colin's counsel of record an NOH specifying the time of that hearing. *Id.* at 66a, 73a, 75a; *Mendez-Colin* A.R. 157. By that point, the immigration court had already held four hearings, each attended by Mendez-Colin or his attorney. See p. 10, *supra*. Thus, in specifying the time of Mendez-Colin's fifth hearing—which was to consider the application for cancellation of removal that his attorney said, at the fourth hearing, Mendez-Colin wanted to submit—that particular NOH necessarily specified a "new time," which was a "change" from the last. 8 U.S.C. 1229(a)(2)(A). Because Mendez-Colin received 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 court of appeals did not question whether Singh and Mendez-Colin had each received the NOH for the hearing that he did not attend. Instead, the court held that those NOHs could not constitute "valid notice under paragraph (2)." App., *infra*, 10a; see *id.* at 54a-55a. That holding rested on the court's view that "there

can be no valid notice under paragraph (2) without valid notice under paragraph (1)." *Id.* at 10a.

a. That construction of paragraph (2) is contrary to the statutory text. It is true that Singh and Mendez-Colin did not receive all of the information specified in paragraph (1) in a single document. But the applicability of paragraph (2) does not depend on whether they did. Rather, the alternative form of notice at issue in paragraph (2) applies "in the case of any change or postponement in the time and place of [the] proceedings." 8 U.S.C. 1229(a)(2)(A). Its applicability thus depends on whether "any change or postponement in the time and place" has occurred, *ibid.*, not on whether the noncitizen previously received valid notice under paragraph (1).

The court of appeals believed that "a 'change' in the time" is "not possible" if the NTA referenced only a time TBD. App., *infra*, 10a. But as the dissent from the denial of rehearing en banc explained, "[i]f the time and place of a hearing were listed in an NTA as 'To Be Set' or 'TBD,' a subsequent NOH that newly provides a particular date, time, and place certainly reflects, in the ordinary sense of the term, a '*change* . . . in the time and place' that was previously listed." *Id.* at 42a (quoting 8 U.S.C. 1229(a)(2)(A)). And even if "the first NOH that follows a defective NTA does not count as a 'change' in the time and place, the same cannot be said of a subsequent NOH, which obviously 'change[s] or postpone[s]' the time in the prior NOH." *Id.* at 45a (brackets in original). But the court of appeals 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, or why the time specified in the NOH for Mendez-Colin's fifth hearing was not a "new time," representing

a "change" in the time of his proceedings. 8 U.S.C. 1229(a)(2)(A).

Contrary to the court of appeals' suggestion, App., *infra*, 10a, this Court in *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), did not squarely address the issues here. The *Pereira* Court stated that "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. But the question presented in *Pereira* concerned the application of "the stop-time rule," *ibid.*, not paragraph (2). And while the Court viewed the text of paragraph (2) as "reinforc[ing]" its conclusion that an NTA "must include at least the time and place of the removal proceedings to trigger the stop-time rule" in another provision of the INA, *ibid.*, the Court did not suggest that an NOH that replaced a TBD time with a specific time would be invalid under paragraph (2)—much less that the NOHs at issue here, which were issued after previous NOHs had already replaced the TBD time and, in Mendez-Colin's case, after the noncitizen or his attorney had already attended multiple hearings, would be invalid. See App., *infra*, 44a-45a (Collins, J., dissenting from the denial of rehearing en banc).

Nor did the Court's subsequent decision in *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474 (2021), address the meaning of paragraph (2). As the dissenters in that case noted, "two-document notice could justify removal in absentia," notwithstanding the majority's interpretation of the stop-time rule. *Id.* at 1491 (Kavanaugh, J., dissenting).

b. The court of appeals' construction of paragraph (2) is also contrary to "common sense." App., *infra*, 41a (Collins, J., dissenting from the denial of rehearing en

banc). It would require 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-Colin's cases illustrate the point.

In Singh's case, the fact that the NTA listed the time of his removal hearing as "TBD" was immaterial for two reasons. *Singh* A.R. 135. First, Singh had actual notice of the time specified in the first NOH that he received. See *id.* at 130 (specifying a time of January 29, 2021, at 8 a.m.); *id.* at 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 had actual notice. Second, the time initially specified was superseded anyway by the second NOH (mailed on October 31, 2018) and then by the third NOH (mailed on November 26, 2018). *Id.* at 127, 129. Thus, even if the NTA had specified an initial time, that 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 omission of a specific time in the NTA.

In Mendez-Colin's case, the fact that the NTA listed the time of his initial removal hearing as "[t]o be set" was likewise immaterial. *Mendez-Colin* A.R. 167. First, like Singh, Mendez-Colin had actual notice of the time specified in the first NOH that he received; in fact, Mendez-Colin personally attended his first hearing. See App., *infra*, 66a. Thus, the lack of a specific time in the NTA demonstrably caused him no prejudice. Second, Mendez-Colin's attorney attended three more hearings on his behalf and made the request that precipitated the need for a fifth hearing, and Mendez-Colin

had actual notice of the time for that fifth hearing—the missed hearing that justified his in absentia removal order. See p. 10, *supra*; App., *infra*, 75a-76a. Mendez-Colin 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-Colin* A.R. 148. Thus, according to Mendez-Colin himself, the lack of a specific time in the August 2001 NTA had nothing to do with his failure to appear at the pivotal hearing.

As these two cases illustrate, the court of appeals' categorical rule leads to the "extraordinary" result of allowing a removal order to be rescinded years or decades later simply because "the *first* link in the chain of notices" was invalid, even though the noncitizen received later notices or attended later hearings. App., *infra*, 45a (Collins, J., dissenting from the denial of rehearing en banc). That construction of the in absentia provisions makes little sense, and nothing in the statutory text justifies it.

B. The Court Of Appeals' Decisions Conflict With The Decisions Of Other Circuits On An Important Question Of Federal Law

1. As the dissent from the denial of rehearing en banc observed, the Ninth Circuit's decisions in these cases conflict with the decisions of other courts of appeals. App., *infra*, 47a-49a.

In *Dacostagomez-Aguilar* v. *U.S. Attorney General*, 40 F.4th 1312 (2022), petition for cert. pending, No. 22-775 (filed Feb. 14, 2023), the Eleventh Circuit explicitly "disagree[d] with the Ninth Circuit's interpretation of the in absentia removal provisions" in these cases. *Id.* at 1318 n.3. Specifically, the Eleventh Circuit rejected the Ninth Circuit's view that "there can be no valid no-

tice under paragraph (2) without valid notice under paragraph (1)." *Ibid.* (citation omitted). The Eleventh Circuit explained that "a paragraph (2) notice can inform a person of a 'change or postponement in the time and place' of removal proceedings even if the initial hearing information appeared in a follow-on notice of hearing." *Ibid.* The outcome of these cases therefore would have been different in the Eleventh Circuit. See *id.* at 1318-1319. Indeed, the Eleventh Circuit regarded as "absurd" the possibility of granting relief to a noncitizen who is ordered removed in absentia "after a perfectly noticed hearing" merely because the noncitizen "did not receive notice of an earlier hearing at which he was not ordered removed." *Id.* at 1318.

The Ninth Circuit's decisions in these cases also conflict with the Sixth Circuit's decision in *Santos-Santos* v. *Barr*, 917 F.3d 486 (2019). The noncitizen in that case was served with an NTA that ordered him to appear for removal proceedings at a time "to be determined." *Id.* at 488. The immigration court later mailed him an NOH that specified a time, but the noncitizen failed to appear and was ordered removed in absentia. *Ibid.* The Sixth Circuit determined that the NTA "did not satisfy the requirements of paragraph (1) because it did not include the date and time of the removal proceeding." *Id.* at 492. But the Sixth Circuit held that because the NOH met "the requirements of paragraph (2)," *ibid.*, the noncitizen was not entitled to rescission of the removal order, *id.* at 492-493. Under that reasoning, Singh and Mendez-Colin likewise would not have been entitled to rescission. See App., *infra*, 48a (Collins, J., dissenting from the denial of rehearing en banc) (observing that the Sixth Circuit's decision in *Santos-Santos* "is directly contrary to the panel's holding" in *Singh*).

Singh and Mendez-Colin also would not have been entitled to rescission in the Fifth Circuit. In *Campos-Chaves* v. *Garland*, 54 F.4th 314 (5th Cir. 2022) (per curiam), petition for cert. pending, No. 22-674 (filed Jan. 18, 2023), the noncitizen was served with an NTA that "did not contain the date and time of his removal proceedings." *Id.* at 315. The noncitizen "d[id] not dispute," however, "that he also received [a] subsequent NOH." *Ibid.* In the Fifth Circuit's view, "[t]he fact that [the noncitizen] received the NOH (or does not dispute receiving the NOH)" rendered the case "distinguishable" from *Rodriguez* v. *Garland*, 15 F.4th 351 (2021), reh'g en banc denied, 31 F.4th 935 (2022), in which the Fifth Circuit had granted relief to a noncitizen who had "received an undated NTA" but had "not receive[d] a subsequent [NOH]," *Campos-Chaves*, 54 F.4th at 315.

Like the noncitizen in *Campos-Chaves*—and unlike the noncitizen in *Rodriguez*—Singh and Mendez-Colin each received a subsequent NOH; indeed, they each received multiple subsequent NOHs. See pp. 5-6, 10, *supra*. Accordingly, their cases would have come out differently in the Fifth Circuit. See *Campos-Chaves*, 54 F.4th at 315 (citing approvingly the dissent from the denial of rehearing en banc in *Singh*); App., *infra*, 49a n.5 (Collins, J., dissenting from the denial of rehearing en banc) (noting that the "reasoning and result" in *Campos-Chaves* "directly conflict with the reasoning and result in *Mendez-Colin*").[2]

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[2] In *Laparra-Deleon* v. *Garland*, 52 F.4th 514 (2022), the First Circuit agreed with the Ninth Circuit that an NOH's substitution of a specific time for a TBD time in the NTA does not count as a "change" in the time under paragraph (2). *Id.* at 520. The First Circuit in *Laparra-Deleon*, however, did not squarely address the application of paragraph (2) to the factual scenarios here, involving

2. The issue on which the Circuits are divided—"the type of notice that must be provided to an alien under [the INA] before an immigration court may proceed with an in absentia removal"—is "exceptionally important." App., *infra*, 28a (Collins, J., dissenting from the denial of rehearing en banc); see *Rodriguez* v. *Garland*, 31 F.4th 935, 938 (5th Cir. 2022) (Elrod, J., dissenting from denial of en banc rehearing) (describing the issue as "extraordinarily important").

Congress enacted the requirement that an NTA specify the time of the initial removal hearing more than 25 years ago. See IIRIRA § 304(a)(3), 110 Stat. 3009-587 to -588. Since then, 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* (Oct. 13, 2022) (showing figures going back to Fiscal Year 2008).[3] For many years, nearly all NTAs served on noncitizens lacked the time of the initial removal hearing. See *Pereira*, 138 S. Ct. at 2111. And motions to reopen and rescind a removal order that was entered in absentia for lack of notice may be "filed at any time," 8 U.S.C. 1229a(b)(5)(C)(ii); there is no statute of limitations.

The upshot is that "potentially tens of thousands" of noncitizens who have already been ordered removed in absentia in the Ninth Circuit will be able to undo those orders under the decision in *Singh*, regardless of how many NOHs they received or how many hearings they attended, and even if the lack of a specific time in their

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multiple subsequent NOHs (*Singh*) and attendance at least one hearing (*Mendez-Colin*). See *id.* at 516 (noting that Laparra-Deleon was mailed a single NOH following his NTA).

[3] https://www.justice.gov/eoir/page/file/1243496/download.

NTAs demonstrably had nothing to do with their subsequent failure to attend their proceedings. App., *infra*, 50a (Collins, J., dissenting from the denial of rehearing en banc). Efforts to rescind such orders in the aftermath of *Singh* will only further burden an immigration-court system that already has a backlog of nearly 1.8 million cases. See EOIR, U.S. Dep't of Justice, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Oct. 13, 2022).[4]

As the dissent from the denial of rehearing en banc emphasized, one "need not look beyond the facts of these cases to see the remarkable breadth of the panel's holding":

> Mendez-Colin received his original NTA *over 20 years ago*. His initial removal proceedings ended 18 years ago. And during those proceedings, he attended multiple hearings, received multiple valid notices of those hearings, and received valid notice of the particular hearing at which he was ordered removed in absentia. Yet, as the panel has decreed, his decades-old removal order is now invalid.

App., *infra*, 50a-51a.

The panel's categorical holding in *Singh* also hinders DHS's ability to obtain *new* in absentia removal orders. There are still many pending proceedings involving NTAs, including NTAs issued before this Court's decision in *Pereira*, that listed the time for the noncitizen's initial hearing as "TBD." If the noncitizens in those proceedings show up for their removal hearings, they can be ordered removed. But if they do not show up, they cannot be ordered removed in absentia under *Singh*. In other words, *Singh* has given noncitizens in

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[4] https://www.justice.gov/eoir/page/file/1242166/download.

those circumstances a perverse incentive to fail to attend their hearings even when they have actual notice of them—the very opposite of what the INA's in absentia removal provisions were meant to accomplish. Given the "disturbingly broad implications of the panel's erroneous opinion," App., *infra*, 51a, this Court's review is warranted.

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

1. The court of appeals applied the same categorical rule in both *Singh* and *Mendez-Colin*, holding that the in absentia removal order in each case could be rescinded simply because the noncitizen had not received all of the information specified in paragraph (1) in a single document. App., *infra*, 11a-12a, 54a-55a. But the two cases do not present identical factual circumstances. Whereas Singh received multiple NOHs before being ordered removed in absentia, Mendez-Colin received multiple NOHs and further attended several hearings personally or through his attorney. See pp. 5-6, 10, *supra*. Although the court of appeals' categorical rule rendered any differences between the two cases immaterial, granting this petition would allow this Court to consider the proper interpretation of the INA's in absentia removal provisions in view of the somewhat different, but frequently recurring, scenarios presented by the two cases.

2. The Court should also grant the petition for a writ of certiorari in *Campos-Chaves* v. *Garland*, No. 22-674 (filed Jan. 18, 2023). *Campos-Chaves* involves the application of the INA's in absentia removal provisions to a third factual scenario: an NTA that does not specify a time, followed by a *single* NOH. See 54 F.4th at 315. Because *Campos-Chaves* involves only a single subse-

quent NOH, it presents the question whether substituting a specific time for a TBD time counts as a "change" in the time under paragraph (2). 8 U.S.C. 1229(a)(2)(A).

Granting the petition in *Campos-Chaves* along with the petition here would enable the Court to address the application of the INA's in absentia removal provisions in full view of the considerations raised by three scenarios: (1) an NTA with a TBD time, followed by multiple NOHs (*Singh*); (2) an NTA with a TBD time, followed by multiple NOHs and attendance at one or more hearings (*Mendez-Colin*); and (3) an NTA with a TBD time, followed by a single NOH (*Campos-Chaves*). Each of those scenarios recurs frequently. And by granting this petition and the petition in *Campos-Chaves*, the Court would be able to consider all three of them at once.

If, however, the Court were inclined to grant only one petition, the Court should grant this one. Because this petition presents two of the three scenarios noted above, granting this petition would allow the Court to cover more ground than granting the petition in *Campos-Chaves*, which presents only one scenario. And the Ninth Circuit panel and dissent from the denial of rehearing en banc addressed the single-NOH scenario as part of their statutory analysis. App., *infra*, 10a-11a, 42a-44a. Thus, the Court should grant at least this petition to ensure that it is able to address as many material factual variations as possible.

3. There is one more pending certiorari petition arising out of the circuit conflict implicated here, in *Dacostagomez-Aguilar* v. *Garland*, No. 22-775 (filed Feb. 14, 2023). That petition, however, presents a less suitable vehicle for this Court's review. Although the Eleventh Circuit in *Dacostagomez-Aguilar* specifically rejected "the Ninth Circuit's interpretation of the in ab-

sentia removal provisions" in these cases, 40 F.4th at 1318 n.3, the Eleventh Circuit's decision ultimately turned on the noncitizen's failure to notify the government about a change in address, see 8 U.S.C. 1229(a)(1)(F)(ii), thereby losing his right to written notice under 8 U.S.C. 1229a(b)(5)(B), see 40 F.4th at 1319. There is no circuit conflict on the application of Section 1229a(b)(5)(B), and that issue could stand as an obstacle to this Court's reaching the issues at the heart of *Singh*, *Mendez-Colin*, and *Campos-Chaves*. Accordingly, the Court should grant both this petition and the petition in *Campos-Chaves*, and it should hold the petition in *Dacostagomez-Aguilar* pending the disposition of the other three cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-70050
Agency No. A209-393-493

VARINDER SINGH, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
RESPONDENT

Argued and Submitted: Nov. 17, 2021
San Francisco, California
Filed: Feb. 4, 2022

On Petition for Review of an Order of the
Board of Immigration Appeals

OPINION

Before: M. MARGARET MCKEOWN and RONALD M. GOULD, Circuit Judges, and DONALD W. MOLLOY,* District Judge

Opinion by Judge Gould

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* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

GOULD, Circuit Judge:

This appeal requires us to decide what notice must be given to noncitizens before the government can order them removed *in absentia*.

The Immigration & Nationality Act provides for two ways in which an *in absentia* removal order can be rescinded. The first is through a motion to reopen filed within 180 days after the date of the order of removal if the noncitizen can show that their failure to appear was due to "exceptional circumstances." 8 U.S.C. § 1229a(b)(5)(C)(i). The second is through a motion to reopen "filed at any time" if the noncitizen can show that they "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title." § 1229a(b)(5)(C)(ii).

Petitioner Varinder Singh seeks rescission of his removal order, entered *in absentia*, under both ways to gain this relief. First, he contends that he did not receive proper notice under § 1229(a) pursuant to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Second, he argues that "exceptional circumstances" were present in his case.[1] The Board of Immigration Appeals ("BIA") affirmed the Immigration Judge's denial of his motion to reopen and rejected both of his arguments. Because the decisions of the Immigration Judge and BIA rested on a legally erroneous interpretation of § 1229(a), we grant relief based on Singh's first argument.

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[1] Singh's motion to reopen was filed within the 180-day window required by 8 U.S.C. § 1229a(b)(5)(C)(i).

BACKGROUND

Singh is a native and citizen of India who entered the United States without inspection in 2016. The Department of Homeland Security ("DHS") began removal proceedings against him and served him with a Notice to Appear. The Notice to Appear did not provide a date or time for Singh's removal hearing, instead stating that the date and time were "TBD."

DHS released Singh after he posted a bond that was paid for by a family friend. Singh then traveled to Indiana to live at one of the family friend's homes but provided the immigration court with the address of one of the friend's other residences because it was the more reliable mailing address. Unfortunately for Singh, the immigration court sent multiple hearing notices to the address, but his friend did not forward them to Singh until 2019. After Singh did not appear at his December 2018 removal hearing, an Immigration Judge ordered him removed *in absentia*. Once Singh learned of the hearing notices and *in absentia* removal order, he filed a motion to reopen and rescind the order.

Singh first argued that the *in absentia* order was invalid because the Notice to Appear that he received lacked time and date information. Relying on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), Singh contended that he did not receive the statutorily required notice under § 1229(a) because the Notice to Appear that he received did not provide the date and time of his removal hearing. Second, Singh argued in the alternative that even if he received proper notice, the *in absentia* order should be rescinded because "exceptional circumstances" were present in his case.

The Immigration Judge denied the motion, reasoning that any defect in Singh's initial Notice to Appear due to the absence of time-and-date information was cured by the subsequent hearing notices. As to Singh's notice argument, the Immigration Judge concluded that *Pereira* was limited to the "narrow question" of whether a document labeled "Notice to Appear" that fails to specify the time or date of the removal proceedings nonetheless triggers the stop-time rule, which relates to a petitioner's eligibility for cancellation of removal. Further, the Immigration Judge emphasized that though the Notice to Appear did not provide the date and time of Singh's hearing, any alleged error was essentially harmless because the government subsequently sent hearing notices to Singh's address that included this information. As to Singh's "exceptional circumstances" argument, the Immigration Judge concluded that "exceptional circumstances" must be beyond a noncitizen's control, and here, a failure in the innerworkings of his family friend's household did not meet that requirement.

After the Immigration Judge's decision, but before the BIA affirmed it, the BIA decided *Matter of Pena-Mejia*, 27 I. & N. Dec. 546 (BIA 2019), in which it limited *Pereira* to the stop-time rule context and held that rescission of an *in absentia* removal order is not required where the government provides the time and date of the hearing in a subsequent hearing notice, even if it is not provided in the initial Notice to Appear. Relying on this precedent, the BIA affirmed the Immigration Judge's denial of Singh's motion to reopen. The BIA also affirmed the Immigration Judge's conclusion rejecting the "exceptional circumstances" ground for reopening. Singh timely petitioned this court for review.

We have jurisdiction to review his petition under 8 U.S.C. § 1252(a)(1). We review the BIA's denial of Singh's motion to reopen for an abuse of discretion but review purely legal questions *de novo*. *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016). We grant Singh's petition and hold that noncitizens must receive a Notice to Appear in a single document specifying the time and date of the noncitizen's removal proceedings, otherwise any *in absentia* removal order directed at the noncitizen is subject to rescission pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii). Because we hold that Singh received defective notice under § 1229(a), we do not reach the issue whether "exceptional circumstances" were present in Singh's case.

DISCUSSION

An *in absentia* removal order can be rescinded if a noncitizen "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(c)(ii). Section 1229(a), in turn, is aptly named "Notice to Appear" and delineates the requirements that apply to such notice. *Id.* § 1229(a). Paragraph (1) defines the "notice to appear" and requires the government to specify seven enumerated categories of information including the "time and place at which the proceedings will be held" in that Notice to Appear. *Id.* § 1229(a)(1).

Paragraph (2) of section 1229(a), by contrast, explains what information must be provided if the government changes the time or place of the removal proceedings. Entitled "Notice of change in time or place of proceedings," this subsection expressly states that "in the case of any change or postponement in the time and place of such proceedings . . . a written notice shall

be given in person to the alien . . . specifying [] the new time or place of the proceedings" and describes the consequences of failing to appear. *Id.* § 1229(a)(2)(A). These notices of change in time or place of proceedings are commonly referred to as "hearing notices."

The government contends, and the BIA accepted, that although Singh received a Notice to Appear that failed to state the time or date of his removal hearing, this omission was cured by the subsequent hearing notices sent to him pursuant to paragraph (2) of § 1229(a) notifying him of changes in time or place of his proceedings. We disagree because this interpretation of § 1229a(b)(5)(C)(ii) contravenes the unambiguous statutory text and the Supreme Court's decision in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).

I.

Section 1229(a)'s notice requirements have generated significant controversy in recent years. In *Pereira v. Sessions*, the Supreme Court considered whether a Notice to Appear that does not specify the time and date of removal proceedings nevertheless triggers the "stop-time rule" ending a noncitizen's continuous presence for purposes of cancellation of removal. 138 S. Ct. at 2113. The Court determined that it "need not resort to *Chevron* deference" because the text of § 1229(a) is unambiguous, and a Notice to Appear that does not specify a time or place for the removal hearing "is not a 'notice to appear under section 1229(a)'" and as a result does not trigger the stop-time rule. *Id.* at 2113, 2114.

After *Pereira*, the government "could have responded . . . by issuing notices to appear with all the infor-

mation § 1229(a)(1) requires," but instead it relied on a two-step practice—familiar to Singh—whereby it would serve a Notice to Appear with the time and date of the removal hearing "to be determined" and then subsequently send hearing notices with this information. *Niz-Chavez*, 141 S. Ct at 1479. The Court rejected this two-step practice in *Niz-Chavez*, interpreting § 1229(a) to require a "single statutorily compliant document" to trigger the stop-time rule and concluding that a subsequent hearing notice could not cure a defective Notice to Appear. *Id.* at 1481.

Nevertheless, the government in this case asks us to approve the same two-step notice process for *in absentia* removal orders that the Supreme Court rejected in the stop-time-rule context in *Niz-Chavez*. Even if the BIA's interpretation of the notice required for *in absentia* removal orders was reasonable in 2019 after *Pereira*, it does not survive *Niz-Chavez*.

In *Matter of Pena-Mejia*, the BIA cabined the reach of *Pereira*, holding that the Supreme Court's interpretation of § 1229(a) notice in *Pereira* was limited to the specific language in the stop-time rule. 27 I. & N. Dec. at 547. But in *Niz-Chavez*, the Supreme Court conducted a statutory analysis of § 1229(a) separate from its analysis of the stop-time rule. *See Niz-Chavez*, 141 S. Ct. at 1480-82. The Supreme Court began by analyzing the stop-time rule's language in § 1229b of the statute, but it then independently analyzed the text of § 1229(a) and rejected the government's two-step approach to providing notice because that approach was inconsistent with the "singular article 'a'" in § 1229(a)(1). *Id.* at 1480. This reasoning demonstrates that the Supreme Court's interpretation of

§ 1229(a)'s notice requirements in *Niz-Chavez* extends beyond the context of the stop-time rule.

Beyond performing a separate statutory analysis of § 1229(a), the Supreme Court in *Niz-Chavez* also expressly interpreted the statutory provisions governing *in absentia* orders. Specifically, the Court explained that § 1229a(b)(7), which limits the discretionary relief available to certain noncitizens who receive *in absentia* orders, uses the singular article "the" before the word "notice." *Id.* at 1483. This use of a definite article with a singular noun indicated to the Court that the statute speaks of a Notice to Appear as a "discrete" document offered at a single point in time rather than an "ongoing endeavor." *Id.* This specific analysis of a statutory provision governing *in absentia* removal orders forecloses the government's argument that the Court's interpretations of notice in *Pereira* and *Niz-Chavez* should be limited to the stop-time rule context. *Niz-Chavez* made clear that the government must provide all statutorily required information in a single Notice to Appear, not only to trigger the stop-time rule, but for all removal proceedings that require notice pursuant to § 1229(a). We therefore join the Fifth Circuit in holding that the Supreme Court's "separate interpretation of the § 1229(a) notice requirements in *Niz-Chavez* [] applies in the in absentia context" in addition to the stop-time-rule context. *Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021).

Lending additional support to our view is the fact that the statutory provisions governing *in absentia* removal orders explicitly incorporate § 1229(a) by reference, just like the statutory provision governing the stop-time rule. *See Pereira*, 138 S. Ct. at 2114. Be-

fore an *in absentia* order can be issued, § 1229a(b)(5)(A) requires "written notice required under paragraph (1) or (2) of section 1229(a)" to be provided. Then, after an *in absentia* order has been issued, a noncitizen can seek rescission at any time if 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). Section 1229a references § 1229(a) notice a third time when it limits discretionary relief for noncitizens who fail to appear at their proceedings when they received oral notice in addition to the "notice described in paragraph (1) or (2) of section 1229(a)." *Id.* § 1229a(b)(7). These three explicit references provide "the glue" binding "the substantive time-and-place requirements mandated by § 1229(a)" to *in absentia* removal orders, just as they are bound to the stop-time rule. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019) (quoting *Pereira*, 138 S. Ct. at 2117).

II.

The government reasons that because § 1229a(b)(5)(A) is written in the disjunctive and allows for *in absentia* removal if a noncitizen received notice in accordance with paragraph (1) "or" (2) of §1229(a), the government should be permitted to follow the two-step notice process in the *in absentia* removal context, even though the Supreme Court rejected that two-step notice process in the stop-time rule context. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). The BIA recently adopted the government's argument in *Matter of Laparra*, 28 I. & N. Dec. 425 (BIA 2022). We are not persuaded by the government or the BIA that the word "or" in § 1229a(b)(5)(A) displaces the Supreme Court's interpretations of "Notice to Appear" in *Pereira* and

Niz-Chavez. The plain text, the statutory structure, and common sense command otherwise.

First, by the plain text of paragraph (2) of § 1229(a) there can be no valid notice under paragraph (2) without valid notice under paragraph (1). Paragraph (2) is entitled "Notice of change in time or place of proceedings," and it requires that "in the case of any change or postponement in the time and place" of the removal proceedings, written notice must be provided to the noncitizen specifying the new time or place. 8 U.S.C. § 1229(a)(2)(A). This text presupposes—and common sense confirms—that the Notice to Appear provided in paragraph (1) must have included a date and time because otherwise, a "change" in the time or place is not possible. We are surprised that the government would argue otherwise given that the Supreme Court already adopted this plain reading of paragraph (2) in *Pereira*:

> By allowing for a "change or postponement" of the proceedings to a "new time or place," paragraph (2) presumes that the Government has already served a "notice to appear under section 1229(a)" that specified a time and place as required by § 1229(a)(1)(G)(i). Otherwise, there would be no time or place to "change or postpon[e]." § 1229(a)(2) . . . . Paragraph (2) clearly reinforces the conclusion that "a notice to appear under section 1229(a)," § 1229b(d)(1), must include at least the time and place of the removal proceedings . . . .

138 S. Ct. at 2114.

Section 1229(a) also begins with unambiguous definitional language, explaining that "written notice" is "in this section referred to as a 'notice to appear.'"

8 U.S.C. § 1229(a)(1). Throughout § 1229(a), then, any reference to written notice is the "Notice to Appear" defined in paragraph (1) with its accompanying enumerated requirements. By definition, subsequent hearing notices under paragraph (2) are not, by themselves, "written notice" under § 1229(a) because they are not a "Notice to Appear" but rather a "Notice of change in time or place of proceedings." *Id.* § 1229(a)(2).

A look at the statutory structure of Section 1229(a) resolves any doubt. Paragraph (1), longer and more descriptive, defines the initial "Notice to Appear" and what it must include. *Id.* § 1229(a)(1). Paragraph (2), shorter in length, describes only what is required when there has been a "Notice of change in time or place of proceedings." *Id.* § 1229(a)(2). Paragraph (2) requires the government to provide the noncitizen with the new time and date of the hearing and sets forth the consequences of not showing up; it does not repeat the long list of requirements for written notice contained in paragraph (1). The hearing notices that the government sent Singh under paragraph (2), then, are additions to, and not alternatives to, the Notice to Appear described in paragraph (1). Thus, the "or" in § 1229a(b)(5)(C)(ii) accounts for situations in which the government needs to change or postpone a noncitizen's removal hearing; it does not provide a textual backdoor to circumvent the written-notice requirements enumerated in paragraph (1).

CONCLUSION

The Supreme Court's decisions in *Pereira* and *Niz-Chavez*, along with the text and structure of the statutory provisions governing *in absentia* removal orders and Notices to Appear, unambiguously required the

government to provide Singh with a Notice to Appear as a single document that included all the information set forth in 8 U.S.C. § 1229(a)(1), including the time and date of the removal proceedings. Because the government did not provide Singh with statutorily compliant notice before his removal hearing, Singh's *in absentia* removal order is subject to recission pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii). We grant Singh's petition on that ground, do not reach his exceptional circumstances argument, and remand to the BIA for further proceedings consistent with this opinion.

PETITION GRANTED and REMANDED.

APPENDIX B

U.S. Department of Justice
Executive Office
for Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

Date: [DEC. 23, 2019]

File: A209-393-493 – Imperial, CA

In re: Varinder SINGH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Saad Ahmad, Esquire

ON BEHALF OF DHS:
Jodi Miller
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of India, appeals from the Immigration Judge's May 15, 2019, decision denying his motion to reopen and rescind a December 12, 2018, in absentia removal order. Section 240(b)(5)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(i). The appeal will be dismissed.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have

met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge held that the respondent has not demonstrated that his failure to appear at the December 12, 2018, hearing was on account of "exceptional circumstances" so as to justify reopening (IJ at 3).[1] Section 240(b)(5)(C)(i) of the Act. The Immigration Judge determined that the respondent's failure to appear, which he attributed to "failure in the inner workings of the household," was not a circumstance over which he had no control, such as battery or extreme cruelty, serious illness or death of a family member (IJ at 3). *See Valencia-Fragoso v. INS*, 321 F.3d 1204 (9th Cir. 2003).

Exceptional circumstances are those beyond the control of the respondent, 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." Section 240(e)(1) of the Act. In ruling on a motion to rescind an in absentia order, the Immigration Judge must examine the "totality of the circumstances" and consider the particularized facts presented in each case. *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000); *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996); *see also Arredondo v. Lynch*, 824

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[1] The Immigration Judge also denied the respondent's motion based on his argument that the Notice to Appear was defective under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (IJ at 2). The respondent concedes that his argument in this regard has been foreclosed by recent Board precedent, but raises "this issue for possible future litigation in the court of appeals" (Respondent's Br. at 3). *See Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019) and *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019).

F.3d 801, 805-06 (9th Cir. 2016). In making this determination, the Ninth Circuit has considered factors such as a respondent's diligence in attending previous hearings and the reasonableness of a respondent's failure to appear. *See Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002).

Here, the Immigration Judge considered that the respondent was sent a Notice of Hearing on three separate dates to an address in Indiana, which he provided to the court, and that the respondent's reason for not appearing in court was based on his claim that the Notice of Hearing was not forwarded to him in a timely manner (IJ at 1-2). The respondent admitted that he was not living at the address where he ascribed the failure to inform him to "inner workings of the household" (Respondent's Motion, "Affidavit" at 1). We agree with the Immigration Judge that under the circumstances presented in his motion to reopen, "failure in the inner workings of the household," is not a circumstance over which he had no control, and does not amount to exceptional circumstances.

On appeal, the respondent argues that the Immigration Judge did not consider the totality of the circumstances and that reopening was warranted given certain favorable factors, including the fact that (a) he had a pending application for relief and, therefore, he had no reason to intentionally delay or miss his hearing (Respondent's Br. at 11-16). Whether the respondent has established exceptional circumstances is a legal conclusion, which we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii). In this regard, even accepting as true all of the respondent's statements in his affidavit, the respondent has not shown exceptional circumstances caused his failure to

appear at his hearing. *See Arredondo v. Lynch*, 824 F.3d at 805-06. Specifically, in addition to admitting that he was not living at the address provided to the Court, the respondent explained that on December 10, 2018, he moved to a location in Fresno, California (Respondent's Motion, "Affidavit" at 2). The respondent did not claim to have updated his address at any time with the Court, prior to the issuance of the in absentia removal order (*Id.*). He also claims that he assumed an attorney he hired had entered his appearance with the Court and would be receiving his hearing notices (*Id.*). Thus, the respondent's actions in relying on the "inner workings of the household" to receive his Notice of Hearing do not amount to exceptional circumstances.

In addition, insofar as the respondent alleges ineffective assistance of counsel on appeal, he has not demonstrated compliance with any of the criteria we set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), to establish such a claim (Respondent's Br. at 8-9, 13-14). The record further does not demonstrate a "clear and obvious case of ineffective assistance." *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002).

Based on this record, under the totality of the circumstances presented, the respondent has not shown that exceptional circumstances beyond his control prevented him from appearing at his hearing. *See* section 240(b)(5)(C) of the Act.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
2409 La Brucherie Road
Imperial, California 92251

File No. A209 393 493

IN THE MATTER OF VARINDER SINGH, RESPONDENT

[Date: May 15, 2019]

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:

Saad Ahmad, Esquire
39111 Paseo Padre Parkway #217
Fremont, California 94538

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Assistant Chief Counsel
1111 North Imperial Avenue
El Centro, California 92243

CHARGE:

Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, (Alien present in the United States without being admitted or paroled)

MOTIONS:

Respondent's Motion to Reopen Proceedings and Rescind *In Absentia* Order of Removal

DECISION AND ORDER
OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

On December 1, 2016, the Department of Homeland Security ("DHS") personally served Respondent with a Notice to Appear, alleging he 1) is not a citizen or national of the United States, 2) is a native and citizen of india, 3) unlawfully entered the United States at or near Calexico, California, on or about October 19, 2016, and 4) was not then admitted or paroled after inspection by an Immigration Officer. (DHS Form I-862, NTA.) Based on these allegations, the DHS charged Respondent as removable from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act"). (*Id.*) On December 2, 2016, the DHS filed the NTA with the Immigration Court in Imperial, California, thereby vesting this Court with jurisdiction over Respondent's removal proceedings. (*Id.*); 8 C.F.R. § 1003.14(a) (2016).

On December 2, 2016, Respondent was released from custody after posting bond in the amount of $1,500. (ICE Form I-830E.) Upon release, he reported that he would be residing at 2610 Queens Lane in Dyer, Indiana. (*Id.*) Respondent was provided with a Form EOIR-33 and was apprised of his obligation to notify the Court of any change of address. (*Id.*)

On December 6, 2016, the Court mailed Respondent a Notice of Hearing to his 2610 Queens Lane address, advising him that he was scheduled for a master hearing

on January 29, 2021, at 8:00 a.m. at the Imperial Immigration Court.

On October 29, 2018, the Court mailed Respondent another Notice of Hearing to the same address, advising him that his hearing was advanced to November 26, 2018, at 1:00 p.m. at the Imperial Immigration Court.

Respondent failed to appear in court on November 26, 2018. The DHS did not have Respondent's file, so the Court re-scheduled the hearing for December 12, 2018. (Order of the IJ, Nov. 26, 2018.) The Court mailed another Notice of Hearing to Respondent that same day.

Respondent failed to appear in court on December 12, 2018. The Court proceeded *in absentia* pursuant to section 240(b)(5)(A) of the Act. (Order of the IJ, Dec. 12, 2018.) The Court found that the DHS submitted documentary evidence relating to Respondent that established the truth of the factual allegations contained in the NTA. (*Id.*) Accordingly, the Court found removability established as charged and ordered Respondent removed to India. (*Id.*)

On April 22, 2019, Respondent filed a motion to reopen proceedings and rescind the *in absentia* order of removal. The DHS opposes the motion. For the following reasons, the Court will deny Respondent's motion.

II. STATEMENT OF LAW

The Court may rescind a removal order entered *in absentia* and reopen a removal proceeding upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice in accordance with sections 239(a)(1) or (a)(2) of the Act, or within 180 days if the alien demonstrates that he did not appear due to "excep-

tional circumstances" as defined in section 240(e)(1). INA § 240(b)(5)(C).

In the case of any change in the time and place of removal proceedings, section 239 of the Act requires that written notice be provided to the alien in person or through service by mail. INA § 239(a)(2). Service by mail is sufficient "if there is proof of attempted delivery to the last address provided by the alien." INA § 239(c); *See also G-Y-R-*, 23 I&N Dec. 186, 187 (BIA 2001). A motion to rescind an *in absentia* order of removal, based on a contention that notice was not received, "must include documentary evidence." 8 C.F.R. § 208.2(c)(3)(ii). Moreover, there is a presumption that "postal officers properly discharge their duties." *Salta v. I.N.S.*, 314 F.3d 1076, 1079 (9th Cir. 2002). An alien may rebut this presumption with documentary evidence. *Id.*

Where the alien argues he did not appear due to exceptional circumstances, those incidences must have been beyond the alien's control, such as battery or extreme cruelty, serious illness of the alien or serious illness or death of his immediate family members "but not including less compelling circumstances." INA § 240(e)(1).

III. FINDINGS AND ANALYSIS

Respondent argues that the Court should rescind the *in absentia* order of removal for two reasons. First, he argues that the Notice to Appear was defective and did not comply with the requirements of the Act because it did not state the time and place of his removal proceedings. He therefore argues that notice was improper. In the alternative, Respondent argues that although the

Notice of Hearing was mailed to the address he provided to the Court, the notice was not forwarded to him in a timely manner. He argues that this "failure in the inner workings of the household" constitutes exceptional circumstances.

Respondent's claim that notice was improper is incorrect. To begin, notice was proper in this case because the Court mailed Respondent a Notice of Hearing to the last address he provided. *See* INA § 239(c) (service by mail is sufficient "if there is proof of attempted delivery to the last address provided by the alien). Granted, when Respondent entered the United States he was served with a Notice to Appear that did not state the time and place of his removal proceedings. Instead, it indicated that his hearing would take place at a date and place "to be determined." Respondent cites to *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018), claiming that this defect renders notice improper. However, in *Pereira*, the Supreme Court addressed the "narrow question" of whether a document labeled "Notice to Appear" that fails to specify the time or place of the removal proceedings nonetheless triggers the stop-time rule. 138 S. Ct. at 2110. The Court concluded that such a document is not a Notice to Appear under section 239 of the Act and therefore does not trigger the stop-time rule. *Id.*

Moreover, in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), the Board of Immigration Appeals held that a Notice to Appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a Notice of Hearing specify-

ing this information is later sent to the alien. The Ninth Circuit agreed with this reasoning in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). Although the NTA here did not specify the time and place of Respondent's removal hearing, the Court subsequently mailed notices of his hearing, specifying this information, to the most recent address he provided. Accordingly, the Court finds that notice was proper here.

In the alternative, Respondent argues that his failure to appear was due to exceptional circumstances. Specifically, he states that although the Notice of Hearing arrived at the correct address, it was not forwarded to him in a timely manner due to "a failure in the inner workings of the household." Where a respondent argues he did not appear due to exceptional circumstances, those incidences must have been beyond the respondent's control, such as battery or extreme cruelty, serious illness of the alien or serious illness or death of his immediate family members "but not including less compelling circumstances." INA § 240(e)(1). Here, a failure in the inner workings of a household does not amount to exceptional circumstances.

IV. CONCLUSION

Notice was proper in this case because notice was sent to the last address Respondent provided to the Court. Although Respondent is correct that the NTA did not specify the time and place of his proceedings, the subsequent notices of hearing specified this information. Accordingly, Respondent's argument that notice was not given in compliance with section 239 of the Act is foreclosed. *See Bermudez-Cota*, 27 I&N Dec. at 447. Lastly, the Court finds that Respondent has not shown

any exceptional circumstances excusing his failure to appear.

Therefore, the following order will be entered:

ORDER:

IT IS HEREBY ORDERED that Respondent's Motion to Reopen Proceedings and Rescind *In Absentia* Order of Removal is **DENIED**.

Dated: [5/15/19] /s/ EDWARD M. BARCUS
Edward M. Barcus
Immigration Judge

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Imperial, California

Case No. A209-393-493

IN THE MATTER OF:
SINGH, VARINDER
RESPONDENT IN REMOVAL PROCEEDINGS

Date: Dec. 12, 2018

DECISION

Jurisdiction was established in this matter by the filing of the Notice to Appear issued by the Department of Homeland Security, with the Executive Office for Immigration Review and by service upon the respondent. See 8 C.F.R. § 1003.14(a), 103.5a.

The respondent was provided written notification of the time, date and location of the respondent's removal hearing. The respondent was also provided a written warning that failure to attend this hearing, for other than exceptional circumstances, would result in the issuance of an order of removal in the respondent's absence provided that removability was established. Despite the written notification provided, the respondent failed to appear at his/her hearing, and no exceptional circumstances were shown for his/her failure to appear.

This hearing was, therefore, conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act.

[ ] At a prior hearing the respondent admitted the factual allegations in the Notice to Appear and conceded removability. I find removability established as charged.

[×] The Department of Homeland Security submitted documentary evidence relating to the respondent which established the truth of the factual allegations contained in the Notice to Appear. I find removability established as charged.

I further find that the respondent's failure to appear and proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution. See Matter of Pearson, 13 I&N Dec. 152 (BIA 1969); Matter of Perez, 19 I&N Dec. 433 (BIA 1987); Matter of R-R, 20 I&N Dec. 547 (BIA 1992).

ORDER: The respondent shall be removed to INDIA alternative to on the charge(s) contained in the Notice to Appear.

/s/ E. MARK BARCUS
E. MARK BARCUS
Immigration Judge

cc: Assistant District Counsel
Attorney for Respondent/Respondent

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-70050
Agency No. A209-393-493

VARINDER SINGH, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
RESPONDENT

[Filed: Oct. 12, 2022]

ORDER

Before: MCKEOWN and GOULD, Circuit Judges, and MOLLOY,* District Judge.

Order;
Dissent by Judge Collins;
Statement by Judge O'Scannlain

The full court was advised of the petition for rehearing *en banc*. A judge requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. *See* Fed. R. App. P. 35.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

The petition for rehearing *en banc* (Dkt. 49) is **DENIED**.

COLLINS, Circuit Judge, with whom CALLAHAN, M. SMITH, IKUTA, BENNETT, NELSON, BADE, LEE, BRESS, FORREST, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel's published opinion in *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022), seriously misconstrues the text of the Immigration and Nationality Act ("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. According to the panel decision in *Singh*, an alien who is properly served with notice of the date, time, and place of his or her removal hearing but then fails to show up can have the resulting in absentia removal order set aside based on irrelevant errors in paperwork at the outset of the removal process. The panel's erroneous decision casts doubt on the validity of potentially tens of thousands of in absentia removal orders that have been issued in this circuit over the last two decades. Indeed, in the panel's accompanying unpublished decision in *Mendez-Colin v. Garland*, 2022 WL 342959 (9th Cir. 2022), the *reductio ad absurdum* has already arrived: the panel applies *Singh* to invalidate a 19-year-old removal order entered in a case in which the alien, after attending multiple hearings over nearly a year and receiving actual notice of the next one, simply dropped out of contact with his lawyer and consequently skipped the next hearing. It is little wonder that the panel's erroneous decision—which already conflicted with a prior decision of the Sixth Circuit—has now been expressly rejected by the Eleventh Circuit. This is a paradigmatic case that cries out for further review, and I respectfully dissent from our failure to rehear this case en banc.

I

To set the panel's analysis in context, and to make the panel's errors more apparent, it is helpful first to summarize the relevant provisions of the INA before turning to the specific facts of these two cases and then to the panel's decisions.

A

Section 239(a) of the INA provides for two distinct types of notices that must be provided to an alien over the course of removal proceedings, which are commonly referred to as a "Notice to Appear" ("NTA") and a "Notice of Hearing" ("NOH"). *See* 8 U.S.C. § 1129(a).[1]

First, paragraph (1) of § 239(a) provides that, at the outset of removal proceedings, a "written notice (in this section referred to as a 'notice to appear') shall be given" to the alien setting forth certain enumerated categories of information, including (i) the "charges against the alien and the statutory provisions alleged to have been violated"; (ii) the "requirement" that the alien provide and update the "address and telephone number" at which he or she "may be contacted" about the removal proceedings; (iii) the "time and place at which the proceedings will be held," and (iv) the "consequences . . . of the

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[1] Because (unlike several other titles) title 8 of the U.S. Code has not been enacted as positive law, I will generally refer to the underlying section numbers of the INA, although I will also provide the corresponding citation to title 8. That is consistent with how the Immigration Judges ("IJs") and the Board of Immigration Appeals ("BIA") generally cite these provisions and with how they are cited in the agency's regulations. The full text of the INA, as amended, is readily available on the website of the U.S. Government Publishing Office. *See* https://www.govinfo.gov/content/pkg/COMPS-1376/pdf/COMPS-1376.pdf.

failure, except under exceptional circumstances, to appear at such proceedings." 8 U.S.C. § 1129(a)(1)(D), (F), (G)(i)-(ii). The Supreme Court has strictly construed the requirements for such NTAs, holding that the use of the article "a" in § 239(a)(1)'s reference to "*a* 'notice to appear,'" as well as other textual clues, confirm that *all* of the statutorily enumerated information required to be included in an NTA must be provided in a "single document." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (emphasis added); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2109-10 (2018) (holding that an NTA that omitted the "time or place of the removal proceedings" failed to comply with the requirements of § 239(a)(1) and was insufficient to trigger the so-called "stop-time rule" of INA § 240A(d)(1)(A)).[2]

Second, paragraph (2) of § 239(a) states that, "in the case of any change or postponement in the time and place" of such removal proceedings, "a written notice shall be given" to the alien that includes only two things: (i) "the new time or place of the proceedings"; and (ii) the "consequences . . . of failing, except under exceptional circumstances, to attend such proceedings." 8 U.S.C. § 1229(a)(2)(i)-(ii). Noting that this provision also refers to "a written notice," the Court in *Niz-Chavez* stated that this smaller subset of statutorily enumerated items that are required for an NOH must likewise be provided in a "single document." 141 S. Ct. at 1483-84.

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[2] Under the stop-time rule, an alien who has not accumulated "10 years of continuous physical presence in the United States" at the time he or she is served with an NTA is thereby ineligible to apply for cancellation of removal. *Pereira*, 138 S. Ct. at 2109.

In describing what an NTA and an NOH must say about the "consequences" of failing to appear at a removal hearing, paragraphs (1) and (2) of § 239(a) both explicitly cross-reference § 240(b)(5) of the INA. *See* 8 U.S.C. § 1229(a)(1), (2) (citing *id.* § 1229a(b)(5)). That provision, in turn, states that "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 239(a) [8 U.S.C. § 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 Service establishes by clear, unequivocal, and convincing evidence [1] that the written notice was so provided and [2] that the alien is removable (as defined in subsection (e)(2))." *Id.* § 1229a(b)(5)(A).[3]

The statute, however, also provides an alien with a limited ability to seek subsequently to rescind an in absentia removal order entered under § 240(b)(5). Specifically, § 240(b)(5)(C) states that "[s]uch an order may be rescinded only" in two circumstances: (1) "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"; or (2) "upon a motion to reopen filed at any time if the alien demonstrates" either (i) "*that the alien did not receive notice in accordance with paragraph (1) or (2)*" of § 239(a), or (ii) "the alien demonstrates that the alien was in Federal or State custody and the failure

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[3] The reference to the "Service" is apparently a vestigial reference to the former Immigration and Naturalization Service ("INS"), and must therefore be construed to refer to the Department of Homeland Security ("DHS"), the agency to which the relevant functions of the INS have since been transferred. *See* 6 U.S.C. § 557.

to appear was through no fault of the alien." 8 U.S.C. § 1229a(b)(5)(C) (emphasis added). As the specific facts of these cases will make clear, the issue here concerns the meaning of this italicized phrase.

B

1

Singh is a native and citizen of India. *See* 24 F.4th at 1316. He entered the United States illegally in October 2016 and was detained by DHS, which began removal proceedings against him. *See id.* On December 1, 2016, DHS personally served Singh with an NTA stating that the date and time of Singh's removal hearing were "TBD." *Id.* DHS released Singh, who reported that he would be residing at an address in Dyer, Indiana.

On December 6, 2016, DHS mailed an NOH under INA § 239(a)(2) to Singh at the designated Indiana address advising him that he was scheduled for a master hearing on January 29, 2021 at 8:00 AM at the immigration court in Imperial, California. *See* 24 F.4th at 1316. On October 29, 2018, DHS sent a second NOH to Singh at the same Indiana address, informing him that the date and time of the master hearing had changed to November 26, 2018 at 1:00 PM.

Singh did not appear for the master hearing on November 26, 2018. The immigration court re-scheduled the hearing for December 12, 2018. DHS sent a third NOH to Singh at the Indiana address informing him that the date of the master hearing had changed to December 12, 2018.

Singh failed to appear for the master hearing on December 12, 2018. *See* 24 F.4th at 1316. Accordingly,

the IJ proceeded to consider whether Singh should be ordered removed in absentia under INA § 240(b)(5)(A). The IJ found that Singh had been provided both written notice of the time, date, and location of the hearing and a written warning that failure to attend the hearing, for other than exceptional circumstances, would result in the issuance of an order of removal if removability was established. The IJ determined that DHS had submitted sufficient evidence to establish Singh's removability as alleged in the NTA and that Singh's failure to appear was not due to exceptional circumstances. 24 F.4th at 1316. Finally, the IJ found that Singh's failure to appear constituted an abandonment of any pending applications for relief. The IJ therefore ordered him removed in absentia. *Id.*

In April 2019, Singh filed a motion to reopen with the immigration court. 24 F.4th at 1316. Singh conceded that the NOHs had arrived at the Indiana address he had designated but he claimed that he never actually received them due to "a failure in the inner workings of the household." *Id.* He nonetheless argued that he did not receive proper notice under § 239 because his NTA lacked the hearing date and time information. The IJ denied the motion and the BIA affirmed.

2

Mendez-Colin is a native and citizen of Mexico. On August 25, 2001—over 20 years ago—Mendez-Colin attempted to gain entry to the United States through the San Luis Port of Entry vehicle lane by falsely claiming to be a U.S. citizen. In doing so, he also attempted to gain entry for two other aliens who were in the vehicle. He was detained and the next day, on August 26, 2001,

the INS[4] personally served Mendez-Colin with an NTA charging him as removable. The NTA indicated that the date and time of Mendez-Colin's master hearing was "To be set." Mendez-Colin was released from detention.

Between October 2001 and July 2002, Mendez-Colin, either directly or through counsel, received at least seven NOHs, and he appeared in person at multiple hearings, together with counsel. At a hearing on July 23, 2002 at which Mendez-Colin was present with his attorney, the IJ found that the charge of removability had been sustained by clear and convincing evidence. However, Mendez-Colin expressed a desire to apply for cancellation of removal, and the IJ scheduled an individual hearing for September 15, 2003 to consider that claim for relief. A confirming NOH was served on July 23, 2002, informing Mendez-Colin that an individual hearing was scheduled in his case for September 15, 2003 at 9:00 AM.

Thereafter, Mendez-Colin failed to stay in contact with his attorney, which led the attorney to file a motion to withdraw as counsel of record. That motion was still pending on September 15, 2003, the scheduled date for Mendez-Colin's individual hearing. Mendez-Colin's attorney appeared at that hearing, but Mendez-Colin did not. The IJ found that Mendez-Colin had been duly notified of the date, time, and place of the hearing but failed, without good cause, to appear as required. Having already previously found that Mendez-Colin was removable, the IJ found that Mendez-Colin had abandoned any claims for relief from removal and ordered

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[4] As noted earlier, the relevant functions of the INS have since been transferred to DHS. *See supra* note 3.

him removed in absentia pursuant to § 240(b)(5). The court also granted Mendez-Colin's attorney's motion to withdraw, subject to remaining the attorney of record for the limited purpose of service of the in absentia order.

On December 10, 2003, Mendez-Colin through his same attorney filed a motion to reopen his removal proceedings. The motion claimed that Mendez-Colin had failed to appear at the September 15 individual hearing because he thought it was scheduled for 1:00 PM, but the motion was not accompanied by any declaration from Mendez-Colin or any other evidence to support this assertion. The IJ denied the motion on December 31, 2003. Noting that Mendez-Colin had failed to maintain contact with his attorney, the IJ concluded that his "failure to appear for his individual hearing appears to stem from a lack of interest, rather than a scheduling error." Moreover, the IJ held that, in light of Mendez-Colin's failure to submit any supporting statement or proof, "the blanket assertion in the motion that [Mendez-Colin] failed to appear because he mistakenly believed that his hearing was scheduled for 1:00PM is insufficient to establish 'exceptional circumstances.'" The IJ further noted that the NOH had been properly served and that Mendez-Colin did not contest that he had received the NOH.

Mendez-Colin did not appeal the IJ's decision to the BIA. Instead, on February 4, 2004, he filed a second motion to reopen. In this motion, Mendez-Colin expressly stated that he did not "challenge the propriety of [the Immigration] Court's order deporting [him] *in absentia*." He therefore did *not* seek rescission of his removal order under INA § 240(b)(5)(C). Instead, he

sought reopening under the general reopening provisions of § 240(c)(7) so that he could pursue his application for cancellation of removal based on newly available material evidence. *See* 8 U.S.C. § 1229a(c)(7). In making this motion, Mendez-Colin recognized that a separate provision of the INA—§ 240(b)(7)—generally prohibits granting cancellation of removal and certain other forms of relief to anyone who has been ordered removed in absentia during the 10 years following the issuance of that order, but he noted that this 10-year bar on relief only applied if, in addition to receiving notice under § 239(a), the alien also received "oral notice" of the consequences of failing to appear at a removal hearing. *See* 8 U.S.C. § 1229a(b)(7). Because he had not received such oral notice, Mendez-Colin argued, he was not subject to this bar.

The IJ denied the second motion to reopen on April 19, 2004. The IJ noted that INA § 240(c)(7) generally limits aliens to a single motion to reopen, and Mendez-Colin had already unsuccessfully filed a prior such motion. Moreover, the motion was filed outside the 90-day time limit that generally applies to motions to reopen under § 240(c)(7), *see* 8 U.S.C. § 1229a(c)(7)(C)(i), and the motion failed to make the showing required for such a motion. Mendez-Colin appealed this decision to the BIA. On November 4, 2004, the BIA dismissed the appeal. Noting that Mendez-Colin had already been removed from the United States, the BIA concluded that his removal counted as a "[d]eparture" and therefore "constitute[d] a withdrawal of the appeal," pursuant to 8 C.F.R. § 1003.4 (2004). The BIA therefore concluded that the IJ's decision was "final to the same extent as though no appeal had been taken."

More than 15 years later, in January 2020, Mendez-Colin filed a motion with the BIA requesting that the BIA reinstate his 2004 appeal or remand the matter to the IJ. Mendez-Colin noted that a subsequent Ninth Circuit decision in 2010 had clarified that an involuntary removal did not give rise to a withdrawal of appeal. He also argued that the 2003 in absentia removal order was invalid because the 2001 NTA that initiated his removal proceedings had failed to specify the time and date of his first hearing. Construing Mendez-Colin's motion as a motion to reconsider the 2004 dismissal, the BIA denied the motion as untimely, noting that it "was filed more than 15 years after the statutory deadline for filing a motion to reconsider before the Board." *See* 8 U.S.C. § 1229a(c)(6)(B) (setting a 30-day deadline). The BIA also declined to exercise its sua sponte authority to reconsider, noting that the motion was filed more than 10 years after the asserted change in the law. To the extent that Mendez-Colin sought remand to the IJ due to defects in his 2001 NTA, the BIA concluded that any such defects were irrelevant in light of the subsequent NOHs that were properly served on him.

C

The panel granted both petitions. In its published opinion in *Singh*, the panel first held that Singh's NTA was plainly defective under *Niz-Chavez* because it did not contain, in a single document, all of the information required by § 239(a)(1), including the date and time of his removal hearing. *See* 24 F.4th at 1318-19. The panel rejected the Government's efforts to confine *Niz-Chavez* to the context of the stop-time rule, and it therefore held that the NTA did not provide valid notice for purposes of the in absentia provisions of the INA. *See*

id. On this point, the panel noted that a decision of the Fifth Circuit had reached the same conclusion. *See id.* at 1319 (citing *Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021)).

The panel next rejected the Government's further, two-step argument that (1) under § 240(b)(5)(A), the notice requirement for an in absentia removal is satisfied if the NOH alone is valid, regardless of whether the earlier NTA was valid; and (2) here, the NOHs sent to Singh were all valid under § 239(a)(2). The panel acknowledged that, as the Government emphasized, § 240(b)(5) allows an in absentia order to be entered if the alien was served with notice "under paragraph (1) *or* (2)" of § 239(a). 24 F.4th at 1319 (quoting 8 U.S.C. § 1229a(b)(5)(A) (emphasis added)). Despite this use of the disjunctive, the panel held that valid notice was required under both paragraph (1) and paragraph (2)—that is, both the original NTA and the NOH for the current hearing date had to meet the respective notice requirements of paragraph (1) and paragraph (2). 24 F.3d at 1319-20.

On the same day it decided *Singh*, the panel issued a memorandum disposition granting Mendez-Colin's petition for review. *Mendez-Colin*, 2022 WL 342959, at *1. "Noncitizens 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.* "Because Mendez-Colin did not receive statutorily compliant notice before his removal hearing, the in absentia removal order issued at that hearing is invalid." *Id.*

II

The panel's decision in *Singh* misconstrues the language of the in absentia provision, which makes clear that an in absentia removal order may be entered so long as the alien has been served with an NOH that (1) contains the date, time, and place information for the hearing that the alien failed to attend; and (2) warns the alien of the consequences of failing to appear. Whether the earlier NTA included such information is irrelevant.

A

As explained earlier, INA § 240(b)(5)(A) allows an IJ to enter an in absentia removal order if DHS establishes that "written notice required under paragraph (1) *or* (2) of section 239(a) [8 U.S.C. § 1229(a)]" was provided and that the alien is removable. 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). The reference is obviously to the *particular* notice—either an NTA (which is a notice "under paragraph (1)") or an NOH (which is a notice "under paragraph . . . (2)")—that notified the alien of the *particular* hearing that the alien missed. And once that in absentia order has been entered, then (absent exceptional circumstances set forth in a timely motion) the alien may obtain rescission of the order only by showing that he or she did not receive the requisite "notice in accordance with paragraph (1) or (2)," as the case may be. *Id.* § 1229a(b)(5)(C)(ii). Accordingly, where—as in both *Singh* and *Mendez-Colin*—the alien 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. Several tex-

tual clues confirm this understanding of the relevant statutory language.

First, the use of the disjunctive "or" generally "indicates alternatives and requires that they be treated separately." *Bunker Hill Co. Lead & Zinc Smelter v. U.S. Env'l Prot. Agency*, 658 F.2d 1280, 1283 n.1 (9th Cir. 1981); *see also United States v. Woods*, 571 U.S. 31, 46 (2013) (noting that the "ordinary use" of "the conjunction 'or'" is "almost always disjunctive" and signifies that the "items are alternatives"). Accordingly, § 240(b)(5)(A)'s disjunctive statement that an in absentia order can been entered if notice was provided under "paragraph (1) or (2)" is properly understood as referring in the alternative to whichever of the two possible forms of notice (NTA or NOH) might have been used to notify the alien of that particular hearing. Likewise, § 240(b)(5)(C)(ii)'s requirement that the alien show that he or she did not "receive notice in accordance with paragraph (1) *or* (2)" only requires the alien to show that the *particular* alternative on which the Government relied to obtain the in absentia order under § 240(b)(5)(A) (*i.e.*, an NTA or an NOH) did not comply with the applicable requirements of the relevant paragraph. Indeed, given that § 240(b)(5) sets forth the consequences of failing to "attend *a* proceeding under this section," it is unsurprising that it uses the disjunctive "or" to refer to whichever of the two types of notices happened to be used for the particular hearing that the alien missed. 8 U.S.C. § 1229a(b)(5)(A) (emphasis added).

Second, in describing the Government's burden in obtaining an in absentia removal order, § 240(b)(5)(A) requires the Government to prove, by "clear, unequivocal, and convincing evidence that *the* written notice"—

singular—"was so provided." 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). The use of this "article coupled with a singular noun" denotes a "discrete document," *see Niz-Chavez*, 141 S. Ct. at 1483, and should therefore be understood to refer to the one of the two alternative forms of notice that may have been used for that particular hearing. That is especially true given that paragraph (1) and paragraph (2) of § 239(a) both refer to the respective documents described therein (*viz.*, an NTA and an NOH) as a "written notice." 8 U.S.C. § 1229(a)(1), (2)(A). Because "grammar and usage establish that 'the' is a function word indicating that a following noun . . . has been previously specified by context," *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (simplified), the phrase "*the* written notice" clearly refers to the particular notice, under either paragraph (1) or paragraph (2), for the specific "proceeding" that the alien "d[id] not attend." 8 U.S.C. § 1229a(b)(5)(A) (emphasis added).

Third, this reading of § 240(b)(5) comports with common sense. Removal proceedings may drag out for many years and involve a half dozen or more hearings. It 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. Yet that absurd result is precisely what the panel decreed in *Mendez-Colin*.

B

The panel in *Singh* gave three reasons for reaching its contrary conclusion, but all of them fail.

1

First, the panel held that, "by the plain text of paragraph (2) of § 1229(a) [INA § 239(a)] there can be no valid notice under paragraph (2) without valid notice under paragraph (1)." 24 F.4th at 1319. Thus, if the NTA at the outset of the removal proceedings failed to include a date and a time, the panel reasoned, *any* subsequent NOH simply does not count as a "notice required under paragraph . . . (2)" of § 239 for purposes of the in absentia removal provision in § 240. 8 U.S.C. § 1229a(b)(5)(A). Because, according to the panel, a notice under "paragraph . . . (2)" requires that there also have been a "valid notice under paragraph (1)," the "or" in § 240(b)(5) is effectively converted into an "and"—both options require valid notice under paragraph (1). This argument is deeply flawed.

In making this argument, the panel emphasized that paragraph (2) of § 239(a) describes the "written notice" that must be given when there is a "*change or postponement* in the time and place" of the removal proceedings. 8 U.S.C. § 1229(a)(2)(A) (emphasis added). The panel concluded that "a 'change' in the time or place is *not possible*" if the earlier NTA failed to include a date and time. 24 F.4th at 1321 (emphasis added). That is wrong. If the time and place of a hearing were listed in an NTA as "To Be Set" or "TBD," a subsequent NOH that newly provides a particular date, time, and place certainly reflects, in the ordinary sense of the term, a "*change* . . . in the time and place" that was previously listed. 8 U.S.C. § 1229(a)(2)(A) (emphasis added). *See Change*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981 ed.) ("an instance of making or becoming different in some particular"). The

panel's fundamental rationale for linking the validity of a notice under paragraph (2) to the validity of an earlier notice under paragraph (1) therefore collapses.

The panel's opinion nonetheless contends that its argument on this score is supported by *Pereira*, but that too is wrong.

As noted earlier, the Court held in *Pereira* that, to qualify as a "notice to appear under section 239(a) [8 U.S.C. § 1229(a)]" within the meaning of the stop-time rule in § 240A(d)(1), *see* 8 U.S.C. § 1229b(d)(1), an NTA must contain all of the information listed in § 239(a)(1), including the time and place of the hearing. 138 S. Ct. at 2109-10. In dissent, Justice Alito argued that "the cross-reference to 'section 1229(a),' as opposed to 'section 1229(a)(1)," supported a contrary conclusion, "because if Congress had meant for the stop-time rule to incorporate the substantive requirements located in § 1229(a)(1)"—as opposed to the notice requirements of that subsection more generally, including paragraph (2)—"it presumably would have referred specifically to that provision and not more generally to 'section 1229(a).'" 138 S. Ct. at 2123 (Alito, J., dissenting). The Court rejected this argument, stating that "the broad reference to § 1229(a) is of no consequence, because, as even the Government concedes, only paragraph (1) bears on the meaning of a 'notice to appear.'" *Id.* at 2114. The Court further stated that, "[i]f anything," paragraph (2) "actually bolsters" the Court's conclusion that the stop-time rule's reference to a "notice to appear" requires that all information required by paragraph (1), including time and place information, have been included in the NTA in order "to trigger the stop-time rule." *Id.* By referring to a "change or

postponement," the Court concluded, "paragraph (2) *presumes* that the Government has already served a 'notice to appear'" that contained such time and place information, because "[o]therwise, there would be no time or place to 'change or postpon[e].'" *Id.* (emphasis added).

Seizing on this latter comment, the panel concluded that the Court thereby supposedly "adopted" its view that it is simply "*not possible*" to characterize as a "change . . . in time or place" an NOH that supplies time and place information that was omitted from an NTA. 24 F.4th at 1320 (emphasis added). The Court did no such thing. The Court was construing the requirements of paragraph (1), which it held required an NTA to include time and place information in order to qualify as a "notice to appear" for purposes of the stop-time rule. That reading of paragraph (1) is, as the Court explained, "bolster[ed]" by paragraph (2)'s use of the phrase "change or postponement in the time and place" in describing when an NOH is required, because that phrasing clearly reflects a *presumption* that the NTA *should* already have provided time and place information. 138 S. Ct. at 2114. But it is quite another thing to say, as the panel does here, that it is not even "possible" to characterize a substitution of a "TBD" notation with a specific time and place as being a "change," much less that an NOH that does so is invalid *under paragraph (2)*. The Court had no such issue before it, and the panel's out-of-context quotation from *Pereira* does not support the much broader and different proposition it adopts.

Moreover, as the Government notes in its rehearing petition, the panel took its own argument several steps

further. Even if the panel were correct that 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. But under the panel's flawed reading of paragraph (2), the validity of an NOH issued years into a multi-hearing removal proceeding turns on its provenance as reflected in the *first* link in the chain of notices. That makes no sense, and nothing in the language of the INA requires such an extraordinary result.

2

Second, the panel stated that § 239(a)(1) "begins with unambiguous definitional language, explaining that 'written notice' is 'in this section referred to as a "notice to appear."'" 24 F.4th at 1320 (quoting 8 U.S.C. § 1229(a)(1)). According to the panel, that means that "*any* reference to written notice" in § 239 "is the 'Notice to Appear' defined in paragraph (1) with its accompanying enumerated requirements." *Id.* (emphasis added). And because the requirements for an NOH in paragraph (2) of § 239 refer to "written notice," the panel concluded, a document that contains only the two items listed in that paragraph, by itself, would not count as "'written notice' under § 1229(a) [INA § 239(a)]." 24 F.4th at 1320. Every step of this analysis is wrong.

As an initial matter, the panel gets its definition exactly backwards. Paragraph (1) defines the phrase "notice to appear" as a particular type of "written notice," *viz.*, one that contains the enumerated list of information. Paragraph (2) defines a different type of "written notice" that requires only a limited subset of information. The panel is thus quite wrong in reading par-

agraph (1) as defining the broader phrase "written notice" to mean a "notice to appear." Nor does paragraph (1) establish the startling proposition that, "[t]hroughout § 1229(a) [INA § 239(a)], then, *any reference to written notice* is the 'Notice to Appear' defined in paragraph (1) with its accompanying enumerated requirements." 24 F.4th at 1320 (emphasis added). Taken literally, that would presumably mean (in contradiction to what even the panel itself seemed to recognize elsewhere in its opinion) that every "written notice" required under paragraph (2) refers to an NTA and that therefore every NOH under paragraph (2) must itself replicate the entirety of the information required under paragraph (1). That, of course, ignores the plain language of the two paragraphs, which requires in an NOH under paragraph (2) only a subset of the information required in an NTA under paragraph (1). *See also Pereira*, 138 S. Ct. at 2114 ("[O]nly paragraph (1) bears on the meaning of a 'notice to appear.'").

The fact that the panel got its definition backwards fatally undermines its reasoning. There are two different types of "written notice"—a "notice to appear" and a "notice of hearing"—and the statute does not define "written notice" as meaning a "notice to appear." Thus, the term "written notice" encompasses the different notices described in both paragraph (1) and paragraph (2), whereas the term "notice to appear" is more specific and refers only to the notice described in paragraph (1). Section 240(b)(5) uses the broader term and omits the narrower term: it requires a single "written notice . . . under paragraph (1) or (2)" of § 239(a). 8 U.S.C. § 1229a(b)(5)(A), (C)(ii). This sharply contrasts with other sections of the INA—such as the stop-time provision at issue in *Pereira* and *Niz-Chavez*—in

which Congress has referred specifically to a "notice to appear." 8 U.S.C. § 1229b(d)(1).

3

Third, the panel held that the structure of § 239(a) supported its conclusion. According to the panel, because paragraph (2) of § 239(a) merely sets forth what is needed when there is a change in time or place, and "does not repeat the long list of requirements for written notice contained in paragraph (1)," any notices under paragraph (2) are meant to be "additions to, and not alternatives to, the Notice to Appear described in paragraph (1)." 24 F.4th at 1320. A contrary reading, the panel asserted, would allow the Government "a textual backdoor to circumvent the written-notice requirements enumerated in paragraph (1)." *Id.* The problem with this reasoning is that, as explained earlier, Congress's use of the disjunctive in § 240(b)(5) means that the validity of an in absentia removal turns only on which of the two types of notices was provided for that particular hearing. In cases in which the notice was provided by an NOH, Congress thus decided to require only a valid NOH (with its fewer requirements), and not a valid NTA, in order to permit in absentia removal. Contrary to what the panel thought, it does not "circumvent" anything for a court to respect that legislative choice.

III

In addition to being manifestly wrong, the panel's analysis in *Singh* conflicts with the decisions of two other circuits and threatens to invalidate potentially tens of thousands of in abstentia removal orders previously executed in this circuit. These additional considerations

underscore why we should have reheard this case en banc.

A

In 2019, the Sixth Circuit held that the delivery of an NOH under paragraph (2) to the alien's designated address was sufficient notice to support an in absentia removal order—even though the NTA under paragraph (1) was invalid. *See Santos-Santos v. Barr*, 917 F.3d 486, 492 (6th Cir. 2019); *see also id.* at 492-93 (holding that the alien had failed in his effort to show that the NOH had never actually been received at the correct address). This construction of § 240(b)(5) is directly contrary to the panel's holding here.

On July 19, 2022, the Eleventh Circuit expressly rejected the panel's holding and reasoning in this case. *See Dacostagomez-Aguilar v. U.S. Att'y Gen.*, 40 F.4th 1312 (11th Cir. 2022). The Eleventh Circuit held that "in absentia removal is lawful so long as the government provided notice *for whichever hearing was missed*, which means reopening is available if the notice for that hearing was not provided." *Id.* at 1316 (emphasis added). Thus, it concluded that an NOH under paragraph (2) of § 239(a) will support an in absentia removal even if the earlier NTA was defective under paragraph (1). *See id.* In reaching this conclusion, the Eleventh Circuit "disagree[d] with the Ninth Circuit's interpretation of the in absentia removal provisions" in *Singh*. *Id.* at 1318 n.3. In explaining its disagreement, the Eleventh Circuit expressly made two of the same points discussed above. First, the court concluded that an NOH can constitute "a 'change or postponement in the time and place' of removal proceedings even if the initial hearing information appeared in a follow-on notice of

hearing." *Id.* Second, the court noted that the panel's holding that "written notice" means "notice to appear" was plainly inconsistent with the statutory language. *Id.*

Therefore, the Sixth Circuit and the Eleventh Circuit agree that a valid NTA is not necessary for an in absentia removal if the relevant notice was provided in a valid NOH. That is an additional consideration that warranted en banc rehearing here.[5]

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[5] As the Eleventh Circuit recognized in *Dacostagomez-Aguilar*, *see* 40 F.4th at 1318 n.4, the Fifth Circuit's panel opinion in *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), does not squarely address the question whether an NOH that contains all of the information required by § 239(a)(2) is, by itself, sufficient to uphold an in absentia removal order under § 240(b)(5). The Fifth Circuit's panel decision in *Rodriguez* held only that, for purposes of applying § 240(b)(5), a defective NTA is not cured by a subsequent NOH and remains a defective NTA. *Id.* at 355-56. Although the facts of *Rodriguez* arguably presented the distinct issue resolved by the Sixth, Ninth, and Eleventh Circuits, the Fifth Circuit did not specifically address that question. *See Cueto-Jimenez v. Garland*, 2022 WL 1262103, at *2 (5th Cir. 2022) (unpub.) (making a similar observation about the limited holding in *Rodriguez*). However, the law in the Fifth Circuit appears to be unsettled at this point. In connection with the denial of rehearing en banc in *Rodriguez*, several judges proceeded to opine on the significance of § 240(b)(5)'s disjunctive phrasing, and they differed as to the correctness of the sort of analysis adopted by the panel here in *Singh*. *Compare Rodriguez v. Garland*, 31 F.4th 935, 935 (5th Cir. 2022) (Duncan, J., concurring in the denial of rehearing en banc) *with id.* at 938 (Elrod, J., dissenting from the denial of rehearing en banc). The picture in the Fifth Circuit is further muddied by a subsequent published decision distinguishing *Rodriguez* and 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

B

Moreover, the panel's decision in *Singh* threatens to nullify an extremely large number of in absentia removal orders previously executed in this circuit. Since the relevant statutory language was adopted in 1996, there likely have been at least tens of thousands of aliens who have been ordered removed in absentia after their initial NTAs did not specify time and date information. Between January 1, 2008 and April 18, 2022, the United States issued more than 545,000 in absentia removal orders. *See* Exec. Off. for Immigr. Rev., Adjudication Statistics: In Absentia Removal Orders (July 15, 2022), https://www.justice.gov/eoir/page/file/1243496/download (last visited October 4, 2022). And as *Mendez-Colin* demonstrates, the Government has been issuing NTAs with the date and time "to be set" since at least 2001, and the Government's petition for rehearing notes that this was the standard practice for many years. Thus, if left in place, the panel's holding would likely invalidate a vast majority of such orders in this circuit, undoing potentially tens of thousands of in absentia removal orders, some decades old.

We need not look beyond the facts of these cases to see the remarkable breadth of the panel's holding. Mendez-Colin received his original NTA *over 20 years ago*. His initial removal proceedings ended 18 years ago. And during those proceedings, he attended multiple hearings, received multiple valid notices of those hearings, and received valid notice of the particular

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and the alien "in fact receives the NOH (or does not dispute receiving it)." *Campos-Chaves v. Garland*, 43 F.4th 447, 448 (5th Cir. 2022). That reasoning and result, of course, directly conflict with the reasoning and result in *Mendez-Colin* here.

hearing at which he was ordered removed in absentia. Yet, as the panel has decreed, his decades-old removal order is now invalid. That result is egregiously wrong and reflects the disturbingly broad implications of the panel's erroneous opinion.

* * *

For the foregoing reasons, I respectfully dissent from our failure to rehear this case en banc.

O'SCANNLAIN, Circuit Judge,[1] respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

[1] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-71846
Agency No. A090-835-140

RAUL DANIE MENDEZ-COLIN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
RESPONDENT

Submitted: Nov. 19, 2021**
San Francisco, California
[Filed: Feb. 4, 2022]

On Petition for Review of an Order of the
Board of Immigration Appeals

MEMORANDUM*

Before: MCKEOWN and GOULD, Circuit Judges, and MOLLOY,*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

Raul Daniel Mendez-Colin petitions this Court for review of the decision by the Board of Immigration Appeals ("BIA") denying his motion seeking, among other outcomes, rescission of his *in absentia* removal order. The Immigration & Nationality Act allows an *in absentia* removal order to be rescinded through a motion to reopen "filed at any time" if the noncitizen provided a compliant address, *see* 8 U.S.C. § 1229a(b)(5)(B), and can show that the noncitizen "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title," *id.* § 1229a(b)(5)(C)(ii). Mendez-Colin argues that the Notice to Appear he received was defective because it failed to provide the date or time of his removal proceedings. We review the BIA's denial of his motion for an abuse of discretion but review purely legal questions *de novo*. *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016).

Mendez-Colin's arguments concerning the defective Notice to Appear that he received pursuant to § 1229(a) match the substance of those raised in a related case that we decide today, *Singh v. Garland*, No. 20-70050, __ F.4th __ (9th Cir. 2022). For the reasons explained in our opinion in that case, we grant Mendez-Colin's petition and remand to the BIA.

Noncitizens 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*. Here, although Mendez-Colin provided an address to trigger the government's obligation to provide notice, the government did not provide statutorily compliant notice to him. Because Mendez-Colin did not receive statutorily compliant notice before his removal

hearing, the *in absentia* removal order issued at that hearing is invalid.

PETITION GRANTED AND REMANDED.

APPENDIX G

U.S. Department of Justice
Executive Office
for Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

Date: [Jun. 3, 2020]

File: A090-835-140 – Phoenix, AZ

In re: Raul Daniel MENDEZ-COLIN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Christopher J. Stender, Esquire

APPLICATION: Reconsideration

On May 18, 2004, the respondent filed an appeal from the Immigration Judge's April 19, 2004, decision denying his motion to reopen. On November 4, 2004, the Board deemed the appeal withdrawn and returned the record to the Immigration Judge without further action upon notification that the respondent had been removed from the United States. On January 21, 2020, the respondent filed the instant motion with the Board. The respondent's motion is an untimely motion to reconsider. Section 240(c)(6)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6)(B); 8 C.F.R. § 1003.2(b)(2); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of Cerna*, 20 I&N Dec. 399, 402 n.2 (BIA 1991) (discussing the characteristics of motions to reopen and reconsider);. The motion will be denied.

On September 15, 2003, an Immigration Judge ordered the respondent removed in absentia. On December 31, 2003, the Immigration Judge denied the respondent's motion to reopen and rescind the in absentia order based on the finding that the respondent did not establish that exceptional circumstances prevented his appearance at the scheduled hearing (IJ, 12/31/03, at 4). *See* sections 240(b)(5)(C)(i), (E)(i) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii). On February 10, 2004, the respondent filed a second motion with the Immigration Judge by which he sought reopening to apply for cancellation of removal. The Immigration Judge noted that the time and number restrictions imposed on motions to reopen under 8 C.F.R § 1003.23(b) applied to the respondent's second (IJ, 04/19/04, at 3-4). *Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998). The Immigration Judge denied the motion on April 19, 2004, finding that it was untimely and number barred, and noting that cancellation of removal was a form of relief that was available to the respondent at the time of the scheduled hearing (IJ at 04/19/2004, at 3-4). *See* 8 C.F.R. § 1003.23(b).

The respondent filed a timely appeal from the Immigration Judge's April 19, 2004, decision on May 18, 2004. However, he was physically removed from the United States on May 18, 2004, and the Board, therefore, deemed the appeal to have been withdrawn in our November 4, 2004, decision. *See* 8 C.F.R. § 1003.4.

In his motion to reopen, the respondent asserts that our November 4, 2004, decision was improper because we applied the departure bar to his case even though he was removed while the appeal from the denial of his motion remained pending (Respondent's Mot. at 5-7). By this motion, the respondent seeks reissuance of the

Board's May 18, 2004, decision to enable him to petition for judicial review; reinstatement of the appeal by certification; or remand to the Immigration Judge (Respondent's Br. at 2, 5-8). In support of his assertion that our prior order was improper, the respondent relies on *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010), in which the United States Court of Appeals for the Ninth Circuit agreed with the decision in *Madrigal v. Holder*, 572 F.3d 239, 244 (6th Cir. 2009), that the "departure bar" at 8 C.F.R. § 1003.4 is inapplicable where the alien is forcibly removed during the pendency of the appeal.

In support of his motion, the respondent also relies on Ninth Circuit decisions holding that the departure bar does not preclude an alien from pursuing a statutory motion before the Immigration Judge or the Board following the alien's physical removal or departure from the United States and the completion of removal proceedings. *See Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007); *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011). However, the instant motion was filed more than 15 years after the statutory deadline for filing a motion to reconsider before the Board. *See* section 240(c)(6)(B) of the Act. Hence, the dispositive issue is the untimeliness of the instant motion to reconsider. Furthermore, we are not persuaded to exercise our authority to reconsider our prior decision sua sponte. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); 8 C.F.R. § 1003.2(a).

The Board may sua sponte reopen proceedings or reconsider a prior Board order where a party promptly files a motion to reopen based on a fundamental change in law. *See Matter of G-C-L-*, 23 I&N Dec. 359, 362

(BIA 2002); *see also Matter of G-D-*, 22 I&N Dec. 1132, 1134-35 (BIA 1998); *Matter of X-G-W-*, 22 I&N Dec. 71, 72-73 (BIA 1998). The instant motion was filed more than 10 years after the decision in *Coyt v. Holder*, 593 F.3d at 902, and was not promptly filed after any change in law pertaining to the "departure bar" at 8 C.F.R. § 1003.4. Furthermore, the respondent has not provided any explanation to account for the delay that would toll the filing deadline or demonstrate and exceptional situation warranting sua sponte reconsideration. We decline to exercise our sua sponte authority to reissue our prior decision where the respondent failed to demonstrate diligence in bringing this matter before the Board. *See Matter of G-C-L-*, 23 I&N Dec. at 362 (BIA 2002).

The respondent also seeks reinstatement of the appeal by certification, and he further seeks remand to the Immigration Judge for consideration of his removability based on his argument that the Notice to Appear (NTA) in this case was defective in view of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). However, his argument is undermined by Ninth Circuit and Board precedent. *See Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020) (holding that a NTA that did not include the address of the immigration court, or date and time of the hearing, did not deprive the Immigration Judge of jurisdiction); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019) (holding that an Immigration Judge had jurisdiction even though the NTA did not specify the time and date of the removal proceedings), *cert. denied sub nom. Karingithi v. Barr*, 140 S. Ct. 1106 (2020); *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019) (holding that neither rescission of an in absentia order of removal nor termination of the proceedings is required where an al-

ien did not appear at a scheduled hearing after being served with a NTA that did not specify the time and place of the initial removal hearing, so long as a subsequent Notice of Hearing (NOH) specifying that information was properly sent to the alien); *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018) (holding that a NTA that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a), so long as a NOH specifying this information is later sent to the alien). In the present case, there is no indication that the respondent was not properly served with a NOH specifying the time and place of the initial removal hearing.

For the foregoing reasons, the respondent's untimely motion to reconsider will be denied. Accordingly, the following order will be entered.

ORDER: The motion to reconsider is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil

monetary penalty of up to $799 for each day the respondent is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX H

U.S. Department of Justice
Executive Office
for Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

Date: [Nov. 4, 2004]

File: A090-835-140 - Phoenix

In re: MENDEZ-COLIN, RAUL DANIEL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Stender, Christopher J., Esquire

ON BEHALF OF DHS:

Sandra B. Myles, Assistant Chief Counsel

ORDER:

PER CURIAM. The record reflects that the respondent was removed from the United States subsequent to the taking of the appeal in these removal proceedings. This departure results in the withdrawal of the appeal, and the initial decision of the Immigration Judge is accordingly final to the same extent as though no appeal had been taken. *See* 8 C.F.R. § 1003.4.

Since there is nothing now pending before this Board, the record is returned to the Immigration Court without further action.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX I

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
200 East Mitchell Drive, Suite 200
Phoenix, Arizona 85201

File No.: A 90 835 140

IN THE MATTER OF:
MENDEZ-COLIN, RAUL DANIEL
RESPONDENT

[Date: Apr. 19, 2004]

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
Christopher J. Stender, Esq.
Stender & Associates, P.C.
2701 East Osborn Road, Suite 101
Phoenix, Arizona 85016

ON BEHALF OF THE DEPARTMENT:
Sandra B. Myles, Esq.
Assistant Chief Counsel
Department of Homeland Security
2035 North Central Avenue
Phoenix, Arizona 85004

Motion:
Motion to Reopen

DECISION AND ORDER
OF THE IMMIGRATION COURT

I. Procedural History

Respondent is a 36-year-old male native and citizen of Mexico. On August 25, 2001, Respondent applied for admission into the United States through the San Luis Port of Entry vehicle lane by verbally claiming to be a U.S. citizen. On this same date, he also knowingly encouraged, induced, assisted, abetted, and aided Matilde Zayas-Torres and Iris Gabriela Soto-Zayas, aliens, to enter or try to enter the United States at or near the San Luis Port of Entry, in violation of law.

On August 25, 2001, the Immigration and Naturalization Service[1] ("INS") issued a Notice to Appear ("NTA"), charging Respondent as removable from the United States pursuant to section 212(a)(6)(E)(i) of the Immigration and Nationality Act ("INA" or "the Act"), in that he is an alien who, at any time, has knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law. On August 26, 2001, INS personally served the NTA on Respondent in accordance with section 239(a)(1)(F) of the Act. (See Ex. 1, NTA.) The NTA indicates both that a copy of it was handed to Respondent and that Respondent was to report address and phone number changes to the listed Court address. (Id.) Receipt of the NTA is evinced by respondent's signature and right thumb print. (Id.)

---

[1] On March 1, 2003, the Immigration and Naturalization Service ceased to exist as an agency under the U.S. Department of Justice and became a part of the newly-formed Department of Homeland Security.

At a master calendar hearing in Phoenix, Arizona on November 6, 2001, Respondent appeared in pro se and conceded service of the NTA, which the Court marked as Exhibit 1. At a continued master calendar hearing on July 23, 2002, Respondent, through counsel, admitted all allegations except for the false claim to U.S. citizenship, conceded the charge of removability, and designated Mexico as the country of removal. Based on Respondent's admissions and concessions, the Court found that the charge of removability had been sustained by clear and convincing evidence. Respondent expressed his desire to apply for Cancellation of Removal for Certain Permanent Residents pursuant to section 240A(a) of the Act. An individual hearing was scheduled for September 15, 2003 at 9:00AM. On July 23, 2002, the Court sent a notice of hearing via first class mail to Respondent's attorney. The notice of hearing informed Respondent and his attorney of the place, date, and time of the individual hearing.

On September 12, 2003, Respondent's counsel, Christopher J. Stender, requested to withdraw as counsel of record. (Ex.10.) He claimed that Respondent had failed to maintain contact with his office.

At an individual hearing on September 15, 2003, Respondent's counsel was present, but Respondent failed to appear. Based on statements made by counsel, including a detailed account of his numerous unsuccessful attempts to contact Respondent, the Court granted Mr. Stender's motion to withdraw, although the Court required that Mr. Stender remain the attorney of record for the limited purpose of service of the in absentia order. The Court also found that Respondent was duly notified of the date, time, and place of his hearing but,

without good cause, failed to appear as required. Thus, the Court found that Respondent had abandoned any and all claims for relief from removal and ordered him removed to Mexico in absentia. See INA § 240(b)(5)(A).

On December 10, 2003, Respondent, through counsel, filed a motion to reopen. The motion was denied because Respondent did not establish that he failed to appear because of "exceptional circumstances." (See Order, Dec. 31, 2003.) On February 5, 2004, Respondent filed a second Motion to Reopen. In this motion, Respondent argues that he did not receive an oral warning of the consequences of failing to appear at the deportation hearing pursuant to former section 242(b)(7) of the Act and that he would like the proceedings reopened for the limited purpose of applying for Cancellation of Removal for Certain Permanent Residents pursuant to section 240A(a) of the Act. (Resp't Mot. at 2.) The Department of Homeland Security ("DHS") opposes the motion.

II. Motions to Reopen

Generally, an order of deportation following proceedings conducted in absentia pursuant to section 242(b) of the Act may be rescinded only upon a motion to reopen filed before the Court either 1) within 180 days after the date of the order of deportation if the alien demonstrates that he failed to appear because of exceptional circumstances, or 2) at any time if the alien demonstrates he did not receive proper notice of the hearing, or because he was in federal or state custody and failed to appear through no fault of his own. INA § 242(b)(5)(C); see also In re Grijalva, 21 I&N Dec. 27 (BIA 1995); In re Gonzalez-Lopez, 20 I&N Dec. 644 (BIA 1993).

However, the rescission requirements prescribed by section 242(b)(5)(c) of the Act are inapplicable where an alien did not receive oral warnings of the consequences of failing to appear pursuant to section 242(b)(7) of the Act. Rather, the Court may reopen the deportation proceedings held in absentia under section 242(b) of the Act in order to allow the alien apply for a form of relief that was unavailable at the time of the hearing. In re M-S-, 22 I&N Dec. 349 (BIA 1998). The alien must make a prima facie showing that he is eligible for the relief sought and the motion must comply with the regulatory requirements set forth at 8 C.F.R. § 1003.23. Id. The alien is not required to show any "exceptional circumstances."

Under 8 C.F.R. § 1003.23, an Immigration Judge may, upon his motion at any time, or upon motion of DHS or an alien, reopen or reconsider any case in which he has made a decision, unless jurisdiction is vested with the BIA. See 8 C.F.R. § 1003.23(b)(1) (2003). A motion to reopen must state the new facts that will be proven at a hearing to be held if the motion is granted, and it must be supported by affidavits or other evidentiary material. See INA § 240(c)(6)(B). It must be filed within 90 days of the date of entry of a final administrative order of removal. See INA § 240(c)(6)(C)(i). A party may only file one motion to reopen. See 8 C.F.R. § 1003.23(b)(1) (2003). A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. Id. § 1003.23(b)(3). The decision to grant or deny a motion to reopen is within the discretion of the Immigration Judge. Id. § 1003.23(b)(iv).

III. Analysis

In this case, Respondent's motion to reopen is timely, as it was filed on February 5, 2003, within 180 days of the date of the order of removal on September 15, 2003. However, the motion will be denied. Respondent is limited by regulation to filing one motion to reopen before the Court. 8 C.F.R. § 1003.23(b). Yet, he already filed a motion to reopen with the Court on December 10, 2003. Thus, the motion is barred.

Moreover, even if Respondent was not provided oral notice of the consequences of failure to appear, his reliance on Matter of M-S-, 22 I&N Dec. 349 (BIA 1998) supports the denial of the motion to reopen. The Board of Immigration Appeal's holding in Matter of M-S- subjects motions to reopen to the regulatory requirements of 8 C.F.R. § 1003.23 where the alien did not receive oral warnings of the consequences of failing to appear at a removal hearing pursuant to section 242(b)(7) of the Act. However, Respondent has failed to comply with the regulatory requirements for a motion to reopen found in 8 C.F.R. § 1003.23, as required by In re M-S-, 22 I&N Dec. at 356-57. There is a need for strict compliance with the regulations. INS v. Jong Ha Wang, 450 U.S. 139 (1981). Here, Respondent motion is not timely, as it was filed with the Court over 90 days after entry of the final administrative order of removal. 8 C.F.R. § 1003.23(b)(1) (2003). Also, Respondent has already filed one motion to reopen. Id. Finally, Cancellation of Removal for Certain Permanent Residents was a form of relief available to Respondent at the former hearing. Id. § 1003.23(b)(3). Finally, Cancellation of Removal for Certain Permanent Residents was a form of

relief available to Respondent at the former Hearing. Id. § 1003.23(b)(3).

For the above reasons, Respondent's motion to reopen must be denied. Accordingly, the following order shall be entered:

ORDER: IT IS HEREBY ORDERED that Respondent's motion to reopen be **DENIED**.

[Apr. 19, 2004] /s/ JOHN W. RICHARDSON
Date JOHN W. RICHARDSON
U.S. Immigration Judge

APPENDIX J

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
200 East Mitchell Drive, Suite 200
Phoenix, Arizona 85201

File No. A 90 835 140

IN THE MATTER OF:
MENDEZ-COLIN, RAUL DANIEL
RESPONDENT

[Date: Dec. 31, 2003]

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
Christopher J. Stender, Esq.
Stender & Associates, P.C.
2701 East Osborn Road, Suite 101
Phoenix, Arizona 85016

ON BEHALF OF THE DEPARTMENT:
Arthur Raznick, Esq.
Assistant Chief Counsel
Department of Homeland Security
2035 N. Central Avenue
Phoenix, Arizona 85004

APPLICATION:
MOTION TO REOPEN

DECISION AND ORDER
OF THE IMMIGRATION COURT

I. Procedural History

The respondent is a 36-year-old male native and citizen of Mexico. On August 25, 2001, the respondent applied for admission into the United States through the San Luis Port of Entry vehicle lane by verbally claiming to be a United States citizen. On this same date, he also knowingly encouraged, induced, assisted, abetted, and aided Matilde Zayas-Torres and Iris Gabriela Soto-Zayas, aliens, to enter or try to enter the United States at or near the San Luis Port of Entry, in violation of law.

On August 25, 2001, the Immigration and Naturalization Service[1] ("INS") issued a Notice to Appear ("NTA"), charging the respondent as removable from the United States pursuant to § 212(a)(6)(E)(i) of the Immigration and Nationality Act ("INA"), in that he is an alien who, at any time, has knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law. On August 26, 2001, INS personally served the NTA on the respondent in accordance with INA §239(a)(1)(F). [See Exhibit 1, NTA.] The NTA indicates both that a copy of it was handed to the respondent and that the respondent was to report address and phone number changes to the listed Court address. [Id.] Receipt of the NTA is evinced by respondent's signature and right thumb print. [Id.]

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[1] On March 1, 2003, the Immigration and Naturalization Service ceased to exist as an agency under the U.S. Department of Justice and became a part of the newly-formed Department of Homeland Security.

At a master calendar hearing in Phoenix, Arizona on November 6, 2001, the respondent appeared in pro se and conceded service of the NTA, which the Court marked as Exhibit 1. At a continued master calendar hearing on July 23, 2002, the respondent, through counsel, admitted all allegations except for the false claim to U.S. citizenship, conceded the charge of removability, and designated Mexico as the country of removal. Based on the respondent's admissions and concessions, the Court found that the charge of removability had been sustained by clear, unequivocal, and convincing evidence. The respondent expressed his desire to apply for Cancellation of Removal for Certain Permanent Residents pursuant to INA § 240A(a). An individual hearing was scheduled for September 15, 2003 at 9:00AM. On July 23, 2002, the Court sent a notice of hearing via first-class mail to the respondent's attorney. The notice of hearing informed the respondent and his attorney of the place, date, and time of the individual hearing.

On September 12, 2003, the respondent's counsel, Christopher J. Stender, requested to withdraw as counsel of record. [Exhibit 10.] He claimed that the respondent had failed to maintain contact with his office.

At an individual hearing on September 15, 2003, the respondent's counsel was present, but the respondent failed to appear. Based on statements made by counsel, including a detailed account of his numerous unsuccessful attempts to contact the respondent, the Court granted Mr. Stender's motion to withdraw, although the Court required that Mr. Stender remain the attorney of record for the limited purpose of service of the in absentia order. The Court also found that the respondent was duly notified of the date, time, and place of his hear-

ing but, without good cause, failed to appear as required. Thus, the Court found that the respondent had abandoned any and all claims for relief from removal and ordered him removed to Mexico in absentia. See INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2003).

On December 10, 2003, the respondent, through counsel, filed a motion to reopen. The respondent argued that he failed to appear at his individual hearing because he mistakenly believed that his hearing was scheduled for 1:00PM, instead of the correct time of 9:00AM. DHS opposes the motion.

II. Motions to Reopen

An in absentia order may be rescinded by a motion to reopen in two circumstances. First, the Court may reopen an order entered in absentia if amotion to reopen is filed within 180 days after the date of the order of removal and the alien demonstrates that the failure to appear was because of exceptional circumstances. INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i) (2003). The term "exceptional circumstances" refers to exceptional circumstances beyond the alien's control, such as serious illness of the alien or serious illness or death of an immediate relative, but not including less compelling circumstances. INA § 240(b)(5)(e)(1), 8 U.S.C. § 1229a(b)(5)(e)(1) (2003).

Second, an in absentia order may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in accordance with INA § 239(a), or because the alien was in Federal or State custody and failed to appear through no fault of his or her own. INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii).

Written notice of a hearing shall be given in person to the alien or, if personal service is not practicable, written notice shall be given by mail to the alien or to the alien's counsel of record, if any. INA § 239, 8 U.S.C. § 1229 (2003). The written notice shall contain the nature of the proceedings, time and place at which the proceedings will be held, and the consequences under INA § 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings. Id.

Pursuant to INA § 239, an NTA must specify that an alien must provide the Attorney General immediately with a written record of any change of the alien's address of telephone number. INA § 239(a)(1)(F)(ii), 8 U.S.C. § 1229(a)(1)(F)(ii) (2003). Furthermore, an NTA must specify the consequences under INA § 240(b)(5) of failure to provide address and telephone information. INA § 239(a)(1)(F)(iii), 8 U.S.C. § 1229 (2003).

III. Analysis

In this case, the respondent's motion to reopen is timely, as it was filed on December 10, 2003, within 180 days of the date of the order of removal on September 15, 2003.

However, the respondent has not shown "exceptional circumstances" warranting a reopening of his case. The respondent claims that he failed to appear at his individual hearing because he mistakenly believed that his hearing was scheduled for 1:00PM, instead of the correct time of 9:00AM. However, the notice of hearing was properly mailed to his attorney, who did appear at the scheduled time and place. His attorney stated at

the September 15, 2003 hearing that he mailed the hearing notice in both English and Spanish to the respondent and that the respondent had signed the bottom of his attorney's hearing notice. His attorney also stated that he made numerous attempts to contact the respondent before the scheduled hearing, but that the respondent had failed to maintain contact with the attorney's office. [See also Exhibit 10.] The respondent's failure to appear for his individual hearing appears to stem from a lack of interest, rather than a scheduling error, and does not constitute "circumstances beyond the control of the alien."

In addition, the blanket assertion in the motion that the respondent failed to appear because he mistakenly believed that his hearing was scheduled for 1:00PM is insufficient to establish "exceptional circumstances." A respondent cannot make bare allegations regarding an exceptional circumstance, but must submit a detailed statement and, where appropriate, proof. See Matter of JP-, 22 I&N Dec. 33 (BIA 1998).

Finally, although the respondent does not allege any failure to receive notice of the removal hearing, the Court met its obligation to provide written notice of the respondent's hearing to the respondent via mail pursuant to INA § 239. INA § 239, 8 U.S.C. § 1229 (2003). The Court mailed the notice of hearing to the respondent's counsel of record. Further, the counsel of record appeared in Court at the scheduled date and time.

For the above reasons, the respondent's motion to reopen must be denied. Accordingly, the following order shall be entered:

ORDER: IT IS HEREBY ORDERED that Respondent's motion to reopen be **DENIED**.

[Dec. 31, 2003] /s/ JOHN W. RICHARDSON
Date JOHN W. RICHARDSON
U.S. Immigration Judge

APPENDIX K

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
200 E. Mitchell Dr., Suite 200
Phoenix, AZ 85012

Case No. A90-835-140
Docket: Phoenix, Arizona

IN THE MATTER OF:
MENDEZ-COLIN, RAUL DANIEL
RESPONDENT

[Date: Sept. 15, 2003]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On Sep 15, 2003, at 9:00 A.M., pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's request for relief from removal. However,

( ) the respondent was not present.

(✓) the respondent's representative was present; however, the respondent was not present.

( ) neither the respondent nor the respondent's representative was present.

Therefore, in the absence of any showing of good cause for the respondent's failure to appear at the hearing concerning the request for relief, I find that the respondent has abandoned any and all claim(s) for relief from removal.

Wherefore, the issue of removability having been resolved, it is HEREBY ORDERED for the reasons set forth in the Immigration and Naturalization Service charging document that the respondent be removed from the United States to MEXICO.

/s/ JOHN W. RICHARDSON
JOHN W. RICHARDSON
Immigration Judge
Date: Sep 15, 2003

APPENDIX L

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
200 E. Mitchell Dr., Suite 200
Phoenix, AZ 85012

Case No. A90-835-140

IN THE MATTER OF:
MENDEZ-COLIN, RAUL DANIEL
RESPONDENT

[Date: Sept. 15, 2003]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon due consideration, it is HEREBY ORDERED that the Motion to Withdraw as Counsel filed by CHRISTOPHER STENDER :

( ) be granted.

(✓) be granted. However, counsel will remain the Attorney of Record for the limited purpose of service of any in absentia order an Immigration Judge might issue.

( ) be denied for the reason that counsel has failed to meet the standards as set forth in Matter of Rosales. 19 I&N 655 (BIA 1988).

( ) be denied for the reasons set forth in the attached decision.

( ) be denied for the reasons orally stated in the rec of the hearing.

/s/ JOHN W. RICHARDSON
JOHN W. RICHARDSON
Immigration Judge
Date: Sep 15, 2003

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-71846
Agency No. A090-835-140

RAUL DANIEL MENDEZ-COLIN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
RESPONDENT

[Filed: Oct. 12, 2022]

ORDER

Before: MCKEOWN and GOULD, Circuit Judges, and MOLLOY,* District Judge.

Order;
Dissent by Judge Collins
Statement by Judge O'Scannlain

The full court was advised of the petition for rehearing *en banc*. A judge requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. *See* Fed. R. App. P. 35.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

The petition for rehearing *en banc* (Dkt. 40) is **DENIED**.

COLLINS, Circuit Judge, with whom CALLAHAN, M. SMITH, IKUTA, BENNETT, NELSON, BADE, LEE, BRESS, FORREST, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel's published opinion in *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022), seriously misconstrues the text of the Immigration and Nationality Act ("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. According to the panel decision in *Singh*, an alien who is properly served with notice of the date, time, and place of his or her removal hearing but then fails to show up can have the resulting in absentia removal order set aside based on irrelevant errors in paperwork at the outset of the removal process. The panel's erroneous decision casts doubt on the validity of potentially tens of thousands of in absentia removal orders that have been issued in this circuit over the last two decades. Indeed, in the panel's accompanying unpublished decision in *Mendez-Colin v. Garland*, 2022 WL 342959 (9th Cir. 2022), the *reductio ad absurdum* has already arrived: the panel applies *Singh* to invalidate a 19-year-old removal order entered in a case in which the alien, after attending multiple hearings over nearly a year and receiving actual notice of the next one, simply dropped out of contact with his lawyer and consequently skipped the next hearing. It is little wonder that the panel's erroneous decision—which already conflicted with a prior decision of the Sixth Circuit—has now been expressly rejected by the Eleventh Circuit. This is a paradigmatic case that cries out for further review, and I respectfully dissent from our failure to rehear this case en banc.

I

To set the panel's analysis in context, and to make the panel's errors more apparent, it is helpful first to summarize the relevant provisions of the INA before turning to the specific facts of these two cases and then to the panel's decisions.

A

Section 239(a) of the INA provides for two distinct types of notices that must be provided to an alien over the course of removal proceedings, which are commonly referred to as a "Notice to Appear" ("NTA") and a "Notice of Hearing" ("NOH"). *See* 8 U.S.C. § 1129(a).[1]

First, paragraph (1) of § 239(a) provides that, at the outset of removal proceedings, a "written notice (in this section referred to as a 'notice to appear') shall be given" to the alien setting forth certain enumerated categories of information, including (i) the "charges against the alien and the statutory provisions alleged to have been violated"; (ii) the "requirement" that the alien provide and update the "address and telephone number" at which he or she "may be contacted" about the removal proceedings; (iii) the "time and place at which the proceedings will be held," and (iv) the "consequences . . . of the

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[1] Because (unlike several other titles) title 8 of the U.S. Code has not been enacted as positive law, I will generally refer to the underlying section numbers of the INA, although I will also provide the corresponding citation to title 8. That is consistent with how the Immigration Judges ("IJs") and the Board of Immigration Appeals ("BIA") generally cite these provisions and with how they are cited in the agency's regulations. The full text of the INA, as amended, is readily available on the website of the U.S. Government Publishing Office. *See* https://www.govinfo.gov/content/pkg/COMPS-1376/pdf/COMPS-1376.pdf.

failure, except under exceptional circumstances, to appear at such proceedings." 8 U.S.C. § 1129(a)(1)(D), (F), (G)(i)-(ii). The Supreme Court has strictly construed the requirements for such NTAs, holding that the use of the article "a" in § 239(a)(1)'s reference to "*a* 'notice to appear,'" as well as other textual clues, confirm that *all* of the statutorily enumerated information required to be included in an NTA must be provided in a "single document." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (emphasis added); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2109-10 (2018) (holding that an NTA that omitted the "time or place of the removal proceedings" failed to comply with the requirements of § 239(a)(1) and was insufficient to trigger the so-called "stop-time rule" of INA § 240A(d)(1)(A)).[2]

Second, paragraph (2) of § 239(a) states that, "in the case of any change or postponement in the time and place" of such removal proceedings, "a written notice shall be given" to the alien that includes only two things: (i) "the new time or place of the proceedings"; and (ii) the "consequences . . . of failing, except under exceptional circumstances, to attend such proceedings." 8 U.S.C. § 1229(a)(2)(i)-(ii). Noting that this provision also refers to "a written notice," the Court in *Niz-Chavez* stated that this smaller subset of statutorily enumerated items that are required for an NOH must likewise be provided in a "single document." 141 S. Ct. at 1483-84.

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[2] Under the stop-time rule, an alien who has not accumulated "10 years of continuous physical presence in the United States" at the time he or she is served with an NTA is thereby ineligible to apply for cancellation of removal. *Pereira*, 138 S. Ct. at 2109.

In describing what an NTA and an NOH must say about the "consequences" of failing to appear at a removal hearing, paragraphs (1) and (2) of § 239(a) both explicitly cross-reference § 240(b)(5) of the INA. *See* 8 U.S.C. § 1229(a)(1), (2) (citing *id.* § 1229a(b)(5)). That provision, in turn, states that "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 239(a) [8 U.S.C. § 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 Service establishes by clear, unequivocal, and convincing evidence [1] that the written notice was so provided and [2] that the alien is removable (as defined in subsection (e)(2))." *Id.* § 1229a(b)(5)(A).[3]

The statute, however, also provides an alien with a limited ability to seek subsequently to rescind an in absentia removal order entered under § 240(b)(5). Specifically, § 240(b)(5)(C) states that "[s]uch an order may be rescinded only" in two circumstances: (1) "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"; or (2) "upon a motion to reopen filed at any time if the alien demonstrates" either (i) "*that the alien did not receive notice in accordance with paragraph (1) or (2)*" of § 239(a), or (ii) "the alien demonstrates that the alien was in Federal or State custody and the failure

[3] The reference to the "Service" is apparently a vestigial reference to the former Immigration and Naturalization Service ("INS"), and must therefore be construed to refer to the Department of Homeland Security ("DHS"), the agency to which the relevant functions of the INS have since been transferred. *See* 6 U.S.C. § 557.

to appear was through no fault of the alien." 8 U.S.C. § 1229a(b)(5)(C) (emphasis added). As the specific facts of these cases will make clear, the issue here concerns the meaning of this italicized phrase.

B

1

Singh is a native and citizen of India. *See* 24 F.4th at 1316. He entered the United States illegally in October 2016 and was detained by DHS, which began removal proceedings against him. *See id.* On December 1, 2016, DHS personally served Singh with an NTA stating that the date and time of Singh's removal hearing were "TBD." *Id.* DHS released Singh, who reported that he would be residing at an address in Dyer, Indiana.

On December 6, 2016, DHS mailed an NOH under INA § 239(a)(2) to Singh at the designated Indiana address advising him that he was scheduled for a master hearing on January 29, 2021 at 8:00 AM at the immigration court in Imperial, California. *See* 24 F.4th at 1316. On October 29, 2018, DHS sent a second NOH to Singh at the same Indiana address, informing him that the date and time of the master hearing had changed to November 26, 2018 at 1:00 PM.

Singh did not appear for the master hearing on November 26, 2018. The immigration court re-scheduled the hearing for December 12, 2018. DHS sent a third NOH to Singh at the Indiana address informing him that the date of the master hearing had changed to December 12, 2018.

Singh failed to appear for the master hearing on December 12, 2018. *See* 24 F.4th at 1316. Accordingly,

the IJ proceeded to consider whether Singh should be ordered removed in absentia under INA § 240(b)(5)(A). The IJ found that Singh had been provided both written notice of the time, date, and location of the hearing and a written warning that failure to attend the hearing, for other than exceptional circumstances, would result in the issuance of an order of removal if removability was established. The IJ determined that DHS had submitted sufficient evidence to establish Singh's removability as alleged in the NTA and that Singh's failure to appear was not due to exceptional circumstances. 24 F.4th at 1316. Finally, the IJ found that Singh's failure to appear constituted an abandonment of any pending applications for relief. The IJ therefore ordered him removed in absentia. *Id.*

In April 2019, Singh filed a motion to reopen with the immigration court. 24 F.4th at 1316. Singh conceded that the NOHs had arrived at the Indiana address he had designated but he claimed that he never actually received them due to "a failure in the inner workings of the household." *Id.* He nonetheless argued that he did not receive proper notice under § 239 because his NTA lacked the hearing date and time information. The IJ denied the motion and the BIA affirmed.

2

Mendez-Colin is a native and citizen of Mexico. On August 25, 2001—over 20 years ago—Mendez-Colin attempted to gain entry to the United States through the San Luis Port of Entry vehicle lane by falsely claiming to be a U.S. citizen. In doing so, he also attempted to gain entry for two other aliens who were in the vehicle. He was detained and the next day, on August 26, 2001,

the INS[4] personally served Mendez-Colin with an NTA charging him as removable. The NTA indicated that the date and time of Mendez-Colin's master hearing was "To be set." Mendez-Colin was released from detention.

Between October 2001 and July 2002, Mendez-Colin, either directly or through counsel, received at least seven NOHs, and he appeared in person at multiple hearings, together with counsel. At a hearing on July 23, 2002 at which Mendez-Colin was present with his attorney, the IJ found that the charge of removability had been sustained by clear and convincing evidence. However, Mendez-Colin expressed a desire to apply for cancellation of removal, and the IJ scheduled an individual hearing for September 15, 2003 to consider that claim for relief. A confirming NOH was served on July 23, 2002, informing Mendez-Colin that an individual hearing was scheduled in his case for September 15, 2003 at 9:00 AM.

Thereafter, Mendez-Colin failed to stay in contact with his attorney, which led the attorney to file a motion to withdraw as counsel of record. That motion was still pending on September 15, 2003, the scheduled date for Mendez-Colin's individual hearing. Mendez-Colin's attorney appeared at that hearing, but Mendez-Colin did not. The IJ found that Mendez-Colin had been duly notified of the date, time, and place of the hearing but failed, without good cause, to appear as required. Having already previously found that Mendez-Colin was removable, the IJ found that Mendez-Colin had abandoned any claims for relief from removal and ordered

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[4] As noted earlier, the relevant functions of the INS have since been transferred to DHS. *See supra* note 3.

him removed in absentia pursuant to § 240(b)(5). The court also granted Mendez-Colin's attorney's motion to withdraw, subject to remaining the attorney of record for the limited purpose of service of the in absentia order.

On December 10, 2003, Mendez-Colin through his same attorney filed a motion to reopen his removal proceedings. The motion claimed that Mendez-Colin had failed to appear at the September 15 individual hearing because he thought it was scheduled for 1:00 PM, but the motion was not accompanied by any declaration from Mendez-Colin or any other evidence to support this assertion. The IJ denied the motion on December 31, 2003. Noting that Mendez-Colin had failed to maintain contact with his attorney, the IJ concluded that his "failure to appear for his individual hearing appears to stem from a lack of interest, rather than a scheduling error." Moreover, the IJ held that, in light of Mendez-Colin's failure to submit any supporting statement or proof, "the blanket assertion in the motion that [Mendez-Colin] failed to appear because he mistakenly believed that his hearing was scheduled for 1:00PM is insufficient to establish 'exceptional circumstances.'" The IJ further noted that the NOH had been properly served and that Mendez-Colin did not contest that he had received the NOH.

Mendez-Colin did not appeal the IJ's decision to the BIA. Instead, on February 4, 2004, he filed a second motion to reopen. In this motion, Mendez-Colin expressly stated that he did not "challenge the propriety of [the Immigration] Court's order deporting [him] *in absentia*." He therefore did *not* seek rescission of his removal order under INA § 240(b)(5)(C). Instead, he

sought reopening under the general reopening provisions of § 240(c)(7) so that he could pursue his application for cancellation of removal based on newly available material evidence. *See* 8 U.S.C. § 1229a(c)(7). In making this motion, Mendez-Colin recognized that a separate provision of the INA—§ 240(b)(7)—generally prohibits granting cancellation of removal and certain other forms of relief to anyone who has been ordered removed in absentia during the 10 years following the issuance of that order, but he noted that this 10-year bar on relief only applied if, in addition to receiving notice under § 239(a), the alien also received "oral notice" of the consequences of failing to appear at a removal hearing. *See* 8 U.S.C. § 1229a(b)(7). Because he had not received such oral notice, Mendez-Colin argued, he was not subject to this bar.

The IJ denied the second motion to reopen on April 19, 2004. The IJ noted that INA § 240(c)(7) generally limits aliens to a single motion to reopen, and Mendez-Colin had already unsuccessfully filed a prior such motion. Moreover, the motion was filed outside the 90-day time limit that generally applies to motions to reopen under § 240(c)(7), *see* 8 U.S.C. § 1229a(c)(7)(C)(i), and the motion failed to make the showing required for such a motion. Mendez-Colin appealed this decision to the BIA. On November 4, 2004, the BIA dismissed the appeal. Noting that Mendez-Colin had already been removed from the United States, the BIA concluded that his removal counted as a "[d]eparture" and therefore "constitute[d] a withdrawal of the appeal," pursuant to 8 C.F.R. § 1003.4 (2004). The BIA therefore concluded that the IJ's decision was "final to the same extent as though no appeal had been taken."

More than 15 years later, in January 2020, Mendez-Colin filed a motion with the BIA requesting that the BIA reinstate his 2004 appeal or remand the matter to the IJ. Mendez-Colin noted that a subsequent Ninth Circuit decision in 2010 had clarified that an involuntary removal did not give rise to a withdrawal of appeal. He also argued that the 2003 in absentia removal order was invalid because the 2001 NTA that initiated his removal proceedings had failed to specify the time and date of his first hearing. Construing Mendez-Colin's motion as a motion to reconsider the 2004 dismissal, the BIA denied the motion as untimely, noting that it "was filed more than 15 years after the statutory deadline for filing a motion to reconsider before the Board." *See* 8 U.S.C. § 1229a(c)(6)(B) (setting a 30-day deadline). The BIA also declined to exercise its sua sponte authority to reconsider, noting that the motion was filed more than 10 years after the asserted change in the law. To the extent that Mendez-Colin sought remand to the IJ due to defects in his 2001 NTA, the BIA concluded that any such defects were irrelevant in light of the subsequent NOHs that were properly served on him.

C

The panel granted both petitions. In its published opinion in *Singh*, the panel first held that Singh's NTA was plainly defective under *Niz-Chavez* because it did not contain, in a single document, all of the information required by § 239(a)(1), including the date and time of his removal hearing. *See* 24 F.4th at 1318-19. The panel rejected the Government's efforts to confine *Niz-Chavez* to the context of the stop-time rule, and it therefore held that the NTA did not provide valid notice for purposes of the in absentia provisions of the INA. *See*

id. On this point, the panel noted that a decision of the Fifth Circuit had reached the same conclusion. *See id.* at 1319 (citing *Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021)).

The panel next rejected the Government's further, two-step argument that (1) under § 240(b)(5)(A), the notice requirement for an in absentia removal is satisfied if the NOH alone is valid, regardless of whether the earlier NTA was valid; and (2) here, the NOHs sent to Singh were all valid under § 239(a)(2). The panel acknowledged that, as the Government emphasized, § 240(b)(5) allows an in absentia order to be entered if the alien was served with notice "under paragraph (1) *or* (2)" of § 239(a). 24 F.4th at 1319 (quoting 8 U.S.C. § 1229a(b)(5)(A) (emphasis added)). Despite this use of the disjunctive, the panel held that valid notice was required under both paragraph (1) and paragraph (2)—that is, both the original NTA and the NOH for the current hearing date had to meet the respective notice requirements of paragraph (1) and paragraph (2). 24 F.3d at 1319-20.

On the same day it decided *Singh*, the panel issued a memorandum disposition granting Mendez-Colin's petition for review. *Mendez-Colin*, 2022 WL 342959, at *1. "Noncitizens 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.* "Because Mendez-Colin did not receive statutorily compliant notice before his removal hearing, the in absentia removal order issued at that hearing is invalid." *Id.*

II

The panel's decision in *Singh* misconstrues the language of the in absentia provision, which makes clear that an in absentia removal order may be entered so long as the alien has been served with an NOH that (1) contains the date, time, and place information for the hearing that the alien failed to attend; and (2) warns the alien of the consequences of failing to appear. Whether the earlier NTA included such information is irrelevant.

A

As explained earlier, INA § 240(b)(5)(A) allows an IJ to enter an in absentia removal order if DHS establishes that "written notice required under paragraph (1) *or* (2) of section 239(a) [8 U.S.C. § 1229(a)]" was provided and that the alien is removable. 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). The reference is obviously to the *particular* notice—either an NTA (which is a notice "under paragraph (1)") or an NOH (which is a notice "under paragraph . . . (2)")—that notified the alien of the *particular* hearing that the alien missed. And once that in absentia order has been entered, then (absent exceptional circumstances set forth in a timely motion) the alien may obtain rescission of the order only by showing that he or she did not receive the requisite "notice in accordance with paragraph (1) or (2)," as the case may be. *Id.* § 1229a(b)(5)(C)(ii). Accordingly, where—as in both *Singh* and *Mendez-Colin*—the alien 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. Several tex-

tual clues confirm this understanding of the relevant statutory language.

First, the use of the disjunctive "or" generally "indicates alternatives and requires that they be treated separately." *Bunker Hill Co. Lead & Zinc Smelter v. U.S. Env'l Prot. Agency*, 658 F.2d 1280, 1283 n.1 (9th Cir. 1981); *see also United States v. Woods*, 571 U.S. 31, 46 (2013) (noting that the "ordinary use" of "the conjunction 'or'" is "almost always disjunctive" and signifies that the "items are alternatives"). Accordingly, § 240(b)(5)(A)'s disjunctive statement that an in absentia order can been entered if notice was provided under "paragraph (1) or (2)" is properly understood as referring in the alternative to whichever of the two possible forms of notice (NTA or NOH) might have been used to notify the alien of that particular hearing. Likewise, § 240(b)(5)(C)(ii)'s requirement that the alien show that he or she did not "receive notice in accordance with paragraph (1) *or* (2)" only requires the alien to show that the *particular* alternative on which the Government relied to obtain the in absentia order under § 240(b)(5)(A) (*i.e.*, an NTA or an NOH) did not comply with the applicable requirements of the relevant paragraph. Indeed, given that § 240(b)(5) sets forth the consequences of failing to "attend *a* proceeding under this section," it is unsurprising that it uses the disjunctive "or" to refer to whichever of the two types of notices happened to be used for the particular hearing that the alien missed. 8 U.S.C. § 1229a(b)(5)(A) (emphasis added).

Second, in describing the Government's burden in obtaining an in absentia removal order, § 240(b)(5)(A) requires the Government to prove, by "clear, unequivocal, and convincing evidence that *the* written notice"—

singular—"was so provided." 8 U.S.C. § 1229a(b)(5)(A) (emphasis added). The use of this "article coupled with a singular noun" denotes a "discrete document," *see Niz-Chavez*, 141 S. Ct. at 1483, and should therefore be understood to refer to the one of the two alternative forms of notice that may have been used for that particular hearing. That is especially true given that paragraph (1) and paragraph (2) of § 239(a) both refer to the respective documents described therein (*viz.*, an NTA and an NOH) as a "written notice." 8 U.S.C. § 1229(a)(1), (2)(A). Because "grammar and usage establish that 'the' is a function word indicating that a following noun . . . has been previously specified by context," *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (simplified), the phrase "*the* written notice" clearly refers to the particular notice, under either paragraph (1) or paragraph (2), for the specific "proceeding" that the alien "d[id] not attend." 8 U.S.C. § 1229a(b)(5)(A) (emphasis added).

Third, this reading of § 240(b)(5) comports with common sense. Removal proceedings may drag out for many years and involve a half dozen or more hearings. It 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. Yet that absurd result is precisely what the panel decreed in *Mendez-Colin*.

B

The panel in *Singh* gave three reasons for reaching its contrary conclusion, but all of them fail.

1

First, the panel held that, "by the plain text of paragraph (2) of § 1229(a) [INA § 239(a)] there can be no valid notice under paragraph (2) without valid notice under paragraph (1)." 24 F.4th at 1319. Thus, if the NTA at the outset of the removal proceedings failed to include a date and a time, the panel reasoned, *any* subsequent NOH simply does not count as a "notice required under paragraph . . . (2)" of § 239 for purposes of the in absentia removal provision in § 240. 8 U.S.C. § 1229a(b)(5)(A). Because, according to the panel, a notice under "paragraph . . . (2)" requires that there also have been a "valid notice under paragraph (1)," the "or" in § 240(b)(5) is effectively converted into an "and"—both options require valid notice under paragraph (1). This argument is deeply flawed.

In making this argument, the panel emphasized that paragraph (2) of § 239(a) describes the "written notice" that must be given when there is a "*change or postponement* in the time and place" of the removal proceedings. 8 U.S.C. § 1229(a)(2)(A) (emphasis added). The panel concluded that "a 'change' in the time or place is *not possible*" if the earlier NTA failed to include a date and time. 24 F.4th at 1321 (emphasis added). That is wrong. If the time and place of a hearing were listed in an NTA as "To Be Set" or "TBD," a subsequent NOH that newly provides a particular date, time, and place certainly reflects, in the ordinary sense of the term, a "*change* . . . in the time and place" that was previously listed. 8 U.S.C. § 1229(a)(2)(A) (emphasis added). *See Change*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981 ed.) ("an instance of making or becoming different in some particular"). The

panel's fundamental rationale for linking the validity of a notice under paragraph (2) to the validity of an earlier notice under paragraph (1) therefore collapses.

The panel's opinion nonetheless contends that its argument on this score is supported by *Pereira*, but that too is wrong.

As noted earlier, the Court held in *Pereira* that, to qualify as a "notice to appear under section 239(a) [8 U.S.C. § 1229(a)]" within the meaning of the stop-time rule in § 240A(d)(1), *see* 8 U.S.C. § 1229b(d)(1), an NTA must contain all of the information listed in § 239(a)(1), including the time and place of the hearing. 138 S. Ct. at 2109-10. In dissent, Justice Alito argued that "the cross-reference to 'section 1229(a),' as opposed to 'section 1229(a)(1)," supported a contrary conclusion, "because if Congress had meant for the stop-time rule to incorporate the substantive requirements located in § 1229(a)(1)"—as opposed to the notice requirements of that subsection more generally, including paragraph (2)—"it presumably would have referred specifically to that provision and not more generally to 'section 1229(a).'" 138 S. Ct. at 2123 (Alito, J., dissenting). The Court rejected this argument, stating that "the broad reference to § 1229(a) is of no consequence, because, as even the Government concedes, only paragraph (1) bears on the meaning of a 'notice to appear.'" *Id.* at 2114. The Court further stated that, "[i]f anything," paragraph (2) "actually bolsters" the Court's conclusion that the stop-time rule's reference to a "notice to appear" requires that all information required by paragraph (1), including time and place information, have been included in the NTA in order "to trigger the stop-time rule." *Id.* By referring to a "change or

postponement," the Court concluded, "paragraph (2) *presumes* that the Government has already served a 'notice to appear'" that contained such time and place information, because "[o]therwise, there would be no time or place to 'change or postpon[e].'" *Id.* (emphasis added).

Seizing on this latter comment, the panel concluded that the Court thereby supposedly "adopted" its view that it is simply "*not possible*" to characterize as a "change . . . in time or place" an NOH that supplies time and place information that was omitted from an NTA. 24 F.4th at 1320 (emphasis added). The Court did no such thing. The Court was construing the requirements of paragraph (1), which it held required an NTA to include time and place information in order to qualify as a "notice to appear" for purposes of the stop-time rule. That reading of paragraph (1) is, as the Court explained, "bolster[ed]" by paragraph (2)'s use of the phrase "change or postponement in the time and place" in describing when an NOH is required, because that phrasing clearly reflects a *presumption* that the NTA *should* already have provided time and place information. 138 S. Ct. at 2114. But it is quite another thing to say, as the panel does here, that it is not even "possible" to characterize a substitution of a "TBD" notation with a specific time and place as being a "change," much less that an NOH that does so is invalid *under paragraph (2)*. The Court had no such issue before it, and the panel's out-of-context quotation from *Pereira* does not support the much broader and different proposition it adopts.

Moreover, as the Government notes in its rehearing petition, the panel took its own argument several steps

further. Even if the panel were correct that 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. But under the panel's flawed reading of paragraph (2), the validity of an NOH issued years into a multi-hearing removal proceeding turns on its provenance as reflected in the *first* link in the chain of notices. That makes no sense, and nothing in the language of the INA requires such an extraordinary result.

2

Second, the panel stated that § 239(a)(1) "begins with unambiguous definitional language, explaining that 'written notice' is 'in this section referred to as a "notice to appear."'" 24 F.4th at 1320 (quoting 8 U.S.C. § 1229(a)(1)). According to the panel, that means that "*any* reference to written notice" in § 239 "is the 'Notice to Appear' defined in paragraph (1) with its accompanying enumerated requirements." *Id.* (emphasis added). And because the requirements for an NOH in paragraph (2) of § 239 refer to "written notice," the panel concluded, a document that contains only the two items listed in that paragraph, by itself, would not count as "'written notice' under § 1229(a) [INA § 239(a)]." 24 F.4th at 1320. Every step of this analysis is wrong.

As an initial matter, the panel gets its definition exactly backwards. Paragraph (1) defines the phrase "notice to appear" as a particular type of "written notice," *viz.*, one that contains the enumerated list of information. Paragraph (2) defines a different type of "written notice" that requires only a limited subset of information. The panel is thus quite wrong in reading par-

agraph (1) as defining the broader phrase "written notice" to mean a "notice to appear." Nor does paragraph (1) establish the startling proposition that, "[t]hroughout § 1229(a) [INA § 239(a)], then, *any reference to written notice* is the 'Notice to Appear' defined in paragraph (1) with its accompanying enumerated requirements." 24 F.4th at 1320 (emphasis added). Taken literally, that would presumably mean (in contradiction to what even the panel itself seemed to recognize elsewhere in its opinion) that every "written notice" required under paragraph (2) refers to an NTA and that therefore every NOH under paragraph (2) must itself replicate the entirety of the information required under paragraph (1). That, of course, ignores the plain language of the two paragraphs, which requires in an NOH under paragraph (2) only a subset of the information required in an NTA under paragraph (1). *See also Pereira*, 138 S. Ct. at 2114 ("[O]nly paragraph (1) bears on the meaning of a 'notice to appear.'").

The fact that the panel got its definition backwards fatally undermines its reasoning. There are two different types of "written notice"—a "notice to appear" and a "notice of hearing"—and the statute does not define "written notice" as meaning a "notice to appear." Thus, the term "written notice" encompasses the different notices described in both paragraph (1) and paragraph (2), whereas the term "notice to appear" is more specific and refers only to the notice described in paragraph (1). Section 240(b)(5) uses the broader term and omits the narrower term: it requires a single "written notice . . . under paragraph (1) or (2)" of § 239(a). 8 U.S.C. § 1229a(b)(5)(A), (C)(ii). This sharply contrasts with other sections of the INA—such as the stop-time provision at issue in *Pereira* and *Niz-Chavez*—in

which Congress has referred specifically to a "notice to appear." 8 U.S.C. § 1229b(d)(1).

3

Third, the panel held that the structure of § 239(a) supported its conclusion. According to the panel, because paragraph (2) of § 239(a) merely sets forth what is needed when there is a change in time or place, and "does not repeat the long list of requirements for written notice contained in paragraph (1)," any notices under paragraph (2) are meant to be "additions to, and not alternatives to, the Notice to Appear described in paragraph (1)." 24 F.4th at 1320. A contrary reading, the panel asserted, would allow the Government "a textual backdoor to circumvent the written-notice requirements enumerated in paragraph (1)." *Id.* The problem with this reasoning is that, as explained earlier, Congress's use of the disjunctive in § 240(b)(5) means that the validity of an in absentia removal turns only on which of the two types of notices was provided for that particular hearing. In cases in which the notice was provided by an NOH, Congress thus decided to require only a valid NOH (with its fewer requirements), and not a valid NTA, in order to permit in absentia removal. Contrary to what the panel thought, it does not "circumvent" anything for a court to respect that legislative choice.

III

In addition to being manifestly wrong, the panel's analysis in *Singh* conflicts with the decisions of two other circuits and threatens to invalidate potentially tens of thousands of in abstentia removal orders previously executed in this circuit. These additional considerations

underscore why we should have reheard this case en banc.

A

In 2019, the Sixth Circuit held that the delivery of an NOH under paragraph (2) to the alien's designated address was sufficient notice to support an in absentia removal order—even though the NTA under paragraph (1) was invalid. *See Santos-Santos v. Barr*, 917 F.3d 486, 492 (6th Cir. 2019); *see also id.* at 492-93 (holding that the alien had failed in his effort to show that the NOH had never actually been received at the correct address). This construction of § 240(b)(5) is directly contrary to the panel's holding here.

On July 19, 2022, the Eleventh Circuit expressly rejected the panel's holding and reasoning in this case. *See Dacostagomez-Aguilar v. U.S. Att'y Gen.*, 40 F.4th 1312 (11th Cir. 2022). The Eleventh Circuit held that "in absentia removal is lawful so long as the government provided notice *for whichever hearing was missed*, which means reopening is available if the notice for that hearing was not provided." *Id.* at 1316 (emphasis added). Thus, it concluded that an NOH under paragraph (2) of § 239(a) will support an in absentia removal even if the earlier NTA was defective under paragraph (1). *See id.* In reaching this conclusion, the Eleventh Circuit "disagree[d] with the Ninth Circuit's interpretation of the in absentia removal provisions" in *Singh*. *Id.* at 1318 n.3. In explaining its disagreement, the Eleventh Circuit expressly made two of the same points discussed above. First, the court concluded that an NOH can constitute "a 'change or postponement in the time and place' of removal proceedings even if the initial hearing information appeared in a follow-on notice of

hearing." *Id.* Second, the court noted that the panel's holding that "written notice" means "notice to appear" was plainly inconsistent with the statutory language. *Id.*

Therefore, the Sixth Circuit and the Eleventh Circuit agree that a valid NTA is not necessary for an in absentia removal if the relevant notice was provided in a valid NOH. That is an additional consideration that warranted en banc rehearing here.[5]

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[5] As the Eleventh Circuit recognized in *Dacostagomez-Aguilar*, *see* 40 F.4th at 1318 n.4, the Fifth Circuit's panel opinion in *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), does not squarely address the question whether an NOH that contains all of the information required by § 239(a)(2) is, by itself, sufficient to uphold an in absentia removal order under § 240(b)(5). The Fifth Circuit's panel decision in *Rodriguez* held only that, for purposes of applying § 240(b)(5), a defective NTA is not cured by a subsequent NOH and remains a defective NTA. *Id.* at 355-56. Although the facts of *Rodriguez* arguably presented the distinct issue resolved by the Sixth, Ninth, and Eleventh Circuits, the Fifth Circuit did not specifically address that question. *See Cueto-Jimenez v. Garland*, 2022 WL 1262103, at *2 (5th Cir. 2022) (unpub.) (making a similar observation about the limited holding in *Rodriguez*). However, the law in the Fifth Circuit appears to be unsettled at this point. In connection with the denial of rehearing en banc in *Rodriguez*, several judges proceeded to opine on the significance of § 240(b)(5)'s disjunctive phrasing, and they differed as to the correctness of the sort of analysis adopted by the panel here in *Singh*. *Compare Rodriguez v. Garland*, 31 F.4th 935, 935 (5th Cir. 2022) (Duncan, J., concurring in the denial of rehearing en banc) *with id.* at 938 (Elrod, J., dissenting from the denial of rehearing en banc). The picture in the Fifth Circuit is further muddied by a subsequent published decision distinguishing *Rodriguez* and 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

B

Moreover, the panel's decision in *Singh* threatens to nullify an extremely large number of in absentia removal orders previously executed in this circuit. Since the relevant statutory language was adopted in 1996, there likely have been at least tens of thousands of aliens who have been ordered removed in absentia after their initial NTAs did not specify time and date information. Between January 1, 2008 and April 18, 2022, the United States issued more than 545,000 in absentia removal orders. *See* Exec. Off. for Immigr. Rev., Adjudication Statistics: In Absentia Removal Orders (July 15, 2022), https://www.justice.gov/eoir/page/file/1243496/download (last visited October 4, 2022). And as *Mendez-Colin* demonstrates, the Government has been issuing NTAs with the date and time "to be set" since at least 2001, and the Government's petition for rehearing notes that this was the standard practice for many years. Thus, if left in place, the panel's holding would likely invalidate a vast majority of such orders in this circuit, undoing potentially tens of thousands of in absentia removal orders, some decades old.

We need not look beyond the facts of these cases to see the remarkable breadth of the panel's holding. Mendez-Colin received his original NTA *over 20 years ago*. His initial removal proceedings ended 18 years ago. And during those proceedings, he attended multiple hearings, received multiple valid notices of those hearings, and received valid notice of the particular

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and the alien "in fact receives the NOH (or does not dispute receiving it)." *Campos-Chaves v. Garland*, 43 F.4th 447, 448 (5th Cir. 2022). That reasoning and result, of course, directly conflict with the reasoning and result in *Mendez-Colin* here.

hearing at which he was ordered removed in absentia. Yet, as the panel has decreed, his decades-old removal order is now invalid. That result is egregiously wrong and reflects the disturbingly broad implications of the panel's erroneous opinion.

* * *

For the foregoing reasons, I respectfully dissent from our failure to rehear this case en banc.

O'SCANNLAIN, Circuit Judge,[1] respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

[1] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

APPENDIX N

1. 8 U.S.C. 1229(a)(1) and (2) 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).

2. 8 U.S.C. 1229a(b)(5) provides:

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.