NO. 19-_____

In the Supreme Court of the United States

MELIDA TERESA LUNA-GARCIA,

Petitioner,

v.

WILLIAM BARR, U.S. ATTORNEY GENERAL,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

NADIA H. DAHAB
COUNSEL OF RECORD
STEPHEN W. MANNING
INNOVATION LAW LAB
333 SW FIFTH AVE. STE. 200
PORTLAND, OR 97204
(971) 277-3424
NADIA@INNOVATIONLAWLAB.ORG

NOVEMBER 20, 2019 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Under the Immigration & Nationality Act (INA), noncitizens have a statutory right to written notice of the time and place of their removal proceedings. 8 U.S.C. § 1229(a)(1). By its text, the INA places the obligation to send that written notice on the Attorney General, 8 U.S.C. § 1229 (a)(1)-(2), who is relieved of that obligation in only one circumstance: when the noncitizen fails to provide an "address . . . at which [she] may be contacted respecting [her removal] proceedings." 8 U.S.C. §§ 1229 (a)(2)(B), 1229(a)(1)(F)(i). So long as the noncitizen complies with the statutory address requirement, she is entitled to written notice so that she can appear and participate in her case.

The court of appeals held that § 1229(a)(1)(F)(i) requires a noncitizen inside the United States to provide a U.S. address; permits a noncitizen outside the United States to provide any address, domestic or foreign; and, in all events, requires the agency to consider the period of years the individual has been in the United States before determining what type of address is required. As to Petitioner, the court held that she was not entitled to notice because she had been physically present in the United States for several years—thus, her permanent address in Guatemala did not suffice.

THE QUESTION PRESENTED IS:

Whether, under § 1229(a)(1), a noncitizen is entitled to written notice of the time and date of her removal proceedings when she provides a foreign address to the Attorney General as the "address . . . at which [she] may be contacted" under § 1229(a)(1)(F)(i).

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Fifth Circuit

Case No. 16-60847

Melida Teresa Luna-Garcia v.
William P. Barr, U.S. Attorney General

Revised Decision Date: July 23, 2019

Rehearing Denial Date: July 23, 2019

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

File A097 831 833

In Re: Melida Teresa Luna-Garcia

Decision Date: November 25, 2016

United States Department of Justice
Executive Office for Immigration Review,
Immigration Court

File A097 831 833

In the Matter of Melida Teresa Luna-Garcia

Decision Date: January 26, 2016

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Melida Teresa Luna-Garcia respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decisions of the court of appeals (App.1a-12a, 14a-24a) are reported at 932 F.3d 285 (5th Cir. 2019), *superseding* 924 F.3d 198 (5th Cir. 2019). The decision of the Board of Immigration Appeals (App.25a-27a) is unreported. The order of the immigration judge (App.28a-31a) is also unreported.

JURISDICTION

The revised opinion and order denying a petition for rehearing by the court of appeals was entered on July 23, 2019. (App.1a, 35a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229

provides, in relevant part,

(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:

* * *

(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.

* * *

(2) Notice of Change in Time or Place of Proceedings

(A) In General

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a (b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under

this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central Address Files

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

8 U.S.C. § 1229a

provides, in relevant part,

(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.

The full text of §§ 1229 and 1229a is reprinted in the Appendix, *infra*, at 37a-56a.

INTRODUCTION

The question this case presents concerns the rights of individuals to appear and participate in removal proceedings. Specifically, the question concerns an individual's statutory right to written notice when the Attorney General initiates removal proceedings against them. That right, to which Congress has attached substantive significance and made clear applies to all noncitizens, *see Pereira v. Sessions*, 138 S.Ct. 2105, 2118 (2018), cannot be applied on a case-by-case basis, as the court of appeals' holding commands.

In 1996, Congress amended the INA to create a mechanism designed to assure individual accountability to appear and participate in removal proceedings. To do so, it added a provision requiring individuals placed into removal proceedings to provide the Attorney General with an "address . . . at which [the individual] may be contacted respecting [those removal] proceedings." 8 U.S.C. § 1229(a)(1)(F)(i). So long as the individual provides that address, the Attorney General

must send her written notice of the time and date of any upcoming hearing. 8 U.S.C. § 1229(a)(1). If she fails to provide that address, the Attorney General need not send that notice. 8 U.S.C. § 1229(a)(2)(B). And, if the individual fails to appear at a hearing, she may be removed *in absentia*, § 1229a(b)(5)(A); thus, she has every incentive to comply with the statutory address requirement. An individual's right to written notice under § 1229(a)(1) is a cornerstone of due process, to which every noncitizen is entitled. *Demore v. Kim*, 538 U.S. 510, 523, 123 S.Ct. 1708 (2003).

The court of appeals held that whether § 1229(a)(1)(F)(i) requires a noncitizen to provide a domestic or foreign address to be entitled to written notice of a removal hearing depends on a fact-intensive, case-by-case analysis. For noncitizens who are physically present in the United States, and have been so for some time, the court of appeals held that § 1229(a)(1)(F)(i) requires the noncitizen to provide a U.S. address, and not a foreign address, as the "address . . . at which [she] may be contacted" respecting her removal proceedings. (App.9a). For noncitizens who are outside the United States, the court of appeals held that § 1229(a)(1)(F)(i) permits the noncitizen to provide any address, domestic or foreign, to satisfy the statutory requirement. (App.8a). And, according to the court of appeals, for noncitizens who have been physically present in the United States for a shorter period of time than Petitioner, the statutory requirement might yet be different. (App.9a n.3). Put differently, the court of appeals held that § 1229(a)(1)—which sets forth fundamental due process rights that exist to protect noncitizens' rights to appear and participate in their removal proceedings—varies in meaning, depending

on whether and how long the individual has been "physically present" in the United States.

The court of appeals' reading of the INA is plainly wrong because the statutory wording simply is not amenable to a case-by-case inquiry. The court's reading also conflicts with long-settled principles of due process that, under the Fifth Amendment, apply to all noncitizens in removal proceedings. In light of the Administration's recently implemented "Migrant Protection Protocols," the court of appeals' opinion, if allowed to stand, will result in widespread and inconsistent applications of the rule of law. It also would entrench into American jurisprudence the principle that courts can construe statutes to have different meanings on different facts—a dangerous principle that lies entirely beyond the power of Congress to control. This Court, and not the court of appeals, should resolve the question presented in this case and settle these important issues of federal law.

STATEMENT OF THE CASE

I. The INA's Statutory Address Requirement Is Designed to Protect Due Process and Assure Individual Accountability in Removal Proceedings.

When Congress amended the INA in 1996, it created a statutory mechanism designed to assure individual accountability to appear and participate in removal proceedings. At that time, Congress was concerned with both protecting noncitizens' due process rights in removal proceedings, *see Demore*, 538 U.S.

at 523, and avoiding "protracted disputes concerning whether an alien has been provided proper notice of a proceeding," H.R. Rep. No. 104-469, at 159 (Mar. 4, 1996). To satisfy both concerns, Congress created an accountability loop—pursuant to that loop, the noncitizen would provide an address (of her choice) to the Attorney General, the Attorney General would record that address and use it to notify the noncitizen of any upcoming hearing, and, if the noncitizen nonetheless failed to appear, she could be removed *in absentia*. *See generally id.* (describing the various stages of that accountability loop).[1] Pursuant to that statutory design, which remains in place today, the noncitizen can provide the Attorney General with any valid address "at which [she] may be contacted," but has every incentive to provide the Attorney General with a good address—that is, one at which she can actually be reached for notice purposes. If she does not, she

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[1] The House Report summarizing the changes to the INA's removal procedures describes the accountability loop similarly:

> First, it requires the INS to establish a central address file to accurately record address information, including changes, provided by aliens. Second, it provides that service by mail of the required notice of hearing is sufficient if there is proof of delivery to the most recent address provided by the alien. Third, it authorizes the immigration judge to enter an in absentia order if the alien fails to appear provided that there is proof of attempted delivery at this address. Fourth, it allows an alien to rescind an in absentia order only in the case of specified exceptional circumstances or if the alien demonstrates that notice was not received notwithstanding the alien's compliance with the notice of address requirements.

H.R. Rep. 104-469, at 159 (Mar. 4, 1996).

forfeits her right to participate in her removal proceedings.

II. The BIA Historically Has Construed the Address Requirement Consistently with that Statutory Design.

Early decisions of the BIA demonstrate that the agency's historical practices—specifically, in sending written notice to any address a noncitizen provides—are consistent with the statutory design that Congress created. As relevant here, those decisions make clear that, in cases where the noncitizen provides a foreign address to the Attorney General as the "address . . . at which [she] may be contacted" respecting her removal proceedings, the immigration courts in turn sent written notice to that address, even if it was outside the United States. *See, e.g.*, *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 445 (BIA 1996) (sending written notice to the noncitizen's address in Mexico); *see also Matter of Rivas-Vivas*, 2008 WL 486913, at *1 (BIA Jan. 30, 2008) (unpublished) (same).

The agency's regulations and established procedures likewise conform with that statutory design. To implement the INA's address requirement, the U.S. Department of Justice, through the Executive Office for Immigration Review (EOIR), has promulgated regulations pertaining to the contents of a Notice to Appear (NTA) and the manner in which a noncitizen may notify the agency that her address has changed. Those regulations require the NTA to contain "[t]he alien's address," without qualification as to whether that address need be domestic or foreign. 8 C.F.R. § 1003.15(c)(2). The regulations also permit the noncitizen to notify the immigration court of her address,

or any change of address, by "completing and filing Form EOIR-33." 8 C.F.R. § 1003.15(d)(1). The Form EOIR-33, entitled "Alien's Change of Address Form," in turn permits the noncitizen to provide an address "[i]n care of" another person, in a country "other than [the] U.S." *See* U.S. Dep't of Justice, Form EOIR-33/IC, Alien's Change of Address Form (2015), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir33icsanfrancisco.pdf (emphasis added). And that has been true for decades: the version of the Form EOIR-33 effective in 2004, when Petitioner initially was apprehended, likewise asked for the noncitizen's "Country, if other than U.S," within the form's "address" field. *See* Form EOIR-33, Alien's Change of Address Form, OMB #1125-0004 (2003) (expiring Aug. 31, 2005).

III. In This Case, Both the Agency and the Court of Appeals Departed from the Statute's Text, Congress's Express Intent, and the Agency's Own Practices.

Petitioner Melida Teresa Luna-Garcia originally entered the United States with her daughter on April 15, 2004. A.R. 86. Shortly thereafter, she was apprehended by a U.S. Customs & Board Protection (CBP) agent near Laredo, Texas, and asked for "an address where [she] could receive mail." A.R. 82, 84. In response, she provided the CBP agent with her home address in Guatemala. A.R. 82.

Petitioner was later served with an NTA that charged her as a noncitizen in the United States without being admitted or paroled. A.R. 84. The NTA did not contain the time or date of her removal hearing, but instead stated that the hearing would take place

on a date and time "to be set." A.R. 84. The NTA also did not contain Petitioner's address; in the space following the phrase "currently residing at," the NTA read "FAILED TO PROVIDE A US ADDRESS." A.R. 84.[2] The home address that Petitioner had provided to the CBP agent was, however, provided to the immigration court for purposes of her removal proceedings. A.R. 86-87 (Form I-213 Record of Deportable/Inadmissible Alien). At that time, Petitioner expected to receive written notice of the date and time of her removal hearing at the address she already had provided—her home address in Guatemala. A.R. 82.

The immigration court never provided Petitioner with written notice of the time or date of her removal proceedings. (App.33a). (Memorandum and Order of Removal). Those proceedings apparently were held in Petitioner's absence on June 10, 2004, at 9:00 a.m., after which an immigration judge ordered Petitioner removed *in absentia*. (App.32a-34a). The *in absentia* removal order was never served on Petitioner. A.R. 82, 62.

Several years later, Petitioner moved to reopen and rescind the *in absentia* removal order on the ground that she never received the written notice to which she

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[2] Petitioner was also never told to file a Form EOIR-33 if her address was not shown on the NTA. *See* 8 C.F.R. § 1003.15(d)(1). Instead, she was told "to provide the INS, in writing, with [her] full mailing address and telephone number," A.R. 85, which she already had done. Although she was also told that she "must notify the Immigration Court immediately . . . whenever [she] change[d her] address or telephone number during the course of this proceeding," A.R. 85, she never did so because the address at which she could be reached for notice purposes never changed, A.R. 82.

was entitled under the INA. A.R. 67-80. An IJ denied Petitioner's motion, reasoning that she was not, at that time, in Guatemala and "had no plans to go there." (App.29a). There is no evidence in the administrative record to support the IJ's finding. The BIA affirmed, stating that "[i]n view of the respondent's failure to provide her U.S. address, no notice for a hearing was required." (App.26a).

The court of appeals denied the petition for review in a series of two published opinions. Finding the INA's text unambiguous, the court of appeals held that Petitioner, "who is physically in the United States and subject to removal from the United States[, must] provide a United States address to receive notice by mail" of the time and date of her removal proceedings. (App.9a). For guidance, the court of appeals relied on its decision in *Ramos-Portillo v. Barr*, 919 F.3d 955 (5th Cir. 2019)—argued on the same day, before the same panel, as Petitioner's case—to conclude that both "common sense" and the INA's "overall statutory scheme" compel the conclusion that "[t]o the extent § 1229(a)(1)(F)(i) concerns notifying [a noncitizen] who is living in the United States and subject to removal from the United States, the [noncitizen] must provide a United States address to satisfy the [statute's] requirements." (App.6a). The court of appeals further noted that, to the extent that other provisions of the INA contemplate that noncitizens might reside outside the United States, *see* 8 U.S.C. §§ 1229a(b)(5)(E); 1225(b)(2)(C) (applying to "any alien who remains in a contiguous foreign territory"), the INA's address requirement under § 1229(a)(1)(F)(i) would either be construed differently or not apply at all. (App.8a). ("[Section 1229a(b)(5)(E)] has little bearing on the

requirement that an alien who will remain in the United States during her proceedings provide a United States address to receive notice by mail."). Finally, the court of appeals held that the type of address the statute requires may turn on the period of years a particular individual has been in the United States. (*See* App.9a n.3).

IV. The Department of Homeland Security's "Migrant Protection Protocols" Places Tens of Thousands Non-Mexican Asylum Applicants Outside the United States During the Pendency of Their Removal Proceedings.

In January 2019—after the court of appeals held oral argument, but before it issued its opinion—the Department of Homeland Security (DHS) began implementing its so-called "Migrant Protection Protocols" ("the Protocols" or "MPP"). The Protocols, which apparently were implemented pursuant to 8 U.S.C. § 1225(b)(2)(C), call for certain non-Mexican applicants for admission at the United States-Mexico border to be returned to Mexico for the duration of their removal proceedings, rather than be placed into traditional or expedited removal proceedings in the United States. *See generally* Dep't of Homeland Security, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf (explaining the authority for, and implementation of, the Protocols.) Since DHS began its implementation, the Protocols have been applied to over 55,000 individuals seeking asylum, most of whom originated in countries other than Mexico. *See* Maria Verza, *Migrants Thrust*

by U.S. Officials Into the Arms of the Cartels, Wash. Post (Nov. 16, 2019), https://www.washingtonpost.com/world/the_americas/migrants-thrust-by-us-officials-into-the-arms-of-the-cartels/2019/11/16/c21079ba-08be-11ea-ae28-7d1898012861_story.html; Camilo Montoya-Galvez, *U.S. Says Asylum Seekers Encountered Along Entire Southern Border Can Now Be Returned to Mexico* (Sept. 27, 2019), https://www.cbsnews.com/news/remain-in-mexico-u-s-says-it-can-now-return-asylum-seekers-to-mexico-along-entire-southern-border/. Because they have been forced to remain in Mexico, none of those noncitizens "may be contacted" at a U.S. address. All of those noncitizens, however, were physically present in the United States when they provided an address to the Attorney General pursuant to § 1229(a)(1)(F)(i).

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to clarify whether § 1229(a)(1)(F)(i) requires an individual placed into removal proceedings to provide the Attorney General with a U.S. address, as opposed to a foreign address, as the "address . . . at which [she] may be contacted respecting [those removal] proceedings." That question is extraordinarily important and, particularly in light of recent developments in immigration policy and procedures, is likely to arise frequently, create confusion, and have astonishingly broad practical consequences in the absence of immediate intervention. Indeed, under the recently implemented "Migrant Protection Protocols," more than 55,000 non-Mexican asylum

applicants have been forced to remain in Mexico for the duration of their removal proceedings. Those individuals, who were physically present in the United States when they provided an address to the Attorney General pursuant to § 1229(A)(1)(F)(i), but are now without any reliable address at all, cannot meaningfully invoke the protections that Congress intended the statute to afford.

Certiorari is particularly important because the court of appeals' reading of the statute is so plainly wrong. The INA's address requirement is clear and unambiguous: under § 1229(a)(1)(F)(i), a noncitizen is required to provide the Attorney General with "an address . . . at which [she] may be contacted respecting [removal] proceedings." Every administrative procedure and regulation to have applied or implemented that statutory command has agreed that the address requirement is unqualified—that is, that an address may be domestic or foreign, and that it is the noncitizen, and not the Attorney General, who must identify the address at which she best can be reached for notice purposes. *See, e.g.*, A.R. 85 (Notice to Appear) (informing Petitioner that she must provide an address "at which [she] may be reached during proceedings"); 8 C.F.R. § 1003.15(d)(1), (2) (same); Form EOIR-33/IC, Alien's Change of Address Form, OMB #1125-0004 (revised July 2015) (same).

Granting certiorari now, despite the absence of a circuit conflict, is necessary to avoid the vast confusion and unfairness that inevitably will result from the court of appeals' reading of the INA. Under the court of appeals' fact-bound, sliding-scale approach, the INA's statutory address requirement varies in meaning in

every case, depending on whether and how long the individual has been physically present in the United States, whether she is a national of a contiguous foreign territory, or whether she has unilaterally been placed into the Administration's "Migrant Protection Protocols" and has been forced to remain in Mexico during her removal proceedings. That fact-bound approach to a textually unambiguous statutory requirement will give rise to precisely the sort of the protracted disputes that Congress expressly sought to avoid. *See* H.R. Rep. No. 104-469, at 159 (Mar. 4, 1996).

This case is an ideal vehicle through which to answer the question presented. Ms. Luna-Garcia has preserved the question presented throughout her proceedings. The IJ and the BIA decisions make clear that the question is dispositive of her request for relief. The Attorney General has conceded in this case that he never provided Ms. Luna-Garcia with written notice, even though she complied fully with the statutory requirements, because she did not provide a U.S. address. A.R. 90.

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE INA'S UNEQUIVOCAL RIGHT TO NOTICE IN REMOVAL PROCEEDINGS.

A noncitizen's right to appear and participate in removal proceedings—a cornerstone of due process—rises or falls on her receipt of notice of the date, time, and place of those proceedings. Thus, under the INA, that all noncitizens are afforded that right to notice is unequivocal: in removal proceedings, written notice "shall be given in person to the [noncitizen] (or, if personal service is not practicable, through service by mail * * *)." 8 U.S.C. § 1229(a)(1). The INA provides a

single exception to that statutory command—where the noncitizen fails to provide the Attorney General with an "address . . . at which [she] may be contacted" for notice purposes. 8 U.S.C. § 1229(a)(2)(B).

A. The Statute Unambiguously Provides that *Any* Address—Domestic or Foreign—Suffices to Fulfill the Address Requirement and Trigger the Attorney General's Obligation to Issue Written Notice.

The INA's address requirement is clear and unambiguous: by its text, it requires a noncitizen simply to provide the Attorney General with "an address . . . at which [she] may be contacted respecting [removal] proceedings." 8 U.S.C. § 1229(a)(1)(F)(i). That text plainly contemplates that any address—domestic or foreign—suffices to fulfill the statutory requirement and, in turn, trigger the Attorney General's obligation to send written notice. In other words, all that is required is a valid address—the statute neither precludes a noncitizen from providing a foreign address, nor requires that she provide a "United States address." She must simply provide "an address . . . at which [she] may be contacted"—an address at which she can be reached for notice purposes.

The court of appeals construed the statute differently, importing into the statute requirements that do not exist on its face and cannot be squared with its text. First, the court of appeals imported into § 1229 (a)(1)(F)(i) a distinction based on whether or not the noncitizen is physically present in the United States. (App.7a-9a). The court of appeals reasoned that, because the statute requires "an address . . . at which the [noncitizen] may be contacted respecting [removal]

proceedings," its scope must concern noncitizens "living in the United States and subject to removal from the United States." (App.6a). (emphasis added). Thus, according to the court of appeals, to the extent that the statute concerns noncitizens subject to removal from the United States, it requires those noncitizens to provide a U.S. address to satisfy the statutory address requirement. (App.6a).

That reasoning must fail, however, under the very definition that Congress has given the phrase "removal proceedings" within the INA's statutory scheme. Under the INA, written notice of the time and place of an individual's removal proceedings is a substantively significant requirement that applies to all noncitizens at the initiation of those proceedings. 8 U.S.C. § 1229 (a)(1); *see also Pereira*, 138 S.Ct. at 2118. Noncitizens in removal proceedings may, in turn, be either "inadmissible" or "deportable," 8 U.S.C. § 1229a(a)(2), (e)(2); in other words, they may be either inside or outside of the United States. *See, e.g.*, *Jennings v. Rodriguez*, 138 S.Ct. 830, 837 (2018) (noting, generally, that a noncitizen becomes deportable "once inside the United States" if she was "inadmissible" prior to. entry); *Landon v. Plasencia*, 459 U.S. 21, 25, 103 S.Ct 321 (1982) (explaining that, before Congress collectively replaced them with "removal proceedings," "[t]he deportation hearing [was] the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing [was] the usual means of proceeding against an alien outside the United States seeking admission"). The court of appeals' reasoning, to the extent that it relies on a different understanding of the phrase "removal proceedings," is plainly wrong.

Acknowledging, in effect, the erroneous premise on which its reasoning is based, the court of appeals went on to explain that, although § 1229(a)(1)(F)(i) requires a U.S. address for those who are physically present inside the United States, (App.6a) it permits a foreign address for those who live outside the United States, (App.8a-9a). Further still, the court of appeals' reasoning suggests that, even for those who are physically present in the United States, the period of years of physical presence might change what the statute requires. (*See* App.9a n.3). (noting the length of time that Petitioner has been inside the United States to explain in part why her Guatemalan address did not fulfill the statute's requirement). In other words, in the court of appeals' view, § 1229(a)(1)(F)(i)'s address requirement compels a time- and location-dependent, sliding-scale inquiry, that could mean something different in every case.

That cannot be what Congress intended. Indeed, the court of appeals' reasoning entrenches into the rule of law the "dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 379, 125 S.Ct. 716 (2005) (refusing to treat differently admitted and nonadmitted individuals where "the statutory text provides for no distinction between [them]"); *see also United States v. Santos*, 553 U.S. 507, 523, 128 S.Ct. 2020 (2008) ("'The lowest common denominator, as it were, must govern.'" (quoting *Clark*, 543 U.S. at 380)). As this Court and practically all courts of appeal have recognized, that principle would "'render every statute a chameleon'" in a manner beyond the power of Congress to control. *Patel v. Napolitano*, 706 F.3d 370, 376 (4th Cir. 2013) (quoting *Santos*, 553 U.S. at 522)

(same); *Zavala v. Ives*, 785 F.3d 367, 382 (9th Cir. 2015) (Callahan, J., dissenting) (same); *United States v. Vilar*, 729 F.3d 62, 75 (2d Cir. 2013) (same). In that respect, and by the INA's unambiguous text, the court of appeals' decision is plainly wrong.

B. The Statutory Text Is Also Consistent with Established Agency Practice, Which for Decades has Permitted Noncitizens to Use a Foreign Address for Notice Purposes.

That § 1229(a)(1)(F)(i) permits noncitizens to provide any address to the Attorney General for notice purposes is consistent with established agency practice, to which the BIA and the court of appeals should have deferred. As noted above, to implement § 1229, the U.S. Department of Justice, through the EOIR, has promulgated regulations pertaining to the contents of an NTA and the manner in which a noncitizen may notify the agency that her address has changed. Those regulations require an NTA to contain '[t]he alien's address," without qualification with respect to whether the address is domestic or foreign. 8 C.F.R. § 1003.15(c)(2). The regulations also permit the noncitizen to notify the immigration of her address, or any change of address, by "completing and filing Form EOIR-33," 8 C.F.R. § 1003.15(d)(1), which itself allows the noncitizen to provide a foreign address. *See* U.S. Dep't of Justice, Form EOIR-33/IC, Alien's Change of Address Form (2015), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir33icsanfrancisco.pdf.

Early agency decisions confirm that those regulations are consistent with the agency's historical practice of allowing foreign addresses for notification

purposes. In *Matter of Sanchez-Avila*, for instance, the BIA acknowledged the then-INS's position that it was a long-settled agency practice for noncitizens to provide a foreign address for notice purposes. 21 I. & N. Dec. at 450-54. Indeed, in that case, the "notice of the scheduled hearing was sent to [Sanchez-Avila] at the address in Mexico that he provided." *Id.* at 445. The hearing notice "was sent by regular mail to the applicant[.]" *Id.*

C. Traditional Tools of Statutory Construction Confirm What the Statute's Text Makes Clear.

This Court's traditional tools of statutory construction—including the statute's legislative history, statutory context, and the familiar canon of constitutional avoidance—confirm that the ordinary meaning of the statute's text should indeed prevail. *See Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1569 (2017) ("normal tools of statutory interpretation" apply at *Chevron*'s first step).

As noted above, the INA's address requirement was the product of a clear legislative decision to create a simple and straightforward accountability loop to which both the Attorney General and the individual are bound. Indeed, Congress explicitly sought to avoid the fact-bound, sliding-scale approach the court of appeals created—which inevitably will lead to "protracted disputes," *see* H.R. Rep. 104-469, at 159—about whether the individual was entitled to written notice and whether that written notice was substantively complete. In that respect, the court of appeals' reasoning, and its ultimate conclusion, are entirely inconsistent with Congress's intent.

The INA's broader statutory scheme likewise confirms what is clear from § 1229(a)(1)'s text and the legislative choices that created it. The expedited removal provisions of IIRIRA,[3] for instance, provide helpful context. Those provisions contemplate that certain applicants for admission "arriving . . . from a foreign territory contiguous to the United States"—*i.e.*, Mexican or Canadian nationals—may be instructed to remain in that contiguous foreign territory during the pendency of their removal proceedings. 8 U.S.C. § 1225(b)(2)(C). Thus, under IIRIRA, Congress not only intended for the Attorney General to provide noncitizens with notice of their removal proceedings at a foreign address, but also contemplated that the Attorney General would require certain noncitizens to reside at a foreign address at the time the notice would issue. 8 U.S.C. § 1229a(b)(5)(E). Construing § 1229 (a)(1) together with § 1225(b)(2) confirms what the statute's text unambiguously compels—that § 1229 (a)(1) must permit a foreign address.

Two other interpretive canons resolve any doubt that remains. The first is this Court's canon of construction that requires ambiguities, to the extent they exist, to be resolved in favor of the noncitizen. *INS v. St. Cyr*, 533 U.S. 289, 320, 121 S.Ct. 2271 (2001) (noting "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (internal quotation marks omitted)); *INS v. Errico*, 385 U.S. 214, 225, 87 S.Ct. 473 (1966) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his

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[3] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. §§ 3009–546 (1996) ("IIRIRA").

freedo[m] beyond that which is required by the narrowest of several possible meanings of the words used." (internal quotation marks omitted)). The second is the familiar canon of constitutional avoidance, pursuant to which the Court must assume that Congress did not intend a result that gives rise to constitutional concern. *See Clark*, 543 U.S. at 380-81 ("If one [interpretation] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

II. CERTIORARI IS NECESSARY NOW TO RESOLVE A CONFLICT THE COURT OF APPEALS HAS CREATED WITH LONG-SETTLED FIFTH AMENDMENT JURISPRUDENCE FROM THIS COURT.

Not only do the statute's text, its implementing regulations, the agency's past practices, and the INA as a whole preclude the court of appeals' reading of the address requirement, so, too, does the Fifth Amendment.

It is axiomatic that the Fifth Amendment's due process protections apply to all persons in the United States. *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491 (2001). Indeed, those protections grow stronger as a noncitizen's ties to the United States become deeper and more established. *Landon*, 459 U.S. at 32 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770, 70 S.Ct. 936 (1950))). The court of appeals' reasoning in this case—*i.e.*, that the longer an individual has lived in the United States, the more burdensome the address

requirement applied to them—runs counter to that long-settled principle and gives rise to a clear conflict with precedents of this Court. It also introduces an otherwise-avoidable constitutional question: whether a noncitizen with strong ties to the United States, and therefore substantial Fifth Amendment interests, is entitled to fewer due process protections under the INA's address requirement? Under the Fifth Amendment, the answer to that question must be, "No."

III. CERTIORARI IS NECESSARY NOW TO PROTECT AGAINST WIDESPREAD AND INCONSISTENT APPLICATIONS OF THE RULE OF LAW IN LIGHT OF THE RECENTLY IMPLEMENTED "MIGRANT PROTECTION PROTOCOLS."

The court of appeals' reasoning becomes even more nonsensical when considered in light of the Administration's now-widespread implementation of the "Migrant Protection Protocols." Those Protocols, as noted above, allow immigration authorities at the United States-Mexico border to force non-Mexican applicants for admission to remain in Mexico while their immigration cases are being adjudicated. To date, more than 55,000 individuals have been returned to Mexico pursuant to the MPP. All of them were physically present in the United States when they provided an address to the Attorney General pursuant to § 1229(a)(1)(F)(i), and so may be required, under the court of appeals' opinion, to provide a U.S. address before they receive notice of their hearing.

Notwithstanding individuals' physical presence in the United States when applying for admission, immigration authorities often require them to provide a foreign address—in many cases choosing it for them.

Where the individual has no Mexican address, which is often the case, immigration authorities write addresses for crowded shelters, street corners, and even social media accounts. *See, e.g.*, Adolfo Flores, *Border Patrol Agents Are Writing "Facebook" as a Street Address for Asylum Seekers Forced to Wait in Mexico*, BuzzFeed News (Sept. 17, 2019), https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico. Under the court of appeals' sliding-scale approach to the U.S. address requirement, immigration officers may improperly be allowing (and often requiring) a foreign address that will not suffice for notice purposes—in violation of the due process requirement to ensure noncitizens subject to removal receive notice and an opportunity to be heard. *See United States v. Benitez-Villafuerte*, 186 F.3d 651, 657 (5th Cir. 1999) ("[D]ue process requires . . . that an alien be provided notice of the charges against him, a hearing before an executive or administrative tribunal, and a fair opportunity to be heard.") (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98, 73 S.Ct. 472 (1953)). If the court of appeals' reasoning is correct, the 55,000 individuals that have been forced to remain in Mexico may (or may not) receive notice of their hearing, and may (or may not) be removed *in absentia*. Such widespread and inconsistent applications of the rule of law is something that only this Court can correct.

Moreover, individuals initially subject to MPP may, in certain circumstances, move out of the program and into removal proceedings conducted wholly in the United States. *See* Dep't of Homeland Security, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant*

Protection Protocols (Jan. 28, 2019), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf (explaining how passage of a non-refoulement interview can move an applicant for admission out of the MPP program and into removal proceedings in the United States). Under the court of appeals' holding, it is entirely unclear whether, and when, individuals moved out of the MPP would need to provide a U.S. address to comply with the address requirement. The court of appeals' analysis suggests, at best, that a sliding-scale approach would have to apply—an approach that, as described *supra*, is entirely contrary to Congress's intent.

IV. THIS CASE IS AN IDEAL VEHICLE IN WHICH TO ANSWER THE QUESTION PRESENTED.

Throughout the course of her removal proceedings, Ms. Luna-Garcia has preserved her argument that the address she provided to the Attorney General—a fixed address in Guatemala—was sufficient to fulfill the INA's address requirement and trigger the Attorney General's obligation to send her written notice of her removal proceeding. She made that argument to the IJ in her motion to reopen and rescind the *in absentia* removal order, A.R. 72-77, but the IJ rejected it in an unpublished order, A.R. 55-56. She made the same argument on appeal to the BIA, A.R. 23-30, but the Board rejected it in an unpublished order, A.R. 7-8. She again preserved the argument in her petition for review in the Fifth Circuit, which rejected the argument in a series of two published opinions. Also in the Fifth Circuit, Ms. Luna Garcia preserved the argument that the agency's decision in this case conflicts with the

INA's contiguous foreign territory provision, 8 U.S.C. § 1225(b)(2)(C). (App.20a). And, in her Petition for Rehearing En Banc, Ms Luna-Garcia raised, at her first opportunity, the argument that the agency's decision and the court of appeals' construction could lead to widespread confusion and inconsistent applications under the Administration's newly implemented "Migrant Protection Protocols." *See* Petitioner's Petition for Rehearing En Banc at 9-11.

The question that this case presents—whether the Guatemalan address that Ms. Luna-Garcia provided was sufficient to satisfy the INA's address requirement—is also dispositive of her motion to reopen and rescind her *in absentia* removal order. The Attorney General conceded that it did not send her written notice of her June 10, 2004, removal hearing, from which her *in absentia* removal order was issued. Both the IJ and the BIA denied Ms. Luna-Garcia's motion to reopen and rescind that *in absentia* order solely because she had provided a Guatemalan address. The court of appeals' alternative holding was improper because the BIA chose not to deny Petitioner's request for relief based on any failure to comply with the regulations. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69, 83 S.Ct. 239 (1962) (citing *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575 (1995)) (holding that courts cannot accept appellate counsel's *post hoc* rationalizations for the agency's action).

Indeed, if that alternative holding were correct, additional due process concerns would arise. If Ms. Luna-Garcia's NTA was intended to put her on notice that she was required to provide the immigration

court with a U.S. address, after she already had provided the Attorney General with her Guatemalan address, the words "FAILED TO PROVIDE A US ADDRESS," without more, would have been grossly inadequate under the Fifth Amendment. Those words in no way could be construed as "reasonably calculated" to inform Ms. Luna-Garcia that the Guatemalan address she already had provided did not suffice. *See Lopez-Dubon v. Holder*, 609 F.3d 642, 646 (5th Cir. 2010) (citing *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950)) (applying that standard).

Finally, if Ms. Luna-Garcia's proceedings were reopened, she could make a strong case for relief from removal. She currently lives in the United States with her 8-year-old daughter, Estrella. Ms. Luna-Garcia's sister-in-law was murdered by a criminal gang, and her relatives testified against the accused at trial. Ms. Luna-Garcia and her daughter fled Guatemala after members of the criminal gang came searching for them.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

NADIA H. DAHAB
COUNSEL OF RECORD
STEPHEN W. MANNING
INNOVATION LAW LAB
333 SW FIFTH AVE. STE. 200
PORTLAND, OR 97204
(971) 277-3424
NADIA@INNOVATIONLAWLAB.ORG
STEPHEN@INNOVATIONLAWLAB.ORG

COUNSEL FOR PETITIONER

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