No. 21-669

In the Supreme Court of the United States

JOSE BENITO GUIDO, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner's petition for review of the Board of Immigration Appeals' determination that his in absentia removal order should not be rescinded on the ground that he was not provided proper notice of his removal hearing.

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (5th Cir.):

Guido v. *Garland*, No. 20-61022 (June 1, 2021)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1), the decision of the Board of Immigration Appeals (Pet. App. 2-8), and the orders of the immigration judge (Pet. App. 11-15, 18-21) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2021. The petition for a writ of certiorari was filed on October 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that a noncitizen placed in removal proceedings under 8 U.S.C. 1229a be given "writ-

ten notice" of certain information. 8 U.S.C. 1229(a)(1).[1] Paragraph (1) of Section 1229(a) provides that "written notice (in this section referred to as a 'notice to appear') shall be given * * * specifying," among other things, the "time and place at which the proceedings will be held," and the "consequences under section 1229a(b)(5) of [Title 8] of the failure * * * to appear at such proceedings." 8 U.S.C. 1229(a)(1)(G)(i)-(ii). Such written notice must also specify the "requirement that the alien must immediately provide * * * a written record of an address * * * at which the alien may be contacted respecting [removal] proceedings"—and "of any change of the alien's address"—to "the Attorney General," and the "consequences under section 1229a(b)(5)" of failure to do so. 8 U.S.C. 1229(a)(1)(F). Paragraph (2) of Section 1229(a) further provides that, "in the case of any change or postponement in the time and place of [the removal] proceedings," "a written notice shall be given" 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)(i)-(ii).

Section 1229a(b)(5), in turn, provides that "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided * * *, 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 * * * if provided at the most

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

recent address provided [by the noncitizen] under section 1229(a)(1)(F)." *Ibid.*; 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)]."). Section 1229a(b)(5)(B), however, provides that if the noncitizen "has failed to provide the address required under section 1229(a)(1)(F)," "[n]o written notice shall be required" before the noncitizen is ordered removed in absentia. 8 U.S.C. 1229a(b)(5)(B). 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) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Petitioner is a native and citizen of El Salvador. Pet. App. 2. On March 20, 2005, petitioner was apprehended near the port of entry in Eagle Pass, Texas. Administrative Record (A.R.) 155. The next day, DHS personally served petitioner with a "Notice to Appear" (NTA) for removal proceedings on "a date to be set" and at "a time to be set." A.R. 160 (emphases omitted); see A.R. 161. The NTA charged that petitioner was subject to removal because he was a noncitizen present in the United States without being admitted or paroled. A.R. 160, 162; see 8 U.S.C. 1182(a)(6)(A)(i).

The NTA informed petitioner: "You are required to provide the [government], in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately * * * whenever you change your address or telephone number." A.R. 161; see 8 C.F.R. 1003.15(d)(1)-(2). The NTA further stated that "[n]otices of hearing will be mailed to this address," and that "the Government shall not be re-

quired to provide you with written notice of your hearing" if "you do not * * * provide an address at which you may be reached during proceedings." A.R. 161. The NTA additionally explained that "[i]f you fail to attend the hearing * * * , a removal order may be made by the immigration judge in your absence." *Ibid.*

Petitioner provided a telephone number and mailing address in Levittown, New York, that he said belonged to his sister-in-law. A.R. 156; see A.R. 59, 66.[2] DHS called the number and confirmed that the information was accurate. A.R. 156. Petitioner signed the NTA, A.R. 161, which listed the Levittown address as his address, A.R. 160. DHS then released petitioner on his own recognizance on the condition that he "not change" his address "without first securing written permission" from his deportation officer. A.R. 84.

DHS subsequently filed the NTA with the immigration court. A.R. 160. The INA's implementing regulations provide that "[t]he Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. 1003.18(a). The regulations further provide that if "the time, place and date of the initial removal hearing" "is not contained in the [NTA], the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. 1003.18(b).

On September 15, 2005, the immigration court mailed a Notice of Hearing (NOH) to petitioner at the Levittown address that he had provided. A.R. 158-159. The NOH stated that the immigration court had sched-

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[2] Petitioner later asserted that the address actually belonged to his former mother-in-law, not his sister-in-law. A.R. 80.

uled petitioner's removal hearing for January 5, 2006, at 9 a.m. in San Antonio, Texas. A.R. 158. On November 29, 2005, the immigration court mailed a second NOH to petitioner at the Levittown address. A.R. 157; see Pet. App. 4. That NOH repeated the same time, place, and date of his removal hearing. A.R. 157. The record does not contain any evidence that either NOH was returned as undeliverable. Pet. App. 6.

Petitioner failed to appear at the scheduled hearing, and the immigration judge (IJ) ordered him removed in absentia. Pet. App. 18-21. The IJ observed that a "notice of the hearing was * * * mailed to [petitioner]" at his "last known address of record" and that "no reasonable cause was provided for [his] failure to appear." *Id.* at 19. The IJ then found petitioner removable as charged and ordered him removed to El Salvador. *Id.* at 20-21. The immigration court sent a copy of the IJ's order to the Levittown address, *id.* at 16, but unlike the NOHs, that mailing was returned as undeliverable, A.R. 151.

3. In February 2019—more than 13 years after the removal order had been entered in absentia—petitioner filed a motion to reopen his removal proceedings. A.R. 57-78. In that motion, petitioner argued, among other things, that the removal order should be rescinded on the ground that he never received notice of his removal hearing in accordance with Section 1229(a). A.R. 62-67. Petitioner contended that "proper notice was never given" because his "NTA lacked the date and time of his proceedings." A.R. 62. He also claimed that he never received an NOH in the mail. A.R. 59, 65. Petitioner asserted that "[a]fter [he] was released" from immigration custody, he "wen[t] to reside" at the Levittown address and "eventually moved to Houston, Texas." A.R. 80. And he asserted that "[w]hile [he] was living at the

[Levittown] address," he "never received any correspondence" from the immigration court. *Ibid.*

a. An IJ denied petitioner's motion to reopen. A.R. 48-49. The IJ explained that it was petitioner's "responsibility to maintain an accurate address w[ith] the Immigration Court" and that petitioner had failed to do so "when [he] moved to Houston." A.R. 48. The IJ concluded that because petitioner had failed to "maintain[]" an "accurate address," the immigration court was "not required to send notice" of his removal hearing. *Ibid.*

b. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 2-8. The Board agreed with the IJ that petitioner had "not established that he was entitled to notice of his hearing" under Section 1229a(b)(5)(B). *Id.* at 4. In his brief on appeal, petitioner had asserted that "during the entire time [he] was actually in removal proceedings, he was residing at the [Levittown] address." A.R. 21. The Board found that assertion unsupported by the record. Pet. App. 4. The Board observed that, in a proposed application for cancellation of removal that petitioner had attached to his motion to reopen, petitioner had acknowledged residing in Houston "since an undisclosed month in 2005." *Ibid.*; see A.R. 93. And the Board emphasized that, "[w]hile [petitioner] has presented numerous documents which attest to his ties to Houston over the course of many years, he has not presented any such similar document which corroborates his claimed residence in Levittown when the NOH was mailed to him on November 29, 2005." Pet. App. 4. The Board thus determined that petitioner had "not shown that, when the NOH was mailed to him, he had not already moved to Houston and therefore had failed to update his address." *Ibid.* And the Board held that, although petitioner's NTA "did not

specify the time and place of the initial removal hearing," "rescission of [the] in absentia order" was not required because petitioner had "failed to provide an address where a notice of hearing could be sent." *Id.* at 5 n.1 (citing *In re Miranda-Cordiero*, 27 I. & N. Dec. 551 (B.I.A. 2019)).

In the alternative, the Board determined that, "[e]ven if [petitioner] was actually residing in Levittown when the NOH was mailed to him on November 29, 2005, reopening would * * * not be warranted" because petitioner had not overcome the "presumption that the NOH was properly delivered to his address by the United States Postal Service." Pet. App. 5. The Board noted that, "[w]hile the record reflects that the [IJ's] decision, mailed on January 8, 2006, was returned as undeliverable, the record does not indicate that the NOH, mailed by regular mail, was likewise returned." *Id.* at 6. The Board therefore concluded that petitioner "can be charged with receiving" the NOH. *Ibid.* And it explained that, although petitioner was "served with a[n] NTA that did not specify the time and place of the initial hearing," "rescission of [the] in absentia order of removal" was not required because "a subsequent NOH specifying that information was properly sent to him." *Id.* at 5 n.2.

4. Petitioner petitioned for review in the court of appeals. The government filed a motion for summary disposition, arguing that the Board correctly determined that petitioner was not entitled to notice of his removal hearing and that, even if he was, he could not overcome the presumption that he received such notice. Gov't C.A. Mot. for Summ. Disposition 15-16. The court of appeals granted the government's motion in an unpublished order. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 13-16) that his in absentia removal order should be rescinded because notice of all the information required under 8 U.S.C. 1229(a) was not provided to him in a single document. But the Board's decision affirming the denial of petitioner's motion to reopen rested on an independent ground that petitioner does not challenge. And the court of appeals' unpublished order granting the government's motion for summary disposition provides no indication that the court even considered the contention that petitioner now raises. Further review is not warranted.

1. The court of appeals correctly denied petitioner's petition for review of the Board's determination that petitioner "has not shown that he was entitled to notice of his removal hearing." Pet. App. 5; see *id.* at 1.

Section 1229a(b)(5)(A) provides that any noncitizen who does not attend his removal hearing "shall be ordered removed in absentia" if DHS "establishes by clear, unequivocal, and convincing evidence" that the "written notice required under paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided" and that "the alien is removable." 8 U.S.C. 1229a(b)(5)(A). Section 1229a(b)(5)(B), however, provides that "[n]o 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 [Title 8]." 8 U.S.C. 1229a(b)(5)(B). Section 1229(a)(1)(F), in turn, requires that the noncitizen "immediately provide * * * the Attorney General with a written record of an address * * * at which the alien may be contacted respecting [removal] proceedings." 8 U.S.C. 1229(a)(1)(F)(i). Section 1229(a)(1)(F) further requires that the noncitizen "provide the Attor-

ney General immediately with a written record of any change of the alien's address." 8 U.S.C. 1229(a)(1)(F)(ii).

The Board did not abuse its discretion in determining that petitioner had "not shown that he [had] complied with the address reporting requirements of section [1229(a)(1)(F)]" in this case. Pet. App. 4. Although petitioner initially resided at the Levittown address that he had provided to the government in March 2005, A.R. 156, he "eventually moved to Houston" later that same year, A.R. 80; see A.R. 93. After moving, however, petitioner did not provide the government "with a written record of any change of [his] address." 8 U.S.C. 1229(a)(1)(F)(ii). Petitioner thus "failed to provide the address required under section 1229(a)(1)(F)." 8 U.S.C. 1229a(b)(5)(B). And because he has "not shown that, when the NOH was mailed to him [on November 29, 2005], he had not already moved to Houston," it is immaterial whether he received that notice. Pet. App. 4. Given his "fail[ure] to update his address," *ibid.*, "[n]o written notice" was required before the IJ ordered him removed in absentia, 8 U.S.C. 1229a(b)(5)(B). The Board therefore correctly rejected petitioner's contention that the in absentia removal order should be rescinded for lack of proper notice. Pet. App. 3-5; see *In re Miranda-Cordiero*, 27 I. & N. Dec. 551, 553 (B.I.A. 2019) (holding that rescission of an in absentia removal order was not warranted where a noncitizen who was served an NTA that did not specify the date and time of her removal hearing failed to provide the address required under Section 1229(a)(1)(F)).

2. Petitioner does not challenge the Board's determination that he "has not shown that, when the NOH was mailed to him, he had not already moved to Houston." Pet. App. 4. Nor does he challenge the Board's

determination that because he "failed to update his address," *ibid.*, "he has not shown that he was entitled to notice of his removal hearing," *id.* at 5.

Instead, petitioner observes (Pet. 14-15) that, after the court of appeals granted the government's motion for summary disposition in this case, the court in *Rodriguez* v. *Garland*, 15 F.4th 351 (5th Cir. 2021), petition for reh'g pending, No. 20-60008 (5th Cir. filed Nov. 15, 2021), held that an in absentia removal order may be rescinded if the notice required under Section 1229(a) is not provided in a single document. *Id.* at 355. Petitioner contends that, because his NTA did not specify the date and time of his removal hearing, he was never provided with a single document that contained all of the required information, Pet. 14, and that he therefore did not "receive[] valid statutory notice, * * * such that he could be ordered removed *in absentia*, pursuant to [Section] 1229a(a)(5)(A)," Pet. 16. That contention does not warrant this Court's review, for two reasons.

First, the Board's decision rested on the independent ground—which petitioner does not challenge here—that no written notice was required under Section 1229a(a)(5)(A) because petitioner had failed to notify the government of his change of his address under Section 1229(a)(1)(F). Pet. App. 3-5. Because "[n]o written notice [was] required under [Section 1229a(a)(5)(A)]," 8 U.S.C. 1229a(b)(5)(B), it is immaterial whether such notice was provided in a single document under *Rodriguez*. Indeed, although petitioner contends (Pet. 14-16) that the decision below implicates an intra-circuit conflict, the Fifth Circuit itself has recognized that its decision in *Rodriguez* has no application where a noncitizen "forfeit[s] his right to notice under § 1229a(b)(5)(B)" by failing to "provide[] immigration authorities with a

viable mailing address." *Spagnol-Bastos* v. *Garland*, 19 F.4th 802, 808 n.2 (5th Cir. 2021) (per curiam); see *In re Laparra-DeLeon*, 28 I. & N. Dec. 425, 436 n.12 (B.I.A. 2022) (observing that the court of appeals' decision in *Spagnol-Bastos* is "consistent with" the Board's decision in *Miranda-Cordiero* in holding that "rescinding an in absentia order is not warranted where a noncitizen who was served with a noncompliant [NTA] failed to provide an address where [an NOH] could be sent pursuant to section [1229(a)(1)(F)]"). Because petitioner "forfeit[ed] his right to notice under § 1229a(b)(5)(B)" by failing to keep his address current, his "reliance on *Rodriguez* is misplaced." *Spagnol-Bastos*, 19 F.4th at 808 n.2.

Second, the court of appeals' unpublished order granting the government's motion for summary disposition does not specify the ground on which it denied petitioner's petition for review. Pet. App. 1. Because petitioner's "fail[ure] to update his address" furnishes an independent ground for the Board's decision, *id.* at 4, the court might not have even considered his contention that he was not provided the information specified in Section 1229(a) in a single document, Pet. C.A. Br. 13-14. And this Court typically does not grant review of issues that were not considered below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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